2024-1757

Volume I (Appx0001-3119)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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

v.

UNITED STATES, Defendant-Appellee.

v.

ERIC ALAN ISAACSON, Interested Party-Appellant

Appeal from the United States District Court
for the District of Columbia
in 1:16-cv-00745-PLF
The Honorable Paul L. Friedman

CORRECTED JOINT APPENDIX
VOLUME I (Appx0001-3119)

ERIC ALAN ISAACSON
6580 Avenida Mirola
LAW OFFICE OF ERIC ALAN ISAACSON
La Jolla, CA 92037-6231
Telephone: (858) 263-9581
Email: ericalanisaacson@icloud.com

Interested Party-Appellant

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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,	)	
v.	)	Civil Action No. 16-0745 (PLF)
UNITED STATES OF AMERICA,	)	
Defendant.	)	

OPINION

For over fifteen years, PACER fees – the per-page fees that the federal judiciary charges the public for online access to court documents – have been a subject of controversy. As a result of the litigation in this case, the United States will return over $100 million of these fees to users of PACER. Today, this litigation substantially comes to a close.

The Court has before it a motion of class representatives National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice (the "Named Plaintiffs") for final approval of a settlement agreement that would resolve the pending claims of hundreds of thousands of plaintiffs and reimburse them for PACER fees that the judiciary unlawfully used to fund certain non-PACER services. Counsel for the Named Plaintiffs also request attorney's fees, costs, and service awards.

After careful consideration of the arguments made by the Named Plaintiffs and by the government, and of the comments and objections by interested persons submitted to the Court and made at the hearing held on October 12, 2023, the Court will approve the settlement

agreement and award $23,863,345.02 in attorney's fees, $1,106,654.98 in costs, and $30,000 in service awards.[1]

[1] The filings and attachments considered by the Court in connection with this matter include: Complaint ("Compl.") [Dkt. No. 1]; Memorandum of Points and Authorities in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment ("Mot. to Dismiss") [Dkt. No. 11]; Plaintiffs' Unopposed Motion for Approval of Revised Plan of Class Notice and Class Notice Documents, Exhibit 3 ("Class Cert. Web Notice") [Dkt. No. 42-5]; Notice of Filing of Revised Notice Documents, Exhibit 1 ("Class Cert. Email Notice") [Dkt. No. 43-1]; Plaintiffs' Motion for Summary Judgment as to Liability ("Pls.' Summ. J. Mot.") [Dkt. No. 52]; Declaration of Jonathan E. Taylor, Exhibit B ("1997 AO Report") [Dkt. No. 52-3]; Declaration of Jonathan E. Taylor, Exhibit E ("Jud. Conf. Letter") [Dkt. No. 52-6]; Declaration of Jonathan E. Taylor, Exhibit H ("Lieberman Letter") [Dkt. No. 52-9]; Plaintiffs' Statement of Undisputed Material Facts ("Pls.' Facts") [Dkt. No. 52-16]; Defendant's Cross-Motion for Summary Judgment ("Def.'s Summ. J. Mot.") [Dkt. No. 74]; Declaration of Wendell A. Skidgel Jr. ("Skidgel Decl.") [Dkt. No. 74-2]; Defendant's Statement of Material Facts as to Which There is No Genuine Dispute and Response to Plaintiffs' Statement of Undisputed Material Facts ("Def.'s Facts") [Dkt. No. 74-3]; Declaration of Wendell A. Skidgel Jr. ("2d Skidgel Decl.") [Dkt. No. 81-1]; Notice of Submission of Revised Proposed Order and Revised Notice Documents, Exhibit 5 ("Sett. Web Notice") [Dkt. No. 152-5]; Plaintiffs' Motion for Final Approval of Class Settlement and for Attorneys' Fees, Costs, and Service Awards ("Pls.' Sett. Mot.") [Dkt. No. 158]; Declaration of Renée Burbank ("Burbank Decl.") [Dkt. No. 158-1]; Declaration of Stuart T. Rossman ("Rossman Decl.") [Dkt. No. 158-2]; Declaration of Rakim Brooks ("Brooks Decl.") [Dkt. No. 158-3]; Declaration of Brian T. Fitzpatrick ("Fitzpatrick Decl.") [Dkt. No. 158-4]; Declaration of Deepak Gupta ("Gupta Decl.") [Dkt. No. 158-5]; Declaration of Meghan S.B. Oliver ("Oliver Decl.") [Dkt. No. 158-6]; Declaration of Gio Santiago Regarding Implementation of Settlement Notice Program ("KCC Decl.") [Dkt. No. 158-7]; Defendant's Response to Plaintiffs' Motion for Final Approval of Class Settlement and for Attorneys' Fees, Costs, and Service Awards ("Def.'s Resp.") [Dkt. No. 159]; Plaintiffs' Reply in Support of Motion for Final Approval of Class Settlement and for Attorneys' Fees, Costs, and Service Awards ("Pls.' Reply") [Dkt. No. 160]; Supplemental Declaration of Brian T. Fitzpatrick ("Fitzpatrick Supp. Decl.") [Dkt. No. 160-1]; Declaration of William B. Rubenstein in Support of Class Counsel's Motion for Attorneys' Fees ("Rubenstein Supp. Decl.") [Dkt. No. 160-2]; Supplemental Declaration of Deepak Gupta ("Gupta Supp. Decl.") [Dkt. No. 160-3]; Declaration of Meghan S.B. Oliver ("Oliver Supp. Decl.") [Dkt. No. 160-4]; Declaration of Gio Santiago Regarding Settlement Administration Costs ("KCC Supp. Decl.") [Dkt. No. 160-5]; Plaintiff-Class Member Don Kozich's Verified Objections to Settlement and Motion to Appear Telephonically or by Zoom ("Kozich Obj. and Mot.") [Dkt. No. 163]; Plaintiffs' Response to Objection of Don Kozich ("Resp. to Kozich Obj.") [Dkt. No. 165]; and Plaintiffs' Notice of Filing of All Objections Received to Date ("Compiled Objs.") [Dkt. No. 166].

The Court also reviewed the following objections to the settlement agreement: Objection of Aaron Greenspan ("Greenspan Obj.") [Dkt. No. 166-1]; Objection of Alexander Jiggetts ("Jiggetts Obj.") [Dkt. No. 166-2]; Objection of Geoffrey Miller ("Miller Obj.") [Dkt.

I. BACKGROUND

A. Origin and History of PACER Fees

Before the late 1980s, federal courts operated on paper. If members of the public wanted to view court dockets or filings, they had to travel to the courthouses where those records physically existed. Then, in 1988, the judiciary "authorized an experimental program of electronic access for the public to court information." JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS 83 (Sept. 14, 1988), www.uscourts.gov/file/1642/download [perma.cc/HKS6-4B34]. This experiment gave rise to the Public Access to Court Electronic Records system, or "PACER." Pls.' Facts ¶ 1. PACER allows the public to access court documents without the need to review physical records or travel to the courthouse to access them. 25 Years Later, PACER, Electronic Filing Continue to Change Courts, U.S. CTS. (Dec. 9, 2013), www.uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts [perma.cc/92NB-8BM7].

Originally, PACER worked via a dial-up phone connection and users were charged fees by the minute. 25 Years Later, PACER, Electronic Filing Continue to Change Courts, supra. But in 1998, PACER moved online, and the judiciary started charging users on a per-page basis. See Def.'s Facts ¶ 16. Around the same time, the judiciary began to use PACER

No. 166-3]; Objection of Eric Isaacson ("Isaacson Obj.") [Dkt. No. 166-5]; and Written Statement of Eric Alan Isaacson of Intent to Appeal in Person at the October 12, 2023, Final-Approval Hearing ("Isaacson Stmt.") [Dkt. No. 166-6].

The Court also reviewed the following prior opinions in this case: Nat'l Veterans Legal Servs. Program v. United States, Civil Action No. 16-0745, 2016 WL 7076986 (D.D.C. Dec. 5, 2016) ("Motion to Dismiss Op."); Nat'l Veterans Legal Servs. Program v. United States, 235 F. Supp. 3d 32 (D.D.C. 2017) ("Class Certification Op."); Nat'l Veterans Legal Servs. Program v. United States, 291 F. Supp. 3d 123 (D.D.C. 2018) ("Summary Judgment Op."); and Nat'l Veterans Legal Servs. Program v. United States, 968 F.3d 1340 (Fed. Cir. 2020) ("Federal Circuit Op.").

fees to pay for programs other than PACER, like Case Management / Electronic Case Filing ("CM/ECF"), a new system that allowed parties to file documents electronically. See 1997 AO Report at 36; Pls.' Facts ¶ 9. By fiscal year 2000, the judiciary was using the fees to pay for PACER-related costs, CM/ECF-related costs, and Electronic Bankruptcy Noticing ("EBN") costs. 2d Skidgel Decl. ¶ 31; id. tab 30; see Summary Judgment Op., 291 F. Supp. 3d at 131.

In 2002, Congress passed the E-Government Act, a statute whose broad purpose was to improve electronic services and processes in government. See E-Government Act of 2002, Pub. L. 107-347, 116 Stat. 2899. As relevant to this litigation, the Act amended the statutory note to 28 U.S.C. § 1913 ("Section 1913 Note") so that it read:

> 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. 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 (a) as a charge for services rendered shall be deposited as offsetting collections . . . to reimburse expenses incurred in providing these services.

28 U.S.C. § 1913 note (internal quotation marks omitted); see E-Government Act of 2002, § 205(e). The Senate Governmental Affairs Committee explained:

> 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.

S. REP. NO. 107-174 at 23 (June 24, 2002). At that point, PACER fees were set at $0.07 per page. See Skidgel Decl. Ex. G at 64.

But PACER fees continued to rise. Effective January 2005, the Judicial Conference increased fees to $0.08 per page. Jud. Conf. Letter at 1. The Director of the Administrative Office of the United States Courts explained that the increase was "predicated upon Congressional guidance that the judiciary is expected to use PACER fee revenue to fund CM/ECF operations and maintenance." Id.

By the end of 2006, the judiciary had accumulated $32.2 million of excess revenue from PACER fees. Pls.' Facts ¶ 16; Summary Judgment Op., 291 F. Supp. 3d at 134. For that reason, the judiciary further expanded the categories of programs that would be funded by the fees. See Summary Judgment Op., 291 F. Supp. 3d at 134-35. These programs included CM/ECF, EBN, courtroom technology upgrades, an online Jury Management System ("Web Juror"), a Violent Crime Control Act ("VCCA") notification system, and a study to determine the feasibility of providing access to state court documents through CM/ECF (the "State of Mississippi Study"). 2d Skidgel Decl. tab 11, tab 12; see Summary Judgment Op., 291 F. Supp. 3d at 135. In 2012, the judiciary increased PACER fees to $0.10 per page. Pls.' Facts at ¶ 22.

