Nos. 19-1081(L), 19-1083

In the United States Court of Appeals for the Federal Circuit

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NATIONAL VETERANS LEGAL SERVICES PROGRAM,
NATIONAL CONSUMER LAW CENTER, ALLIANCE FOR JUSTICE,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NO. 1:16-745-ESH (THE HON. ELLEN S. HUVELLE)

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
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NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*,
Plaintiffs,

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UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 16-745 (ESH)

ORDER

For the reasons stated in an accompanying Memorandum Opinion, ECF No. 89, it is hereby

ORDERED that plaintiffs' motion for summary judgment as to liability, ECF No. 52, is **DENIED**; and it is further

ORDERED that defendant's cross-motion for summary judgment as to liability, ECF No. 73, is **GRANTED IN PART AND DENIED IN PART**; and it is further

ORDERED that the parties shall confer and file a Joint Status Report with a proposed schedule for further proceedings by **April 16, 2018**; and it is further

ORDERED that a Status Conference is scheduled for **April 18, 2018, at 3:00 p.m.** in Courtroom 23A.

/s/ *Ellen Segal Huvelle*
ELLEN SEGAL HUVELLE
United States District Judge

Date: March 31, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*, **Plaintiffs,** **v.** **UNITED STATES OF AMERICA,** **Defendant.**	**Civil Action No. 16-745 (ESH)**

MEMORANDUM OPINION

The federal judiciary's Public Access to Court Electronic Records ("PACER") system, which is managed by the Administrative Office of the United States Courts ("AO"), provides the public with online access to the electronic records of federal court cases. The fees for using PACER are established by the Judicial Conference of the United States Courts and set forth in the judiciary's Electronic Public Access ("EPA") Fee Schedule. In this class action, users of the PACER system contend that the fees charged from 2010 to 2016 violated federal law, *see* 28 U.S.C. § 1913 note (enacted as § 404 of the Judiciary Appropriations Act, 1991, Pub. L. 101-515, 104 Stat. 2101 (Nov. 5, 1990) and amended by § 205(e) of the E-Government Act of 2002, Pub. L. 107-347, 116 Stat. 2899 (Dec. 17, 2002)). Before the Court are the parties' cross-motions for summary judgment as to liability. (*See* Pls.' Mot. Summ. J., ECF No. 52; Def.'s Cross-Mot. Summ. J., ECF No. 73.) For the reasons stated herein, the Court will deny plaintiffs' motion and grant in part and deny in part defendant's motion.

BACKGROUND

I. FACTUAL BACKGROUND

Although the present litigation is a dispute over whether, during the years 2010–2016, the PACER fees charged violated 28 U.S.C. § 1913 note, the relevant facts date back to PACER's creation.[1]

A. Origins of PACER and the Judiciary's Electronic Public Access ("EPA") Fee Schedule

In September 1988, the Judicial Conference "authorized an experimental *program of electronic access for the public to court information* in one or more district, bankruptcy, or appellate courts in which the experiment can be conducted at nominal cost, and delegated to the Committee [on Judicial Improvements] the authority to establish access fees during the pendency of the program." (Rep. of Proceedings of the Jud. Conf. of the U.S. ("Jud. Conf. Rep.") at 83 (Sept. 18, 1988) (emphasis added) (Ex. A to the Decl. of Wendell Skidgel, Nov. 11, 2017, ECF No. 73-2 ("Skidgel Decl.")); *see also* Def.'s Statement Facts ¶¶ 1-2, ECF No. 73-3 ("Def.'s Facts")). The following year, the Federal Judicial Center initiated pilot PACER programs in several bankruptcy and district courts. (*See* Chronology of the Fed. Judiciary's Elec. Pub. Access (EPA) Program at 1 ("EPA Chronology") (Ex. C to the Decl. of Jonathan Taylor, Aug. 28, 2017, ECF No. 52-1 ("Taylor Decl.")).)

In February 1990, during a hearing on judiciary appropriations for 1991, a subcommittee of the House Committee on Appropriations took up the judiciary's "request[] [for] authority to collect fees for access to information obtained through automation." *Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1991: Hearing Before*

[1] The facts set forth herein are undisputed.

a Subcomm. of the H. Comm. on Appropriations, 101st Cong. 323 (1990) ("1990 Hrg."). It asked a representative for the judiciary whether there were "any estimates on how much you will collect and will this fee help offset some of your automation costs." *Id*. at 324. The response from the judiciary was that "estimates of the revenue that will be generated from these fees are not possible due to the lack of information on the number of attorneys and individuals who have the capability of electronic access," but that there "ha[d] been a great deal of interest expressed" and it was "anticipated that the revenue generated will offset a portion of the Judiciary's cost of automation." *Id*. The Senate Report on 1991 appropriations bill noted that it "included language which authorizes the Judicial Conference to prescribe reasonable fees for public access to case information, *to reimburse the courts for automating the collection of the information*." S. Rep. No. 101-515, at 86 (1990) ("1990 S. Rep.") (emphasis added).

In March 1990, "barring congressional objection," the Judicial Conference "approved an initial rate schedule for electronic public access to court data [in the district and bankruptcy courts] via the PACER system." (Jud. Conf. Rep. at 21 (Mar. 13, 1990) (Skidgel Decl. Ex. C); Def.'s Facts ¶ 5.)[2]

Then, in November 1990, Congress included the following language in the Judiciary Appropriations Act of 1991:

> (a) The Judicial Conference shall prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, and 1930 of title 28, United States Code, for collection by the courts under those sections for access to information available through automatic data processing equipment. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the

[2] At that time, "PACER allow[ed] a law firm, or other organization or individual, to use a personal computer to access a court's computer and extract public data in the form of docket sheets, calendars, and other records." (Jud. Conf. Rep. at 21 (Mar. 13, 1990).) The initial fee schedule included a Yearly Subscription Rate ($60 per court for commercial users; $30 per court for non-profits) and a Per Minute Charge ($1 per minute for commercial users; 50 cents per minute for non-profits). (*Id*.)

> fees, in order to avoid unreasonable burdens and to promote public access to such information. The Director, under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> (b) The Judicial Conference and the Director shall transmit each schedule of fees prescribed under paragraph (a) to the Congress at least 30 days before the schedule becomes effective. All fees hereafter collected by the Judiciary under paragraph (a) as a charge for services rendered shall be deposited as offsetting collections to the Judiciary Automation Fund pursuant to 28 U.S.C. 612(c)(1)(A) to reimburse expenses incurred in providing these services.

Pub. L. 101-515, § 404, 104 Stat. 2101 (Nov. 5, 1990) (codified at 28 U.S.C. § 1913 note).[3] Three aspects of this law are relevant to this litigation: (1) the Judicial Conference was given the authority (indeed, it was required) to charge reasonable fees for "access to information available through automatic data processing equipment,"[4] which covered its newly-developed PACER

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[3] The statutory sections referenced authorize the federal courts to charge certain fees. *See* 28 U.S.C. § 1913 (fees for courts of appeals); *id* § 1914 (fees for district courts); *id*. § 1926 (fees for Court of Federal Claims); *id*. § 1930 (fees for bankruptcy courts).

[4] The term "automatic data processing equipment" is not defined in 28 U.S.C. § 1913 note, but it was defined in 28 U.S.C. § 612 as having "the meaning given that term in section 111(a)(2)(A) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(a)(2)(A))," which at that time defined it as:

> . . . any equipment or interconnected system or subsystems of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching interchange, transmission, or reception, of data or information—
>
> . . .
>
> (B) Such term includes—
>
> (i) computers;
> (ii) ancillary equipment;
> (iii) software, firmware, and similar procedures;
> (iv) services, including support services; and
> (v) related resources as defined by regulations issued by the Administrator for General Services.

system; (2) the Director of the AO was required to publish a "schedule of reasonable fees for electronic access to information"; and (3) the fees collected by the judiciary pursuant to that fee schedule were to be deposited in the Judiciary Automation Fund[5] "to reimburse expenses incurred in providing these services." *Id*.

In the summer of 1992, the House Committee on Appropriations issued a report that "note[d] that the Judiciary's investments in automation have resulted in enhanced service to the public and to other Government agencies in making court records relating to litigation available by electronic media" and "request[ed] that the Judiciary equip all courts, as rapidly as is feasible, with the capability for making such records available electronically and for collecting fees for doing so." H.R. Rep. No. 102-709, at 58 (July 23, 1992) ("1992 H.R. Rep.") (report accompanying appropriations bill for the judiciary for fiscal year ("FY") 1993).[6]

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[5] Congress had established the Judiciary Automation Fund ("JAF") in 1989 to be "available to the Director [of the AO] without fiscal year limitation for the procurement (by lease, purchase, exchange, transfer, or otherwise) of automatic data processing equipment for the judicial branch of the United States" and "for expenses, including personal services and other costs, for the effective management, coordination, operation, and use of automatic data processing equipment in the judicial branch." *See* Pub. L. 101-162, 103 Stat 988 (1989) (codified at 28 U.S.C. § 612(a)). Before 28 U.S.C. § 1913 note was enacted, PACER fees were required to be deposited in the U.S. Treasury. (*See* Jud. Conf. Rep. at 20 (Mar. 14, 1989) (Skidgel Decl. Ex. B).) In 1989, the Judicial Conference, "[o]bserving that such fees could provide significant levels of new revenues at a time when the judiciary face[d] severe funding shortages," had "voted to recommend that Congress credit to the judiciary's appropriations account any fees generated by providing public access to court records"; determined that it would try to change that. (*See id*.; Def.'s Facts ¶ 3; *see also* Jud. Conf. Rep. at 21 (Mar. 13, 1990) (noting that the FY 1990 appropriations act provided that the judiciary was "entitled to retain the fees collected for PACER services in the bankruptcy courts," and that the Conference would "seek similar legislative language to permit the judiciary to retain the fees collected for district court PACER services").)

[6] According to this report, the Committee believed that "more than 75 courts are providing this service, most of them at no charge to subscribers"; that "approximately a third of current access to court records is by non-Judiciary, governmental agencies" and that "fees for access in these instances are desirable"; and that it was "aware that a pilot program for the collection of fees ha[d] been successfully implemented in the Courts and encourage[d] the Judiciary to assess charges in all courts, in accordance with the provisions of section 404(a) of P.L. 101-515[.]"

In 1993, the Judicial Conference amended the fee schedules for the Courts of Appeals to include a "fee for usage of electronic access to court data" for "users of PACER and other similar electronic access systems," while deciding not to impose fees for another "very different electronic access system" then in use by the appellate courts. (Jud. Conf. Rep. at 44–45 (Sept. 20, 1993) (Skidgel Decl. Ex. D).)[7] In 1994, the Judicial Conference approved a "fee for usage of electronic access to court data" for the Court of Federal Claims. (Jud. Conf. Rep. at 16 (Mar. 15, 1994) (Skidgel Decl. Ex. E).) Finally, in March 1997, it did the same for the Judicial Panel on Multidistrict Litigation. (Jud. Conf. Rep. at 20 (Mar. 11, 1997)[8]; Def.'s Facts ¶ 13.)

B. EPA Fees Before the E-Government Act (1993–2002)

As the Judicial Conference was adding EPA fees to the fee schedules for additional courts, it became apparent that the "income accruing from the fee[s] w[ould] exceed the costs of providing the service." (Jud. Conf. Rep. at 13–14 (Mar. 14, 1995).) Accordingly, after noting that this revenue "is to be used to support and enhance the electronic public access systems," the Judicial Conference reduced the fee from $1.00 to 75 cents per minute in 1995. (*Id.*) In 1996, after noting that the previous reduction had been "to avoid an ongoing surplus," it "reduce[d] the

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1992 H.R. Rep. at 58.

[7] The Judicial Conference Report explained that:

> Some appellate courts utilize a very different electronic access system called Appellate Court Electronic Services (ACES) (formerly known as Electronic Dissemination of Opinions System (EDOS)). The Committee determined that, at this time, the costs of implementing and operating a billing and fee collection system for electronic access to the ACES/EDOS system would outweigh the benefit of the revenues to be generated.

(Jud. Conf. Rep. at 44 (Sept. 20, 1993).)

[8] Legislation authorizing the Judicial Conference to establish a fee schedule for the Judicial Panel on Multidistrict Litigation was enacted in 1996. *See* Pub. L. No. 104-317 (1996) § 403(b), Oct. 19, 1996, 110 Stat. 3854 (codified at 28 U.S.C. § 1932).

fee for electronic public access further," from 75 to 60 cents per minute. (Jud. Conf. Rep. at 16 (Mar. 13, 1996) (Skidgel Decl. Ex. F); *see also* EPA Chronology at 1; Def.'s Facts ¶ 14.)

Shortly after the 1996 fee reduction, the House and Senate Appropriations Committees issued reports that included commentary on the judiciary's EPA fees. The House Report stated:

> The Committee supports the ongoing efforts of the Judiciary to improve and expand information made available in electronic form to the public. Accordingly, the Committee expects the Judiciary to utilize available balances derived from electronic public access fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. *The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, enhanced use of the Internet, and electronic bankruptcy noticing.*

H.R. Rep. No. 104-676, at 89 (July 16, 1996) (emphasis added) ("1996 H.R. Rep."). The Senate Report stated that:

> The Committee supports efforts of the judiciary to make electronic information available to the public, and expects that available balances from public access fees in the judiciary automation fund will be used to enhance availability of public access.

S. Rep. No. 104-353, at 88 (Aug. 27, 1996) ("1996 S. Rep.").

Soon thereafter, "the judiciary started planning for a new e-filing system called ECF [Electronic Case Filing]." (Pls.' Statement Facts ¶ 9, ECF No. 52-16 ("Pls.' Facts").) In March 1997, the staff of the AO prepared a paper, entitled "Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues and the Road Ahead," "to aid the deliberations of the Judicial Conference in this endeavor," which would allow courts to maintain complete electronic case files. (Taylor Decl. Ex. B, at 36 ("1997 AO Paper").) In discussing how the ECF system could be funded, the paper discussed the possibility of charging a separate fee for ECF, but also opined that "[s]tarting with fiscal year 1997, the judiciary has greater freedom in the use of revenues generated from electronic public access fees" because "the [1996] House and Senate

appropriations committee reports . . . include[d] language expressly approving use of these monies for electronic filings, electronic documents, use of the Internet, etc." (1997 AO Paper at 36; *see* Pls.' Facts ¶ 9; *see also* Second Decl. of Wendell Skidgel, March 14, 2018, ECF 81-1 ("2d Skidgel Decl."), Tab 1 ("FY 2002 Budget Request") ("Fiscal year 1997 appropriations report language expanded the judiciary's authority to use these funds to finance automation enhancements that improve the availability of electronic information to the public.").) In the summer of 1998, the Senate Appropriations Committee reiterated its view that it "support[ed] efforts of the judiciary to make information available to the public electronically, and expect[ed] that available balances from public access fees in the judiciary automation fund will be used to enhance the availability of public access." S. Rep. No. 105-235, at 114 (July 2, 1998) ("1998 S. Rep.").

At some point, "a web interface was created for PACER" and the Judicial Conference prescribed the first Internet Fee for Electronic Access to Court Information, charging 7 cents per page "for public users obtaining PACER information through a federal judiciary Internet site." (Jud. Conf. Rep. at 64 (Sept. 15, 1998) (Skidgel Decl. Ex. G); *see* EPA Chronology at 1.) The Judicial Conference stated in its report that

> The revenue from these fees is used exclusively to fund the full range of electronic public access (EPA) services. With the introduction of Internet technology to the judiciary's current public access program, the Committee on Court Administration and Case Management recommended that a new Internet PACER fee be established to maintain the current public access revenue while introducing new technologies to expand public accessibility to PACER information.

(Jud. Conf. Rep. at 64 (Sept. 15, 1998).)[9]

[9] At the same time, the Judicial Conference "addressed the issue of what types of data or information made available for electronic public access should have an associated fee and what types of data should be provided at no cost." (Jud. Conf. Rep. at 64–65 (Sept. 15, 1998).) It concluded that while it "prescribed a fee for access to court data obtained electronically from the

In March 2001, the Judicial Conference eliminated the EPA fees from the court-specific miscellaneous fee schedules and replaced them with "an independent miscellaneous EPA fee schedule that would apply to all court types." (Jud. Conf. Rep. at 12–13 (Mar. 14, 2001) (Skidgel Decl. Ex. H); *see also* EPA Chronology at 1.) At the same time, it amended the EPA fee schedule to provide: (1) that attorneys of record and parties in a case would receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer, which could then be printed and saved to the recipient's own computer or network; (2) that no fee is owed by a PACER user until charges of more than $10 in a calendar year are accrued; (3) a new fee of 10 cents per page for printing paper copies of documents through public access terminals at clerks' offices; and (4) a new PACER Service Center search fee of $20.[10] (Jud. Conf. Rep. at 12–13 (Mar. 14, 2001).) In 2002, the Judicial Conference further amended the EPA fee schedule "to cap the charge for accessing any single document via the Internet at the fee for 30 pages."[11] (Jud. Conf. Rep. at 11 (Mar. 13, 2002) (Skidgel Decl. Ex. I).)

Starting no later than fiscal year 2000,[12] the judiciary was using its EPA fees to pay for

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public dockets of individual case records in the court," courts should be allowed to "provide other local court information at no cost," such as local rules, court forms, news items, court calendars, opinions designated by the court for publication, and other information—such as court hours, court location, telephone listings—determined locally to benefit the public and the court." (*Id*.)

[10] At the time, "[t]he PACER Service Center provide[d]s registration, billing, and technical support for the judiciary's EPA systems and receive[d] numerous requests daily for particular docket sheets from individuals who d[id] not have PACER accounts." (Jud. Conf. Rep. at 12–13 (Mar. 14, 2001).)

[11] The Judicial Conference took this step because otherwise "the fee is based upon the total number of pages in a document, even if only one page is viewed, because the case management/electronic case files system (CM/ECF) software cannot accommodate a request for a specific range of pages from a document," which "can result in a relatively high charge for a small usage." (Jud. Conf. Rep. at 11 (Mar. 13, 2002).)

[12] The record does not include any specifics as to the use of EPA fees prior to FY 2000.

PACER-related costs, CM/ECF-related costs, and Electronic Bankruptcy Noticing ("EBN").[13] (*See* 2d Skidgel Decl. ¶¶ 31–33 & Tabs 30–32 ("expenditures relating to the Judiciary's Electronic Public Access Program" for FY 2000–2002).)

C. E-Government Act of 2002

In December 2002, Congress passed the E-Government Act of 2002. Section 205 pertained to the "Federal Courts. Subsection (a) required all courts to have "individual court websites" containing certain specified information or links to websites that include such information (e.g., courthouse location, contact information, local rules, general orders, docket information for all cases, access to electronically filed documents, written opinions, and any other information useful to the public)"; subsection (b) provided that "[t]he information and rules on each website shall be updated regularly and kept reasonably current; subsection (c), entitled "Electronic Filings," provided that, with certain exceptions for sealed documents and privacy and security concerns, "each court shall make any document that is filed electronically publicly available online"; subsection (d), entitled "Dockets with links to documents" provided that "[t]he Judicial Conference of the United States shall explore the feasibility of technology to post online dockets with links allowing all filings, decisions, and rulings in each case to be obtained from the docket sheet of that case"; and subsections (f) and (g) address the time limits for courts to comply with the above requirements. E-Government Act of 2002, § 205(a)–(d), (f), and (g) (codified at 44 U.S.C. § 3501 note). Subsection (e), entitled Cost of Providing Electronic Docketing Information, "amend[ed] existing law regarding the fees that the Judicial Conference prescribes for access to electronic information" by amending the first sentence of 28 U.S.C. §

[13] A line item amount expended from EPA fees for Electronic Bankruptcy Noticing appears in AO's accounting of EPA fees for FY 2000, but not for 2001 or 2002. (*See* 2d Skidgel Decl. Tabs 30–32.)

1913 note to replace the words "shall hereafter" with "may, only to the extent necessary." E-Government Act of 2002, § 205(e). The E-Government Act left the remainder of 28 U.S.C. § 1913 note unchanged.

The Senate Governmental Affairs Committee Report describes Section 205 as follows:

> Section 205 requires federal courts to provide greater access to judicial information over the Internet. Greater access to judicial information enhances opportunities for the public to become educated about their legal system and to research case-law, and it improves access to the court system. The mandates contained in section 205 are not absolute, however. Any court is authorized to defer compliance with the requirements of this section, and the Judicial Conference of the United States is authorized to promulgate rules to protect privacy and security concerns.

S. Rep. No. 107-174, at 23 (June 24, 2002) ("2002 S. Rep.") (Taylor Decl. Ex. D). As to the amending language in subsection 205(e), the report stated:

> The Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible. For example, the Administrative Office of the United States Courts operates an electronic public access service, known as PACER, that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and from the U.S. Party/Case Index. Pursuant to existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information.

2002 S. Rep. at 23.

D. EPA Fees After the E-Government Act

1. 2003–2006

After the passage of the E-Government Act, the judiciary continued to use EPA fees for the development of its CM/ECF system. (*See* Taylor Decl. Ex. F (FY 2006 Annual Report for the Judiciary Information Technology Fund ("JITF") (formerly the "Judiciary Automation Fund")[14] ("The entire development costs for the Case Management/Electronic Case Files

[14] In 2005, 28 U.S.C. § 612 had been amended to substitute "Judiciary Information Technology

(CM/ECF) project have been funded solely through EPA collections.").)

In 2003, a report from the House Appropriations Committee stated that: "The Committee expects the fee for the Electronic Public Access program to provide for Case Management/Electronic Case Files system enhancements and operational costs." H.R. Rep. No. 108-221, at 116 (July 21, 2003) ("2003 H.R. Rep."). The Senate Appropriations Committee also expressed its enthusiasm for CM/ECF:

> The Committee fully supports the Judiciary's budget request for the Judiciary Information Technology Fund [JITF]. The Committee would like to see an even greater emphasis on automation in the local courts. To this end, the Committee expects the full recommended appropriation for the JITF, as reflected in the budget request, be deposited into this account. The Committee lauds the Judicial Committee on Information Technology (IT Committee) and their Chairman for their successes helping the Courts run more efficiently through the use of new automation. Of particular note, the Committee is impressed and encouraged by the new Case Management/Electronic Case File system [CM/ECF]. This new and innovative system allows judges, their staffs, the bar and the general public to work within the judicial system with greater efficiency. This new system is currently implemented in many bankruptcy and district courts and will soon begin implementation in the appellate courts. The CM/ECF system is already showing its potential to revolutionize the management and handling of case files and within the next few years should show significant cost savings throughout the Judiciary. The Committee on Appropriations expects a report on the savings generated by this program at the earliest possible date.

S. Rep. No. 108-144, at 118 (Sept. 5, 2003) ("2003 S. Rep."). The associated Conference Committee report "adopt[ed] by reference the House report language concerning Electronic Public Access fees." *See* 149 Cong Rec. H12323, at H12515 (Nov. 23, 2003) ("2003 Conf. Rep.").

In September 2004, the Judicial Conference, "[i]n order to provide sufficient revenue to fully fund currently identified case management/electronic case files system costs," "increase[d]

Fund" for "Judiciary Automation Fund" and "information technology" for "automatic data processing."

the fee for public users obtaining information through a federal judiciary Internet site from seven to eight cents per page." (Jud. Conf. Rep. at 12 (Sept. 21, 2004) (Skidgel Decl. Ex. J); *see also* EPA Chronology at 2; Taylor Decl. Ex. E (Oct. 21, 2004 AO memorandum) ("This increase is predicated upon Congressional guidance that the judiciary is expected to use PACER fee revenue to fund CM/ECF operations and maintenance. The fee increase will enable the judiciary to continue to fully fund the EPA Program, in addition to CM/ECF implementation costs until the system is fully deployed throughout the judiciary and its currently defined operations and maintenance costs thereafter.").)

The judiciary's Financial Plan for fiscal year 2006 described its EPA program at the time:

> The judiciary's Electronic Public Access (EPA) program provides for the development, implementation and enhancement of electronic public access systems in the federal judiciary. The EPA program provides centralized billing, registration and technical support services for PACER (Public Access to Court Electronic Records), which facilitates Internet access to data from case files in all court types, in accordance with policies set by the Judicial Conference. The increase in fiscal year 2006 EPA program operations includes one-time costs associated with renegotiation of the Federal Telephone System (FTS) 2001 telecommunications contract.
>
> Pursuant to congressional directives, the program is self-funded and collections are used to fund information technology initiatives in the judiciary related to public access. Fee revenue from electronic access is deposited into the Judiciary Information Technology Fund. Funds are used first to pay the expenses of the PACER program. Funds collected above the level needed for the PACER program are then used to fund other initiatives related to public access. The development and implementation costs for the CM/ECF project have been funded through EPA collections. Beginning last year, in accordance with congressional direction, EPA collections were used to support CM/ECF operations and maintenance as well. In fiscal year 200[6], the judiciary plans to use EPA collections to continue PACER operations, complete CM/ECF development and implementation, and operate and maintain the installed CM/ECF systems in the various courts across the country.

(2d Skidgel Decl. Tab 9 (FY 2006 Financial Plan at 45).)

2. 2006–2009

In July 2006, the Senate Appropriations Committee issued a report pertaining to the 2007

appropriations bill in which it stated: "The Committee supports the Federal judiciary sharing its case management electronic case filing system at the State level and urges the judiciary to undertake a study of whether sharing such technology, including electronic billing processes, is a viable option." S. Rep. No. 109-293, at 176 (July 26, 2006) ("2006 S. Rep.") (2d Skidgel Decl. Tab 38).

By the end of 2006, "resulting from unanticipated revenue growth associated with public requests for case information," the judiciary found that its EPA fees fully covered the costs of its "EPA Program" and left it with an "unobligated balance" of $32.2 million from EPA fees in the JITF. (FY 2006 JITF Annual Rep. at 8; Pls.' Facts ¶ 16.) In light of this "unobligated balance," the judiciary reported that it was "examining expanded use of the fee revenue in accordance with the authorizing legislation." (FY 2006 JITF Annual Rep. at 8.)

In March 2007, the judiciary submitted its financial plan for fiscal year 2007 to the House and Senate Appropriations Committees. (Def.'s Facts ¶ 27.) In the section of the plan that covered the JITF, it proposed using EPA fees "first to pay the expenses of the PACER program" and then "to fund other initiatives related to public access." (Skidgel Decl. Ex. K (FY 2007 Financial Plan at 45).) It identified the "public access initiatives" that it planned to fund with EPA fees as CM/ECF Infrastructure and Allotments; EBN; Internet Gateways; and Courtroom Technology Allotments for Maintenance/Technology Refreshment. (*Id.*) With respect to Courtroom Technology, the plan requested "expanded authority" to use EPA fees for that purpose:

> Via this financial plan submission, the Judiciary seeks authority to expand use of Electronic Public Access (EPA) receipts to support courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. The Judiciary seeks this expanded authority as an appropriate use of EPA receipts to improve the ability to share case evidence with the public in the courtroom during proceedings and to share case evidence electronically

> through electronic public access services when it is presented electronically and becomes an electronic court record.

(FY 2007 Financial Plan at 43, 46.) With no specific reference to EPA fees, the plan also sought

> spending authority to implement a Memorandum of Agreement with the State of Mississippi to undertake a three-year study of the feasibility of sharing the Judiciary's case management electronic case filing system at the state level, to include electronic billing processes. The estimated cost of this three year pilot will not exceed $1.4 million.

(*Id*. at 41.) In May 2007, the FY 2007 Financial Plan was approved by the House and Senate Appropriations Committees, with the approval letter signed on May 2, 2007, by the Chairman and the Ranking Member of the Subcommittee on Financial Services and General Government, stating that there was no objection to "the expanded use of Electronic Public Access Receipts" or "a feasibility study for sharing the Judiciary's case management system with the State of Mississippi." (Skidgel Decl. Ex. L ("FY 2007 Senate Approval Letter"); *id*. Ex. M ("FY 2007 House Approval Letter").)

The judiciary began using EPA fees to pay for courtroom technology expenses in 2007, "to offset some costs in [its] information technology program that would otherwise have to be funded with appropriated funds." (Pls.' Facts ¶ 18; 2d Skidgel Decl. Tab 35 (FY 2007–08 EPA Expenditures); *Hearings Before a Subcomm. of the Sen. Comm. on Appropriations on H.R. 7323/S. 3260*, 110th Cong. 51 (2008) (testimony of the chair of the Judicial Conference's Comm. on the Budget) ("[t]he Judiciary's fiscal year 2009 budget request assumes $68 million in PACER fees will be available to finance information technology requirements in the courts' Salaries and Expenses account, thereby reducing our need for appropriated funds").)

In its fiscal year 2008 financial plan, the judiciary indicated that it intended to use EPA fees for Courtroom Technology ($24.8 million) and two new programs: a Jury Management System ("JMS") Web Page ($2.0 million) and a Violent Crime Control Act ("VCCA")

Notification. (2d Skidgel Decl. Tab 11 (FY 2008 Financial Plan at 11).) Actual expenditures for fiscal year 2008 included spending on those programs. (*Id.* Tab 35 (FY 2008 EPA Expenditures) ($24.7 million spent on Courtroom Technology; $1.5 million spent on the JMS Web Page; $1.1 million spent on the VCCA Notification).) Its fiscal year 2009 financial plan included a third new expense category: a CM/ECF state feasibility study ($1.4 million)—this was previously described in the 2007 financial plan as the State of Mississippi study, albeit not in the section related to EPA fee use. (*Id.* Tab 12 (FY 2009 Financial Plan at 45).) The judiciary also projected spending $25.8 million on Courtroom Technology; $200,000 on the JMS Public Web Page; and $1 million on VCCA Notification. (*Id.*) Again, actual expenditures for fiscal year 2009 included each of these programs. *(Id.* Tab 36 (FY 2009 EPA Expenditures) ($160,000 spent on the State of Mississippi study; $24.6 million spent on Courtroom Technology; $260,000 spent on Web-Based Juror Services (replacing line item for JMS); and $69,000 spent on VCCA Notification).)

In February 2009, Senator Lieberman, in his capacity as Chair of the Senate Committee on Homeland Security and Government Affairs, sent a letter to the Chair of the Judicial Conference Committee on Rules of Practice and Procedure, inquiring whether the judiciary was complying with the E-Government Act. (*See* Taylor Decl. Ex. H.) According to Senator Lieberman, the "goal of this provision . . . was to increase free public access to [court] records." (*Id.*) Given that PACER fees had increased since 2002, and that "the funds generated by these fees [were] still well higher than the cost of dissemination," he asked the Judicial Conference to "explain whether the Judicial Conference is complying with Section 205(e) of the E-Government Act, how PACER fees are determined, and whether the Judicial Conference is only charging 'to the extent necessary' for records using the PACER system." (*Id.*)

On behalf of the Judicial Conference and its Rules Committee, the Committee Chair and the Director of the AO responded that the judiciary was complying with the law because EPA fees are "used only to fund public access initiatives," such as "CM/ECF, the primary source of electronic information on PACER," and the "EBN system, which "provides access to bankruptcy case information to parties listed in the case by eliminating the production and mailing of traditional paper notices and associated postage costs, while speeding public service." (Taylor Decl. Ex. I ("3/26/2009 AO Letter").)

In March 2010, Senator Lieberman raised his concerns in a letter to the Senate Appropriations Committee. (*See* Taylor Decl. Ex. G.) In addition, he specifically questioned the use of EPA receipts for courtroom technology, acknowledging that the Appropriations Committees had approved this use in 2007, but expressing his opinion that this was "an initiative that [was] unrelated to providing public access via PACER and against the requirement of the E-Government Act." (*Id*. at 3.)

In 2011, the Judicial Conference, "[n]oting that . . . for the past three fiscal years the EPA program's obligations have exceeded its revenue," again amended the PACER fee schedule, raising the per-page cost from 8 to 10 cents. (Jud. Conf. Rep. at 16 (Sept. 13, 2011) (Skidgel Decl. Ex. N).) At the same time, it increased the fee waiver amount from $10 to $15 per quarter. (*Id*.)

3. 2010–2016[15]

From the beginning of fiscal year 2010 to the end of fiscal year 2016, the judiciary collected more than $920 million in PACER fees; the total amount collected annually increased

[15] These are the years that are relevant to the present litigation because there is a six-year statute of limitation on plaintiffs' claims.

from about $102.5 million in 2010 to $146.4 million in 2016.[16] (*See* Pls.' Facts ¶¶ 28, 46, 62, 80, 98, 116, 134; Taylor Decl. Ex. L; *see also* Attachment 1 hereto.[17])

During that time, PACER fees were used to pay for the costs of PACER, CM/ECF, EBN, the State of Mississippi study, Web-Based Juror Services, VCCA Notification, and Courtroom Technology. In its internal accounting, the judiciary divided these costs into Program Requirements and Congressional Priorities. (Taylor Decl. Ex. L.)

Under Program Requirements, there are five categories: (1) Public Access Services; (2) CM/ECF System; (3) Telecommunications (2010–11) or Communications Infrastructure, Services and Security (2012–16); (4) Court Allotments; and (5) EBN. (*Id*.) The Public Access Services category includes only expenses that relate directly to PACER. (*See* Taylor Decl. Ex. M, at 22-23 ("Def.'s Resp. to Pls.' Interrogs."); 3/23/18 Tr. at __.) From 2010 to 2016, the judiciary spent nearly $129.9 million on Public Access Services. (*Id*.) The next three categories, CM/ECF System, Telecommunications/Communications Infrastructure, and Court Allotments, include only expenses that relate to CM/ECF or PACER. (*See* 3/23/18 Tr. at __[18]; *see also* Def.'s Resp. to Pls.' Interrogs. at 22–26.) From 2010 to 2016, the judiciary spent $217.9 million on the CM/ECF System; $229.4 million on Telecommunications/ Communications Infrastructure; and $74.9 million on Court Allotments. (Taylor Decl. Ex. L (FY 2010-2016 EPA

[16] This number does not include print fee revenues, which are also collected pursuant to the EPA fee schedule.

[17] The document submitted to the Court as Exhibit L to the Taylor Declaration is defendant's internal accounting of PACER revenues and the use of PACER fees from FY 2010 through FY 2016. (*See* Taylor Decl. Ex. L; 3/23/18 Tr. at __.) While the contents of this document are described in this Memorandum Opinion, for the reader's benefit, an example of this internal accounting for the year 2010 is appended hereto as Attachment 1 in order to demonstrate how the judiciary has described and categorized the expenditures that were paid for by PACER fees.

[18] The official transcript from the March 23, 2018 motions hearing is not yet available. The Court will add page citations once it is.

Expenditures).) The final category, Electronic Bankruptcy Noticing, refers to the system which "produces and sends court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." (Def.'s Resp. to Pls.' Interrogs. at 10.) From 2010 to 2016, the judiciary spent a total of $73.3 million on EBN. (Taylor Decl. Ex. L.)

Under Congressional Priorities, there are four categories: (1) State of Mississippi; (2) VCCA Victim Notification; (3) Web-Based Juror Services; and (4) Courtroom Technology. (*Id*.) The State of Mississippi category refers to a study which "provided software, and court documents to the State of Mississippi, which allowed the State of Mississippi to provide the public with electronic access to its documents." (Def.'s Resp. to Pls.' Interrogs. at 5.) In 2010—the only year this category appears between 2010 and 2016—the judiciary spent a total of $120,988 for the State of Mississippi study. (Taylor Decl. Ex. L.) The next category is Victim Notification (Violent Crime Control Act), which refers to "[c]osts associated with the program that electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision." (Def.'s Resp. to Pls.' Interrogs. at 5.) Via this program, "[l]aw enforcement officers receive electronic notification of court documents that were previously sent to them through the mail." (*Id*.) From 2010 to 2016, the judiciary spent $3.7 million on the VCCA victim notification program. The third category, Web-Based Juror Services, refers to "[c]osts associated with E-Juror software maintenance, escrow services, and scanner support." (*Id.* at 26.) "E-Juror provides prospective jurors with electronic copies of courts documents regarding jury service." (*Id*.) From 2010 to 2016, the judiciary spent $9.4 million on Web-Based Juror Services. (Taylor Decl. Ex. L.) Finally, the category labeled Courtroom Technology funds "the maintenance, cyclical replacement, and upgrade of courtroom technology in the courts." (Def.'s Resp. to Pls.' Interrogs. at 26.) From 2010 to 2016, the judiciary spent

$185 million on courtroom technology. (Taylor Decl. Ex. L.)

II. PROCEDURAL HISTORY

On April 21, 2016, three national nonprofit organizations, National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice, on behalf of themselves and a nationwide class of similarly-situated PACER users, filed suit against the United States under the Little Tucker Act, 28 U.S.C. § 1346(a), claiming that the PACER fees charged by the Administrative Office of the United States Courts "exceeded the amount that could be lawfully charged, under the E-Government Act of 2002" and seeking "the return or refund of the excessive PACER fees." (Compl. ¶¶ 33–34.)

After denying defendant's motion to dismiss (*see* Mem. Op. & Order, Dec. 5, 2016, ECF Nos. 24, 25), the Court granted plaintiffs' motion for class certification (*see* Mem. Op. & Order, Jan. 24, 2017, ECF Nos. 32, 33). Pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), the Court certified a class consisting of: "[a]ll individuals and entities who have paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding class counsel in this case and federal government entities" and "certifie[d] one class claim: that the fees charged for accessing court records through the PACER system are higher than necessary to operate PACER and thus violate the E-Government Act, entitling plaintiffs to monetary relief from the excessive fees under the Little Tucker Act." (Order, Jan. 24, 2017, ECF No. 32.)

On August 28, 2017, plaintiffs filed a motion seeking "summary adjudication of the defendant's liability," while "reserving the damages determination for after formal discovery." (Pls.' Mot. at 1.) On November 17, 2017, defendant filed a cross-motion for summary judgment as to liability. The Court permitted the filing of three amicus briefs.[19] The cross-motions for

[19] Amicus briefs were filed by the Reporters Committee for Freedom of the Press, *et al.*, ECF No. 59, the American Association of Law Libraries, *et al.*, ECF No. 61, and Senator Joseph

summary judgment on liability are fully-briefed and a hearing on the motions was held on March 23, 2018.

ANALYSIS

The parties' cross-motions for summary judgment on liability present the following question of statutory interpretation: what restrictions does 28 U.S.C. § 1913 note place on the amount the judiciary may charge in PACER fees?

In relevant part, 28 U.S.C. § 1913 note reads:

> Court Fees for Electronic Access to Information
>
> (a) The Judicial Conference may, only to the extent necessary, prescribe reasonable fees . . . for collection by the courts . . . for access to information available through automatic data processing equipment.
>
> . . .
>
> The Director, under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> (b) . . . All fees hereafter collected by the Judiciary under paragraph (a) as a charge for services rendered shall be deposited as offsetting collections to the Judiciary Automation Fund . . . to reimburse expenses incurred in providing these services.

28 U.S.C. § 1913 note.

I. LEGAL STANDARD

Statutory interpretation "begins with the language of the statute." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017). This means examining "'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole'" to determine if it has a "'plain and unambiguous meaning with regard to the particular dispute in the case.'" *United States v. Wilson*, 290 F.3d 347, 352–53 (D.C. Cir. 2002) (quoting *Robinson v.*

Lieberman and Congressman Darrell Issa, ECF No. 63.

Shell Oil Co., 519 U.S. 337, 340 (1997)); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005) (statutory interpretation "requires examination of the statute's text in light of context, structure, and related statutory provisions"). A statutory term that is neither a term of art nor statutorily defined is customarily "construe[d] . . . in accordance with its ordinary or natural meaning," frequently derived from the dictionary. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

Where statutory language does not compel either side's interpretation, the Court may "look to the statute's legislative history to determine its plain meaning." *U.S. Ass'n of Reptile Keepers, Inc. v. Jewell*, 103 F. Supp. 3d 133, 146 (D.D.C. 2015) (citing *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 781 (D.C. Cir. 2012)); *see also Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text."). The fact that a statute can be read in more than one way does not demonstrate that it lacks "plain meaning." *United States v. Hite*, 896 F. Supp. 2d 17, 25 (D.D.C. 2012); *see, e.g.*, *Abbott v. United States,* 562 U.S. 8, 23 (2010).

A statute's legislative history includes its "statutory history," a comparison of the current statute to its predecessors and differences between their language and structure, *see, e.g.*, *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 231–32 (2007), along with relevant committee reports, hearings, or floor debates. In general, "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1289 n.26 (D.C. Cir. 1983) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980)). But even though, "[t]he view of a later Congress cannot control the interpretation of an earlier enacted statute," *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996), in certain narrow circumstances, "'congressional

acquiescence to administrative interpretations of a statute'" may "inform the meaning of an earlier enacted statute." *U.S. Ass'n of Reptile Keepers*, 103 F. Supp. 3d at 153 & 154 n.7 (D.D.C. 2015) (quoting *O'Gilvie*, 519 U.S. at 90); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001)). Such a situation may be where Congress has amended the relevant provisions without making any other changes. *See, e.g.*, *Barnhart v. Walton*, 535 U.S. 212, 220 (2002). However, "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 191 (1978).

II. APPLICATION

Applying the "ordinary principles of statutory construction," the parties arrive at starkly different interpretations of this statute. Plaintiffs take the position that the statute "prohibits the AO from charging more in PACER fees than is necessary to recoup the total marginal cost of operating PACER." (Pls.' Mot. at 12.) Under plaintiffs' interpretation, defendant's liability is established because with the exception of the category of expenditures labeled Public Access Services (*see* Attachment 1), most, if not all, of the other expenditures covered by PACER fees are not part of the "'marginal cost of disseminating records' through PACER." (*See* Pls.' Mot. at 17; *see also*, *e.g.*, Pls.' Facts ¶¶ 32, 34, 36, 38, 41, 43, 45 (fiscal year 2010).) Defendant readily admits that PACER fees are being used to cover expenses that are not part of the "marginal cost" of operating PACER (*see, e.g.*, Def.'s Resp. to Pls.' Facts ¶¶ 32, 34, 36, 38, 41, 43, 45), but it rejects plaintiffs' interpretation of the statute. Instead, defendant reads the statute broadly to mean that the Judicial Conference "may charge [PACER] fees in order to fund the dissemination of information through electronic means." (3/23/18 Tr. at __; *see also* Def.'s Mot. at 11 (Judicial Conference may "charge fees, as it deems necessary, for the provision of

information to the public through electronic means").) Under defendant's interpretation, it is not liable because "every single expenditure . . . [is] tied to disseminating information through electronic means." (3/23/18 Tr. at __.)

If the Court agreed with either proposed interpretation, the ultimate question of defendant's liability would be relatively straightforward. If PACER fees can only be spent to cover the "marginal cost" of operating PACER, defendant is liable most expenditures.[20] If PACER fees can be spent on any expenditure that involves "the dissemination of information through electronic means," defendant is not liable. But the Court rejects the parties' polar opposite views of the statute, and finds the defendant liable for certain costs that post-date the passage of the E-Government Act, even though these expenses involve dissemination of information via the Internet.

A. Does the E-Government Act Limit PACER Fees to the Marginal Cost of Operating PACER?

As noted, plaintiffs interpret the statute as prohibiting the AO "from charging more in

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[20] The Court would still have to determine the meaning of "marginal cost" and whether any of the expenditures beyond those in the category of Public Access Services are part of that cost, since plaintiffs only expressly challenged "some" of the expenditures in several important categories, and defendant has only admitted that "some" of the expenditures in those categories are not part of the marginal cost. (*See, e.g.*, Pls.' Facts ¶¶ 41 (CM/ECF), 43 (Telecommunications), 45 (Court Allotments); Def.'s Resp. to Pls.' Facts ¶¶ 41, 43, 45.) The categories that plaintiffs argue should be examined as part of a determination of damages (as opposed to liability), since they may include PACER-related costs, are CM/ECF, Telecommunications/Communications Infrastructure, and Court Allotments. (Pls.' Mot. at 19; *see also* Attachment 1.)

Defendant, on the other hand, responds that even though only some of the costs associated with these categories involve PACER-related expenses, all of the expenses related to PACER and/or CM/ECF. (3/23/18 Tr. at __.)

However these costs are categorized, the Court rejects plaintiffs' suggestion that the issue is one to be decided as part of a determination of damages, for the issue as to liability necessarily requires a determination of whether these costs are proper expenditures under the E-Government Act.

PACER fees than is necessary to recoup the total marginal cost of operating PACER." (Pls.' Mot. at 12.) Plaintiffs concede, as they must, that this is not what the text of the statute actually says. But they argue that this is the best reading of the statutory language in light of its "plain language," its "history," and the need to "avoid[] two serious constitutional concerns that would be triggered by a broader reading." (*See* Pls.' Reply at 1.)

Plaintiffs first argue that it is clear from the text that the words "these services" in the last sentence of subparagraph (b), where it provides that the fees collected must be used "to reimburse expenses incurred in providing *these* services," include only the services that the AO is actually charging fees for as set forth in the EPA Fee Schedule, i.e., the PACER system, the PACER Service Center, and the provision of printed copies of documents "accessed electronically at a public terminal in a courthouse." (Pls.' Reply at 3–4; 3/23/18 Tr. at __.) The Court does not agree that the text dictates this constraint. The term "these services" could also mean any service that provides "access to information available through automatic data processing equipment," whether or not it is expressly part of the EPA fee schedule.

Plaintiffs' next argument is based on the legislative history of the 2002 amendment, which consists of the following single paragraph in a Senate Committee Report:

> The Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible. For example, the Administrative Office of the United States Courts operates an electronic public access service, known as PACER, that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and from the U.S. Party/Case Index. Pursuant to existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information.

2002 S. Rep. at 23. Plaintiffs argue that this paragraph "makes clear that Congress added this language because it sought to prevent the AO from 'charg[ing] fees that are higher than the marginal cost of disseminating the information,'" as it had been doing for several years, and that

"although the E-Government Act does not refer to PACER by name, Congress clearly had PACER in mind when it passed the Act." (Pls.' Mot. at 11 (quoting 2002 S. Rep. at 23).)

The Court finds this argument unconvincing for several reasons. First, there is no mention in the statute of PACER or its "marginal cost," and in the 2002 Senate Report, the reference to PACER and "marginal cost" follows the words "For example," suggesting that the amendment was not intended to apply only to PACER. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 649 (1990) ("[T]he language of a statute—particularly language expressly granting an agency broad authority—is not to be regarded as modified by examples set forth in the legislative history."). And, in fact, the 2002 Senate Report recognizes that PACER is only a subset of a larger system when it stated: "[t]he Committee intends to encourage the Judicial Conference to move from a structure in which *electronic docketing systems* are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible." 2002 S. Rep. at 23 (emphasis added). The use of the phrase "electronic docketing systems" appears to envision more than just PACER, and to at least encompass CM/ECF, given that it, unlike PACER, is an electronic docketing system.

Second, a single committee's report reflects only what the committee members might have agreed to, not the "intent" of Congress in passing the law. As the Supreme Court observed, "[u]nenacted approvals, beliefs, and desires are not laws." *P.R. Dep't of Consumer Affairs v. Isla Petrol. Corp.*, 485 U.S. 495, 501 (1988). As the Supreme Court observed in rejecting reliance on "excerpts" said to reflect congressional intent to preempt state law, "we have never [looked for] congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text." *Id.*

Perhaps most tellingly, the E-Government Act changed only one phrase in the first

sentence of the first paragraph—replacing "shall hereafter" with "may, only to the extent necessary." It did not alter the third sentence of paragraph (b), which is the part of the statute that governs what expenses can be reimbursed by PACER fees. Thus, even though the 2002 Senate Report correctly observes that PACER fees exceeded the marginal cost of operating PACER, the amendment to the statute did not address which services could be reimbursed, but only the amount of fees for services that could be charged. In addition, at the time the E-Government Act was passed, CM/ECF had been in operation for at least four years, PACER fees were already being used to pay for non-PACER costs, such as EBN and CM/ECF (*see* 2d Skidgel Decl. Tabs 30–32), and there is nothing in the statute's text or legislative history to suggest that Congress intended to disallow the use of PACER fees for those services. In the end, a single sentence in a committee report, which has been taken out of context, is not enough to persuade the Court that Congress intended the E-Government Act to impose a specific limitation on the judiciary's collection and use of EPA fees to the operation of only PACER.

Plaintiffs also point to "[p]ost-enactment history"—the letters from the E-Government Act's sponsor, Senator Joseph Lieberman, in 2009 and 2010. (Pls.' Mot. at 11–12 ("The Act's sponsor has repeatedly expressed his view, in correspondence with the AO's Director, that the law permits the AO to charge fees 'only to recover the direct cost of distributing documents via PACER,' and that the AO is violating the Act by charging more in PACER fees than is necessary for providing access to 'records using the PACER system.'").) But, as plaintiffs essentially conceded during the motions hearing, the post-enactment statements of a single legislator carry no legal weight when it comes to discerning the meaning of a statute. (3/23/18 Tr. at __); *see Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J. concurring) ("the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a

judge concerning a statute not yet passed"); *see also Consumer Prod. Safety Comm'n*, 447 U.S. at 117–18 ("even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history").

Plaintiffs' final argument is that the "constitutional doubt" canon of construction requires their interpretation because any other interpretation would raise a question as to whether Congress had unconstitutionally delegated its taxing authority because the statute does not clearly state its intention to do so. *Skinner v. Mid-Am. Pipeline Co*., 490 U.S. 212, 224 (1989) ("Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes,' on those parties."). Assuming *arguendo* that this doctrine applies with equal force to unregulated parties, an issue not addressed by the parties, the Court does not find plaintiffs' argument persuasive. First, this canon of construction has a role only where the statute is ambiguous, which, as explained herein, the Court concludes is not the case. *See FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 516 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts."). Second, the canon can only be applied where there is a "reasonable alternative interpretation," *Gomez v. United States*, 490 U.S. 858, 864 (1989), but the Court has already explained that it does not find plaintiffs' proposed interpretation to be a reasonable alternative interpretation. Finally, as will be discussed in Section C, *infra*, the Court finds that the statute does clearly state that the judiciary has the authority to use its PACER fees for services that may not directly benefit a particular PACER user. *See Sebelius v. Auburn Reg'l Med. Ctr*., 568 U.S. 145, 153–54 (2013) ("This is not to say that Congress must incant magic words in order to speak

clearly. We consider context . . . as probative of [Congress' intent].").

For these reasons, the Court will not adopt plaintiffs' interpretation of the statute as limiting PACER fees to the total marginal cost of operating PACER.

B. Does the E-Government Act Allow PACER Fees to Fund Any "Dissemination of Information Through Electronic Means"?

Defendant's interpretation of the statute embraces the other extreme, positing that the statute allows PACER fees to be used for any expenditure that is related to "disseminating information through electronic means." (3/23/18 Tr. at __; *see* Def.'s Mot. at 11.) It is not entirely clear to the Court how the defendant arrived at this definition. Most of the reasons defendant gives to justify its interpretation are really just arguments against plaintiffs' interpretation, such as (1) the authority to charge EPA fees and use them to reimburse "services" predated the E-Government Act and that language was not changed by the Act; (2) there is no mention of PACER or "marginal cost" in the 2002 amendment; and (3) the legislative history discussed PACER only as an "example." As for defendant's affirmative arguments, addressed below, none demonstrates that defendant's conclusion is correct.

Defendant's first argument is based on the fact that the text of the statute requires that EPA fees be deposited in the JITF, which is the fund that the judiciary is allowed to use for "broad range of information technology expenditures." (Def.'s Mot. at 10.) According to defendant, the fact that EPA fees are deposited in this fund "informs how Congress intended the fees received from PACER access to be spent." (*Id.*) However, while the statute provides that PACER fees are to be deposited in the JITF, it also directs that they are to be used to "reimburse expenses incurred" in providing "access to information available through data processing equipment." That statutory language cannot be ignored as defendant attempts to do. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its

provisions, so that no part will be inoperative or superfluous, void or insignificant."). Notably, it is clear that the judiciary has never treated its EPA fees in the JITF as fungible with the rest of the money in the JAF. (*See* FY 2006 JITF Annual Report; FY 2007 Financial Plan; 3/26/2009 AO Letter at 3-4 ("While fee collections from the EPA program are also deposited into the JITF, they are used only to fund electronic public access initiatives and account for only a small portion of its balance.").)

Defendant's main argument is that its interpretation of the statute has been accepted by Congress because the Appropriations Committees, either explicitly or implicitly, endorsed, mandated, or approved every request pertaining to the use of EPA fees. For example, defendant points out that the 1996 House Report stated that the Committee "expect[ed] available balances from public access fees" to be used for electronic bankruptcy noticing and electronic case filing, 1996 H.R. Rep. at 89; the 2003 House and Senate Committee Reports "expressly directed the AO to use PACER fees to update the CM/ECF system," 2003 H.R. Rep. at 116; 2003 S. Rep. at 118; those same Committees endorsed the Judiciary's FY 2007 Financial Plan, which set forth the AO's plan "to use receipts from PACER fees to fund courtroom technology and to perform infrastructure maintenance consistent with Congressional actions" (FY 2007 Financial Plan at 45; FY 2007 Senate Approval Letter; FY 2007 House Approval Letter); and the 2006 Senate Report, which urged the judiciary to undertake a study about the feasibility of sharing CM/ECF technology with states, *see* 2006 S. Rep. at 176, which the judiciary then did via its State of Mississippi study (FY 2009 EPA Expenditures). (*See* Def.'s Mot. at 17–18.) More generally, and applicable at least as to the expenditures that post-date the passage of the E-Government Act, congressional approval is reflected by the fact that after the judiciary submitted its proposed budget to Congress and Congress appropriated money to the judiciary, the judiciary was then

required to submit its proposed financial plan, which included its intended use of EPA fees, to the House and Senate Appropriations Committees for approval. (Def.'s Reply at 3; 3/23/18 Tr. at__.) Looking at this entire process as a "totality," defendant argues, establishes that by implicitly approving certain expenditures, Congress agreed with the Judicial Conference's interpretation of the statute. (3/23/18 Tr. at __ ("[W]e have 26 years where the only legislative history that has gone to the judicial conference, but for Senator Lieberman's letter, says the judicial conference's interpretation is correct. The judicial conference's interpretation of that language that PACER fees may be used more broadly is correct.").)

For a number of reasons, defendant's argument is flawed. First, the record does not reflect meaningful congressional approval of each category of expenditures. Each so-called "approval" came from congressional committees, which is not the same as approval by Congress "as a whole." *See Tenn. Valley Auth.*, 437 U.S. at 192.[21] Moreover, the Court questions whether it is even possible to infer approval of a specific expenditure based solely on committee-approval of the judiciary's financial plans, where the record does not show any particular attention was paid to this itemization of intended uses of EPA fees. For almost of all the years for which defendant has included copies of approvals, the "approvals" consist of a mere line in an email or letter that indicates, without any elaboration or specification, that the Appropriations Committee has "no objection."[22] (*See, e.g.*, 2d Skidgel Decl. Tab 16 (2010); *see also id*. Tabs 15, 17, 20–27

[21] Despite having the opportunity to respond to the holding of *Tennessee Valley Authority v. Hill*, defendant has failed to cite any legal support for its use of approvals by the Committee on Appropriations.

[22] The one exception was courtroom technology. In response to the judiciary's request in its FY 2007 Financial Plan to use PACER fees for Courtroom Technology, the Chairman and Ranking Member of the Subcommittee on Financial Services and General Government wrote on May 2, 2007: "We have reviewed the information included and have no objection to the financial plan including . . . the expanded use of Electronic Public Access Receipts." (2007 Senate Approval Lettter; *see also id*. 2007 House Approval Letter.)

(2011, 2013–2016).) In 2009 and 2012, there are letters from the Appropriations Committees which reflect a closer analysis of some parts of the financial plan, but neither mentions the judiciary's planned uses of PACER fees. (*Id*. Tabs 14, 18–19.) By contrast, in July 2013, the AO sent an email to the Senate Appropriation Committee at 1:02 p.m. noting that "[i]n looking through our records we don't seem to have approval of our FY 2013 financial plan. Would you be able to send us an email or something approving the plan? The auditors ask for it so we like to have the House and Senate approvals on file." (2d Skidgel Decl. Tab 20.) Less than an hour later, at 1:47 p.m., an email came from a staff member on the Senate Appropriations Committee stating "Sorry about that and thanks for the reminder. We have no objection." (*Id*.)

Second, even if the record established approval of the various uses of EPA fees, there is nothing to support the leap from approval of specific expenditures to defendant's contention that the Appropriations Committees were cognizant and approved of the Judicial Conference's "interpretation." (*See* 3/23/18 Tr. at __). In fact, the AO never used the definition defendant now urges the Court to adopt—the "dissemination of information through electronic means"—to explain its use of EPA fees for more than PACER. Rather, it used terms like "public access initiatives" to describe these expenditures. (*See* FY 2007 Financial Plan ("collections are used to fund information technology initiatives in the judiciary related to public access"); 2d Skidgel Decl. Tab 12 (FY 2009 Financial Plan at 45) (EPA revenues "are used to fund IT projects related to public access"); Taylor Decl. Ex. J at 10 (AO document, entitled Electronic Public Access Program Summary, December 2012, stating that EPA revenue "is dedicated solely to promoting and enhancing public access").)

Finally, as defendant acknowledges, the post-enactment action of an appropriations committee cannot alter the meaning of the statute, which is what controls what expenditures are

permissible. *See Tenn. Valley Auth.*, 437 U.S. at 191 ("Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress.").[23] Thus, the fact that appropriations committees expressly or implicitly endorsed the use of EPA fees for certain expenditures cannot establish that those expenditures are permissible uses of EPA fees.

For these reasons, the Court is not persuaded that the statute permits the collection of EPA fees to fund any expense that involves the "dissemination of information through electronic means."

C. What Limitation Did the E-Government Act Place on the Use of PACER Fees?

Having rejected the parties' diametrically opposed interpretations, the Court must embark on its own analysis to determine whether defendant's use of PACER fees between 2010 and 2016 violated the E-Government Act. The Court concludes that defendant properly used PACER fees to pay for CM/ECF[24] and EBN, but should not have used PACER fees to pay for the State of Mississippi Study, VCCA, Web-Juror, and most of the expenditures for Courtroom

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[23] Even an appropriations Act passed by Congress cannot alter the meaning of statute. *See Tenn. Valley Auth.*, 437 U.S. at 190–91 ("We recognize that both substantive enactments and appropriations measures are 'Acts of Congress,' but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. [This] would lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation . . . .").

[24] It is undisputed that the expenses in the categories now labeled CM/ECF, Court Allotments and Telecommunication/Communications Infrastructure include only expenses that are directly related to PACER or CM/ECF. (*See* 3/23/18 Tr. at __; *see also* Skidgel Decl. ¶ 19 ("through court allotments, "courts are able to determine the best ways to improve electronic public access services (such as by adding a public printer or upgrading to a more robust internet web server)" and "[f]unding court staff to work on EPA projects, such as CM/ECF, utilizes existing expertise and reduces training time and associated costs compared to that of hiring contractors"; Def.'s Resp. to Pls.' Interrogs. at 22–26.)

Technology. (*See* Attachment 1.)

The statutory language in 28 U.S.C. § 1913 note is clear that, to be paid for with PACER fees, a "service" must be one that provides the public with "access to information available through automatic data processing equipment." An examination of this statutory provision's history—dating from its enactment in 1990 and culminating in its amendment by the E-Government Act in 2002—resolves any ambiguity in its meaning and allows the Court to determine which expenditures between 2010 and 2016 were properly funded by PACER fees.

When the 28 U.S.C. § 1913 note was first enacted in 1989, s*ee* Pub. L. 101-515, § 404, PACER was in its infancy, but it was operational, and the statute clearly applied to it. (*See* Jud. Conf. Rep. at 83 (Sept. 14, 1988); EPA Chronology at 1; Jud. Conf. Rep. at 19 (Mar. 14, 1989); Jud. Conf. Rep. at 21 (Mar. 13, 1990); 1990 S. Rep. at 86.) Yet, there was no mention of PACER in the statute, nor was there any suggestion that the judiciary was precluded from recouping expenses beyond the cost of operating PACER. In fact, it is apparent that Congress recognized the possibility that fees would cover the costs of making court records available to the public electronically. *See* 1990 S. Rep. at 86 ("language . . . authorizes the Judicial Conference to prescribe reasonable fees for public access to case information, to reimburse the courts for automating the collection of the information"); *see also* 1992 H.R. Rep. at 58 (noting that "the Judiciary's investments in automation have resulted in enhanced service to the public and to other Government agencies in making court records relating to litigation available by electronic media" and "request[ing] that the Judiciary equip all courts, as rapidly as is feasible, with the capability for making such records available electronically and for collecting fees for doing so").

The first federal court experiment with electronic case filing began in the Northern

District of Ohio in 1996. (1997 AO Paper at 4.) Later that year, both the House and Senate Appropriations Committees made clear that they expected the judiciary to use its EPA fee collections for more than just paying for the cost of PACER. (1996 H.R. Rep. at 89 ("The Committee supports the ongoing efforts of the Judiciary to improve and expand information made available in electronic form to the public. Accordingly, the Committee expects the Judiciary to utilize available balances derived from electronic public access fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as *electronic case documents, electronic filings, enhanced use of the Internet, and electronic bankruptcy noticing*.") (emphasis added); 1996 S. Rep. at 88 ("The Committee supports efforts of the judiciary to make electronic information available to the public, and expects that available balances from public access fees in the judiciary automation fund will be used to enhance availability of public access.").)