PACER fees have been controversial since at least 2008. That year, a group of activists attempted to download significant portions of the court documents available on PACER and make them available for free. John Schwartz, An Effort to Upgrade a Court Archive System to Free and Easy, N.Y. TIMES (Feb. 12. 2009), www.nytimes.com/2009/02/13/us/13records.html. These activists, along with scholars and public officials, argued that PACER fees make it difficult for the public to access information integral to understanding our country's law and legal system. E.g., Timothy B. Lee, The Case Against PACER: Tearing Down the Courts' Paywall, ARSTECHNICA (Apr. 9, 2009), www.arstechnica.com/tech-policy/2009/04/case-against-pacer [perma.cc/X52V-RYQT]; see also Pls.' Sett. Mot. at 5 ("High PACER fees hinder equal access to justice, impose often insuperable barriers for low-income and pro se litigants, discourage academic research and journalism, and thereby inhibit public understanding of the courts.").

In 2009, Senator Joe Lieberman, sponsor of the E-Government Act, expressed concern that the judiciary may have been violating the Act by collecting PACER fees "well higher than" the cost of funding PACER. Lieberman Letter at 1. Still, this trend continued. 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 from about $102.5 million in 2010 to $146.4 million in 2016. See Pls.' Facts ¶¶ 28, 46, 62, 80, 98, 116, 134.

B. Procedural History

The current litigation began in April 2016, when the Named Plaintiffs filed a class-action lawsuit against the United States alleging that the judiciary had violated the

E-Government Act by charging excessive PACER fees. Compl. ¶¶ 1-3, 34.[2] The Named Plaintiffs alleged jurisdiction under the Little Tucker Act, 28 U.S.C. § 1346(a). Id. ¶ 33. The Named Plaintiffs were, and still are, represented by Gupta Wessler LLP and Motley Rice LLC ("Class Counsel").

The United States moved to dismiss. See Mot. to Dismiss. The government argued that the Court lacked jurisdiction, id. at 15-19, that the Named Plaintiffs could not sue without first alerting the PACER Service Center, id. at 13-15, and that other similar class action lawsuits challenging PACER fees should be litigated first under the "first-to-file rule." Id. at 12-13. This Court denied the motion to dismiss. See Motion to Dismiss Op., 2016 WL 7076986. In January 2017, the Court certified a class. See Class Certification Op., 235 F. Supp. 3d 32. The class consisted 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." Id. at 39. These class members were given notice and an opportunity to opt out. Gupta Decl. ¶ 14; see Order Approving Plan of Class Notice ("1st Notice Appr.") [Dkt. No. 44]. The parties then engaged in informal discovery, which clarified what categories of expenses were funded by PACER fees. Gupta Decl. ¶ 15.

In August 2017, the Named Plaintiffs filed a motion seeking "summary adjudication of the defendant's liability, reserving the damages determination for after formal discovery." Pls.' Summ. J. Mot. at 1. The United States then filed a cross-motion for summary judgment as to liability. Def.'s Summ. J. Mot. at 1. In these motions, the parties asked the Court to decide the central question in the case: Under the E-Government Act, what categories of

[2] Judge Ellen Segal Huvelle presided over this case until her retirement, at which time the case was reassigned to the undersigned.

expenses may be funded by PACER fees? See id. at 1-2; Pls.' Summ. J. Mot. at 1. The Named Plaintiffs argued that the Act "prohibits the [judiciary] from charging more in PACER fees than is necessary to recoup the total marginal cost of operating PACER," so none of the additional categories of expenses were permitted. Pls.' Summ. J. Mot. at 11. The United States urged a broader reading of the statute which would allow the judiciary to "charge fees, as it deems necessary, for the provision of information to the public through electronic means," making all of the additional categories of expenses lawful. Def.'s Summ. J. Mot. at 11.

The Court rejected both positions, holding that the government's interpretation of the E-Government Act was too broad, but that the Named Plaintiffs' interpretation was too narrow. See Summary Judgment Op., 291 F. Supp. 3d at 141-44. The Court concluded that the judiciary "properly used PACER fees to pay for CM/ECF 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 [c]ourtroom [t]echnology." Id. at 146. Using PACER fees to pay for these expenses was improper because the programs failed to further "the public's ability to access information on the federal court's CM/ECF docketing system." Id. at 150.

The parties cross-appealed to the United States Court of Appeals for the Federal Circuit. In August 2020, the Federal Circuit affirmed this Court's interpretation. See Federal Circuit Op., 968 F.3d at 1359. The Federal Circuit wrote that Judge Huvelle "got it just right" in interpreting the E-Government Act to "limit[] PACER fees to the amount needed to cover expenses incurred in services providing public access to federal court electronic docketing information." Id. at 1343, 1350. The Named Plaintiffs' interpretation failed because it "combine[d] part of the first sentence of paragraph (a) [of the Section 1913 Note] ('The Judicial Conference may, only to the extent necessary, prescribe reasonable fees . . . .') with two parts of

the last sentence of paragraph (b) ('to reimburse expenses incurred in providing' the 'services rendered,' which plaintiffs construe to mean PACER access), paying little heed to the substantial amount of text in between." Id. at 1350. Instead, the full text of the Section 1913 Note, along with its legislative history, made clear that the E-Government Act "limits the use of PACER fees to expenses incurred in providing (1) electronic access for members of the public (2) to information stored on a federal court docketing system." Id. at 1351-52.[3]

Applying this interpretation to the contested categories of expenses, the Federal Circuit agreed with this Court that it was unlawful for the judiciary to use PACER fees to pay for the State of Mississippi Study, VCCA, Web-Juror, and most courtroom technology expenses. Federal Circuit Op., 968 F.3d at 1358. The appellate court declined to decide whether it was lawful for PACER fees to fund all CM/ECF expenditures, holding that the issue was not properly before it and remanding to this Court for further proceedings. Id. at 1358-59.

After remand, the parties began settlement discussions. See Gupta Decl. ¶¶ 23-24. Even after the Federal Circuit ruling, the government took the position that it did not owe damages to class members because the class could not prove that PACER fees would have been lower if the judiciary had refrained from making the unlawful expenditures. Id. ¶ 23. The government also maintained that all CM/ECF expenditures were properly funded by PACER fees. Id. The Named Plaintiffs disagreed with both positions. Id.

In May 2021, the parties engaged in an all-day mediation session with Professor Eric Green. Gupta Decl. ¶ 25. During the mediation, the parties agreed to a common-fund settlement structure and the United States made a "final offer" for the total amount of the fund.

[3] The Federal Circuit also held that the Little Tucker Act granted jurisdiction over the lawsuit because the E-Government Act was sufficiently "money-mandating." Federal Circuit Op., 968 F.3d at 1347-49.

Id. ¶ 26. Over the next few weeks, Professor Green continued to mediate, and the parties agreed on a fund amount of $125 million. See id. ¶ 27. Reaching agreement on the remaining sticking points – including how the fund would be distributed, what would happen to unclaimed money, and the scope of the release of legal claims – took many months more. Id. ¶¶ 27-28. In July 2022, the parties executed a settlement agreement, which they amended once in September 2022 and again in April 2023 (collectively, the "Agreement"). Id. ¶ 28; see id. Ex. A ("Sett. Agreement"); id. Ex. B ("First Supp. Agreement"); id. Ex. C ("Second Supp. Agreement").

On May 8, 2023, the Court granted preliminary approval of the Agreement and scheduled a hearing to consider final approval for October 12, 2023 (the "Settlement Hearing"). See Order Granting Plaintiffs' Revised Motion for Preliminary Approval of Class Settlement ("Prelim. Approval") [Dkt. No. 153] at ¶¶ 1, 3. At that time, the Court certified a revised settlement class. Id. ¶ 7. The settlement class included all members of the original class who did not opt out, plus those meeting the same criteria who had paid PACER fees before May 2018 but after the original class was certified. Id. The Court directed that notice of the Agreement and its terms be provided to the settlement class. Id. ¶¶ 15, 16, 18. Using the government's PACER registration data, the claims administrator identified members of the class to be notified. Id. ¶ 13; KCC Decl. ¶¶ 5-7.

In July 2023, the claims administrator sent the court-approved settlement notice, both through email and through postcards, to over 500,000 PACER account holders. KCC Decl. ¶¶ 8-11. These notices provided class members with the settlement amount, an overview of the litigation, information about opting out and submitting objections, and a link to additional information and the full Agreement on a website dedicated to the settlement. Id. Ex. B; see PACER FEES CLASS ACTION, www.pacerfeesclassaction.com [https://perma.cc/N4L5-AYHS].

Objections could be filed by mailing or emailing Class Counsel and the Court. See Sett. Web Notice at 5. Because some class members already had the opportunity to opt out when the original class was certified, the notice sent to them did not include the option to opt out. KCC Decl. ¶8; see id. Ex. A. The claims administrator also issued publication notice through a widely disseminated press release and a banking newsletter. Id. ¶¶ 12, 13.

There were a few hiccups in the notice process. First, the initial notice omitted some class members who were part of the original class. KCC Decl. ¶ 15. Second, the notice sent to some members of the original class incorrectly indicated that they had another opportunity to opt out. Id. ¶ 16. The settlement administrator corrected both mistakes and sent new notices on August 7, 2023. Id. ¶¶ 15, 16. Thirty-three individuals timely opted out of the settlement class.[4] Five individuals filed objections. See Compiled Objs.[5]

On August 28, 2023, the Named Plaintiffs moved for final approval of the class settlement and for attorney's fees, costs, and service awards. Pls.' Sett. Mot. The Court held the Settlement Hearing on October 12, 2023. Class Counsel, as well as representatives for each of the three Named Plaintiffs, gave statements in support of the Agreement. Two objectors spoke in opposition to the Agreement. Then the Court gave the parties an opportunity to respond to

[4] While the Named Plaintiffs initially stated that thirty-four individuals timely opted out, Pls.' Sett. Mot. at 13, the parties clarified at the Settlement Hearing that they had included a duplicate in their count and that the correct number is thirty-three. In addition, the parties clarified at the Settlement Hearing that sixteen individuals attempted to opt out after the opt out deadline. But none of these sixteen individuals were actually eligible to opt out, as all were either part of the original class and had the opportunity to opt out in 2017, or were federal employees who were never part of the class to begin with. See id.

[5] These individuals were: Aaron Greenspan, Alexander Jiggetts, Geoffrey Miller, Don Kozich, and Eric Isaacson. Of the written objections, two of the five were timely (Mr. Miller's and Mr. Isaacson's), and one of the three untimely objections was filed by an individual who is likely not a class member (Mr. Kozich). Nevertheless, the Court has considered all five objections filed.

written and oral objections. Finally, the Court heard from the parties and from objectors on the issue of attorney's fees.

II. THE SETTLEMENT AGREEMENT

The Agreement creates a common fund of $125 million and provides for the distribution of at least 80% of that fund to the hundreds of thousands of persons or entities who paid PACER fees between April 21, 2010 and May 31, 2018 (the "Class Period").

A. The Settlement Class and Fund

The settlement class includes all persons or entities who paid PACER fees in the period beginning six years before the Named Plaintiffs filed their original complaint (April 22, 2010) and ending on the date the judiciary stopped using PACER fees to fund prohibited expenses (May 31, 2018) – with the exception of those who opted out, of federal agencies, and of Class Counsel. Sett. Agreement ¶ 3; First Supp. Agreement; see Pls.' Sett. Mot. at 11. This class includes at least several hundred thousand members. See Class Certification Op., 235 F. Supp. 3d at 39.

The settlement common fund totals $125 million. Sett. Agreement ¶ 11. From this fund, at least 80%, or $100 million, is to be distributed to class members. Id. ¶ 18. Up to 20%, or $25 million, is to be used for attorney's fees, litigation expenses, and service awards for the class representatives. Id. ¶ 28. As to the attorney's fees and service awards, the Agreement specifies that "the Court will ultimately determine whether the amounts requested are reasonable." Id. The Agreement further specifies that service awards cannot exceed $10,000 per class representative. Id.

B. Fund Allocation and Distribution to Class Members

The Agreement allocates the common fund to class members through a two-step calculation. See Sett. Agreement ¶ 19. First, all class members are allocated either $350 or, if they paid less than $350 in PACER fees during the Class Period, the actual amount that they paid. Id. Second, class members who paid over $350 receive, in addition to the first $350, a pro rata allocation of the remaining common fund. Id. This pro rata allocation compares the amount that a given class member paid over $350 to the amounts that other class members paid over $350, and allots the remaining common fund accordingly. See id. To illustrate the calculation, if a class member paid $100 in PACER fees during the Class Period, they will get all of it back. See id. ¶¶ 19, 20. But if a class member paid $1000 in PACER fees during the Class Period, they will get $350 plus an amount from the remaining common fund proportional to the additional $650 that they paid. See id. If there is unclaimed money after these allocations are distributed to class members, then the rest of the common fund will be distributed to class members who have not been fully reimbursed for the PACER fees they paid during the Class Period and who successfully collected their first distribution. Id. ¶ 23.

In contrast to most class action settlements, class members will not need to submit claims to get their share of this common fund. See Pls.' Sett. Mot. at 13. Instead, the claims administrator will use the information provided to them by the government – which has comprehensive records of PACER registrants and the fees they paid – to identify class members and distribute their payments. See id.; Sett. Agreement ¶¶ 14, 21, 23; KCC Decl. ¶¶ 5-7. The claims administrator will disburse the first set of payments within 180 days of receiving the settlement fund from the government, and will distribute any remaining money three months after that. Second Supp. Agreement ¶ 21; Sett. Agreement ¶ 24.

III. FAIRNESS

Under Rule 23 of the Federal Rules of Civil Procedure, no class action may be dismissed, settled, or compromised without the approval of the Court. FED. R. CIV. P. 23(e). Before giving its approval, the Court must direct the provision of adequate notice to all members of the class, conduct a hearing, and find, after notice and a hearing, that the settlement is "fair, reasonable, and adequate." Id.; see Thomas v. Albright, 139 F.3d 227, 231 (D.C. Cir. 1998); In re Black Farmers Discrimination Litig., 856 F. Supp. 2d 1, 26 (D.D.C. 2011). In performing this task, the Court must protect the interests of those unnamed class members whose rights may be affected by the settlement of the action. See WILLIAM B. RUBENSTEIN, 4 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 13:40 (6th ed. 2023).

To determine whether a settlement is fair, reasonable, and adequate, the Court "looks to the 'paramount twin elements of procedural and substantive fairness.'" Mercier v. United States, 156 Fed. Cl. 580, 584 (2021) (quoting Courval v. United States, 140 Fed. Cl. 133, 139 (2018) (internal quotation marks omitted)). The Federal Rules instruct the Court to consider a variety of factors in doing so. The first two of these factors are procedural: whether "(A) the class representatives and class counsel have adequately represented the class; [and] (B) the proposal was negotiated at arm's length." FED. R. CIV. P. 23(e)(2). The remaining factors are substantive; the Court is to consider whether:

> (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Id.

Having carefully considered the parties' arguments and all of the objections that have been filed with the Court and expressed at the Settlement Hearing, the Court concludes that the settlement is fair, reasonable, and adequate.

A. Procedural Fairness

The Court finds that the Named Plaintiffs and Class Counsel have more than "adequately represented" the class. See FED. R. CIV. P. 23(e)(2)(A). The Named Plaintiffs are nonprofit organizations who pay PACER fees despite their nonprofit status, and whose members experienced real burdens because of the fees. Class Certification Op., 235 F. Supp. 3d at 42. These characteristics made them "particularly good class representatives." Id. The two law firms representing the class, in tandem, have extensive experience both in class actions and in lawsuits against the federal government. See Gupta Decl. ¶¶ 45-48, 50-55, 59-61; see also infra Section IV.B.1.

The Named Plaintiffs and Class Counsel have vigorously litigated this case for nearly eight years, over seven of them after the class was certified. See Gupta Decl. ¶¶ 11-13. They engaged in informal discovery, argued (and, in part, won) summary judgment, and successfully defended the summary judgment ruling on appeal. See id. ¶¶ 14-21; see also infra Section IV.B.2. After remand, they engaged in extensive settlement negotiations with the government. Gupta Decl. ¶¶ 23-28.

By all accounts, these settlement negotiations happened at "arm's length," indicating no collusion between the parties. See FED. R. CIV. P. 23(e)(2)(B). Negotiations came at a point in the litigation where liability was resolved but there were still significant questions about the possibility, and amount, of damages. The negotiations were thus neither "too early to be suspicious nor too late to be a waste of resources." In re Vitamins Antitrust Litig., 305 F.

Supp. 2d 100, 105 (D.D.C. 2004). And because of "significant informal discovery, . . . the parties were well-positioned to mediate their claims." Radosti v. Envision EMI, LLC, 717 F. Supp. 2d 37, 56 (D.D.C. 2010). The negotiations took place over nearly two years but came together "after a lengthy mediation session that was presided over by an experienced mediator," indicating skilled negotiating on both sides. See id. Further evidence that the negotiations were at arm's length and not collusive is provided by the positions taken by the parties during settlement negotiations and the compromises ultimately reached. See infra at 24.

The notice requirements of Rule 23 were also satisfied. When the Court preliminarily approved the settlement, it "direct[ed] notice in a reasonable manner to all class members who would be bound by the proposal." FED. R. CIV. P. 23(e)(1)(B); see Prelim. Approval ¶¶ 15, 16, 18. The Court also found the planned notice to be "the best notice practicable under the circumstances," Prelim. Approval ¶ 21, as was required for the individuals and entities who were not part of the originally certified class. See FED. R. CIV. P. 23(c)(2)(B). The claims administrator adequately executed this notice. Using the government's PACER registration data, it identified over 500,000 potential class members and sent them court-approved notices, both through email and through postcards. KCC Decl. ¶¶ 5-7, 8-11; see Prelim. Approval ¶ 13; see also FED. R. CIV. P. 23(c)(2)(B) (requiring, for new class members, "individual notice to all members who can be identified through reasonable effort"). The claims administrator also issued publication notice. KCC Decl. ¶¶ 12, 13. Each form of notice directed class members to additional information on the dedicated settlement website. See id. Exs. A-H. While there were a few errors in the notice process – the initial notice omitted some class members and gave some class members incorrect information – the claims administrator promptly corrected these errors and gave recipients sufficient time to opt out or object.

Id. ¶¶ 15-18.[6] The notice also satisfied Rule 23's substantive requirements for new class members. The emails, postcards, and publications, along with the dedicated settlement website:

> clearly and concisely state[d] in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

See FED. R. CIV. P. 23(c)(2)(B). The Court finds that this notice was more than sufficient and was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Haggart v. Woodley, 809 F.3d 1336, 1348-49 (Fed. Cir. 2016) (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950)).

After class members were given notice, they had over a month (and most had over two months) to file written objections. See KCC Decl. ¶¶ 10, 15; Prelim. Approval ¶¶ 3, 20. Objections could be filed by mailing or emailing Class Counsel and the Court. See Sett. Web Notice at 5. Only five individuals filed written objections. On October 12, 2023, the Court held the Settlement Hearing. After the parties' opening statements, the Court heard objections to the settlement. No one spoke who had not already submitted a written objection. Then, the Court gave the parties an opportunity to respond to objections. Finally, the Court heard from the parties and from objectors on the issue of attorney's fees.

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[6] Objector Don Kozich contends that he did not receive notice of the settlement. Kozich Obj. and Mot. at 2. While no method of notice is perfect, Mr. Kozich's failure to receive notice was likely proper. Mr. Kozich does not appear to be a member of the class. He incurred PACER fees during the Class Period, but he did not pay those fees during the Class Period, and thus is ineligible for relief. Resp. to Kozich Obj. at 1.

Objector Eric Isaacson has questioned a few procedural aspects of the Settlement Hearing. First, he argues that discussing the proper award of attorney's fees after the time scheduled for objectors to speak deprives objectors of due process and runs afoul of the Federal Rules, Isaacson Stmt. at 7, which instruct the Court to consider "the terms of any proposed award of attorney's fees" in evaluating the adequacy of "the relief provided for the class" in the proposed settlement. FED. R. CIV. P. 23(e)(2)(C)(iii). Second, Mr. Isaacson argues that objectors at the hearing should have been given the opportunity to cross-examine declarants who provided support for Class Counsel's requested fees. Isaacson Stmt. at 7.[7]

Both of these arguments overstate an objector's role in the class settlement process. While the Court must consider – and has considered – the arguments of any class member who objects to the settlement, the Court need not give objectors the opportunity to speak at every possible point in the hearing; nor does the Court need to give objectors the opportunity to probe declarations or exhibits through cross-examination or other means. See 4 RUBENSTEIN, supra, § 13:42. Moreover, to assuage Mr. Isaacson's concerns, the Court allowed him to speak during the portion of the hearing addressing attorney's fees, in addition to his opportunity to speak during the portion of the hearing during which the reasonableness of the settlement was discussed.