While these statements in the reports of the Committee on Appropriations predated the passage of the E-Government Act, they are not dispositive in terms of discerning what Congress intended the statute to mean. They are part of a bigger picture and an important backdrop to the passage of the E-Government Act. Contemporaneously with Congress's prompting the judiciary to use EPA fees to pay for public access to electronically-stored case documents "[t]he transition towards electronic case files ("ECF") in the federal courts [wa]s underway" by March 1997. (1997 AO Paper at v.) Over the next few years, relying expressly on the 1996 House and Senate Reports relating to fiscal year 1997 appropriations, the judiciary began using EPA fees to fund the development of a national case management and electronic case filing system, CM/ECF,

which would allow federal courts to maintain complete electronic files. (*See, e.g.*, FY 2002 Budget Request ("Fiscal year 1997 appropriations report language expanded the Judiciary's authority to use these funds to finance automation enhancements that improve the availability of electronic information to the public.").) The judiciary anticipated that CM/ECF would "produce an impressive range of benefits . . . including . . . public access to case file information." (1997 AO Paper at v.) For instance, in 1998, the Judicial Conference created a web interface for PACER and added a per page fee for accessing case dockets and electronic filings via the Internet. (Jud. Conf. Rep. at 64–65 (Sept. 15, 1998); EPA Chronology at 1.) At that time, the Judicial Conference noted in its report that

> The revenue from these fees is used exclusively to fund the full range of electronic public access (EPA) services. With the introduction of Internet technology to the judiciary's current public access program, the Committee on Court Administration and Case Management recommended that a new Internet PACER fee be established to maintain the current public access revenue *while introducing new technologies to expand public accessibility to PACER information*.

(Jud. Conf. Rep. at 64–65 (Sept. 15, 1998) (emphasis added).) By no later than fiscal year 2000, the judiciary was spending substantial sums of money, derived from EPA fees, on CM/ECF and EBN. (2d Skidgel Decl. Tab 30 (FY 2000 EPA Expenditures).) In fact, over $10 million was spent on case management/electronic case files, infrastructure and electronic bankruptcy noticing in 2000. (*Id.*)

Then in 2002, Congress passed the E-Government Act. This Act encompassed far more than § 205(e)'s limitation on the charging of fees. The overall purpose of the section pertaining to the judiciary was to "require federal courts to provide greater access to judicial information over the Internet." 2002 S. Rep. at 23. To that end, the Act mandated that the judiciary expand the public's access to electronically stored information that was accessible via PACER:

- § 205(a), "Individual Court Websites," "require[d] the Supreme Court, each circuit court,

each district court, and each bankruptcy court of a district to establish a website that would include public information such as location and contact information for courthouses, local rules and standing orders of the court, docket information for each case, and access to written opinions issued by the court, in a text searchable format." 2002 S. Rep. at 22.

- § 205(b), "Maintenance of Data Online," required that "[t]he information and rules on each website . . . be updated regularly and kept reasonably current."

- § 205(c), "Electronic Filings," required, subject to certain specified exceptions, that courts provide public access to all electronically filed documents and all documents filed in paper that the court converts to electronic form.

and

- § 205(d), "Dockets with Links to Documents," directed the Judicial Conference to "explore the feasibility of technology to post online dockets with links allowing all filing, decision, and rulings in each case to be obtained from the docket sheet of that case."

Subsection 205(e), entitled "Cost of Providing Electronic Docketing Information," changed the language that required the judiciary to charge fees ("shall, hereafter") to make its decision to charge fees discretionary and to limit those fees "to the extent necessary." Even though the judiciary was already using EPA fees to pay for the costs of CM/ECF and EBN, no changes were made to the last sentence of subparagraph (b), which defined the scope of services that can be reimbursed with EPA fees.

As is clear from the E-Government Act, Congress intended in 2002 for the judiciary to expand its capability to provide access to court information, including public information relating to the specific court and docket information for each case, including filings and court opinions. With certain exceptions, documents filed electronically were to be made available publicly, and the judiciary was to explore the possibility of providing access to the underlying contents of the docket sheets through links to filings, decisions and rulings. This ambitious program of providing an electronic document case management system was mandated by Congress, although no funds were appropriated for these existing and future services, but

Congress did provide that fees could be charged even though the fees could be "only to the extent necessary."

Consistent with this view the Appropriations Committees reiterated their support for allowing EPA fees to be spent on CM/ECF in 2003. 2003 H.R. Rep. at 116; 2003 S. Rep. at 118; 2003 Conf. Rep. at H12515.

Although congressional "acquiescence" as an interpretative tool is to be viewed with caution, the Court is persuaded that when Congress enacted the E-Government Act, it effectively affirmed the judiciary's use of EPA fees for all expenditures being made prior to its passage, specifically expenses related to CM/ECF and EBN. Accordingly, the Court concludes that the E-Government Act allows the judiciary to use EPA fees to pay for the categories of expenses listed under Program Requirements: CM/ECF, EBN, Court Allotments and Telecommunications/Communications Infrastructure.[25] (*See* Attachment 1.)

However, Congress' endorsement of the expenditures being made in 2002, in conjunction with the statutory language, the evolution of the E-Government Act, and the judiciary's practices as of the date of the Act's passage, leads the Court to conclude that the E-Government Act and its predecessor statute imposed a limitation on the use of PACER fees to expenses incurred in providing services, such as CM/ECF and EBN, that are part of providing the public with access to electronic information maintained and stored by the federal courts on its CM/ECF docketing system. This interpretation recognizes that PACER cannot be divorced from CM/ECF, since

[25] Plaintiffs' recent supplemental filing after the motions hearing suggested for the first time that the CM/ECF category might require closer examination to determine whether the expenditures therein, in particular CM/ECF NextGen, were all appropriately treated as "public access services." (*See* Pls.' Resp. to Def.'s Supp. Authority at 3, ECF No. 85.) But plaintiffs made no such argument in response to defendant's motion for summary judgment. (*See* Pls.' Reply at 6 (raising no challenge to CM/ECF if the statute authorizes "PACER fees to cover all costs necessary for providing PACER access and other public access services").)

PACER is merely the portal to the millions of electronically-filed documents that are housed by the judiciary on CM/ECF and are available to the public via the Internet only because of CM/ECF.

With this understanding, the Court will consider whether the judiciary properly used PACER fees for the remaining categories of expenses, which the judiciary now identifies as Congressional Priorities: Courtroom Technology, the State of Mississippi study, Web-Juror, and VCCA. (*See* Attachment 1.)

The judiciary only began using EPA fees for these expenses five or more years after the E-Government Act. Defendant's first attempt to justify the use of EPA fees for each of these categories focused almost exclusively on purported congressional approvals. As previously discussed, post-enactment legislative history as a general rule is of limited use in statutory interpretation, particularly when the action comes from a committee—especially an appropriations committee—rather than Congress as a whole. Compounding that problem here, also as previously noted (with the exception of courtroom technology, *see* supra note 22), is the questionable substance of the congressional approvals for several of these expenditures with the exception of courtroom technology.

Even if defendant could rely on congressional approvals, the Court would still have to decide whether the expenses fit within the definition of permissible expenses.

State of Mississippi: The category labeled "State of Mississippi" is described by defendant as a study that "provided software, and court documents to the State of Mississippi, which allowed the State of Mississippi to provide the public with electronic access to its documents." (Def.'s Resp. to Pls.' Interrogs. at 5.) It is apparent from this description that this study was not a permissible expenditure since it was unrelated to providing access to electronic

information on the federal courts' CM/ECF docketing system.

VCCA: The category labeled Victim Notification (Violent Crime Control Act) refers to "[c]osts associated with the program that electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision." (Def.'s Resp. to Pls.' Interrogs. at 11.) Via this program, "[l]aw enforcement officers receive electronic notification of court documents that were previously sent to the through the mail." (*Id.*) Defendant first defended the use of EPA fees to pay for this program on the ground that it "improves the overall quality of electronic service to the public via an enhanced use of the Internet." (Def.'s Resp. to Pls.' Facts ¶¶ 34, 53, 69, 87, 105, 123, 141.) Defendant has also argued that this program benefits the public because by sharing this information electronically, the information gets to law enforcement agencies more quickly, and they in turn may be able to revoke supervision, if warranted, more quickly. (*See* 3/23/18 Tr. at __.) But neither of these justifications establishes that VCCA is a permissible expenditure of PACER funds. While this program disseminates federal criminal case information, and its outcome may indirectly have some benefit to the public, it does not give the public access to any electronically stored CM/ECF information.

Web-Juror: The category labeled Web-Based Juror Services refers to the costs associated with E-Juror, a juror management system. (Def.'s Resp. to Pls.' Interrogs. at 11.) It "provides prospective jurors with electronic copies of court documents regarding jury service." (*Id.*) Defendant's justification for using EPA fees to pay for these costs is that the E-Juror program "improves the overall quality of electronic service to the public via an enhanced use of the Internet." (Def.'s Resp. to Pls.' Facts ¶¶ 71, 89, 107, 125, 143.) Again, whether a program "improves the overall quality of electronic service to the public via an enhanced use of the Internet" does not establish that it is permissible use of EPA fees where there is no nexus to the

public's ability to access information on the federal court's CM/ECF docketing system.

Courtroom Technology: The category labeled "Courtroom Technology" funds "the maintenance, cyclical replacement, and upgrade of courtroom technology in the courts." (Def.'s Resp. to Pls.' Interrogs. at 11.) The expenses in this category include "the costs of repairs and maintenance for end user IT equipment in the courtroom; obligations incurred for the acquisition and replacement of digital audio recording equipment in the courtroom; costs for audio equipment in the courtroom, including purchase, design, wiring and installation; and costs for video equipment in the courtroom, including purchase, design, wiring and installation." (Def.'s Resp. to Pls.' Interrogs. at 32.) Defendant argues that EPA fees are appropriately used for courtroom technology because "it improves the ability to share case evidence with the public in the courtroom during proceedings and to share case evidence electronically through electronic public access services when it is presented electronically and becomes an electronic court record." (FY 2007 Financial Report at 46.) Again, there is a lack of nexus with PACER or CM/ECF. From the existing record, it would appear that the only courtroom technology expenditure that might be a permissible use of EPA fees is the "digital audio equipment" that allows digital audio recordings to be made during court proceedings and then made part of the electronic docket accessible through PACER. (*See* Taylor Decl. Ex. A (2013 EPA Fee Schedule) (charging $2.40 "for electronic access to an audio file of a court hearing via PACER").) But, the Court does not see how flat-screen TVs for jurors or those seated in the courtroom, which are used to display exhibits or other evidence during a court proceeding, fall within the statute as they do not provide the public with access to electronic information maintained and stored by the federal courts on its CM/ECF docketing system.

Accordingly, with the exception of expenses related to digital audio equipment that is

used to create electronic court records that are publicly accessible via PACER, the Court concludes that the expenses in the categories listed as Congressional Priorities are not a permissible use of EPA fees.[26]

CONCLUSION

For the reasons stated above, the Court will deny plaintiffs' motion for summary judgment as to liability and will grant in part and deny in part defendant's cross-motion for summary judgment as to liability. A separate Order, ECF No. 88, accompanies this Memorandum Opinion.

/s/ *Ellen Segal Huvelle*
ELLEN SEGAL HUVELLE
United States District Judge

Date: March 31, 2018

[26] The Court urges the parties to confer prior to the next status conference to determine for the years 2010 to 2016 the amount of courtroom technology expenditures that cannot be paid with PACER fees.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 16-745 (ESH)

ORDER

Before the Court is defendant's Motion to Certify the Court's Orders of December 5, 2016, and March 31, 2018 for Interlocutory Appeal and to Stay Proceedings Pending Appeal (ECF No. 99). Plaintiffs advised the Court during a status conference on July 18, 2018, that they opposed certification of the December 5, 2016 Order, but otherwise consented to defendant's motion. Upon consideration of the motion, plaintiffs' partial consent thereto, and the entire record herein, and for the reasons stated in open court on July 18, 2018, and in the accompanying Memorandum Opinion, it is hereby

ORDERED that the defendant's motion is **GRANTED IN PART AND DENIED IN PART** as follows:

(1) For the reasons stated in open court on July 18, 2018, the motion is **DENIED** as to the December 5, 2016 Order (ECF No. 24).

(2) For the reasons stated in an accompanying Memorandum Opinion, ECF No. 105, the motion is **GRANTED** as to the Court's Order of March 31, 2018 (ECF No. 88).

(3) The motion to stay further proceedings pending appeal is **GRANTED** and all proceedings in this matter are hereby **STAYED** pending further order from this Court.

It is further **ORDERED** that the Court's Order of March 31, 2018 (ECF No. 88) is **AMENDED** to add the following statement:

> It is further **ORDERED** that this Order is certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) because it involves "a controlling question of law as to which there is substantial ground for difference of opinion" and because "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). A separate Memorandum Opinion issued today sets out in greater detail the basis for the Court's decision to certify this Order.

SO ORDERED.

Ellen S. Huvelle

ELLEN S. HUVELLE
United States District Judge

DATE: August 13, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*, **Plaintiffs,** **v.** **UNITED STATES OF AMERICA,** **Defendant.**	**Civil Action No. 16-745 (ESH)**

MEMORANDUM OPINION

The Court issues this Memorandum Opinion in further support of its Order granting defendant's Motion to Certify the Court's Order of March 31, 2018 for Interlocutory Appeal. (*See* Order, ECF No. 104; Defs.' Mot. to Certify, ECF No. 99; March 31, 2018 Order, ECF No 88.)

BACKGROUND

This case concerns the lawfulness of the fees charged by the federal judiciary for the use of its Public Access to Court Electronic Records (PACER) system. Plaintiffs are PACER users who contend that the fees charged from 2010 to 2016 exceeded the amount allowed by federal law, *see* 28 U.S.C. § 1913 note (enacted as § 404 of the Judiciary Appropriations Act, 1991, Pub. L. 101-515, 104 Stat. 2101 (Nov. 5, 1990) and amended by § 205(e) of the E-Government Act of 2002, Pub. L. 107-347, 116 Stat. 2899 (Dec. 17, 2002)). They brought suit under the Little Tucker Act, seeking monetary relief from the excessive fees.

On December 5, 2016, the Court denied defendants' motion to dismiss (*see* Order, ECF

No. 24), and, on January 24, 2017, it granted plaintiffs' motion for class certification (*see* Order, ECF No. 32). Pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), the Court certified a class consisting of:

> All individuals and entities who have paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding class counsel in this case and federal government entities.

The parties then filed cross-motions for summary judgment on liability, which, they agreed, depended on a single and novel question of statutory interpretation: "what restrictions does 28 U.S.C. § 1913 note place on the amount the judiciary may charge in PACER fees?" *Nat'l Veterans Legal Servs. Program v. United States*, 291 F. Supp. 3d 123, 138 (D.D.C. 2018). The parties advocated for starkly different interpretations of the statute, *id*. at 139-40, neither of which the Court found persuasive. In the end, it arrived at its own interpretation, which led to the denial of plaintiffs' motion and the granting in part and denying in part of defendant's motion. (*See* Order, ECF No. 89.)

At the first status conference after deciding the cross-motions for summary judgment, the Court asked the parties to consider whether the March 31, 2018 Order should be certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), given the fact that the exact determination of damages would likely require a lengthy period of fact and expert discovery, additional summary judgment briefing and potentially a bench trial. (*See* Tr., Apr. 18, 2018, at 5, 6, 13, 20; *see also* Joint Status Report Proposing a Schedule to Govern Further Proceedings, ECF No. 91 (proposing an additional five months of fact discovery, then five months for expert discovery, to be followed by summary judgment briefing or a bench trial).) Plaintiffs readily agreed that certification would be appropriate and desirable. (*Id*. at 21.) The government indicated that it needed additional time to respond in order to seek the necessary approval from the Solicitor

General. (*Id*. at 20.)

On July 13, 2018, the parties filed a joint status report advising the Court that "the Solicitor General has authorized interlocutory appeal in this case." (Joint Status Report at 2, ECF No. 98.) That same day, defendant filed the pending motion to certify the March 31, 2018 Order.[1] At the status conference on July 18, 2018, and in their written response filed on July 27, 2018, plaintiffs noted their continued belief that the March 2018 Order should be certified. (*See* Pls.' Resp., ECF No. 102.)

ANALYSIS

A district judge may certify a non-final order for appeal if it is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see Z St. v. Koskinen*, 791 F.3d 24, 28 (D.C. Cir. 2015). The decision whether to certify a case for interlocutory appeal is within the discretion of the district court. *In re Kellogg Brown & Root, Inc*., 756 F.3d 754, 761 (D.C. Cir. 2014). If the district court finds that each requirement is met, it "shall so state in writing in such order," and the party seeking to appeal must then file an application with the Court of Appeals "within ten days after the entry of the order." 28 U.S.C. § 1292(b).

Although the statute does not expressly require the Court to do anything more than state that each of these requirements is met in the order itself, the general rule is that "[a] district court order certifying a § 1292(b) appeal should state the reasons that warrant appeal," and "a

[1] Defendants' motion also sought certification of the December 5, 2016 Order denying their motion to dismiss. The Court explained in open court during the status conference on July 18, 2018, why it would not certify that Order, but noted that defendant was free to raise a challenge to the Court's subject matter jurisdiction at any time. (*See* Tr., July 18, 2018.)

thoroughly defective attempt may be found inadequate to support appeal." 16 Wright & Miller, Federal Practice & Procedure § 3929 (3d ed. 2008). Accordingly, the Court sets forth herein the basis for its conclusion that the March 31, 2018 Order satisfies each of the three requirements of § 1292(b).

1. Controlling Question of Law

The first requirement for § 1292(b) certification is that the order involve a "controlling question of law." "[A] 'controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course of litigation with resulting savings of the court's or the parties' resources.'" *APCC Servs. v. Sprint Communs. Co*., 297 F. Supp. 2d 90, 95–96 (D.D.C. 2003) (quoting *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 233 F. Supp. 2d 16, 19 (D.D.C. 2002)). The March 31, 2018 Order involves a controlling question of law under either prong.

The parties' cross-motions for summary judgment presented the Court with a pure legal issue -- the proper interpretation of 28 U.S.C. § 1913 note. That statute provides, in relevant part:

> The Judicial Conference may, only to the extent necessary, prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, 1930, and 1932 of title 28, United States Code, for collection by the courts under those sections for access to information available through automatic data processing equipment. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. The Director of the Administrative Office of the United States Courts, under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> (b) The Judicial Conference and the Director shall transmit each schedule of fees prescribed under paragraph (a) to the Congress at least 30 days before the schedule becomes effective. All fees hereafter collected by the Judiciary under paragraph as a charge for services rendered shall be deposited as offsetting

> collections to the Judiciary Automation Fund pursuant to 28 U.S.C. 612(c)(1)(A) to reimburse expenses incurred in providing these services.

Plaintiffs took the position that the statute prohibits the government from charging more in PACER fees "than is necessary to recoup the total marginal cost of operating PACER,'" and that the government is liable for fees it has charged in excess of this amount. *Nat'l Veterans Legal Servs. Program*, 291 F. Supp. 3d at 139. The government "readily admit[ted] that PACER fees are being used to cover expenses that are not part of the 'marginal cost' of operating PACER," but countered that the statute allows the government to "charge [PACER] fees in order to fund the dissemination of information through electronic means," which was exactly what it had done. *Id.* at 140. The Court adopted neither view, concluding the statute did not preclude the use of PACER fees to cover certain expenses beyond the marginal cost of operating PACER, but that certain uses of PACER fees were impermissible. *Id*. at 140-150. Thus, if the Court's interpretation is incorrect, the March 31, 2018 Order would require reversal – one of the prongs of the definition of a "controlling question of law."

In addition, regardless of which of these three interpretations of the statute is correct, the answer will "materially affect the course of [the] litigation." If the Federal Circuit were to reverse and adopt defendant's view, there would be no liability and the case would be over. If it were to reverse and adopt plaintiffs' view or affirm this Court, the case would continue, but the nature of what would follow would differ significantly. If the Circuit were to adopt plaintiffs' interpretation, the government would be liable for the difference between the approximately $923 million in PACER user fees collected from 2010 to 2016 and the "marginal cost" of operating PACER. Therefore, the main issue would be determining the marginal cost of operating PACER. Plaintiffs concede that at least $129 million was part of the "marginal cost"

of operating PACER, while defendant admits that at least $271 million was not,[2] and as to the remaining $522 million the parties agree "at least some" is not part of the "marginal cost," but there is no agreement as to how much of that $522 million is part of the marginal cost.[3] On the other hand, if the Federal Circuit affirms this Court's Order, there will be no need to determine the marginal cost of operating PACER, for the only issue unresolved by the Court's opinion is the precise amount spent from PACER fees on impermissible expenditures.[4] These vastly different possible outcomes lead to the conclusion that immediate review of the March 31, 2018 Order will materially affect the course of this litigation with resulting savings of time and resources.

Accordingly, the March 31, 2018 Order involves a "controlling question of law."

2. Substantial ground for difference of opinion

The second requirement for § 1292(b) certification is that there must "exist a substantial ground for difference of opinion." "A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits." *APCC Servs.*, 297 F. Supp. 2d at 97. Here, there is a complete absence of any precedent from any jurisdiction. In addition, although the Court ultimately found the arguments

[2] Defendant admits that none of the money spent on EBN, the State of Mississippi study, the VCCA Notification System, and Web-Based Juror Services was part of the "marginal cost" of operating PACER,

[3] Defendant admits that "at least some of the money" spent on CM/ECF, Telecommunications, Court Allotments, and Courtroom Technology is not part of the "marginal cost" of operating PACER.

[4] Based on the current record, that amount is approximately $192 million. This number reflects the total expenditures from 2010 to 2016 for the State of Mississippi study ($120,998); the Violent Crime Control Act notification system ($3,650,979); Web-Based Juror Services ($9,443,628); and Courtroom Technology ($185,001,870), less the expenditures made for digital audio equipment, including software ($6,052,647).

in favor of each parties' position unpersuasive, this Court's opinion made clear that these arguments are not without merit and that "the issue is truly one on which there is a substantial ground for dispute." *APCC Servs.*, 297 F. Supp. 2d at 98; *see also Molock v. Whole Foods Mkt. Grp.*, 2018 WL 2926162, at *3 (D.D.C. June 11, 2018). Accordingly, the Court concludes that there exists a substantial ground for difference of opinion on the issue resolved by the March 31, 2018 Order.

3. Materially advance the litigation

The third requirement for § 1292(b) certification is that an immediate appeal will "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). "To satisfy this element a movant need not show that a reversal on appeal would actually end the litigation. Instead, the relevant inquiry is whether reversal would hasten or at least simplify the litigation in some material way, such as by significantly narrowing the issues, conserving judicial resources, or saving the parties from needless expense." *Molock*, 2018 WL 2926162, at *3 (citing *APCC Servs.*, 297 F. Supp. 2d at 100). Here, there is no question that this requirement is satisfied. As previously explained, if the Court's Order is reversed in the government's favor, the litigation will be over. If it is reversed in plaintiffs' favor, it would significantly alter the issues to be addressed. Either outcome now, instead of later, would conserve judicial resources and save the parties from needless expenses. Thus, before proceeding to a potentially lengthy and complicated damages phase based on an interpretation of the statute that could be later reversed on appeal, it is more efficient to allow the Federal Circuit an opportunity first to determine what the statute means. Accordingly, the Court concludes that an immediate appeal will "materially advance the ultimate termination of the litigation."

CONCLUSION

Having concluded that the March 31, 2018 Order satisfies all three requirements for §1292(b) certification, the Court will exercise its discretion and certify that Order for immediate appeal. A separate Order accompanies this Memorandum Opinion.

Ellen S. Huvelle

ELLEN S. HUVELLE
United States District Judge

DATE: August 13, 2018

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:16-cv-00745-ESH

NATIONAL VETERANS LEGAL SERVICES PROGRAM et al v. UNITED STATES OF AMERICA
Assigned to: Judge Ellen S. Huvelle
Case in other court: USCA for the Federal Circuit, 19-01083-SJ
USCA for the Federal Circuit, 18-00154-CP
USCA for the Federal Circuit, 18-00155-CP
USCA for the Federal Circuit, 19-01081-SJ
Cause: 28:1346 Tort Claim

Date Filed: 04/21/2016
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: U.S. Government Defendant

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Date Filed	#	Docket Text
04/21/2016	1	COMPLAINT against All Defendants *United States of America* (Filing fee $ 400 receipt number 0090-4495374) filed by NATIONAL VETERANS LEGAL SERVICES PROGRAM, ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER. (Attachments: # 1 Civil Cover Sheet, # 2 Summons to United States Attorney General, # 3 Summons to U.S. Attorney for the District of Columbia)(Gupta, Deepak) (Entered: 04/21/2016)
04/21/2016	2	LCvR 7.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Gupta, Deepak) (Entered: 04/21/2016)
04/21/2016		Case Assigned to Judge Ellen S. Huvelle. (jd) (Entered: 04/22/2016)
04/22/2016	3	SUMMONS (2) Issued Electronically as to UNITED STATES OF AMERICA, U.S. Attorney and U.S. Attorney General (Attachment: # 1 Consent Forms)(jd) (Entered: 04/22/2016)
04/26/2016	4	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the United States Attorney. Date of Service Upon United States Attorney on 4/26/2016. Answer due for ALL FEDERAL DEFENDANTS by 6/25/2016. (Gupta, Deepak) (Entered: 04/26/2016)
04/26/2016	5	NOTICE of Appearance by Elizabeth S. Smith on behalf of All Plaintiffs (Smith, Elizabeth) (Entered: 04/26/2016)
04/26/2016	6	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- William H. Narwold, :Firm- Motley Rice LLC, :Address- 20 Church Street, 17th Floor, Hartford, CT 06103. Phone No. - 860-882-1676, Fax No. - 860-882-1682 Filing fee $ 100, receipt number

		0090-4500590. Fee Status: Fee Paid. by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Declaration, # 2 Text of Proposed Order)(Smith, Elizabeth) (Entered: 04/26/2016)
04/26/2016		MINUTE ORDER granting 6 Motion for Leave to Appear Pro Hac Vice: It is hereby ORDERED that the motion for leave to appear pro hac vice is GRANTED; and it is further ORDERED that William H. Narwold is admitted pro hac vice for the purpose of appearing in the above-captioned case. Signed by Judge Ellen S. Huvelle on April 26, 2016. (AG) (Entered: 04/26/2016)
05/02/2016	7	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on United States Attorney General. Date of Service Upon United States Attorney General 05/02/2016. (Gupta, Deepak) (Entered: 05/02/2016)
05/02/2016	8	MOTION to Certify Class by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Declaration of Deepak Gupta, # 2 Declaration of William Narwold, # 3 Declaration of Jonathan Taylor, # 4 Text of Proposed Order)(Gupta, Deepak) (Entered: 05/02/2016)
05/16/2016	9	NOTICE of Appearance by William Mark Nebeker on behalf of UNITED STATES OF AMERICA (Nebeker, William) (Entered: 05/16/2016)
05/16/2016	10	Unopposed MOTION for Extension of Time to File Response/Reply as to 8 MOTION to Certify Class by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(Nebeker, William) (Entered: 05/16/2016)
05/17/2016		MINUTE ORDER: It is hereby ORDERED that defendant's unopposed 10 Motion for Extension of Time to File Response/Reply is GRANTED, and defendant's Response is due by July 11, 2016. Signed by Judge Ellen S. Huvelle on May 17, 2016. (lcesh2) (Entered: 05/17/2016)
06/27/2016	11	MOTION to Dismiss *Or, In The Alternative*, MOTION for Summary Judgment by UNITED STATES OF AMERICA (Attachments: # 1 Exhibit (1 through 5), # 2 Text of Proposed Order)(Nebeker, William) (Entered: 06/27/2016)
07/08/2016	12	Joint MOTION for Extension of Time to File Response/Reply as to 8 MOTION to Certify Class , 11 MOTION to Dismiss *Or, In The Alternative* MOTION for Summary Judgment by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Text of Proposed Order)(Gupta, Deepak) (Entered: 07/08/2016)
07/08/2016		MINUTE ORDER granting 12 Motion for Extension of Time to File Response re 8 MOTION to Certify Class and 11 MOTION to Dismiss: Upon consideration of the parties' joint motion to extend the briefing schedule, it is hereby ORDERED that the motion is GRANTED; it is FURTHER ORDERED that the time within which the defendant may file a memorandum of points and authorities in response to plaintiffs' motion for class certification is further extended though July 25, 2016, and no additional extensions shall be granted; and it isFURTHER ORDERED that the time within which the plaintiffs may file a memorandum of points and authorities in response to defendant's motion to dismiss is initially extended though July 29, 2016. Signed by Judge Ellen S. Huvelle on July 7, 2016. (AG) (Entered: 07/08/2016)
07/25/2016	13	Memorandum in opposition to re 8 MOTION to Certify Class filed by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit A, # 2 Declaration Garcia, # 3 Text of Proposed Order)(Nebeker, William) (Entered: 07/25/2016)

07/26/2016	14	MOTION to Stay *Discovery* by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(Nebeker, William) (Entered: 07/26/2016)
07/29/2016	15	RESPONSE re 11 MOTION to Dismiss *Or, In The Alternative* MOTION for Summary Judgment filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Exhibit Govt's MTD in Fisher, # 2 Exhibit Complaint in NVLSP v. USA, # 3 Exhibit Complaint in Fisher)(Gupta, Deepak) (Entered: 07/29/2016)
08/04/2016	16	Unopposed MOTION for Extension of Time to File Response/Reply as to 11 MOTION to Dismiss *Or, In The Alternative* MOTION for Summary Judgment by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(Nebeker, William) (Entered: 08/04/2016)
08/04/2016	17	REPLY to opposition to motion re 8 MOTION to Certify Class filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 08/04/2016)
08/05/2016		MINUTE ORDER granting 16 Unopposed Motion for Extension of Time to File Reply re 11 MOTION to Dismiss *Or, In The Alternative*, MOTION for Summary Judgment : Upon consideration of the Unopposed Motion For An Enlargement Of Time, And Memorandum In Support Thereof, and for the reasons set forth in support thereof, it is hereby ORDERED that the motion is GRANTED; and it is FURTHER ORDERED that the time within which Defendant may file a reply to Plaintiffs' opposition to the pending Motion To Dismiss Or, In The Alternative, For Summary Judgment is enlarged up to and including August 16, 2016. Signed by Judge Ellen S. Huvelle on August 5, 2016. (AG) (Entered: 08/05/2016)
08/09/2016	18	Joint MOTION for Scheduling Order by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Text of Proposed Order)(Narwold, William) (Entered: 08/09/2016)
08/16/2016		MINUTE ORDER: It is hereby ORDERED that the 18 Joint Motion for Scheduling Order is GRANTED. Signed by Judge Ellen S. Huvelle on August 16, 2016. (lcesh2) (Entered: 08/16/2016)
08/16/2016		MINUTE ORDER: It is hereby ORDERED that defendant's 14 Motion to Stay is DENIED as moot. Signed by Judge Ellen S. Huvelle on August 16, 2016. (lcesh2) (Entered: 08/16/2016)
08/16/2016	19	SCHEDULING ORDER: The parties' 18 Joint Motion for Proposed Phased Schedule is hereby GRANTED. See Order for details. Signed by Judge Ellen S. Huvelle on August 16, 2016. (lcesh2) (Entered: 08/16/2016)
08/16/2016	20	REPLY to opposition to motion re 11 MOTION to Dismiss *Or, In The Alternative* MOTION for Summary Judgment filed by UNITED STATES OF AMERICA. (Attachments: # 1 Declaration Second Garcia)(Nebeker, William) (Entered: 08/16/2016)
08/17/2016	21	MOTION for Leave to File *Sur-Reply* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Exhibit Sur-Reply, # 2 Statement of Facts, # 3 Text of Proposed Order)(Gupta, Deepak) (Entered: 08/17/2016)
08/17/2016	22	RESPONSE re 21 MOTION for Leave to File *Sur-Reply* filed by UNITED STATES OF AMERICA. (Attachments: # 1 Text of Proposed Order)(Nebeker, William) (Entered: 08/17/2016)
10/01/2016	23	NOTICE OF SUPPLEMENTAL AUTHORITY by ALLIANCE FOR JUSTICE,

		NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Exhibit Opinion in Fisher v. United States) (Gupta, Deepak) (Entered: 10/01/2016)
12/05/2016		MINUTE ORDER granting in part and denying in part 21 Plaintiffs' Motion for Leave to File Sur-Reply: It is hereby ORDERED that plaintiffs may file [21-2] Plaintiffs' Concise Statement of Genuine Issues of Material Fact, but plaintiffs may not file [21-1] Plaintiffs' Sur-Reply. A sur-reply is unnecessary because plaintiffs seek to reply to a statement that defendant originally presented in its motion to dismiss. Signed by Judge Ellen S. Huvelle on December 5, 2016. (lcesh2) (Entered: 12/05/2016)
12/05/2016	24	ORDER denying 11 Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment for the reasons stated in the accompanying Memorandum Opinion. Signed by Judge Ellen S. Huvelle on December 5, 2016. (lcesh2) (Entered: 12/05/2016)
12/05/2016	25	MEMORANDUM OPINION in support of 24 Order Denying 11 Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment. Signed by Judge Ellen S. Huvelle on December 5, 2016. (lcesh2) (Entered: 12/05/2016)
12/05/2016	26	SUPPLEMENTAL MEMORANDUM (Statement of Genuine Issues of Material Fact) to re 11 MOTION to Dismiss *Or, In The Alternative* MOTION for Summary Judgment filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (znmw) (Entered: 12/06/2016)
12/15/2016		MINUTE ORDER Setting Hearing on Motion: It is hereby ORDERED that a motion hearing on 8 Plaintiffs' MOTION to Certify Class is set for 1/18/2017 at 02:30 PM in Courtroom 23A before Judge Ellen S. Huvelle. Signed by Judge Ellen S. Huvelle on December 15, 2016. (lcesh2) (Entered: 12/15/2016)
12/19/2016	27	ANSWER to Complaint by UNITED STATES OF AMERICA.(Nebeker, William) (Entered: 12/19/2016)
01/18/2017		Minute Entry for proceedings held before Judge Ellen S. Huvelle: Motion Hearing held on 1/18/2017, re 8 MOTION to Certify Class, heard and taken under advisement. (Court Reporter Scott Wallace) (gdf) (Entered: 01/18/2017)
01/20/2017	28	AFFIDAVIT re 8 MOTION to Certify Class *of Daniel L. Goldberg* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 01/20/2017)
01/20/2017	29	AFFIDAVIT re 8 MOTION to Certify Class *of Stuart Rossman* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 01/20/2017)
01/20/2017	30	AFFIDAVIT re 8 MOTION to Certify Class *of Barton F. Stichman* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 01/20/2017)
01/20/2017	31	AFFIDAVIT re 8 MOTION to Certify Class *of Deepak Gupta (Second)* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Gupta, Deepak) (Entered: 01/20/2017)
01/24/2017	32	ORDER granting 8 Plaintiffs' Motion to Certify Class for the reasons stated in the accompanying Memorandum Opinion. See Order for details. Signed by Judge Ellen S. Huvelle on January 24, 2017. (lcesh2) (Entered: 01/24/2017)
01/24/2017	33	MEMORANDUM OPINION in support of 32 Order Granting 8 Plaintiffs' Motion to Certify Class. Signed by Judge Ellen S. Huvelle on January 24, 2017. (lcesh2) (Entered:

		01/24/2017)
01/24/2017	34	SCHEDULING ORDER: See Order for deadlines and details. Signed by Judge Ellen S. Huvelle on January 24, 2017. (lcesh2) (Entered: 01/24/2017)
02/14/2017	35	TRANSCRIPT OF PROCEEDINGS before Judge Ellen S. Huvelle held on 1-18-17; Page Numbers: (1-29). Date of Issuance:1-29-17. Court Reporter/Transcriber Scott Wallace, Telephone number 202-354-3196, Transcripts may be ordered by submitting the Transcript Order Form<P></P><P></P>For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter. <P>**NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov.<P></P> Redaction Request due 3/7/2017. Redacted Transcript Deadline set for 3/17/2017. Release of Transcript Restriction set for 5/15/2017.(Wallace, Scott) (Entered: 02/14/2017)
02/21/2017	36	NOTICE of Appearance by Brian J. Field on behalf of All Defendants (Field, Brian) (Entered: 02/21/2017)
02/23/2017	37	Unopposed MOTION For Approval of Plan of Class Notice by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Exhibit 1 - Email Notice, # 2 Exhibit 2 - Postcard Notice, # 3 Exhibit 2 - Website Notice, # 4 Text of Proposed Order) (Narwold, William) (Entered: 02/23/2017)
02/28/2017	38	RESPONSE re 37 Unopposed MOTION For Approval of Plan of Class Notice filed by UNITED STATES OF AMERICA. (Nebeker, William) (Entered: 02/28/2017)
03/31/2017	39	NOTICE *of Joint Filing of Proposed Order* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM re 37 Unopposed MOTION For Approval of Plan of Class Notice (Attachments: # 1 Text of Proposed Order)(Narwold, William) (Entered: 03/31/2017)
03/31/2017	40	Consent MOTION for Protective Order by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Text of Proposed Order)(Narwold, William) (Entered: 03/31/2017)
04/03/2017	41	STIPULATED PROTECTIVE ORDER granting 40 Motion for Protective Order. Signed by Judge Ellen S. Huvelle on April 3, 2017. (lcesh2) (Entered: 04/03/2017)
04/13/2017	42	Unopposed MOTION for Approval of Revised Plan of Class Notice and Class Notice Documents by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Exhibit 1 - Email Notice, # 2 Exhibit 1-A - BLACKLINE Email Notice, # 3 Exhibit 2 - Postcard Notice, # 4 Exhibit 2-A - BLACKLINE Postcard Notice, # 5 Exhibit 3 - Website Notice, # 6 Exhibit 3-A - BLACKLINE Website Notice, # 7 Exhibit 4 - Online Exclusion, # 8 Exhibit 5 - Printable Exclusion, # 9 Exhibit 6 - Proposed Order, # 10 Exhibit 6-A - BLACKLINE Proposed Order)(Narwold, William) (Entered: 04/13/2017)
04/14/2017	43	NOTICE *of Filing of Revised Notice Documents* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL

		SERVICES PROGRAM (Attachments: # 1 Exhibit 1 Revised Email Notice, # 2 Exhibit 1A Revised and Blacklined Email Notice, # 3 Exhibit 2 Revised Postcard Notice, # 4 Exhibit 2A Revised and Blacklined Postcard Notice)(Narwold, William) (Entered: 04/14/2017)
04/17/2017	44	ORDER granting 42 Plaintiffs' Unopposed Motion for Approval of Revised Plan of Class Notice and Class Notice Documents: See Order for details. Signed by Judge Ellen S. Huvelle on April 17, 2017. (lcesh2) (Entered: 04/17/2017)
04/17/2017		MINUTE ORDER finding as moot 37 Motion for Approval of Class Notice in light of approval of 42 Motion for Approval of Revised Class Notice. Signed by Judge Ellen S. Huvelle on April 17, 2017. (AG) (Entered: 04/17/2017)
05/22/2017	45	NOTICE to Exclude by ROSEMARIE HOWELL re 44 ORDER granting 42 Plaintiffs' Unopposed Motion for Approval of Revised Plan of Class Notice and Class Notice Documents (jf) (Entered: 05/24/2017)
06/15/2017	46	MOTION for Order for Exclusion by ROB RAWSON. "Let this be filed" signed by Judge Ellen Segal Huvelle on 06/09/2017 (jf) Modified event title on 6/16/2017 (znmw). (Entered: 06/15/2017)
06/15/2017		MINUTE ORDER: It is hereby ORDERED that the Clerk shall mail a copy of 46 NOTICE of and MOTION For An Order For Exclusion filed by ROB RAWSON to the PACER Fees Class Action Administrator, P.O. Box 43434, Providence, RI 02940-3434. Signed by Judge Ellen S. Huvelle on June 15, 2017. (lcesh2) (Entered: 06/15/2017)
07/05/2017	47	NOTICE of Change of Address by Deepak Gupta (Gupta, Deepak) (Entered: 07/05/2017)
07/05/2017	48	Unopposed MOTION for Extension of Time to File *Motion for Summary Judgment* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Text of Proposed Order)(Gupta, Deepak) (Entered: 07/05/2017)
07/05/2017		MINUTE ORDER granting 48 Unopposed Motion for Extension of Time to File Motion for Summary Judgment: Upon consideration of the plaintiffs' unopposed motion to extend the briefing schedule, it is hereby ORDERED that the motion is GRANTED; and it is FURTHER ORDERED that the time within which the plaintiffs may file their motion for summary judgment solely on the issue of liability, i.e., whether the fees charged to access records through PACER violate the E-Government Act of 2002, Pub. L. No. 107-347, § 205(e), 116 Stat. 2899, 2915 (Dec. 17, 2002) (28 U.S.C. § 1913 note), is extended through August 28, 2017; and it is FURTHER ORDERED that the defendant shall file its opposition 20 days after this date, on September 18, 2017, and the plaintiffs' reply is due 10 days after that, on September 28, 2017, consistent with this Courts scheduling order entered on January 24, 2017. Signed by Judge Ellen S. Huvelle on July 5, 2017. (AG) (Entered: 07/05/2017)
07/07/2017		Set/Reset Deadlines: Plaintiff's Summary Judgment motion due by 8/28/2017. Response to Motion for Summary Judgment due by 9/18/2017. Plaintiff's Reply in support of Motion for Summary Judgment due by 9/28/2017. (hs) (Entered: 07/07/2017)
07/17/2017	49	MOTION for Leave to File Amicus Curiae, MOTION to Appear by Phone, by DON KOZICH (Attachments: # 1 Exhibit Application to Proceed In Forma Pauperis)(jf) Modified text on 7/19/2017 (znmw). (Entered: 07/18/2017)
07/19/2017	50	SUPPLEMENT re 45 NOTICE to Exclude by ROSEMARIE HOWELL re 44 ORDER granting 42 Plaintiffs' Unopposed Motion for Approval of Revised Plan of Class Notice and Class Notice Documents filed by ROSEMARIE HOWELL. (jf) (Entered: 07/19/2017)

08/24/2017	51	NOTICE of Change of Address by Elizabeth S. Smith (Smith, Elizabeth) (Entered: 08/24/2017)
08/28/2017	52	MOTION for Summary Judgment *as to Liability* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Declaration Declaration of Jonathan Taylor, # 2 Exhibit Exhibit A, # 3 Exhibit Exhibit B, # 4 Exhibit Exhibit C, # 5 Exhibit Exhibit D, # 6 Exhibit Exhibit E, # 7 Exhibit Exhibit F, # 8 Exhibit Exhibit G, # 9 Exhibit Exhibit H, # 10 Exhibit Exhibit I, # 11 Exhibit Exhibit J, # 12 Exhibit Exhibit K, # 13 Exhibit Exhibit L, # 14 Exhibit Exhibit M, # 15 Declaration Declaration of Thomas Lee and Michael Lissner, # 16 Statement of Facts Plaintiffs' Statement of Undisputed Material Facts) (Gupta, Deepak) (Entered: 08/28/2017)
09/05/2017	53	MOTION for Leave to File *Amicus Curiae Brief* by REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Attachments: # 1 Exhibit Proposed Amicus Brief, # 2 Proposed Order, # 3 Certificate of Corporate Disclosure)(Brown, Bruce) (Entered: 09/05/2017)
09/05/2017	54	NOTICE of Appearance by Sasha Samberg-Champion on behalf of AMERICAN ASSOCIATION OF LAW LIBRARIES (Samberg-Champion, Sasha) (Entered: 09/05/2017)
09/05/2017	55	MOTION for Leave to File *Brief Amici Curiae* by AMERICAN ASSOCIATION OF LAW LIBRARIES (Attachments: # 1 Proposed Brief, # 2 Text of Proposed Order) (Samberg-Champion, Sasha) (Entered: 09/05/2017)
09/05/2017	56	MOTION for Leave to File *Amicus Curiae Brief* by JOSEPH I. LIEBERMAN (Attachments: # 1 Exhibit Proposed Amicus Brief, # 2 Text of Proposed Order)(Bailen, Mark) (Entered: 09/05/2017)
09/13/2017	57	MOTION for Extension of Time to File Response/Reply by UNITED STATES OF AMERICA (Field, Brian) (Entered: 09/13/2017)
09/13/2017		MINUTE ORDER granting 53 55 56 Movants' Motions for Leave to File Briefs as Amicus Curiae: Upon consideration of the above-referenced motions, plaintiffs' consent and defendant's representation that it will not oppose, it is hereby ORDERED that the motions are GRANTED and movants are granted leave to file briefs as amicus curiae. Signed by Judge Ellen S. Huvelle on September 13, 2017. (AG) (Entered: 09/13/2017)
09/13/2017	58	RESPONSE re 57 MOTION for Extension of Time to File Response/Reply filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 09/13/2017)
09/13/2017	59	AMICUS BRIEF by REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATED PRESS MEDIA EDITORS, ASSOCIATION OF ALTERNATIVE NEWS MEDIA, CENTER FOR INVESTIGATIVE REPORTING, FIRST AMENDMENT COALITION, FIRST LOOK MEDIA WORKS, INC., INTERNATIONAL DOCUMENTARY ASSOCIATION, INVESTIGATIVE REPORTING WORKSHOP, MEDIA CONSORTIUM, MPA, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, ONLINE NEWS ASSOCIATION, RADIO TELEVISION DIGITAL NEWS ASSOCIATION, REPORTERS WITHOUT BORDERS, SEATTLE TIMES COMPANY, SOCIETY OF PROFESSIONAL JOURNALISTS, TULLY CENTER FOR FREE SPEECH. (znmw) (Entered: 09/14/2017)
09/13/2017	60	LCvR 7.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATED PRESS MEDIA EDITORS, ASSOCIATION OF ALTERNATIVE NEWS MEDIA,

		CENTER FOR INVESTIGATIVE REPORTING, FIRST AMENDMENT COALITION, FIRST LOOK MEDIA WORKS, INC., INTERNATIONAL DOCUMENTARY ASSOCIATION, INVESTIGATIVE REPORTING WORKSHOP, MEDIA CONSORTIUM, MPA, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, ONLINE NEWS ASSOCIATION, RADIO TELEVISION DIGITAL NEWS ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, REPORTERS WITHOUT BORDERS, SEATTLE TIMES COMPANY, SOCIETY OF PROFESSIONAL JOURNALISTS, TULLY CENTER FOR FREE SPEECH identifying Other Affiliate SYRACUSE UNIVERSITY for TULLY CENTER FOR FREE SPEECH; Other Affiliate AMERICAN UNIVERSITY SCHOOL OF COMMUNICATION for INVESTIGATIVE REPORTING WORKSHOP; Corporate Parent MCCLATCHY COMPANY for SEATTLE TIMES COMPANY. (znmw) (Entered: 09/14/2017)
09/13/2017	61	AMICUS BRIEF by AMERICAN ASSOCIATION OF LAW LIBRARIES, DEBORAH BEIM, THOMAS BRUCE, PHILLIP MALONE, JONATHAN ZITTRAIN. (znmw) (Entered: 09/14/2017)
09/13/2017	62	LCvR 7.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by AMERICAN ASSOCIATION OF LAW LIBRARIES. (See Docket Entry 61 to view document). (znmw) (Entered: 09/14/2017)
09/13/2017	63	AMICUS BRIEF by JOSEPH I. LIEBERMAN, DARRELL ISSA. (znmw) (Entered: 09/14/2017)
09/14/2017		MINUTE ORDER granting in part and denying in part 57 defendant's Motion for Extension of Time to File Response re 52 plaintiffs' MOTION for Summary Judgment *as to Liability*: Upon consideration of defendant's motion, plaintiff's partial consent and partial opposition thereto, and the entire record herein, it is hereby ORDERED that the motion is GRANTED; and it is further ORDERED that defendant shall have until November 2, 2017, to file its response to plaintiffs' motion for summary judgment; and it is further ORDERED that plaintiffs reply is due by November 13, 2017. Signed by Judge Ellen S. Huvelle on September 14, 2017. (AG) (Entered: 09/14/2017)
09/25/2017	64	Verified MOTION For Free Access To Pacer by DON KOZICH (jf) (Entered: 09/27/2017)
09/29/2017	65	RESPONSE re 64 MOTION For Free Access To Pacer filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 09/29/2017)
10/02/2017	66	ORDER DENYING as moot 64 Motion for Free Access to PACER Until Final Disposition of this Case. Signed by Judge Ellen S. Huvelle on October 2, 2017. (lcesh2,) (Entered: 10/02/2017)
10/10/2017	67	MOTION to Clarify Minute Order dated 09/13/2017 by DON KOZICH (jf) (Entered: 10/13/2017)
10/17/2017	68	ORDER denying 49 Motion for Leave to File Amicus Brief and to Appear Telephonically; denying as moot 67 Motion to Clarify: see Order for details. Signed by Judge Ellen S. Huvelle on October 17, 2017. (lcesh2) (Entered: 10/17/2017)
10/30/2017	69	Unopposed MOTION for Extension of Time to File Response/Reply as to 52 MOTION for Summary Judgment *as to Liability* by UNITED STATES OF AMERICA (Attachments: # 1 Text of Proposed Order)(Nebeker, William) (Entered: 10/30/2017)
10/30/2017	72	STRIKEN PURSUANT TO MINUTE ORDER FILED ON 11/9/17.....Verified MOTION with Briefing by ROSEMARIE HOWELL (Attachments: # 1 Appendix 1, # 2 Appendix 2, # 3 Appendix 3)(jf) Modified on 11/12/2017 (zgdf). (Entered: 11/08/2017)

10/31/2017		MINUTE ORDER granting 69 Unopposed Motion for Extension of Time to File Response re 52 MOTION for Summary Judgment as to Liability: Upon Consideration of the Unopposed Motion For An Enlargement Of Time, AndMemorandum In Support Thereof in response thereto, and for the reasons set forth in support thereof, it is hereby ORDERED that the motion should be and is hereby GRANTED; and it is FURTHER ORDERED that Defendant file its opposition to Plaintiff's Motion For Summary Judgment As To Liability (ECF No. 52) on or before November 17, 2017; and it is FURTHER ORDERED that Plaintiffs may respond to Defendant's filing on or before December 5, 2017. Signed by Judge Ellen S. Huvelle on October 31, 2017. (AG) (Entered: 10/31/2017)
10/31/2017	70	MOTION for Reconsideration re 68 Order on Motion for Miscellaneous Relief, Order on Motion for Leave to File, Order on Motion to Clarify by DON KOZICH (Attachments: # 1 Exhibit)(jf) (Entered: 11/01/2017)
11/06/2017	71	ORDER denying 70 Motion for Reconsideration of October 17, 2017 Order Denying Petitioners Motion for Clarification of September 13, 2017 Order and Denying Petitioners Motion to File Amicus Curiae; and granting Movant access to documents filed in this case. See Order for details. Signed by Judge Ellen S. Huvelle on November 6, 2017. (lcesh2) (Entered: 11/06/2017)
11/09/2017		MINUTE ORDER: It is hereby ORDERED that Rosemarie Howell's Verified Motion with Briefing 72 is STRICKEN from the docket as filed without leave of Court; it is further ORDERED that leave to file is denied because Rosemarie Howell has opted out of the class, see ECF 45; and it is further ORDERED that the Clerk shall return the motion to Rosemarie Howell, along with a copy of this Minute Order. Signed by Judge Ellen S. Huvelle on November 9, 2017. (lcesh2) (Entered: 11/09/2017)
11/17/2017	73	Cross MOTION for Summary Judgment by UNITED STATES OF AMERICA (Attachments: # 1 Memorandum in Support, # 2 Declaration Decl. of W. Skidgel, # 3 Statement of Facts, # 4 Text of Proposed Order)(Field, Brian) (Entered: 11/17/2017)
11/17/2017	74	Memorandum in opposition to re 52 MOTION for Summary Judgment *as to Liability* filed by UNITED STATES OF AMERICA. (Attachments: # 1 Memorandum in Support, # 2 Declaration Decl. of W. Skidgel, # 3 Statement of Facts, # 4 Text of Proposed Order) (Field, Brian) (Entered: 11/17/2017)
12/05/2017	75	REPLY to opposition to motion re 52 MOTION for Summary Judgment *as to Liability*, filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Statement of Facts Response to Defendant's Statement of Facts)(Gupta, Deepak) Modified to remove link on 12/6/2017 (znmw). (Entered: 12/05/2017)
12/05/2017	76	Memorandum in opposition to re 73 Cross MOTION for Summary Judgment filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (See Docket Entry 75 to view document). (znmw) (Entered: 12/06/2017)
12/08/2017	77	MOTION for Extension of Time to File Response/Reply as to 73 Cross MOTION for Summary Judgment by UNITED STATES OF AMERICA (Field, Brian) (Entered: 12/08/2017)
12/08/2017		MINUTE ORDER granting in part and denying in part 77 defendant's opposed Motion for Extension of Time to File Reply re 73 Cross Motion for Summary Judgment: Upon consideration of the above-referenced motion, and the entire record herein, it is hereby ORDERED that the motion is GRANTED IN PART AND DENIED IN PART; and it is further ORDERED that defendant shall have until January 5, 2018, to file its reply in

		support of its cross-motion for summary judgment. Signed by Judge Ellen S. Huvelle on December 8, 2017. (lcesh2) (Entered: 12/08/2017)
12/12/2017	78	LEAVE TO FILE DENIED- Declaration of Amended Service. This document is unavailable as the Court denied its filing. "Leave To File Denied" Signed by Judge Ellen S. Huvelle on 12/12/2017. (jf) (Entered: 12/15/2017)
01/05/2018	79	REPLY to opposition to motion re 73 Cross MOTION for Summary Judgment filed by UNITED STATES OF AMERICA. (Field, Brian) (Entered: 01/05/2018)
02/27/2018		MINUTE ORDER Setting Hearing on Motions: It is hereby ORDERED that a hearing on 52 plaintiffs' MOTION for Summary Judgment as to Liability and 73 defendant's Cross MOTION for Summary Judgment is set for Monday, March 19, 2017, at 11:00 a.m. in Courtroom 23A before Judge Ellen S. Huvelle. Signed by Judge Ellen S. Huvelle on February 27, 2018. (AG) (Entered: 02/27/2018)
03/01/2018	80	Consent MOTION to Continue *Motions Hearing* by UNITED STATES OF AMERICA (Field, Brian) (Entered: 03/01/2018)
03/02/2018		MINUTE ORDER granting in part and denying in part 80 Consent Motion to Continue: Upon consideration of the Consent Motion to Continue, it is hereby ORDERED that the motion is granted in part and denied in part; and it is further ORDERED that the Summary Judgment Motions Hearing presently set for 3/19/2018 is CONTINUED TO 3/21/2018 at 11:00 AM in Courtroom 23A. Signed by Judge Ellen S. Huvelle on March 2, 2018. (AG) (Entered: 03/02/2018)
03/15/2018	81	NOTICE *Of Filing* by UNITED STATES OF AMERICA re 52 MOTION for Summary Judgment *as to Liability*, Order Setting Hearing on Motion, 73 Cross MOTION for Summary Judgment (Attachments: # 1 Exhibit Tabs 1 through 40)(Nebeker, William) (Entered: 03/15/2018)
03/21/2018	82	Unopposed MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Meghan Oliver, :Firm- Motley Rice LLC, :Address- 28 Bridgeside Blvd, Mt. Pleasant, SC 29464. Phone No. - 843-216-9492. Fax No. - 843-216-9430 Filing fee $ 100, receipt number 0090-5382765. Fee Status: Fee Paid. by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Declaration Declaration of Meghan Oliver, # 2 Text of Proposed Order Proposed Order)(Smith, Elizabeth) (Entered: 03/21/2018)
03/21/2018		MINUTE ORDER: It is hereby ORDERED that the hearing on plaintiffs' MOTION for Summary Judgment as to Liability and defendant's Cross MOTION for Summary Judgment is CONTINUED from Wednesday, March 21, 2018, to Friday, March 23, 2018, at 1:30 p.m. in Courtroom 23A before Judge Ellen S. Huvelle. Signed by Judge Ellen S. Huvelle on March 21, 2018. (AG) (Entered: 03/21/2018)
03/21/2018		MINUTE ORDER granting 82 Unopposed Motion for Leave to Appear Pro Hac Vice: Upon consideration of the above-referenced motion, it is hereby ORDERED that the motion is GRANTED; and it is further ORDERED that Meghan Oliver is admitted pro hac vice for the purpose of appearing in the above-captioned case. Signed by Judge Ellen S. Huvelle on March 21, 2018. (AG) (Entered: 03/21/2018)
03/21/2018	83	Unopposed MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Jonathan Taylor, :Firm- Gupta Wessler PLLC, :Address- jon@guptawessler.com. Phone No. - 2028881741. Fax No. - 2028887792 *Address: 1900 L Street NW, Suite 312, Washington DC 20036* Filing fee $ 100, receipt number 0090-5383035. Fee Status: Fee Paid. by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Declaration of Jonathan Taylor, # 2 Text of Proposed Order)(Gupta, Deepak) (Entered: 03/21/2018)

03/21/2018		MINUTE ORDER granting 83 Unopposed Motion for Leave to Appear Pro Hac Vice: Upon consideration of the Unopposed MOTION for Leave to Appear Pro Hac Vice, it is hereby ORDERED that the motion is GRANTED; and it is further ORDERED that Jonathan Taylor is admitted pro hac vice for the purpose of appearing in proceedings in the above-captioned case. Counsel is reminded that pursuant to LCvR 83.2(c)(2) "An attorney who engages in the practice of law from an office located in the District of Columbia must be a member of the District of Columbia Bar and the Bar of this Court to file papers in this Court." Signed by Judge Ellen S. Huvelle on March 21, 2018. (AG) (Entered: 03/21/2018)
03/22/2018		Set/Reset Hearings: Motion Hearing set for 3/23/2018 at 1:30 PM in Courtroom 23A before Judge Ellen S. Huvelle. (gdf) (Entered: 03/22/2018)
03/23/2018		Minute Entry; for proceedings held before Judge Ellen S. Huvelle: Oral Arguments held on 3/23/2018. Plaintiffs' 52 MOTION for Summary Judgment as to Liability and Defendant's 73 Cross MOTION for Summary Judgment; heard and Taken Under Advisement. (Court Reporter Lisa Griffith) (hs) (Entered: 03/23/2018)
03/24/2018	84	NOTICE by UNITED STATES OF AMERICA (Attachments: # 1 Exhibit Ex. A, # 2 Exhibit Ex. B, # 3 Exhibit Ex. C, # 4 Exhibit Ex. D, # 5 Exhibit Ex. E, # 6 Exhibit Ex. F, # 7 Exhibit Ex. G)(Field, Brian) (Entered: 03/24/2018)
03/28/2018	85	RESPONSE *to Defendant's supplemental authority* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM re 84 Notice (Other) (Gupta, Deepak) Modified event title on 3/29/2018 (znmw). (Entered: 03/28/2018)
03/29/2018	86	RESPONSE re 85 Notice (Other) filed by UNITED STATES OF AMERICA. (Field, Brian) (Entered: 03/29/2018)
03/29/2018	87	REPLY re 86 Response to Document filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 03/29/2018)
03/31/2018	88	ORDER denying 52 plaintiffs' Motion for Summary Judgment; granting in part and denying in part 73 defendant's Motion for Summary Judgment; and setting Status Conference for 4/18/2018 at 03:00 PM in Courtroom 23A. Joint status report due by April 16, 2018. Signed by Judge Ellen S. Huvelle on March 31, 2018. (AG) (Entered: 03/31/2018)
03/31/2018	89	MEMORANDUM OPINION accompanying Order, ECF No. 88 , denying 52 plaintiffs' Motion for Summary Judgment and granting in part and denying in part defendant's Cross-Motion for Summary Judgment. Signed by Judge Ellen S. Huvelle on March 31, 2018. (AG) Modified on 4/2/2018 to remove attachment. Attachment docketed separately for opinion posting purposes.(ztnr) (Entered: 03/31/2018)
03/31/2018	90	ATTACHMENT to 89 Memorandum & Opinion Signed by Judge Ellen S. Huvelle on March 31, 2018. (ztnr) (Entered: 04/02/2018)
04/02/2018		Set/Reset Deadlines: Joint Status Report due by 4/16/2018. (gdf) (Entered: 04/02/2018)
04/16/2018	91	Joint STATUS REPORT *Proposing a Schedule to Govern Further Proceedings* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Narwold, William) (Entered: 04/16/2018)
04/18/2018		Minute Entry for proceedings held before Judge Ellen S. Huvelle: Status Conference held on 4/18/2018. Status Report due by 5/11/2018. Status Conference set for 5/18/2018 at

		1:30 PM in Courtroom 23A before Judge Ellen S. Huvelle. (Court Reporter Lisa Griffith) (gdf) (Entered: 04/18/2018)
04/18/2018	92	ORDER setting Status Conference for May 18, 2018, at 1:30 p.m. in Courtroom 23A. Joint Status Report due by May 11, 2018. See order for details. Signed by Judge Ellen S. Huvelle on April 18, 2018. (AG) (Entered: 04/18/2018)
04/26/2018	93	MOTION for Extension of Time to *File Status Report*, MOTION to Continue *Status Conference* by UNITED STATES OF AMERICA (Attachments: # 1 Exhibit, # 2 Text of Proposed Order)(Field, Brian) (Entered: 04/26/2018)
04/27/2018		MINUTE ORDER denying 93 Motion for Extension of Time to file Status Report; granting in part and denying in part 93 Motion to Continue Status Conference: Upon consideration of defendant's motion, plaintiffs' opposition thereto, and the entire record herein, it is hereby ORDERED that defendant's motion for an extension of time to file a status report is DENIED; and it is further ORDERED that defendant's motion to continue the Status Conference presently set for May 18, 2018, is GRANTED IN PART AND DENIED IN PART; and it is further ORDERED that the Status Conference presently scheduled for May 18, 2018, is RESCHEDULED to May 17, 2018, at 11:00 a.m. in Courtroom 23A. Signed by Judge Ellen S. Huvelle on April 27, 2018. (AG) (Entered: 04/27/2018)
05/11/2018	94	Joint STATUS REPORT by UNITED STATES OF AMERICA. (Field, Brian) (Entered: 05/11/2018)
05/17/2018	95	TRANSCRIPT OF PROCEEDINGS before Judge Ellen S. Huvelle held on 3-23-18; Page Numbers: 1-121. Date of Issuance:5-17-18. Court Reporter/Transcriber Lisa Griffith, Telephone number (202) 354-3247, Transcripts may be ordered by submitting the Transcript Order Form<P></P><P></P>For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter. <P>**NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov.<P></P> Redaction Request due 6/7/2018. Redacted Transcript Deadline set for 6/17/2018. Release of Transcript Restriction set for 8/15/2018.(Griffith, Lisa) (Entered: 05/17/2018)
05/17/2018	96	TRANSCRIPT OF PROCEEDINGS before Judge Ellen S. Huvelle held on 4-18-18; Page Numbers: 1-38. Date of Issuance:5-17-18. Court Reporter/Transcriber Lisa Griffith, Telephone number (202) 354-3247, Transcripts may be ordered by submitting the Transcript Order Form<P></P><P></P>For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter. <P>**NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov.<P></P> Redaction Request due 6/7/2018. Redacted Transcript

		Deadline set for 6/17/2018. Release of Transcript Restriction set for 8/15/2018.(Griffith, Lisa) (Entered: 05/17/2018)
05/17/2018		Minute Entry for proceedings held before Judge Ellen S. Huvelle on 5/17/18 : Status Conference held. Order to be issued. Joint Status Report due by 7/13/18. Further Status Conference set for 7/18/18 at 12:00 PM in Courtroom 23A before Judge Ellen S. Huvelle. (Court Reporter: Lisa Griffith) (kk) (Entered: 05/17/2018)
05/17/2018	97	ORDER re discovery and future proceedings. Joint Status Report due by 7/13/2018. Status Conference set for 7/18/2018 at 12:00 PM in Courtroom 23A before Judge Ellen S. Huvelle. See order for details. Signed by Judge Ellen S. Huvelle on May 17, 2018. (AG) (Entered: 05/17/2018)
07/13/2018	98	Joint STATUS REPORT by UNITED STATES OF AMERICA. (Field, Brian) (Entered: 07/13/2018)
07/13/2018	99	MOTION for Certification for interlocatory appeal, MOTION to Stay by UNITED STATES OF AMERICA (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Field, Brian). Added MOTION to Stay on 7/17/2018 (jf). (Entered: 07/13/2018)
07/18/2018		Minute Entry for proceedings held before Judge Ellen S. Huvelle: Status Conference held on 7/18/2018. Parties should submit a report by the C.O.B. on Friday, 7/20/18. (Court Reporter: Scott Wallace) (gdf) (Entered: 07/19/2018)
07/20/2018	100	NOTICE *Regarding Annual Courtroom Technology Expenditures* by UNITED STATES OF AMERICA (Field, Brian) (Entered: 07/20/2018)
07/20/2018	101	Joint STATUS REPORT by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 07/20/2018)
07/27/2018	102	RESPONSE re 99 MOTION for Certification for interlocatory appeal MOTION to Stay filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 07/27/2018)
08/02/2018	103	REPLY to opposition to motion re 99 MOTION for Certification for interlocatory appeal MOTION to Stay filed by UNITED STATES OF AMERICA. (Field, Brian) (Entered: 08/02/2018)
08/13/2018	104	ORDER granting in part and denying in part 99 defendant's Motion for to Certify Orders for Interlocutory Appeal; amending Order filed on March 31, 2018, ECF No. 88 , to certify for interlocutory appeal for the reasons stated in an accompanying Memorandum Opinion, ECF No. 105 ; and granting 99 unopposed Motion to Stay. See order for details. Signed by Judge Ellen S. Huvelle on August 13, 2018. (AG) (Entered: 08/13/2018)
08/13/2018	105	MEMORANDUM OPINION accompanying August 13, 2018 Order, ECF No. 104 , re certification of March 31, 2018 Order, ECF No. 88 for interlocutory appeal. Signed by Judge Ellen S. Huvelle on August 13, 2018. (AG) (Entered: 08/13/2018)
08/20/2018	106	TRANSCRIPT OF PROCEEDINGS before Judge Ellen S. Huvelle held on 7-18-18; Page Numbers: 1-21. Date of Issuance:7-18-18. Court Reporter/Transcriber Scott Wallace, Telephone number 202-354-3196, Transcripts may be ordered by submitting the Transcript Order Form<P></P><P></P>For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter.