[7] Mr. Isaacson further objects that "the settling parties arranged with the court to keep class members' objections off the public record." Isaacson Stmt. at 3. This objection has no factual basis. Though the objections the Court received through email were not automatically docketed, they were available upon request. In fact, at Mr. Isaacson's request, Class Counsel filed all objections to the public docket. See Compiled Objs.

B. Substantive Fairness

In considering a proposed class action settlement, the Court must compare the benefits afforded to class members under the settlement with the likely recovery that plaintiffs would have realized if they pursued the resolution of their claims through litigation in court. Thomas v. Albright, 139 F.3d at 231; see In re Black Farmers Discrimination Litig., 856 F. Supp. 2d at 30. The Court must look at the settlement as a whole and should not reject a settlement merely because individual class members claim that they would have received more by litigating rather than settling. Thomas v. Albright, 139 F.3d at 231. The Court should scrutinize the terms of the settlement carefully, but should also keep in mind "the interest in encouraging settlements, particularly in class actions, which are often complex, drawn out proceedings demanding a large share of finite judicial resources." Christensen v. United States, 65 Fed. Cl. 625, 629 (2005) (quoting Mayfield v. Barr, 985 F.2d 1090, 1092 (D.C. Cir. 1993)). And "the opinion of 'experienced and informed counsel should be afforded substantial consideration by [the C]ourt in evaluating the reasonableness of a proposed settlement.'" Prince v. Aramark Corp., 257 F. Supp. 3d 20, 26 (D.D.C. 2017) (quoting In re Lorazepam & Clorazepate Antitrust Litig., Civil Action No. 99-0790, 2003 WL 22037741, at *6 (D.D.C. June 16, 2003)).

In its analysis of the Agreement's substantive fairness, the Court is guided by the substantive factors enumerated in the Federal Rules of Civil Procedure: whether "the relief provided for the class is adequate, taking into account" various subfactors, and whether "the proposal treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2).

1. Whether the Relief is Adequate

The relief the settlement provides to class members is substantial. The majority of class members will receive a full refund for the PACER fees they paid during the Class

Period. Gupta Decl. ¶ 43. Although the minority of class members – those who paid over $350 in fees during the Class Period – will likely not receive a full refund, they may receive substantially more than $350. See Sett. Agreement ¶ 19. In addition, the "proposed method of distributing relief to the class" is efficient. See FED. R. CIV. P. 23(e)(2)(C)(ii). There are no claims to process, and class members will receive the relief even if they have never contacted Class Counsel or the claims administrator. See Pls.' Sett. Mot. at 13.

Contrast this substantial relief with the potential "costs, risks, and delay of trial and appeal." See FED. R. CIV. P. 23(e)(2)(C)(i). The Federal Circuit's liability ruling in this case found some, but not all, of the PACER fees collected during the Class Period to be unlawful. Federal Circuit Op., 968 F.3d at 1350-51, 1357. It left open the question of the extent to which it was lawful for the judiciary to fund CM/ECF through PACER fees. See id. at 1358. And the ruling effectively set the maximum possible recoverable damages for the class at around $500 million. Fitzpatrick Decl. ¶ 20.

Even putting aside the costs of trial and potential further appeal, the path to obtaining this $500 million would have been anything but smooth. "[T]here are several reasons to think a full recovery is unrealistic." In re APA Assessment Fee Litig., 311 F.R.D. 8, 19 (D.D.C. 2015). After the Federal Circuit's ruling, the government continued to assert that the class had no claim to damages because class members could not prove that – but for the unlawful expenditures – PACER fees would have been lower. Gupta Decl. ¶ 23. Moreover, even if class members would not have had to prove damages with specificity, the amount of potentially recoverable damages still would have been uncertain. Much of the potential recovery came from fees the judiciary used to pay for CM/ECF services, Fitzpatrick Decl. ¶ 20, and the Federal Circuit explicitly declined to rule on how much of these services were appropriately funded

through PACER fees. Federal Circuit Op., 968 F.3d at 1358. The recoverability of a sizable portion of the potential damages was thus an open question at the time of settlement.

In other words, at the point of the litigation at which the parties agreed on the terms of their settlement, it would have been a substantial risk to class members to proceed to trial. Evidence could have shown that all of the judiciary's CM/ECF expenditures were lawful. Or the government could have convinced the Court of its position on damages. In that case, the Named Plaintiffs would have faced the difficult task of proving that the judiciary would have chosen to charge lower PACER fees had its expenditures been limited to the lawful categories. The common fund amount – roughly a quarter of the potential recovery if every legal and factual issue had gone the plaintiffs' way – was impressively large in comparison to the risks of continuing to litigate.

Some objectors see a quarter of the maximum potential recovery as an unimpressive figure. See Isaacson Obj. at 3 (calling the settlement "remarkably mediocre"); Greenspan Obj. at 1 (asserting that the settlement should have fully reimbursed PACER users). These views do not properly account for the formidable arguments that were available to the government if the case had proceeded to trial. In addition, Objector Aaron Greenspan asserts that the common fund amount is too low because the judiciary can only legally charge for the marginal cost of document transmission, and that marginal cost is zero. Greenspan Obj. at 1. But the Court has explicitly rejected an interpretation of the E-Government Act that would limit lawful fees to those necessary to pay the marginal cost of operating PACER. Summary Judgment Op., 291 F. Supp. 3d at 140-43. Instead, the judiciary can use PACER fees to fund the full cost of providing public access to federal court electronic docketing information, including fixed costs. See Federal Circuit Op., 968 F.3d at 1349-52.

Other objectors argue that the Agreement is unreasonable because of its provision regarding attorney's fees, expenses, and service awards. See Isaacson Obj. at 9-17; Greenspan Obj. at 1-2. The Court has conducted a full analysis of the proper fee awards below. See infra Section IV. For now, it suffices to say that the fees provision of the Agreement is reasonable. See FED. R. CIV. P. 23(e)(2)(C)(iii) (instructing courts to consider the provisions of settlement agreements that relate to attorney's fees). The Agreement does not fix an amount of attorney's fees or service awards. Instead, it sets an upper limit on both – Class Counsel was able to request up to 20% of the common fund for attorney's fees, expenses, and service awards, including no more than $10,000 per service award for each class representative. Sett. Agreement ¶ 28. The Agreement leaves to the Court the ultimate determinations of how much to award. Id. Rather than setting an unreasonably high amount of attorney's fees or service awards, the Agreement thus caps the amount the Court has the opportunity to approve as reasonable.

Finally, the relative paucity of objections to the Agreement is a strong indicator of the adequacy of the relief. See In re Black Farmers Discrimination Litig., 856 F. Supp. 2d at 29; Mercier v. United States, 156 Fed. Cl. at 597. As Class Counsel notes, the settlement class is comprised of hundreds of thousands of PACER users and is "perhaps the most litigious group of people and entities ever assembled in a single class action, . . . including sophisticated data aggregators, federal-court litigators, and law firms of every stripe." Pls.' Reply at 1. Of this group, only thirty-three opted out of the class, and only five have objected to the settlement. In light of the terms of the Agreement and class members' lack of opposition to them, the Court finds the settlement relief adequate.

2. Whether the Settlement Treats Class Members Equitably

The Court concludes that the Agreement "treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2)(D). While it treats those who paid $350 or less in PACER fees during the Class Period differently from those who paid more than $350, this difference in treatment is fair and justified.

The requirement of intra-class equity exists to ensure that "class counsel ha[s not] sold out some of the class members at the expense of others, or for their own benefit." 4 RUBENSTEIN, supra, § 13:56. If class counsel prioritizes settling a case over vigorously advocating for all class members' claims, counsel may agree to provide some (more powerful or more vocal) class members more relief than they deserve while giving other class members less than they deserve. To ensure that class counsel has not done so, it falls upon the Court to determine whether similarly situated class members are treated similarly and whether "dissimilarly situated class members are not arbitrarily treated as if they were similarly situated." Id.

There is absolutely no indication that Class Counsel "sold out" any group of class members in this case. The Agreement strikes a balance between two competing goals: First, to give relief to small-scale PACER users – the non-lawyer members of the public and individual law practitioners who were most affected by having to pay unlawful fees; the full reimbursement of all PACER fees paid up to $350 makes it more likely that small-scale users will be wholly compensated. See Sett. Agreement ¶ 20. And second, to treat all class members – including large-scale users like law firms – equitably based on what they actually paid. The pro rata allocation above $350 makes it more likely that the sizable fees paid by large-scale users will be adequately accounted for. See id. The Agreement thus does a good job of treating similarly

situated class members similarly, while accounting for the differences between dissimilarly situated class members.

The details the parties have provided about the settlement negotiations further support the reasonableness of the Agreement's common fund distribution. As to the allocation of settlement funds, the Named Plaintiffs initially took the position that the fund should be distributed on an exclusively pro rata basis. Gupta Decl. ¶ 28. The government countered that, before the pro rata allocation, class members should first be fully reimbursed up to a large amount. Id. It grounded this position in the E-Government Act's authorization to "'distinguish between classes of persons' in setting PACER fees . . . 'to avoid unreasonable burdens and to promote public access to'" electronic docketing information. Id. (quoting 28 U.S.C. § 1913 note). Consistent with the judiciary's policy of offering waivers and other pricing mechanisms to make PACER cheaper for some groups of users, the government wanted more of the settlement fund to go to reimbursing those who used PACER less. See id. The $350 figure reflected a compromise between the Named Plaintiffs' position and the government's position. Far from "selling out" class members, the different treatment of different groups within the class reflects vigorous negotiation on both sides, and reflects the text of the E-Government Act.

A number of the objectors dispute the reasonableness of the distribution. Mr. Isaacson argues that too much of the common fund is allocated pro rata, unfairly favoring large-scale users over small-scale users. Isaacson Obj. at 4-5. Objector Geoffrey Miller argues that too much of the common fund is allocated to fully reimbursing users who paid $350 or less, unfairly favoring small-scale users over large-scale users. Miller Obj. at 1-2.[8] As Class Counsel

[8] Mr. Miller also objects that "[t]he proposed plan of allocation under Federal Rule 23 is in tension with the Rules Enabling Act, 28 U.S.C. §[§] 2071-2077, because, by providing different treatment to litigants with identical legal claims, it arguably abridges their

points out, these arguments cannot both be correct, and the fact that each of them was made indicates, if anything, a good compromise. See Pls.' Reply at 4. Moreover, the structure of the distribution is on sound legal footing. "Neither the Federal Rules of Civil Procedure nor the Supreme Court requires that settlements offer a pro rata distribution to class members . . . ." Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615, 629 (6th Cir. 2007). At the same time, courts routinely approve settlements providing for pro rata distributions of common funds because such distributions directly account for the differences in the value of the claims of different class members. See, e.g., In re APA Assessment Fee Litig., 311 F.R.D. at 13; In re Facebook Biometric Info. Priv. Litig., 522 F. Supp. 3d 617, 629 (N.D. Cal. 2021); In re Telik, Inc. Sec. Litig., 576 F. Supp. 2d 570, 580-81 (S.D.N.Y. 2008).