		<P>**NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov.<P></P> Redaction Request due 9/10/2018. Redacted Transcript Deadline set for 9/20/2018. Release of Transcript Restriction set for 11/18/2018.(Wallace, Scott) (Entered: 08/20/2018)
08/23/2018		USCA for the Federal Circuit Case Number 18-154-CP (zrdj) (Entered: 08/23/2018)
08/23/2018		USCA for the Federal Circuit Case Number 18-155-CP (zrdj) (Entered: 08/23/2018)
10/16/2018		USCA for the Federal Circuit Case Number 19-1081-SJ (zrdj) (Entered: 10/18/2018)
10/16/2018		USCA for the Federal Circuit Case Number 19-1083-SJ (zrdj) (Entered: 10/18/2018)
11/28/2018	107	NOTICE OF GRANT OF PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(B)by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. Filing fee $ 505, receipt number 0090-5811958. Fee Status: Fee Paid. Parties have been notified. (Attachments: # 1 USCA Order)(Narwold, William) Modified on 11/29/2018 to correct docket event/text (jf). (Entered: 11/28/2018)
11/29/2018	108	Transmission of the Notice of Grant of Permission to Appeal Under 28 U.S.C. § 1292(B)and Docket Sheet to Federal Circuit. The appeal fee was paid this date re 107 Notice of Appeal to the Federal Circuit. (jf) (Entered: 11/29/2018)

PACER Service Center			
Transaction Receipt			
01/28/2019 18:08:00			
PACER Login:	deepakgupta:3927546:0	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	1:16-cv-00745-ESH
Billable Pages:	18	**Cost:**	1.80

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM,
1600 K Street, NW
Washington, DC 20006

NATIONAL CONSUMER LAW CENTER,
1001 Connecticut Avenue, NW
Washington, DC 20036

ALLIANCE FOR JUSTICE,
11 Dupont Circle, NW
Washington, DC 20036,

for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
950 Pennsylvania Avenue, NW
Washington, DC 20530,
Defendant.

Case No. _____

CLASS ACTION COMPLAINT

INTRODUCTION

The Administrative Office of the U.S. Courts (AO) requires people to pay a fee to access records through its Public Access to Court Electronic Records system, commonly known as PACER. This action challenges the legality of those fees for one reason: the fees far exceed the cost of providing the records. In 2002, Congress recognized that "users of PACER are charged fees that are higher than the marginal cost of disseminating the information," and sought to ensure that records would instead be "freely available to the greatest extent possible." S. Rep. 107–174, 107th Cong., 2d Sess. 23 (2002). To that end, the E-Government Act of 2002 authorizes PACER fees "as a charge for services rendered," but "only to the extent necessary" "to reimburse expenses in providing these services." 28 U.S.C. § 1913 note.

Despite this express statutory limitation, PACER fees have twice been increased since the Act's passage. This prompted the Act's sponsor to reproach the AO for continuing to charge fees "well higher than the cost of dissemination"—"against the requirement of the E-Government Act"—rather than doing what the Act demands: "create a payment system that is used only to recover the direct cost of distributing documents via PACER." Instead of complying with the law, the AO has used excess PACER fees to cover the costs of unrelated projects—ranging from audio systems to flat screens for jurors—at the expense of public access.

This noncompliance with the E-Government Act has inhibited public understanding of the courts and thwarted equal access to justice. And the AO has further compounded those harms by discouraging fee waivers, even for *pro se* litigants, journalists, researchers, and nonprofits; by prohibiting the free transfer of information by those who obtain waivers; and by hiring private collection lawyers to sue people who cannot afford to pay the fees.

The plaintiffs are three national nonprofit organizations that have downloaded public court records from PACER—downloads for which they agreed to incur fees, and were in fact charged fees, in excess of the cost of providing the records. Each download thus gave rise to a separate claim for illegal exaction in violation of the E-Government Act. On behalf of themselves and a nationwide class of those similarly situated, they ask this Court to determine that the PACER fee schedule violates the E-Government Act and to award them a full recovery of past overcharges.[1]

[1] This case is the first effort to challenge the PACER fee schedule by parties represented by counsel. A now-dismissed *pro se* action, *Greenspan v. Administrative Office*, No. 14-cv-2396 (N.D. Cal.), did seek to challenge the fees (among a slew of other claims), but it was dismissed on jurisdictional grounds inapplicable here. Last year, two other cases were filed alleging that PACER, in violation of its own terms and conditions, overcharges its users due to a systemic billing error concerning the display of some HTML docket sheets—an issue not raised in this case. *Fisher v. Duff*, 15-5944 (W.D. Wash), and *Fisher v. United States*, 15-1575C (Ct. Fed. Cl.). Neither case challenges the PACER fee schedule itself, as this case does.

PARTIES

1. Plaintiff National Veterans Legal Services Program (NVLSP) is a nonprofit organization founded in 1980 and based in Washington, D.C. It seeks to ensure that American veterans and active-duty personnel receive the full benefits to which they are entitled for disabilities resulting from their military service. Over the years, the organization has represented thousands of veterans in individual court cases, educated countless people about veterans-benefits law, and brought numerous class-action lawsuits challenging the legality of rules and policies of the U.S. Department of Veterans Affairs. As a result, NVLSP has paid fees to the PACER Service Center to obtain public court records within the past six years.

2. Plaintiff National Consumer Law Center (NCLC) is a national nonprofit organization that seeks to achieve consumer justice and economic security for low-income and other disadvantaged Americans. From its offices in Washington, D.C. and Boston, NCLC pursues these goals through policy analysis, advocacy, litigation, expert-witness services, and training for consumer advocates throughout the nation, and does so on a wide range of issues, including consumer protection, unfair and deceptive acts and practices, privacy rights, civil rights, and employment. Among other things, NCLC prepares and publishes 20 different treatise volumes on various consumer-law topics. In the course of its research, litigation, and other activities, NCLC has paid fees to the PACER Service Center to obtain public court records within the past six years.

3. Plaintiff Alliance for Justice (AFJ) is a nonprofit corporation with its headquarters in Washington, D.C. and offices in Los Angeles, Oakland, and Dallas. It is a national association of over 100 public-interest organizations that focus on a broad array of issues—including civil rights, human rights, women's rights, children's rights, consumer rights, and ensuring legal representation for all Americans. Its members include AARP, the Center for Digital Democracy,

Consumers Union, the National Center on Poverty Law, and the National Legal Aid & Defender Association. On behalf of these groups and the public-interest community, AFJ works to ensure that the federal judiciary advances core constitutional values, preserves unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans. AFJ has paid fees to the PACER Service Center to obtain public court records within the past six years.

4. Defendant United States of America, through the AO and its PACER Service Center, administers PACER and charges fees for access to public court records.

JURISDICTION AND VENUE

5. This Court has subject-matter jurisdiction over this action under 28 U.S.C. § 1331 and 28 U.S.C. § 1346(a). Each plaintiff and putative class member has multiple individual illegal-exaction claims against the United States, none of which exceeds $10,000.

6. The Court has personal jurisdiction over all parties to this lawsuit, and venue is proper under 28 U.S.C. § 1391 and 28 U.S.C. § 1402(a).

FACTUAL ALLEGATIONS

How PACER works: A brief overview

7. PACER is a decentralized system of electronic judicial-records databases. It is managed by the AO, and each federal court maintains its own database. Any person may access records through PACER by registering for an online account and searching the applicable court database. Before accessing a particular record, however, each person must first agree to pay a specific fee, shown on the computer screen, which says: "To accept charges shown below, click on the 'View Document' button, otherwise click the 'Back' button on your browser." The current fee is $.10 per page (with a maximum of $3.00 per record) and $2.40 per audio file. There is no charge for judicial opinions. Only if the person affirmatively agrees to pay the fee will a PDF of the record appear for downloading and printing. Unless that person obtains a fee waiver or

incurs less than $15 in PACER charges in a given quarter, he or she will have a contractual obligation to pay the fees.

How we got here: Congress authorizes fees "to reimburse" PACER expenses.

8. This system stretches back to the early 1990s, when Congress began requiring the federal judiciary to charge "reasonable fees . . . for access to information available through automatic data processing equipment," including records available through what is now known as PACER. Judiciary Appropriations Act, 1991, Pub. L. No. 101–515, § 404, 104 Stat. 2129, 2132–33. In doing so, Congress sought to limit the amount of the fees to the cost of providing access to the records: "All fees hereafter collected by the Judiciary . . . *as a charge for services rendered* shall be deposited as offsetting collections . . . *to reimburse expenses incurred in providing these services*." *Id.* (emphasis added). When the system moved from a dial-in phone service to an Internet portal in 1998, the AO set the PACER fees at $.07 per page (introducing in 2002 a maximum of $2.10 per request), without explaining how it arrived at these figures. *See* Chronology of the Federal Judiciary's Electronic Public Access (EPA) Program, http://1.usa.gov/1lrrM78.

9. It soon became clear that these amounts were far more than necessary to recover the cost of providing access to electronic records. But rather than reduce the fees to cover only the costs incurred, the AO instead decided to use the extra revenue to subsidize other information-technology-related projects—a mission creep that only grew worse over time.

The AO begins using excess PACER fees to fund ECF.

10. The expansion began in 1997, when the judiciary started planning for a new e-filing system called ECF. The AO produced an internal report discussing how the system would be funded. It emphasized the "long-standing principle" that, when charging a user fee, "the government should seek, not to earn a profit, but only to charge fees commensurate with the cost of providing a particular service." Admin. Office of the U.S. Courts, *Electronic Case Files in the*

Federal Courts: A Preliminary Examination of Goals, Issues and the Road Ahead (discussion draft), at 34 (Mar. 1997). Yet, just two pages later, the AO contemplated that the ECF system could be funded with "revenues generated from electronic public access fees"—that is, PACER fees. *Id.* at 36. The AO believed that these fees could lawfully be used not only to reimburse the cost of providing access to records through PACER, but also for technology-related purposes more broadly, including "electronic filings, electronic documents, use of the Internet, etc." *Id.* The AO did not offer any statutory authority to support this view.

Congress responds by passing the E-Government Act of 2002.

11. After the AO began charging PACER fees that exceeded the cost of providing access to records, Congress did not respond by relaxing the statutory requirement that the fees be limited to those costs. To the contrary, when Congress revisited the subject of PACER fees a few years later, it amended the statute to *strengthen* this requirement.

12. Recognizing that, under "existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information," Congress amended the law "to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible." S. Rep. 107–174, 107th Cong., 2d Sess. 23 (2002). The result was a provision of the E-Government Act of 2002 that amended the language authorizing the imposition of fees—removing the mandatory "shall prescribe" language and replacing it with language permitting the Judicial Conference to charge fees "only to the extent necessary." Pub. L. No. 107–347, § 205(e), 116 Stat. 2899, 2915 (Dec. 17, 2002) (28 U.S.C. § 1913 note). The full text of the statute is thus as follows:

> **(a)** The Judicial Conference may, *only to the extent necessary*, prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, 1930, and 1932 of title 28, United States Code, for collection by the courts under those sections *for access to information*

> *available through automatic data processing equipment*. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. The Director of the [AO], under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> **(b)** The Judicial Conference and the Director shall transmit each schedule of fees prescribed under paragraph (a) to the Congress at least 30 days before the schedule becomes effective. All fees hereafter collected by the Judiciary under paragraph (a) *as a charge for services rendered* shall be deposited as offsetting collections to the Judiciary Automation Fund pursuant to 28 U.S.C. 612(c)(1)(A) *to reimburse expenses incurred in providing these services*.

28 U.S.C. § 1913 note (emphasis added).

Even after the E-Government Act, the AO increases PACER fees.

13. Rather than reduce or eliminate PACER fees, however, the AO increased them to $.08 per page in 2005. Memorandum from Leonidas Ralph Mecham, Director of the Admin. Office, to Chief Judges and Clerks (Oct. 21, 2004). To justify this increase, the AO did not point to any growing costs of providing access to records through PACER. It relied instead on the fact that the judiciary's information-technology fund—the account into which PACER fees and other funds (including appropriations) are deposited, 28 U.S.C. § 612(c)(1)—could be used to pay the costs of technology-related expenses like ECF. As before, the AO cited no statutory authority for this increase.

The AO finds new ways to spend extra PACER fees as they continue to grow.

14. Even expanding the conception of costs to cover ECF did not bring the PACER balance sheet to zero. Far from it: By the end of 2006, the judiciary's information-technology fund had accumulated a surplus of nearly $150 million—at least $32 million of which was from PACER fees. Admin. Office, *Judiciary Information Technology Annual Report for Fiscal Year 2006*, at 8, http://bit.ly/1V5B9p2. But once again, the AO declined to reduce or eliminate PACER fees,

and instead chose to seek out new ways to spend the excess, using it to fund "courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance." Quoted in Letter from Sen. Lieberman, Chair, Sen. Comm. on Homeland Security and Governmental Affairs, to Sens. Durban and Collins, Sen. Comm. on Appropriations (Mar. 25, 2010).

15. Two years later, in 2008, the chair of the Judicial Conference's Committee on the Budget testified before the House. She explained that the judiciary used PACER fees not only to reimburse the cost of "run[ning] the PACER program," but also "to offset some costs in our information technology program that would otherwise have to be funded with appropriated funds." Hearings Before a Subcomm. of the Sen. Comm. on Appropriations on H.R. 7323/S. 3260, 110th Cong. 51 (2008). Specifically, she testified, "[t]he Judiciary's fiscal year 2009 budget request assumes $68 million in PACER fees will be available to finance information technology requirements in the courts' Salaries and Expenses account, thereby reducing our need for appropriated funds." *Id.*

The E-Government Act's sponsor says that the AO is violating the law.

16. In early 2009, Senator Joe Lieberman (the E-Government Act's sponsor) wrote the AO "to inquire if [it] is complying" with the statute. He noted that the Act's "goal" was "to increase free public access to [judicial] records," yet "PACER [is] charging a higher rate" than it did when the law was passed. Importantly, he explained, "the funds generated by these fees are still well higher than the cost of dissemination." He asked the Judicial Conference to explain "whether [it] is only charging 'to the extent necessary' for records using the PACER system." Letter from Sen. Lieberman to Hon. Lee Rosenthal, Chair, Committee on Rules of Practice and Procedure, Judicial Conf. of the U.S. (Feb. 27, 2009).

17. The Judicial Conference replied with a letter adhering to the AO's view that it is authorized to use PACER fees to recoup non-PACER-related costs. The letter did not identify any statutory language supporting this view, and acknowledged that the E-Government Act "contemplates a fee structure in which electronic court information 'is freely available to the greatest extent possible.'" Letter from Hon. Lee Rosenthal and James C. Duff, Judicial Conf. of the U.S., to Sen. Lieberman, Chair, Sen. Comm. on Homeland Security and Governmental Affairs (Mar. 26, 2009). The letter did not cite any statute that says otherwise. Yet it claimed that Congress, since 1991, has "expand[ed] the permissible use of the fee revenue to pay for other services"—even though Congress has actually done the opposite, enacting the E-Government Act in 2002 specifically to limit any fees to those "necessary" to "reimburse expenses incurred" in providing the records. 28 U.S.C. § 1913 note. The sole support the AO offered for its view was a sentence in a conference report accompanying the 2004 appropriations bill, which said only that the Appropriations Committee "expects the fee for the Electronic Public Access program to provide for [ECF] system enhancements and operational costs." *Id.* The letter did not provide any support (even from a committee report) for using the fees to recover non-PACER-related expenses beyond ECF.

18. Later, in his annual letter to the Appropriations Committee, Senator Lieberman expressed his "concerns" about the AO's interpretation. "[D]espite the technological innovations that should have led to reduced costs in the past eight years," he observed, the "cost for these documents has gone up." And it has done so for only one reason: so that the AO can fund "initiatives that are unrelated to providing public access via PACER." He reiterated his view that this is "against the requirement of the E-Government Act," which permits "a payment system that is used only to recover the direct cost of distributing documents via PACER"—not other technology-related projects that "should be funded through direct appropriations." Letter from

Sen. Lieberman, Chair, Sen. Comm. on Homeland Security and Governmental Affairs, to Sens. Durban and Collins, Sen. Comm. on Appropriations (Mar. 25, 2010).

The AO again increases PACER fees.

19. Undeterred by Senator Lieberman's concerns, the AO responded by raising PACER fees once again, to $.10 per page beginning in 2012. It acknowledged that "[f]unds generated by PACER are used to pay the entire cost of the Judiciary's public access program, including telecommunications, replication, and archiving expenses, the Case Management/Electronic Case Files system, electronic bankruptcy noticing, Violent Crime Control Act Victim Notification, on-line juror services, and courtroom technology." Admin. Office, *Electronic Public Access Program Summary* 1 (2012), http://1.usa.gov/1Ryavr0. But the AO believed that the fees comply with the E-Government Act because they "are only used for public access, and are not subject to being redirected for other purposes." *Id.* at 10. It did not elaborate.

20. In a subsequent congressional budget summary, however, the judiciary reported that (of the money generated from "Electronic Public Access Receipts") it spent just $12.1 million on "public access services" in 2012, while spending more than $28.9 million on courtroom technology. *The Judiciary: Fiscal Year 2014 Congressional Budget Summary*, App. 2.4.

The AO continues to charge more in fees than the cost of PACER.

21. Since the 2012 fee increase, the AO has continued to collect large amounts in PACER fees and to use these fees to fund activities beyond providing access to records. In 2014, for example, the judiciary collected more than $145 million in fees, much of which was earmarked for other purposes such as courtroom technology, websites for jurors, and bankruptcy notification systems. Admin. Office of the U.S. Courts, *The Judiciary Fiscal Year 2016 Congressional Budget Summary* 12.2 (Feb. 2015). When questioned during a House appropriations hearing that same year, representatives from the judiciary acknowledged that "the Judiciary's Electronic

Public Access Program encompasses more than just offering real-time access to electronic records." *Financial Services and General Government Appropriations for 2015, Part 6: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 113th Cong. 152 (2014).

22. Some members of the federal judiciary have been open about the use of PACER revenue to cover unrelated expenses. For example, Judge William Smith (a member of the Judicial Conference's Committee on Information Technology) has acknowledged that the fees "also go to funding courtroom technology improvements, and I think the amount of investment in courtroom technology in '09 was around 25 million dollars. . . . Every juror has their own flat-screen monitors. . . . [There have also been] audio enhancements. . . . We spent a lot of money on audio so the people could hear what's going on. . . . This all ties together and it's funded through these [PACER] fees." Hon. William Smith, Panel Discussion on Public Electronic Access to Federal Court Records at the William and Mary Law School Conference on Privacy and Public Access to Court Records (Mar. 4–5, 2010), bit.ly/1PmR0LJ.

The AO's policy of limiting fee waivers and targeting those who cannot pay the fees

23. The judiciary's decision to increase PACER fees to fund these (otherwise unobjectionable) expenses has created substantial barriers to accessing public records—for litigants, journalists, researchers, and others. The AO has compounded these barriers through a policy of discouraging fee waivers, even for journalists, *pro se* litigants, and nonprofits; by prohibiting the transfer of information, even for free, by those who manage to obtain waivers; and by hiring private collection lawyers to sue individuals who cannot pay the fees.

24. Two examples help illustrate the point: In 2012, journalists at the Center for Investigative Reporting applied "for a four-month exemption from the per page PACER fee." *In re Application for Exemption from Elec. Public Access Fees*, 728 F.3d 1033, 1035–36 (9th Cir. 2013). They "wanted to comb court filings in order to analyze 'the effectiveness of the court's conflict-

checking software and hardware to help federal judges identify situations requiring their recusal,'" and "planned to publish their findings" online. *Id.* at 1036. But their application was denied because policy notes accompanying the PACER fee schedule instruct courts not to provide a fee waiver to "members of the media" or anyone not in one of the specific groups listed. *Id.* at 1035. The Ninth Circuit held that it could not review the denial. *Id.* at 1040.

25. The other example is from five years earlier, when private collection lawyers representing the PACER Service Center brought suit in the name of the United States against "a single mother of two minor children" who had "no assets whatsoever," claiming that she owed $30,330.80 in PACER fees. *See* Compl. in *United States v. Deanna Manning*, No. 07-cv-04595, filed July 3, 2007 (C.D. Cal.); Answer, Dkt. 12, filed Oct. 16, 2007. Representing herself, the woman "admit[ted] to downloading and printing a small amount [of] material from PACER, no more than $80 worth," which "would be 1,000 pages, actually much more than she remembers printing." Answer, Dkt. 12, at 1. But she explained that "[t]here is no way she would have had enough paper and ink to print 380,000 pages as the Complaint alleges," so "[t]his must be a huge mistake." *Id.* She concluded: "Our great and just government would have better luck squeezing blood from a lemon than trying to get even a single dollar from this defendant who can barely scrape up enough money to feed and clothe her children." *Id.* at 2. Only then did the government dismiss the complaint.

CLASS ACTION ALLEGATIONS

26. The plaintiffs bring this class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

27. The plaintiffs seek certification of the following class:

> *All individuals and entities who have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government.*

28. The class is so numerous that joinder of all members is impractical. While the exact number and identity of class members is unknown to the plaintiffs at this time and can only be ascertained through appropriate discovery, the plaintiffs believe that the number of class members is approximately 2,000,000. The precise number and identification of the class members will be ascertainable from the defendant's records.

29. There are questions of law and fact common to all members of the class. Those common questions include, but are not limited to, the following:

(i) Are the fees imposed for PACER access excessive in relation to the cost of providing the access—that is, are the fees higher than "necessary" to "reimburse expenses incurred in providing the[] services" for which they are "charge[d]"? 28 U.S.C. § 1913 note.

(ii) What is the measure of damages for the excessive fees charged?

30. The plaintiffs' claims are typical of the claims of the class because they, like the class members, paid the uniform fees required by the defendant in order to access PACER.

31. The plaintiffs will fairly and adequately protect the interests of the class because each of them has paid PACER fees during the class period, their interests do not conflict with the interests of the class, and they have obtained counsel experienced in litigating class actions and matters involving similar or the same questions of law.

32. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the plaintiffs' claims. Joinder of all members is impracticable. Furthermore, because the injury suffered by the individual class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

CLAIM FOR RELIEF: ILLEGAL EXACTION

33. The plaintiffs bring this case under the Little Tucker Act, 28 U.S.C. § 1346(a), which waives sovereign immunity and "provides jurisdiction to recover an illegal exaction by government officials when the exaction is based on an asserted statutory power." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572–74 (Fed. Cir. 1996) (allowing an illegal-exaction claim for excess user fees). Courts have long recognized such an "illegal exaction" claim—a claim that money was "improperly paid, exacted, or taken from the claimant" in violation of a statute, *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005)—regardless of whether the statute itself creates an express cause of action. As one court has explained, "the lack of express money-mandating language in the statute does not defeat [an] illegal exaction claim" because "otherwise, the Government could assess any fee or payment it wants from a plaintiff acting under the color of a statute that does not expressly require compensation to the plaintiff for wrongful or illegal action by the Government, and the plaintiff would have no recourse." *N. Cal. Power Agency v. United States*, 122 Fed. Cl. 111, 116 (2015).

34. Here, each download of a public record for which the plaintiffs agreed to incur a fee, and were in fact charged a fee, gives rise to a separate illegal-exaction claim. The fees charged by the defendant for the use of PACER exceeded the amount that could be lawfully charged, under the E-Government Act of 2002 and other applicable statutory authority, because they did not reasonably reflect the cost to the government of the specific service for which they are charged. The plaintiffs are entitled to the return or refund of the excessive PACER fees illegally exacted or otherwise unlawfully charged.

PRAYER FOR RELIEF

The plaintiffs request that the Court:

a. Certify this action as a class action under Federal Rule of Civil Procedure 23(b)(3);

b. Declare that the fees charged for access to records through PACER are excessive;

c. Award monetary relief for any PACER fees collected by the defendant in the past six years that are found to exceed the amount authorized by law;

d. Award the plaintiffs their costs, expenses, and attorney fees under 28 U.S.C. § 2412 and/or from a common fund; and

e. Award all other appropriate relief.

Respectfully submitted,

/s/ Deepak Gupta

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Attorneys for Plaintiffs

April 21, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745-ESH

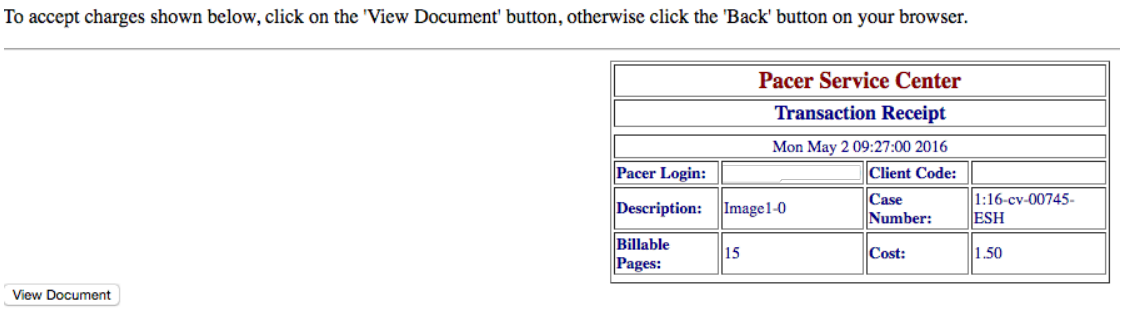
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This case challenges the legality of fees charged to access records through the Public Access to Court Electronic Records system, commonly known as PACER. The theory of liability is that these fees—set at the same rate across the judiciary—far exceed the cost of providing the records, and thus violate the E-Government Act, which authorizes fees "as a charge for services rendered," but "only to the extent necessary" to "reimburse expenses in providing these services." 28 U.S.C. § 1913 note. As the Act's sponsor put it: PACER fees are now "well higher than the cost of dissemination" and hence "against the requirement of the E-Government Act," which allows fees "only to recover the direct cost of distributing documents via PACER"—not unrelated projects that "should be funded through direct appropriations." Taylor Decl., Ex. B.

Because this theory of liability applies equally to everyone who has paid a PACER fee within the six-year limitations period, the plaintiffs move to certify the case as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the following class: "All individuals and entities who have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government."

BACKGROUND

PACER is a system that provides online access to federal judicial records and is managed by the Administrative Office of the U.S. Courts (or AO). The AO has designed the system so that, before accessing a particular record, a person must first agree to pay a specific fee, shown on the computer screen, which says: "To accept charges shown below, click on the 'View Document' button, otherwise click the 'Back' button on your browser." Here is an example of what the person sees on the screen:


To accept charges shown below, click on the 'View Document' button, otherwise click the 'Back' button on your browser.

Pacer Service Center			
Transaction Receipt			
Mon May 2 09:27:00 2016			
Pacer Login:		Client Code:	
Description:	Image1-0	Case Number:	1:16-cv-00745-ESH
Billable Pages:	15	Cost:	1.50

View Document

The current PACER fee is set at $.10 per page (with a maximum of $3.00 per record) and $2.40 per audio file. Only if the person affirmatively agrees to pay the fee will a PDF of the record appear. Unless that person obtains a fee waiver or incurs less than $15 in PACER charges in a given quarter, he or she will incur an obligation to pay the fees.

Each of the named plaintiffs here—the National Veterans Legal Services Program, the National Consumer Law Center, and the Alliance for Justice—has repeatedly incurred fees to access court records through the PACER system.

Congress authorizes fees "to reimburse" PACER expenses. This system stretches back to the early 1990s, when Congress began requiring the judiciary to charge "reasonable fees" for access to records. Judiciary Appropriations Act, 1991, Pub. L. No. 101–515, § 404, 104 Stat. 2129, 2132–33. In doing so, Congress sought to limit the fees to the cost of providing the records: "All fees hereafter collected by the Judiciary . . . *as a charge for services rendered*

shall be deposited as offsetting collections . . . *to reimburse expenses incurred in providing these services*." *Id.* (emphasis added). The AO set the fees at $.07 per page in 1998. *See* Chronology of the Fed. Judiciary's Elec. Pub. Access (EPA) Program, http://1.usa.gov/1lrrM78.

It soon became clear that this amount was far more than necessary to recover the cost of providing access to records. But rather than reduce the rate to cover only the costs incurred, the AO instead used the extra revenue to subsidize other information-technology-related projects.

The AO begins using excess PACER fees to fund ECF. The expansion began in 1997, when the judiciary started planning for a new e-filing system called ECF. The AO produced an internal report discussing how the system would be funded. It emphasized the "long-standing principle" that, when charging a user fee, "the government should seek, not to earn a profit, but only to charge fees commensurate with the cost of providing a particular service." AO, *Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues and the Road Ahead* (discussion draft), at 34 (Mar. 1997), http://bit.ly/1Y3zrX0. Yet, just two pages later, the AO contemplated that ECF could be funded with "revenues generated from electronic public access fees"—that is, PACER fees. *Id.* at 36. The AO did not offer any statutory authority to support this view.

Congress responds by passing the E-Government Act of 2002. When Congress revisited the subject of PACER fees a few years later, it did not relax the requirement that the fees be limited to the cost of providing access to records. To the contrary, it amended the statute to *strengthen* this requirement. Recognizing that, under "existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information," Congress amended the law "to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this

information is freely available to the greatest extent possible." S. Rep. No. 107–174, 107th Cong., 2d Sess. 23 (2002).

The result was a provision of the E-Government Act of 2002 that amended the language authorizing the imposition of fees—removing the mandatory "shall prescribe" language and replacing it with language permitting the Judicial Conference to charge fees "only to the extent necessary." Pub. L. No. 107–347, § 205(e), 116 Stat. 2899, 2915 (Dec. 17, 2002) (codified at 28 U.S.C. § 1913 note). The full text of the statute is thus as follows:

> **(a)** The Judicial Conference may, *only to the extent necessary*, prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, 1930, and 1932 of title 28, United States Code, for collection by the courts under those sections *for access to information available through automatic data processing equipment*. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. The Director of the [AO], under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> **(b)** The Judicial Conference and the Director shall transmit each schedule of fees prescribed under paragraph (a) to the Congress at least 30 days before the schedule becomes effective. All fees hereafter collected by the Judiciary under paragraph (a) *as a charge for services rendered* shall be deposited as offsetting collections to the Judiciary Automation Fund pursuant to 28 U.S.C. 612(c)(1)(A) *to reimburse expenses incurred in providing these services*.

28 U.S.C. § 1913 note (emphasis added).

Even after the E-Government Act, the AO increases PACER fees. Rather than reduce or eliminate PACER fees, however, the AO increased them to $.08 per page in 2005. Memorandum from AO Director Leonidas Ralph Mecham to Chief Judges and Clerks (Oct. 21, 2004). To justify this increase, the AO did not point to any growing costs of providing access to records through PACER. It relied instead on the fact that the judiciary's information-technology fund—the account into which PACER fees and other funds (including appropriations) are

deposited, 28 U.S.C. § 612(c)(1)—could be used to pay the costs of technology-related expenses like ECF. *Id.* As before, the AO cited no statutory authority for this increase.

The AO finds new ways to spend extra PACER fees as they keep growing. By the end of 2006, the judiciary's information-technology fund had accumulated a surplus of nearly $150 million—at least $32 million of which was from PACER fees. AO, *Judiciary Information Technology Annual Report for Fiscal Year 2006*, at 8, http://bit.ly/1V5B9p2. But once again, the AO declined to reduce or eliminate PACER fees. It instead sought out new ways to spend the excess, using it to cover "courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance"—services that relate to those provided by PACER only in the sense that they too concern technology and the courts. Taylor Decl., Ex. A (Letter from Sen. Lieberman to Sens. Durbin and Collins (Mar. 25, 2010)).

Two years later, in 2008, the chair of the Judicial Conference's Committee on the Budget testified before the House. She admitted that the judiciary used PACER fees not only to reimburse the cost of "run[ning] the PACER program," but also "to offset some costs in our information technology program that would otherwise have to be funded with appropriated funds." Hearings Before a Subcomm. of the Sen. Comm. on Appropriations on H.R. 7323/S. 3260, 110th Cong. 51 (2008). Specifically, she testified, "[t]he Judiciary's fiscal year 2009 budget request assumes $68 million in PACER fees will be available to finance information technology requirements . . . , thereby reducing our need for appropriated funds." *Id.*

The E-Government Act's sponsor says that the AO is violating the law. In early 2009, Senator Joe Lieberman (the E-Government Act's sponsor) wrote the AO "to inquire if [it] is complying" with the law. Taylor Decl., Ex. B (Letter from Sen. Lieberman to Hon. Lee Rosenthal (Feb. 27, 2009)). He noted that the Act's "goal" was "to increase free public access to [judicial] records," yet "PACER [is] charging a higher rate" than it did when the law was passed.

Id. Importantly, he explained, "the funds generated by these fees are still well higher than the cost of dissemination." *Id.* Invoking the key statutory text, he asked the judiciary to explain "whether [it] is only charging 'to the extent necessary' for records using the PACER system." *Id.*

The Judicial Conference replied with a letter defending the AO's position that it may use PACER fees to recoup non-PACER-related costs. The letter acknowledged that the Act "contemplates a fee structure in which electronic court information 'is freely available to the greatest extent possible.'" Letter from Hon. Lee Rosenthal and James C. Duff to Sen. Lieberman (Mar. 26, 2009). Yet the letter claimed that Congress has "expand[ed] the permissible use of the fee revenue to pay for other services," *id.*—even though it actually did the opposite, enacting the E-Government Act specifically to limit any fees to those "necessary" to "reimburse expenses incurred" in providing the records. 28 U.S.C. § 1913 note. The sole support that the AO offered for its view was a sentence in a conference report accompanying the 2004 appropriations bill, which said that the Appropriations Committee "expects the fee for the Electronic Public Access program to provide for [ECF] system enhancements and operational costs." Letter from Rosenthal and Duff to Sen. Lieberman. The letter did not provide any support (even from a committee report) for using fees to recover non-PACER-related expenses beyond ECF.

Later, in his annual letter to the Appropriations Committee, Senator Lieberman expressed his "concerns" about the AO's interpretation. Taylor Decl., Ex. A (Letter from Sen. Lieberman to Sens. Durbin and Collins). "[D]espite the technological innovations that should have led to reduced costs in the past eight years," he observed, the "cost for these documents has gone up." *Id.* It has done so because the AO uses the fees to fund "initiatives that are unrelated to providing public access via PACER." *Id.* He reiterated his view that this is "against the requirement of the E-Government Act," which permits "a payment system that is used only to

recover the direct cost of distributing documents via PACER." *Id.* Other technology-related projects, he stressed, "should be funded through direct appropriations." *Id.*

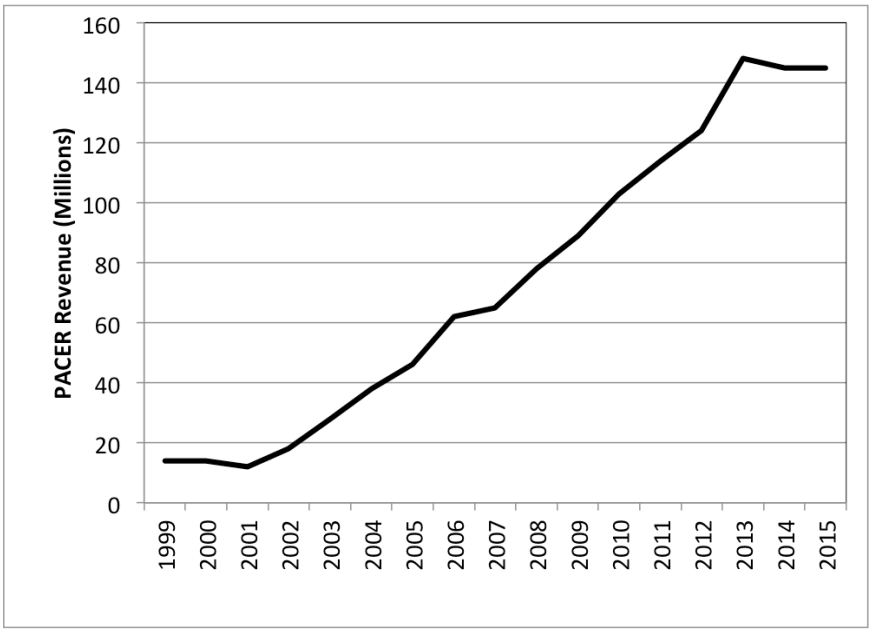
The AO again increases PACER fees. The AO responded by raising PACER fees once again, to $.10 per page beginning in 2012. It acknowledged that "[f]unds generated by PACER are used to pay the entire cost of the Judiciary's public access program, including telecommunications, replication, and archiving expenses, the [ECF] system, electronic bankruptcy noticing, Violent Crime Control Act Victim Notification, on-line juror services, and courtroom technology." AO, *Electronic Public Access Program Summary* 1 (2012), http://1.usa.gov/1Ryavr0. But the AO believed that the fees comply with the E-Government Act because they "are only used for public access." *Id.* at 10. It did not elaborate.

Subsequent congressional budget summaries, however, indicate that the PACER revenue at that time was more than enough to cover the costs of providing the service. The judiciary reported that in 2012, of the money generated from "Electronic Public Access Receipts," it spent just $12.1 million on "public access services," while spending more than $28.9 million on courtroom technology. *The Judiciary: Fiscal Year 2014 Congressional Budget Summary*, App. 2.4.

The AO continues to charge fees that exceed the cost of PACER. Since the 2012 fee increase, the AO has continued to collect large amounts in PACER fees and to use these fees to fund activities beyond providing access to records. In 2014, for example, the judiciary collected more than $145 million in fees, much of which was earmarked for other purposes, like courtroom technology, websites for jurors, and bankruptcy-notification systems. AO, *The Judiciary Fiscal Year 2016 Congressional Budget Summary* 12.2, App. 2.4 (Feb. 2015).

The chart on the following page—based entirely on data from the published version of the judiciary's annual budget, *see* Taylor Decl. ¶ 3—illustrates the rapid growth in PACER revenue over the past two decades, a period when "technological innovations," including

exponentially cheaper data storage, "should have led to reduced costs." Taylor Decl., Ex. A (Letter from Sen. Lieberman to Sens. Durbin and Collins).



For much of this period, the judiciary projected that the annual cost of running the program would remain well under $30 million. AO, *Long Range Plan for Information Technology in the Federal Judiciary: Fiscal Year 2009 Update* 16 (2009).

Some members of the federal judiciary have been open about the use of PACER revenue to cover unrelated expenses. When questioned during a 2014 House appropriations hearing, representatives from the judiciary admitted that the "Electronic Public Access Program encompasses more than just offering real-time access to electronic records." *Fin. Servs. and General Gov. Appropriations for 2015, Part 6: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 113th Cong. 152 (2014).[1] And Judge William Smith (a member of the Judicial Conference's Committee on Information Technology) has acknowledged that the fees "also go to funding

[1] As a percentage of the judiciary's total budget, however, PACER fees are quite small. Based on the judiciary's budget request of $7.533 billion for fiscal year 2016, PACER fees make up less than 2% of the total budget—meaning that the excess fees are a fraction of a fraction. Matthew E. Glassman, *Judiciary Appropriations FY2016*, at 1 (June 18, 2015), http://bit.ly/1QF8enE.

courtroom technology improvements, and I think the amount of investment in courtroom technology in '09 was around 25 million dollars. . . . Every juror has their own flat-screen monitor. . . . [There have also been] audio enhancements. . . . This all ties together and it's funded through these [PACER] fees." Panel Discussion, William and Mary Law School Conference on Privacy and Public Access to Court Records (Mar. 4–5, 2010), bit.ly/1PmR0LJ.

ARGUMENT

I. This Court has jurisdiction over the claims of all class members.

Before certifying the class, the Court must first assure itself that it has subject-matter jurisdiction over the claims of all class members. The basis for jurisdiction here is the Little Tucker Act, which waives the federal government's sovereign immunity and "provides jurisdiction to recover an illegal exaction by government officials when the exaction is based on an asserted statutory power." *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1348 (Fed. Cir. 2005) (quoting *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed. Cir. 1996)). Courts have long recognized such illegal-exaction claims—claims that money was "improperly paid, exacted, or taken from the claimant" in violation of a statute, *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005)—regardless of whether the statute itself creates an express cause of action.

By its terms, the Little Tucker Act grants district courts "original jurisdiction, concurrent with the United States Court of Federal Claims," over any non-tort, non-tax "claim against the United States, not exceeding $10,000," 28 U.S.C. § 1346(a)(2), while vesting exclusive appellate jurisdiction in the Federal Circuit, *id.* § 1295(a). This means that the Federal Circuit's interpretation of the Act is binding on district courts. And the Federal Circuit has made clear that, in a class action, "there will be no aggregation of claims" for purposes of assessing the $10,000 limit. *Chula Vista City Sch. Dist. v. Bennett*, 824 F.2d 1573, 1579 (Fed. Cir. 1987).

The Federal Circuit has also made clear that the Little Tucker Act does not require that each plaintiff's total *recovery* be $10,000 or less. Quite the contrary: Federal Circuit precedent holds that even a single plaintiff seeking millions of dollars may bring suit in federal district court under the Little Tucker Act if the total amount sought represents the accumulation of many separate transactions, each of which gives rise to a separate claim that does not itself exceed $10,000. *See Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 797 (Fed. Cir. 1993).

In the 1990s, airline companies brought two lawsuits in this district seeking to recover what they claimed were illegal exactions by the government. In one case, the General Services Administration (or GSA) deducted roughly $100 million from future payments it owed the airlines after determining that it had overpaid for plane tickets. *Alaska Airlines v. Austin*, 801 F. Supp. 760 (D.D.C. 1992). In the other, GSA "withheld future payments to the airlines to offset" the costs of tickets that were never used. *Am. Airlines, Inc. v. Austin*, 778 F. Supp. 72, 74 (D.D.C. 1991). The airlines claimed that GSA was "recouping alleged overcharges from them in violation of the law," and sought "return of the funds" that had "been assessed against them unlawfully." *Alaska Airlines*, 801 F. Supp. at 761.

In both cases, the court recognized that each airline was seeking well over $10,000, but determined that the total amount each plaintiff sought "represents the accumulation of disputes over alleged overcharges on thousands of individual tickets." *Id.* at 762. Thus, the court held that the asserted overcharge for each individual ticket constituted its own claim under the Little Tucker Act—even though the airlines paid numerous overcharges at a time through GSA's withholdings, and even though each case presented one "straightforward" legal question. *Id.* Because "[e]ach contested overcharge is based on a single ticket and is for less than $10,000," the district court had jurisdiction. *Id.*; *see Am. Airlines*, 778 F. Supp. at 76. The court explained that "[t]he Government cannot escape [Little Tucker Act] jurisdiction by taking a lump sum offset

that totals over $10,000 and then alleging that the claims should be aggregated." *Id.* On appeal, the Federal Circuit agreed, holding that "the district court had concurrent jurisdiction with the Court of Federal Claims." *Alaska Airlines*, 8 F.3d at 797.

Under this binding precedent, each transaction to access a record through PACER in exchange for a certain fee—a fee alleged to be excessive, in violation of the E-Government Act—constitutes a separate claim under the Little Tucker Act. As a result, each class member has multiple individual illegal-exaction claims, none of which exceeds $10,000. Even if a very small percentage of class members might ultimately receive more than $10,000, that amount "represents the accumulation of disputes over alleged overcharges on thousands of individual [transactions]"; it is no bar to this Court's jurisdiction. *Alaska Airlines*, 801 F. Supp. at 762.

Nor does the Little Tucker Act's venue provision pose a barrier to certifying the class here. Although it requires that individual actions be brought "in the judicial district where the plaintiff resides," 28 U.S.C. § 1402(a)(1), it does not alter the general rule in class actions that absent class members "need not satisfy the applicable venue requirements," *Briggs v. Army & Air Force Exch. Serv.*, No. 07–05760, 2009 WL 113387, *6 (N.D. Cal. 2009); *see also Whittington v. United States*, 240 F.R.D. 344, 349 (S.D. Tex. 2006); *Bywaters v. United States*, 196 F.R.D. 458, 463–64 (E.D. Tex. 2000).

Were the law otherwise, the Little Tucker Act would preclude nationwide class actions, instead requiring nearly a hundred mini class actions, one in each federal district, to remedy a widespread, uniform wrong committed by the federal government. That extreme result "simply is not to be found in the text of the Act itself," and "the venue provision would be an awkward vehicle by which to effectuate any anti-class policy." *Briggs*, 2009 WL 113387, at *7. This Court thus has the authority to certify the class if it meets the requirements of Rule 23.

II. This Court should certify the class under Rule 23.

Class certification is appropriate where, as here, the plaintiffs can satisfy the requirements of both Rule 23(a) and (b). Rule 23(a) requires a showing that (1) the class is sufficiently numerous to make joinder of all class members impracticable, (2) there are common factual or legal issues, (3) the named plaintiffs' claims are typical of the class, and (4) the named plaintiffs will fairly and adequately protect the interests of the class.

Rule 23(b) requires one of three things. Under subsection (b)(1), the plaintiffs may show that prosecuting separate actions would create a risk of inconsistent results, such as where the defendant is "obliged by law to treat the members of the class alike." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Under (b)(2), the plaintiffs may show that the defendant "has acted or refused to act on grounds that apply generally to the class," such that declaratory or injunctive relief is appropriate. And under (b)(3), the plaintiffs may show that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The class in this case satisfies both (b)(1) and (b)(3).

A. This case meets Rule 23(a)'s requirements.

1. The class is sufficiently numerous.

To begin, this case satisfies Rule 23(a)(1)'s requirement that the class be "so numerous that joinder of all members is impracticable." "Courts in this District have generally found that the numerosity requirement is satisfied and that joinder is impracticable where a proposed class has at least forty members," *Cohen v. Warner Chilcott Public Ltd. Co.*, 522 F. Supp. 2d 105, 114 (D.D.C. 2007), and a plaintiff need not "provide an exact number of putative class members in order to satisfy the numerosity requirement," *Pigford v. Glickman*, 182 F.R.D. 341, 347 (D.D.C. 1998); *see Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 305–06 (D.D.C. 2007)

(certifying class of 30 people). Although the plaintiffs do not have access to the defendant's records, and so cannot yet know exactly how many people have paid PACER fees in the past six years, they estimate that the class contains at least several hundred thousand class members. According to documents prepared by the judiciary and submitted to Congress, there are nearly two million PACER accounts, "approximately one-third" of which "are active in a given year." *The Judiciary: Fiscal Year 2016 Congressional Budget Justification*, App. 2.1. Making even the most generous assumptions about how many of these people receive fee waivers or have never incurred more than $15 in charges in a given quarter (and thus have never paid a fee), there can be no serious dispute that this class satisfies Rule 23(a)(1).

2. The legal and factual issues are common to the class.

This case likewise easily satisfies Rule 23(a)(2)'s requirement of "questions of law or fact common to the class." This requirement is met if "[e]ven a single common question" exists, *Thorpe v. District of Columbia*, 303 F.R.D. 120, 145 (D.D.C. 2014) (Huvelle, J.), so long as "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Here, the two most important questions in the case are common: (1) Are the fees imposed for PACER access excessive in relation to the cost of providing the access—that is, are the fees higher than "necessary" to "reimburse expenses incurred in providing the[] services" for which they are "charge[d]"? 28 U.S.C. § 1913 note; and (2) what is the measure of damages for the excessive fees charged? *See* Compl. ¶ 29. These questions "will generate common answers for the entire class and resolve issues that are central (and potentially dispositive) to the validity of each plaintiff's claim and the claims of the class as a whole." *Thorpe*, 303 F.R.D. at 146–47.

3. The named plaintiffs' claims are typical of the class.

This case also meets Rule 23(a)(3)'s requirement that the named plaintiffs' claims be typical of the class's claims, a requirement that is "liberally construed." *Bynum v. District of Columbia*, 214 F.R.D. 27, 34 (D.D.C. 2003). When "the named plaintiffs' claims are based on the same legal theory as the claims of the other class members, it will suffice to show that the named plaintiffs' injuries arise from the same course of conduct that gives rise to the other class members' claims." *Id.* at 35. That is the case here. The named plaintiffs' claims are typical of the class because they arise from the same course of conduct by the United States (imposing a uniform PACER fee schedule that is higher than necessary to reimburse the cost of providing the service) and are based on the same legal theory (challenging the fees as excessive, in violation of the E-Government Act). *See* Compl. ¶ 30.

4. The named plaintiffs are adequate representatives.

Rule 23(a)(4) asks whether the named plaintiffs "will fairly and adequately protect the interests of the class," an inquiry that "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625. It has two elements: "(1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and (2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel." *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997); *Thorpe*, 303 F.R.D. at 150. Both are met here.

a. The named plaintiffs. The plaintiffs are three of the nation's leading nonprofit legal advocacy organizations: the National Veterans Legal Services Program, the National Consumer Law Center, and the Alliance for Justice. Compl. ¶¶ 1–3. They all care deeply about "preserv[ing] unfettered access to the courts," *id.* ¶ 3, and brought this suit to vindicate

Congress's goal in passing the E-Government Act: to ensure that court records are "freely available to the greatest extent possible." S. Rep. 107–174, 107th Cong., 2d Sess. 23 (2002).

Since 1980, the National Veterans Legal Services Program has represented thousands of veterans in individual court cases, and has worked to ensure that our nation's 25 million veterans and active-duty personnel receive all benefits to which they are entitled for disabilities resulting from their military service. Compl. ¶ 1. Excessive PACER fees impede this mission in numerous ways—including by making it difficult to analyze patterns in veterans' cases, and thus to detect pervasive problems and delays. The organization is concerned that the fees have not only hindered individual veterans' ability to handle their own cases, but have also "inhibited public understanding of the courts and thwarted equal access to justice." *Id.* at 2.

The excessive fees likewise impede access to justice for low-income consumers—like those waging legal battles to try to save their homes from foreclosure—which is why the National Consumer Law Center also brought this suit. The Law Center conducts a wide variety of research, litigation, and other activities on behalf of elderly and low-income consumers, and publishes 20 different treatises that comprehensively report on the development of consumer law in the courts. *Id.* ¶ 2. The organization has incurred PACER fees in carrying out all of these activities, *id.*, and is also concerned about the many *pro se* consumers whose interaction with the judicial system has been made far more difficult by the PACER fee structure.

Finally, the Alliance for Justice is a national association of over 100 public-interest organizations—such as the National Center on Poverty Law and the National Legal Aid & Defender Association—nearly all of whom are affected by excess PACER fees. *Id.* ¶ 3. These organizations also strongly support the judiciary's efforts to obtain whatever resources it needs. They do not aim to deplete the judiciary's budget, nor do they object to the judiciary's quest for

increased funding. All they object to is using excess PACER fees to fund unrelated projects that "should be funded through direct appropriations." Letter from Sen. Lieberman to Rosenthal.

Because excess PACER fees are unlawful and significantly impede public access (and yet make up only a fraction of a fraction of the judiciary's budget, as explained in footnote 1), the named plaintiffs will vigorously prosecute this case on behalf of themselves and all absent class members. Each named plaintiff has paid numerous PACER fees in the past six years, and each has the same interests as the unnamed class members. Compl. ¶ 31. And the relief the plaintiffs are seeking—a full refund of excess fees charged within the limitations period, plus a declaration that the fees violate the E-Government Act—would plainly "be desired by the rest of the class." *McReynolds v. Sodexho Marriott Servs., Inc.*, 208 F.R.D. 428, 446 (D.D.C. 2002) (Huvelle, J.).

b. Class counsel. Proposed co-lead class counsel are Gupta Wessler PLLC, a national boutique based in Washington that specializes in Supreme Court, appellate, and complex litigation; and Motley Rice LLC, one of the nation's largest and most well-respected class-action firms. The firms will also consult with two lawyers with relevant expertise: Michael Kirkpatrick of Georgetown Law's Institute for Public Representation and Brian Wolfman of Stanford Law School. Together, these law firms and lawyers have a wealth of relevant experience.

One of the two co-lead firms, Gupta Wessler, has distinctive experience with class actions against the federal government. Two of its lawyers, Deepak Gupta and Jonathan Taylor, represent a certified class of federal bankruptcy judges and their beneficiaries in a suit concerning judicial compensation, recently obtaining a judgment of more than $56 million. *See* Gupta Decl. ¶¶ 1, 4–8; *Houser v. United States*, No. 13-607 (Fed. Cl.). Mr. Gupta and Mr. Taylor both received the President's Award from the National Conference of Bankruptcy Judges for their work on the case. Gupta Decl. ¶ 8. Just over a month ago, the *American Lawyer* reported on the firm's work, observing that "[i]t's hard to imagine a higher compliment than being hired to represent federal

judges" in this important class-action litigation. *Id.* Mr. Gupta and Mr. Taylor also currently represent (along with Motley Rice) a certified class of tax-return preparers seeking the recovery of unlawful fees paid to the IRS. *See id.* ¶¶ 1, 9–10; *Steele v. United States*, No. 14-1523 (D.D.C.). And Mr. Gupta, who worked at the Consumer Financial Protection Bureau and Public Citizen Litigation Group before founding the firm, has successfully represented a certified class of veterans challenging the government's illegal withholding of federal benefits to collect old debts arising out of purchases of military uniforms, recovering about $7.4 million in illegal charges. Gupta Decl. ¶¶ 1, 13–16.

The other co-lead firm, Motley Rice, regularly handles class actions and complex litigation in jurisdictions across the U.S., and currently serves as lead or co-lead counsel in over 25 class actions and as a member of the plaintiffs' steering committee in numerous MDL actions. Narwold Decl. ¶ 3. William Narwold, chair of the firm's class-action practice, will play a lead role in prosecuting this case and is also currently class counsel in *Steele v. United States*, the tax-return-preparer case mentioned above. *Id.* ¶¶ 1–3, 6. His colleague Joseph Rice, one of the top class-action and mass-tort-settlement negotiators in American history, will play a lead role in any settlement negotiations. *Id.* ¶ 1. Under their leadership, Motley Rice has secured some of the largest verdicts and settlements in history, in cases involving enormously complex matters. The firm is a member of the plaintiffs' steering committee in the *BP Deepwater Horizon Oil Spill Litigation*, where Mr. Rice served as one of the two lead negotiators in reaching settlements. One of those settlements, estimated to pay out between $7.8 billion and $18 billion to class members, is the largest civil class-action settlement in U.S. history. *Id.* ¶ 6. The firm also served as co-lead trial counsel on behalf of ten California cities and counties against companies that had concealed the dangers of lead paint. In 2014, after a lengthy bench trial, the court entered judgment in favor of the cities and counties for $1.15 billion. *Id.*

B. This case meets Rule 23(b)'s requirements.

1. This case satisfies Rule 23(b)(1).

Rule 23(b)(1) permits class certification if prosecuting separate actions by individual class members would risk "inconsistent or varying adjudications" establishing "incompatible standards of conduct" for the defendant. Because this case seeks equitable relief in addition to return of the excessive PACER fees already paid, the risk of inconsistent results is acute. If there were separate actions for equitable relief, the AO could be "forced into a 'conflicted position,'" Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 388 (1967), potentially subjecting it to "incompatible court orders," 2 William B. Rubenstein, *Newberg on Class Actions* § 4.2 (5th ed. 2015). That makes this case the rare one in which a class action is "not only preferable but essential." Rubenstein, *Newberg on Class Actions* § 4.2; *see also* Fed. R. Civ. P. 23(b)(1), 1966 advisory committee note (listing as examples cases against the government "to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment"). Under these circumstances, Rule 23(b)(1) is satisfied.

2. This case satisfies Rule 23(b)(3).

Because this case seeks the return of all excessive PACER fees paid in the last six years, however, the most appropriate basis for certification is Rule 23(b)(3). *See Dukes*, 563 U.S. at 362 ("[I]ndividualized monetary claims belong in Rule 23(b)(3)."). Rule 23(b)(3) contains two requirements, predominance and superiority, both of which are met here.

"The first requirement is that common factual and legal issues predominate over any such issues that affect only individual class members." *Bynum*, 214 F.R.D. at 39. As already explained, the plaintiffs allege that the AO lacks the authority to charge (and in fact charges) PACER fees that exceed the costs of providing the service. The central argument is that the E-

Government Act unambiguously limits any PACER fees "charge[d] for services rendered" to those "necessary" to "reimburse expenses in providing these services"—a limit the AO has failed to heed. 28 U.S.C. § 1913 note. And even if this language were somehow ambiguous, the background rule of administrative law is that user fees may not exceed the cost of the service provided (because then they would become taxes) unless Congress "indicate[d] clearly" an "intention to delegate" its taxing authority. *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 224 (1989). The plaintiffs might prevail on their theory; they might not. But either way, these are the common predominant legal questions in this case.

The sole individual issue—calculation of the amount of each class member's recovery, which depends on how many PACER fees they have paid—is ministerial, and hence cannot defeat predominance. The government's "own records . . . reflect the monetary amount that each plaintiff" has paid in fees over the past six years. *Hardy v. District of Columbia*, 283 F.R.D. 20, 28 (D.D.C. 2012). Once the total excess amount is calculated and the measure of damages is determined (both common questions), divvying up the excess on a pro rata basis would "clearly be a mechanical task." *Id.*

"The second requirement of Rule 23(b)(3) is that the Court find that maintaining the present action as a class action will be superior to other available methods of adjudication." *Bynum*, 214 F.R.D. at 40. This requirement, too, presents no obstacle here. Class treatment is most appropriate in cases like this one, "in which the individual claims of many of the putative class members are so small that it would not be economically efficient for them to maintain individual suits." *Id.* The vast majority of class members "stand to recover only a small amount of damages," making it difficult to "entice many attorneys into filing such separate actions." *Id.* Nor are there any concerns that "potential difficulties in identifying the class members and sending them notice will make the class unmanageable." *Id.* To the contrary, this class is manageable

because the government itself has all the information needed to identify and notify every class member, including their names and email addresses. Class counsel can send notice to the email addresses the PACER Service Center has on file for everyone who has paid a fee.

III. The Court should approve class counsel's notice proposal.

As required by Local Civil Rule 23.1(c), we propose the following class-notice plan, as reflected in the proposed order filed with this motion. First, we propose that class counsel retain a national, reputable class-action-administration firm to provide class notice. Second, to the extent possible, we propose that email notice be sent to each class member using the contact information maintained by the government for each person or entity who has paid PACER fees over the past six years. Third, we propose that if the PACER Service Center does not have an email address on file for someone, or if follow-up notice is required, notice then be sent via U.S. mail. Class counsel would pay all costs incurred to send the notice, and all responses would go to the class-action-administration firm. We respectfully request that the Court direct the parties to file an agreed-upon proposed form of notice (or, if the parties cannot agree, separate forms of notice) within 30 days of the Court's certification order, and direct that email notice be sent to the class within 90 days of the Court's approval of a form of notice.

Because the government has yet to enter an appearance, we were unable to confer with opposing counsel under Local Civil Rule 7(m) regarding the notice proposal or this motion. We are filing the motion now to toll the limitations period for the class, *see Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), and to ensure that class certification is decided at the outset, *cf.* Fed. R. Civ. P. 23 (class certification must be decided "[a]t an early practicable time after a person sues"); Local Civil Rule 23(b) (requiring motion to be filed "[w]ithin 90 days after the filing of a complaint in a case sought to be maintained as a class action"). We intend to confer with opposing counsel as soon as they make their appearance.

CONCLUSION

The plaintiffs' motion for class certification should be granted.

Respectfully submitted,

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Attorneys for Plaintiffs

May 2, 2016

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2016, I filed this class-certification motion through this Court's CM/ECF system. I further certify that, because no counsel for the defendant has yet appeared, I served copies via U.S. mail on the following counsel:

United States Attorney for the District of Columbia
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Attorney General of the United States
United States Department of Justice
Room 4400
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Washington, DC 20530

/s/ Deepak Gupta
Deepak Gupta

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 16-745 ESH
UNITED STATES OF AMERICA,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

This is the third recent civil action instituted as a class action challenging the fees charged by the Administrative Office of United States Courts ("AO") on the theory that it has overcharged for access to information made available through its Public Access to Court Electronic Records ("PACER") system. See Complaint at 2, fn.1; Fisher v. United States, U.S. Court of Federal Claims Case No. 1:15-cv-01575-TCW; Fisher v. Duff, Case No. C15-5944 BHS (W.D. Wash).[1] Accordingly, it should be dismissed under the first-to-file rule. In any event, a prerequisite to an action challenging PACER

[1] On December 28, 2015, Bryndon Fisher ("Fisher") filed a class action complaint against the United States in the Court of Federal Claims ("CFC Complaint"). See June 15, 2016 Order in Fisher v. Duff, Case No. C15-5944 BHS (W.D. Wash) (Exhibit 5) at 1. In the June 15, 2016 Order, the earlier District Court action was dismissed based upon the first-to-file rule, because the district court action was filed after the CFC Complaint and the putative class members could obtain relief in the Court of Federal Claims suit. Id.

fees is the requirement that the entity billed for such fees has, within 90-days of the date of the PACER bill, alerted the PACER Service Center to any errors in billing. See Declaration of Anna Marie Garcia. Docket No. 18 in Fisher v. Duff (Exhibit 1), ¶¶ 3-4. As Plaintiffs do not allege that they have satisfied this contractual obligation, the action should be dismissed for failure to state a claim. At a minimum, the claims should be limited to those plaintiffs who have timely but unsuccessfully attempted to resolve the alleged overbilling by alerting the PACER Service Center, as required.[2]

BACKGROUND

PACER is an electronic public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts, and the PACER Case Locator. See Complaint (ECF No. 1), ¶ 7-8; https://www.pacer.gov/. "PACER is provided by the Federal Judiciary in keeping with its commitment to providing public access to court information via a centralized service." Id. To that end, PACER allows users to access Court documents for $0.10 per page, up to a maximum charge of $3.00 per

[2] Moreover, the Plaintiff class members would have to exclude those PACER users whose downloads exceeded the $3.00 maximum download charge sufficiently to reduce the per page charge to that deemed acceptable to Plaintiffs.

transaction; and PACER fees are waived if a user does not exceed $15 in a quarter. Id. (Exhibit 4) at 2; Complaint, ¶ 73.

The terms provided to all PACER users during the registration process include a requirement that users "must alert the PACER Service Center to any errors in billing within 90 days of the date of the bill." https://www.pacer.gov/documents/pacer_policy.pdf (PACER Policies). Similarly, the PACER User Manual states, "If you think there is an error on your bill, you must submit the Credit Request Form. Requests may also be faxed to the PACER Service Center. . ." https://www.pacer.gov/documents/pacermanual.pdf (PACER User Manual) at 5. The Credit Request Form requires users to "Complete this form and submit it along with a letter of explanation in support of the credit request." It also requires users to provide a "detailed explanation in support of the request for credit," a "list of transactions in question" and a "completed refund request form if payment has been made on the account." Plaintiff does not allege that he, or any other member of the purported class, submitted any claim to the PACER Service Center for the overcharges he alleges in his complaint.

On December 28, 2015, Bryndon Fisher instituted a purported class action against the United States based on allegations that he was overcharged by the AO for downloading certain documents from

PACER. Docket No. 1 in Fisher v. United States, (Exhibit 2), ¶¶ 1-5, 37-45. On May 12, 2016, Mr. Fisher filed an amended Complaint in the case, but still pursues class action claims that he and the class he represents (PACER users) were overcharged by the AO and that the fees were not in compliance with the limitations placed on fees by the Judicial Appropriations Act of 1992, Pub. L. 102–140, title III, § 303, 105 Stat. 810 (1991), and the E-Government Act of 2002, Pub. L. 107–347, title II, § 205(e), 116 Stat. 2915 (2002). Docket No. 8 (Amended Complaint) in Fisher v. United States, (Exhibit 3) ¶¶ 14-16.[3]

Based on what Plaintiffs in the instant action allege are PACER overcharges, Plaintiffs similarly assert class action claims for illegal exaction, on one of the theories shared in the Fisher litigation. Plaintiffs here, like those in Fisher, similarly assert that the fees charged through PACER are in excess of those authorized by the E-Government Act of 2002 and its limitation allowing fees "only to the extent necessary." Complaint, ¶¶ 11-12, 27-29, 33-34;

[3] According to the Amended Complaint in Fisher v. United States, "Congress expressly limited the AO's ability to charge user fees for access to electronic court information by substituting the phrase "only to the extent necessary" in place of "shall hereafter" in the above statute. E-Government Act of 2002, § 205(e). Exhibit 3, ¶ 16.

Exhibit 3, ¶¶ 15, 29-41, 45(E).[4] The purported class of users in Fisher v. United States, consists of "All PACER users who, from December 28, 2009 through present, accessed a U.S. District Court, U.S. Bankruptcy Court, of the U.S. Court of Federal Claims and were charged for at least one docket report in HTML format that included a case caption containing 850 or more characters." Exhibit 3, ¶ 41. In the instant action, Plaintiffs seek to certify a class of "All individuals and entities who have paid for the use of PACER within the past six years, excluding class counsel and agencies of the federal government." Complaint, ¶ 27. Thus, the class in this action would encompass all Plaintiffs in Fisher.

ARGUMENT

Standard Of Review

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, see Willy v. Coastal Corp., 503 U.S. 131, 136-137, 112 S.Ct. 1076, 1080, 117 L.Ed.2d 280 (1992); Bender v. Williamsport Area School Dist., 475 U.S. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501 (1986), which

[4] Paragraph 45(E)-(F) of the Amended Complaint in Fisher v. United States posits as an issue common to all of the purported class members the following: Whether the AO's conduct constituted an illegal exaction by unnecessarily and unreasonably charging PACER users more than the AO and the Judicial Conference authorized under Electronic Public Access Fee Schedule and the E-Government Act of 2002; [and] Whether Plaintiff and the Class have been damaged by the wrongs alleged and are entitled to compensatory damages." Exhibit 3, ¶ 45(E)-(F).

> is not to be expanded by judicial decree, American Fire & Casualty Co. v. Finn, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, Turner v. Bank of North America, America, 4 U.S. (4 Dall.) 8, 11, 1 L.Ed. 718 (1799), and the burden of establishing the contrary rests upon the party party asserting jurisdiction, McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182-183, 56 S.Ct. 780, 782, 80 L.Ed. 1135 (1936).

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994).

A Rule 12(b)(1) motion to dismiss for lack of jurisdiction may be presented as a facial or factual challenge. "A facial challenge attacks the factual allegations of the complaint that are contained on the face of the complaint, while a factual challenge is addressed to the underlying facts contained in the complaint." Al-Owhali v. Ashcroft, 279 F. Supp. 2d 13, 20 (D.D.C. 2003) (internal quotations and citations omitted.) When defendants make a facial challenge, the the district court must accept the allegations contained in the complaint as true and consider the factual allegations in the light most favorable to the non-moving party. Erby v. United States, 424 F. Supp. 2d 180, 182 (D.D.C. 2006). With respect to a factual challenge, the district court may consider materials outside of the pleadings to determine whether it has subject matter jurisdiction over the claims. Jerome Stevens Pharmacy, Inc. v. FDA, 402 F.3d 1249, 1249, 1253 (D.C. Cir. 2005). The plaintiff bears the responsibility

of establishing the factual predicates of jurisdiction by a preponderance of evidence. Erby, 424 F. Supp. 2d at 182.

In order to survive a Rule 12(b)(6) motion, the plaintiff must present factual allegations that are sufficiently detailed "to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). As with facial challenges to subject-matter jurisdiction under Rule 12(b)(1), a district court is required to deem the factual allegations in the complaint as true and consider those allegations in the light most favorable to the non-moving party when evaluating a motion to dismiss under Rule 12(b)(6). Trudeau v. FTC, 456 F.3d 178, 193 (D.C. Cir. 2006). However, where "a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" Ashcroft Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557). Further, a "court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Iqbal, 556 U.S. at 679. While "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, [] it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." Id. at 678-79. Finally,

Finally, as a general matter, the Court is not to consider matters outside the pleadings, per Rule 12(b), without converting a defendant's motion to a motion for summary judgment. In interpreting interpreting the scope of this limitation, however, the D.C. Circuit has instructed that the Court may also consider "any documents either attached to or incorporated in the complaint and matters of which we may take judicial notice." EEOC v. St. Francis Xavier Parochial School, 117 F.3d 621, 624 (D.C. Cir. 1997). For example, the D.C. Circuit has approved judicial notice of public records on file. In re Cheney, 406 F.3d 723, 729 (D.C. Cir. 2005) (statements attached to complaint that undermined inference advocated by plaintiff). Defendant specifically asks that the Court take judicial notice of the documents accompanying this filing. See Fed. R. Evid. 201.

Summary judgment is appropriate when, as here, the pleadings, together with the declarations, demonstrate that "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Washington Post Co. v. U.S. Dept. of Health and Human Services, 865 F.2d 320, 325 (D.C. Cir. 1989). As the Supreme Court has declared, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every

action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). Summary Summary judgment is appropriate, under Rule 56, if the pleadings on file, as well as the affidavits submitted, evidence that there is no genuine issue of any material fact and that movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see also Mendoza Mendoza v. Drug Enforcement Admin., 465 F.Supp.2d 5 (D.D.C. 2006).

Courts are required to view the facts and inferences in a light most favorable to the non-moving party. See Flythe v. District of Columbia, 791 F.3d 13, 19 (D.C. Cir. 2015)(citing Scott v. Harris, 550 U.S. 372, 383 (2007). However, the party opposing the motion cannot simply "rest upon the mere allegations or denials of the adverse party's pleading, but. . . must set forth specific facts showing that there is a genuine issue for trial." Mendoza, 465 F.Supp.2d at 9 (quoting Fed R. Civ. P. 56(e). A non-moving party must show more than "that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

In Neal v. Kelly, 963 F.2d 453 (D.C. Cir. 1992), the Court recognized that "any factual assertions in the movants affidavits will be accepted as being true unless [the opposing party] submits his own affidavits or other documentary evidence contradicting the assertion." Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982).

"[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Since the Court is constrained to "treat the complaint's factual allegations as true", Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113 (D.C. Cir. 2000), the facts alleged in the Complaint "must be enough to raise a right to relief above the speculative level." Schuer v. Rhodes, 416 U.S. 232, 236 (1974).

Finally, where the District Court has employed the first-to-file rule, its action has been reviewed on appeal only for abuse of discretion. See Washington Metro. Area Transit Auth. v. Ragonese, 617 F.2d 828, 830 (D.C. Cir. 1980) (judge acted within his discretion when he dismissed the action).

First-To-File

Where two cases between the same parties on the same cause of action are commenced in two different Federal courts, the one which is commenced first is to be allowed to proceed to its conclusion first. Food Fair Stores v. Square Deal Mkt. Co., 187 F.2d 219, 220-21 (D.C. Cir. 1951). Relying on principles of comity, the Court of Appeals has affirmed that a District Court acts within its discretion when it dismisses an action under the "first-to-file rule." Washington Metro. Area Transit Auth. v. Ragonese, 617 F.2d at 830-31.

Just as was the case in Fisher v. Duff, the claims here overlap with those in the Claims court litigation. Both cases involve allegations that the same entities utilized the PACER system and were charged more for downloading information than is authorized by the same statutes and agreements. The class here would include nearly every class member in Fisher,[5] and the Fisher litigation was filed first, on December 28, 2015. Accordingly, this action should be dismissed to allow the Claims Court litigation to proceed. See Docket No. 25 in Fisher v. Duff (Exhibit 5); Food Fair Stores v. Square Deal Mkt. Co., 187 F.2d at 220-21; Washington Metro. Area Transit Auth. v. Ragonese, 617 F.2d at 830-31.

Plaintiffs Do Not Allege They Timely Alerted The PACER Service Center

Under their agreements with the Defendant, the Plaintiffs, when using PACER, agree that if there is an error in the user's PACER bill, the user "must alert the PACER Service Center to any errors in billing within 90 days of the date of the bill." Exhibit 1, ¶ 3. Essentially, the submission of claims to the PACER Service Center

[5] Plaintiffs' Motion For Class Certification recognizes that the class would be limited to those charged within the six-year limitations period. ECF No. 8 at 1; Complaint at 15 (limiting the demanded monetary recovery to "the past six years that are found to exceed the amount authorized by law"). Thus, the class would exclude those whose PACER fees were charged before April 21, 2010. The limitations period in Fisher v. United States would presumably go back six years from the filing of the original complaint on December 28, 2015, an extra few months.

is, by the plain terms of the agreement between Plaintiffs and the Defendant, a condition precedent to any duty to refund billing errors. See 13 *Williston on Contracts* § 38:7 (4th ed.) ("A condition precedent is either an act of a party that must be performed or a certain event that must happen before a contractual right accrues or a contractual duty arises."). Because Plaintiffs have not alleged that this condition precedent was performed, they have not stated a claim for relief.

As with exhaustion of statutory administrative remedies, there are sound policy reasons to require the plaintiffs to fulfill their contractual duty to submit any claim to the PACER Service Center. As the Supreme Court noted in McKart v. United States, such reasons "are not difficult to understand." Id., 395 U.S. 185, 193 (1969). Since agency decisions "frequently require expertise, the agency should be given the first chance to . . . apply that expertise." Id. "And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages." Id.; see Thomson Consumer Elecs., Inc. v. United States, 247 F.3d 1210, 1214 (Fed. Cir. 2001) (citing McKart while explaining that administrative remedies are sometimes preferable to litigation because "courts may never have to intervene if the complaining party

is successful in vindicating his rights" and "the agency must be given a chance to discover and correct its own errors.").

Here, the billing errors at issue are clearly a matter of highly specific expertise. If Plaintiffs would fulfil their obligations and submit a claim for a specific alleged overcharge to the PACER Service Center, they could engage in a dialog with those at the PACER Service Center and allow the Defendant to exercise its expertise regarding the workings of the PACER system and respond directly to Plaintiffs' concerns about the accuracy of the PACER bill. Such a result is required by the agreement, and would also be more efficient than testing Plaintiff's theories in Court.

Plaintiffs Have Not Alleged A Statutory Remedy That Supports An Illegal Exaction Claim

> In both the Tucker Act, 28 U.S.C. § 1491, and the Little Tucker Act, 28 U.S.C. § 1346(a)(2), Congress has waived sovereign immunity for certain actions for monetary relief against the United States. United States v. Mitchell, 463 U.S. 206, 212–18, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983). The pertinent portions of the Tucker Act and the Little Tucker Act waive sovereign immunity for claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1); id. § 1346(a)(2). The Little Tucker Act permits an action to be brought in a district court, but only if a claim does not exceed $10,000 in amount; the Tucker Act contains no such monetary restriction but authorizes actions to be brought only in the Court of Federal Claims.

Doe v. United States, 372 F.3d 1308, 1312 (Fed. Cir. 2004). Because Plaintiff has relied upon the Little Tucker Act for this Court's jurisdiction, Complaint, ¶ 5, any review of the final judgment will likely be in the United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(2).

To invoke federal court jurisdiction over an illegal exaction claim, "a claimant must demonstrate that the statute or provision causing the exaction itself provides, either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" Norman v. United States, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (quoting Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1373 (Fed. Cir. 2000)).[6]

Here, Plaintiffs' illegal exaction claim fails because that claim expressly recognizes that the liability comes only after an agreement is reached between the PACER user and the AO. See Complaint, ¶ 7 ("each person must agree to pay a specific fee"). The obligations of those using PACER are further set forth in the PACER User Manual and the policies and procedures promulgated by the AO,

[6] Because the allegation of a proper statute or provision is a jurisdictional issue under the Little Tucker Act, Defendant moves to dismiss the claim under Fed. R. Civ. p. 12(b)(1). Dismissal is also warranted under Fed. R. Civ. P. 12(b)(6), because, even if jurisdiction is present, Plaintiffs have alleged a statutory/regulatory framework that expressly requires his claims to be submitted to the PACER Service Center. See Kipple v. United States, 102 Fed. Cl. 773, 779 (2012).

which form the basis for Plaintiffs' claim that the user consents 'statute or provision' causing the exaction. See Complaint ¶ 7-10; Exhibit 1 (Declaration of Anna Marie Garcia), ¶¶ 2-4. That manual and those regulations, however, require all claims regarding billing errors to be submitted to the PACER Service Center. The complaint does not allege that the plaintiff took the necessary steps to receive a refund: submitting the requisite paperwork to the PACER Service Center. Accordingly, Plaintiffs have failed to allege that the statute and associated regulations provide a remedy for the specific exactions they allege.

Plaintiffs cite the "E-Government Act of 2002, the Electronic Public Access Fee Schedule" as well as other policies and procedures promulgated by the AO in the PACER User Manual to suggest that fees adopted and charged are excessive. See Complaint, ¶ 7-10. They then allege that these laws and regulations resulted in excessive fees. See Complaint, ¶¶ 11-13, 21.[7]

In fact, Plaintiffs' proposed remedy – the return of all monies (regardless of whether claims are presented to the PACER Service Center) – is contrary to the express terms of the governing

[7] In addition, the statutory authority cited by Plaintiffs they expressly recognize that the PACER Service Center is a part of the regulatory framework, by including "PACER Service Center" fees as part of the "the Electronic Public Access Program" See Complaint, ¶ 19.

contractual requirements, namely the AO's policies and procedures and the PACER User Manual. The framework in place expressly limits the monetary remedy to those claims that are submitted to the PACER Service Center within 90 days of the bill. Pacer Policy (users "must alert the PACER Service Center to any errors in billing within 90 days of the date of the bill"); Pacer User Manual at 5 ("If you think there is an error on your bill, you must submit the Credit Request Form."); Exhibit 1, ¶¶ 2-4.

Plaintiffs' claim is dependent on the inclusion of the PACER User Manual and other AO policies and procedures, including the PACER Policy, because the cited statutory authority states only that the Director of the AO and the Judicial Conference may "prescribe reasonable fees" for PACER information, 28 U.S.C. § 1913, and that those fees are $0.10 per "page" for docket reports, not to exceed thirty pages. 28 U.S.C. §§ 1913, 1914, 1926, 1930, 1932. This language, standing alone, is insufficient to create the remedy of return of all possible claims (including those not submitted to the AO). See Norman, 429 F.3d at 1096 (dismissing claim where law did not "directly result in an exaction").

Instead, the policies and procedures of the AO are a necessary part of the framework supporting Plaintiffs' alleged exaction.

Those same policies and procedures that establish the fees to be paid, however, are fatal to Plaintiffs' exaction claim, because they also require claims to be submitted to the PACER Service Center within 90 days of the date of the bill. Accordingly, Plaintiffs' illegal exaction claim fails.

CONCLUSION

For the foregoing reasons the Complaint should be dismissed or, in the alternative, summary judgment should be granted in favor of the Defendant based both on to the first-to-file rule and as to any claim that was not presented to the PACER Service Center with alleged errors in billing within 90 days of the date of the bill.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 16-745 ESH
UNITED STATES OF AMERICA,	)	
Defendant.	)	

OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

INTRODUCTION

Plaintiffs have brought this suit against the United States seeking to represent a class of "[a]ll individuals and entities who have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government." Plaintiffs' Motion For Class Certification ("Pl. Class Motion") at 1. Defendant asserts that this action encompasses some of the claims being pursued in the Court of Federal Claims in Fisher v. United States, U.S. Court of Federal Claims Case No. 1:15-cv-01575-TCW (ECF No. 11-1 at 24-42), and that any claim based on asserted PACER overcharges should be pursued in that action. Moreover, Plaintiffs have failed to establish numerosity, a commonality of claims, that the claims of the named Plaintiffs are typical of all members of the class, that questions common to the class predominate, that they will

fairly and adequately represent the class or that this action would be superior to other available methods to adjudicate the controversy. Certification should therefore be denied.

As the Court of Appeals has reiterated, such a conclusion would be set aside only if deemed an abuse of discretion, see Garcia v. Johanns, 444 F.3d 625, 631 (D.C. Cir. 2006) ("we review a certification ruling conservatively only to ensure against abuse of discretion or erroneous application of legal criteria, and we will affirm the district court even if we would have ruled differently in the first instance.") (citations and internal quotations omitted); Love v. Johanns, 439 F.3d 723, 727-28 (D.C. Cir. 2006) (D.C. Cir. Feb. 6, 2006). This Court would act well within its discretion in declining class certification in this instance.

The Fisher Class-Action

In the class action pending before the Court of Federal Claims since December 28, 2015, Bryndon Fisher alleges that he was overcharged by the AO for downloading certain docket sheets from PACER. Docket No. 1 in Fisher v. United States, (Exhibit 2), ¶¶ 1-5, 37-45. On May 12, 2016, Mr. Fisher filed an amended Complaint in the case, but still pursues class action claims that Fisher and the class he purports to represents (PACER users) were overcharged by the Administrative Office of United

States Courts ("AO") and that the fees were not in compliance with the limitations placed on fees by the Judicial Appropriations Act of 1992, Pub. L. 102–140, title III, § 303, 105 Stat. 810 (1991), and the E-Government Act of 2002, Pub. L. 107–347, title II, § 205(e), 116 Stat. 2915 (2002). Docket No. 8 (Amended Complaint) in Fisher v. United States, (Exhibit 3) ¶¶ 14-16 (ECF No. 11-1 at 27).[1]

Based on what Plaintiffs in the instant action allege are PACER overcharges, Plaintiffs similarly assert class action claims for illegal exaction, on one of the theories shared in the Fisher litigation. Plaintiffs here, like those in Fisher, similarly assert that the fees charged through PACER are in excess of those authorized by the E-Government Act of 2002 and its limitation allowing fees "only to the extent necessary." Complaint, ¶¶ 11-12, 27-29, 33-34; Exhibit 3, ¶¶ 15, 29-41, 45(E) (ECF No. 11-1 at 27, 31-34).[2] The purported class of users

[1] According to the Amended Complaint in Fisher v. United States, "Congress expressly limited the AO's ability to charge user fees for access to electronic court information by substituting the phrase "only to the extent necessary" in place of "shall hereafter" in the above statute. E-Government Act of 2002, § 205(e). See ECF 11-1, ¶ 16.

[2] Paragraph 45(E)-(F) of the Amended Complaint in Fisher v. United States posits as an issue common to all of the purported class members the following: Whether the AO's conduct constituted an illegal exaction by unnecessarily and unreasonably charging PACER users more than the AO and the

in Fisher v. United States, consists of "All PACER users who, from December 28, 2009 through present, accessed a U.S. District Court, U.S. Bankruptcy Court, of the U.S. Court of Federal Claims and were charged for at least one docket report in HTML format that included a case caption containing 850 or more characters." Exhibit 3, ¶ 41 (ECF No. 11-1 at 33). In the instant action, Plaintiffs seek to certify a class of "All individuals and entities who have paid for the use of PACER within the past six years, excluding class counsel and agencies of the federal government." Complaint, ¶ 27. Thus, the class in this action would encompass all Plaintiffs in Fisher.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO ESTABLISH THAT CLASS CERTIFICATION IS APPROPRIATE

A. The Standards for Class Certification

A litigant seeking class certification must justify the use of a litigation device that is "an exception to the usual rule." General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 155 (1982) (quoting California v. Yamasaki, 442 U.S. 682, 700 (1979)). As a threshold matter, the putative class for which

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Judicial Conference authorized under Electronic Public Access Fee Schedule and the E-Government Act of 2002; [and] Whether Plaintiff and the Class have been damaged by the wrongs alleged and are entitled to compensatory damages." Exhibit 3, ¶ 45(E)-(F) (ECF No. 11-1 at 34-35).

certification is sought must meet a standard that is not explicit in Rule 23, but is implicit in the availability of the class action as a tool of judicial efficiency in litigation: the proposed class must be ascertainable and manageable; i.e., susceptible to precise definition. See, e.g., Lewis v. National Football League, 146 F.R.D. 5, 8 (D.D.C. 1992) (clearly defined class is necessary "to ensure that the class is 'neither amorphous, nor imprecise'") (internal citation omitted). The class definition "must make it 'administratively feasible for the court to determine whether a particular individual is a member.'" Rodriguez v. U.S. Dept. of Treasury, 131 F.R.D. 1, 7 (D.D.C. 1990) (citing cases); see also 7A Wright & Miller, Fed. Practice and Procedure § 1760 at 120-21 (2d ed. 1986) (citing cases).

Plaintiffs must also demonstrate that the proposed class satisfies each of the four requirements of Rule 23(a) of the Federal Rules of Civil Procedure, namely, that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a); Love v. Johanns, 439 F.3d at 727.

In addition, the class claims must fit within at least one of the categories set forth in Rule 23(b). Id. (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613-16 (1997)). In this case, Plaintiffs claim that their proposed class satisfies Fed. R. Civ. P. 23(b)(1) and (3). These provisions provide as follows:

> A class action may be maintained if Rule 23(a) is satisfied and if:
>
> **(1)** prosecuting separate actions by or against individual class members would create a risk of:
>
> **(A)** inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> **(B)** adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> * * *
>
> **(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> **(A)** the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> **(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> **(D)** the likely difficulties in managing a

class action.

Fed. R. Civ. P. 23(b).

Plaintiffs bear the burden of proof with respect to satisfying each of the requirements of Rule 23(a) and establishing compliance with Rule 23(b). See In re American Medical Sys., Inc., 75 F.3d 1069, 1086 (6th Cir. 1996) (reversing the district court which had erroneously asked the defendants to show why a class should not be certified); McCarthy v. Kleindienst, 741 F.2d 1406, 1414 n.9 (D.C. Cir. 1984). "Strict adherence to those prerequisites [of Rule 23] is necessary to avoid unfairness to the defendant and to protect the interests of potential class members who may assert timely, representative claims in the future." Sperling v. Donovan, 104 F.R.D. 4, 9 (D.D.C. 1984). Plaintiffs must establish that a class action would "advance 'the efficiency and economy of litigation which is a principal purpose of the procedure.'" Falcon, 457 U.S. at 159 (quoting American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974)). The Court is to undertake a "rigorous analysis" of whether Rule 23(a) has been satisfied, because "actual, not presumed, conformance with Rule 23(a) [is] . . . indispensable." Falcon, 457 U.S. at 160-61. Further, while an undue inquiry into the merits of the class claims is not appropriate in adjudicating class certification, "an

analysis of the nature of the proof which will be required at trial is 'directly relevant to the determination of whether the matters in dispute are principally individual in nature or are susceptible of proof equally applicable to all class members.'" Rodriguez, 131 F.R.D. at 8 (internal citation omitted); see also, e.g., Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) ("class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action'") (internal citations omitted); Wagner v. Taylor, 836 F.2d 578, 587 (D.C. Cir. 1987) ("some inspection of the circumstances of the case is essential to determine whether the prerequisites of . . . Rule 23 have been met. Necessarily, the Court must examine both the claims presented and the showing in support of class certification for their adherence to the requirements of Rule 23.") (footnotes omitted). In addition, even if the requirements of Rule 23 are satisfied, the decision of whether to certify a class is firmly committed to the trial court's discretion. See Yamasaki, 442 U.S. at 703; Love v. Johanns, 439 F.3d at 727-28.

For the reasons stated herein, Plaintiffs are unable to carry their heavy burden of showing that class certification is appropriate. Specifically, Plaintiffs have failed to satisfy the requirements of Rule 23(a)(1), (3), (4) and Rule 23(b)(1) or

(3).

B. The Numerosity Requirement (Rule 23(a)(1))

> The "numerosity" requirement of Rule 23(a) states that the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "The numerosity requirement 'imposes no absolute limitations,' but rather 'requires examination of the specific facts of each case.' " [Cohen v.] Chilcott, 522 F.Supp.2d [105, 114 (D.D.C. 2007)] (quoting Gen. Telephone Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980)). "Courts in this District have generally found that the numerosity requirement is satisfied and that joinder is impracticable where a proposed class has at least forty members." Id.; see also McKinney v. U.S. Postal Serv., 11-cv-631, 2013 WL 164283, at *5 (D.D.C. Jan. 16, 2013) (numerosity satisfied when class would "likely exceed" 40); Smith v. Wash. Post Co., 962 F.Supp.2d 79, 91 (D.D.C. 2013) ("Plaintiff's complaint states a plausible claim for class-wide relief" at approximately 60 class members); Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd., 246 F.R.D. 293, 307 (D.D.C. 2007) (numerosity requirement satisfied for a class with 30 members).

Alvarez v. Keystone Plus Constr. Corp., 303 F.R.D. 152, 160 (D.D.C. 2014).

Plaintiffs have failed to establish that there exist sufficient numbers of would-be class members who may pursue viable claims for alleged overpayment of PACER fees, because all PACER users agree that they will raise any concerns with their PACER bills with the PACER Service Center within 90 days of receiving their bills. See Memorandum Of Points And Authorities In Support Of Motion To Dismiss Or, In The Alternative, For

Summary Judgment ("Def. Mem.") (ECF No. 11) at 13-15 and Exhibit 1 (ECF No. 11-1) at 1-2; Declaration of Anna Garcia ("Garcia Decl."), ¶¶ 3-4 (a copy of which accompanies this memorandum). Plaintiffs have made no effort to identify what number of potential Plaintiffs have properly presented their claims to the PACER Service Center as required. Similarly, as set forth in greater detail below, Plaintiffs are only able adequately to represent the interests of non-profit PACER users (i.e., users who can seek PACER fee exemptions under the current system for assessing PACER fees), as they are unlike other users because they have the ability to request PACER fee exemptions. If the exemption is granted, this would allow the named Plaintiffs to avoid all user fees.3 This, in effect, shifts the fees to those not eligible for a waiver of fees. The named Plaintiffs have made no attempt to identify the number of non-profit organizations who would share their claims in the case and their priorities. Thus, Plaintiffs' claim of numerosity fails to satisfy Fed. R. Civ. P. 23(a)(1).

C. Typicality of Claims/Fair and Adequate Representation (Rule 23(a)(3)-(4))

The absence of typical claims gives rise to inadequate

[3] The named Plaintiffs do not allege that they have even tried to secure a waiver for their non-profit work. Had they done so, they may have secured the relief they seek without the need to pursue this litigation.

representation because class representatives lack incentive to pursue fully the claims of the other class members. See Falcon, 457 U.S. at 158 n.13 (commonality and typicality tend to merge with adequacy of representation); American Medical, 75 F.3d at 1083 ("adequate representation requirement overlaps with the typicality requirement"). See Garcia Decl., ¶¶ 5-6 (noting that many PACER users do not pay fees or pay reduced fees, leaving 37% of PACER users to pay for the cost of maintenance and operation of the system).

Plaintiffs have described themselves as "three of the nation's leading nonprofit legal advocacy organizations," concerned about "unfettered access to the courts" and ensuring that "court records are 'freely available to the greatest extent possible'" Pl. Class Motion at 3-4 (citing S. Rep. No. 107-174, 107th Cong. 2d Sess. 23 (2002). In this way, they are unlike other PACER users, in that they have the ability to request PACER fee exemptions as non-profits, which would allow them to avoid all user fees. Garcia Decl., ¶¶ 5-6; Exhibit A[4]; see also Fee Schedules adopted December 1, 2015 and December 1, 2013 (set out in the notes to 28 U.S.C.A. § 1913). The Electronic Public

[4] Exhibit A is from a website maintained by the Administrative Office of United States Courts, available at https://www.pacer.gov/documents/epa_feessched.pdf. Defendant asks that the Court take judicial notice of the document pursuant to Fed. R. Evid. 201.

Access ("EPA") program at issue is completely self-funded through the user fees. Revenues from the fees pay for providing and enhancing the public access system, including designing, implementing, operating, and enhancing the Case Management/Electronic Case Filing ("CM/ECF") system. When a customer is exempt from the fees, these costs are shifted to other fee-paying users. That means that the named Plaintiffs' interests in free PACER access to their groups of veterans, elderly and low-income consumers, and other public interest organizations of concern to the named Plaintiffs (see Pl. Class Motion at 15-16) make them far different from those PACER users who do not share the named Plaintiffs' interests in seeing that other users receive free services. Because the interests of the named Plaintiffs is to ensure that their constituencies receive free PACER access and because the named Plaintiffs are eligible to request free PACER access through the non-profit exception to PACER fees, their interests will diverge from the interests of all of the PACER users whose concern is simply to minimize their costs of accessing PACER.

Plaintiffs' claims are not typical of the class. Plaintiffs seek to limit what services or materials PACER fees may be expended for. In this way, they would categorize what items may be paid for through the amounts deposited into the

fund established under 28 U.S.C. § 612 insofar as those amounts come from PACER fees. And, one presumes, the named Plaintiffs would seek to limit the charges of PACER fees for actual pages of information downloaded plus those costs needed to pay for the free access for their favored groups of users. They have not indicated that they would be seeking to limit PACER fees to "services rendered" to individual users who do not want to pay for any portion of "services rendered" to others, such as those individuals chosen by the named Plaintiffs to warrant free PACER access. Thus, while Plaintiffs and other PACER users may share a desire to reduce PACER fees to a point, Plaintiffs appear unwilling to push to reduce those fees beyond the limit that would affect free access to their favored sub-set of PACER users. Indeed, if PACER fees are reduced to those able merely to cover "services rendered" (see Pl. Class Motion at 18-19 ("The central argument is that the E-Government Act unambiguously limits any PACER fees "charge[d] for services rendered". . .), then free PACER access to non-profits, such as the named Plaintiffs themselves, would be in jeopardy.

> Federal Rule of Civil Procedure 23(a)(4) requires that a certified class have adequate representation. This requirement involves both adequacy of the named plaintiffs and adequacy of counsel. The requirement is met when: (1) there is no conflict of interest between the legal interests of the named plaintiffs and those of the proposed class; and (2) counsel for

> the class is competent to represent the class. Twelve John Does v. District of Columbia, 117 F.3d 571, 575 (D.C. Cir. 1997). The adequacy of representation requirement involves a constitutional due process dimension because of the binding effect of a final judgment on absent class members. See Nat'l Ass'n of Regional Med. Programs, Inc. v. Mathews, 551 F.2d 340, 345-46 (D.C. Cir. 1976).

Bame v. Dillard, No. Civil Action No. 05-1833 RMC, 2008 WL 2168393, at *7 (D.D.C. May 22, 2008).

Plaintiffs also bear the burden of showing that they can "fairly and adequately protect the interests of the class," as required by Rule 23(a)(4). See Fed. R. Civ. P. 23(a)(4). The adequacy of representation requirement involves a constitutional due process dimension because of the binding effect of a final judgment on absent class members. National Ass'n of Regional Medical Programs, Inc. v. Mathews, 551 F.2d 340, 345-46 (D.C. Cir. 1976). Accordingly, the Court should "undertake a stringent and continuing examination of the adequacy of representation." Kas v. Financial General Bankshares, Inc., 105 F.R.D. 453, 462 (D.D.C. 1984). The two requirements for determining the adequacy of representation: are (1) the named plaintiffs must not have antagonistic or conflicting interests with unnamed class members, and (2) the named plaintiffs must be able to vigorously and competently pursue the interests of the class through qualified counsel. Twelve John Does v. District

of Columbia, 117 F.3d 571, 575-76 (D.C. Cir. 1997). As set forth herein, the named Plaintiffs cannot satisfy these criteria. Their interests in free PACER access for their favored subset of PACER users diverge from the interests of those PACER fees seeking to minimize their costs of PACER use. Defendant challenges the ability of the named Plaintiffs adequately to represent the interests of those who are not non-profit, public interest organizations, or who may not share the goals of providing free access to a substantial number of PACER users.

And, with respect to counsel, Defendant does not dispute the abilities of Plaintiffs' counsel. However, what appears to be a potential conflict with some clients, and the impracticality of securing waivers from the clients, suggests that Plaintiffs' counsel cannot fulfill the obligations of representing all members of the proposed class in the instant action. As recounted herein, the named Plaintiffs have interests that diverge from the typical PACER user, who is simply interested in minimizing costs. A separate set of counsel would be required for the profit-minded PACER users, or, at a minimum, waivers would have to be secured for those class members who are not non-profit organizations with similar interests as the named Plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745-ESH

PLAINTIFFS' OPPOSITION TO THE GOVERNMENT'S MOTION TO DISMISS

If a friend were to complain that a restaurant is "overpriced," you would know what she means: the prices on the menu are too high. Nobody would think that, if she were to take her complaint to a waiter, he would (or could) lower those prices. The prices were presumably set by the management or, if the restaurant is a chain, by the chain's corporate headquarters.

But it would be a very different story if the friend's complaint were instead that, whenever she orders a glass of a particular type of wine at that restaurant, she is incorrectly billed for the full bottle—because of an error in the restaurant's billing software. This second complaint, unlike the first, is not that the restaurant's prices are too high. Rather, the complaint is that the restaurant is charging a small subset of customers more than the menu price for a particular item. In that scenario, asking the waiter to correct the bill might make perfect sense.

Understanding the distinction between these two types of complaints is all that is needed to dispose of the government's motion to dismiss in this case. That motion—much of it adopted verbatim from the government's motion to dismiss in *Fisher v. United States*, No. 15-1575C, ECF No. 11 (Fed. Cl.) (attached as Exhibit A)—is entirely predicated on the mistaken belief that the

plaintiffs here are just like the friend in the second scenario, complaining about a billing error. But, as we made clear in our complaint (at 2 n.1 and throughout), the three nonprofit plaintiffs in this case are actually like the friend in the first scenario: They allege that PACER's fees are set too high, at amounts that far exceed the cost of providing access, in contravention of the E-Government Act of 2002. *See generally* ECF No. 1 (attached as Exhibit B). The government's basic misunderstanding of the nature of the plaintiffs' claims infects all of its arguments for dismissal.

1. The first-to-file rule is inapplicable. The government's lead argument (at 12–13) is that the Court should dismiss this case under the "first-to-file rule" because a different case—filed by a different plaintiff in a different court—also involves PACER fees. *See Fisher v. United States*, No. 15-1575C (Fed. Cl.). But that case is nothing like this one. It falls instead into the second scenario mentioned above: a complaint of a "systemic billing error" in a narrow category of transactions. ECF No. 8 in *Fisher* (attached as Exhibit C), at 10; *see id.* at 2 (alleging that "the PACER billing system contains an error").

The plaintiff in *Fisher* challenges a particular aspect of the formula that PACER uses to convert docket reports to billable pages (which is necessary because docket reports, unlike case filings, are in HTML format and not PDF). He claims that the formula miscalculates the number of billable pages by "counting the number [of] bytes in the case caption" more than once, causing everyone who accesses a docket page from a case with a caption of "more than 850 characters" to be billed an extra page or two. *Id.* at 10. He does *not*, however, challenge the PACER fee schedule itself, as our case does. On the contrary, he claims that the government *violated* the fee schedule—and hence its contractual obligations to PACER users—by charging for more pages than permissible to access certain docket reports. That narrow "billing error" theory is wholly distinct from the legal theory in this case.

So the first-to-file rule has no application here. First-to-file rules serve "to prevent copycat litigation," *U.S. ex rel. Heath v. AT&T*, 791 F.3d 112, 123 (D.C. Cir. 2015)—not to force the dismissal of different claims by different parties seeking different relief based on different legal theories. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) ("[T]he general principle is to avoid duplicative litigation."). If the facts and legal issues do not "substantially overlap," dismissal is improper. *In re Telebrands Corp.*, — F.3d —, 2016 WL 3033331, *2 (Fed. Cir. 2016). Here, neither the facts nor the "core issue" in each case is the same. *Int'l Fidelity Ins. v. Sweet Little Mexico Corp.*, 665 F.3d 671, 678 (5th Cir. 2011). As just explained, *Fisher* focuses on the correctness of the government's formula for converting case captions to billable pages in docket sheets. And should the plaintiff in that case successfully seek class certification, he will, by operation of Court of Federal Claims Rule 23, represent only those people who affirmatively opt in to the class by filing written consent, and who accessed docket sheets in cases with captions of more than 850 characters (assuming they can be easily identified).

This case, by sharp contrast, focuses on whether the PACER fee schedule *itself* violates the E-Government Act and, if so, what the difference is between the aggregate amount the government collects in fees and the aggregate costs it incurs in providing access. *See* Electronic Pubic Access Fee Schedule, *available at* http://bit.ly/2aAPtsq. And the three nonprofit plaintiffs have already moved to certify this case as an opt-out class under Federal Rule of Civil Procedure 23, meaning that (should they be successful) they will represent all PACER users who paid a fee during the statute-of-limitations period and do not affirmatively opt out of the case. Given these enormous differences between the two cases, the first-to-file rule has no bearing here.[1]

[1] A third case—brought by the same plaintiff as in *Fisher*, pressing the exact same claims on the exact same legal theories, and seeking to represent a virtually "identical" class—was dismissed on first-to-file grounds. *See Fisher v. Duff*, No. 15-cv-5944, 2016 WL 3280429, *2 (W.D. Wash. June 15, 2016). That case really was *Fisher II*. This one is not.

2. The contract's billing-error-notification provision is irrelevant. The government also contends (at 13) that the plaintiffs cannot bring this suit because PACER's own terms and conditions require them to first "alert the PACER Service Center to any error in billing within 90 days of the date of the bill." In the government's view, this is a "condition precedent" that must be satisfied "before a contractual right accrues or a contractual duty arises." Mot. 14. But even assuming that were true, we have not violated any such "contractual obligation," *id.* at 4, because we are not alleging any "billing error" under the PACER fee schedule. We are instead challenging the fee schedule itself. Nor are we alleging that the government has violated any *contractual* duty to ensure that fees charged do not exceed the cost of providing access. Our theory, rather, is that the government has a *statutory* obligation to do so.

The government's contractual-exhaustion argument might make sense in a case alleging a billing error, where the plaintiffs' theory is that the government breached its contractual obligations. In that context, it might very well be reasonable to take the position that, before a party may bring suit based on an alleged violation of a contractual duty, that party must first avail itself of contractual remedies. And indeed, in *Fisher*, the government has pressed an argument of just this stripe. *See* Ex. A, at 7–10. But cut and pasted into *this* case, *see* Mot. 14–15, the argument is not just meritless—it is entirely beside the point.[2]

At any rate, it would be a fool's errand to force the plaintiffs in this case to first bring their claims to the attention of a customer-service representative at the PACER Service Center. *Cf. McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 675 (1963) (students seeking

[2] This is not to say that we agree with the government's position in *Fisher* that the billing-error-notification provision is in fact a condition precedent to bringing a contractual claim based on a billing error—a claim, once again, that is not at issue here. As the plaintiffs in *Fisher* argue, the notification provision does not use the kind of clear, unambiguous language that is generally necessary to create a condition precedent. Instead, the provision may simply reflect an internal policy encouraging PACER users to call customer service promptly if they want their bill to be fixed administratively (that is, without filing a lawsuit).

school integration need not file complaint with superintendent because exhaustion would be futile where the "Superintendent himself apparently has no power to order corrective action"). Although the government imagines a scenario in which the plaintiffs would "engage in a dialog with those at the PACER Service Center" regarding any "concerns about the accuracy of the PACER bill," *id.* at 15, the plaintiffs do not challenge the "accuracy" of their bill—they challenge the *legality* of it, even if it accurately reflects the fees on the schedule. Even the government does not assert that a call to PACER's customer-service hotline could redress that grievance. Just as a waiter lacks authority to lower menu prices at Ruth's Chris Steakhouse, a representative at the PACER call center lacks authority to overrule a fee schedule adopted by the Administrative Office of the U.S. Courts.

In a last-ditch effort, the government advances a variant of this "exhaustion" requirement at the end of its motion, to no better effect. Again echoing its *Fisher* briefing, it argues (at 16–19) that the plaintiffs have no statutory claim because the remedy is instead provided by PACER's terms and conditions, which "require all claims regarding billing error to be submitted to the PACER Service Center." But to repeat: we are *not* alleging a billing error, so "submitting the requisite paperwork to the PACER Service Center" would accomplish nothing. *Id.* at 17.

CONCLUSION

The government's motion to dismiss should be denied.

Respectfully submitted,

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Attorneys for Plaintiffs

July 29, 2016

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2016, I filed this opposition brief through this Court's CM/ECF system, and that all parties required to be served have been thereby served.

/s/ Deepak Gupta

Deepak Gupta

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 16-745 ESH
UNITED STATES OF AMERICA,	)	
Defendant.	)	

REPLY IN SUPPORT OF MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendant has filed a Motion To Dismiss Or, In The Alternative, For Summary Judgment. Plaintiffs' Opposition does not provide any proper basis to deny the motion.

Plaintiffs assert that this action should not be dismissed under the "first to file rule" because, in Plaintiffs' opinion, the Fisher case[1] "is nothing like this one." Plaintiffs' Opposition To The Government's Motion To Dismiss ("Pl. Opp.") at 2. In fact, as Plaintiffs have pointed out, the successful motion in the earlier District Court action was adopted largely verbatim in pressing Defendant's dispositive motion here. (See Pl. Opp. at 1 and Exh. A). That is precisely because this case and the Fisher the case are

[1] Fisher v. United States, No. 15-1575C (Fed. Cl).

so similar. A non-exhaustive list of issues common to both cases would include the following:

- What did the government charge PACER users in the last six years?
- Which PACER users were among those who were charged for the PACER downloads, given the avenues to receive free downloads?
- What should the government have charged the PACER users for PACER downloads under the E-Government Act?
- If PACER users were overcharged, were they required to first present the overcharges to the PACER Service Center within 90 days, as they agreed?
- If PACER users were overcharged, by what amount were they overcharged?
- Which PACER users over the past six years have presented their claimed overcharges to the PACER Service Center, as they agreed to do?
- Of the PACER users that presented their claims to the PACER Service Center, which were denied, and which received, relief?
- Whether the Plaintiffs (who have relied on the E-Government Act) have alleged a statutory remedy that supports an illegal exaction claim?

See Defendant's Statement Of Material Facts As To Which There Is No Genuine Issue ("Def. SMF") ¶¶ 1-6; Def. Exhibit 2 (Fisher Complaint) (ECF No. 11-1); Pl. Exhibit A (Fisher Motion To Dismiss) (ECF No. 15-1). In addition, if, as Plaintiffs appear to allege, the government is only able to charge for the actual cost of providing

the information downloaded through PACER, this Court would have to address how much those costs would be affected by any change in what can be collected for PACER Docket sheets as a result of a judgment in the Fisher case. This confluence of issues, despite Plaintiffs' bald assertion to the contrary (see Pl. Opp. at 3) should make clear that both actions involve the same facts.

Plaintiffs also assert that the parties are different in both actions. Pl. Opp. at 3. Perhaps the named parties currently differ, but if, as Plaintiffs seek, the class includes all PACER users who paid a fee during the relevant period and do not opt out, it would, of necessity, include Mr. Fisher unless and until he opts out. Fisher Amended Complaint (Pl. Exhibit C, ECF No. 15-3), ¶¶ 7, 30-32, 41.

Plaintiffs argue that the Fisher class action involves a narrower issue, an overcharge for printing the PACER Docket sheets in excess of 850 characters. Pl. Opp. at 2. Plaintiffs do not assert that the potential members of the class in this case (all who "have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government", see Complaint, ¶ 27, have not, within that six-year period, downloaded at least one PACER Docket sheet with a caption over 850 characters, the basis for at least part of the claims in Fisher. See Pl. Opp.

at 2.[2] Thus, likely every member of this purported class would also be a potential member of the Fisher class action, if certified.

Accordingly, Plaintiffs who downloaded a PACER Docket Sheet of typical length would be allowed, under Plaintiffs' theory, to proceed in two separate federal court actions to recover for alleged overbilling for the same docket sheet(s). This is not likely to lead to the efficiency sought in class action litigation. See Fed. R. Civ. P. 23(b).

Plaintiffs argue that the cases are completely distinct and that they do not need to first seek to resolve their billing issues with the PACER Service Center, despite their admitted agreement to do so (see Def. SMF, ¶ 6),[3] because they are not suing over a "billing error". Pl Opp. at 2-4. First, the agreement was "to alert the PACER Service Center to any errors in billing within 90 days of the date of the bill." Def. SMF, ¶ 6. Plaintiffs' effort to couch their claim that they were overcharged on the bills as something other than

[2] For comparison purposes, counsel undertook to count the characters in the PACER caption from this case (copy attached), a relatively typical caption. The number of characters counted was 1476. Counsel notes that these are the characters printed in a PACER docket sheet. The calculation of the cost for a Docket sheet is based on the bytes of data extracted. See Fisher Amended Complaint, ¶ 23.

[3] Plaintiffs have not addressed the facts proffered by Defendant in Defendant's Statement of Material Facts As To Which There Is No Genuine Issue. Accordingly, as described further below, those facts should be deemed admitted. See Local Civ. R. 7(h)(1).

an "error in billing" is weak, at best. Consider, for example, their analogy to a patron in a restaurant over-billed for wine. Pl. Opp. at 1-2. Would not that patron feel that, whatever the reason he was overcharged for the wine, it was an "error"? And given that the "error" was on the "bill", would it not be readily, and accurately, described by any patron as an "error in billing"? The PACER Service Center addresses and resolves many issues brought to it, even if those issues can easily be described as not even truly "errors." They would typically refer to such resolutions, where despite the absence of an actual error on the part of the PACER system, a user is nonetheless still provided a refund, as a "courtesy." Second Declaration of Anna Garcia, ¶¶3-11. Plaintiffs' effort to describe the bills that they have received (and paid) in excess of what is allowable, would seem to fit nicely into the category of an claim of an "error in billing." See Webster's II New Riverside University Dictionary (1994) Definition of "error" ("1. An act, assertion, or belief that unintentionally deviates from what is correctly, right, or true. 2. The state of having false knowledge. 3. A deviation from an accepted code of behavior. 4. A mistake. 5. The difference between a computed or measured value and a correct value...").

Plaintiffs have made no effort to address the claim made in support of Defendant's dispositive motion that they have not alleged

a statutory remedy that supports an illegal extraction claim. Def. Mem. at 15-19. Arguments not made in the District Court are deemed waived. See F.T.C. v. Boehringer Ingelheim Pharmaceuticals, Inc., 778 F.3d 142, 158 n.5 (D.C. Cir. 2015); Marymount Hosp., Inc. v. Shalala, 19 F.3d 658 (D.C. Cir. 1994). See also Zolfaghari v. Sheikholeslami, 943 F.2d 451 (4th Cir. 1991). Indeed, as the Court of Appeals has reiterated this general proposition that issues not raised before the district court are usually considered to have been waived on appeal. Kingman Park Civil Association v. Williams, 348 F.3d 1033, 1039 (D.C. Cir. 2003); see also Whelan v. Abell, 48 F.3d 1247, 1253 (D.C. Cir. 1995) (citing Kattan by Thomas v. District of Columbia, 995 F.2d 274, 276 (D.C. Cir. 1993)); Yee v. City of Escondito, 503 U.S. 519, 533 (1992). Here, Plaintiff does not contest either the factual assertions made by the Defendant or the argument that Plaintiffs have failed to identify an applicable statute to support their unlawful exaction claim .

Because Plaintiff has failed to respond properly to Defendant's Statement of Material Facts with any citation to record evidence, in contravention of Local Civil Rule 7(h)(1), the Court may treat the proffered statements as established for purposes of summary judgment. See Local Civ. R. 7(h); Fed. R. Civ. P. 56(e)(2); McCauley v. Salazar, 38 F.Supp.3d 35, 38-39 (D.D.C. 2014).

In McCauley, the Court properly observed:

> Under Rule 56(a), "the court shall grant summary judgment" where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (emphasis added). The court must "state on the record the reasons for granting or denying the motion." Id. A nonmoving party's complete failure to come forward with evidence to demonstrate the existence of a genuine issue of material fact constitutes a "reason" for the grant of summary judgment. See Fed. R. Civ. P. 56(a); see also Grimes v. District of Columbia, 923 F.Supp.2d 196, 198 (D.D.C. 2013).

McCauley v. Salazar, 38 F.Supp.3d at 38-39; see also Local Civ. R. 7(h). Given that Plaintiffs have failed to demonstrate the existence of a genuine dispute of material fact or to meaningfully contest Defendant's motion, Defendant is entitled to judgment as a matter of law and the Court should grant summary judgment to Defendant. See id.; Bruder v. Chu, 953 F. Supp. 2d 234, 236 (D.D.C. 2013).

For these reasons, and those previously set forth in support of Defendant's Motion To Dismiss Or, In The Alternative, For Summary

Judgment, this action should be dismissed or summary judgment entered in favor of Defendant.

Respectfully submitted,

CHANNING D. PHILLIPS, DC Bar #415793
United States Attorney

DANIEL F. VAN HORN, DC Bar #924092
Chief, Civil Division

By: /s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Reply In Support Of Motion To Dismiss Or, In The Alternative, For Summary Judgment, has been made through the Court's electronic transmission facilities on this 16th day of August, 2016.

/s/

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 16-745 (ESH)

ORDER

Having considered defendant's motion to dismiss the complaint or, in the alternative, for summary judgment [ECF No. 11], for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendant's motion is **DENIED**.

/s/ *Ellen Segal Huvelle*
ELLEN SEGAL HUVELLE
United States District Judge

Date: December 5, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 16-745 (ESH)

MEMORANDUM OPINION

Plaintiffs, organizations and individuals who have paid fees to obtain records through the Public Access to Court Electronic Records system (PACER), claim that PACER's fee schedule is higher than necessary to cover the costs of operating PACER and therefore violates the E-Government Act of 2002, Pub. L. No. 107-347, § 205(e), 116 Stat. 2899, 2915 (codified as 28 U.S.C § 1913 note). (Compl. at 2, ECF No. 1.) They have brought this class action suit against the United States under the Little Tucker Act, 28 U.S.C. § 1346(a), to recover the allegedly excessive fees that they have paid over the last six years. (*Id.* at 14-15, ¶¶ 33-34.) Defendant has moved to dismiss the suit under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), claiming that it is barred by the first-to-file rule and does not state a claim within this Court's jurisdiction under the Little Tucker Act. (Def.'s Mot. Dismiss, ECF. No. 11; *see also* Pls.' Opp., ECF No. 15; Def.'s Reply, ECF No. 20.) For the reasons herein, the Court will deny the motion.[1]

[1] Defendant has also moved for summary judgment, but it has not offered any grounds upon which summary judgment should be granted if the motion to dismiss is denied. (*See* Def.'s Mot. at 1, 19.) Therefore, the Court will deny defendant's unsupported motion for summary judgment.

BACKGROUND

According to plaintiffs, "PACER is a decentralized system of electronic judicial-records databases" operated by the Administrative Office for the U.S. Courts ("AO"). (Compl. at 1, ¶ 7.) "Any person may access records through PACER" but "must first agree to pay a specific fee." (*Id.* at ¶ 7.) Congress has authorized the Judicial Conference that it "may, only to the extent necessary, prescribe reasonable fees . . . for access to information available through automatic data processing equipment." 28 U.S.C. § 1913 note. The fees "shall be deposited as offsetting collections . . . to reimburse expenses incurred in providing these services." *Id.*

Plaintiffs allege that the fee was $.07 per page in 1998, with a maximum of $2.10 per request introduced in 2002. (Compl. at ¶ 8.) The AO increased the fee to $.08 per page in 2005 and to $.10 per page in 2012. (*Id.* at ¶¶ 13, 19.) The current fee is $.10 per page, with a maximum of $3.00 per record. (*Id.* at ¶ 7.) Plaintiffs claim that these fees are "far more than necessary to recover the cost of providing access to electronic records." (*Id.* at ¶ 9.) For example, in 2012 the judiciary spent $12.1 million generated from public access receipts on the public access system, while it spent more than $28.9 million of the receipts on courtroom technology. (*Id.* at ¶ 20.) "In 2014 . . . the judiciary collected more than $145 million in fees, much of which was earmarked for other purposes such as courtroom technology, websites for jurors, and bankruptcy notification systems." (*Id.* at ¶ 21.)

Named plaintiffs are nonprofit organizations that have incurred fees for downloading records from PACER. (Compl. at ¶¶ 1-3.) Plaintiff National Veterans Legal Services Program (NVLSP) "has represented thousands of veterans in individual court cases, educated countless people about veterans-benefits law, and brought numerous class-action lawsuits challenging the legality of rules and policies of the U.S. Department of Veterans Affairs." (*Id.* at ¶ 1.) Plaintiff

National Consumer Law Center (NCLC) conducts "policy analysis, advocacy, litigation, expert-witness services, and training for consumer advocates." (*Id.* at ¶ 2.) Plaintiff Alliance for Justice (AFJ) "is a national association of over 100 public-interest organizations that focus on a broad array of issues" and "works to ensure that the federal judiciary advances core constitutional values, preserves unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans." (*Id.* at ¶ 3.)

Plaintiffs claim that the fees they have been charged violate the E-Government Act because they exceed the cost of providing the records. (Compl. at 2.) Furthermore, they claim that excessive fees have "inhibited public understanding of the courts and thwarted equal access to justice." (*Id.* at 2.) Based on the alleged violation of the E-Government Act, plaintiffs assert that the Little Tucker Act entitles them to a "refund of the excessive PACER fees illegally exacted." (*Id.* at ¶¶ 33-34.) Plaintiffs seek to pursue this claim on behalf of a class of "all individuals and entities who have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government." (*Id.* at ¶ 27.) "Each plaintiff and putative class member has multiple individual illegal-exaction claims against the United States, none of which exceeds $10,000." (*Id.* at ¶ 5.)

ANALYSIS

Defendant seeks dismissal of plaintiffs' complaint on two grounds. First, defendant argues that this suit is barred because a similar suit was filed first in the Court of Federal Claims. Second, it argues that plaintiffs have failed to state a claim under the Little Tucker Act because they did not first present their challenge to the PACER Service Center. The Court rejects both arguments.

I. LEGAL STANDARDS

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In ruling on a 12(b)(6) motion, a court may consider the complaint, documents incorporated in the complaint, and matters of which courts may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). To survive a motion to dismiss under Rule 12(b)(1), plaintiffs bear the burden of demonstrating that the Court has subject-matter jurisdiction, and the Court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992); *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993).

II. FIRST-TO-FILE RULE

Under the "first-to-file rule," "when two cases are the same or very similar, efficiency concerns dictate that only one court decide both cases." *In re Telebrands Corp.*, 824 F.3d 982, 984 (Fed. Cir. 2016); *see also UtahAmerican Energy, Inc. v. Dep't of Labor*, 685 F.3d 1118, 1124 (D.C. Cir. 2012) ("[W]here two cases between the same parties on the same cause of action are commenced in two different Federal courts, the one which is commenced first is to be allowed to proceed to its conclusion first." (quoting *Wash. Metro. Area Transit Auth. v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980))).[2] The rule reflects concerns that "district courts

[2] The Federal Circuit has exclusive jurisdiction over appeals from Little Tucker Act suits, and therefore, the law of the Federal Circuit applies to both the merits of those cases and related procedural issues. 28 U.S.C. § 1295(a)(2); *Chrysler Motors Corp. v. Auto Body Panels of Ohio, Inc.*, 908 F.2d 951, 952-53 (Fed. Cir. 1990); *United States v. One (1) 1979 Cadillac Coupe De Ville VIN 6D4799266999*, 833 F.2d 994, 997 (Fed. Cir. 1987). Here, the Court would reach the same result on the first-to-file issue under either the Federal Circuit's or the D.C. Circuit's law.

would be required to duplicate their efforts" and "twin claims could generate contradictory results." *UtahAmerican*, 685 F.3d at 1124. A judge considering a first-to-file challenge to a suit that was filed second and that raises different claims from the first suit should determine "whether the facts and issues 'substantially overlap.'" *Telebrands*, 824 F.3d at 984-85.

Defendant contends that this suit is barred by *Fisher v. United States*, No. 15-1575C, 2016 WL 5362927 (Fed. Cl. Sept. 26, 2016). According to defendant, both this case and *Fisher* "involve allegations that the same entities utilized the PACER System and were charged more for downloading information than is authorized by the same statutes and agreements." (Def.'s Mot. at 13.) Furthermore, defendant asserts that "[t]he class here would include nearly every class member in *Fisher*." (*Id.*) Plaintiffs respond that "plaintiff in *Fisher* challenges a particular aspect of the formula that PACER uses to convert docket reports to billable pages" but he "does *not* . . . challenge the PACER fee schedule itself, as our case does." (Pls.' Opp. at 2.)