The fact that two objectors (Mr. Isaacson and Mr. Miller) hold these contradictory positions is understandable. A class member who paid substantially more than $350 in PACER fees, but substantially less than a large-scale user, may look at large-scale users and feel disappointed that these users are getting so much more in absolute dollars. And a large-scale user may look at a class member who paid $350 or less in PACER fees and find it unfair that that class member is getting fully reimbursed by the Agreement, while the large-scale user is not. At bottom, however, this dissatisfaction arises from the amount of the common fund, not its allocation. There is simply not enough money in the common fund to reimburse every class member for all of what they paid in PACER fees – nor should there be, as some of the fees were

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right to be treated equally before the law." Miller Obj. at 2. But the Rules Enabling Act is irrelevant to allocations between class members in common-fund settlements. Instead, as applied to class actions, the Rules Enabling Act prevents courts from "giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 458 (2016).

lawful. No settlement is perfect. But the Court finds that the difference in how this settlement treats different class members is justified, fair, and equitable.

Mr. Isaacson raises another issue of equity. He points out that many of the institutional class members are law firms, and that these firms have likely already been reimbursed – by their clients or through settlement agreements in other cases – for PACER fees paid during the Class Period. Isaacson Obj. at 4-7. Because these law firms have already been reimbursed, he argues, it is inequitable to treat them like other class members, particularly like individuals who never received reimbursement. See id. at 4.[9]

This argument makes some sense in the abstract. While a reasonable settlement hypothetically could differentiate between law firm class members who had been reimbursed for their PACER fees and other class members who had not been reimbursed for their PACER fees, there were good reasons not to do so here. First, prior to settlement, the claims of the law firms that had been reimbursed by their clients were just as valid as the claims of other class members. See S. Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918). In fact, the law firm class members were likely the only plaintiffs who could have brought claims against the government to recover the relevant PACER fees. Their clients could not have brought such claims because damages under the Little Tucker Act are available only to those who paid unlawful fees to the government, to those who paid unlawful fees to others "at the direction of

[9] Mr. Isaacson further argues that the common fund allocations to many large-scale claimants are improper because entities whose aggregated claims total over $10,000 fall outside of Little Tucker Act jurisdiction. Isaacson Obj. at 7-8. This argument misunderstands the law. "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." Class Certification Op., 235 F. Supp. 3d at 38 (citing 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); United States v. Louisville & Nashville R.R. Co., 221 F.2d 698, 701 (6th Cir. 1955)).

the government to meet a governmental obligation," see Aerolineas Argentinas v. United States, 77 F.3d 1564, 1573 (Fed. Cir. 1996), or to those against whom the government took action, related to unlawful fees, that had a "direct and substantial impact." See Ontario Power Generation, Inc. v. United States, 369 F.3d 1298, 1303 (Fed. Cir. 2004) (quoting Casa de Cambio Comdiv S.A., de C.V. v. United States, 291 F.3d 1356, 1361 (Fed. Cir. 2002)). Because clients who reimbursed law firms for unlawful PACER fees do not appear to fit into any of these categories, it would have been difficult – perhaps impossible – for them to recover anything from the government. Instead, once law firm class members have received their distributions under the Agreement, clients may have claims against them – to recover what the clients paid to the law firms in PACER fees – through sources of law unrelated to class actions, like contract law or state statutes. See In re AT&T Mobility Wireless Data Servs. Sales Tax Litig., 789 F. Supp. 2d 935, 967 (N.D. Ill. 2011) (approving a settlement even though some class members had been reimbursed for unlawful fees). That is between lawyers and their clients and beyond the scope of this litigation.

Second, it makes sense to leave disputes concerning reimbursement to law firm class members and the clients who reimbursed them, rather than to the claims administrator. It is true, as Mr. Isaacson points out, that law firms often bill clients for PACER fees. Isaacson Obj. at 4; see, e.g., Decastro v. City of New York, Civil Action No. 16-3850, 2017 WL 4386372, at *10 (S.D.N.Y. Sept. 30, 2017). But it would be complicated and burdensome for the claims administrator to sort through billing records to determine what happened with respect to each set of PACER fees billed. Sometimes, firms write fees off. Sometimes, clients do not pay. And if a client paid part, but not all, of their bills, it may not even be possible for the claims administrator to figure out what portion of a client's payment went towards PACER charges. On the other

hand, law firm class members are better equipped to determine which of their clients to reimburse for PACER charges, and by how much. If the clients believe the firms to be unlawfully withholding reimbursement, they can sue. More likely, law firms and clients will resolve any disputes over reimbursement out of court. Allowing this process to play out does not make the settlement inequitable.

In short, the benefits offered to class members by the Agreement are substantial, and the likely outcome for the class if the case were to proceed to trial is uncertain. The Court is convinced that the Agreement is fair, reasonable, and adequate.

IV. ATTORNEY'S FEES, COSTS, AND SERVICE AWARDS

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." FED. R. CIV. P. 23(h). Here, the Agreement authorizes attorney's fees, costs, and services awards, but limits the amount the Court can award for these categories combined to no more than 20% of the common fund, or $25 million. Sett. Agreement ¶ 28. The Agreement further specifies that service awards cannot exceed $10,000 per Named Plaintiff. Id.

Class Counsel effectively requests the maximum amount allowed by the settlement: $1,106,654.98 in costs, $30,000 in service awards ($10,000 for each of the three Named Plaintiffs), and $23,863,345.02 – the difference between the $25 million cap and the

other two amounts – in attorney's fees. Pls.' Sett. Mot. at 4.[10] The government does not oppose their request.[11]

The Court must independently determine the reasonableness of the requested fees, costs, and service awards. After carefully considering the submissions of the parties, the relevant Federal Rule, and the case law, and after considering all of the objections that have been filed with the Court and expressed at the Settlement Hearing, the Court awards the full amount requested by Class Counsel in fees, costs, and service awards.

A. Legal Background

1. Attorney's Fees

"The 'common fund doctrine' allows an attorney whose efforts created, increased or preserved a fund 'to recover from the fund the costs of his litigation, including attorneys' fees.'" In re Baan Co. Sec. Litig., 288 F. Supp. 2d 14, 16 (D.D.C. 2003) (quoting Vincent v. Hughes Air West, Inc., 557 F.2d 759, 769 (9th Cir.1977)). In common-fund cases, courts have a duty to "ensure that claims for attorneys' fees are reasonable, in light of the results obtained." Rogers v. Lumina Solar, Inc., Civil Action No. 18-2128, 2020 WL 3402360, at *11 (D.D.C. June 19, 2020) (K.B. Jackson, J.) (quoting In re Black Farmers Discrimination Litig., 953 F. Supp. 2d 82, 87 (D.D.C. 2013)). The Court's independent scrutiny of an award's reasonableness is particularly important in common-fund cases because "the conflict between a class and its

[10] The $1,106,654.98 that Class Counsel requests in costs is comprised of $29,654.98 in attorney expenses and $1,077,000 in settlement-administration and noticing costs. Pls.' Sett. Mot. at 4.

[11] In its briefs, the government raised concerns about the size of the requested fees. Def.'s Resp. at 4-7. At the Settlement Hearing, however, the government indicated that Class Counsel's reply brief had alleviated their concerns.

attorneys may be most stark where a common fund is created and the fee award comes out of, and thus directly reduces, the class recovery." Democratic Cent. Comm. of D.C. v. Washington Metro. Area Transit Comm'n, 3 F.3d 1568, 1573 (D.C. Cir. 1993) (quoting Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991)). Thus, in common-fund cases, the court acts "as fiduciary for the beneficiaries" of the fund "because few, if any, of the action's beneficiaries actually are before the court at the time the fees are set" and because "there is no adversary process that can be relied upon in the setting of a reasonable fee." In re Dep't of Veterans Affs. (VA) Data Theft Litig., 653 F. Supp. 2d 58, 60 (D.D.C. 2009) (quoting Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237, 251 (1985)).

Courts have identified two approaches to calculating reasonable attorney's fees in common-fund cases. The first is the "percentage-of-the-fund method, through which 'a reasonable fee is based on a percentage of the fund bestowed on the class.'" Health Republic Ins. Co. v. United States, 58 F.4th 1365, 1371 (Fed. Cir. 2023) (quoting Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984)). The second is the lodestar method, "through which the court calculates the product of reasonable hours times a reasonable rate, and then adjusts that 'lodestar' result, if warranted, on the basis of such factors as the risk involved and the length of the proceedings." Id. (cleaned up).

While courts have discretion to use either method, fee awards in common-fund cases are "typically based on some percentage of the common fund." Moore v. United States, 63 Fed. Cl. 781, 786 (2005). The lodestar method, by contrast, generally is used in fee-shifting cases. Health Republic Ins. Co. v. United States, 58 F.4th at 1371. Many courts of appeals have expressed an explicit preference for using the percentage method in common-fund cases. 5 RUBENSTEIN, supra, § 15:64 & n.15; see, e.g., Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261,

1271 (D.C. Cir. 1993); see also In re Baan Co. Sec. Litig., 288 F. Supp. 2d at 17. This is because the percentage method "helps to align more closely the interests of the attorneys with the interests of the parties," Democratic Cent. Comm. of Dist. of Columbia v. Washington Metro. Area Transit Comm'n, 3 F.3d at 1573, by discouraging inflation of attorney hours and promoting "efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system." Trombley v. Nat'l City Bank, 826 F. Supp. 2d 179, 205 (D.D.C. 2011) (quoting In re Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 369, 383 (D.D.C. 2002)). The lodestar method, on the other hand, may give attorneys "an incentive to run up" "the number of hours they have billed," which could "prolong[] litigation unnecessarily and hence defer[] the class's compensation." 5 RUBENSTEIN, supra, § 15:65; see Swedish Hosp. Corp. v. Shalala, 1 F.3d at 1268.

When using the percentage-of-the-fund method, the Federal Circuit has identified the following factors to consider:

> (1) the quality of counsel; (2) the complexity and duration of the litigation; (3) the risk of nonrecovery; (4) the fee that likely would have been negotiated between private parties in similar cases; (5) any class members' objections to the settlement terms or fees requested by class counsel; (6) the percentage applied in other class actions; and (7) the size of the award.