The Court agrees that the first-to-file rule does not apply here. According to the class action complaint in *Fisher*, "PACER claims to charge users $0.10 for each page in a docket report" and calculates pages by equating 4,320 extracted bytes to one page, thus "purporting to charge users $0.10 per 4,320 bytes. But the PACER system actually miscalculates the number of extracted bytes in a docket report, resulting in an overcharge to users." First Am. Class Action Compl. at ¶¶ 2, 37, *Fisher v. United States*, No. 15-1575C (Fed. Cl. May 12, 2016), ECF No. 8. In their illegal exaction claim, the *Fisher* plaintiffs assert that "[t]he Electronic Public Access Fee Schedule only authorizes fees of $0.10 per page," but "[b]y miscalculating the number of bytes in a page, the AO collected charges from Plaintiff and the Class in excess of $0.10 per page . . . ." *Id.* at ¶¶ 73-74. In other words, *Fisher* claims an *error in the application* of the PACER fee schedule to a particular type of request. In contrast, plaintiffs here challenge the

legality of the fee schedule. (Compl. at 2.) These are separate issues, and a finding of liability in one case would have no impact on liability in the other case. Therefore, the Court will not dismiss the suit based on the first-to-file rule.

III. FAILURE TO STATE A LITTLE TUCKER ACT CLAIM

The Little Tucker Act gives district courts jurisdiction over a "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1346(a)(2). Interpreting the identical wording of the Tucker Act, which applies to claims that exceed $10,000, the Federal Circuit has held that a plaintiff can "recover an illegal exaction by government officials when the exaction is based on an asserted statutory power" and "was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)); *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005). The statute causing the exaction must also provide "either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" *Norman*, 429 F.3d at 1095 (quoting *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed.Cir.2000)); *see also N. Cal. Power Agency v. United States*, 122 Fed. Cl. 111, 116 (2015).

According to defendant, plaintiffs have failed to state a claim under the Little Tucker Act and that failure warrants dismissal under Federal Rules of Civil Procedure 12(b)(6) and also 12(b)(1), because the Little Tucker Act is the source of the Court's jurisdiction. (Def.'s Mot. at 1, 16 n.6.) Defendant asks this Court to take judicial notice of the fact that users cannot obtain a

PACER account without agreeing to the PACER policies and procedures, which include a statement that users "must alert the PACER Service Center to any errors in billing within 90 days of the date of the bill." (*Id.* at 10, 13.) On the basis of this policy, defendant argues that (1) plaintiffs have not performed a condition precedent in the contract, which is akin to an administrative exhaustion requirement, and (2) plaintiffs have no statutory remedy when they have failed to fulfill the contractual condition. (Def.'s Mot. at 13-19.) Plaintiffs do not dispute the PACER policy statement or object to this Court's taking judicial notice of it, but they argue that the statement is irrelevant because they are not claiming a billing error. (Pls.' Opp. at 4-5.)

The court in *Fisher* has already rejected defendant's arguments that the PACER notification requirement is a contractual condition or creates an administrative exhaustion requirement. *Fisher*, 2016 WL 5362927, at *3, *5-*6 (reasoning that contractual conditions must be expressly stated in conditional language and that there can be no administrative exhaustion requirement unless the suggested administrative proceeding involves some adversarial process). This Court need not reach those legal issues because, unlike *Fisher*, plaintiffs here do not claim a billing error. Therefore, even if the notification requirement constituted a contractual condition, it would not apply to the plaintiffs' challenges to the legality of the fee schedule. Likewise, even if users were required to exhaust their claims for billing errors, that requirement would not apply to the claim in this case. In sum, the PACER policy statement provides no basis for dismissing this suit.

CONCLUSION

For the reasons discussed above, defendant's motion to dismiss or, in the alternative, for summary judgment is denied. A separate Order accompanies this Memorandum Opinion.

/s/ *Ellen Segal Huvelle*
ELLEN SEGAL HUVELLE
United States District Judge

Date: December 5, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745

DECLARATION OF DANIEL L. GOLDBERG

I, Daniel L. Goldberg, declare as follows:

1. I am the Legal Director of the Alliance for Justice (AFJ), a national association of over 100 public-interest organizations that focus on a broad array of issues—including civil rights, human rights, women's rights, children's rights, consumer rights, and ensuring legal representation for all Americans. On behalf of these groups and the public-interest community, AFJ works to ensure that the federal judiciary advances core constitutional values, preserves unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans.

2. AFJ has paid at least $391.40 in fees to the PACER Service Center to obtain public court records within the past six years. AFJ has never sought exemptions from PACER fees at any time during the class period given the financial-hardship and other requirements that would have applied. In 2015, AFJ's annual revenues were $4.02 million, our expenses were $4.50 million, and our net assets were $4.36 million.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

/s/ Daniel L. Goldberg

Executed on January 19, 2017.

Daniel L. Goldberg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745

DECLARATION OF STUART ROSSMAN

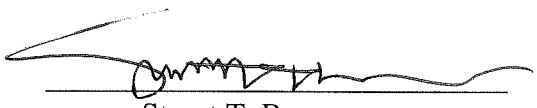
I, Stuart T. Rossman, declare as follows:

1. I am the Litigation Director of the National Consumer Law Center (NCLC), a national nonprofit organization that seeks to achieve consumer justice and economic security for low-income and other disadvantaged Americans. NCLC pursues these goals through policy analysis, advocacy, litigation, expert-witness services, and training for consumer advocates throughout the nation.

2. In the course of its research, litigation, and other activities, NCLC has paid at least $5,863.92 in fees to the PACER Service Center to obtain public court records within the past six years. NCLC has never sought exemptions from PACER fees at any time during the class period given the financial-hardship and other requirements that would have applied. In 2015, NCLC's annual revenues were $11.49 million, our expenses were $11.72 million, and our net assets were $17.97 million.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on January 19, 2017.



Stuart T. Rossman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745

DECLARATION OF BARTON F. STICHMAN

I, Barton F. Stichman, declare as follows:

1. I am Joint Executive Director of the National Veterans Legal Services Program (NVLSP), a nonprofit organization that seeks to ensure that American veterans and active-duty personnel receive the full benefits to which they are entitled for disabilities resulting from their military service. Over the years, the organization has represented thousands of veterans in court cases, educated countless people about veterans-benefits law, and brought numerous class-action lawsuits challenging the legality of rules and policies of the U.S. Department of Veterans Affairs.

2. In 2016, NVLSP paid $317 in fees to the PACER Service Center to obtain public court records. I estimate that we paid similar amounts annually over the past six years. NVLSP has never sought exemptions from PACER fees during the class period given the financial-hardship requirements that would have applied. In 2014, NVLSP had revenues of $3.75 million, expenses of $3.72 million, and net assets of $3.86 million.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on January 19, 2017.

Barton F. Stichman

ES AND GENERAL GOVERNMENT APPROPRIATIONS FOR 2016

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS

ANDER CRENSHAW, Florida, *Chairman*

TOM GRAVES, Georgia
KEVIN YODER, Kansas
STEVE WOMACK, Arkansas
JAIME HERRERA BEUTLER, Washington
MARK E. AMODEI, Nevada
E. SCOTT RIGELL, Virginia
JOSÉ E. SERRANO, New York
MIKE QUIGLEY, Illinois
CHAKA FATTAH, Pennsylvania
SANFORD D. BISHOP, JR., Georgia

NOTE: Under Committee Rules, Mr. Rogers, as Chairman of the Full Committee, and Mrs. Lowey, as Ranking Minority Member of the Full Committee, are authorized to sit as Members of all Subcommittees.

WINNIE CHANG, KELLY HITCHCOCK,
ARIANA SARAR, and AMY CUSHING,
Subcommittee Staff

PART 2

FY 2016 BUDGET JUSTIFICATIONS

Printed for the use of the Committee on Appropriations

APPENDIX 2 - ELECTRONIC PUBLIC ACCESS PROGRAM

ELECTRONIC PUBLIC ACCESS PROGRAM

GENERAL STATEMENT AND INFORMATION

The Electronic Public Access (EPA) program provides electronic public access to court information in accordance with federal statutes, judiciary policies, and user needs. The Internet-based Public Access to Court Electronic Records (PACER) service provides courts, litigants, and the public with access to court dockets, case reports, and over 500 million documents filed with the courts through the Case Management/Electronic Case Files (CM/ECF) system. In other words, PACER is a portal to CM/ECF, which is in turn integral to public access. In fiscal year 2014 alone, PACER processed over 500 million requests for information.

Currently, there are more than 1.8 million PACER user accounts; approximately one-third of all user accounts are active in a given year. Besides court staff, users include members of the bar, city, state and federal employees, and the general public. The biggest user is the Department of Justice. Other than the Department of Justice, the top 10 users are major commercial enterprises or financial institutions. During fiscal year 2014, the judiciary's PACER Service Center established over 186,000 new PACER accounts and responded to more than 223,000 telephone and email requests.

Pursuant to Congressional directives, the Electronic Public Access program is funded entirely through user fees set by the Judicial Conference of the United States. Fees are deposited in a special account in the U.S. Treasury and are then used by the Judicial Conference exclusively to fund the entire cost of the judiciary's public access program, including telecommunications, replication, and archiving expenses, the Case Management/Electronic Case Files system, electronic bankruptcy noticing, Violent Crime Control Act Notification, on-line juror services, and the courtroom technology program.

User fees are expected to total $145 million in fiscal year 2016. Of these fees, the vast majority, approximately 70 percent of revenue, is attributable to less than 1 percent of "power-users." which are almost exclusively comprised of financial institutions or other major commercial enterprises which collect massive amounts of data for aggregation and resale. There are no added fees to attorneys or parties for filing documents over the Internet using CM/ECF.

Over the past year, the judiciary has continued to work to achieve further savings in the area of bankruptcy noticing by encouraging the courts to use electronic noticing, which includes noticing debtors electronically. Electronic Bankruptcy Noticing (EBN) now accounts for 38 percent of the notices distributed by the Bankruptcy Noticing Center (BNC), up from 35.8 percent last year. All bankruptcy courts use the BNC, which transmitted 109.3 million notices in fiscal year 2014, with annual cost-savings of close to $10 million resulting from the EBN program.

The judiciary continues to seek to improve electronic public access to its records, and a number of initiatives have been put into place to broaden public access, including:

- *Opinion Initiative.* In September 2012, the Judicial Conference of the United States approved national implementation of the program to provide access to court opinions via the Government Printing Office's Federal Digital System (FDSys) and agreed to encourage all courts, at the discretion of the chief judge, to participate in the program. Ninety-five courts are live, with over 1.19 million individual court opinions available on FDSys. This has proven to be extremely popular with the public. Federal court opinions are one of the most utilized collections on FDSys, which includes the Federal Register and Congressional bills and reports. FDSys is available free of charge via the Internet at www.gpo.gov.

- *Notification of Case Activity.* All appellate courts, 64 district courts, and 89 bankruptcy courts have implemented an Internet tool, RSS, to "push" notification of docket activity to the public free of charge, much like a Congressional committee might notify its RSS users of press releases, hearings, or markups. The public can easily stay informed of new case openings, filings and docketed events provided by a court's RSS feed. The RSS feed includes automatic notification of activity in all cases including summarized text, such as the name of the document filed, with links to the document and docket in PACER.

- *Violent Crime Control Act Notification.* Ninety-four districts have implemented the Law Enforcement Notification System (LENS). LENS is a web-based system used to provide law enforcement with information on offenders in accordance with the Violent Crime Control and Law Enforcement Act of 1994. The information transmitted includes a photo of the offender, up-to-date contact information, and all other information the Act requires. Law enforcement agencies that are enrolled in LENS automatically receive the new information on offenders for their use.

- *Debtor Electronic Bankruptcy Noticing.* The judiciary has established a new program, known as Debtor Electronic Bankruptcy Noticing (DeBN), specifically for debtors to receive court notices and orders electronically upon request. The DeBN program has been piloted by five bankruptcy courts and will be made available for use by all bankruptcy courts during fiscal year 2015.

CM/ECF revolutionized the way federal courts and the bar manage cases and documents. The transition to a Next Generation of CM/ECF is well underway. The requirements-gathering phase of the project concluded in March 2012, as groups of judges, chambers staff, clerks, court staff and Administrative Office staff identified and prioritized hundreds of functional requirements. The project also received input from the bar, academia, government agencies, and others through interviews, focus groups and surveys of approximately 10,000 of the judiciary s stakeholders. The project is in the design and development phase. The first Next Generation release was implemented in the Second and Ninth Circuit Courts of Appeals in the fall of 2014. This will be followed by full transition over several years. The goals of the project include: improving efficiency and integration among the appellate, district, and bankruptcy systems; achieving greater consistency, especially for

external users; collecting more case-related statistics; and sharing data with other judiciary systems.

Obligations of Funds from Electronic Public Access Receipts

Funds from the EPA receipts fund operations, maintenance, and improvements in EPA programs. The table on page 2.4, which breaks out obligations by program and year, reflects increases in several program components.

For fiscal year 2016, revenue is projected to total $145 million. Total revenue for fiscal year 2014 totaled $144 million, and revenue is estimated at $145 million in fiscal year 2015. From fiscal year 2007 to fiscal year 2013, PACER revenue more than doubled, growing from $65 million to $147 million, with the majority of revenue coming from major commercial enterprises and financial institutions. Beginning in fiscal year 2014, there has been a decline in new registrations and a clear leveling off in usage and revenue. This decline is fueled, in part, by the decline in bankruptcy filings.

Table A-2.1 Utilization of Electronic Public Access Receipts & Prior Year Recoveries ($000)

Category	FY 2014 Actual	FY 2015 Plan 1/	FY 2016 Request
Public Access Services	15,500	25,950	22,640
CM/ECF Development, Operations, and Maintenance	39,246	36,573	36,189
Courtroom Technology	26,064	26,622	26,962
Communications Infrastructure, Services, and Security	38,310	43,110	39,648
Electronic Bankruptcy Noticing	10,005	9,906	7,934
Allotments to the Courts	10,754	13,210	12,545
Web-based Juror Services	2,451	2,033	1,911
Violent Crime Control Act Notification	475	509	457
TOTAL	**142,805**	**157,913**	**148,286**

1/ Excludes $26.8 million in encumbered carryforward (slippage).

Appendix 2.4

FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS FOR 2014

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS

ANDER CRENSHAW, Florida, *Chairman*

JO BONNER, Alabama
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TOM GRAVES, Georgia
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JAIME HERRERA BEUTLER, Washington
JOSÉ E. SERRANO, New York
MIKE QUIGLEY, Illinois
MARCY KAPTUR, Ohio
ED PASTOR, Arizona

NOTE: Under Committee Rules, Mr. Rogers, as Chairman of the Full Committee, and Mrs. Lowey, as Ranking Minority Member of the Full Committee, are authorized to sit as Members of all Subcommittees.

JOHN MARTENS, WINNIE CHANG, KELLY HITCHCOCK, ARIANA SARAR, and AMY CUSHING,
Subcommittee Staff

PART 2

FY 2014 BUDGET JUSTIFICATIONS

Printed for the use of the Committee on Appropriations

APPENDIX 2 - ELECTRONIC PUBLIC ACCESS PROGRAM

ELECTRONIC PUBLIC ACCESS PROGRAM

GENERAL STATEMENT AND INFORMATION

The Electronic Public Access (EPA) program provides electronic public access to court information in accordance with federal statutes, judiciary policies, and user needs. The Internet-based Public Access to Court Electronic Records (PACER) service provides courts, litigants, and the public with access to court dockets, case reports, and over 500 million documents filed with the courts through the Case Management/Electronic Case Files (CM/ECF) system. In other words, PACER is a portal to CM/ECF, which is in turn integral to public access. In fiscal year 2012 alone, PACER processed over 500 million requests for information.

Currently, there are more than 1.5 million user accounts; approximately one-third of all user accounts are active in a given year. Besides court staff, users include members of the bar, city, state and federal employees, and the general public. The biggest user is the Department of Justice. Other than the Department of Justice, the top 10 users are major commercial enterprises or financial institutions. During fiscal year 2012, the judiciary's PACER Service Center established 160,000 new PACER accounts and responded to more than 220,000 telephone and email requests.

Pursuant to Congressional directives, the Electronic Public Access program is funded entirely through user fees set by the Judicial Conference of the United States. Fees are deposited in a special account in the U.S. Treasury and are then used by the Judicial Conference exclusively to fund the entire cost of the judiciary's public access program, including telecommunications, replication, and archiving expenses, the Case Management/Electronic Case Files system, electronic bankruptcy noticing, Violent Crime Control Act Notification, on-line juror services, and the courtroom technology program. There are no added fees to attorneys or parties for filing documents over the Internet using CM/ECF. Over the past year, the following steps have been taken to contain EPA program costs:

- *Contractor Costs.* Contractor costs have been reduced through two efforts. First, a new contracting vehicle for acquiring information technology services, with lower rates than the previous contract, was established during 2011 for a five year period. Second, the judiciary continues to use court staff on temporary duty assignments, in addition to contractors and government staff, to design and develop the next generation of CM/ECF. Not only has this allowed the judiciary to contain contractor costs, it will result in a better product due to court staff's intimate knowledge of the business processes.

- *Bankruptcy Noticing.* Electronic Bankruptcy Noticing (EBN) now accounts for more than one-third of the notices distributed by the Bankruptcy Noticing Center (BNC). Each electronic notice saves the judiciary 25 cents when compared to the cost of a paper notice, with total savings of $9.4 million in fiscal year 2012. The current BNC projections call for electronic noticing to grow at a rate of 5 percent per year, with a corresponding decrease in paper noticing. Incentives have been built

into the BNC contract to encourage the contractor to promote movement from paper to electronic noticing. All bankruptcy courts use the BNC, which transmitted over 142 million notices in fiscal year 2012.

The judiciary continues to seek to improve electronic public access to its records, and a number of initiatives have been put into place to broaden public access, including:

- *Opinion Initiative.* In September 2012, the Judicial Conference of the United States approved national implementation of the program to provide access to court opinions via the Government Printing Office's Federal Digital System (FDSys) and agreed to encourage all courts, at the discretion of the chief judge, to participate in the program. Twenty-nine courts are live, with over 600,000 individual court opinions available on FDSys. This has proven to be extremely popular with the public. Federal court opinions are one of the most utilized collections on FDSys, which includes the Federal Register and Congressional bills and reports. FDSys is available free of charge via the Internet at www.gpo.gov.

- *Notification of Case Activity.* Approximately 5 appellate courts, 50 district courts, and 80 bankruptcy courts have implemented an Internet tool, RSS, to "push" notification of docket activity to the public free of charge, much like a Congressional committee might notify its RSS users of press releases, hearings, or markups. The public can easily stay informed of new case openings, filings and docketed events provided by a court's RSS feed. The RSS feed includes automatic notification of activity in all cases including summarized text, such as the name of the document filed, with links to the document and docket in PACER.

- *Violent Crime Control Act Notification.* The Law Enforcement Notification System (LENS) has been implemented in 67 districts. LENS is a web-based system used to provide law enforcement with information on offenders in accordance with the Violent Crime Control and Law Enforcement Act of 1994. The information transmitted includes a photo of the offender, up-to-date contact information, and all other information the Act requires. Law enforcement agencies that are enrolled in LENS automatically receive the new information on offenders for their use.

CM/ECF revolutionized the way federal courts and the bar manage cases and documents. The transition to a Next Generation of CM/ECF is well underway. The requirements-gathering phase of the project concluded in March 2012, as groups of judges, chambers staff, clerks, court staff and Administrative Office staff identified and prioritized hundreds of functional requirements. The project also received input from the bar, academia, government agencies, and others through interviews, focus groups and surveys of approximately 10,000 of the judiciary's stakeholders. The project is in the design and development phase. The initial schedule calls for the first Next Generation release to be available to the courts in March 2014, followed by full transition over several years. The goals of the project include: improving efficiency and integration among the appellate, district, and bankruptcy systems; achieving greater consistency, especially for external users; collecting more case-related statistics; and sharing data with other judiciary systems.

While cost containment efforts have made it possible to increase services to the public, in September 2011, the Judicial Conference felt it necessary to authorize an increase in the judiciary's electronic public access fee from $.08 to $.10 per page, which took effect on April 1, 2012. The change is needed to ensure there are sufficient funds to continue to support and improve PACER services, and to develop and implement the next generation of the judiciary's Case Management/Electronic Case Filing system. The fee had not been increased since 2005. The Conference was mindful of the impact such an increase could have on other public entities and on public users accessing the system to obtain information on a particular case. For this reason, local, state, and federal government agencies will be exempt from the increase for three years. Moreover, PACER users who do not accrue charges of more than $15 in a quarterly billing cycle will not be charged a fee. (The previous waiver was $10 per quarter.) The expanded waiver means that approximately 70 percent of all users will still pay no fees. Fee information is published in the Electronic Public Access Fee Schedule, available on www.uscourts.gov.

Obligations of funds from Electronic Public Access Receipts

Funds from the EPA receipts fund operations, maintenance, and improvements in EPA programs. The table on page 2.4, which breaks out obligations by program and year, reflects increases in several program components, as follows:

- *Public Access Services* – The increases in fiscal year 2013 and fiscal year 2014 are mainly due to the replacement of the infrastructure associated with the replication and archiving of the court's electronic case files, which is necessary to ensure that the files are adequately preserved and available to the public.
- *CM/ECF Development, Operations, and Maintenance* – The increases in fiscal year 2013 and fiscal year 2014 are attributable to the design and development of the next generation of CM/ECF, which includes centralizing the court servers.
- *Communications Infrastructure, Services and Security* – Of the increases in fiscal year 2013 and fiscal year 2014, $2.5 million is for expenses associated with security to enhance the protection of the judiciary's websites and case files from external threats. The other driver for the increase is associated with diversifying the network to ensure uninterrupted case filing and public access.
- *Allotments to the Courts* – Of the increases in fiscal year 2013 and fiscal year 2014, $3.5 million is for expenses associated with the court staff on temporary duty assignments for the design and development of the next generation of CM/ECF. Additionally, $20 million will be allotted in fiscal year 2014 so the courts can obtain implementation support locally for the next generation of CM/ECF, which is scheduled for release to the courts in March 2014.

Table A-2.1 Utilization of Electronic Public Access Receipts ($000)

Category	FY 2012 Actual	FY 2013	FY 2014
Public Access Services	12,089	22,610	20,587
CM/ECF Development, Operations, and Maintenance	26,399	38,512	51,930
Courtroom Technology	28,926	31,002	27,537
Communications Infrastructure, Services, and Security	26,581	30,880	40,136
Electronic Bankruptcy Noticing	13,789	12,845	12,615
Allotments to the Courts	10,617	14,098	34,477
Web-based Juror Services	745	2,665	4,003
Violent Crime Control Act Notification	1,031	682	475
TOTAL	**120,177**	**153,294**	**191,760**

The Judiciary

Fiscal Year 2013

Congressional Budget Summary

PREPARED BY
THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS
WASHINGTON, DC
February 2012

APPENDIX 2 - ELECTRONIC PUBLIC ACCESS PROGRAM

ELECTRONIC PUBLIC ACCESS PROGRAM

GENERAL STATEMENT AND INFORMATION

The Electronic Public Access (EPA) program provides electronic public access to court information in accordance with federal statutes and with judiciary policies and user needs. PACER (Public Access to Court Electronic Records) was established in 1988 as a dial-up service. In the last decade, through the implementation of the Case Management/Electronic Case Files (CM/ECF) system, PACER has evolved into an Internet-based service, which provides the courts, litigants, and public with access to court dockets, case reports, and over 500 million documents filed with the courts through CM/ECF. PACER is a portal to CM/ECF, which is in turn integral to public access.

The program has over 1,300,000 registered user accounts of which approximately one-third were active during fiscal year 2011. This is an increase of 160,000 new accounts over fiscal year 2010. Besides court staff, users include members of the bar, city, state and federal employees, and the general public. The biggest user is the Department of Justice. Other than the Department of Justice, the top 10 users are major commercial enterprises or financial institutions. During fiscal year 2011, the judiciary's PACER Service Center established 160,000 new PACER accounts and responded to more than 205,000 telephone and email requests.

Pursuant to Congressional directives, the Electronic Public Access program is funded entirely through user fees set by the Judicial Conference of the United States. Fees are deposited in a special account in the U.S. Treasury and are then used by the Judicial Conference exclusively to fund program expenses and enhancements that increase public access to the courts, including court websites, courtroom technology, web-based juror services, and electronic bankruptcy noticing. In addition, expenses associated with the operation, maintenance, and enhancement of CM/ECF are funded completely from EPA fee revenue, there are no added fees to attorneys or parties for filing documents over the Internet using CM/ECF. Over the past year, the following steps have been taken to contain EPA program costs:

- *Contractor Costs.* Contractor costs have been reduced through two efforts. First, a new contracting vehicle for acquiring information technology services, with lower rates than the previous contract, was established during 2011. Second, the judiciary has used court staff on temporary duty assignments rather than contractors to develop the requirements for the next generation of CM/ECF. Not only has this allowed the judiciary to avoid contractor costs for this task, it has resulted in a better product due to court staff's intimate knowledge of the business processes.

- *Bankruptcy Noticing.* Electronic Bankruptcy Noticing (EBN) currently accounts for 25 percent of the notices distributed by the Bankruptcy Noticing Center (BNC). Each electronic notice saves the judiciary 25 cents when compared to the cost of a paper notice, with total savings of $8 million in fiscal year 2011. The current BNC projections call for electronic noticing to grow at a rate of

5 percent per year, with a corresponding decrease in paper noticing. Incentives have been built into the BNC contract to encourage the contractor to promote movement from paper to electronic noticing. The BNC has undertaken an ongoing effort to identify and eliminate duplicate notices sent to the same email address to hold down costs.

These cost containment efforts allowed the program to improve the PACER service during fiscal year 2011 in the following key areas:

- *Mobile Access to Case Information.* The judiciary launched a new mobile version of the PACER Case Locator. The PACER Case Locator allows searching for court records in all district, bankruptcy, and appellate courts. The Mobile PACER Case Locator is accessible using Apple devices, such as iPads, as well as Android devices Version 2.2 or higher.

- *Training and Education.* The judiciary is working with the Government Printing Office (GPO) and the American Association of Law Libraries to implement an initiative to provide training and education to the public on how to access court records efficiently and effectively. The program was piloted in two libraries during fiscal year 2011, the Library of Congress and the San Bernadino County Law Library, and will be expanded to additional libraries in fiscal year 2012. In conjunction with this initiative, the judiciary has launched a new PACER training site. This allows anyone with an Internet connection to learn how to use PACER free of charge without obtaining a PACER account. The site includes data from real cases, allowing users to become familiar with the type of case information and documents available through PACER.

- *Opinion Pilot Program.* The judiciary also worked with the GPO to make United States court opinions available to the public through GPO's FDsys web site, which provides electronic access to Federal electronic information from all three branches of government. More than 12,000 opinions from three courts were made available in October 2011. Opinions from additional courts will be added during the upcoming fiscal year.

- *eJuror.* The courts are in the process of implement a new jury management system that web based access to jurors. The eJuror component provides jurors with 24-hour access to online information and assistance via the court's website. Prospective jurors have the option to go online to complete qualification questionnaires and other jury forms, query status and reporting information, request excuses and deferments, and complete exit surveys.

Because CM/ECF has served the district and bankruptcy courts well for nearly a decade, the judiciary has launched a project, the Next Generation of CM/ECF, to develop a enhanced successor system that takes advantage of current technology. With the assistance of judges, chambers staff, clerks of court, and clerks' office staff, and other judiciary stakeholders, the Administrative Office has examined court processes and procedures to develop functional requirements for the judiciary's future case management system. In addition, an outreach effort to define the needs of additional stakeholders including those outside the judiciay was conducted, with over 5,000 external CM/ECF users surveyed and more than fifty requirements-gathering sessions held in various meetings throughout the country.

By the end of February 2012, the judiciary will complete the process of defining its requirements for the next generation of CM/ECF, as well as for the electronic public access program reporting functions, and will move into the next stage of the project, designing and programming the system. The Next Generation effort, which is expected to span the next four to six years, will take an transitional approach to providing new functionality for all stakeholders.

While cost containment efforts have made it possible to increase services to the public, in September 2011, the Judicial Conference felt it necessary to authorized an increase in the judiciary's electronic public access fee from $.08 to $.10 per page, which will take effect on April 1, 2012. The change is needed to continue to support and improve PACER services, and to develop and implement the next generation of the judiciary's Case Management/Electronic Case Filing system. The fee has not been increased since 2005. The Conference was mindful of the impact such an increase could have on other public entities and on public users accessing the system to obtain information on a particular case. For this reason, local, state, and federal government agencies will be exempt from the increase for three years. Moreover, PACER users who do not accrue charges of more than $15 in a quarterly billing cycle will not be charged a fee. (The current exemption is $10 per quarter.) The expanded exemption means that 75 to 80 percent of all users will still pay no fees. Fee information is published in the Electronic Public Access Fee Schedule, available on www.uscourts.gov.

Obligations of funds from Electronic Public Access Receipts

Funds from the EPA receipts fund operations, maintenance, and improvements in EPA programs. The table below breaks out obligations by program and year.

Table A-2.1 Utilization of Electronic Public Access Receipts ($000)

Category	FY 2011 Actual	FY 2012	FY 2013
Public Access Services and Applications	18,022	17,075	19,713
CM/ECF Development, Operations, and Maintenance	22,541	34,121	34,470
Courtroom Technology	21,542	31,285	34,518
Telecommunications	23,528	26,648	30,879
Electronic Bankruptcy Noticing	11,904	13,789	13,215
Allotments to the Courts	10,619	12,197	11,793
Web-based Juror Services	0	884	2,536
Violent Crime Control Act Notification	509	1,044	682
TOTAL	**108,665**	**137,043**	**147,806**

FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS FOR 2012

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS

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JO BONNER, Alabama
MARIO DIAZ-BALART, Florida
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STEVE WOMACK, Arkansas
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BARBARA LEE, California
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ED PASTOR, Arizona

NOTE: Under Committee Rules, Mr. Rogers, as Chairman of the Full Committee, and Mr. Dicks, as Ranking Minority Member of the Full Committee, are authorized to sit as Members of all Subcommittees.

JOHN MARTENS, WINNIE CHANG, KELLY SHEA, and ARIANA SARAR,
Subcommittee Staff

PART 2

FY 2012 BUDGET JUSTIFICATIONS

U.S. GOVERNMENT PRINTING OFFICE

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APPENDIX 2 - ELECTRONIC PUBLIC ACCESS PROGRAM

ELECTRONIC PUBLIC ACCESS PROGRAM

GENERAL STATEMENT AND INFORMATION

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The program has over 1,000,000 registered user accounts of which approximately one-third were active during fiscal year 2010. Besides court staff, users include members of the bar; city, state and federal employees, and the general public. The biggest user is the Department of Justice. Other than the Department of Justice, the top 10 users are major commercial enterprises or financial institutions. During fiscal year 2010, PACER Service Center support staff responded to nearly 160,000 calls and 42,000 emails from users. Registered PACER users access court documents from a court's website or the Case Locator (formerly U.S. Party/Case Index). The Case Locator is a PACER tool for locating court records that reside in CM/ECF databases in the U.S. district, bankruptcy, and appellate courts across the country.

Pursuant to Congressional directives, the program is funded entirely through user fees set by the Judicial Conference at $0.08 per page. There is a $2.40 maximum charge for any single document, no matter its length. The fee does not apply to judicial opinions – which are available through PACER free of charge. Certain categories of users may be exempted by the court from paying the fee including parties to a court case who receive a free copy of filings in the case. Also, the fee is waived for usage amounting to less than $10.00 quaterly. In fiscal year 2010, approximately seventy-five percent of PACER users did not pay fees as a result of fee waivers and exemptions. The fees are published in the *Electronic Public Access Fee Schedule*, available on uscourts.gov.

Fees are deposited in a special account in the U.S. Treasury and are then used by the Judicial Conference of the United States exclusively to fund program expenses and enhancements that increase public access to the courts, including court websites and electronic bankruptcy noticing.

In 2010, the judiciary completed a year-long assessment of the program's services. The assessment provides a clearer picture of who uses PACER services and shows that the vast majority of users are satisfied with the value they receive for the fees they pay. Information was gathered through focus groups, interviews, and surveys conducted with the courts, attorneys, litigants, librarians, and other users. In all, over 11,000 PACER users contributed to the assessment and eighty-six percent are satisfied with the services. The findings point to areas that could have a significant impact on user satisfaction. Based on findings from the assessment, in March 2010, a new search tool, the Case Locator, was released, replacing the U.S. Party/Case Index with added search capabilities and a fresh user interface, and in May 2010 the PACER website (pacer.gov) was redesigned to make information about PACER more easily accessible. More

improvements are planned, including a communications campaign to inform users about current and new features and services, a redesign of the PACER invoice, and a new training initiative, in partnership with the Government Printing Office and the American Association of Law Libraries.

In March 2010, based on the results of a pilot program, the Judicial Conference endorsed the digital audio initiative, which enables district and bankruptcy judges to make digital audio files of court hearings publicly available through PACER for a fee of $2.40 per file. To be included, digital audio must be the original method used to take the record. The determination as to which audio files are made available is made by the presiding judge. Seventeen courts are currently implementing the initiative, joining the original seven pilot courts.

In fiscal year 2012, the judiciary plans to use EPA collections to continue PACER operations, to make improvements as identified by the assessment, to operate and maintain the installed CM/ECF systems in the various courts across the country, and to finance other information technology expenses related to public access. CM/ECF is currently operational in all district and bankruptcy courts, all 12 courts of appeals, 5 bankruptcy appellate panels, the Court of International Trade and the Court of Federal Claims. Over 37 million cases are on CM/ECF systems, and more than 400,000 attorneys and others have filed documents over the Internet. The associated expenses are funded completely from EPA fee revenue. Attorneys practicing in courts offering the electronic filing capability are able to file documents directly with the court over the Internet. There are no added fees for filing documents over the Internet using CM/ECF.

Implementation of the judiciary's CM/ECF system began in 2001 in the bankruptcy courts after several years of pilot experiences in the district and bankruptcy courts. Because CM/ECF has served many district and bankruptcy courts well for nearly a decade, many in the court community have begun planning for a successor system. While users benefit significantly from having electronic access to court records, a number of areas have been identified in which enhancements and improvements to CM/ECF could be developed to serve the courts, the litigants, and the judiciary's external stakeholders optimally in the future. These potential improvements include better interfaces with other applications, centralized registration and authentication, fee collection prior to docketing, improved functionality for chambers, incorporation of a calendar system, improved accessibility to data, and better reporting functions.

Currently, the judiciary is defining its requirements for the next generation of CM/ECF as well as for the electronic public access program reporting functions. With the assistance of judges, chambers staff, clerks of court, and clerks' office staff, the Administrative Office is examining court processes and procedures to develop functional requirements for the judiciary's future case management system. The Next Generation effort, which is expected to span the next five years, is also including needs from other stakeholders with a separate group focused on CM/ECF interfaces among the judiciary and non-judiciary stakeholders. The various groups are using the EPA assessment study, interviews, surveys, and national focus group meetings to identify consolidated requirements for CM/ECF Next Generation. The judiciary plans to use EPA fee revenue to fund the Next Generation efforts.

Obligations of funds from Electronic Public Access Receipts

Funds from the EPA receipts fund operations, maintenance, and improvements in EPA programs. The table below breaks out obligations by program and year.

Table A-2.1 Utilization of Electronic Public Access Receipts ($000)

Category	FY 2010 Actual	FY 2011	FY 2012
Public Access Services and Applications	18,768	22,544	22,664
CM/ECF Development, Operations, and Maintenance	23,755	26,570	29,526
Courtroom Technology Allotments for Maintenance/Technology Refreshment	24,732	24,800	24,800
Telecommunications	24,185	23,551	24,103
Electronic Bankruptcy Noticing	9,662	11,904	13,789
Allotments to the Courts	9,429	11,643	12,159
CM/ECF State Feasibility Study	121	0	0
Violent Crime Control Act Notification	333	739	1,044
TOTAL	**110,985**	**121,751**	**128,085**

FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS FOR 2011

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS

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PART 2

FY 2011 BUDGET JUSTIFICATIONS

U S. GOVERNMENT PRINTING OFFICE

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APPENDIX 2 - ELECTRONIC PUBLIC ACCESS PROGRAM

ELECTRONIC PUBLIC ACCESS PROGRAM

GENERAL STATEMENT AND INFORMATION

The Electronic Public Access (EPA) program provides electronic public access to court information in accordance with legislation and with judiciary policies, security requirements and user needs. PACER (Public Access to Court Electronic Records) was established in 1988 as a dial-up service. In the last decade, through the implementation of the Case Management/Electronic Case Files (CM/ECF) system, PACER has evolved into an Internet-based service, which provides the courts, litigants, and public with access to court dockets, case reports, and over 500 million documents filed with the courts through CM/ECF. PACER is a portal to CM/ECF, which is in turn integral to public access.

The program reached a new milestone in registrations last year, surpassing 1,000,000 user accounts. Besides court staff, customers include members of the bar; city, state and federal employees, the general public, as well as major commercial enterprises and financial institutions. During fiscal year 2009, PACER Service Center support staff responded to nearly 150,000 calls and more than 35,000 emails from users. Registered PACER users access court documents from a court's website or the U.S. Party/Case Index (USPCI). The USPCI is a PACER tool for locating court records that reside in CM/ECF databases in the U.S. district, bankruptcy, and appellate courts across the country.

Pursuant to Congressional directives, the program is funded entirely through user fees set by the Judicial Conference at $0.08 per page. There is a $2.40 maximum charge for any single document, no matter its length. The fee does not apply to judicial opinions – which are available through PACER free of charge. Certain categories of users may be exempted by the court from paying the fee including parties to a court case who receive a free copy of filings in the case. Also, the fee is waived for usage amounting to less than $10.00 per year (which translates into access up to 125 pages). The fees are published in the *Electronic Public Access Fee Schedule*, available on uscourts.gov.

In fiscal year 2009, nearly fifty percent of PACER users did not pay fees as a result of fee waivers and exemptions. The biggest user is the Department of Justice at approximately $4 million annually. Other than the Department of Justice, the top 10 customers are major commercial enterprises or financial institutions. Fees are deposited in a special account in the U.S. Treasury and are then used by the Judicial Conference of the United States exclusively to fund program expenses and enhancements that increase public access to the courts, including court websites and courtroom technology.

In 2009, the judiciary commenced a year-long assessment of the program's services and interfaces such as PACER and the USPCI. The goal of the assessment is to identify potential enhancements to existing services and new electronic public access services for the courts, the public, and federal agencies. A contract was awarded and a number of tasks are being performed including:

- a help desk survey to identify satisfaction with PACER Service Center user support;
- an account holder survey to learn more about various categories of users;

- user satisfaction surveys to identify improvements that users are seeking with respect to PACER and the USPCI; and
- as well as interviews and focus group sessions with a broad selection of stakeholders.

In all, over 30,000 PACER users will be invited to contribute to the assessment.

A digital audio pilot project is also in progress in seven courts to upload digital audio files of court hearings to CM/ECF and to make them available to the public through PACER. The presiding judge determines which audio files are made available. Through this pilot, audio files of hearings associated with the major automaker bankruptcies have also been made available. This proved to be particularly popular with the litigants, interested parties, the media, and the public. The Federal Judicial Center is assisting in evaluating the pilot and will provide a report on the costs, benefits, and anticipated usage levels if it were adopted for national implementation.

In fiscal year 2011, the judiciary plans to use EPA collections to continue PACER operations and to operate and maintain the installed CM/ECF systems in the various courts across the country, and to finance other information technology expenses related to public access. CM/ECF is currently operational in all district and bankruptcy courts, all 12 courts of appeals, 5 bankruptcy appellate panels, the Court of International Trade and the Court of Federal Claims. Over 33 million cases are on CM/ECF systems, and more than 400,000 attorneys and others have filed documents over the Internet. The associated expenses are funded completely from EPA fee revenue. Attorneys practicing in courts offering the electronic filing capability are able to file documents directly with the court over the Internet. There are no added fees for filing documents over the Internet using CM/ECF.

Implementation of the judiciary's CM/ECF system began in 2001 in the bankruptcy courts after several years of pilot experiences in the district and bankruptcy courts. Because CM/ECF has served many district and bankruptcy courts well for nearly a decade, many in the court community have begun planning for a successor system. While users benefit significantly from having electronic access to court records, a number of areas have been identified in which enhancements and improvements to CM/ECF could be developed to serve the courts, the litigants, and the judiciary's external stakeholders optimally in the future. These improvements include better interfaces with other applications, centralized registration and authentication, fee collection prior to docketing, improved functionality for chambers, incorporation of a calendar system, improved accessibility to data, and better reporting functions.

Currently, the judiciary is defining its requirements for the next generation of CM/ECF as well as for the electronic public access program reporting functions. With the assistance of judges, chambers staff, clerks of court, and clerks' office staff, the Administrative Office is examining court processes and procedures to develop functional requirements for the judiciary's future case management system. The Next Generation effort, which is expected to span the next five years, is also including needs from other stakeholders with a separate group focused on CM/ECF interfaces among the judiciary and non-judiciary stakeholders. The various groups are using the EPA assessment study, interviews, surveys, and national focus group meetings to identify consolidated requirements for CM/ECF Next Generation. The judiciary plans to use EPA fee revenue to fund the Next Generation efforts.

Court of Appeals for the Federal Circuit

A total of $152,000 is planned for obligation in fiscal year 2010, and an additional $46,000 is planned for obligation in fiscal year 2011. EPA receipts will be used to offset the Court's local CM/ECF and courtroom technology requirements.

Table A-2.1 Utilization of Electronic Public Access Receipts ($000)

Category	FY 2009 Actual	FY 2010	FY 2011
Public Access Services and Applications	16,413	21,938	20,215
CM/ECF Development, Operations, and Maintenance	17,689	27,660	25,416
Courtroom Technology Allotments for Maintenance/Technology Refreshment	24,634	24,800	24,800
Telecommunications	17,365	25,333	23,585
Electronic Bankruptcy Noticing	9,700	9,662	9,662
Allotments to the Courts	8,373	9,680	9,077
CM/ECF State Feasibility Study	159	1,240	0
Web-based Juror Services	260	0	2,179
Violent Crime Control Act Notification	68	855	766
TOTAL	94,661	121,168	115,700

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 16-745 (ESH)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that plaintiffs' motion for class certification [ECF No. 8] is **GRANTED**; and it is further

ORDERED that pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), a class is certified that consists of:

> All individuals and entities who have paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding class counsel in this case and federal government entities.

It is further **ORDERED** that the Court certifies one class claim: that the fees charged for accessing court records through the PACER system are higher than necessary to operate PACER and thus violate the E-Government Act, entitling plaintiffs to monetary relief from the excessive fees under the Little Tucker Act; it is further

ORDERED that Gupta Wessler PLLC and Motley Rice LLC are appointed as co-lead class counsel; and it is further

ORDERED that within 30 days of the date of this Order, the parties shall file an agreed-

upon proposed form of class notice. If the parties cannot agree on a proposed form of class notice, then they shall file separate proposed forms within 20 days of the date of this Order. After a form of class notice has been determined by the Court, class counsel shall ensure that individual notice is provided to all absent class members who can be identified through reasonable efforts using the records maintained by defendant, as required by Fed. R. Civ. P. 23(c)(2), within 90 days of the Court's order approving the form of notice. Class counsel shall pay all costs incurred to provide notice.

It is further **ORDERED** that the parties shall proceed according to the Scheduling Order issued on January 24, 2017.

/s/ *Ellen Segal Huvelle*
ELLEN SEGAL HUVELLE
United States District Judge

Date: January 24, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 16-745 (ESH)

MEMORANDUM OPINION

Plaintiffs, organizations and individuals who have paid fees to obtain records through the Public Access to Court Electronic Records system (PACER), claim that PACER's fee schedule is higher than necessary to cover the costs of operating PACER and therefore violates the E-Government Act of 2002, Pub. L. No. 107-347, § 205(e), 116 Stat. 2899, 2915 (codified as 28 U.S.C § 1913 note). (Compl. at 2, ECF No. 1.) They have brought this class action against the United States under the Little Tucker Act, 28 U.S.C. § 1346(a), to recover the allegedly excessive fees that they have paid over the last six years. (*Id.* at 14-15, ¶¶ 33-34.) Plaintiffs have moved to certify a class of "[a]ll individuals and entities who have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government." (Pls.' Mot. Class Certif., ECF No. 8.) The proposed class representatives are three nonprofit legal advocacy organizations: the National Veterans Legal Services Program, the National Consumer Law Center, and the Alliance for Justice. (*Id.* at 14.) Defendant opposes class certification primarily on the ground that the named plaintiffs are not adequate representatives because they are eligible to apply for PACER fee exemptions, while some other

class members are not. (Def.'s Opp., ECF. No. 13) For the reasons herein, the Court will grant plaintiffs' motion and certify a class under Rule 23(b)(3).

BACKGROUND

PACER is an online electronic records system provided by the Federal Judiciary that allows public access to case and docket information from federal courts. PACER, https://www.pacer.gov (last visited Jan. 23, 2017). Congress has authorized the Judicial Conference that it "may, only to the extent necessary, prescribe reasonable fees . . . for access to information available through automatic data processing equipment." 28 U.S.C. § 1913 note. The fees "shall be deposited as offsetting collections . . . to reimburse expenses incurred in providing these services." *Id.* Plaintiffs allege that the fee to use PACER was $.07 per page in 1998, with a maximum of $2.10 per request introduced in 2002. (Compl. at ¶ 8.) The fee increased to $.08 per page in 2005 and to $.10 per page in 2012. (*Id.* at ¶¶ 13, 19.)

The current PACER fee schedule issued by the Judicial Conference sets forth both the access fees and the conditions for exemption from the fees. *Electronic Public Access Fee Schedule*, PACER, https://www.pacer.gov/documents/epa_feesched.pdf (Effective Dec. 1, 2013). The current fee is $.10 per page, with a maximum of $3.00 per record for case documents but no maximum for transcripts and non-case specific reports. *Id.* There is no fee for access to judicial opinions, for viewing documents at courthouse public access terminals, for any quarterly billing cycle in which a user accrues no more than $15.00 in charges, or for parties and attorneys in a case to receive one free electronic copy of documents filed in that case. *Id.* As a matter of discretion, courts may grant fee exemptions to "indigents, bankruptcy case trustees, *pro bono* attorneys, *pro bono* alternative dispute resolution neutrals, Section 501(c)(3) not-for-profit organizations, and individual researchers associated with educational institutions," but only if

they "have demonstrated that an exemption is necessary in order to avoid unreasonable burdens and to promote public access to information." *Id.* "Courts should not . . . exempt individuals or groups that have the ability to pay the statutorily established access fee." *Id.* "[E]xemptions should be granted as the exception, not the rule," should be granted for a definite period of time, and should be limited in scope. *Id.*

Plaintiffs claim that the fees they have been charged violate the E-Government Act because they are "far more than necessary to recover the cost of providing access to electronic records." (Compl. at 2, ¶ 9.) For example, in 2012 the judiciary spent $12.1 million generated from public access receipts on the public access system, while it spent more than $28.9 million of the receipts on courtroom technology. (*Id.* at ¶ 20.) "In 2014 . . . the judiciary collected more than $145 million in fees, much of which was earmarked for other purposes such as courtroom technology, websites for jurors, and bankruptcy notification systems." (*Id.* at ¶ 21.) Furthermore, plaintiffs claim that excessive fees have "inhibited public understanding of the courts and thwarted equal access to justice." (*Id.* at 2.) Based on the alleged violation of the E-Government Act, plaintiffs assert that the Little Tucker Act entitles them to a "refund of the excessive PACER fees illegally exacted." (*Id.* at ¶¶ 33-34.) "Each plaintiff and putative class member has multiple individual illegal-exaction claims against the United States, none of which exceeds $10,000." (*Id.* at ¶ 5.)

Named plaintiffs are nonprofit organizations that have incurred fees for downloading records from PACER. (Compl. at ¶¶ 1-3.) Plaintiff National Veterans Legal Services Program (NVLSP) "has represented thousands of veterans in individual court cases, educated countless people about veterans-benefits law, and brought numerous class-action lawsuits challenging the legality of rules and policies of the U.S. Department of Veterans Affairs." (*Id.* at ¶ 1; Stichman

Decl. ¶ 1, ECF No. 30.) Plaintiff National Consumer Law Center (NCLC) conducts "policy analysis, advocacy, litigation, expert-witness services, and training for consumer advocates." (Compl. at ¶ 2; Rossman Decl. ¶ 1, ECF No. 29.) Plaintiff Alliance for Justice (AFJ) "is a national association of over 100 public-interest organizations that focus on a broad array of issues" and "works to ensure that the federal judiciary advances core constitutional values, preserves unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans." (Compl. at ¶ 3; Goldberg Decl. ¶ 1, ECF No. 28.)

During the six years covered by this lawsuit, named plaintiffs regularly paid fees to use PACER. NVLSP paid $317 in PACER fees in 2016 and estimates that it has paid similar amounts annually over the past six years. (Stichman Decl. ¶ 2.) NCLC paid at least $5,863 in fees during the past six years. (Rossman Decl. ¶ 2; Mot. Hr'g Tr. 2, Jan. 18, 2017.) AFJ paid at least $391 in fees during the past six years. (Goldberg Decl. ¶ 2; Tr. 3.) None of the three named plaintiffs asked for exemptions from PACER fees, because they could not represent to a court that they were unable to pay the fees. (Tr. 3-4.) The reason for this is that each organization has annual revenue of at least $3 million. (*Id.*; Stichman Decl. ¶ 2; Rossman Decl. ¶ 2; Goldberg Decl. ¶ 2.)

In a prior opinion, this Court denied defendant's motion to dismiss the suit. *See National Veterans Legal Services Program v. United States*, No. 16-cv-745, 2016 WL 7076986 (D.D.C. Dec. 5, 2016). First, the Court held that the first-to-file rule did not bar this suit because it concerns the legality of the PACER fee schedule, whereas the plaintiffs in *Fisher v. United States*, No. 15-1575C (Fed. Cl. May 12, 2016), claim an error in the application of the fee schedule. *Id.* at *3. Second, the Court held that plaintiffs were not required to alert the PACER Service Center about their claims as a prerequisite to bringing suit under the Little Tucker

Act. *Id.*

In the current motion, plaintiffs have asked this Court to certify a class under Rule 23(b)(3) or, in the alternative, 23(b)(1). (Pls.' Mot. at 18.) Their motion proposed a class of "[a]ll individuals and entities who have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government." (*Id.* at 1.) In opposition to class certification, defendant argues that (1) plaintiffs have failed to demonstrate that they satisfy the numerosity requirement, because they have not established the number of users who raised their concerns with the PACER Service Center or the number of potential plaintiffs who are nonprofit organizations; (2) the class representatives fail the typicality and adequacy requirements, because their nonprofit status makes them eligible to request fee exemptions, which not all class members can do; (3) the Court should not allow this suit to proceed as a class action, because it could produce results that conflict with those in *Fisher*; and (4) individual questions predominate, because the Court would need to determine whether each user received free pages in excess of the 30 charged pages, such that the user's per page cost did not violate the E-Government Act. (Def.'s Opp. at 9-22.)

ANALYSIS

I. JURISDICTION

Although defendant has not raised any jurisdictional arguments in its opposition to class certification, courts must assure themselves that they have jurisdiction. Plaintiffs have brought this case under the Little Tucker Act, which gives district courts jurisdiction over a "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any

express or implied contract with the United States." 28 U.S.C. § 1346(a)(2).[1] Interpreting the identical wording of the Tucker Act, which applies to claims that exceed $10,000, the Federal Circuit has held that a plaintiff can "recover an illegal exaction by government officials when the exaction is based on an asserted statutory power" and "was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)); *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005).[2]

In their complaint, plaintiffs request "monetary relief for any PACER fees collected by the defendant in the past six years that are found to exceed the amount authorized by law." (Compl. at 14-15.) A suit in district court under the Little Tucker Act may seek over $10,000 in total monetary relief, as long as the right to compensation arises from separate transactions for which the claims do not individually exceed $10,000. *Am. Airlines, Inc. v. Austin*, 778 F. Supp. 72, 76-77 (D.D.C. 1991); *Alaska Airlines v. Austin*, 801 F. Supp. 760, 762 (D.D.C. 1992), *aff'd*

[1] The Federal Circuit has exclusive jurisdiction over appeals from Little Tucker Act suits, and therefore, the law of the Federal Circuit applies to both the merits of those cases and related procedural issues. 28 U.S.C. § 1295(a)(2); *Chrysler Motors Corp. v. Auto Body Panels of Ohio, Inc.*, 908 F.2d 951, 952-53 (Fed. Cir. 1990); *United States v. One (1) 1979 Cadillac Coupe De Ville VIN 6D4799266999*, 833 F.2d 994, 997 (Fed. Cir. 1987). This Court refers to Federal Circuit precedent when it exists.

[2] For the Court to have jurisdiction over an illegal exaction claim under the Little Tucker Act, the statute causing the exaction must also provide "either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" *Norman*, 429 F.3d at 1095 (quoting *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed.Cir.2000)). The Court of Federal Claims has taken an expansive view of the phrase "necessary implication" because "[o]therwise, the Government could assess any fee or payment it wants from a plaintiff acting under the color of a statute that does not expressly require compensation to the plaintiff for wrongful or illegal action by the Government, and the plaintiff would have no recourse for recouping the money overpaid." *N. Cal. Power Agency v. United States*, 122 Fed. Cl. 111, 116 (2015).

in relevant part by Alaska Airlines, Inc. v. Johnson, 8 F.3d 791, 797 (Fed. Cir. 1993); *United States v. Louisville & Nashville R.R. Co.*, 221 F.2d 698, 701 (6th Cir. 1955). Plaintiffs assert that no class member has a claim exceeding $10,000 for a single PACER transaction, and defendant does not dispute this. (Pls.' Mot. at 11; Tr. 22-23.) Therefore, plaintiffs' monetary claim does not exceed the jurisdictional limitation of the Little Tucker Act.

II. CLASS CERTIFICATION

Rule 23 sets forth two sets of requirements for a suit to be maintained as a class action. Fed. R. Civ. P. 23. First, under Rule 23(a), all class actions must satisfy the four requirements of numerosity, commonality, typicality, and adequacy. Second, the suit must fit into one of the three types of class action outlined in Rule 23(b)(1), (b)(2), and (b)(3). The Court finds that this suit satisfies the 23(a) requirements and that a class should be certified under 23(b)(3).

A. Class Definition

In their motion for class certification, plaintiffs propose a class of "[a]ll individuals and entities who have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government." (Pls.' Mot. at 1.) At the motion hearing, plaintiffs suggested that it would actually only be necessary to exclude federal executive branch agencies, because their concern was that the Justice Department could not both defend the suit and represent executive branch agency plaintiffs. (Tr. 5-7.) The Court shares plaintiffs' concern but finds that the issue is not limited to executive branch agencies. "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516. Many independent agencies lack independent litigating authority and are instead represented by the Justice Department, at least on some issues or in

some courts. *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 Cal. L. Rev. 255, 263-80 (1994); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 799-804 (2013). Some commentators consider independent regulatory commissions and boards to be on the boundary between the executive and legislative branches, and yet the Solicitor General typically controls their litigation before the Supreme Court. Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. Pa. L. Rev. 841, 867, 920-21 (2014). To avoid individualized questions about the litigating authority of federal entities, the Court will exclude from the class all federal government entities, not only executive branch agencies.

For the sake of clarity, the Court will make two additional minor modifications to the proposed class definition before analyzing the requirements of Rule 23. First, the class definition that plaintiffs introduced in their complaint and repeated in their motion for class certification defines the class in terms of those "who have paid fees for the use of PACER within the past six years," but that language is unclear when it is no longer associated with the dated complaint. Thus, the Court will substitute the actual dates for the six-year period ending on the date of the complaint—April 21, 2016. (Compl. at 15.) Second, rather than stating that the definition excludes "class counsel," the Court will state that it excludes "class counsel in this case." Plaintiffs' counsel stated at the motion hearing that they were excluding only themselves, not all PACER users who have acted as counsel in class actions. (*See* Tr. 7.). The modified class definition is: "All individuals and entities who have paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding class counsel in this case and federal government entities."

B. Rule 23(a) Requirements

Under Rule 23(a), a suit may be maintained as a class action "only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). "Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Rather, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.*

1. Numerosity

Plaintiffs claim that the joinder of all members of their proposed class would be impracticable because they estimate that the class contains at least several hundred thousand members. (Pls.' Mot. at 12-13.) Defendant raises two arguments to challenge this contention. First, defendant argues that "[p]laintiffs have failed to establish that there exist sufficient numbers of would-be class members who may pursue viable claims for alleged overpayment of PACER fees, because all PACER users agree that they will raise any concerns with their PACER bills with the PACER Service Center within 90 days of receiving their bills." (Def.'s Opp. at 9.) In denying defendant's motion to dismiss, this Court has already held that plaintiffs were not required to alert the PACER Service Center about their claims as a prerequisite to bringing suit under the Little Tucker Act. *NVLSP*, 2016 WL 7076986, at *3. Therefore, defendant is wrong to count only potential class members who have alerted the PACER Service Center.

Second, defendant argues that "[p]laintiffs are only able adequately to represent the

interests of non-profit PACER users" and "named Plaintiffs have made no attempt to identify the number of non-profit organizations who would share their claims." (Def.'s Opp. at 10.) As defendant's own language suggests, defendant's argument is actually about adequacy of representation, not about numerosity. When the Court reaches the adequacy requirement below, it will address plaintiffs' ability to represent entities other than nonprofit organizations.

Defendant does not dispute that it would be impracticable to join all members of the class that plaintiffs have proposed: "[a]ll individuals and entities who have paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government." (Pls.' Mot. at 1; Def.'s Opp. at 9-10.) In 2012 the Judiciary reported that there were currently more than 1.4 million user accounts, and there had been 325,000 active users in 2009. *Electronic Public Access Program Summary*, PACER (Dec. 2012), https://www.pacer.gov/documents/epasum2012.pdf. Accepting the Judiciary's estimate that approximately 65-75 percent of active users are exempt from fees in at least one quarter during a typical fiscal year, *id.*, there remain a very large number of users paying fees in a typical year. Although the parties have not presented any precise data about the size of the class, there is no question that the class satisfies the numerosity requirement.

2. Commonality

A common question is a question "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. Plaintiffs argue that the two most important questions presented by their suit are common: (1) "Are the fees imposed for PACER access excessive in relation to the cost of providing the access . . . ?" and (2) "[W]hat is the measure of damages for the excessive fees charged?" (Pls.'

Mot. at 13.) Defendant has not argued that plaintiffs' proposed class fails to satisfy the commonality requirement (*see* Def.'s Opp. at 8),[3] and this Court agrees that the legality of the PACER fee schedule and the formula for measuring any damages are common questions.

3. Typicality

A class representative's "'claim is typical if it arises from the same event or practice or course of conduct that gives rise to a claim of another class member's where his or her claims are based on the same legal theory.'" *Bynum v. Dist. of Columbia*, 214 F.R.D. 27, 34 (D.D.C. 2003) (quoting *Stewart v. Rubin*, 948 F. Supp. 1077, 1088 (D.D.C.1996)). A leading treatise on class actions has explained that "typicality focuses on the similarities between the class representative's claims and those of the class while adequacy focuses on evaluating the incentives that might influence the class representative in litigating the action, such as conflicts of interest." William B. Rubenstein, *Newberg on Class Actions* § 3:32 (5th ed. 2016).

According to named plaintiffs, their claims "are typical of the class because they arise from the same course of conduct by the United States (imposing a uniform PACER fee schedule that is higher than necessary to reimburse the cost of providing the service) and are based on the same legal theory (challenging the fees as excessive, in violation of the E-Government Act)." (Pls.' Mot. at 14.). In response, defendant argues that named plaintiffs are "unlike other PACER users, in that they have the ability to request PACER fee exemptions as non-profits." (Def.'s Opp. at 11.) According to defendant, named plaintiffs' claims are not typical because they "appear unwilling to push to reduce those fees beyond the limit that would affect free access to their favored sub-set of PACER users." (*Id.* at 13.)

[3] Defendant stated on the first page of its filing that "Plaintiffs have failed to establish . . . a commonality of claims." (Def.'s Opp. at 1.) However, it omitted commonality from a later list of challenges, *see id.* at 8, and failed to raise any argument about commonality.

Contrary to defendant's argument, plaintiffs satisfy the typicality requirement. Named plaintiffs and all class members are challenging the PACER fee schedule on the theory that it violates the E-Government Act by generating revenue that exceeds the costs of providing PACER. Defendant's objection focuses not on differences between named plaintiffs' claims and those of other class members but on incentives that could affect how named plaintiffs would pursue the litigation. Thus, the Court will address defendant's objection under the rubric of adequacy, which is the crux of defendant's opposition.

4. Adequacy

"'Two criteria for determining the adequacy of representation are generally recognized: 1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel.'" *Twelve John Does v. Dist. of Columbia*, 117 F.3d 571, 575-76 (D.C. Cir. 1997) (quoting *Nat'l Ass'n of Reg'l Med. Programs, Inc. v. Mathews*, 551 F.2d 340, 345 (D.C. Cir. 1976)). Conflicts of interest prevent named plaintiffs from satisfying the adequacy requirement only if they are "fundamental to the suit and . . . go to the heart of the litigation." *Keepseagle v. Vilsack*, 102 F. Supp. 3d 205, 216 (D.D.C. 2015) (quoting *Newberg* § 3:58); *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012). Furthermore, conflicts will not defeat the adequacy requirement if they are speculative or hypothetical. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003). "[P]otential conflicts over the distribution of damages . . . will not bar a finding of adequacy at the class certification stage." *Newberg* § 3:58.

According to defendant, named plaintiffs are not adequate representatives because "[t]heir interests in free PACER access for their favored subset of PACER users diverge from the

interests of those PACER [users] seeking to minimize their costs of PACER use." (Def.'s Opp. at 15.) Defendant argues that named plaintiffs' nonprofit status gives them "the ability to request PACER fee exemptions." (*Id.* at 11.) Defendant further asserts that named plaintiffs are "interest[ed] in free PACER access to their groups of veterans, elderly and low-income consumers, and other public interest organizations of concern to the named Plaintiffs." (*Id.* at 12.) As a result, defendant reasons, "Plaintiffs appear unwilling to push to reduce those fees beyond the limit that would affect free access to their favored sub-set of PACER users." (*Id.* at 13.)

Defendant greatly exaggerates the relevance of named plaintiffs' nonprofit status. It is true that "a court may consider exempting . . . Section 501(c)(3) not-for-profit organizations" from payment of PACER fees. *Electronic Public Access Fee Schedule*. However, the Fee Schedule also instructs courts that applicants must "have demonstrated that an exemption is necessary in order to avoid unreasonable burdens and to promote public access to information." *Id.* "Courts should not . . . exempt individuals or groups that have the ability to pay the statutorily established access fee." *Id.* "[E]xemptions should be granted *as the exception*, not the rule." *Id.* (emphasis added). Courts grant exemptions only for access to their own district's records, and some districts are more willing than others to grant exemptions. *See* Christina L. Boyd & Jacqueline M. Sievert, *Unaccountable Justice? The Decision Making of Magistrate Judges in the Federal District Courts*, 34 Just. Sys. J. 249, 255 & n.1 (2013). This Court has found examples where courts granted exemptions to nonprofit organizations for purposes of litigation, but those organizations had claimed that payment of PACER fees was a financial hardship. *See, e.g.*, Orders Granting Request for Exemption, *PACER Service Center Exemption Requests & Orders*, No. 3:02-mc-00006 (D. Or. 2015), ECF Nos. 33, 35.

Named plaintiffs are not exempt from PACER fees and thus share with the other class members an interest in reducing the fees. The PACER fees that named plaintiffs have paid are low relative to their annual revenue and other costs of litigation. Because of their multimillion dollar annual budgets, named plaintiffs have averred that they cannot represent that they are unable to pay PACER fees, and as a result, they cannot qualify for exemptions. (Tr. 3-4.) Thus, named plaintiffs must pay PACER fees and accordingly have an interest in reducing those fees.

In fact, the nonprofit organizations who are named plaintiffs in this case make particularly good class representatives. They are interested in reducing PACER fees not only for themselves but also for their constituents. As nonprofit organizations, named plaintiffs exist to advocate for consumers, veterans, and other public-interest causes. (Compl. at ¶¶ 1-3.) The Alliance for Justice is an association of over 100 public-interest organizations, many of whom may face the same barriers as named plaintiffs to obtaining fee exemptions. Individual consumers and veterans may be eligible to apply for exemptions if they are indigent. *Electronic Public Access Fee Schedule*. However, courts frequently deny exemptions even to plaintiffs who have *in forma pauperis* status. *See, e.g.*, *Oliva v. Brookwood Coram I, LLC*, No. 14–cv–2513, 2015 WL 1966357, at *2 (E.D.N.Y. April 30, 2015); *Emrit v. Cent. Payment Corp.*, No. 14–cv–00042, 2014 WL 1028388, at *3 (N.D. Cal. Mar. 13, 2014); *Scott v. South Carolina*, Civ. No. 6:08-1684, 2009 WL 750419, at *1-*2 (D.S.C. March 18, 2009). Thus, named plaintiffs have dual incentives to reduce PACER fees, both for themselves and for the constituents that they represent. In addition, "organizational representatives with experience" can "provide more vigilant and consistent representation than individual representatives." *In re Pharm. Indus. Average Wholesale Price Litig.*, 277 F.R.D. 52, 62 (D. Mass. 2011).

In an attempt to argue that named plaintiffs' commitment to increasing public PACER

access actually disqualifies them from being representatives in this suit, defendant asserts that "[p]laintiffs appear unwilling to push to reduce those fees beyond the limit that would affect free access to their favored sub-set of PACER users." (Def.'s Opp. at 13.) This argument assumes the existence of some class members who would argue that the E-Government Act requires the Judicial Conference to eliminate exemptions and charge paying users only the fees that are necessary to provide PACER to them. Not only is such a claim based on sheer speculation, it also lacks viability given that Congress has explicitly directed the Judicial Conference that the "fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information." 28 U.S.C. § 1913 note. Even if a claim to eliminate exemptions were viable and not speculative, it would not create a conflict of interest that would prevent named plaintiffs from being adequate representatives, for a claim to eliminate exemptions would be independent from the claim in this case (i.e., that the E-Government Act prevents the Judiciary from collecting PACER fees that are not necessary to fund PACER). Named plaintiffs' pursuit of this class action will not interfere with other plaintiffs' ability to pursue a claim for elimination of exemptions. For all of these reasons, whether named plaintiffs lack interest in challenging the current exemption policy is irrelevant to their ability to serve as representatives in this suit.

Regarding the adequacy of class counsel, defendant argues only that the divergence in interests between named plaintiffs and other class members prevents named plaintiffs' counsel from adequately representing all class members. (Def.'s Opp. at 15.) The Court rejects this argument for the same reasons that it has already rejected defendant's argument that named plaintiffs have a conflict of interest with other class members. There is no dispute about the

competency of class counsel. (*See* Pls.' Mot., Attachments 1-3; Def.'s Opp. at 15.) In sum, named plaintiffs and their counsel satisfy the adequacy requirement.

C. Rule 23(b) Requirements

Rule 23(b) describes three types of class action and requires every class action to match one or more of the three types. Fed. R. Civ. P. 23(b); *Newberg* § 4:1. Plaintiffs argue that their proposed class can be certified under 23(b)(1) or 23(b)(3).

1. Rule 23(b)(1)

In a 23(b)(1) class action, "prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1). According to the Advisory Committee notes to Rule 23, an action "to compel or invalidate an assessment" is the type of class action contemplated in Rule 23(b)(1). Fed. R. Civ. P. 23(b)(1) advisory committee's note to 1966 amendment.

In their motion, plaintiffs argue that Rule 23(b)(1) permits certification of this class action because plaintiffs' complaint "seeks equitable relief," and inconsistent results in separate actions for equitable relief could force the Judiciary into a conflicted position. (Pls.' Mot. at 18.) Plaintiffs' complaint does ask the Court to "[d]eclare that the fees charged for access to records through PACER are excessive." (Compl. at 15.) However, at the motion hearing, plaintiffs stated that the declaration they are requesting is merely a step on the way to granting monetary relief, it is "not . . . equitable relief," and it "wouldn't bind anyone." (Tr. 12-13.) Indeed,

plaintiffs acknowledged that they "couldn't seek equitable relief" under the Little Tucker Act. (*Id.*; *see also Doe v. United States*, 372 F.3d 1308, 1312-14 (Fed. Cir. 2004); *Bobula v. U.S. Dep't of Justice*, 970 F.2d 854, 859 (Fed. Cir. 1992).) Therefore, the Court will not certify the class under Rule 23(b)(1).

2. Rule 23(b)(3)

To certify a class under Rule 23(b)(3), a court must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Plaintiffs argue that "[t]he sole individual issue—calculation of each class member's recovery . . . is ministerial" and therefore the common legal questions predominate. (Pls.' Mot. at 19.) In opposition, defendant contends that "the Court will have to assess whether and in what degree the individual Plaintiffs were able to secure free pages in excess of the 30 pages for which they were charged for lengthy documents. If the individual plaintiff's downloads of these documents operate to decrease the per page cost to below that sought by Plaintiffs, then there will be no liability to the class-member." (Def.'s Opp. at 20.) The Court does not share defendant's concern, because plaintiffs' theory of liability is that the fee schedule itself violated the E-Government Act, not that charges to individual plaintiffs violated the Act when they amounted to more than the cost of distribution to those particular plaintiffs. (*See* Pls.' Reply at 6, ECF No. 17.) If plaintiffs prevail on their common legal theory that the Judiciary was required to set a lower rate that corresponded to PACER's funding needs, defendant would be liable to any class member who paid the illegal higher rate. Calculating the amount of damages would be ministerial because it would be proportional to the fees that plaintiffs paid, rather than dependent upon the types of

documents that they obtained. Therefore, the Court finds that common questions predominate.

Although defendant does not use the word "superiority," it also objects that "class action litigation was not intended to facilitate *two* class actions, which would result if this case proceeds as a class and the *Fisher* case is similarly prosecuted." (Def.'s Opp. at 21.) This Court has already rejected the argument that *Fisher* should bar this suit, explaining that the suits make different claims. *NVLSP*, 2016 WL 7076986, at *3. Besides, defendant's argument has nothing to do with the superiority of the class action vehicle, as opposed to individual actions.[4]

Allowing this action to proceed as a class action is superior to requiring individual actions, both for reasons of efficiency and to enable individuals to pursue small claims. As the Supreme Court has explained, "'[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

In sum, the Court will certify the class under Rule 23(b)(3), but it in no way resolves the merits of plaintiffs' challenge to the PACER fee schedule.

III. NOTICE TO CLASS MEMBERS

"For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). In their motion for class certification, plaintiffs proposed a class-notice plan involving "email notice . . . to each class member using the contact information maintained by the government" for PACER users. (*See* Pls.' Mot. at 20.) Plaintiffs "request that the Court direct the parties to file an agreed-upon

[4] Furthermore, the plaintiff in *Fisher* has not yet moved for class certification. (Tr. 9.)

proposed form of notice (or, if the parties cannot agree, separate forms of notice) within 30 days of the Court's certification order, and direct that email notice be sent to the class within 90 days of the Court's approval of a form of notice." (*Id.*) With no opposition from defendant, the Court will grant this request.

CONCLUSION

Plaintiffs' motion for class certification is granted, with minor modifications to the proposed class definition. A separate Order accompanies this Memorandum Opinion.

/s/ ***Ellen Segal Huvelle***
ELLEN SEGAL HUVELLE
United States District Judge

Date: January 24, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.	)	Civil Action No. 16-745
Plaintiffs,	)	January 18, 2017 2:30 p.m.
v.	)	Washington, D.C.
UNITED STATES OF AMERICA,	)	
Defendant.	)	

TRANSCRIPT OF MOTION HEARING PROCEEDINGS BEFORE THE HONORABLE ELLEN SEGAL HUVELLE, UNITED STATES DISTRICT COURT JUDGE

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AFTERNOON SESSION, JANUARY 18, 2017

(2:31 p.m.)

THE COURT: Good afternoon.

ALL PARTIES PRESENT: Good afternoon.

THE COURTROOM CLERK: Your Honor, this is Civil Action 16-745, *National Veterans Legal Services Program, et al., versus United States of America*.

I'm going to ask counsel to please come forward, identify yourselves for the record, introducing any parties at your table.

MR. GUPTA: Good afternoon, Your Honor, I'm Deepak Gupta for the plaintiffs. And with me at counsel table are my colleagues John Taylor from my firm, Gupta Wessler, and Bill Narwold from the Motley Rice firm.

THE COURT: Good afternoon.

MR. NEBEKER: Good afternoon, Your Honor. Mark Nebeker, Assistant United States Attorney, here on behalf of the defendant. With me at counsel table is Mr. William Myers, deputy general counsel at the Administrative Office of the U.S. Courts and Wendell Skidgel, a junior attorney.

THE COURT: Mr. Nebeker, just to make sure no one has any problem, obviously as a federal judge I have something to do with the Administrative Office. I don't actually -- I don't think I know Mr. Myers, or if I do, I can't honestly say I remember a conversation, but it seems that the rule of necessity has to kick in here.

Electronic Public Access Fee Schedule

(Issued in accordance with 28 U.S.C. § 1913, 1914, 1926, 1930, 1932)

Effective December 1, 2013

The fees included in the Electronic Public Access Fee Schedule are to be charged for providing electronic public access to court records.

Fees for Public Access to Court Electronic Records (PACER)

(1) Except as provided below, for electronic access to any case document, docket sheet, or case-specific report via PACER: $0.10 per page, not to exceed the fee for thirty pages.

(2) For electronic access to transcripts and non-case specific reports via PACER (such as reports obtained from the PACER Case Locator or docket activity reports): $0.10 per page.

(3) For electronic access to an audio file of a court hearing via PACER: $2.40 per audio file.

Fees for Courthouse Electronic Access

(4) For printing copies of any record or document accessed electronically at a public terminal in a courthouse: $0.10 per page.

PACER Service Center Fees

(5) For every search of court records conducted by the PACER Service Center: $30 per name or item searched.

(6) For the PACER Service Center to reproduce on paper any record pertaining to a PACER account, if this information is remotely available through electronic access: $0.50 per page.

(7) For any payment returned or denied for insufficient funds: $53.

Free Access and Exemptions

(8) Automatic Fee Exemptions

- No fee is owed for electronic access to court data or audio files via PACER until an account holder accrues charges of more than $15.00 in a quarterly billing cycle.

- Parties in a case (including *pro se* litigants) and attorneys of record receive one free electronic copy, via the notice of electronic filing or notice of docket activity, of all documents filed electronically, if receipt is required by law or directed by the filer.

- No fee is charged for access to judicial opinions.

- No fee is charged for viewing case information or documents at courthouse public access terminals.

(9) Discretionary Fee Exemptions:

- Courts may exempt certain persons or classes of persons from payment of the user access fee. Examples of individuals and groups that a court may consider exempting include: indigents, bankruptcy case trustees, *pro bono* attorneys, *pro bono* alternative dispute resolution neutrals, Section 501(c)(3) not-for-profit organizations, and individual researchers associated with educational institutions. Courts should not, however, exempt individuals or groups that have the ability to pay the statutorily established access fee. Examples of individuals and groups that a court should not exempt include: local, state or federal government agencies, members of the media, privately paid attorneys or others who have the ability to pay the fee.

- In considering granting an exemption, courts must find:

  - that those seeking an exemption have demonstrated that an exemption is necessary in order to avoid unreasonable burdens and to promote public access to information;

  - that individual researchers requesting an exemption have shown that the defined research project is intended for scholarly research, that it is limited in scope, and that it is not intended for redistribution on the internet or for commercial purposes.

- If the court grants an exemption:

  - the user receiving the exemption must agree not to sell the data obtained as a result, and must not transfer any data obtained as the result of a fee exemption, unless expressly authorized by the court; and

  - the exemption should be granted for a definite period of time, should be limited in scope, and may be revoked at the discretion of the court granting the exemption.

- Courts may provide local court information at no cost (e.g., local rules, court forms, news items, court calendars, and other information) to benefit the public.

Applicability to the United States and State and Local Governments

(10) Unless otherwise authorized by the Judicial Conference, these fees must be charged to the United States, except to federal agencies or programs that are funded from judiciary appropriations (including, but not limited to, agencies, organizations, and individuals providing services authorized by the Criminal Justice Act [18 U.S.C. § 3006A], and bankruptcy administrators).

(11) The fee for printing copies of any record or document accessed electronically at a public terminal ($0.10 per page) described in (4) above does not apply to services rendered on behalf of the United States if the record requested is not remotely available through electronic access.

(12) The fee for local, state, and federal government entities, shall be $0.08 per page until April 1, 2015, after which time, the fee shall be $0.10 per page.

Judicial Conference Policy Notes

The Electronic Public Access (EPA) fee and its exemptions are directly related to the requirement that the judiciary charge user-based fees for the development and maintenance of electronic public access services. The fee schedule provides examples of users that may not be able to afford reasonable user fees (such as indigents, bankruptcy case trustees, individual researchers associated with educational institutions, 501(c)(3) not-for-profit organizations, and court-appointed pro bono attorneys), but requires those seeking an exemption to demonstrate that an exemption is limited in scope and is necessary in order to avoid an unreasonable burden. In addition, the fee schedule includes examples of other entities that courts should not exempt from the fee (such as local, state or federal government agencies, members of the media, and attorneys). The goal is to provide courts with guidance in evaluating a requestor's ability to pay the fee.

Judicial Conference policy also limits exemptions in other ways. First, it requires exempted users to agree not to sell the data they receive through an exemption (unless expressly authorized by the court). This prohibition is not intended to bar a quote or reference to information received as a result of a fee exemption in a scholarly or other similar work. Second, it permits courts to grant exemptions for a definite period of time, to limit the scope of the exemptions, and to revoke exemptions. Third, it cautions that exemptions should be granted as the exception, not the rule, and prohibits courts from exempting all users from EPA fees.

ELECTRONIC CASE FILES IN THE FEDERAL COURTS:

A Preliminary Examination of Goals, Issues, and the Road Ahead

For more information, contact
Gary L. Bockweg
Applications Management and Development Division
Administrative Office of the U.S. Courts
Phone: (202) 273-2500
Fax: (202) 273-2459

March 1997

D. Financial Considerations

1. Fees Issues

Fee issues to be examined in connection with the electronic case files project include both broader policy questions, such as the degree to which users of the system should pay the costs incurred by the courts for equipment and software, and more specific details, such as whether any fees charged should be the same in all federal courts or for all types of documents and access.[49]

Decision-makers should keep in mind three key facts. First, Congress has directed that the judiciary impose fees for access to electronically stored information. Second, it has mandated that all new expenditures be offset by new collections or reductions in current spending. Third, there is a long-standing principle that the government should seek, not to earn a profit, but only to charge fees commensurate with the cost of providing a particular service.[50]

In analyzing court fees and determining what should be charged for use of an electronic case file system, many specific issues must be considered and resolved. These include:

- Should the cost of an electronic case file system be paid entirely by user fees, or by a mix of fees and appropriated funds? Should start-up costs be paid for differently than continuing costs? What is the anticipated impact of fees on user access to case file information?

- Should an electronic filing or usage fee be charged in addition to, or included in, the current "filing fee" (which varies by the type of proceeding and generally applies only to case-opening documents)?

- Which filings should be subject to an electronic filing fee—initiating documents only (complaint, bankruptcy petition, notice of appeal) or all documents?

- Should electronic filers receive a discount on the "filing fee" (to reflect the lower cost to the court of processing an electronically filed case)? Should there be a surcharge for paper filings?

- Should electronic filing fees be the same in all federal courts?

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[49] Appendix E outlines the current authority for imposition of filing and other court fees.

[50] Preliminary considerations concerning the costs that courts may incur in establishing ECF are addressed in Appendix F.

Chronology of the Federal Judiciary's Electronic Public Access (EPA) Program

- **1989** Federal Judicial Center initiated pilot programs to provide Public Access to Court Electronic Records (PACER) systems in several bankruptcy and district courts.

- **1990** Judicial Conference directed by Congress to prescribe reasonable fees for public access to electronic information, to be deposited into a special fund for information technology projects. The initial fee for public access, via a dial-in bulletin board service, was set at $1/minute.

- **1992** PACER expanded to additional district and bankruptcy courts.

- **1995** Fee reduced to 75 cents per minute.

- **1996** Fee reduced to 60 cents per minute.

- **1997** National locator index added.

- **1998** As the judiciary began development of the new Case Management/Electronic Case Files (CM/ECF) system, which allows courts to maintain complete electronic case files, a web interface was created for PACER, and the Judicial Conference prescribed a 7 cents per page fee for Internet access to documents from the case file. The Conference also stated that courts could make certain items, such as local rules and forms, opinions and other local information available at no cost.

- **2001** As deployment of CM/ECF continued, the Judicial Conference approved two new provisions:
  - 1. Attorneys of record and parties in a case receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer.
  - 2. No fee is owed until charges of more than $10 in a calendar year are accrued.

- **2002** Judicial Conference approved a 30 page cap on per-document charges ($2.10)

- **2003** The Judicial Conference made several changes to the fee structure, most notably:
  - 1. Judicial Conference extended the $2.10 cap, the equivalent of 30 pages, to all case documents, including docket sheets and case-specific reports, with the exception of transcripts of federal court proceedings.

- 2. The Judicial Conference also addressed the issue of exemptions– specifying the individuals and groups whom courts may exempt, upon a showing of cause, including indigents, bankruptcy case trustees, individual researchers associated with educational institutions, courts, section 501(c)(3) not-for-profit organizations and pro bono ADR neutrals from payment of the fees.

- 3. The Judicial Conference further directs that courts should not exempt local, state or federal government agencies, members of the media, attorneys or others who are not members of the groups specified above, prohibits courts from using the exemption language from exempting all users, and dictates that exemptions apply only to access for the specific case or purpose for which it was given.

- **2004** The Judicial Conference amended Item I of the Electronic Public Access Fee Schedule to increase the fee for public users obtaining information through a federal judiciary Internet site from seven cents per page to eight cents per page, effective January 1, 2005.

Calendar No. 439

107TH CONGRESS *2d Session*	SENATE	REPORT 107–174

E-GOVERNMENT ACT OF 2001

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 803

TO ENHANCE THE MANAGEMENT AND PROMOTION OF ELECTRONIC GOVERNMENT SERVICES AND PROCESSES BY ESTABLISHING A FEDERAL CHIEF INFORMATION OFFICER WITHIN THE OFFICE OF MANAGEMENT AND BUDGET, AND BY ESTABLISHING A BROAD FRAMEWORK OF MEASURES THAT REQUIRE USING INTERNET-BASED INFORMATION TECHNOLOGY TO ENHANCE CITIZEN ACCESS TO GOVERNMENT INFORMATION AND SERVICES, AND FOR OTHER PURPOSES

JUNE 24, 2002.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
99–010 WASHINGTON : 2002

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Calendar No. 439

107TH CONGRESS *2d Session*	SENATE	REPORT 107–174

E-GOVERNMENT ACT OF 2001

JUNE 24, 2002.—Ordered to be printed

Mr. LIEBERMAN, from the Committee on Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 803]

The Committee on Governmental Affairs, to whom was referred the bill (S. 803) to enhance the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services, and for other purposes, reports favorably thereon with an amendment and an amendment to the title and recommends that the bill as amended do pass.

CONTENTS

I. PURPOSE AND SUMMARY

S. 803 is a bipartisan bill to enhance the management and promotion of electronic government services and processes. The bill establishes an Office of Electronic Government within the Office of Management and Budget (OMB); it also establishes a broad framework of measures that require using Internet applications and other information technologies to enhance access to Government information and services and to boost the effectiveness and efficiency

nature compatibility, or for other purposes consistent with the section.

The term electronic signatures is defined in the Government Paperwork Elimination Act as "a method of signing a message that—(A) identifies and authenticates a particular person as the source of the electronic message; and (B) indicates such person's approval of the information contained in the electronic message." (Public Law 105–277, Section 1710) A digital signature is one type of electronic signature, often involving the use of trusted third parties. The federal bridge certification authority has recently begun limited operations. The federal bridge certification authority can be a unifying element to link otherwise unconnected agency certification authorities.

Section 204. Federal Internet portal

This section authorizes the development of an integrated Internet-based system, a Federal Internet portal, to provide the public with consolidated access to government information and services from a single point, organized according to function, topic and the needs of the public rather than agency jurisdiction. Increasingly, the Federal portal should be able to include access to information and services provided by state, local and tribal governments. The portal will continue to improve upon FirstGov.gov, which is administered by the General Services Administration. The Administrator of the Office of Electronic Government will assist the Director by overseeing the work of the General Services Administration and other agencies in maintaining, improving, and promoting the portal. The bill authorizes $15,000,000 to be appropriated in fiscal year 2003 for the maintenance, improvement, and promotion of the portal, and such sums as are necessary for the subsequent four years.

The Committee intends that access to information on a portal web site be consistent with existing laws and policies on privacy. Portal web sites maintained by Federal agencies should only allow access to information on individuals if such access fully complies with privacy protections under existing law and policy.

Section 205. Federal courts

Section 205 requires federal courts to provide greater access to judicial information over the Internet. Greater access to judicial information enhances opportunities for the public to become educated about their legal system and to research case-law, and it improves access to the court system. The mandates contained in section 205 are not absolute, however. Any court is authorized to defer compliance with the requirements of this section, and the Judicial Conference of the United States is authorized to promulgate rules to protect privacy and security concerns.

Subsections 205(a) through (c) require the Supreme Court, each circuit court, each district court, and each bankruptcy court of a district to establish a website that would include public information such as location and contact information for courthouses, local rules and standing orders of the court, docket information for each case, and access to written opinions issued by the court, in a text searchable format. Documents filed electronically, and those converted to electronic form, shall also be made available, except that

documents not otherwise available to the public shall not be made available online. Under subsection 205(c)(3), the Judicial Conference of the United States may promulgate rules to protect important privacy and security concerns.

Under subsection 205(f), courts are required to establish websites within two years, and to establish access to electronically filed documents within four years. Subsection 205(g) authorizes any court or district to defer compliance with any requirement of section 205 by submitting a notification to the Administrative Office of the United States Courts stating the reasons for the deferral and the alternative methods the court is using to provide greater public access to court information. Every year, the Administrative Office will submit to Congress a report that summarizes and evaluates all notifications it has received in the previous year. The Committee does not intend that the deferral provision will allow courts to avoid their obligations under this section indefinitely. Rather, the Committee recognizes that some courts may have a difficult time meeting the prescribed deadlines, and intends to provide flexibility for courts with different circumstances.

Subsection 205(d) directs the Judicial Conference of the United States to explore the feasibility of technology to post online dockets with links allowing all filings, decisions, and rulings in a given case to be obtained from the docket sheet of that case.

Subsection 205(e) amends existing law regarding the fees that the Judicial Conference prescribes for access to electronic information. In the Judiciary Appropriations Act of 1992, Congress provided that "[t]he Judicial Conference shall hereafter prescribe reasonable fees * * * for collection by the courts * * * for access to information available through automatic data processing equipment." Subsection 205(e) amends this sentence to read, "[t]he judicial conference may, only to the extent necessary, prescribe reasonable fees * * * for collection by the courts * * * for access to information available through automatic data processing equipment." The Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible. For example, the Administrative Office of the United States Courts operates an electronic public access service, known as PACER, that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and from the U.S. Party/Case Index. Pursuant to existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information.

Section 206. Regulatory agencies

Electronic Government holds particular promise in the area of enhancing public participation in administrative regulatory processes. Regulatory agencies vary widely in the degree to which they use information technology to disseminate information about regulations, inform the public of opportunities to participate, and facilitate the receipt of public comments.[32] Section 206 will improve per-

[32] See "Federal Rulemaking: Agencies' Use of Information Technology to Facilitate Public Participation," General Accounting Office, B–284527, June 30, 2000.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

October 21, 2004

MEMORANDUM TO: CHIEF JUDGES, UNITED STATES COURTS
CLERKS, UNITED STATES COURTS

SUBJECT: Electronic Public Access (EPA) Fee Schedule Change (INFORMATION)

The Judicial Conference, at its September 21, 2004 session, amended the language of Section I of the Electronic Public Access Fee Schedule for the appellate, district, and bankruptcy courts, the United States Court of Federal Claims, and the Judicial Panel on Multidistrict Litigation (adopted by the Judicial Conference pursuant to sections 1913, 1914, 1926, 1930, and 1932 of Title 28, United States Code). The amendment increases the PACER Internet access fee from seven cents per page to eight cents per page.

This increase is predicated upon Congressional guidance that the judiciary is expected to use PACER fee revenue to fund CM/ECF operations and maintenance. The fee increase will enable the judiciary to continue to fully fund the Electronic Public Access Program, in addition to CM/ECF implementation costs until the system is fully deployed throughout the judiciary and its currently defined operations and maintenance costs thereafter.

The fee increase will be **effective on January 1, 2005**. CM/ECF software, which includes the necessary changes to implement the fee increase, will be provided to the courts in mid-November. All courts must install this software release by the end of the calendar year to effect the increase on January 1, 2005. A copy of the new EPA Fee Schedule is attached.

If you have any questions on these matters, please contact Mary M. Stickney, Chief of the EPA Program Office via email at *Mary Stickney/DCA/AO/USCOURTS* or Susan Del Monte, EPA Program Attorney-Advisor via email at *Susan Del Monte/DCA/AO/USCOURTS* or we may be contacted in the Office of Court Administration at (202) 502-1500.

Leonidas Ralph Mecham
Director

Attachment

cc: Circuit Executives
District Court Executives
Clerks, Bankruptcy Appellate Panels

ELECTRONIC PUBLIC ACCESS FEE SCHEDULE (eff. 1/1/05)

As directed by Congress, the Judicial Conference has determined that the following fees are necessary to reimburse expenses incurred by the judiciary in providing electronic public access to court records. These fees shall apply to the United States unless otherwise stated. No fees under this schedule shall be charged to federal agencies or programs which are funded from judiciary appropriations, including, but not limited to, agencies, organizations, and individuals providing services authorized by the Criminal Justice Act, 18 U.S.C. § 3006A, and bankruptcy administrator programs.

I. For electronic access to court data via dial up service: sixty cents per minute. For electronic access to court data via a federal judiciary Internet site: eight cents per page, with the total for any document, docket sheet, or case-specific report not to exceed the fee for thirty pages– provided however that transcripts of federal court proceedings shall not be subject to the thirty-page fee limit. Attorneys of record and parties in a case (including *pro se* litigants) receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. No fee is owed under this provision until an account holder accrues charges of more than $10 in a calendar year. Consistent with Judicial Conference policy, courts may, upon a showing of cause, exempt indigents, bankruptcy case trustees, individual researchers associated with educational institutions, courts, section 501(c)(3) not-for-profit organizations and pro bono ADR neutrals from payment of these fees. Courts must find that parties from the classes of persons or entities listed above seeking exemption have demonstrated that an exemption is necessary in order to avoid unreasonable burdens and to promote public access to information. Any user granted an exemption agrees not to sell for profit the data obtained as a result. Exemptions may be granted for a definite period of time and may be revoked at the discretion of the court granting the exemption.

II. For printing copies of any record or document accessed electronically at a public terminal in the courthouse: ten cents per page. This fee shall apply to services rendered on behalf of the United States if the record requested is remotely available through electronic access.

III. For every search of court records conducted by the PACER Service Center, $20.

JUDICIAL CONFERENCE POLICY NOTES

Courts should not exempt local, state or federal government agencies, members of the media, attorneys or others not members of one of the groups listed above. Exemptions should be granted as the exception, not the rule. A court may not use this exemption language to exempt all users. An exemption applies only to access related to the case or purpose for which it was given.

The electronic public access fee applies to electronic court data viewed remotely from the public records of individual cases in the court, including filed documents and the docket sheet. Electronic court data may be viewed free at public terminals at the courthouse and courts may provide other local court information at no cost. Examples of information that can be provided at no cost include: local rules, court forms, news items, court calendars, opinions, and other information – such as court hours, court location, telephone listings – determined locally to benefit the public and the court.

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

March 25, 2010

The Honorable Richard Durbin
Chairman
Subcommittee on Financial Services and General Government
Committee on Appropriations
184 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Susan Collins
Ranking Member
Subcommittee on Financial Services and General Government
Committee on Appropriations
125 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Collins:

Thank you for affording me the opportunity to provide my views. I hope the following recommendations and comments will assist you as your subcommittee deliberates on the Financial Services and General Government Appropriations Bill for Fiscal Year 2011.

Privacy and Civil Liberties Oversight Board

I remain deeply concerned that the Administration has not yet nominated anyone for the Privacy and Civil Liberties Oversight Board, created by the 2004 Intelligence Reform and Terrorism Prevention Act, and reconstituted by the 2007 Implementing Recommendations of the 9/11 Commission Act. The 9/11 Commission recognized that without adequate oversight the vital work of combating terrorism could tread dangerously close to intruding on core rights and liberties, and urged creation of this Board to help advise on and review the nation's policies against terrorism with an eye toward safeguarding key freedoms. While we applaud the hard work of the original Board, in 2007 Congress concluded that the panel needed more independence and reconstituted it as an independent agency outside the Executive Office of the President. Unfortunately, the effort to create a stronger Board has, thus far, resulted in no board at all. I once again urge the President to put forward nominees for the Board without delay, and I urge the Appropriations Committee to fund it at a robust level. The authorizing legislation originally recommended funding of $10 million by FY 2011. While it is questionable that a new Board could effectively spend that much in its first year, I recommend that the Board receive funding to begin as strongly as feasible, certainly well above the President's request of $1.68 million.

Office of Electronic Government and the Electronic Government Fund

This year the Administration requested $35 million in the General Services Administration (GSA) budget for the E-Government Fund for the establishment of pilots relating to cloud computing, collaborative platforms, and transparency and participation. In FY 2009 the Administration rolled out a number of ambitious initiatives, including data.gov, the IT Dashboard, and apps.gov, which have increased transparency and have begun to illustrate the potential for reducing costs and increasing transparency across the government by using information technology. The additional funds requested for FY 2010 will be used to further modernize government systems and pave the way for greater savings. For that reason, I fully support the Administration's request for $35 million for this effort.

In addition, the Administration has requested $50 million for the Integrated, Efficient and Effective Uses of Information Technology fund in the budget for the Office of Management and Budget (OMB). These funds would both further implement pilots originally developed under the E-Government Fund and assist with project management and guidance for information technology projects. While I believe this is an important goal and support the amounts requested, this funding should be included with the $35 million for the statutorily-created E-Government fund – which is required to report to Congress on its expenditures. Funding these initiatives, along with the additional project management tools, will lower costs and allow departments and agencies to provide additional services in less time. As a result, we are likely to see more results from our information technology expenditures and greater savings in future fiscal years.

Given the important role of the E-Government Office in managing these funds and its additional responsibilities, I also believe that the Congress should increase the appropriation for OMB to allow for additional staff for this office. Currently, the E-Government Office has approximately 13 FTEs with the statutory responsibility to manage the information technology budget across the entire Federal government – which will add up to over $79 billion in the FY 2011 budget request. In addition, the E-Government Office has responsibilities – shared with the Department of Homeland Security – over the security of Federal information systems, but has limited staff to assist in this key priority. Given the office's role, I recommend that the budget for OMB be increased by $3 million to allow for the hiring of additional staff in the E-Government Office.

Public Access to Court Electronic Records (PACER)

I have concerns about how the Administrative Office of the Courts is interpreting a key provision of the E-Government Act relating to public access to Court records. Given the transparency efforts that have been made a priority across the Federal Government - as well as the recent call in the FCC's Broadband plan for increased online access to court records - I believe more attention needs to be paid to make these records free and easily accessible.

As you know, Court documents are electronically disseminated through the PACER system, which charges $.08-a-page for access. While charging for access was previously

required, Section 205(e) of the E-Government Act changed a provision of the Judicial Appropriation Act of 2002 (28 U.S.C. 1913 note) so that courts "may, only to the extent necessary" (instead of "shall") charge fees "for access to information available through automatic data processing equipment." The Committee report stated: "[t]he Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible... Pursuant to existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information."

Since the passage of the E-Government Act, the vision of having information "freely available to the greatest extent possible" is far from being met, despite the technological innovations that should have led to reduced costs in the past eight years. In fact, cost for these documents has gone up, from $.07 to $.08-per-page. The Judiciary has attempted to mitigate the shortcomings of the current fee approach in a variety of ways, including limiting charges to $2.40-per-document and the recent announcement that any charges less than $10-per-quarter will be waived. While these efforts should be commended, I continue to have concerns that these steps will not dramatically increase public access as long as the pay-per-access model continues.

To move closer to the mandate of the E-Government Act, the Administrative Office of the Courts should reevaluate the current PACER pay-per-access model. Even to retrieve free materials such as opinions, PACER currently requires the individual to establish a PACER account. One goal of this review should be to create a payment system that is used only to recover the direct cost of distributing documents via PACER. That review should also examine how a payment system could allow for free bulk access to raw data that would allow increased analytical and oversight capability by third parties.

Additionally, in 2007, the Judiciary asked for and received written consent from the Appropriations Committees to "expand use of Electronic Public Access (EPA) receipts to support courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance." As a result, funds collected by the $.08-per-page charge have been used for initiatives that are unrelated to providing public access via PACER and against the requirement of the E-Government Act. The Appropriations Committee should review the Judiciary Information Technology Fund Report provided each year to ensure the funds generated from PACER are only going to pay for the direct costs of disseminating documents via PACER, and not for additional items which I believe should be funded through direct appropriations.

Modernization of Acquisition Systems

I support the President's request for an additional $20.5 million for the General Services Administration for the purpose of modernizing the Integrated Acquisition Environment (IAE), which consists of eight major data systems, including the Federal Procurement Data System, Federal Business Opportunities (FedBizOpps.gov), the Excluded Parties List, and the Past Performance Information Retrieval System. These systems support over 40,000 federal procurement professionals, 600,000 vendors, over $523 billion in annual procurement spending, and over eight million transactions per year. Unfortunately, despite depending on the same

underlying data, these systems were developed over the years in a stove-piped manner and therefore are disjointed and difficult to use. Modernization of IAE will help the federal acquisition workforce make smarter contracting decisions and ensure that contracts are not awarded to irresponsible parties or to companies that have been debarred or suspended. In addition, providing easier access to information about federal procurement opportunities would enhance competition by attracting a larger pool of potential bidders. Finally, a modernized IAE would provide greater transparency to the American public and the Congress on federal contract spending. I am convinced that this investment in IAE will pay for itself over time.

Acquisition Workforce

The President's budget requests $24.9 million for the General Services Administration for government-wide efforts to strengthen the acquisition workforce through better training, certification, and workforce management. The number of acquisition professionals in the federal government simply has not kept pace with the explosive growth in federal contracting over the last decade. Moreover, more than half of the acquisition workforce will be eligible to retire over the next eight years. We therefore are fast approaching a crisis unless we recruit and train a skilled workforce that can promote competition, get the best value for the government, and guard against waste, fraud and abuse in federal contracting. I understand that there may be some unobligated balances in the Acquisition Workforce Training Fund that may be available to help fund the President's proposed initiative. While taking those funds into account, I urge the Committee to provide a sufficient amount to fund the proposed initiative.

Office of Federal Procurement Policy

I am extremely concerned that the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget lacks adequate personnel to carry out its mission of providing overall government-wide direction for procurement policies, regulations, and procedures. While total federal spending on goods and services has risen dramatically over the last decade, from $189 billion in 1999 to over $523 billion in 2009, the staffing level at OFPP has remained stagnant at roughly a dozen FTE's, including administrative support. Both under legislative mandate and at President Obama's direction, OFPP is responsible for reducing waste and abuse in contracting by promoting competition, preventing misuse of cost-plus contracts, bringing rationale to the interagency contracting process, mitigating conflicts of interest, and ensuring that inherently-governmental work is performed by federal employees. Each of these areas is highly complex and requires strong government-wide leadership from OFPP to bring greater efficiency and integrity to federal contracting. I therefore recommend that, at a minimum, the appropriation for OFPP be doubled, from $3 million to $6 million.

United States Postal Service

The United States Postal Service (USPS or Postal Service) continues to experience accelerated declines in mail volume and revenue, primarily due to the current economic crisis and the electronic diversion of mail. In fiscal year 2009, the Postal Service recorded a loss of $3.8 billion and USPS ended the first quarter of this fiscal year (October 1 to December 31,

2009) with a net loss of $297 million. The Postmaster General recently indicated that, without substantial changes, losses will be even more substantial going forward.

Therefore, as Congress works with the Postal Service on long-term solutions, I recommend that we consider providing the Postal Service with additional financial relief in FY 2011. One option, recommended by the Postal Service, is to allow USPS to restructure its required payments into the Postal Service Retiree Health Benefits Fund. Currently, the Postal Accountability and Enhancement Act (P.L. 109-435) requires the Postal Service to pre-pay its retiree health benefits obligations for future retirees into the Fund, while it makes payments for current retirees. Thus, restructuring the Postal Service's payments into the Fund would provide USPS with financial relief during this economic downturn.

National Archives and Records Administration (NARA)

I support the $460 million in the President's budget request for the National Archives and Records Administration (NARA). The role of the National Archives in protecting and preserving our national heritage continues to be critical – particularly as the number of records it preserves and protects increases exponentially. Furthermore, in recent years, NARA has received many additional responsibilities, including the establishment of the National Declassification Center last year and the creation of the Office of Government Information Services to oversee Freedom of Information Act activities government-wide. In 2008, NARA was designated as the lead agency for the implementation of the Controlled Unclassified Information (CUI) framework, which is intended to streamline the use of sensitive, unclassified information within the federal government.

I also believe that the appropriation for the National Historical Publications and Records Commission (NHPRC) should be increased from $10 million to $13 million. The NHPRC supports the efforts of NARA to preserve and publish any material relating to the history of the United States. In the last Congress, this Committee passed the Presidential Historical Records Preservation Act of 2008 (P.L. 110-404), which gave additional responsibilities to the NHPRC to make grants to preserve records of former Presidents, provide online access to the documents of the founding fathers, and create a database for records of servitude, emancipation, and post-Civil War reconstruction. I believe these important missions require additional funding for the Commission to allow it to also continue its traditional role in protecting the records that define this country.

* * * * *

I appreciate this opportunity to comment on issues of concern to the Committee on Homeland Security and Governmental Affairs.

Sincerely,

Joseph I. Lieberman
Chairman

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

February 27, 2009

The Honorable Lee H. Rosenthal
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Rosenthal:

I am writing to inquire if the Court is complying with two key provisions of the E-Government Act of 2002 (P.L. 107-347) which were designed to increase public access to court records and protect the privacy of individuals' personal information contained in those records.

As you know, court documents are electronically released through the Public Access to Court Electronic Records (PACER) system, which currently charges $.08 a page for access. While charging for access was previously required, Section 205(e) of the E-Government Act changed a provision of the Judicial Appropriation Act of 2002 (28 U.S.C. 1913 note) so that courts "may, to the extent necessary" instead of "shall" charge fees "for access to information available through automatic data processing equipment."

The goal of this provision, as was clearly stated in the Committee report that accompanied the Senate version of the E-Government Act, was to increase free public access to these records. As the report stated: "[t]he Committee intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible. ... Pursuant to existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information."

Seven years after the passage of the E-Government Act, it appears that little has been done to make these records freely available – with PACER charging a higher rate than 2002. Furthermore, the funds generated by these fees are still well higher than the cost of dissemination, as the Judiciary Information Technology Fund had a surplus of approximately $150 million in FY2006.[1] Please explain whether the Judicial Conference is complying with Section 205(e) of the E-Government Act, how PACER fees are determined, and whether the Judicial Conference is only charging "to the extent necessary" for records using the PACER system.

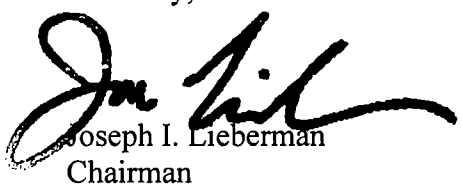
In addition I have concerns that not enough has been done to protect personal information contained in publicly available court filings, potentially violating another provision of the

[1] Judiciary Information Technology Fund Annual Report for Fiscal Year 2006

E-Government Act.[2] A recent investigation by Carl Malamud of the non-profit Public.Resource.org found numerous examples of personal data not being redacted in these records. Given the sensitivity of this information and the potential for indentify theft or worse, I would like the court to review the steps they take to ensure this information is protected and report to the Committee on how this provision has been implemented as we work to increase public access to court records.

I thank you in advance for your time and I look forward to your response.

Sincerely,



Joseph I. Lieberman
Chairman

[2] Section 205(c)(3) requires that rules be developed to "protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically."

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

March 26, 2009

Honorable Joseph I. Lieberman
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We are responding on behalf of the Judicial Conference and its Rules Committees to your letter to Judge Lee H. Rosenthal dated February 27, 2009. Your letter raises two questions about the Judiciary's compliance with the E-Government Act of 2002: the first involves the fees charged for Internet-based access to court records, to which Director Duff responds; and the second relates to the protection of private information within these court records, to which Judge Rosenthal responds. The Judiciary welcomes the opportunity to address these issues.

User Fees Necessary to Support PACER

You inquired whether the Judiciary's Public Access to Court Electronic Records (PACER) system complies with a provision of the E-Government Act that contemplates a fee structure in which electronic court information "is freely available to the greatest extent possible." We assure you that the Judiciary is charging PACER fees only to the extent necessary. As described below, many services and documents are provided to the public for free, and charges that are imposed are the minimum possible only to recover costs. As such, we believe we are meeting the E-Government Act's requirements to promote public access to federal court documents while recognizing that such access cannot be entirely free of charge.

There are high costs to providing the PACER service. This fact raises an important question of who should pay for the costs — taxpayers or users. Congress initially answered the question in our 1991 appropriations act when it required that improved electronic access to court information be funded through reasonable fees paid by the users of the information, and not through taxes paid by the general public. That requirement is the basis for the current Electronic Public Access (EPA) program, and for the fees charged for access to federal court documents through the PACER system.

The PACER user population includes lawyers, *pro se* filers, government agencies, trustees, bulk collectors, researchers, educational institutions, commercial enterprises, financial institutions, the media, and the general public. The fees are the same for all users of the system. The program does not, however, provide free access to every individual, law firm, or corporation (most notably data resellers and credit reporting firms) that is interested in obtaining vast amounts of court data at no cost.

As noted above, Congress mandated 18 years ago that the Judiciary charge user fees for electronic access to court files as a way to pay for this service. Since that time, various legislative directives have amended the mandate, mostly to expand the permissible use of the fee revenue to pay for other services related to the electronic dissemination of court information, such as the Case Management/Electronic Case Files (CM/ECF) system[1] and an Electronic Bankruptcy Noticing (EBN) system.[2] Your letter correctly notes that the E-Government Act shifted emphasis by providing that fees "may," rather than "shall," be collected, and "only to the extent necessary." It did not, however, alter Congress's policy that the EPA program recoup the cost of services provided through a reasonable fee. Indeed, the Conference Report on the Judiciary Appropriations Act of 2004, adopted two years after the E-Government Act, included the following statement: "[t]he Committee expects the fee for the Electronic Public Access program to provide for Case Management/Electronic Case Files system enhancements and operational costs."[3] Consistent with that directive, the Judicial Conference increased the EPA fee by one cent per page accessed.

The Judiciary takes its responsibility to establish the EPA fee very seriously. Since well before the E-Government Act, it has been the Judicial Conference's policy to set the electronic public access fee to be commensurate with the costs of providing and enhancing services related to public access. In fact, prior to the one-cent per-page increase in 2004, the Conference had a history of lowering the fee. As a result, PACER is a very economical service:

- The charge for accessing filings is just eight cents per page (as opposed to the fees for using commercial services such as Westlaw or Lexis, which are much more);

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[1] CM/ECF, the primary source of electronic information on PACER, was developed and is maintained with EPA fees. This system provides for electronic filing of all documents in all 94 district courts and all 90 bankruptcy courts, and currently is being implemented in the courts of appeals.

[2] The EBN system is funded in its entirety by EPA fee revenue. It provides access to bankruptcy case information to parties listed in the case by eliminating the production and mailing of traditional paper notices and associated postage costs, while speeding public service. Available options include Internet e-mail and fax services, and Electronic Data Interchange for large volume notice recipients. Over 20 million bankruptcy notices were transmitted through the EBN program in fiscal year 2008.

[3] *See* H.R. Rpt. No. 108-401, 108th Cong., 1st Sess., at 614 (adopting the language of H.R. Rpt. No. 108-221, 108th Cong., 1st Sess., at 116).

- There is a $2.40 maximum charge for any single document, no matter its length; and

- At federal courthouses, public access terminals provide free PACER access to view filings in that court, as well as economical printouts (priced at $.10 per page).

In addition, contrary to the notion that little has been done to make court records freely available, the Electronic Public Access (EPA) program *does* provide a significant amount of federal court information to the public for free. For example, through PACER:

- Free access to all judicial opinions is provided;

- Parties to a court case receive a free copy of filings in the case;

- If an individual account does not reach $10 annually (which translates into access to at least 125 pages), no fee is charged at all – in 2008, there were over 145,000 accounts in this status; and

- Approximately 20 percent of all PACER usage is performed by users who are exempt from any charge, including indigents, academic researchers, CJA attorneys, and *pro bono* attorneys.[4]

Nonetheless, the fact remains that the EPA program does require funding, and Congress has never provided appropriations for its support. If the users, the largest of which are finance and information management corporations, are not charged for the services they receive, the Judiciary cannot maintain PACER or other public access facilities unless Congress annually provides taxpayer-funded appropriations to support the program.

Additionally, a misconception about PACER revenues needs clarification. There is *no* $150 million PACER surplus; the figure referenced in your correspondence was a FY 2006 balance of $146.6 million in the much larger Judiciary Information Technology Fund (JITF). The JITF finances the IT requirements of the entire Judiciary and is comprised primarily of "no-year" appropriated funds which are expected to be carried forward each year. While fee

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[4] In addition to these examples, the EPA program provides free access to court case information through VCIS (Voice Case Information System), an automated voice response system that provides a limited amount of bankruptcy case information directly from the court's database in response to touch-tone telephone inquiries. The Judicial Conference also recently attempted to expand free PACER access through a pilot project that provided PACER terminals in Federal Depository Libraries. The purpose of the pilot was to provide access to individuals who would be unlikely to go to the courthouse, have ready access to the Internet, or establish a PACER account. Unfortunately, after only 11 months, the pilot had to be suspended pending an evaluation and an investigation of potentially inappropriate use.

collections from the EPA program are also deposited into the JITF, they are used only to fund electronic public access initiatives and account for only a small portion of its balance.[5]

Finally, the Judiciary is making a serious effort to implement the requirements of the E-Government Act. Section 205(d) directed the Judicial Conference to "explore the feasibility of technology to post online dockets with links allowing all filings, decisions and rulings in each case to be obtained from the docket sheet of that case." In reality, the Judiciary has done much more than "explore" such technology — *we have designed and now implemented in all courts a system that provides nearly one million PACER users with access to over 250 million case file documents at a reasonable fee, and frequently free of any charge at all.* The EPA program was developed as an alternative to going to the courthouse during business hours and making copies at the cost of 50 cents a page.

In contrast, very few state courts have electronic access systems, and none provides as much information as PACER. Many state courts charge several dollars for a single records search. We receive frequent inquiries from state court officials and court administrators from other countries about PACER, which is viewed as an electronic public access model. Taxpayers, who incur none of the expenses associated with PACER, and users of the system, who enjoy rapid access to a vast amount of docket information, are well served by PACER. The PACER system is an on-going success story and the Judiciary remains committed to providing a high level of electronic public access to court information.

Private Information in Electronic Court Records

The Judicial Conference and its Rules Committees share your commitment to protecting private information in court filings from public access. Over a decade ago, before electronic filing was adopted in the federal district and bankruptcy courts and well before enactment of the E-Government Act of 2002, the Conference began developing a policy to protect private information in electronic case files while ensuring Internet-based public access to those files. That policy became effective in September 2001. Changes to the Federal Appellate, Bankruptcy, Civil, and Criminal Rules, largely incorporating the privacy policy and addressing other rules' aspects of protecting personal identifiers and other public information from remote electronic public access, became effective in December 2007, under the E-Government Act and pursuant to the Rules Enabling Act process.[6]

The Judicial Conference has continued to examine how the privacy policy and rules are working in practice. Two Conference committees are reviewing the rules, the policy, and their implementation. The Administrative Office of the United States Courts has also continued

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[5] The carryover JITF balances (including the portion attributable to EPA fee collections) have been substantially reduced since FY 2006 in order to meet the Judiciary's IT requirements.

[6] Fed. R. App. P. 25(a)(5); Fed. R. Bankr. P. 9037; Fed. R. Civ. P. 5.2; and Fed. R. Crim. P. 49.1.

to reinforce effective implementation. The Federal Judiciary has been in the forefront of protecting privacy interests while ensuring public access to electronically filed information.

In late 1999, a few federal courts served as pilot projects to test electronic filing. In 2009, the Judiciary's CM/ECF system has become fully operational in 94 district courts and 93 bankruptcy courts, and it will soon become operational in all 13 courts of appeals. As courts and litigants have acquired experience with nationwide electronic filing, new issues have emerged on how to balance privacy interests with ensuring public access to court filings.

The Judiciary-wide privacy policy was adopted in September 2001 after years of study, committee meetings, and public hearings. The policy requires that court filings must be available electronically to the same extent that they are available at the courthouse, provided that certain personal identifiers are redacted from those filings by the attorney or the party making the filing. The personal identifiers that must be redacted include the first five digits of a social-security number, financial account numbers, the name of a minor, the date of a person's birth, and the home address in a criminal case. These redaction requirements were incorporated into the Federal Rules amendments promulgated in December 2007 after the public notice and comment period prescribed under the Rules Enabling Act. These rules, which also address other privacy protection issues, meet the requirements of the E-Government Act.

The 2001 Conference policy and the 2007 privacy rules put the responsibility for redacting personal identifiers in court filings on the litigants and lawyers who generate and file the documents. The litigants and lawyers are in the best position to know if such information is in the filings and, if so, where. Making litigants and lawyers responsible to redact such information has the added benefit of restraining them from including such information in the first place. Moreover, requiring court staff unilaterally to modify pleadings, briefs, transcripts, or other documents that are filed in court was seen to be impractical and potentially compromising the neutral role the court must play. For these reasons, the rules clearly impose the redaction responsibility on the filing party. The Committee Notes accompanying the rules state: "The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or non-party making the filing."[7] The courts have made great efforts to ensure that filers are fully aware of their responsibility to redact personal identifiers. Those efforts continue.

The reported instances of personal identifier information contained in court filings is disturbing and must be addressed. The Rules Committees' Privacy Subcommittee, which developed and proposed the 2007 privacy rules, is charged with the task of examining how the rules have worked in practice, what issues have emerged since they took effect on December 1, 2007, and why personal identifier information continues to appear in some court filings. The

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[7] Fed. R. Civ. P. 5.2 (Committee Note).

Privacy Subcommittee, which includes representatives from the Advisory Rules Committees as well as the Court Administration and Case Management Committee, will consider whether the federal privacy rules or the Judicial Conference privacy policy should be amended and how to make implementation more effective. The subcommittee will review empirical data; the experiences of lawyers, court staff, and judges with electronic court filings; the software programs developed by some district and bankruptcy courts to assist in redacting personal identifier information; and other steps taken by different courts to increase compliance with the privacy rules.

While this work is going on, the Judiciary is taking immediate steps to address the redaction problem. Court personnel have been trained in administering the privacy policy and rules; additional training is taking place. On February 23, 2009, the Administrative Office issued a written reminder to all Clerks of Court about the importance of having personal identifiers redacted from documents before they are filed and of the need to remind filers of their redaction obligations. Court clerks were directed to use a variety of court communications, such as newsletters, listservs, continuing legal education programs, and notifications on websites administered directly by the courts, to reach as many filers as possible, as effectively as possible. Plans are underway to modify the national CM/ECF system to include an additional notice reminding filers of their redaction obligation. In addition, all the courts have been asked to provide information on their experience with the privacy policy and rules. Early responses have included some promising approaches that the Privacy Subcommittee will consider for possible national adoption.

The Privacy Subcommittee does not underestimate the difficulty or complexity of the problems. Court filings can be voluminous. Some cases involve hundreds or even thousands of pages of administrative or state-court paper records that cannot be electronically searched. Redacting personal identifier information in certain criminal proceedings may interfere with legitimate law enforcement prosecutions. Erroneously redacting information can affect the integrity of a court record. The propriety of court staff changing papers filed in private civil litigation is an ongoing concern. Internet access to court filings present other privacy and security issues besides the redaction of the personal identifiers specified in the 2007 rules, and these issues need to be studied as well.

The resolution of these privacy issues will involve important policy decisions that require careful and comprehensive consideration and input from the bench, bar, and public. The Judicial Conference and its Rules Committees look forward to continuing this dialogue with you.

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If we may be of assistance to you in either of these areas, or on any other matter, please do not hesitate to contact the Office of Legislative Affairs in the Administrative Office at 202-502-1700.