Health Republic Ins. Co. v. United States, 58 F.4th at 1372 (quoting Moore v. United States, 63 Fed. Cl. at 787). In addition, "as settlement amounts increase in magnitude, the percentage of fees awarded should decrease." Haggart v. United States, 116 Fed. Cl. 131, 147 (2014). This is because "[i]n many instances the increase [in recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." Id. (alterations in original) (quoting In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions, 148 F.3d 283, 339 (3d Cir. 1998)).

Courts sometimes employ a "lodestar cross-check" when they use the percentage method. See 5 RUBENSTEIN, supra, § 15:85. In a lodestar cross-check, "the reasonableness of a potential percentage-of-the-fund fee is checked by dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier, and when this implicit multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award." Health Republic Ins. Co. v. United States, 58 F.4th at 1372 (cleaned up). While "the resulting multiplier need not fall within any pre-defined range, . . . courts must take care to explain how the application of a multiplier is justified by the facts of a particular case, . . . [and] must provide sufficient analysis and consideration of multipliers used in comparable cases to justify the award made." Id. at 1375 (cleaned up). That said, lodestar cross-checks "need entail neither mathematical precision nor bean-counting," as "district courts may rely on summaries submitted by the attorneys and need not review actual billing records." In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 306-07 (3d Cir. 2005). Although not required, the Federal Circuit has strongly suggested using a lodestar cross-check, "at least as a general matter." Health Republic Ins. Co. v. United States, 58 F.4th at 1374 n.2.

2. Costs and Service Awards

Rule 23 contemplates recovery of "nontaxable costs," FED. R. CIV. P. 23(h), the "reasonable expenses normally charged to a fee paying client." 5 RUBENSTEIN, supra, § 16:5; see Quimby v. United States, 107 Fed. Cl. 126, 135 (2012). And "[i]t is well settled that counsel who have created a common fund for the benefit of a class are entitled to be awarded for out-of-pocket costs reasonably incurred in creating the fund." Mercier v. United States, 156 Fed. Cl. at 593. Aside from being reasonable, such expenses must be adequately documented. 5 RUBENSTEIN, supra, § 16:10.

Service awards, also known as "incentive" or "case-contribution" awards, are distributions from the common fund to class representatives in recognition of their service to the class and their role in the litigation. See 5 RUBENSTEIN, supra, § 17:1. Service awards "recognize the unique risks incurred and additional responsibility undertaken by named plaintiffs in class actions," Mercier v. United States, 156 Fed. Cl. at 589, and also compensate class representatives for expenses and work performed by in-house counsel. See In re Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. at 400. Service awards must be reasonable and proportionate to class representatives' role in the case. See 5 RUBENSTEIN, supra, § 17:13.

B. Reasonableness of Requested Attorney's Fees

Class Counsel and the government agree that the Court should use the percentage-of-the-fund method to assess the reasonableness of the requested fees. Pls.' Sett. Mot. at 27; Def.'s Resp. at 8-9. Mr. Isaacson argues that the Court should use the lodestar method and award fees not exceeding Class Counsel's lodestar. Isaacson Obj. at 9-10. He relies primarily on Supreme Court precedent discussing fee-shifting cases and on precedent predating Rule 23 and the modern class action lawsuit. Id. But as the D.C. Circuit has noted, "the latest guidance from the High Court counsels the use of a percentage-of-the-fund methodology." Swedish Hosp. Corp. v. Shalala, 1 F.3d at 1268 (citing Blum v. Stenson, 465 U.S. at 900 n.16); see also In re Home Depot Inc., 931 F.3d 1065, 1085 (11th Cir. 2019) ("[T]he Supreme Court precedent requiring the use of the lodestar method in statutory fee-shifting cases does not apply to common-fund cases."); In re BioScrip, Inc. Sec. Litig., 273 F. Supp. 3d 474, 479-89 (S.D.N.Y. 2017) (Nathan, J.) (rejecting similar arguments made by Mr. Isaacson). For these reasons, and because the percentage method promotes efficiency and ensures that class counsel is compensated primarily based on the result achieved, the Court will use the percentage method.

The government urges the Court to also employ a lodestar cross-check. Def.'s Resp. at 7. Class Counsel points out, rightly, that a lodestar cross-check is not required, but it stops short of arguing that the Court should refrain from doing one. Pls.' Sett. Mot. at 35; see id. at 36-37; Pls.' Reply at 10. The Court will add a lodestar cross-check to its percentage-method analysis to confirm that the fee awarded properly accounts for the effort Class Counsel expended to litigate the case. The Court will first analyze the percentage requested using each of the above-described Federal Circuit factors, and then will conduct a lodestar cross-check.

1. The Quality of Counsel

As the Court has stated before, "[t]here is no dispute about the competency of class counsel." Class Certification Op., 235 F. Supp. 3d at 43. Gupta Wessler is one of the nation's leading plaintiff and public interest appellate boutiques, and also has extensive experience in complex litigation against the federal government. See Gupta Decl. ¶¶ 46-48, 50-55, 59-61. Motley Rice is a leading class-action law firm. Id. ¶ 45. In dividing case responsibilities, each firm took charge of what it does best – Gupta Wessler led the briefing, argument, research, and legal analysis, and Motley Rice led the case management, discovery, and settlement administration. Id. These two firms have "thoroughly impress[ive] . . . qualifications" and class members undoubtedly "benefit[ted] from the wealth of experience" they brought to the case. Steele v. United States, Civil Action No. 14-2221, 2015 WL 4121607, at *4 (D.D.C. June 30, 2015) (describing groups of attorneys including current members of Class Counsel).

2. The Complexity and Duration of the Litigation

The litigation was reasonably complex. As in most class actions, the litigation involved a motion to dismiss, disputes regarding class certification, and cross-motions for summary judgment. See Motion to Dismiss Op., 2016 WL 7076986; Class Certification Op., 235 F. Supp. 3d 32; Summary Judgment Op., 291 F. Supp. 3d 123. But unlike most class actions, this case required appellate argument both as to a novel theory of jurisdiction and as to the most important merits issue in the case. See Federal Circuit Op., 968 F.3d at 1343. After remand, Class Counsel engaged in lengthy settlement negotiation with the government. Gupta Decl. ¶¶ 23-28. And even after the parties reached an agreement, Class Counsel put significant effort into answering class members' questions. Gupta Supp. Decl. ¶¶ 2, 3. All told, Class Counsel worked on this case for nearly eight years. See Gupta Decl. ¶¶ 11, 12.

Mr. Isaacson asserts that this case was easy to litigate because it involved an issue of statutory construction that was ultimately settled by the Federal Circuit. Isaacson Obj. at 14. But this argument ignores the fact that it was Class Counsel's very efforts that caused the Federal Circuit to construe the statute in a way that would allow the class to recover. The unsettled interpretation of the E-Government Act at the outset of the litigation speaks to the complexity of the case, not against it.

3. The Risk of Nonrecovery

There was an exceptionally high risk of nonrecovery in this case. As one of the attorneys representing the class describes, before this lawsuit, "litigation against the federal judiciary was not seen as a realistic way to bring about reform of the PACER fee regime" – both because "the judiciary has statutory authority to charge at least some amount in fees" and because "the fees were still assumed to be beyond the reach of litigation." Gupta Decl. ¶ 7. He

points out correctly that the Administrative Procedure Act – which normally provides jurisdiction and a waiver of sovereign immunity for lawsuits against agencies – explicitly exempts the federal judiciary from its reach. See id.; 5 U.S.C. § 551(1)(B).

Even after Class Counsel identified their alternative and ultimately successful strategy of arguing that the Little Tucker Act provided the necessary jurisdiction and waiver of sovereign immunity, there was still a significant risk of nonrecovery for class members. To show illegal exaction under the Little Tucker Act, the Named Plaintiffs had to "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." Federal Circuit Op., 968 F.3d at 1348 (internal quotation marks omitted) (quoting Norman v. United States, 429 F.3d 1081, 1095 (Fed. Cir. 2005)). But the E-Government Act, which Class Counsel argued caused the exaction, "nowhere explicitly requires payment of damages by the government for overcharging users." Id. Thus, before even getting to the merits, Class Counsel had to fight an uphill interpretive battle.

On the merits, Class Counsel's argument was similarly difficult. Take, for example, the one sentence in the E-Government Act that explicitly spoke to PACER fees: "The Judicial Conference may, only to the extent necessary, prescribe reasonable fees . . . for collection by the courts under those sections for access to information available through automatic data processing equipment." 28 U.S.C. § 1913 note. As the Federal Circuit acknowledged, far from supporting its ultimate holding, this sentence "supports the government's interpretation, as it authorizes charging fees for electronic access to information without any express restrictions." Federal Circuit Op., 968 F.3d at 1351. Nevertheless, Class Counsel persuaded the Federal Circuit that the rest of the statute, and its context, imposed

restrictions on the sorts of electronic information dissemination for which the judiciary could use PACER fees. See id. at 1352-57.

Finally, there was litigation risk even after the Federal Circuit held that the E-Government Act did impose such restrictions. See supra Section III.B.1. Whether the judiciary could use PACER fees to pay for all of CM/ECF was still an open question. See Federal Circuit Op., 968 F.3d at 1358. And the government made plausible arguments that the class could not recover damages without an additional evidentiary showing. See Gupta Decl. ¶ 23. Until the moment the Named Plaintiffs reached a settlement with the government, there was a significant risk of nonrecovery.

4. The Fee that Likely Would Have Been Negotiated in Similar Cases

The Court is to consider what fee "likely would have been negotiated between private parties in similar cases." Health Republic Ins. Co. v. United States, 58 F.4th at 1372 (quoting Moore v. United States, 63 Fed. Cl. at 787). The truth is that there are few "similar cases" with which to compare this case: a class action lawsuit against the federal judiciary for charging too much in fees that it is explicitly authorized to charge at least in part. See infra Section IV.B.6. Still, it is worth noting that the percentage award Class Counsel requests here is below the typical 33% contingency fee. And as Class Counsel points out, each Named Plaintiff signed a retainer agreement providing for a contingency fee of up to 33% of the common fund, Gupta Decl. ¶ 65, and each class member who was also part of the original class agreed to a contingency fee of up to 30% by declining to opt out. Class Cert. Email Notice; Class Cert. Web Notice at 7; see 1st Notice Appr. At the same time, the Court takes these agreements with a grain of salt. Each plaintiff in a class action "typically has a small interest in the overall controversy" and thus "has no incentive to negotiate a competitive rate with class counsel."

5 RUBENSTEIN, supra, § 15:74. And while one third of the recovery may be the typical fee in cases with relatively few plaintiffs, it is not the standard for large class actions where the size of the class is one of the main determinants of the size of the recovery. This factor thus has minimal bearing on the reasonableness of Class Counsel's requested fee. See Mercier v. United States 156 Fed. Cl. at 592 ("Even if some other class members had agreed to a 33.3% contingency fee, they almost certainly would have evaluated the fee's reasonableness in terms of their own recoveries, overlooking the economies of scale that class counsel enjoyed by representing thousands of similarly situated plaintiffs.").

5. Class Members' Objections to the Settlement Terms or Fees Requested by Class Counsel

Most of the objections to the Agreement or the requested fees have already been discussed in the context of the fairness of the settlement, see supra Section III, or with regard to another fee approval factor. See supra Section IV.B.2. Mr. Isaacson raises several additional arguments regarding attorney's fees. First, Mr. Isaacson argues that the Court should not consider the supplemental declarations of Professor William Rubenstein and Professor Brian Fitzpatrick because Class Counsel submitted these declarations after the deadline for class members to file objections. Isaacson Stmt. at 3. Second, Mr. Isaacson quibbles with the content of these supplemental declarations. Id. at 3-6.

Strictly construed, Mr. Isaacson's first argument lacks merit. Under the Federal Rules of Civil Procedure, the only relevant requirement is that notice of a motion for attorney's fees must be "directed to class members in a reasonable manner" so that class members "may object to the motion." FED. R. CIV. P. 23(h). The Advisory Committee notes that, "[i]n setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion." Id. advisory committee's note (2003).

Rule 23 thus requires only that class members have sufficient time to respond to the fee motion and accompanying evidence, not to evidence submitted in response or reply. Here, Class Counsel submitted their motion for attorney's fees over two weeks before the objection deadline, giving objectors sufficient time to respond. See Pls.' Sett. Mot.

That said, it is a fair point that class members lack a meaningful opportunity to object to attorney's fees requests if counsel submits declarations raising new bases of support for the requested fees after the objection deadline. And the professors' supplemental declarations do just that. Professor Fitzpatrick's declaration provides information about why the Fitzpatrick Matrix should not be used as Mr. Isaacson suggests. See Fitzpatrick Supp. Decl. ¶¶ 4-6. Professor Rubenstein's declaration examines the data used in the Fitzpatrick Matrix and comes to certain conclusions about reasonable fees based on a subset of that data. See Rubenstein Supp. Decl. ¶¶ 13-26. Neither of these points was raised in the professors' original declarations, which accompanied Class Counsel's fees motion.

Based on Mr. Isaacson's objections, the Court will not rely on the supplemental declarations of Professor Fitzpatrick or Professor Rubenstein in assessing the reasonableness of Class Counsel's requested fees. Because the Court will not rely on the declarations, it need not address Mr. Isaacson's arguments about their content.

6. The Percentage Applied in Other Class Actions

Thirty years ago, the D.C. Circuit noted that "a majority of common fund class action fee awards fall between twenty and thirty percent." Swedish Hosp. Corp. v. Shalala, 1 F.3d at 1272. This remains true today. See 5 RUBENSTEIN, supra, § 15:83 (summary of empirical studies on common fund fee awards finding means between 22% and 27% and medians between 24% and 29%). For cases in which the common fund is especially large, fee

awards tend towards the low end of this range. The latest comprehensive study on class action fee awards, using data from 2009-2013, reports that the mean percentage awarded from common funds greater than $67.5 million is 22.3%. Theodore Eisenberg et al., Attorneys' Fees in Class Actions: 2009-2013, 92 N.Y.U. L. REV. 937, 948 (2017).

Although it is difficult to locate good comparisons to the settlement in this case, the comparisons that the Court did find are in line with these statistics. Two cases involving insufficient pay by the Department of Veterans Affairs provide the closest analogues. In Quimby v. United States, a class of over 40,000 health professionals formerly employed by the Department alleged that they were deprived of additional pay that they earned for working undesirable shifts. Quimby v. United States, 107 Fed. Cl. at 128-29. As this Court has done in this case, the Court of Claims granted in part and denied in part cross-motions for summary judgment on the government's liability. Id. at 128. The class ultimately settled with the government in 2012 – after eleven years of contentious litigation – and the settlement agreement provided for a common fund of $74 million. See id. at 133. The Court of Claims granted class counsel's request for 30% of the common fund in attorney's fees, id. at 132, 135, reasoning that the attorneys obtained "excellent results," id. at 133 (quoting Hensley v. Eckerhart, 461 U.S. 424, 435 (1983)), and that "[t]he complexity of this litigation, the government's opposition to the Court's ruling on the merits, and the absence of controlling precedent concerning many of the issues presented together indicate that continued litigation would have created substantial uncertainty for members of the class." Id.

The plaintiffs in Mercier v. United States brought similar claims. See Mercier v. United States, 156 Fed. Cl. 580. There, a class of over 3,000 nurses and physician assistants sued the Department of Veterans Affairs, alleging that they were deprived of overtime pay. Id.

at 583. The Court of Claims granted the government's motion to dismiss, but was reversed on appeal. Id. The litigation continued. Id. The class settled with the government in 2021 – after eight years of litigation – and the settlement agreement provided for a common fund of $160 million. Id. at 583-84. Class counsel requested 30% of the common fund in attorney's fees. Id. at 590. In analyzing the reasonableness of this request, the Court of Claims found that class counsel was skilled and experienced, that the litigation was complex, and that the risk of nonrecovery was substantial. Id. at 591. But because the common fund was so large (in part due to the size of the class itself), the court rejected class counsel's request and awarded 20% of the fund instead of the requested 30%. Id. at 592-93. The court found that the awarded percentage would "protect[] the interests of the class members but also provide[] ample compensation to counsel for their excellent work in this case" and "encourage other counsel to take on the representation of plaintiffs in similar cases." Id. at 593.

Here, the requested percentage is 19.1%. It is smaller than the percentage the Court of Claims awarded in Quimby, a complex case that lasted longer than this one – and where, as here, the government opposed the court's rulings on novel issues of law. See Quimby v. United States, 107 Fed. Cl. at 128-133. It is approximately what the Court of Claims awarded in Mercier, another complex case, of similar duration to this one – and where, as here, counsel for the class successfully litigated issues of liability on appeal. See Mercier v. United States 156 Fed. Cl. at 583-84, 591-93. Furthermore, according to the most recent comprehensive study on class action fee awards, the requested percentage is around the average for common funds in the range of the fund created by this settlement. See Eisenberg et al., supra, at 948. Because the requested fee award fits neatly within the relevant statistical range and aligns with the best case analogues, this factor strongly counsels in favor of approval of the attorney's fees request.

7. The Size of the Award

The size of the requested fee award – nearly $24 million – is large. But "so is the class members' total recovery." See Raulerson v. United States, 108 Fed. Cl. 675, 680 (2013) (approving fee award of approximately $11 million). Three additional considerations convince the Court that the absolute size of the requested award is not a cause for concern. First, $24 million is nowhere near the highest amounts courts have awarded in attorney's fees in common-fund cases. See, e.g., 52 Fikes Wholesale, Inc. v. HSBC Bank USA, N.A., 62 F.4th 704, 723-24 (2d Cir. 2023) (affirming fee award of approximately $523 million); In re Equifax Inc. Customer Data Sec. Breach Litig., 999 F.3d 1247, 1281 (11th Cir. 2021) (affirming fee award of $77.5 million); see also Eisenberg et al., supra, at 943-44 (finding yearly average fee awards between $37.9 million and $124 million in common-fund cases with recoveries greater than $100 million). Second, $24 million is close to the absolute size of the fees awarded in the closest comparator cases identified above. See Mercier v. United States 156 Fed. Cl. at 593 (awarding $32 million in fees); Quimby v. United States, 107 Fed. Cl. at 135 (awarding approximately $22 million in fees). And third, the Court's lodestar cross-check, performed below, directly accounts for the size of the fee award by comparing it to the amount of effort that Class Counsel expended in this case. As a result, this factor does not move the needle in either direction.

8. Lodestar Cross-Check

The Federal Circuit has noted a "norm of . . . multipliers in the range of 1 to 4" in lodestar cross-checks of reasonable fee requests. Health Republic Ins. Co. v. United States, 58 F.4th at 1375. Statistics show that, between 2009 and 2013, the mean lodestar multiplier was 1.48. Eisenberg et al., supra, at 965 tbl.12. For cases with common funds over $67.5 million, the mean multiplier was 2.72. Id. at 967 tbl.13. Multipliers significantly above this

mean may be cause for concern. In Mercier, for example, the Court of Claims found a multiplier of 4.4 to be too high, but a multiplier of 2.95 to result in "a very generous but reasonable recovery." Mercier v. United States, 156 Fed. Cl. at 592; see also 5 RUBENSTEIN, supra, § 15:87 ("Empirical evidence of multipliers across many cases demonstrates that most multipliers are in the relatively modest 1-2 range; this fact counsels in favor of a presumptive ceiling of 4, or slightly above twice the mean.").

Here, Class Counsel estimates their lodestar at $6,031,678.25 based on the hourly rates that the firms' attorneys charge in non-contingency cases. Gupta Decl. ¶¶ 63, 64; Oliver Decl. ¶¶ 12, 13. Both the government and Mr. Isaacson suggest that Class Counsel's lodestar should be estimated using the hourly rates in the U.S. Attorney's Office Fitzpatrick Matrix, instead of using Class Counsel's actual rates. Def.'s Resp. at 5-7; Isaacson Obj. at 12-13. But the Fitzpatrick Matrix was not designed to be used for lodestar cross-checks in common fund class actions; instead, "[t]he matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover 'reasonable' attorney's fees." U.S. ATT'Y'S OFF. FOR D.C., THE FITZPATRICK MATRIX, Explanatory Note 2, www.justice.gov/usao-dc/page/file/1504361/download [https://perma.cc/EVQ5-NNMC]; see, e.g., J.T. v. District of Columbia, 652 F. Supp. 3d 11, 26-27, 31-36 (D.D.C. 2023) (using Fitzpatrick Matrix to calculate reasonable attorney's fees under the fee-shifting provision of the Individuals with Disabilities Education Act). Mr. Isaacson also asserts that the Court should require Class Counsel to submit itemized records of hours billed in order to make "appropriate deductions." Isaacson Obj. at 12. But the Court declines to engage in the "bean-counting" that it has been cautioned against, and instead

will "rely on summaries submitted by the attorneys." In re Rite Aid Corp. Sec. Litig., 396 F.3d at 306-07.[12]

In addition, the government argues that Class Counsel's use of current billing rates "fail[s] to account [for the fact] that the litigation began in 2016, with class certification in 2017, when rates for both firms presumably were lower." Def's Resp. at 4. But courts routinely use current billing rates for lodestar cross-checks, even when the attorneys requesting fees charged lower rates at the outset of litigation. See, e.g., Bakhtiar v. Info. Res., Inc., Civil Action No. 17-4559, 2021 WL 4472606, at *9 (N.D. Cal. Feb. 10, 2021); In re Apollo Grp. Inc. Sec. Litig., Civil Action No. 04-2147, 2012 WL 1378677, at *7 & n.2 (D. Ariz. Apr. 20, 2012). Until fees are awarded, class action attorneys work on a case without pay. Using current billing rates, which are almost always higher than historical rates, accounts for this delay in payment. See James v. District of Columbia, 302 F. Supp. 3d 213, 226-28 (D.D.C. 2018) (citing Perdue v. Kenny A. ex. rel. Winn, 559 U.S. 542, 556 (2010)); cf. Stetson v. Grissom, 821 F.3d 1157, 1166 (9th Cir. 2016) (when calculating attorney's fees using the lodestar method, rather than the percentage-of-the-fund method, in common-fund cases, "[t]he lodestar should be computed either using an hourly rate that reflects the prevailing rate as of the date of the fee request, to compensate class counsel for delays in payment inherent in contingency-fee cases, or using historical rates and compensating for delays with a prime-rate enhancement").