Sincerely,

Lee H. Rosenthal
Chair, Standing Committee on
Rules of Practice and Procedure

James C. Duff
Secretary, Judicial Conference
of the United States

Public Access and Records Management Division

AVAILABLE RESOURCES:

Summary of Resources QTRLY Rprt

			FY 2010 Actuals YB
1	PACER Fee Revenue - Prior Year Carry Forward (OXEEPAC)	$	34,381,874
2	PACER Fee Revenue - Current Year Receipts (OXEEPAC)	$	102,511,199
3	Print Fee Revenue - Prior Year Carry Forward (OXEEPAP)	$	516,534
4	Print Fee Revenue - Current Year Receipts (OXEEPAP)	$	187,118
5	**Total Available Resources**	**$**	**137,596,725**
6	***PROGRAM REQUIREMENTS:***		
7	**Public Access Services and Applications**		
8	EPA Program (OXEEPAX)	$	18,768,552
9	EPA Technology Infrastructure & Applications (OXEPTAX)	$	-
10	EPA Replication (OXEPARX)	$	-
11	**Public Access Services and Applications**	**$**	**18,768,552**
12	**Case Management/Electronic Case Files System**		
13	Development and Implementation (OXEECFP)	$	3,695,078
14	Operations and Maintenance (OXEECFO)	$	15,536,212
15	CM/ECF Futures (OXECMFD)	$	3,211,403
16	Appellete Operational Forum (OXEAOPX)changed from OXEACAX	$	144,749
17	District Operational Forum (OXEDCAX)	$	674,729
18	Bankruptcy Operational Forum (OXEBCAX)	$	492,912
19	**Subtotal, Case Management/Electronic Case Files System**	**$**	**23,755,083**
20	**Electronic Bankruptcy Noticing:**		
21	Electronic Bankruptcy Noticing (OXEBNCO)	$	9,662,400
22	**Subtotal, Electronic Bankruptcy Noticing**	**$**	**9,662,400**
23	**Telecommunications (PACER-Net & DCN)**		
24	PACER-Net (OXENETV)	$	10,337,076
25	DCN and Security Services (OXENETV)	$	13,847,748
26	PACER-Net & DCN (OXDPANV)	$	-

27	Security Services (OXDSECV)	$	-
28	**Subtotal, Telecommunications (PACER-Net & DCN)**	**$**	**24,184,824**
29	**Court Allotments**		
30	Court Staffing Additives(OXEEPAA)	$	228,373
31	Court Allotments (OXEEPAA) [incl. in program areas prior to FY 09]	$	1,291,335
32	CM/ECF Court Allotments (OXEECFA)	$	7,605,585
33	Courts/AO Exchange Program (OXEXCEX)	$	303,527
34	**Subtotal, Court Allotments**	**$**	**9,428,820**
35	**Total Program Requirements**	**$**	**85,799,679**
36	***Congressional Priorities:***		
37	**Victim Notification (Violent Crime Control Act)**		
38	Violent Crime Control Act Notification (OXJVCCD & OXJVCCO)	$	332,876
39	**Subtotal, Victim Notification (Violent Crime Control Act)**	**$**	**332,876**
40	**Web-based Juror Services**		
41	Web Based E-Juror Services O&M (OXEJMEO)	$	-
42	**Subtotal, Web-based Juror Services**	**$**	**-**
43	**Courtroom Technology (OXHCRTO-3000)**		
44	Courtroom Technology (OXHCRTO-3000)	$	24,731,665
45	**Subtotal, Courtroom Technology Program**	**$**	**24,731,665**
46	**State of Mississippi (OXEMSPX)**		
47	State of Mississippi (OXEMSPX)	$	120,988
48	**Subtotal, Mississippi State Courts**	**$**	**120,988**
49	**Total Congressional Priorities**	**$**	**25,185,529**
50	**Total Program & Congressional Priorities**	$	110,985,208
51	**Total EPA Carry Forward (Revenue less Disbursement)**	**$**	**26,611,517**
52	PACER FEE (OXEEPAC) Carry Forward	$	26,051,473
53	PRINT FEE (OXEEPAP) Carry Forward	$	-
54	**Total EPA Carry Forward**	**$**	**26,051,473**
55	Total Print Fee Revenue	$	703,652
56	Disbursed in (OXEEPAA) Allotments	$	143,608
57	PRINT FEE (OXEEPAP) Carry Forward	$	560,044

Public Access and Records Management Division

AVAILABLE RESOURCES:

		FY 2011 Actuals YB
1	PACER Fee Revenue - Prior Year Carry Forward (OXEEPAC)	$ 26,051,473
2	PACER Fee Revenue - Current Year Receipts (OXEEPAC)	$ 113,770,265
3	Print Fee Revenue - Prior Year Carry Forward (OXEEPAP)	$ 560,044
4	Print Fee Revenue - Current Year Receipts (OXEEPAP)	$ 182,064
6	Accounts Receivable 5114VA Previous Fiscal Year Carry Forward Revenue	$ -
7	Accounts Receivable 5114VA Current Fiscal Year Revenue	$ 6,717
8	**Total Available Resources**	**$ 140,570,563**
9	***PROGRAM REQUIREMENTS:***	
10	**Public Access Services and Applications**	
12	EPA Program (OXEEPAX)	$ 3,363,770
13	EPA Technology Infrastructure & Applications (OXEPTAX)	$ 10,339,444
14	EPA Replication (OXEPARX)	$ 4,318,690
15	**Public Access Services and Applications**	**$ 18,021,904**
16	**Case Management/Electronic Case Files System**	
18	Development and Implementation (OXEECFP)	$ 5,400,000
19	CM/ECF Positions (OXEEPOX)	
20	Operations and Maintenance (OXEECFO)	$ 11,154,753
21	CM/ECF Futures (OXECMFD)	$ 4,582,423
22	Appellete Operational Forum (OXEAOPX)changed from OXEACAX	$ 176,198
24	District Operational Forum (OXEDCAX)	$ 705,054
25	Bankruptcy Operational Forum (OXEBCAX)	$ 522,500
26	**Subtotal, Case Management/Electronic Case Files System**	**$ 22,540,928**
27	**Electronic Bankruptcy Noticing:**	
28	Electronic Bankruptcy Noticing (OXEBNCO)	$ 11,904,000
30	**Subtotal, Electronic Bankruptcy Noticing**	**$ 11,904,000**
31	**Telecommunications (PACER-Net & DCN)**	
32	PACER-Net (OXENETV)	$ 9,221,324
33	DCN and Security Services (OXENETV)	$ 9,806,949
34	PACER-Net & DCN (OXDPANV)	$ 4,147,390

36	Security Services (OXDSECV)	$ 352,610
37	**Subtotal, Telecommunications (PACER-Net & DCN)**	**$ 23,528,273**
38	**Court Allotments**	
39	Court Staffing Additives(OXEEPAA)	$ 468,954
40	Court Allotments (OXEEPAA) [incl. in program areas prior to FY 09]	$ 1,403,091
42	CM/ECF Court Allotments (OXEECFA)	$ 7,977,635
43	Courts/AO Exchange Program (OXEXCEX)	$ 769,125
44	**Subtotal, Court Allotments**	**$ 10,618,805**
45	**Total Program Requirements**	**$ 86,613,911**
46	***Congressional Priorities:***	
48	**Victim Notification (Violent Crime Control Act)**	
49	Violent Crime Control Act Notification (OXJVCCD)	$ -
50	Violent Crime Control Act Notification (OXJVCCO)	$ 508,903
51	**Subtotal, Victim Notification (Violent Crime Control Act)**	**$ 508,903**
52	**Web-based Juror Services**	
54	Web Based E-Juror Services O&M (OXEJMEO)	$ -
55	**Subtotal, Web-based Juror Services**	**$ -**
56	**Courtroom Technology (OXHCRTO-3000)**	
57	Courtroom Technology (OXHCRTO-3000)	$ 21,542,457
58	Prospectus (OXHCTPD)	
60	Courtroom Technology OIT (OXDCRTO-3000)	
61	Courtroom Technology Program (OXDCTPD)	
62	**Subtotal, Courtroom Technology Program**	**$ 21,542,457**
63	**Total Congressional Priorities**	**$ 22,051,360**
64	**Total Program & Congressional Priorities**	$ 108,665,271
66	**Total EPA Carry Forward (Revenue less Disbursement)**	**$ 31,905,292**
67	PACER FEE (OXEEPAC) Carry Forward	$ 31,320,278
68	PRINT FEE (OXEEPAP) Carry Forward	$ 585,015
69	**Total EPA Carry Forward**	**$ 31,905,293**
70	Total Print Fee Revenue	$ 742,108
72	Disbursed in (OXEEPAA) Allotments	$ 157,093
73	PRINT FEE (OXEEPAP) Carry Forward	$ 585,015
73	Accounts Receivable 5114VA Previous Year Carry Forward Revenue	$ 6,717
74	Total 5114VA Revenue Carry Forward	
65	Total Print Fee Revenue	

66	Disbursed in (OPCEPAA) Allotments
67	PRINT FEE (OPCEPAP) Carry Forward

Public Access and Records Management Division

AVAILABLE RESOURCES:

		FY 2012 Actuals
1	PACER Fee Revenue - Prior Year Carry Forward (OXEEPAC)	$ 31,320,278
2	PACER Fee Revenue - Current Year Receipts (OXEEPAC)	$ 124,021,883
3	Print Fee Revenue - Prior Year Carry Forward (OXEEPAP)	$ 585,015
4	Print Fee Revenue - Current Year Receipts (OXEEPAP)	$ 200,254
5	Accounts Receivable 5114VA Current Fiscal Year Revenue	$ 2,724
	Technical adj slippage OXHCRTO TO OXDCTPD	$ -
	Technical adj slippage OXHCRTO TO OXDCTPD	$ -
	Technical adj USCA13BPAC009 $184.2 de-Ob booked Acct. Per. 01/2014	$ -
6	Understated correction OXEEPOX FY12	$ 343,236
7	Travel correction OXEXCEX FY12	$ 382,169
8	**Total Available Resources**	**$ 156,855,559**
9	***PROGRAM REQUIREMENTS:***	
10	**Public Access Services**	
11	EPA Program (OXEEPAX)	$ 3,547,279
12	EPA Technology Infrastructure & Applications (OXEPTAX)	$ 5,389,870
13	EPA Replication (OXEPARX) FY14 crosswalk to OXDPASX	$ 3,151,927
14	**Subtotal, Public Access Services**	**$ 12,089,076**
15	**Case Management/Electronic Case Files System**	
16	Testing (OXEECFP)	$ 5,491,798
17	CM/ECF Positions (OXEEPOX)	$ 6,095,624
18	Operations and Maintenance (OXEECFO)	$ 8,006,727
19	CM/ECF Next Gen. (OXECMFD)	$ 5,291,223
20	Next Gen. OXECMFD FY14 crosswalk to CM/ECF OXDCMSX - SDSD	$ -
21	Appellete Operational Forum (OXEAOPX)	$ 164,255
22	District Operational Forum (OXEDCAX)	$ 817,706
23	Bankruptcy Operational Forum (OXEBCAX)	$ 531,162
24	**Subtotal, Case Management/Electronic Case Files System**	**$ 26,398,495**
25	**Electronic Bankruptcy Noticing:**	

26	Electronic Bankruptcy Noticing (OXEBNCO)	$ 13,789,000
27	**Subtotal, Electronic Bankruptcy Noticing**	**$ 13,789,000**
28	**Comm. Infrastructure, Services and Security**	
29	PACER Net DCN OXDPANV	$ 22,128,423
30	Security Services OXDSECV	$ 4,452,572
31	**Subtotal, Comm. Infrastruture, Services and Security**	**$ 26,580,994**
32	**Court Allotments**	
33	Court Staffing Additives/Allotments(OXEEPAA)	$ 1,662,967
34	CM/ECF Court Allotments (OXEECFA)	$ 8,063,870
35	Courts/AO Exchange Program (OXEXCEX)	$ 890,405
36	**Subtotal, Court Allotments**	**$ 10,617,242**
37	**Total Program Requirements**	**$ 89,474,807**
38	***Congressional Priorities:***	
39	**Victim Notification (Violent Crime Control Act)**	
40	Violent Crime Control Act Notification (OXJVCCD)	$ 480,666
41	Violent Crime Control Act Notification (OXJVCCO)	$ 550,256
42	**Subtotal, Victim Notification (Violent Crime Control Act)**	**$ 1,030,922**
43	**Web-based Juror Services**	
44	Web-based Juror Services (OXEJMSD)	$ -
45	Web based Ejuror Services O&M (OXEJMEO)	$ 744,801
46	**Subtotal, Web-based Juror Services**	**$ 744,801**
47	**Courtroom Technology (OXDCRTO-3000)**	
48	Courtroom Technology (OXHCRTO-3000)	$ 25,122,739
49	Courtroom Technology Program (OXHCTPD)	$ 3,803,497
50	Courtroom Technology OIT (OXDCRTO)	$ -
51	Courtroom Technology Program (OXDCTPD)	$ -
52	**Subtotal, Courtroom Technology Program**	**$ 28,926,236**
53	**State of Mississippi (OXEMSPX)**	
54	State of Mississippi (OXEMSPX)	$ -
55	**Subtotal, Mississippi State Courts**	**$ -**
56	**Total Congressional Priorities**	**$ 30,701,959**
57	**Total Program & Congressional Priorities**	$ 120,176,766
58	**Total EPA Carry Forward (Revenue less Disbursement)**	**$ 36,678,793**

59	PACER FEE (OXEEPAC) Carry Forward	$ 36,049,102
60	PRINT FEE (OXEEPAP) Carry Forward	$ 629,691
61	**Total EPA Carry Forward**	**$ 36,678,793**
62	Total Print Fee Revenue	$ 785,269
63	Disbursed in (OXEEPAA) Allotments	$ 155,578
64	PRINT FEE (OXEEPAP) Carry Forward	$ 629,691

Court Services - Electronic Public Access Policy & Program

AVAILABLE RESOURCES:

		DO NOT EDIT
		ACTUALS
		FY 2013
		Actuals
1	PACER Fee Revenue - Prior Year Carry Forward (OXEEPAC)	$ 36,049,102
2	PACER Fee Revenue - Current Year Receipts (OXEEPAC)	$ 147,469,581
3	Print Fee Revenue - Prior Year Carry Forward (OXEEPAP)	$ 629,691
4	Print Fee Revenue - Current Year Receipts (OXEEPAP)	$ 174,450
5	Accounts Receivable 5114VA Current Fiscal Year Revenue	$ 6,887
6	Adjustments	$ (1,231,137)
7	** FY12 slippage OXHCRTO to OXDCTPD	$ -
8	**Technical Adj. to return de-obligated funds booked to FY14	$ -
9	* FY2012 Understated correction in OXEEPOX not charged by OIS	$ -
10	*FY2012 Travel correction Zachary Porianda not charged to OXEXCEX	$ -
11	**Total Available Resources**	**$ 183,098,574**
12	***PROGRAM REQUIREMENTS:***	
13	**Public Access Services**	
14	EPA Program (OPCEPAX)	$ 4,652,972
15	EPA - Electronic Public Access (SDSD) (OTSEPAX)	
16	EPA US Courts.gov Web Support OPAF (OXAEPAX)	$ -
17	EPA Technology Infrastructure & Applications (OTSPTAX)	$ 5,139,947
18	EPA Replication (OXEPARX)	$ 10,462,534
19	EPA CTHD SDSD (OTHPASX)	$ -
20	**Subtotal, Public Access Services**	**$ 20,255,453**
21	**Case Management/Electronic Case Files System**	
22	Testing (OXEECFP) FY14 cross walk to OXDCMSX	$ 4,492,800
23	CM/ECF Positions (OPCEPOX)	$ 7,272,337
24	CM/ECF Positions (OPTEPOX)	
25	Operations & Maint. (OPTECFO)	$ 6,091,633

26	CM/ECF Next Gen. (OPCCMFD)	$ 13,416,708
27	CM/ECF Next Gen. (OPTCMFD)	
28	EPA: Next Gen & legacy CM/ECF Training (OTSCMCX)	
29	EPA: Enterprise Messaging (OTSCMEX)	
30	EPA - CM/ECF SDSD (OTSCMSX)	$ -
31	EPA: Testing (OTSCMTX)	
32	EPA - CM/ECF (CTHD) (OTHCMSX)	
33	EPA - Enterprise Data Warehouse - O&M (OPAEDXO)	
34	CSO Combined Forum OPCOPSX	$ -
35	District Court Forum (OXEDCAX)	$ 800,000
36	Bank. Court (OXEBCAX)	$ 52,000
37	**Subtotal, Case Management/Electronic Case Files System**	**$ 32,125,478**
38	**Electronic Bankruptcy Noticing:**	
39	Electronic Bankruptcy Noticing (OPCBNCO)	$ 12,845,156
40	**Subtotal, Electronic Bankruptcy Noticing**	**$ 12,845,156**
41	**Comm. Infrastructure, Services and Security**	
42	PACER Net DCN (OTIPANV)	$ 23,205,057
43	Security Services (OTRSECV)	$ 4,295,654
44	**Subtotal, Comm. Infrastruture, Services and Security**	**$ 27,500,711**
45	**Court Allotments**	
46	Court Staffing Additives/Allotments(OPCEPAA)	$ 2,262,193
47	CM/ECF Court Allotments (OPCECFA)	$ 12,912,897
48	Courts/AO Exchange Program (OPCXCEX)	$ 578,941
49	Courts/AO Exchange Program (OPTXCEX)	
50	**Subtotal, Court Allotments**	**$ 15,754,031**
51	**Total Program Requirements**	**$ 108,480,829**
52	***Congressional Priorities:***	
53	**Victim Notification (Violent Crime Control Act)**	
54	Violent Crime Control Act Notification (OPTVCCD)	$ 254,548
55	Violent Crime Control Act Notification (OPTVCCO)	$ 427,124

56	**Subtotal, Victim Notification (Violent Crime Control Act)**	**$ 681,672**
57	**Web-based Juror Services**	
52	Web-based Juror Services (OXEJMSD)	$ -
58	Web based Ejuror Ser. O&M (OPCJMEO)	$ 2,646,708
59	**Subtotal, Web-based Juror Services**	**$ 2,646,708**
60	**Courtroom Technology (OXDCRTO-3000)**	
56	Courtroom Technology (OXHCRTO-3000)	$ -
57	Courtroom Technology Program (OXHCTPD)	$ -
61	Courtroom Technology OIT (OTICRTO)	$ 24,835,203
62	Courtroom Technology OIT (OTTCRTO)	
63	Courtroom Technology Program (OTICTPD)	$ 6,695,113
64	**Subtotal, Courtroom Technology Program**	**$ 31,530,316**
61	**State of Mississippi (OXEMSPX)**	
62	State of Mississippi (OXEMSPX)	$ -
63	**Subtotal, Mississippi State Courts**	**$ -**
65	**Total Congressional Priorities**	**$ 34,858,696**
66	**Total Program & Congressional Priorities**	$ 143,339,525
67	**Total EPA Carry Forward (Revenue less Disbursement)**	**$ 39,759,049**
68	PACER FEE (OPCEPAC) Carry Forward	$ 39,094,163
69	PRINT FEE (OPCEPAP) Carry Forward	$ 664,886
70	**Total EPA Carry Forward**	**$ 39,759,049**
71	Total Print Fee Revenue	$ 804,141
72	Disbursed in (OPCEPAA) Allotments	$ 139,255
73	PRINT FEE (OPCEPAP) Carry Forward	$ 664,886

	Court Services - Electronic Public Access Policy & Program AVAILABLE RESOURCES:	DO NOT EDIT ACTUALS FY 2014 ACTUALS
1	PACER Fee Revenue - Prior Year Carry Forward (OXEEPAC)	$ 39,094,163
2	PACER Fee Revenue - Current Year Receipts (OXEEPAC)	$ 144,612,517
3	Print Fee Revenue - Prior Year Carry Forward (OXEEPAP)	$ 664,886
4	Print Fee Revenue - Current Year Receipts (OXEEPAP)	$ 177,647
5	Accounts Receivable 5114VA Current Fiscal Year Revenue	$ 386
6	Adjustments	$ 828,105
7	**Total Available Resources**	**$ 185,377,704**
8	***PROGRAM REQUIREMENTS:***	
9	**Public Access Services**	
10	EPA Program (OPCEPAX)	$ 4,262,398
11	EPA - Electronic Public Access (SDSD) (OTSEPAX)	$ 667,341
12	EPA US Courts.gov Web Support OPAF (OXAEPAX)	
13	EPA Technology Infrastructure & Applications (OTSPTAX)	$ 6,202,122
14	EPA CTHD SDSD (OTHPASX)	$ 4,367,846
15	**Subtotal, Public Access Services**	**$ 15,499,707**
16	**Case Management/Electronic Case Files System**	
17	CM/ECF Positions (OPTEPOX)	$ 8,210,918
18	CM/ECF Next Gen. (OPCCMFD)	$ 7,925,183
19	CM/ECF Next Gen. (OPTCMFD)	
20	EPA: Next Gen & legacy CM/ECF Training (OTSCMCX)	
21	EPA: Enterprise Messaging (OTSCMEX)	
22	EPA - CM/ECF SDSD (OTSCMSX)	$ 12,938,052
23	EPA: Testing (OTSCMTX)	
24	EPA - CM/ECF (CTHD) (OTHCMSX)	$ 6,640,397
25	EPA - Enterprise Data Warehouse - O&M (OPAEDXO)	$ 3,328,417
26	CSO Combined Forum OPCOPSX	$ 75,000
27	**Subtotal, Case Management/Electronic Case Files System**	**$ 39,246,201**
28	**Electronic Bankruptcy Noticing:**	
29	Electronic Bankruptcy Noticing (OPCBNCO)	$ 10,005,284
30	**Subtotal, Electronic Bankruptcy Noticing**	**$ 10,005,284**
31	**Comm. Infrastructure, Services and Security**	
32	PACER Net DCN (OTIPANV)	$ 33,022,253
33	Security Services (OTRSECV)	$ 5,288,226
34	**Subtotal, Comm. Infrastruture, Services and Security**	**$ 38,310,479**
35	**Court Allotments**	
36	Court Staffing Additives/Allotments(OPCEPAA)	$ 2,688,616
37	CM/ECF Court Allotments (OPCECFA)	$ 7,698,248
38	Courts/AO Exchange Program (OPCXCEX)	$ 367,441
39	Courts/AO Exchange Program (OPTXCEX)	
40	**Subtotal, Court Allotments**	**$ 10,754,305**
41	**Total Program Requirements**	**$ 113,815,976**
42	***Congressional Priorities:***	
43	**Victim Notification (Violent Crime Control Act)**	

44	Violent Crime Control Act Notification (OPTVCCD)	$	-
45	Violent Crime Control Act Notification (OPTVCCO)	$	474,673
46	**Subtotal, Victim Notification (Violent Crime Control Act)**	**$**	**474,673**
47	**Web-based Juror Services**		
48	Web based Ejuror Ser. O&M (OPCJMEO)	$	2,450,096
49	**Subtotal, Web-based Juror Services**	**$**	**2,450,096**
50	**Courtroom Technology (OXDCRTO-3000)**		
51	Courtroom Technology OIT (OTICRTO)	$	24,843,380
52	Courtroom Technology OIT (OTTCRTO)		
53	Courtroom Technology Program (OTICTPD)	$	1,220,959
54	**Subtotal, Courtroom Technology Program**	**$**	**26,064,339**
55	**Total Congressional Priorities**	**$**	**28,989,108**
56	**Total Program & Congressional Priorities**	**$**	**142,805,084**
57	**Total EPA Carry Forward (Revenue less Disbursement)**	**$**	**42,572,620**
58	PACER FEE (OPCEPAC) Carry Forward	$	41,876,991
59	PRINT FEE (OPCEPAP) Carry Forward	$	695,629
60	**Total EPA Carry Forward**	**$**	**42,572,620**
61	Total Print Fee Revenue	$	842,533
62	Disbursed in (OPCEPAA) Allotments	$	146,904
63	PRINT FEE (OPCEPAP) Carry Forward	$	695,629
64	**Total EPA Carry Forward**	**$**	**40,972,961**
65	Total Print Fee Revenue	$	869,268
66	Disbursed in (OPCEPAA) Allotments	$	151,160
67	PRINT FEE (OPCEPAP) Carry Forward	$	718,108

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Court Services - Electronic Public Access Policy & Program

AVAILABLE RESOURCES:

		DO NOT EDIT ACTUALS FY 2015 ACTUALS
1	PACER Fee Revenue - Prior Year Carry Forward (OXEEPAC)	$ 41,876,991
2	PACER Fee Revenue - Current Year Receipts (OXEEPAC)	$ 144,911,779
3	Print Fee Revenue - Prior Year Carry Forward (OXEEPAP)	$ 695,629
4	Print Fee Revenue - Current Year Receipts (OXEEPAP)	$ 173,639
5	Accounts Receivable 5114VA Current Fiscal Year Revenue	$ -
6	Prior Year Recoveries	$ 1,037,667
7	Anticipated Lapse of Decentralized EPA Allotments	
8	EPA Returned/Exchanged Funds	
9	**Total Available Resources**	**$ 188,695,705**
10	***PROGRAM REQUIREMENTS:***	
11	**Public Access Services**	
12	EPA Program (OPCEPAX)	$ 2,575,977
13	EPA Product Improvement (OPTEPIX)	
14	EPA Reimbursables - Salaries (OPCEPAR)	
15	EPA - Electronic Public Access (SDSD) (OTSEPAX)	$ 642,160
16	EPA US Courts.gov Web Support OPAF (OXAEPAX)	$ 1,295,509
17	EPA Technology Infrastructure & Applications (OTSPTAX)	$ 3,345,593
18	EPA Information Technology Support (OTSTESX)	
19	EPA CTHD SDSD (OTHPASX)	$ 13,567,318
20	**Subtotal, Public Access Services**	**$ 21,426,557**
21	**Case Management/Electronic Case Files System**	
22	CM/ECF Positions (OPTEPOR)	$ 6,622,167
23	CM/ECF Next Gen. (OPCCMFD)	$ 108,513
24	CM/ECF Implementation (OPCCMID)	
25	CM/ECF Next Gen. (OPTCMFD)	$ 10,169,819
26	CM/ECF Technical Assessment (OTTEPAX)	
27	EPA: Next Gen & legacy CM/ECF Training (OTSCMCX)	$ 1,727,563

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28	EPA: Enterprise Messaging (OTSCMEX)	$	2,730,585
29	EPA - CM/ECF SDSD (OTSCMSX)	$	3,336,570
30	EPA: Testing (OTSCMTX)	$	4,574,158
31	EPA - Enterprise Data Warehouse - O&M (OPAEDXO)	$	3,244,352
32	CSO Combined Forum OPCOPSX	$	1,680,128
33	**Subtotal, Case Management/Electronic Case Files System**	**$**	**34,193,855**
34	**Electronic Bankruptcy Noticing**		
35	Electronic Bankruptcy Noticing (OPCBNCO)	$	8,090,628
36	**Subtotal, Electronic Bankruptcy Noticing**	**$**	**8,090,628**
37	**Comm. Infrastructure, Services and Security**		
38	PACER Net DCN (OTIPANV)	$	36,035,687
39	Security Services (OTRSECV)	$	7,378,502
40	**Subtotal, Comm. Infrastruture, Services and Security**	**$**	**43,414,189**
41	**Court Allotments**		
42	Court Staffing Additives/Allotments(OPCEPAA)	$	1,064,956
43	CM/ECF Court Allotments (OPCECFA)	$	7,964,723
44	Courts/AO Exchange Program (OPTXCEX)	$	1,343,999
45	**Subtotal, Court Allotments**	**$**	**11,059,019**
46	**Total Program Requirements**	**$**	**118,184,248**
47	***Congressional Priorities:***		
48	**Victim Notification (Violent Crime Control Act)**		
49	Violent Crime Control Act Notification (OPTVCCO)	$	508,433
50	**Subtotal, Victim Notification (Violent Crime Control Act)**	**$**	**508,433**
51	**Web-based Juror Services**		
52	Web based Ejuror Ser. O&M (OPCJMEO)	$	1,646,738
53	**Subtotal, Web-based Juror Services**	**$**	**1,646,738**
54	**Courtroom Technology (OXDCRTO-3000)**		
55	Courtroom Technology OIT (OTICRTO)	$	-
56	Courtroom Technology OIT (OTTCRTO)	$	24,799,997
57	Courtroom Technology Program (OTICTPD)	$	2,583,328
58	**Subtotal, Courtroom Technology Program**	**$**	**27,383,325**
59	**Total Congressional Priorities**	**$**	**29,538,496**

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60	**Total Program & Congressional Priorities**	**$**	**147,722,744**
61	**Total EPA Carry Forward (Revenue less Disbursement)**	**$**	**40,972,961**
62	PACER FEE (OPCEPAC) Carry Forward	$	40,254,853
63	PRINT FEE (OPCEPAP) Carry Forward	$	718,108
64	**Total EPA Carry Forward**	**$**	**40,972,961**
65	Total Print Fee Revenue	$	869,268
66	Disbursed in (OPCEPAA) Allotments	$	151,160
67	PRINT FEE (OPCEPAP) Carry Forward	$	718,108

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Court Services - Electronic Public Access Policy & Program

AVAILABLE RESOURCES:

		DO NOT EDIT ACTUALS FY 2016 ACTUALS
1	PACER Fee Revenue - Prior Year Carry Forward (OXEEPAC)	$ 40,254,853
2	PACER Fee Revenue - Current Year Receipts (OXEEPAC)	$ 146,421,679
3	Print Fee Revenue - Prior Year Carry Forward (OXEEPAP)	$ 718,108
4	Print Fee Revenue - Current Year Receipts (OXEEPAP)	$ 197,077
5	Accounts Receivable 5114VA Current Fiscal Year Revenue	$ -
6	Prior Year Recoveries	$ 7,485,659
7	Anticipated Lapse of Decentralized EPA Allotments	$ -
8	EPA Returned/Exchanged Funds	$ -
9	**Total Available Resources**	**$ 195,077,376**
10	***PROGRAM REQUIREMENTS:***	
11	**Public Access Services**	
12	EPA Program (OPCEPAX)	$ 748,495
13	EPA Product Improvement (OPTEPIX)	$ 678,400
14	EPA Reimbursables - Salaries (OPCEPAR)	$ 2,046,473
15	EPA - Electronic Public Access (SDSD) (OTSEPAX)	$ 2,443,614
16	EPA US Courts.gov Web Support OPAF (OXAEPAX)	$ 1,241,031
17	EPA Technology Infrastructure & Applications (OTSPTAX)	$ 6,282,055
18	EPA Information Technology Support (OTSTESX)	$ 67,605
19	EPA CTHD SDSD (OTHPASX)	$ 10,364,682
20	**Subtotal, Public Access Services**	**$ 23,872,355**
21	**Case Management/Electronic Case Files System**	$ -
22	CM/ECF Positions (OPTEPOR)	$ 6,290,854
23	CM/ECF Next Gen. (OPCCMFD)	$ 134,093
24	CM/ECF Implementation (OPCCMID)	$ 635,520
25	CM/ECF Next Gen. (OPTCMFD)	$ 11,415,754

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26	CM/ECF Technical Assessment (OTTEPAX)	$	1,649,068
27	EPA: Next Gen & legacy CM/ECF Training (OTSCMCX)	$	1,786,404
28	EPA: Enterprise Messaging (OTSCMEX)	$	3,785,177
29	EPA - CM/ECF SDSD (OTSCMSX)	$	2,422,404
30	EPA: Testing (OTSCMTX)	$	6,182,547
31	EPA - Enterprise Data Warehouse - O&M (OPAEDXO)	$	3,645,631
32	CSO Combined Forum OPCOPSX	$	1,798,503
33	**Subtotal, Case Management/Electronic Case Files System**	**$**	**39,745,955**
34	**Electronic Bankruptcy Noticing**	$	-
35	Electronic Bankruptcy Noticing (OPCBNCO)	$	7,069,408
36	**Subtotal, Electronic Bankruptcy Noticing**	**$**	**7,069,408**
37	**Comm. Infrastructure, Services and Security**	$	-
38	PACER Net DCN (OTIPANV)	$	36,577,995
39	Security Services (OTRSECV)	$	9,344,081
40	**Subtotal, Comm. Infrastruture, Services and Security**	**$**	**45,922,076**
41	**Court Allotments**	$	-
42	Court Staffing Additives/Allotments(OPCEPAA)	$	(346,799)
43	CM/ECF Court Allotments (OPCECFA)	$	6,588,999
44	Courts/AO Exchange Program (OPTXCEX)	$	1,069,823
45	**Subtotal, Court Allotments**	**$**	**7,312,023**
46	**Total Program Requirements**	**$**	**123,921,817**
47	***Congressional Priorities:***	$	-
48	**Victim Notification (Violent Crime Control Act)**	$	-
49	Violent Crime Control Act Notification (OPTVCCO)	$	113,500
50	**Subtotal, Victim Notification (Violent Crime Control Act)**	**$**	**113,500**
51	**Web-based Juror Services**	$	-
52	Web based Ejuror Ser. O&M (OPCJMEO)	$	1,955,285
53	**Subtotal, Web-based Juror Services**	**$**	**1,955,285**
54	**Courtroom Technology (OXDCRTO-3000)**	$	-
55	Courtroom Technology OIT (OTICRTO)	$	-

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56	Courtroom Technology OIT (OTTCRTO)	$	18,759,887
57	Courtroom Technology Program (OTICTPD)	$	6,063,645
58	**Subtotal, Courtroom Technology Program**	**$**	**24,823,532**
59	**Total Congressional Priorities**	**$**	**26,892,317**
60	**Total Program & Congressional Priorities**	**$**	**150,814,134**
61	**Total EPA Carry Forward (Revenue less Disbursement)**	**$**	**44,263,242**
62	PACER FEE (OPCEPAC) Carry Forward	$	43,499,203
63	PRINT FEE (OPCEPAP) Carry Forward	$	764,039
64	**Total EPA Carry Forward**	**$**	**44,263,242**
65	Total Print Fee Revenue	$	915,185
66	Disbursed in (OPCEPAA) Allotments	$	151,146
67	PRINT FEE (OPCEPAP) Carry Forward	$	764,039

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER, and ALLIANCE FOR JUSTICE, for themselves and all others similarly situated, ***Plaintiffs,*** **v.** **UNITED STATES OF AMERICA,** ***Defendant.***	**Case No. 16-745**

DECLARATION OF THOMAS LEE AND MICHAEL LISSNER

Thomas Lee and Michael Lissner hereby declare as follows:

Thomas Lee Background and Experience

1. Thomas Lee is a software developer and technologist with a background in federal government transparency issues. He currently develops software for a large venture-backed software company. In this capacity he uses cloud-based storage and computation services on a daily basis and assists in cost estimation, planning and optimization tasks concerning those services.

2. Before taking on his current private-sector role in 2014, Mr. Lee spent six years working at the Sunlight Foundation, serving four of those years as the Director of Sunlight Labs, the Foundation's technical arm. The Sunlight Foundation is a research and advocacy

organization focused on improving government transparency. Sunlight Labs' work focused on the modernization of government information technology and improving the distribution of government data. This work included technical project management, budgeting, media appearances and testimony before Congress, among other tasks.

3. Prior to joining the Sunlight Foundation, Mr. Lee built websites for large nonprofits, the U.S. Navy, and the offices of individual members and committees within the U.S. Senate and House of Representatives. Mr. Lee's resume is attached to this declaration.

Michael Lissner Background and Experience

4. Michael Lissner is the executive director of Free Law Project, a nonprofit organization established in 2013 to provide free, public, and permanent access to primary legal materials on the internet for educational, charitable, and scientific purposes to the benefit of the general public and the public interest. In this capacity he provides organizational management, publishes advocacy materials, responds to media inquiries, and writes software.

5. Since 2009, Free Law Project has hosted RECAP, a free service that makes PACER resources more widely available. After installing a web browser extension, RECAP users automatically

contribute PACER documents they purchase to a central repository. In return, when using PACER, RECAP users are notified if a document exists in the RECAP central repository. When it does, they may download it directly from the RECAP repository, avoiding the need to pay PACER fees.

6. In the course of maintaining and improving RECAP, Mr. Lissner has become extensively familiar with PACER. During this time RECAP's archive of PACER documents has grown to more than 1.8 million dockets containing more than 40 million pages of PACER documents.

7. Mr. Lissner has conducted extensive research on the operation and history of the PACER system. Among other topics, this research has focused on the costs of PACER content and the history of PACER fees. This research is available on the Free Law Project website.[1] Mr. Lissner's resume is attached to this declaration.

Expert Assignment and Materials Reviewed

8. We have been asked by the plaintiffs' counsel in this case to evaluate the reported fee revenue and costs of the PACER system in light of our knowledge of existing information technology and data-storage costs, our specific knowledge of the PACER system, and our background in federal government information systems.

[1] **https://free.law/pacer-declaration/**

9. Specifically, the plaintiffs' counsel have asked us to offer an opinion on whether the Administrative Office of the U.S. Courts (AO) is charging users more than the marginal cost of disseminating records through the PACER system—in other words, to use the language of the E-Government Act of 2002, the "expenses incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered."

10. In forming our opinion, we have reviewed the Plaintiffs' Statement of Undisputed Material Facts and some of the materials cited in that statement, including a spreadsheet provided to the plaintiffs' counsel in discovery (Taylor Decl., Ex. L) and the Defendant's Response to Plaintiffs' First Set of Interrogatories (Taylor Decl., Ex. M).

11. We also rely upon our accumulated experience as technologists and government transparency advocates.

Reasoning and Conclusions on Marginal Cost

12. As we explain in detail below, it is overwhelmingly likely that the PACER system, as operated by the Administrative Office of the Courts (AO), collects fees far in excess of the costs associated with providing the public access to the records it contains.

13. The following calculations are intended to convey fair but approximate estimates rather than precise costs.

14. The marginal cost of providing access to an electronic record consists of (a) the expenses associated with detecting and responding to a request for the record; (b) the bandwidth fees associated with the inbound and outbound transmissions of the request and its response; and (c) the pro rata expense associated with storing the records in a durable form between requests.

15. As a point of comparison we use the published pricing of Amazon Web Services (AWS). AWS leads the market for cloud computing services[2] and counts organizations including Netflix, Adobe Systems, and NASA among its customers. Like most cloud providers, AWS pricing accounts for complex considerations such as equipment replacement, technical labor, and facilities costs. Although the division is profitable, AWS prices are considered highly competitive. AWS services are organized into regions, each of which represents a set of data centers in close geographic and network proximity to one another.

16. For our evaluation, we first consider the cost of storage. Researcher Matthew Komorowski[3] and data storage firm BackBlaze[4] have published storage cost time series that when combined cover the period dating from the PACER system's 1998 debut to the present.

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[2] https://www.srgresearch.com/articles/leading-cloud-providers-continue-run-away-market.
[3] http://www.mkomo.com/cost-per-gigabyte
[4] https://www.backblaze.com/blog/hard-drive-cost-per-gigabyte/

During this time their data shows the cost of a gigabyte of storage falling from $65.37 to $0.028, a reduction of over 99.9%. During this same time period PACER's per-page fees increased 43%, from $0.07 to $0.10.

17. The effect of economies of scale makes it difficult to assemble comparable time series for bandwidth and computing costs. We are therefore unable to easily compare PACER fees' growth rate to the change in bandwidth and computing costs from 1998 to the present.

18. Fortunately, it is possible to compare recent PACER fee revenue totals to reasonable contemporary costs for the technical functionality necessary to perform PACER's record retrieval function. The AWS Simple Storage Service (S3) provides this necessary data storage and retrieval functionality and publishes straightforward and transparent pricing for it. S3 costs vary by region. Using the prices published on August 27, 2017 for the "GovCloud" region, which is designed for U.S. government users, we find storage prices of $0.039 per gigabyte[5] per month for the first 50 terabytes, $0.037 per gigabyte per month for the next 450 terabytes, and $0.0296 per gigabyte per month for the next 500 terabytes. Retrieving an item from the

[5] The quantity of data contained in a terabyte/gigabyte/megabyte/kilobyte varies slightly according to which of two competing definitions is used. Our analysis employs the definitions used by Amazon Web Services. c.f. https://docs.aws.amazon.com/general/latest/gr/glos-chap.html

GovCloud region currently costs $0.004 per 10,000 requests, plus data transmission at $0.01 per gigabyte.

19. Determining how these prices might apply to PACER's needs requires knowledge of the PACER system's size. We are not aware of a current and authoritative source for this information. Instead, we employ an estimate based on two sources from 2014: that year's Year-End Report on the Federal Judiciary,[6] and an article published in the *International Journal for Court Administration*.[7] The former states that PACER "currently contains, in aggregate, more than one billion retrievable documents." The latter states that the PACER "databases contain over 47,000,000 cases and well over 600,000,000 legal documents; approximately 2,000,000 new cases and tens of millions of new documents are entered each year." Although the large difference in document counts makes it unlikely that both of these estimates are correct, they provide an order of magnitude with which to work. For the sake of our estimate we double the larger of these numbers and make the generous assumption that PACER now contains two billion documents.

20. Mr. Lissner's custodianship of the RECAP archive allows us to make estimates of the typical properties of PACER documents.

[6] https://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf
[7] Brinkema, J., & Greenwood, J.M. (2015). E-Filing Case Management Services in the US Federal Courts: The Next Generation: A Case Study. International Journal for Court Administration, 7(1). Vol. 7, No. 1, 2015.

21. The RECAP Archive contains the most-requested documents from PACER, making them appropriate for our analysis.

22. Mr. Lissner finds an average document size of 254 kilobytes and 9.1 pages, and therefore an average page size of 27.9 kilobytes. Assuming a PACER database size of two billion documents and the prices recorded above, we calculate that annual storage costs of the the PACER database on S3 would incur fees totaling $226,041.60.

23. This leaves the task of estimating the costs incurred by the retrieval of documents. To do this we must estimate the total number of requests served by PACER each year. The PACER fee revenue reported for 2016 in the spreadsheet provided to the plaintiffs' counsel in discovery is $146,421,679. The per-page PACER fee in 2016 was $0.10. Simple arithmetic suggests that approximately 1,464,216,790 pages were retrieved from PACER in 2016.

24. This calculation does not reflect the 30 page/$3.00 per-document cap on fees built into PACER's price structure; nor the fact that some of the revenue comes from search results, which are also sold by the page; nor any other undisclosed discounts.

25. The RECAP dataset's 9.1 page average document length suggests that the fee cap might not represent a substantial discount to users in practice.

27. Out of an abundance of caution against underestimating costs, we account for these inaccuracies by rounding the estimated request count up to two billion for the following calculations.

28. Using aforementioned S3 prices for retrieving an item from storage, this volume of annual requests would incur $800 in fees. An additional $558.24 in bandwidth costs would also be incurred. This yields a total yearly estimate for storing and serving PACER's dataset using AWS S3's GovCloud region of $227,399.84, or 0.16% of PACER's reported 2016 fee revenue.

29. The tremendous disparity between what the judiciary actually charges in PACER fees and what is reasonably necessary to charge is illustrated by two alternative calculations. The first considers what the per page fee could be if PACER was priced according to our calculations. Including storage costs, we estimate that the per page cost of retrieving a document from PACER could cost $0.0000006 (about one half of one ten-thousandth of a penny). The second alternate calculation considers how many requests PACER could serve if the fees it currently collects were used exclusively and entirely for providing access to its records. Assuming no change in the size of the dataset and using the storage costs calculated in association with that size, $146,195,637.40 in fee revenue remains to cover document requests and bandwidth. At the previously cited rates, this would

cover the costs associated with serving 215,271,893,258,900 requests, or approximately 1,825 pages per day for every person in the United States.

Reasoning and Conclusions on Reasonableness of Costs

30. We offer the preceding analysis with three caveats. First, at the time of PACER's design and implementation, cloud computing services were not widely available and the cost savings associated with their scale could not be achieved. It is therefore reasonable to assume that PACER's costs could be artificially high due to the time in which it was built, although effective ongoing maintenance and modernization should attenuate this effect. Second, although the Administrative Office of the Courts could directly use the Amazon Web Services we discuss, it would not be uncommon or unreasonable to purchase those services through a reseller who increases their price by some amount. Third, it is important to note that as outside analysts with limited information, we cannot anticipate or account for all of the costs that could conceivably be associated with access to PACER records.

31. But it is noteworthy that PACER fees increased during a period of rapidly declining costs in the information technology sector. Even after taking the preceding caveats into account, we are unable to offer a reasonable explanation for how PACER's marginal cost for

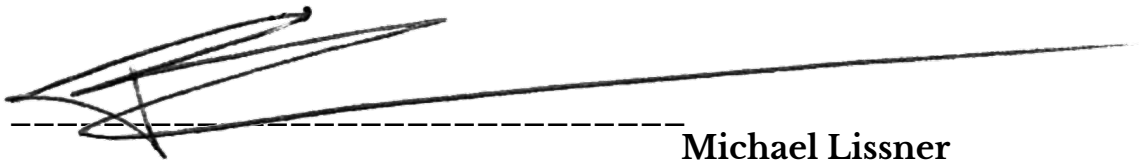
serving a record could be many orders of magnitude greater than the contemporary cost of performing this function.

32. It is overwhelmingly likely that the PACER system, as administered by the AO, collects fees far in excess of the costs associated with providing the public access to the records it contains.

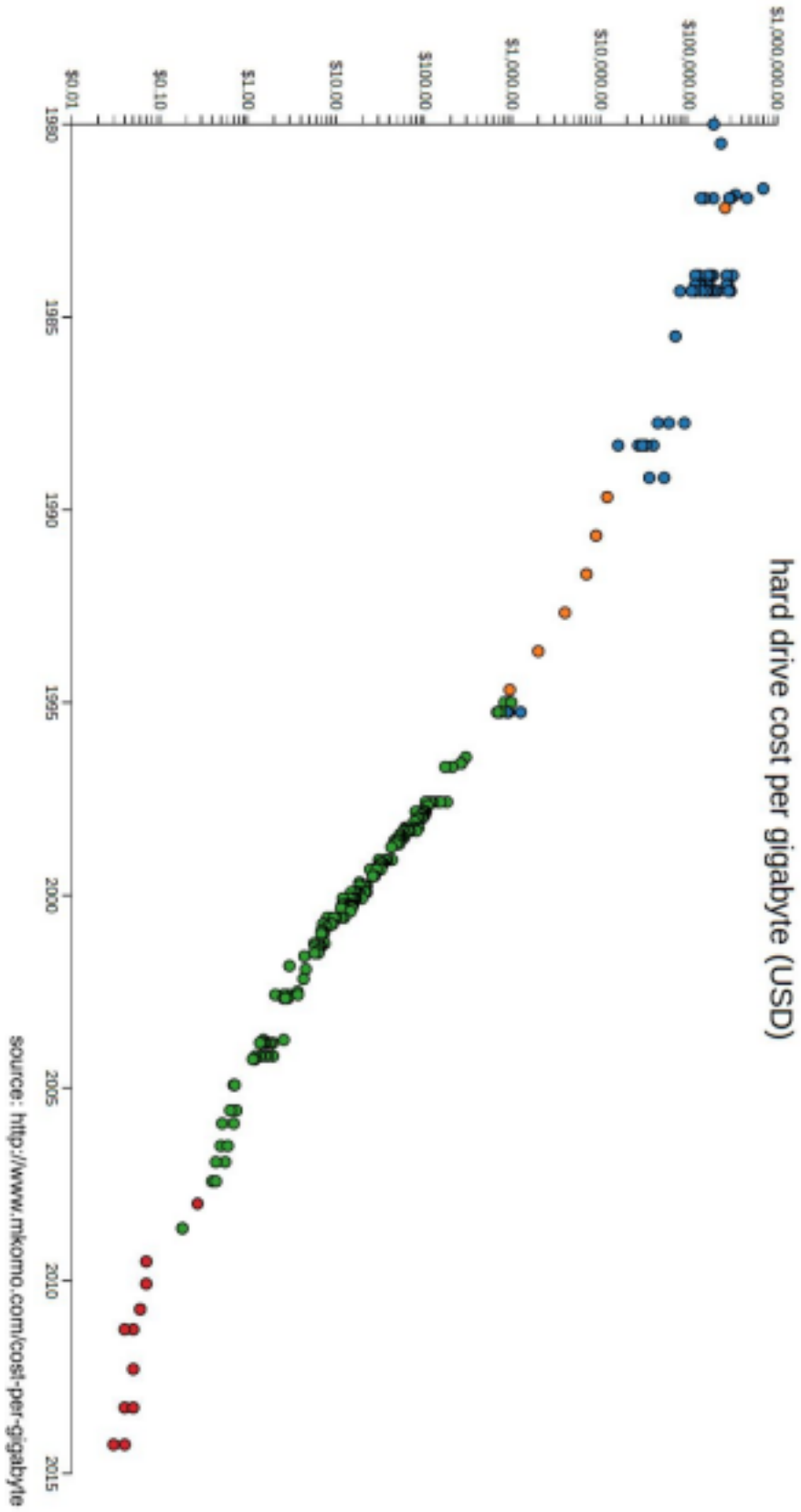
33. We declare under penalty of perjury that the foregoing is true and correct.

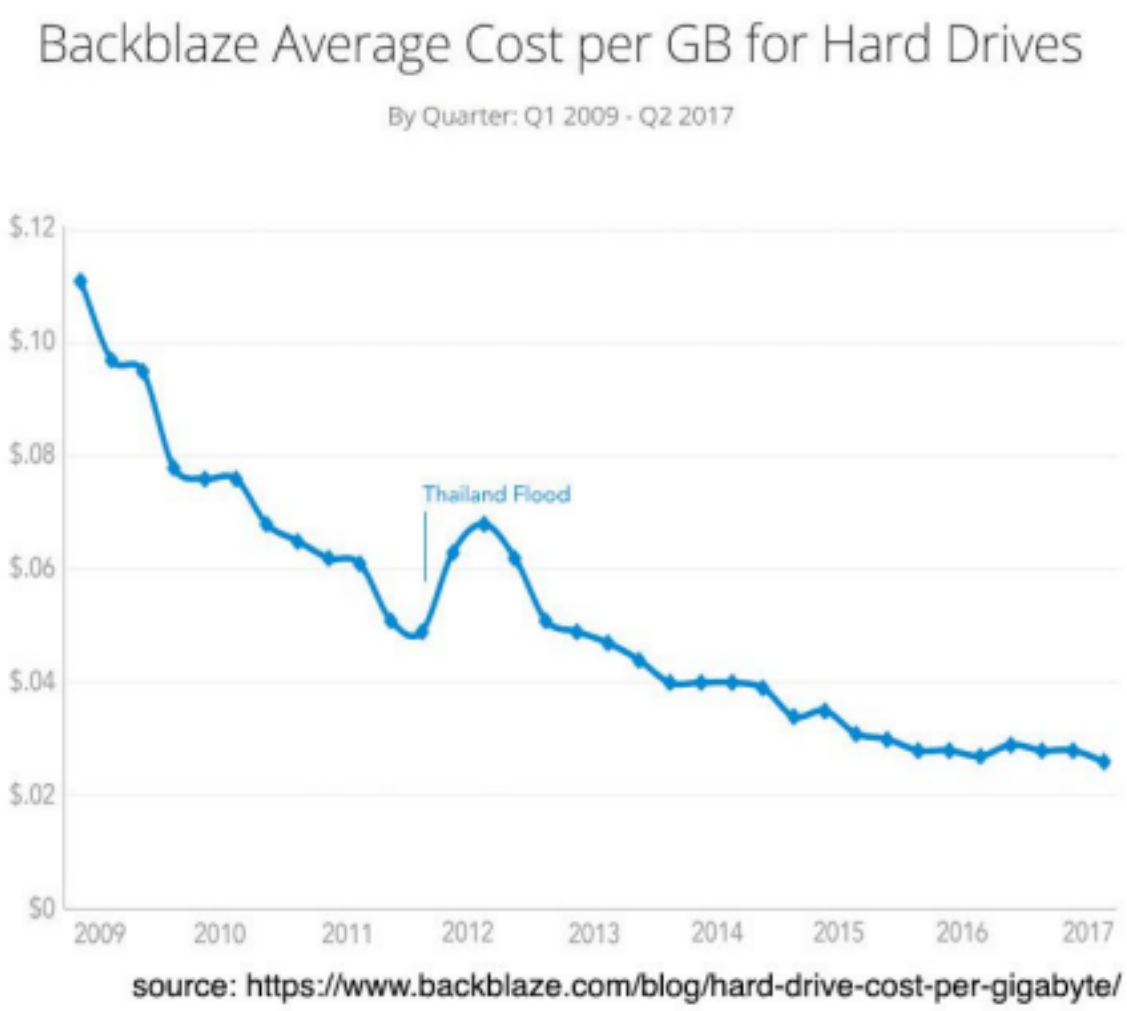
Executed on August 28, 2017.

Thomas Lee



Michael Lissner


hard drive cost per gigabyte (USD)
$0.01
$0.10
$1.00
$10.00
$100.00
$1,000.00
$10,000.00
$100,000.00
$1,000,000.00
1980
1985
1990
1995
2000
2005
2010
2015
source: http://www.mkomo.com/cost-per-gigabyte


Backblaze Average Cost per GB for Hard Drives
By Quarter: Q1 2009 - Q2 2017
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$.10
$.08
$.06
$.04
$.02
$0
Thailand Flood
2009
2010
2011
2012
2013
2014
2015
2016
2017
source: https://www.backblaze.com/blog/hard-drive-cost-per-gigabyte/

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

Case No. 16-745-ESH

PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

As required by Local Rule 7(h)(1), the plaintiffs provide the following statement of material facts as to which they contend there is no genuine issue[1]:

I. Overview of PACER fees

1. The Public Access to Court Electronic Records system, commonly known as PACER, is a system that provides online access to federal judicial records and is managed by the Administrative Office of the U.S. Courts (or AO). *See* ECF No. 27 (Answer) ¶ 7.

2. The current fee "for electronic access to any case document, docket sheet, or case-specific report via PACER [is] $0.10 per page, not to exceed the fee for thirty pages." *Electronic Public Access Fee Schedule* (Taylor Decl., Ex. A); *see* Answer ¶ 7.

3. The current fee "[f]or electronic access to transcripts and non-case specific reports via PACER (such as reports obtained from the PACER Case Locator or docket activity reports) [is] $0.10 per page." Taylor Decl., Ex. A; *see* Answer ¶ 7.

[1] Much of what follows is based on documents produced by the government for purposes of this litigation. These documents set forth the amount of money collected in PACER fees since fiscal year 2010, which programs that money has been used to fund, and the government's description of the programs. Although the plaintiffs do not challenge the truthfulness of any of this information in moving for summary judgment on the issue of liability, they reserve the right to do so at a later stage. In addition, the words "judiciary" and "Administrative Office" or "AO" are used interchangeably when referring to the Judicial Branch's administrative action.

4. The current fee "[f]or electronic access to an audio file of a court hearing via PACER [is] $2.40 per audio file." Taylor Decl., Ex. A; *see* Answer ¶ 7.

5. Anyone who accesses records through PACER will incur an obligation to pay fees unless she obtains a fee waiver or incurs less than $15 in fees in a given quarter. Taylor Decl., Ex. A.

II. History of PACER fees

A. The creation of PACER

8. In 1990, Congress began requiring the judiciary to charge "reasonable fees . . . for access to information available through automatic data processing equipment," including records available through what is now known as PACER. Judiciary Appropriations Act, 1991, Pub. L. No. 101–515, § 404, 104 Stat. 2129, 2132–33. In doing so, Congress provided that "[a]ll fees hereafter collected by the Judiciary . . . as a charge for services rendered shall be deposited as offsetting collections . . . to reimburse expenses incurred in providing these services." *Id.*

9. Later in the decade, the judiciary started planning for a new e-filing system called ECF. The staff of the AO produced a paper "to aid the deliberations of the Judicial Conference" in this endeavor. *Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues and the Road Ahead* (Mar. 1997) (Taylor Decl., Ex. B). The paper discussed, among other things, how the ECF system could be funded. *Id.* at 34–36. The AO staff wrote that "there is a long-standing principle" that, when imposing user fees, "the government should seek, not to earn a profit, but only to charge fees commensurate with the cost of providing a particular service." *Id.* at 34. But, two pages later, the staff contemplated that the ECF system could be funded with "revenues generated from electronic public access fees"—that is, PACER fees. *Id.* at 36.

10. The Judicial Conference set PACER fees at $.07 per page beginning in 1998. *See* Chronology of the Fed. Judiciary's Elec. Pub. Access (EPA) Program (Taylor Decl., Ex. C).

B. The E-Government Act of 2002

11. Four years after that, Congress enacted the E-Government Act of 2002. According to a report prepared by the Committee on Governmental Affairs, Congress found that, under "existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information." S. Rep. 107–174, 107th Cong., 2d Sess. 23 (2002) (Taylor Decl., Ex. D, at 23). With the E-Government Act, "[t]he Committee intend[ed] to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible." *Id.*; *see also* ECF No. 1 (Compl.) ¶ 12; Answer ¶ 12.

12. The E-Government Act amended the language authorizing the imposition of fees—removing the mandatory "shall prescribe" language and replacing it with language permitting the Judicial Conference to charge fees "only to the extent necessary." Pub. L. No. 107–347, § 205(e), 116 Stat. 2899, 2915 (Dec. 17, 2002) (28 U.S.C. § 1913 note).

13. The full text of 28 U.S.C. § 1913 note, as amended by the E-Government Act, is as follows:

> (a) The Judicial Conference may, only to the extent necessary, prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, 1930, and 1932 of title 28, United States Code, for collection by the courts under those sections for access to information available through automatic data processing equipment. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. The Director of the [AO], under the direction of the Judicial Conference of the United States, shall prescribe a schedule of reasonable fees for electronic access to information which the Director is required to maintain and make available to the public.
>
> (b) The Judicial Conference and the Director shall transmit each schedule of fees prescribed under paragraph (a) to the Congress at least 30 days before the schedule becomes effective. All fees hereafter collected by the Judiciary under paragraph (a) as a charge for services rendered shall be deposited as offsetting collections to the Judiciary Automation Fund pursuant to 28 U.S.C. 612(c)(1)(A) to reimburse expenses incurred in providing these services.

C. The AO's Response to the E-Government Act

14. The Judicial Conference did not reduce or eliminate PACER fees following the enactment of the E-Government Act. *See* Compl. ¶ 13; Answer ¶ 13.

15. To the contrary, in September 2004 the Judicial Conference increased fees to $.08 per page, effective on January 1, 2005. Memorandum from Leonidas Ralph Mecham, Director of the Admin. Office, to Chief Judges & Clerks (Oct. 21, 2004) (Taylor Decl., Ex. E). In a letter announcing the increase to the chief judges and clerks of each federal court, the AO's Director wrote: "The fee increase will enable the judiciary to continue to fully fund the Electronic Public Access Program, in addition to CM/ECF implementation costs until the system is fully deployed throughout the judiciary and its currently defined operations and maintenance costs thereafter." *Id.* The letter does not mention the E-Government Act. *See* Compl. ¶ 13; Answer ¶ 13.

16. By the end of 2006, the Judiciary Information Technology Fund had accumulated a surplus of $146.6 million—$32.2 million of which was from PACER fees. Admin. Office, Judiciary Information Technology Annual Report for Fiscal Year 2006, at 8, (Taylor Decl., Ex. F). According to the AO, these fees had "result[ed] from unanticipated revenue growth associated with public requests for case information." *Id.*

17. Despite the surplus, the AO still did not reduce or eliminate PACER fees, but instead began "examining expanded use of the fee revenue." *Id.* It started using the excess PACER revenue to fund "courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance." Letter from Sen. Lieberman, Chair, Sen. Comm. on Homeland Security and Governmental Affairs, to Sens. Durbin and Collins, Sen. Comm. on Appropriations (Mar. 25, 2010) (Taylor Decl., Ex. G); *see* Compl. ¶ 14; Answer ¶ 14.

18. Two years later, in 2008, the chair of the Judicial Conference's Committee on the Budget testified before the House of Representatives. She explained that the judiciary used PACER fees not only to reimburse the cost of "run[ning] the PACER program," but also "to offset some costs in our information technology program that would otherwise have to be funded with appropriated funds." Hearings Before a Subcomm. of the Sen. Comm. on Appropriations on H.R. 7323/S. 3260, 110th Cong. 51 (2008). Specifically, she testified, "[t]he Judiciary's fiscal year 2009 budget request assumes $68 million in PACER fees will be available to finance information technology requirements in the courts' Salaries and Expenses account, thereby reducing our need for appropriated funds." *Id.*; *see* Compl. ¶ 15; Answer ¶ 15.

19. In early 2009, Senator Joe Lieberman (the E-Government Act's sponsor) wrote a letter to the Judicial Conference "to inquire if [it] is complying" with the statute. Letter from Sen. Lieberman to Hon. Lee Rosenthal, Chair, Committee on Rules of Practice and Procedure, Judicial Conf. of the U.S. (Feb. 27, 2009) (Taylor Decl., Ex. H). He noted that "[t]he goal of this provision, as was clearly stated in the Committee report that accompanied the Senate version of the E-Government Act, was to increase free public access to [judicial] records." *Id.* He also noted that "PACER [is] charging a higher rate" than it did when the law was passed, and that "the funds generated by these fees are still well higher than the cost of dissemination." *Id.* He asked the Judicial Conference to explain "whether [it] is only charging 'to the extent necessary' for records using the PACER system." *Id.*; *see* Compl. ¶ 16; Answer ¶ 16.

20. The AO's Director replied with a letter acknowledging that the E-Government Act "contemplates a fee structure in which electronic court information 'is freely available to the greatest extent possible,'" but taking the position that "the Judiciary [was] charging PACER fees only to the extent necessary." Letter from Hon. Lee Rosenthal and James C. Duff to Sen. Lieberman (Mar. 26, 2009) (Taylor Decl., Ex. I). The sole support the letter offered for this view

was a sentence in a conference report accompanying the 2004 appropriations bill, which said only that the Appropriations Committee "expects the fee for the Electronic Public Access program to provide for [ECF] system enhancements and operational costs." *Id.* The letter did not provide any support (even from a committee report) for using the fees to recover non-PACER-related expenses beyond ECF. *See* Compl. ¶ 17; Answer ¶ 17.

21. The following year, in his annual letter to the Appropriations Committee, Senator Lieberman expressed his "concerns" about the AO's interpretation. Taylor Decl., Ex. G. "[D]espite the technological innovations that should have led to reduced costs in the past eight years," he observed, the "cost for these documents has gone up" so that the AO can fund "initiatives that are unrelated to providing public access via PACER." *Id.* He reiterated his view that this is "against the requirement of the E-Government Act," which permits "a payment system that is used only to recover the direct cost of distributing documents via PACER"—not other technology-related projects that "should be funded through direct appropriations." *Id.*; *see also* Compl. ¶ 18; Answer ¶ 18.

22. The AO did not lower PACER fees in response to Senator Lieberman's concerns, and instead increased them to $.10 per page beginning in 2012. It acknowledged that "[f]unds generated by PACER are used to pay the entire cost of the Judiciary's public access program, including telecommunications, replication, and archiving expenses, the Case Management/Electronic Case Files system, electronic bankruptcy noticing, Violent Crime Control Act Victim Notification, on-line juror services, and courtroom technology." Admin. Office, Electronic Public Access Program Summary 1 (2012), (Taylor Decl., Ex. J). But the AO took the position that the fees comply with the E-Government Act because they "are only used for public access, and are not subject to being redirected for other purposes." *Id.* at 10; *see* Compl. ¶ 19; Answer ¶ 19.

23. In a subsequent congressional budget summary, however, the judiciary reported that (of the money generated from "Electronic Public Access Receipts") it spent just $12.1 million on "public access services" in 2012, while spending more than $28.9 million on courtroom technology. *Part 2: FY 2014 Budget Justifications, Financial Services and General Government Appropriations for 2014, Hearings Before a Subcommittee of the House Committee on Appropriations*, 113th Cong. 538, App. 2.4 (2013) (Taylor Decl., Ex. K).

24. Since the 2012 fee increase, the AO has continued to collect large amounts in PACER fees. In 2014, for example, the judiciary collected nearly $145 million in fees, much of which was earmarked for other purposes such as courtroom technology, websites for jurors, and bankruptcy notification systems. Admin. Office of the U.S. Courts, *The Judiciary Fiscal Year 2016 Congressional Budget Summary*, App. 2.3 & 2.4 (Feb. 2015) (ECF No. 31-1, at 647–48).

25. When questioned during a House appropriations hearing that same year, representatives from the judiciary acknowledged that "the Judiciary's Electronic Public Access Program encompasses more than just offering real-time access to electronic records." *Financial Services and General Government Appropriations for 2015, Part 6: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 113th Cong. 152 (2014); *see* Compl. ¶ 21; Answer ¶ 21.

26. Judge William Smith (a member of the Judicial Conference's Committee on Information Technology) has said that PACER fees "also go to funding courtroom technology improvements, and I think the amount of investment in courtroom technology in '09 was around 25 million dollars. . . . Every juror has their own flat- screen monitors. . . . [There have also been] audio enhancements. . . . We spent a lot of money on audio so the people could hear what's going on. . . . This all ties together and it's funded through these [PACER] fees." Hon. William Smith, Panel Discussion on Public Electronic Access to Federal Court Records at the William

and Mary Law School Conference on Privacy and Public Access to Court Records (Mar. 4–5, 2010), https://goo.gl/5g3nzo; *see* Compl. ¶ 22; Answer ¶ 22.

III. Use of PACER fees within the class period

A. Fiscal year 2010

28. The judiciary collected $102,511,199 in PACER fees for fiscal year 2010 and carried forward $34,381,874 from the previous year. Public Access and Records Management Division, *Summary of Resources* (Taylor Decl., Ex. L).

29. The cost of the Electronic Public Access Program for fiscal year 2010 was $18,768,552. *Id.* According to the government, "[t]he EPA program provided electronic public access to court information; developed and maintained electronic public access systems in the judiciary; and, through the PACER [] Service Center, provided centralized billing. It also included funding the technical elements to the PACER program, including, but not limited to, the PACER Service Center [] technical costs, contracts, technical training, uscourts.gov website, and program office technical costs." Def.'s Resp. to Pls.' First Set of Interrogs., at 2 (Taylor Decl., Ex. M).

30. Beyond the cost of the EPA program, the AO used PACER fees to fund the following programs in fiscal year 2010:

31. ***Courtroom technology.*** The AO spent $24,731,665 from PACER fees on "the maintenance, cyclical replacement, and upgrade of courtroom technology in the courts." Taylor Decl., Ex. L; Ex. M, at 5.

32. At least some of the money spent to upgrade courtroom technology, such as purchasing flat screens for jurors, is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in

providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

33. ***Violent Crime Control Act Notification.*** The AO spent $332,876 from PACER fees on a "program [that] electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision." Taylor Decl., Ex. L; Ex. M, at 5.

34. Notifying law enforcement under the Violent Crime Control Act is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

35. ***State of Mississippi.*** The AO spent $120,988 from PACER fees on a "Mississippi state three year study on the feasibility of sharing the Judiciary's CM/ECF filing system at the state level." Taylor Decl., Ex. L; Ex. M, at 5. The government says that "[t]his provided software, and court documents to the State of Mississippi, which allowed the State of Mississippi to provide the public with electronic access to its documents." *Id.*

36. Paying the State of Mississippi is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

37. ***Electronic Bankruptcy Noticing.*** The AO spent $9,662,400 from PACER fees on a system that "produces and sends court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." Taylor Decl., Ex. L; Ex. M, at 3. (A "341 meeting" is a meeting of creditors and equity security holders in a bankruptcy under 11 U.S.C. § 341.)

38. Notifying bankruptcy creditors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

39. ***CM/ECF.*** The AO spent $23,755,083 from PACER fees on CM/ECF (short for Case Management/Electronic Case Files), the e-filing and case-management system that "provides the ability to store case file documents in electronic format and to accept filings over the internet." Taylor Decl., Ex. L; Ex. M, at 3. There is no fee for filing a document using CM/ECF. PACER, *FAQs*, https://www.pacer.gov/psc/efaq.html#CMECF.

40. The CM/ECF costs for fiscal year 2010 consisted of the following: $3,695,078 for "Development and Implementation" of the CM/ECF system; $15,536,212 for "Operations and Maintenance" of the system; $3,211,403 to "assess[] the judiciary's long term case management and case filing requirements with a view to modernizing or replacing the CM/ECF systems" (which the government calls "CM/ECF Futures"); $144,749 for "Appellate Operational Forum," which "is an annual conference at which judges, clerks of court, court staff, and AO staff exchange ideas and information about operational practices and policies related to the Appellate CM/ECF system"; $674,729 for "District Operational Forum," which is a similar conference for the "District CM/ECF system"; and $492,912 for "Bankruptcy Operational Forum," a similar conference for the "Bankruptcy CM/ECF system," Taylor Decl., Ex. L; Ex. M, at 2–3.

41. At least some of the money spent on CM/ECF is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

42. ***Telecommunications.*** The AO spent $13,847,748 from PACER fees on what it calls "DCN and Security Services." Taylor Decl., Ex. L. DCN stands for "Data Communications Network"—"a virtual private network that allows access only to those resources that are considered part of the uscourts.gov domain." Taylor Decl., Ex. M, at 33. "This DCN cost [was] split between appropriated funds and Electronic Public Access (EPA) funds," and covered the "costs associated with network circuits, routers, switches, security, optimization, and management devices along with maintenance management and certain security services to support the portion of the Judiciary's WAN network usage associated with CM/ECF." *Id.* at 4. The government also spent $10,337,076 on PACER-Net, the network that "allows courts to post court information on the internet in a secure manner" and hosts both "[t]he public side of CM/ECF as well as court websites." Taylor Decl., Ex. L; Ex. M, at 2–3.

43. At least some of the money spent on telecommunications is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

44. ***Court Allotments.*** Finally, the AO spent $9,428,820 from PACER fees on payments to the federal courts, which consisted of the following:

- $7,605,585 for "CM/ECF Court Allotments," which the governments says were "funds provided as the CM/ECF contribution/portion of the IT Infrastructure Formula, and funds for attorney training on CM/ECF";
- $1,291,335 for "Court Allotments" to fund "public terminals, internet web servers, telephone lines, paper and toner at public printers, digital audio, McVCIS" (short for "Multi-court Voice Case Information System," which "provides bankruptcy case information" to "the public over the phone"), and "grants for the courts";

- $303,527 for "Courts/AO Exchange Program," which "fund[ed] participants in the IT area, related to the Next Gen program" ("the next iteration of CM/ECF"); and
- $228,373 for "Court Staffing Additives," which covered the costs of staffing people who "worked on projects like the development of [McVCIS]."

Taylor Decl., Ex. L; Ex. M, at 4, 30.

45. At least some of the money given to courts is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

B. Fiscal year 2011

46. The judiciary collected $113,770,265 in PACER fees for fiscal year 2011 and carried forward $26,051,473 from the previous year. Taylor Decl., Ex. L.

47. The cost of the Electronic Public Access Program for fiscal year 2011 was $3,363,770. *Id.*

48. Beyond the cost of the EPA program, the judiciary spent $10,339,444 from PACER fees on what it calls "EPA Technology Infrastructure & applications," *id.*, which is the "[d]evelopment and implementation costs for CM/ECF," and $4,318,690 on what it calls "EPA Replication," which "cover[ed] expenses for CM/ECF servers and replication and archive services." Taylor Decl., Ex. L; Ex. M, at 5–6.

49. The AO also used PACER fees to fund the following programs in fiscal year 2011:

50. ***Courtroom technology.*** The AO spent $21,542,457 from PACER fees on "the maintenance, cyclical replacement, and upgrade of courtroom technology in the courts." Taylor Decl., Ex. L; Ex. M, at 8.

51. At least some of the money spent to upgrade courtroom technology is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

52. ***Violent Crime Control Act Notification.*** The AO spent $508,903 from PACER fees on a "program [that] electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision." Taylor Decl., Ex. L; Ex. M, at 8.

53. Notifying law enforcement under the Violent Crime Control Act is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

54. ***Electronic Bankruptcy Noticing.*** The AO spent $11,904,000 from PACER fees to "produce[] and send[] court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." Taylor Decl., Ex. L; Ex. M, at 7.

55. Notifying bankruptcy creditors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

56. ***CM/ECF.*** The AO spent $22,540,928 from PACER fees on CM/ECF. Taylor Decl., Ex. L. These costs consisted of the following: $5,400,000 for "Development and Implementation"; $11,154,753 for "Operations and Maintenance"; $4,582,423 for "CM/ECF Futures"; $176,198 for "Appellate Operational Forum"; $705,054 for "District Operational Forum"; and $522,500 for "Bankruptcy Operational Forum." *Id.*; *see* Taylor Decl., Ex. M, at 6.

57. At least some of the money spent on CM/ECF is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

58. ***Telecommunications.*** The AO spent $23,528,273 from PACER fees on telecommunications costs. Taylor Decl., Ex. L. These costs consisted of the following: $9,806,949 for "DCN and Security Services," which covered the "[c]osts associated with the FTS 2001 and Networx contracts with the PACER-Net"; $4,147,390 for "PACER-Net & DCN," which was "split between appropriated funds and Electronic Public Access (EPA) funds," and which covered the "costs associated with network circuits, routers, switches, security, optimization, and management devices along with maintenance management and certain security services to support the portion of the Judiciary's WAN network usage associated with CM/ECF"; $9,221,324 for PACER-Net; and $352,610 for "Security Services," which covered the "costs for security services associated with the PACER-Net." Taylor Decl., Ex. L; Ex. M, at 7.

59. At least some of the money spent on telecommunications is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

60. ***Court allotments.*** Finally, the AO spent $10,618,805 from PACER fees on payments to the courts. Taylor Decl., Ex. L. These costs consisted of: $7,977,635 for "CM/ECF Court Allotments"; $769,125 for "Courts/AO Exchange Program"; $1,403,091 for "Court Allotments"; and $468,954 for "Court Staffing Additives." Taylor Decl., Ex. L; Ex. M, at 7–8.

61. At least some of the money given to courts is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an

"expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

C. Fiscal year 2012

62. The judiciary collected $124,021,883 in PACER fees for fiscal year 2012 and carried forward $31,320,278 from the previous year. Taylor Decl., Ex. L.

63. The cost of the Electronic Public Access Program for fiscal year 2012 was $3,547,279. *Id.*

64. Beyond the cost of the EPA program, the judiciary also used PACER fees to fund $5,389,870 in "[d]evelopment and implementation costs for CM/ECF" (under the category of "EPA Technology Infrastructure & applications"); and $3,151,927 in "expenses for CM/ECF servers and replication and archive services" (under the category of "EPA Replication"). Taylor Decl., Ex. L; Ex. M, at 9.

65. The AO also used PACER fees to fund the following programs in fiscal year 2012:

66. ***Courtroom Technology.*** The AO spent $28,926,236 from PACER fees on courtroom technology. Taylor Decl., Ex. L; *see* Taylor Decl., Ex. M, at 11–12.

67. At least some of the money spent to upgrade courtroom technology is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

68. ***Violent Crime Control Act Notification.*** The AO spent $1,030,922 from PACER fees on a "program that electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision"—$480,666 in development costs and $550,256 in operation and maintenance costs. Taylor Decl., Ex. L; Ex. M, at 11.

69. Notifying law enforcement under the Violent Crime Control Act is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

70. ***Web-based Juror Services.*** The AO spent $744,801 from PACER fees to cover "[c]osts associated with E-Juror software maintenance, escrow services, and scanner support. E-Juror provides prospective jurors with electronic copies of courts documents regarding jury service. Taylor Decl., Ex. L; Ex. M, at 11.

71. Providing services to jurors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

72. ***Electronic Bankruptcy Noticing***. The AO spent $13,789,000 from PACER fees to "produce[] and send[] court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." Taylor Decl., Ex. L; Ex. M, at 10.

73. Notifying bankruptcy creditors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

74. ***CM/ECF.*** The AO spent $26,398,495 from PACER fees on CM/ECF. Taylor Decl., Ex. L. These costs consisted of: $8,006,727 for "Operations and Maintenance"; $164,255 for "Appellate Operational Forum"; $817,706 for "District Operational Forum"; and $531,162 for "Bankruptcy Operational Forum." *Id.* The costs also consisted of: $5,491,798 for "testing CM/ECF"; $6,095,624 to "fund[] positions that perform duties in relation to the CM/ECF

system" (which the government labels "CM/ECF Positions"); and $5,291,223 to "assess[] the judiciary's long term case management and case filing requirements with a view to modernizing or replacing the CM/ECF systems" (which the government labels "CM/ECF Next Gen."). Taylor Decl., Ex. L; Ex. M, at 9.

75. At least some of the money spent on CM/ECF is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

76. ***Communications Infrastructure, Services and Security.*** The AO spent $26,580,994 from PACER fees on these costs, which consisted of $22,128,423 for "PACER Net DCN" and $4,452,575 for "security services associated with PACER and CM/ECF." Taylor Decl., Ex. L; Ex. M, at 10.

77. At least some of the money spent on telecommunications is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

78. ***Court Allotments***. Finally, the AO spent $10,617,242 from PACER fees on payments to the courts. Taylor Decl., Ex. L. These costs consisted of: $8,063,870 for "CM/ECF Court Allotments"; $890,405 for "Courts/AO Exchange Program"; and $1,662,967 for "Court Staffing Additives/Allotments." Taylor Decl., Ex. L; Ex. M, at 10–11.

79. At least some of the money given to courts is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

D. Fiscal year 2013

80. The judiciary collected $147,469,581 in PACER fees for fiscal year 2013 and carried forward $36,049,102 from the previous year. Taylor Decl., Ex. L.

81. The cost of the Electronic Public Access Program for fiscal year 2013 was $4,652,972. *Id.*

82. Beyond the cost of the EPA program, the AO also spent $5,139,937 from PACER fees on "[d]evelopment and implementation costs for CM/ECF" (under the category of "EPA Technology Infrastructure & Applications"), and $10,462,534 from PACER fees on "expenses for CM/ECF servers and replication and archive services" (under the category of "EPA Replication"). Taylor Decl., Ex. L; Ex. M, at 12.

83. The AO also used PACER fees to fund the following programs in fiscal year 2013.

84. ***Courtroom Technology.*** The AO spent $31,520,316 from PACER fees on courtroom technology. Taylor Decl., Ex. L; *see* Taylor Decl., Ex. M, at 15.

85. At least some of the money spent to upgrade courtroom technology is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

86. ***Violent Crime Control Act Notification.*** The AO spent $681,672 from PACER fees on a "program that electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision"—$254,548 in development costs and $427,124 in operation and maintenance costs. Taylor Decl., Ex. L; Ex. M, at 14.

87. Notifying law enforcement under the Violent Crime Control Act is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d

Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

88. ***Web-based Juror Services.*** The AO spent $2,646,708 from PACER fees on "E-Juror maintenance and operation." Taylor Decl., Ex. L; Ex. M, at 14.

89. Providing services to jurors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

90. ***Electronic Bankruptcy Noticing***. The AO spent $12,845,156 from PACER fees to "produce[] and send[] court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." Taylor Decl., Ex. L; Ex. M, at 13.

91. Notifying bankruptcy creditors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

92. ***CM/ECF.*** The AO spent $32,125,478 from PACER fees on CM/ECF. Taylor Decl., Ex. L. These costs consisted of: $4,492,800 for testing the system; $7,272,337 for "CM/ECF Positions," $6,091,633 for "Operations and Maintenance," $13,416,708 for "CM/ECF Next Gen.," $800,000 for the "District Court Forum," and $52,000 for the "Bank[ruptcy] Court" forum. Taylor Decl., Ex. L; Ex. M, at 12–13.

93. At least some of the money spent on CM/ECF is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

94. ***Communications Infrastructure, Services and Security.*** The AO spent $27,500,711 from PACER fees on these costs, which consisted of $23,205,057 for "PACER Net DCN" and $4,295,654 for "security services associated with PACER and CM/ECF." Taylor Decl., Ex. L; Ex. M, at 13.

95. At least some of the money spent on telecommunications is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

96. ***Court Allotments***. Finally, the AO spent $15,754,031 from PACER fees on payments to the courts. Taylor Decl., Ex. L. These costs consisted of: $12,912,897 for "CM/ECF Court Allotments"; $578,941 for "Courts/AO Exchange Program"; and $2,262,193 for "Court Staffing Additives/Allotments." Taylor Decl., Ex. L; Ex. M, at 14.

97. At least some of the money given to courts is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

E. Fiscal year 2014

98. The judiciary collected $144,612,517 in PACER fees for fiscal year 2014 and carried forward $39,094,63 from the previous year. Taylor Decl., Ex. L.

99. The cost of the Electronic Public Access Program for fiscal year 2014 was $4,262,398, plus $667,341 in "[c]osts associated with managing the non-technical portion of the PACER Service Center i.e., rent, billing process costs, office equipment and supplies." Taylor Decl., Ex. L; Ex. M, at 15.

100. Beyond the cost of the EPA program, the AO also spent $6,202,122 from PACER fees on "[d]evelopment and implementation costs for CM/ECF" (under the category of "EPA Technology Infrastructure & Applications"), and $4,367,846 on "expenses for CM/ECF servers" and "support for CM/ECF Infrastructure" (under the category of "EPA Replication"). *Id.*

101. The AO also used PACER fees to fund the following programs in fiscal year 2014:

102. ***Courtroom Technology.*** The AO spent $26,064,339 from PACER fees on courtroom technology. Taylor Decl., Ex. L; *see* Taylor Decl., Ex. M, at 18.

103. At least some of the money spent to upgrade courtroom technology is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

104. ***Violent Crime Control Act Notification.*** The AO spent $474,673 from PACER fees on a "program that electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision." Taylor Decl., Ex. L; Ex. M, at 18.

105. Notifying law enforcement under the Violent Crime Control Act is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

106. ***Web-based Juror Services.*** The AO spent $2,450,096 from PACER fees on "E-Juror maintenance and operation." Taylor Decl., Ex. L; Ex. M, at 18.

107. Providing services to jurors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

108. ***Electronic Bankruptcy Noticing***. The AO spent $10,005,284 from PACER fees to "produce[] and send[] court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." Taylor Decl., Ex. L; Ex. M, at 17.

109. Notifying bankruptcy creditors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

110. ***CM/ECF.*** The AO spent $39,246,201 from PACER fees on CM/ECF. Taylor Decl., Ex. L. These costs consisted of $8,210,918 for "CM/ECF Positions" and $7,925,183 for "CM/ECF Next Gen." Taylor Decl., Ex. L; Ex. M, at 16. The costs also included: $12,938,052 in "costs associated with SDSO support services for [CM/ECF], CM/ECF NextGen Development and Legacy [CM/ECF] systems," including "function and technical support desk services, release, distribution, installation support services, communications services, and written technical documentation material"; $6,640,397 in "expenses for CM/ECF servers" and "support for CM/ECF Infrastructure"; $3,328,417 for "tasks related to the operation and maintenance of the [Enterprise Data Warehouse] and other integration services, enhancement and/or migration services that are required to support technology advancement or changing business needs," which were designed to support CM/ECF by providing "on-line analytics, reports, dashboards, as well as seamless integration with other judiciary systems through web services and other application programming interfaces"; and $75,000 for the "CSO Combined Forum," which "is a conference at which judges, clerks of court, court staff, and AO staff exchange ideas and information about operations practices and policies related to the CM/ECF system." *Id.*

111. At least some of the money spent on CM/ECF is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an

"expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

112. ***Communications Infrastructure, Services and Security.*** The AO spent $38,310,479 from PACER fees on these costs, which consisted of $33,022,253 for "PACER Net DCN" and $5,288,226 for "security services associated with PACER and CM/ECF." Taylor Decl., Ex. L; Ex. M, at 17.

113. At least some of the money spent on telecommunications is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

114. ***Court Allotments***. Finally, the AO spent $10,754,305 from PACER fees on payments to the courts. Taylor Decl., Ex. L. These costs consisted of: $7,698,248 for "CM/ECF Court Allotments"; $367,441 for "Courts/AO Exchange Program"; and $2,688,616 for "Court Staffing Additives/Allotments." Taylor Decl., Ex. L; Ex. M, at 17.

115. At least some of the money given to courts is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

F. Fiscal year 2015

116. The judiciary collected $144,911,779 in PACER fees for fiscal year 2015 and carried forward $41,876,991 from the previous year. Taylor Decl., Ex. L.

117. The cost of the Electronic Public Access Program for fiscal year 2015 was $2,575,977, plus $642,160 in "[c]osts associated with managing the non-technical portion of the

PACER Service Center i.e., rent, billing process costs, office equipment and supplies." Taylor Decl., Ex. L; Ex. M, at 18.

118. Beyond the cost of the EPA program, the judiciary also used PACER fees to fund the following: $3,345,593 in "[d]evelopment and implementation costs for CM/ECF" (under the category of "EPA Technology Infrastructure & Applications"); $13,567,318 in "expenses for CM/ECF servers" and "support for CM/ECF Infrastructure" (under the category of "EPA Replication"); and $1,295,509 in "costs associated with the support of the uscourts.gov website." Taylor Decl., Ex. L; Ex. M, at 18–19.

119. The AO also used PACER fees to fund the following programs in fiscal year 2015:

120. ***Courtroom Technology.*** The AO spent $27,383,325 from PACER fees on courtroom technology. Taylor Decl., Ex. L; *see* Taylor Decl., Ex. M, at 22.

121. At least some of the money spent to upgrade courtroom technology is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

122. ***Violent Crime Control Act Notification.*** The AO spent $508,433 from PACER fees on a "program that electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision." Taylor Decl., Ex. L; Ex. M, at 21.

123. Notifying law enforcement under the Violent Crime Control Act is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

124. ***Web-based Juror Services.*** The AO spent $1,646,738 from PACER fees on "E-Juror maintenance and operation." Taylor Decl., Ex. L; Ex. M, at 21.

125. Providing services to jurors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

126. ***Electronic Bankruptcy Noticing***. The AO spent $8,090,628 from PACER fees to "produce[] and send[] court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." Taylor Decl., Ex. L; Ex. M, at 20–21.

127. Notifying bankruptcy creditors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

128. ***CM/ECF.*** The AO spent $34,193,855 from PACER fees on CM/ECF. Taylor Decl., Ex. L. These costs consisted of $6,622,167 for "CM/ECF Positions" and $10,169,819 for "CM/ECF Next Gen." Taylor Decl., Ex. L; Ex. M, at 19. The costs also consisted of: $1,727,563 for "providing curriculum design and training for legal CM/ECF and NextGen," which "include[d] the scheduling of classes to meet court staff turnover (operational and technical staff) and to provide training on new features provided by NextGen"; $2,730,585 for "JENIE Branch and Information Services Branch support of CM/ECF and CM/ECF NextGen development on the JENIE platforms," including "[e]ngineering efforts for NextGen utilizing the JENIE environment"; $3,336,570 in "costs associated with SDSO support services for [CM/ECF], CM/ECF NextGen Development and Legacy [CM/ECF] systems"; $4,574,158 for testing the system; $3,244,352 for "tasks related to the operation and maintenance of the [Enterprise Data Warehouse] and other integration services, enhancement and/or migration services that are required to support technology advancement or changing business needs";

$1,680,128 for the "CSO Combined Forum"; and $108,513 for a "CM/ECF NextGen project working group." *Id.* at 19–20.

129. At least some of the money spent on CM/ECF is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

130. ***Communications Infrastructure, Services and Security.*** The AO spent $43,414,189 from PACER fees on these costs, which consisted of $36,035,687 for "PACER Net DCN" and $7,378,502 for "security services associated with PACER and CM/ECF." Taylor Decl., Ex. L; Ex. M, at 21.

131. At least some of the money spent on telecommunications is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

132. ***Court Allotments***. Finally, the AO spent $11,059,019 from PACER fees on payments to the courts. Taylor Decl., Ex. L. These costs consisted of: $7,964,723 for "CM/ECF Court Allotments"; $1,343,993 for "Courts/AO Exchange Program"; and $1,064,956 for "Court Staffing Additives/Allotments." Taylor Decl., Ex. L; Ex. M, at 21.

133. At least some of the money given to courts is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

G. Fiscal year 2016

134. The judiciary collected $146,421,679 in PACER fees for fiscal year 2016 and carried forward $40,254,853 from the previous year. Taylor Decl., Ex. L.

135. The cost of the Electronic Public Access Program for fiscal year 2016 was $748,495, plus $2,443,614 in "[c]osts associated with managing the non-technical portion of the PACER Service Center i.e., rent, billing process costs, office equipment and supplies." Taylor Decl., Ex. L; Ex. M, at 22–23.

136. Beyond the cost of the EPA program, the judiciary also used PACER fees to fund the following: $6,282,055 in "[d]evelopment and implementation costs for CM/ECF"; $10,364,682 in "expenses for CM/ECF servers" and "support for CM/ECF Infrastructure"; $2,046,473 to fund "positions that perform duties in relation to the CM/ECF system"; $678,400 in "[c]osts associated with an Agile team, staffed by contractors, with the purpose of re-designing and implementing an entirely new centralized product for access to all CM/ECF case data"; $1,241,031 in "costs associated with the support of the uscourts.gov website"; and $67,605 in "Information Technology support for PACER Development Branch and PACER Services Branch Staff." *Id.*

137. The AO also used PACER fees to fund the following programs in fiscal year 2016:

138. ***Courtroom Technology.*** The AO spent $24,823,532 from PACER fees on courtroom technology. Taylor Decl., Ex. L; *see* Taylor Decl., Ex. M, at 26.

139. At least some of the money spent to upgrade courtroom technology is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

140. ***Violent Crime Control Act Notification.*** The AO spent $113,500 from PACER fees on a "program that electronically notifies local law enforcement agencies of changes to the case history of offenders under supervision." Taylor Decl., Ex. L; Ex. M, at 26.

141. Notifying law enforcement under the Violent Crime Control Act is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

142. ***Web-based Juror Services.*** The AO spent $1,955,285 from PACER fees on "E-Juror maintenance and operation." Taylor Decl., Ex. L; Ex. M, at 26.

143. Providing services to jurors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

144. ***Electronic Bankruptcy Noticing***. The AO spent $7,069,408 from PACER fees to "produce[] and send[] court documents (bankruptcy notices, including notices of 341 meetings) electronically to creditors in bankruptcy cases." Taylor Decl., Ex. L; Ex. M, at 25.

145. Notifying bankruptcy creditors is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

146. ***CM/ECF.*** The AO spent $39,745,955 from PACER fees on CM/ECF. Taylor Decl., Ex. L. These costs consisted of $6,290,854 for "CM/ECF Positions" and $11,415,754 for "CM/ECF Next Gen." Taylor Decl., Ex. L; Ex. M, at 23. The costs also include: $1,786,404 for "providing curriculum design and training for legal CM/ECF and NextGen"; $3,785,177 for

"JENIE Branch and Information Services Branch support of CM/ECF and CM/ECF NextGen development on the JENIE platforms"; $2,422,404 in "costs associated with SDSO support services for [CM/ECF], CM/ECF NextGen Development and Legacy [CM/ECF] systems"; $6,182,547 for testing the system; $3,645,631 for "tasks related to the operation and maintenance of the [Enterprise Data Warehouse] and other integration services, enhancement and/or migration services that are required to support technology advancement or changing business needs"; $1,680,128 for the "CSO Combined Forum," which "is a conference at which judges, clerks of court, court staff, and AO staff exchange ideas and information about operations practices and policies related to the CM/ECF system"; $134,093 for a "CM/ECF NextGen project working group"; $635,520 for "CM/ECF Implementation," which funds "new contractors" and covers travel funds for "660 trips per year to support 60 courts implementing NextGen CM/ECF"; and $1,649,068 to fund a "CM/ECF Technical Assessment" to review and analyze the "performance of the Next GEN CM/ECF system." Taylor Decl., Ex. L; Ex. M, at 23–25.

147. At least some of the money spent on CM/ECF is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

148. ***Communications Infrastructure, Services and Security.*** The AO spent $45,922,076 from PACER fees on these costs, which consisted of $36,577,995 for "PACER Net DCN" and $9,344,081 for "security services associated with PACER and CM/ECF." Taylor Decl., Ex. L; Ex. M, at 25.

149. At least some of the money spent on telecommunications is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d

Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

150. ***Court Allotments***. Finally, the AO spent $7,312,023 from PACER fees on payments to the courts. Taylor Decl., Ex. L. These costs consisted of: $6,588,999 for "CM/ECF Court Allotments"; $1,069,823 for "Courts/AO Exchange Program"; and –$346,799 for "Court Staffing Additives/Allotments." Taylor Decl., Ex. L; Ex. M, at 26.

151. At least some of the money given to courts is not part of the "marginal cost of disseminating" records through PACER, S. Rep. 107–174, 107th Cong., 2d Sess. 23—*i.e.*, an "expense[] incurred in providing" access to such records for which it is "necessary" to charge a fee "for [the] services rendered." 28 U.S.C. § 1913 note.

IV. The decrease in the cost of data storage

152. Researcher Matthew Komorowski and data-storage firm BackBlaze have published storage-cost-time series that when combined cover the period dating from the PACER system's 1998 debut to the present. During this time their data shows the cost of a gigabyte of storage falling from $65.37 to $0.028, a reduction of over 99.9%. During this same time period PACER's per-page fees increased 43%, from $0.07 to $0.10. Lee & Lissner Decl. ¶ 16.

Respectfully submitted,

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August 28, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES, et al., *Plaintiffs,* v. UNITED STATES OF AMERICA *Defendant*.	Civil Action No. 16-745 (ESH)

DEFENDANT'S MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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First, it is important to understand the fund that Congress selected as the source for depositing PACER receipts. In 1989, Congress created the JAF with "[m]oneys … available to the Director [of the Administrative Office of the United States Courts] without fiscal year limitation for the procurement … of automatic data processing equipment for the judicial branch of the United States." Pub. L. No. 101-162, § 404(b)(1). The Director was also required to provide, with the approval from the Judicial Conference, an annually updated "long range plan for meeting the automatic data processing needs of the judicial branch." *Id*.[5] The plan, along with revisions, is submitted to Congress annually. *See id*.; 28 U.S.C. § 612(b)(1). And the Director may "use amounts in the Fund to procure information technology resources for the activities funded under [28 U.S.C. § 612(a)] only in accordance with the plan[.]" 28 U.S.C. § 612(b)(2). Section 612(a) describes how money in the fund may be expended:

> Moneys in the Fund shall be available to the Director without fiscal year limitation for the *procurement* (by lease, purchase, exchange, transfer, or otherwise) *of information technology resources for program activities included in the courts of appeals, district courts, and other judicial services account of the judicial branch of the United States*. The Fund shall *also* be available for expenses, including personal services, support personnel in the courts and in the Administrative Office of the United States Courts, and other costs, *for the* effective management, coordination, operation, and *use of information technology resources purchased by the Fund*.

28 U.S.C. § 612(a) (emphasis added). As noted, this is the fund Congress selected for depositing receipts of PACER fees, which informs how Congress intended the fees received from PACER access to be spent.[6] *See* Pub. L. No. 102-140, § 303.

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[5] With some changes in terminology (*e.g*., "meeting the automatic data processing needs of the judicial branch" became "meeting the information technology resources needs of the activities funded under subsection (a)"), the law is now codified at 28 U.S.C. § 612. *See* Pub. L. No. 108-420; Pub. L. No. 104-106, § 5602.

[6] Notably, Plaintiffs do not identify any uses of PACER funds that do not satisfy this broad range of information technology expenditures approved by Congress.

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 14, 1988

The Judicial Conference of the United States convened on September 14, 1988, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. 331. The Chief Justice presided and the following members of the Conference were present:

First Circuit:

Chief Judge Levin H. Campbell
Chief Judge Frank H. Freedman, District of Massachusetts

Second Circuit:

Chief Judge Wilfred Feinberg
Chief Judge John T. Curtin, Western District of New York

Third Circuit:

Chief Judge John J. Gibbons
Chief Judge William J. Nealon, Jr., Middle District of Pennsylvania

Fourth Circuit:

Chief Judge Harrison L. Winter
Judge Frank A. Kaufman, District of Maryland

Fifth Circuit:

Chief Judge Charles Clark
Chief Judge L. T. Senter, Jr., Northern District of Mississippi

RELEASE AND SALE OF COURT DATA

The judiciary generates a large volume of data which is of considerable interest and value to the bar and litigants, to the media, to scholars and government officials, to commercial enterprises, and to the general public. The courts and the Administrative Office are frequently requested to release or sell court data to individuals and organizations outside the court family, including a growing volume of requests from credit agencies and other commercial organizations desiring bankruptcy case information for purposes of resale.

On recommendation of the Committee, the Judicial Conference authorized an experimental program of electronic access for the public to court information in one or more district, bankruptcy, or appellate courts in which the experiment can be conducted at nominal cost, and delegated to the Committee the authority to establish access fees during the pendency of the program. Although existing law requires that fees collected in the experimental phase would have to be deposited into the United States Treasury, the fees charged for automated access services could defray a significant portion of the cost of providing such services, were the Congress to credit these fees to the judiciary's appropriations account in the future.

VIDEOTAPING COURT PROCEEDINGS

Under 28 U.S.C. 753, district judges may voluntarily use a variety of methods for taking the record of court proceedings, subject to guidelines promulgated by the Judicial Conference. At the request of a court that it be allowed to experiment with videotaping as a means of taking the official record, the Judicial Conference authorized an experimental program of videotaping court proceedings. Under the two-year experiment, which would include approximately six district courts (judges), in no more than two circuits, the courts of appeals would have to agree to accept as the official record on appeal a videotape in lieu of transcript or, in the alternative, the circuit must limit the production of transcript to be accepted on appeal to a very few pages. Participating judges would continue to utilize their present court reporting techniques (court reporter, electronic sound recording, etc.) during the experimental program.

The Conference designated the chair of the Committee on Judicial Improvements to seek approval of the Director of the Federal Judicial Center for the Judicial Center to design, conduct, and evaluate the experiment.

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

March 14, 1989

The Judicial Conference of the United States convened on March 14, 1989, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. 331. The Chief Justice presided and the following members of the Conference were present:

First Circuit:

Chief Judge Levin H. Campbell
Chief Judge Frank H. Freedman, District of Massachusetts

Second Circuit:

Chief Judge James L. Oakes
Judge John T. Curtin, Western District of New York

Third Circuit:

Chief Judge John J. Gibbons
Judge William J. Nealon, Jr., Middle District of Pennsylvania

Fourth Circuit:

Chief Judge Sam J. Ervin, III
Judge Frank A. Kaufman, District of Maryland

Fifth Circuit:

Chief Judge Charles Clark
Chief Judge L. T. Senter, Jr., Northern District of Mississippi

circuit and the distance traveled. Henceforth, the guidelines will provide that a judge assigned to work on the court of appeals should serve for at least one regular sitting (as defined by that circuit), and a judge assigned to work on the general calendar of a district court should serve at least two weeks.

COMMITTEE ON THE INTERNATIONAL APPELLATE JUDGES CONFERENCE OF 1990

The Committee on the International Appellate Judges Conference reported on its progress in planning and raising funds for the International Appellate Judges Conference to be held in Washington, D.C., in September, 1990.

COMMITTEE ON THE JUDICIAL BRANCH

JUDICIAL PAY

The single greatest problem facing the judiciary today is obtaining adequate pay for judicial officers. Judges have suffered an enormous erosion in their purchasing power as a result of the failure of their pay to keep pace with inflation. It is becoming more and more difficult to attract and retain highly qualified people on the federal bench.

In order to obtain a partial solution to this critical problem, the Judicial Conference, by unanimous vote, agreed to recommend that Congress immediately increase judicial salaries by 30 percent, and couple these increases with periodic cost-of-living adjustments (COLAs) similar to those received by other government recipients.

COMMITTEE ON JUDICIAL ETHICS

The Committee on Judicial Ethics reported that as of January, 1989, the Committee had received 2,495 financial disclosure reports and certifications for the calendar year 1987, including 1,021 reports and certifications from judicial officers, and 1,474 reports and certifications from judicial employees.

COMMITTEE ON JUDICIAL IMPROVEMENTS

RELEASE AND SALE OF COURT DATA

A. At its September 1988 session (Conf. Rpt., p. 83), the Judicial Conference authorized an experimental program of electronic

access by the public to court information in one or more district, bankruptcy, or appellate courts, and delegated to the Committee on Judicial Improvements the authority to establish access fees during the pendency of the program. Under existing law, fees charged for such services would have to be deposited into the United States Treasury. Observing that such fees could provide significant levels of new revenues at a time when the judiciary faces severe funding shortages, the Conference voted to recommend that Congress credit to the judiciary's appropriations account any fees generated by providing public access to court records.

B. The Administrative Office and the Department of Justice have entered into an agreement whereby bankruptcy courts download docket information from the NIBS and BANCAP systems to local United States Trustee offices' computers. The agreement does not deal directly with use of this information by the Trustees.

Since it is essential that this court data be disseminated and sold by the judiciary consistent with a uniform policy to be developed under the use and sale of court data program (above), the Conference resolved that data provided by the courts in these circumstances be for the Trustees' internal use only, and may not otherwise be disseminated or sold by the Trustees. Should the Trustees fail to comply, the judiciary will discontinue providing the data or seek an appropriate level of reimbursement.

ONE-STEP QUALIFICATION AND SUMMONING OF JURORS

Title VII of the Judicial Improvements and Access to Justice Act (Public Law 100-702) authorizes the Judicial Conference to conduct a two-year experiment among up to ten districts testing the viability of a one-step qualification and summoning procedure. The Conference selected for inclusion in the experiment the Northern District of Alabama, the Districts of Arizona and the District of Columbia, the Southern District of Florida, the Northern District of Illinois, the Western District of New York, the Districts of Oregon and South Dakota, the Eastern District of Texas, and the District of Utah.

LAWBOOKS FOR BANKRUPTCY JUDGES

The Conference approved revised lists of lawbooks for bankruptcy judges, Exhibits C-1 and C-2 of Volume I, Guide to Judiciary Policies and Procedures, Chapter VIII, Part E. A concise bankruptcy

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

March 12, 1996

The Judicial Conference of the United States convened in Washington, D.C., on March 12, 1996, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Juan R. Torruella
Chief Judge Joseph L. Tauro,
District of Massachusetts

Second Circuit:

Chief Judge Jon O. Newman
Chief Judge Peter C. Dorsey,
District of Connecticut

Third Circuit:

Chief Judge Dolores K. Sloviter
Chief Judge Edward N. Cahn,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge J. Harvie Wilkinson, III
Judge W. Earl Britt,
Eastern District of North Carolina

Fifth Circuit:

Chief Judge Henry A. Politz
Chief Judge William H. Barbour,
Southern District of Mississippi

MISCELLANEOUS FEE SCHEDULES - SEARCH FEE

Although the miscellaneous fee schedules for the district and bankruptcy courts include a fee for every search of the records of the court conducted by the clerk's office, the fee schedule for the United States Court of Federal Claims (28 U.S.C. § 1926) contains no search fee. On recommendation of the Committee, the Judicial Conference approved an amendment to the miscellaneous fee schedule for the Court of Federal Claims to add a $15 search fee and to include a reference to the guidelines for the application of the search fee found in the district court miscellaneous fee schedule.

MISCELLANEOUS FEE SCHEDULES - ELECTRONIC PUBLIC ACCESS FEE

In March 1991, the Judicial Conference approved a fee for electronic access to court data for the district and bankruptcy courts (JCUS-MAR 91, p. 16), and a similar fee was approved in March and September 1994 for the appellate courts (JCUS-MAR 94, p. 16) and the United States Court of Federal Claims (JCUS-SEP 94, p. 47), respectively. This fee has been incorporated into the appropriate miscellaneous fee schedules. The fee was initially established at $1.00 per minute; it was reduced in March 1995 to 75 cents per minute to avoid an ongoing surplus (JCUS-MAR 95, pp. 13-14). At this session, the Conference approved a Committee recommendation to reduce the fee for electronic public access further, from 75 cents per minute to 60 cents per minute.

CLOSED CIRCUIT TELEVISING OF COURT PROCEEDINGS

Proposed legislation would require federal courts to order the closed circuit televising of proceedings in certain criminal cases, particularly cases that have been moved to a remote location. The legislation would authorize or require the costs of the closed circuit system to be paid from private donations. The Judicial Conference determined to take no policy position on the legislative amendments pertaining to closed circuit television. It also approved a recommendation of the Court Administration and Case Management Committee that the House and Senate Judiciary Committee leadership be informed that such legislation, if enacted, should be modified to (a) remove any prohibition relating to the expenditure of appropriated funds; and (b) make discretionary any requirement that courts order closed circuit televising of certain criminal proceedings.

United States Senate
COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510–6025
http://appropriations.senate.gov

May 2, 2007

Mr. James Duff
Director
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. Duff:

This letter is in response to the request for approval for the Judiciary's Fiscal Year 2007 Financial Plan, dated March 14, 2007 in accordance with section 113 of Public Law 110-5. For Fiscal Year 2007, Public Law 110-5 provided just under a five percent increase for the Judiciary over last year's level. With the increased funding provided in Fiscal Year 2007, $20.4 million is provided for critically understaffed workload associated with immigration and other law enforcement needs, especially at the Southwest Border.

We have reviewed the information included and have no objection to the financial plan including the following proposals:

- a cost of living increase for panel attorneys;
- the establishment of a branch office of the Southern District of Mississippi to allow for a federal Defender organization presence in the Northern District of Mississippi;
- a feasibility study for sharing the Judiciary's case management system with the State of Mississippi, and;
- the expanded use of Electronic Public Access Receipts.

Any alteration of the financial plan from that detailed in the March 14, 2007 document would be subject to prior approval of the Senate Committee on Appropriations.

Sincerely,

Richard J. Durbin
Chairman
Subcommittee on Financial Services
and General Government

Sam Brownback
Ranking Member
Subcommittee on Financial Services
and General Government

provisions of 28 U.S.C. § 612(a). Claiming to offer the statutory interpretation that "makes the most sense" and "tracks the plain language," Pls.' Opp. at 1, Plaintiffs again ask this Court to ignore statutory language. Here, they ask the Court to ignore the fact that Congress identified the JITF in the E-Government Act. Yet, there can be no debate about the fact that Congress identified the JITF as the location for depositing EPA revenues. *See* 28 U.S.C. § 1913 note. And, when Congress did so, it was aware that this fund permitted certain uses and yet it did not include any additional limitations when it identified JITF as the location for deposits. It naturally follows that this should inform a fair reading of how Congress intended the PACER fees to be spent.[4]

Reports of Congressional Committees. Plaintiffs conclude their Opposition by stating the obvious—committee reports cannot authorize a statutory violation. *See* Pls.' Opp. at 9. But this strawman does nothing to advance Plaintiffs' arguments. Indeed, at no point does Defendant suggest that the Court should adopt an interpretation contrary to the E-Government Act (or its predecessors) in light of anything stated by a committee report. *See generally* Def.'s Mot. Instead, Defendant points to various statements from the House and Senate Appropriations Committees as indicative of the fact that Defendant's interpretation of the E-Government Act is correct. Indeed, courts routinely look to committee reports as support for an interpretation of statutory language. *See, e.g., Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2505–506 (2014) (discussing language in a committee report when interpreting amendments to Copyright Act); *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1162 (2014) (discussing language in committee report when interpreting purpose of Sarbanes-Oxley Act of 2002); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 535 (2013) (relying on committee reports when discussing contours of the first sale doctrine). It is

[4] As discussed above, Plaintiffs' suggestion that this argument is somehow at odds with the 2009 letter from the AO's director to then-Senator Lieberman is incorrect. *See* Pls.' Opp. at 8; *see also supra* note 1.

ELECTRONIC PUBLIC ACCESS (EPA)

Financing ($000)

	FY 2006 Financial Plan	FY 2006 Actual	FY 2007 Financial Plan	Percent Change over FY 2006 Plan
Collections	$ 49,152	$ 62,300	$ 62,120	26.4%
Prior-year Carryforward	$ 14,376	$ 14,376	$ 32,200	124.0%
Total	**$ 63,528**	**$ 76,676**	**$ 94,320**	**48.5%**

SPENDING

($000s)	FY 2006 Financial Plan	FY 2006 Actual	FY 2007 Financial Plan	Percent Change over FY 2006 Plan
EPA Program Operations	$ 19,346	$ 11,560	$ 27,229	40.7%
Available to Offset Approved Public Access initiatives (e.g. CM/ECF)	$ 36,807	$ 32,916	$ 41,372	12.4%
Planned Carryforward	$ 7,325	$ 32,200	$ 25,719	251.1%
Total	**$ 63,528**	**$ 76,676**	**$ 94,320**	**48.5%**

The judiciary's Electronic Public Access (EPA) program provides for the development, implementation and enhancement of electronic public access systems in the federal judiciary. The EPA program provides centralized billing, registration and technical support services for PACER (Public Access to Court Electronic Records), which facilitates Internet access to data from case files in all court types, in accordance with policies set by the Judicial Conference. The increase in fiscal year 2007 EPA program operations includes one-time costs associated with renegotiation of the Federal Telephone System (FTS) 2001 telecommunications contract.

Pursuant to congressional directives, the program is self-funded and collections are used to fund information technology initiatives in the judiciary related to public access. Fee revenue from electronic access is deposited into the Judiciary Information Technology Fund. Funds are used first to pay the expenses of the PACER program. Funds collected above the level needed for the PACER program are then used to fund other initiatives related to public access. The development, implementation, and maintenance costs for the CM/ECF project have been funded through EPA collections. In fiscal year 2007, the judiciary plans to use $41.4 million in EPA collections to fund public access initiatives within the Salaries and Expenses financial plan including:

- CM/ECF Infrastructure and Allotments $20.6 million
- Electronic Bankruptcy Noticing $5.0 million
- Internet Gateways $8.8 million
- Courtroom Technology Allotments for Maintenance/Technology Refreshment $7.0 million (New authority requested for this item on page 46)

The fiscal year 2007 financial plan for courtroom technologies includes $7.0 million for court allotments to be funded EPA receipts to provide cyclical replacement of equipment and infrastructure maintenance.

Via this financial plan submission, the Judiciary seeks authority to expand use of Electronic Public Access (EPA) receipts to support courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. The Judiciary seeks this expanded authority as an appropriate use of EPA receipts to improve the ability to share case evidence with the public in the courtroom during proceedings and to share case evidence electronically through electronic public access services when it is presented electronically and becomes an electronic court record.

COURT OF INTERNATIONAL TRADE

The following table details the beginning balances, deposits, obligations, and carryforward balances in the JITF for the Court of International Trade for fiscal years 2006 and 2007.

Judiciary Information Technology Fund	FY 2006 Financial Plan	FY 2006 Actual	FY 2007 Financial Plan	Percent Change over FY 2006 plan
Balance, Start of Year	$ 598	$ 605	$ 657	9.9%
Current-year Deposits	$ 0	$ 200	$ 0	0.0%
Obligations	$ (313)	$ (148)	$ (357)	14.1%
Balance, End of Year	**$ 285**	**$ 657**	**$ 300**	**5.3%**

The Court has been using the Judiciary Information Technology Fund to upgrade and enhance its information technology needs and infrastructure. Of the $0.7 million that carried forward into fiscal year 2007 in the Judiciary Information Technology Fund, $0.4 million is planned for obligation in the fiscal year 2007 financial plan, the remaining $0.3 million will carry forward into fiscal year 2008.

These funds will be used to continue the Court's information technology initiatives, in accordance with its long-range plan, and to support the Court's recent and future information technology growth. The Court is planning to use these funds to continue the support of its newly upgraded data network and voice connections; to pay for the recurring Virtual Private Network System (VPN) phone and cable line charges; replace the Court's CM/ECF file server; purchase computer desktop systems and laptops for the Court's new digital recording system; replace computer desktop systems, printers and laptops in accordance with the judiciary's cyclical replacement program; and upgrade and support existing software applications.

ELECTRONIC PUBLIC ACCESS (EPA)

Financing ($000s)

Funding Sources	FY 2008 Financial Plan	FY 2008 Actuals	FY 2009 Financial Plan
Collections	$ 70,130	$ 76,803	$ 87,135
Prior-year Carryforward	$ 44,503	$ 44,503	$ 40,344
Total	**$ 114,633**	**$ 121,306**	**$ 127,479**

SPENDING

Category ($000s)	FY 2008 Financial Plan	FY 2008 Actuals	FY 2009 Financial Plan
Obligations	$ 94,727	$ 80,962	$ 106,788
Planned Carryforward	$ 19,906	$ 40,344	$ 20,691

The judiciary's Electronic Public Access Program (EPA) encompasses systems and services that provide the public with electronic access to federal case and court information and that provide centralized billing, registration, and technical support services through the Public Access to Court Electronic Records (PACER) Service Center. The program provides internet access to data from case files in all court types, in accordance with policies set by the Judicial Conference and congressional directives.

Pursuant to congressional directives, the EPA program is self-funded and revenues are used to fund IT projects related to public access, including costs for the Case Management /Electronic Case Files system (CM/ECF). CM/ECF is operational in 93 bankruptcy courts, 94 district courts, 10 appellate courts, the Court of International Trade and the Court of Federal Claims. CM/ECF should be fully implemented in all courts in calendar year 2009.

In fiscal year 2009, the judiciary plans to use $106.8 million in EPA collections and prior-year carryforward to fund public access initiatives including the following:

- Public Access Services and Applications $17.7 million;
- Telecommunications $8.7 million;
- EPA Equipment $1.3 million;
- CM/ECF Development, Operations and Maintenance $33.4 million;
- Courtroom Technology Allotments for Maintenance/Technology Refreshment $25.8 million;
- Electronic Bankruptcy Noticing $9.7 million;
- CM/ECF Allotments to Courts $7.5 million;
- CM/ECF state feasibility study $1.4 million;
- Violent Crime Control Act Notification $1.0 million; and
- Jury Management System Public Web Page $0.2 million.

EPA

ELECTRONIC PUBLIC ACCESS (EPA)

Financing

Funding Sources ($000s)	FY 2011 Financial Plan	FY 2011 Actuals	FY 2012 Financial Plan
Collections	$ 107,890	$ 113,959	$ 130,190
Prior-year Carryforward	$ 26,611	$ 26,611	$ 31,905
Total Financing	**$ 134,501**	**$ 140,570**	**$ 162,095**

Spending

Category ($000s)	FY 2011 Financial Plan	FY 2011 Actuals	FY 2012 Financial Plan
Obligations	$ 121,750	$ 108,665	$ 137,043
Planned Carryforward	$ 12,751	$ 31,905	$ 25,052

The Electronic Public Access program provides electronic public access to court information in accordance with policies set by the Judicial Conference, congressional directives, and user needs. PACER (Public Access to Court Electronic Records) was established in 1988 as a dial-up service. In the last decade, through the implementation of the Case Management/Electronic Case Files (CM/ECF) system, PACER has evolved into an Internet-based service, which provides the courts, litigants, and public with access to court dockets, case reports, and over 500 million documents filed with the courts through CM/ECF. Centralized user support services are provided by the Public Access to Court Electronic Records (PACER) Service Center. During fiscal year 2011, PACER Service Center support staff established 160,000 new PACER accounts and responded to more than 205,000 telephone and email requests.

Pursuant to congressional directives, the EPA program is self-funded and revenues are used to fund IT projects related to public access, including costs for the Case Management /Electronic Case Files system (CM/ECF). CM/ECF is currently operational in all bankruptcy and district courts, 12 appellate courts, 5 bankruptcy appellate panels, the Court of International Trade and the Court of Federal Claims.

In fiscal year 2012, the judiciary plans to use $137.0 million in EPA collections and prior-year carryforward to fund public access initiatives including the following:

- CM/ECF Development, Operations and Maintenance $34.1 million;
- Courtroom Technology Allotments for Maintenance/Technology Refreshment $26.8 million;
- Telecommunications $26.6 million;
- Public Access Services and Applications $17.1 million;
- Electronic Bankruptcy Noticing $13.8 million;
- Allotments to the Courts $12.2 million;
- Prospectus Courtroom Technology Projects $4.5 million;
- Violent Crime Control Act Notification $1.0 million; and
- Web-Based eJuror Services $0.9 million.

FY 2013 Senate Approval of Fin Plan

RE: FY 2013 Financial Plan
[redacted](Appropriations)
07/31/2013 01:47 PM
To:
'Edward_O'Kane@ao.uscourts.gov'
Cc:
"Dorothy_Seder@ao.uscourts.gov", [redacted](Appropriations)"
Hide Details
From: [redacted](Appropriations)"[redacted]@appro.senate.gov>

To: "'Edward_O'Kane@ao.uscourts.gov'" <Edward_O'Kane@ao.uscourts.gov>

Cc: "Dorothy_Seder@ao.uscourts.gov" <Dorothy_Seder@ao.uscourts.gov>, [redacted](Appropriations)"[redacted]@appro.senate.gov>

History: This message has been replied to and forwarded.
Sorry about that and thanks for the reminder. We have no objection.

From: Edward_O'Kane@ao.uscourts.gov [mailto:Edward_O'Kane@ao.uscourts.gov]
Sent: Wednesday, July 31, 2013 1:02 PM
To: [redacted](Appropriations)
Cc: Dorothy_Seder@ao.uscourts.gov
Subject: FY 2013 Financial Plan

[redacted]

In looking through our records we don't seem to have Senate approval of our FY 2013 financial plan. Would you be able to send us an email or something approving the plan? The auditors ask for it so we like to have the House and Senate approvals on file. Thanks.

Ed

Case Management/Electronic Case Files		Congressional Directive/mandate/approval	Years
Budget Name			
CM/ECF: Case Management/Electronic Case Files System - Development and Implementation			
Description			
Development and Implementation costs for CM/ECF. CM/ECF is the case management system used in the appellate, district, and bankruptcy courts. CM/ECF provides the ability to store case file documents in electronic format and to accept filings over the Internet.		"The Committee expects the fee for the Electronic Public Access program to provide for Case Management/Electronic Case Files system enhancements and operational costs." - Judiciary Appropriations Act of 2004 [H.R. Rep. No. 108-221 at 116]	07, 08
Budget Name			
CM/ECF: Case Management/Electronic Case Files System - Operations & Maintentance			
Description			
Operations & Maintentance costs for CM/ECF. CM/ECF is the case management system used in the appellate, district, and bankruptcy courts. CM/ECF provides the ability to store case file documents in electronic format and to accept filings over the Internet.		"The Committee expects the fee for the Electronic Public Access program to provide for Case Management/Electronic Case Files system enhancements and operational costs." - Judiciary Appropriations Act of 2004 [H.R. Rep. No. 108-221 at 116]	07, 08
Budget Name			
CM/ECF Next Generation Project			
Description			
The CM/ECF Next Generation project is assessing the judiciary's long term case management and case filing requirements with a view to modernizing or replacing the CM/ECF systems.		"The Committee expects the fee for the Electronic Public Access program to provide for Case Management/Electronic Case Files system enhancements and operational costs." - Judiciary Appropriations Act of 2004 [H.R. Rep. No. 108-221 at 116]	07, 08
Budget Name			
CM/ECF Operational Practices Forums -- Appellate Courts			
Description			
The CM/ECF operational practices forums are annual conferences at which judges, clerks of court, court staff, and AO staff exchange ideas and information about operational practices and policies related to the CM/ECF system.		"The Committee expects the fee for the Electronic Public Access program to provide for Case Management/Electronic Case Files system enhancements and operational costs." - Judiciary Appropriations Act of 2004 [H.R. Rep. No. 108-221 at 116]	07, 08
Budget Name			
CM/ECF Operational Practices Forums --District Courts			
Description			
The CM/ECF operational practices forums are annual conferences at which judges, clerks of court, court staff, and AO staff exchange ideas and information about operational practices and policies related to the CM/ECF system.		"The Committee expects the fee for the Electronic Public Access program to provide for Case Management/Electronic Case Files system enhancements and operational costs." - Judiciary Appropriations Act of 2004 [H.R. Rep. No. 108-221 at 116]	07, 08
Budget Name			
CM/ECF Operational Practices Forums -- Bankruptcy Court			
Description			
The CM/ECF operational practices forums are annual conferences at which judges, clerks of court, court staff, and AO staff exchange ideas and information about operational practices and policies related to the CM/ECF system.		"The Committee expects the fee for the Electronic Public Access program to provide for Case Management/Electronic Case Files system enhancements and operational costs." - Judiciary Appropriations Act of 2004 [H.R. Rep. No. 108-221 at 116]	07, 08
Electronic Bankruptcy Noticing		Congressional Directive/mandate/approval	Years
Budget Name			
Electronic Bankruptcy Noticing			
Description			
The Bankruptcy Noticing Center (BNC) retrieves data each day from the bankruptcy courts' CM/ECF databases, and produces and sends bankruptcy notices electronically or by mail. Electronic transmission options include internet e-mail or fax and, for large email recipients, EDI and XML.		"The Committee supports the ongoing efforts of the Judiciary to improve and expand information made available in electronic form to the public. Accordingly, the Committee expects the Judiciary to utilize available balances derived from electronic public access fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, enhanced use of the Internet, and electronic bankruptcy noticing."-- Judiciary Appropriations Act of 1997 [H.R. Rep. No. 104-676 at 89]	07, 08
Court Allotments		Congressional Directive/mandate/approval	Years
Budget Name			
Court Implementation Additives			
Description			
These funds for a court additives to support activities like CM/ECF implementation and making digital audio recordings of hearings available via PACER.		"The Committee expects the fee for the Electronic Public Access program to provide for Case Management/Electronic Case Files system enhancements and operational costs." - Judiciary Appropriations Act of 2004 [H.R. Rep. No. 108-221 at 116]	07, 08
Courtroom Technology		Congressional Directive/mandate/approval	Years
Budget Name			
Courtroom Technology		Financial Services and General Government Appropriations Act, 2008 (Submitted to Congress in spending plan which was approved by Congress.)	07, 08, 09, 10, 11, 12, 13, 14, 15, 16
Description			
This allotment funds the maintenance, cyclical replacement, and upgrade of courtroom technologies in the courts.			
Telecommunications (P/			Years

Budget Name			
PACER-Net			
Description			
The Public Access Network (PACER-Net) is the network which allows courts to post court information on the Internet in a secure manner. The public side of CM/ECF as well as court web sites are hosted on the PACER-Net. As it is the most accessible network		"The Committee supports the ongoing efforts of the Judiciary to improve and expand information made available in electronic form to the public. Accordingly, the Committee expects the Judiciary to utilize available balances derived from electronic public access fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, enhanced use of the Internet, and electronic bankruptcy noticing. -- Judiciary Appropriations Act of 1997 [H.R. Rep. No. 104-676 at 89] and Judiciary Appropriations Act of 1992 [Pub. L. No. 102-140, Title III, Section 303]	07, 08
Budget Name			
DCN and Security Services			
Description			
Provides network circuits, routers, switches, security, optimization, and management devices along with maintenance management and certain security services to support the Judiciary's WAN network. This DCN cost is split between appropriated funds and EPA funds.		"The Committee supports the ongoing efforts of the Judiciary to improve and expand information made available in electronic form to the public. Accordingly, the Committee expects the Judiciary to utilize available balances derived from electronic public access fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, enhanced use of the Internet, and electronic bankruptcy noticing." -- Judiciary Appropriations Act of 1997 [H.R. Rep. No. 104-676 at 89] and Judiciary Appropriations Act of 1992 [Pub. L. No. 102-140, Title III, Section 303]	07, 08
Victim Notification		Congressional Directive/mandate/approval	Years
Budget Name			
Violent Crime Control Act Notification			
Description			
The Law Enforcement Officer Notification project will develop a system for probation and pretrial services officers to electronically notify local law enforcement agencies of changes to the case history of offenders under supervision as required by the Victim		"The Committee supports efforts of the judiciary to make information available to the public electronically, and expects that available balances from public access fees in the judiciary automation fund will be used to enhance availability of public access." --Judiciary Appropriations Act of 1999 [S. Rep. No. 105-235 at 114]	09, 10, 11, 12, 13, 14, 15, 16
State of Mississippi		Congressional Directive/mandate/approval	Years
Budget Name			
State of Mississippi			
Description			
Mississippi state three year study of the feasibility of sharing the Judiciary's CM/ECF filing system at the state level, to include electronic billing processes. Not to exceed the estimated cost of $1.4 million.		"The Committee supports the Federal judiciary sharing its case management electronic case filing system at the State level and urges the judiciary to undertake a study of whether sharing such technology, including electronic billing processes, is a viable option."-- Judiciary Appropriations Act 2007 [S. Rept. No. 109-293 at page 176]	07, 08, 09, 10, 12, 13
Web-based Juror Services		Congressional Directive/mandate/approval	Years
Budget Name			
Web based E Juror Services			
Description			
eJuror hotline and software maintenance cost, escrow services, scanner support		"The Committee supports the ongoing efforts of the Judiciary to improve and expand information made available in electronic form to the public. Accordingly, the Committee expects the Judiciary to utilize available balances derived from electronic public access fees in the Judiciary Automation Fund to make information and services more accessible to the public through improvements to enhance the availability of electronic information. The overall quality of service to the public will be improved with the availability of enhancements such as electronic case documents, electronic filings, enhanced use of the Internet, and electronic bankruptcy noticing._-- Judiciary Appropriations Act of 1997 [H.R. Rep. No. 104-676 at 89] & "The Committee supports efforts of the judiciary to make electronic information available to the public, and expects that available balances from public access fees in the judiciary automation fund will be used to enhance availability of public access." -- Judiciary Appropriations Act of 1999 [S. Rep. No. 105-235 at 114]	09, 10, 11, 12, 13, 14, 15, 16

Calendar No. 535

109TH CONGRESS *2d Session*	SENATE	REPORT 109–293

TRANSPORTATION, TREASURY, HOUSING AND URBAN DEVELOPMENT, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS BILL, 2007

JULY 26, 2006.—Ordered to be printed

Mr. BOND, from the Committee on Appropriations, submitted the following

REPORT

[To accompany H.R. 5576]

The Committee on Appropriations, to which was referred the bill (H.R. 5576) making appropriations for the Departments of Transportation, Treasury, and Housing and Urban Development, the Judiciary, District of Columbia, and independent agencies for the fiscal year ending September 30, 2007, and for other purposes, reports the same to the Senate with an amendment and recommends that the bill as amended do pass.

Amounts of new budget (obligational) authority for fiscal year 2007

Total of bill as reported to the Senate	$89,389,989,000
Amount of 2006 appropriations [1]	102,948,146,000
Amount of 2007 budget estimate	86,748,272,000
Amount of House allowance [2]	86,656,536,000
Bill as recommended to Senate compared to—	
2006 appropriations	−13,558,157,000
2007 budget estimate	+2,641,717,000
House allowance	+2,654,889,000

[1] Includes $20,685,563,000 in emergency appropriations.
[2] Excludes $575,200,000 considered by the House for the District of Columbia.

28–780 PDF

the United States Congress and the Government Accountability Office Personnel Appeals Board are also reviewed by the court.

COMMITTEE RECOMMENDATION

The Committee recommends an appropriation of $25,273,000. The recommendation is $1,493,000 above the fiscal year 2006 funding level and $1,027,000 below the budget request.

Of the amount provided, the Committee has funded the requested increase for disaster recovery of information, but denies the program increase requests for information technology upgrades and the retrofitting of courtrooms to provide enhanced technological capabilities. The Committee notes that the Federal Circuit currently has appropriate technology upgrades in one of its three courtrooms, which meets existing standards enacted by the Judicial Conference.

U.S. COURT OF INTERNATIONAL TRADE

SALARIES AND EXPENSES

Appropriations, 2006	$15,345,000
Budget estimate, 2007	16,182,000
House allowance	16,182,000
Committee recommendation	16,182,000

PROGRAM DESCRIPTION

The United States Court of International Trade, located in New York City, consists of nine Article III judges. The court has exclusive nationwide jurisdiction over civil actions brought against the United States, its agencies and officers, and certain civil actions brought by the United States, arising out of import transactions and the administration and enforcement of the Federal customs and international trade laws.

COMMITTEE RECOMMENDATION

The Committee recommends an appropriation of $16,182,000. The recommendation is $837,000 above the fiscal year 2006 funding level and the same as the budget request.

COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES

SALARIES AND EXPENSES

Appropriations, 2006	$4,308,345,000
Budget estimate, 2007	4,687,244,000
House allowance	4,556,114,000
Committee recommendation	4,583,360,000

PROGRAM DESCRIPTION

Salaries and Expenses is one of four accounts that provide total funding for the Courts of Appeals, District Courts and Other Judicial Services. In addition to funding the salaries of judges and support staff, this account also funds the operating costs of appellate, district and bankruptcy courts, and probation and pretrial services offices.

COMMITTEE RECOMMENDATION

The Committee recommends an appropriation of $4,583,360,000. The recommendation is $275,015,000 above the fiscal year 2006 funding level and $103,884,000 below the budget request.

The Committee has adequately funded this account to enable the courts to meet their workload demands. As previously stated, the Committee urges the Judicial Conference to make the retention of personnel its top priority. The Committee supports the Federal judiciary sharing its case management electronic case filing system at the State level and urges the judiciary to undertake a study of whether sharing such technology, including electronic billing processes, is a viable option.

Southwest Border.—The Committee is concerned about the impact that increased immigration funding and enforcement activities are having on the Federal judiciary's caseload and their ability to handle such a dramatic increase in filings. At present, the criminal cases filed in the five districts along the Southwest border account for nearly one-third of criminal cases nationwide. Since 2001, approximately 1,200 border agents have been added along the border with Mexico, resulting in a significant increase in caseload and workload levels. The judiciary plays an integral role in the Nation's homeland security efforts, and the Committee commends the numerous judges and staff who have ensured the continuing success of this vital piece of the Nation's border security strategy. Because the border courts remain critically understaffed, the Committee has provided $20,371,000, as requested, for magistrate judges and critical staff positions for those districts located along the Southwest border. The Committee directs the Administrative Office to include a plan for the hiring of these positions in its fiscal year 2007 financial plan and to keep the Committee apprised of the number of positions actually brought on board along the Southwest border throughout fiscal year 2007.

Staffing Formulas.—The Committee is aware that the Administrative Office utilizes a sophisticated staffing formula to determine the staffing needs for the local courts. Due to the varied nature of caseload levels throughout the Nation, courts maintain different requirements for staffing. While the Southwest Border Courts have seen the greatest increase in funds allocated over the past several fiscal years, the gap between their funding allotment and their actual workload growth remains substantially greater when compared to the courts throughout the rest of the Nation. For example, during several of the past few fiscal years, supplemental funding from the administrative office and Congress has been required to meet the unique needs of the Southwest Border Courts. This consistent need for additional urgently needed funding in this one region demonstrates, at a minimum, the need for a thorough review of the staffing formulas used to determine local court needs. The Committee recognizes that the formulas currently employed to determine staffing needs place significant weight on the work requirements of the local courts' districts. However, due to the increasing gap between workload and staffing levels, the Committee is concerned that the current formula does not adequately address the differing staffing requirements that face courts located along

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2019, I electronically filed the foregoing Joint Appendix with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit by using the CM/ECF system. All participants in the case are represented by counsel, and thus according to Federal Circuit Rule 30(a)(7), service is made through CM/ECF.

/s/ Deepak Gupta
Deepak Gupta