Dividing Class Counsel's requested fees ($23,863,345.02) by their estimated lodestar ($6,031,678.25) results in a multiplier of 3.96. Put another way, Class Counsel's

[12] The Court agrees with the government, as it represented at the Settlement Hearing, that any concerns about Class Counsel's future time estimate included in their estimated lodestar have been addressed through Class Counsel's supplemental declarations. See Gupta Supp. Decl. ¶¶ 2-3; Oliver Supp. Decl. ¶¶ 3-5.

requested fee award would compensate them at slightly below four times their hourly rates for the work they performed in this case. This multiplier is within the normal range of one to four – although, admittedly, on the high end of it. The Court believes that a multiplier of this magnitude is warranted due to the risk Class Counsel took on in agreeing to litigate the case. Class Counsel provided exceptional service to the class for over seven years, all the while in danger of being paid nothing (or close to it). And multipliers of this size, or even higher, are by no means unheard of. See 5 RUBENSTEIN, supra, § 15:89 (noting "roughly 70 reported cases with multipliers over 4"); e.g., Kane Cnty., Utah v. United States, 145 Fed. Cl. 15, 20 (2019) (multiplier of 6.13 for attorney's fee award of approximately $6 million, one third of the common fund); Geneva Rock Prod., Inc. v. United States, 119 Fed. Cl. 581, 595 (2015) (multiplier of 5.39 for attorney's fee award of approximately $4 million, 17.5% of the common fund). After all, when counsel in a class action request a reasonable percentage of a common fund, the lodestar cross-check must remain a cross-check of that percentage, and no more. "[T]he point is not to identify the precise outdoor temperature at noon but to know whether or not a coat might be necessary when venturing out for lunch." 5 RUBENSTEIN, supra, § 15:87. Here, the temperature is just fine.

The Court will award the full amount of attorney's fees requested by Class Counsel. In addition to reflecting a reasonable lodestar multiplier, the fees requested reflect a percentage of the fund around the average for common funds of similar size – even though Class Counsel's representation, and the result they achieved for the class, were well above average. Class Counsel did an exceptional job in novel litigation with a high risk of nonrecovery. For these reasons, their fee request is warranted.

C. Expenses and Service Awards

Class Counsel requests $10,000 for each of the three Named Plaintiffs as service awards. Pls.' Sett. Mot. at 40-41. Mr. Isaacson objects that awards of this type are unlawful under nineteenth-century Supreme Court precedent. Isaacson Obj. at 14-15; see Trustees v. Greenough, 105 U.S. 527 (1882); Cent. R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885). The "overwhelming majority" of circuits disagree with Mr. Isaacson's interpretation of these cases. Moses v. N.Y. Times Co., 79 F.4th 235, 253 (2d Cir. 2023) (collecting cases). Mr. Isaacson urges the Court to adopt the reasoning of the Eleventh Circuit, the one outlier from this modern consensus. See Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1255 (11th Cir. 2020). But even the Eleventh Circuit – and the Supreme Court cases on which Mr. Isaacson relies – acknowledges that "[a] plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation." Id. at 1257; see Trustees v. Greenough, 105 U.S. at 537; Cent. R.R. & Banking Co. v. Pettus, 113 U.S. at 122-23. And each Named Plaintiff in this case has expended over $10,000 worth of attorney time and expenses in leading this litigation. See Burbank Decl. ¶ 6; Rossman Decl. ¶ 3; Brooks Decl. ¶ 2. Thus, the Court finds the award to the Named Plaintiffs here appropriate. As one of the attorneys representing the class stated in his declaration:

> [E]xperienced in-house lawyers [for the Named Plaintiffs] performed invaluable work that was necessary to prosecute this case effectively and ethically. Had they not performed that work on the litigation, the same work would have had to be performed by class counsel or, perhaps more likely, by other outside counsel hired by each organization at far greater expense.

Gupta Supp. Decl. ¶ 7.

The Court also approves Class Counsel's request for $29,654.98 in attorney expenses and $1,077,000 in settlement administration costs. Pls.' Sett. Mot. at 40. As documented by Class Counsel, the attorney expense reimbursements requested include travel, food, lodging, court fees, Westlaw/Lexis fees, photocopying, printing, and mail services; they also include the plaintiffs' portion of the cost of mediation services. Oliver Decl. ¶¶ 14-18. The settlement administration amount was calculated based on the noticing expenses, as well as the "not-to-exceed" amount quoted by the settlement administrator. Id. ¶ 19; KCC Supp. Decl. ¶ 4. The Court finds these expenses and administration costs to be reasonable and adequately documented.

V. CONCLUSION

The Named Plaintiffs and the United States have reached an historic settlement agreement in this case that reimburses PACER users for $100 million of the fees they paid within a period of over eight years. The Agreement reimburses many small-scale PACER users for all of the fees they paid during this period. And it reimburses large-scale users substantially, and in proportion to what they paid. The Court finds the Agreement to be fair, reasonable, and adequate.

Before reaching a settlement in this unique case, Class Counsel impressively litigated for nearly eight years. They took the case from an untested idea, to a certified class action, to a win on partial summary judgment, to a successful appeal. They negotiated with the federal government to deliver to the class much of the recovery the class sought – although, as with any compromise, not all of it. The Court approves Class Counsel's full request for attorney's fees, costs, and service awards.

Plaintiffs' Motion for Final Approval of Class Settlement and for Attorneys' Fees, Costs, and Service Awards [Dkt. No. 158] is hereby GRANTED. The Final Judgment and Order on Final Approval of Class Settlement, Attorney's Fees, Costs, and Service Awards will issue this same day.

SO ORDERED.

Paul L. Friedman

PAUL L. FRIEDMAN
United States District Judge

DATE: 3/20/24

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.

Civil Action No. 16-0745 (PLF)

FINAL JUDGMENT AND ORDER ON FINAL APPROVAL OF CLASS SETTLEMENT, ATTORNEY'S FEES, COSTS, AND SERVICE AWARDS

This matter came before the Court on October 12, 2023 for a hearing pursuant to the Order of this Court, dated May 8, 2023, on the application of the Settling Parties for approval of the Settlement set forth in the Class Action Settlement Agreement, as amended. Due and adequate notice having been given to the Class as required in the Order, the Court having considered all papers filed and proceedings held herein, and for the reasons explained in this Court's Opinion issued today, and good cause having been shown, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This Judgment incorporates by reference the definitions in the Settlement Agreement, and all terms used herein shall have the same meanings as set forth in the Settlement Agreement, unless otherwise stated herein.

2. This Court has jurisdiction over the subject matter of the Litigation and over all parties to the Litigation, including all members of the Class.

3. Excluded from the Class is any person who timely and validly sought exclusion from the Class, as identified in Exhibit 1 hereto.

4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby approves the Settlement set forth in the Agreement, and finds that:

a. in light of the benefits to the Class and the complexity and expense of further litigation, the Settlement Agreement is, in all respects, fair, reasonable, and adequate and in the best interests of the Class;

b. there was no collusion in connection with the Settlement Agreement;

c. Class Representatives and Class Counsel had adequately represented the Class;

d. the Settlement Agreement was the product of informed, arm's-length negotiations among competent, able counsel;

e. the relief provided for the Class is adequate, having taken into account (i) the costs, risks and delay of trial and appeal; (ii) the effectiveness of the proposed method of distributing relief to the Class, including the use of billing data maintained by the Administrative Office of the U.S. Courts and the notification and dispute procedures on the class website; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Federal Rule of Civil Procedure 23(e)(3);

f. the Settlement Agreement treats Class Members equitably relative to each other; and

g. the record is sufficiently developed and complete to have enabled Class Representatives and Defendant to have adequately evaluated and considered their positions.

5. Accordingly, the Court authorizes and directs implementation and performance of all the terms and provisions of the Settlement Agreement, as well as the terms and provisions set forth in this Order. Except as to any individual claim of those persons who have validly and

timely requested exclusion from the Class, the Litigation and all claims alleged therein are dismissed with prejudice as to the Class Representatives, and the other Class Members, as defined in the Settlement Agreement.

6. No person shall have any claim against the Class Representatives, Class Counsel, or the Claims Administrator, or any other person designated by Class Counsel, based on determinations or distributions made substantially in accordance with the Settlement Agreement or order of this Court.

7. Upon release of the Aggregate Amount of $125,000,000 from the U.S. Department of the Treasury's Judgment Fund, the Class Representatives, and each of the Class Members not timely and validly excluded, shall be deemed to have and by operation of this Judgment shall have, fully, finally, and forever waived, released, discharged, and dismissed as to the United States, its political subdivisions, its officers, agents, and employees, including in their official and individual capacities, any and all claims, known or unknown, that were brought or could have been brought against the United States for purported overcharges of any kind arising from their use of PACER during the Class Period, with prejudice on the merits, whether or not the Class Representatives, or each of the Class Members ever obtains any distribution from the Settlement Fund. Claims to enforce the terms of the Stipulation and the Agreement are not released.

8. The distribution and publication of notice of the settlement as provided for in this Court's Order of May 8, 2023, constituted the best notice practicable under the circumstances, including individual notice to Class Members in the data maintained by the Administrative Office of the U.S. Courts. This notice fully satisfied the requirements of Federal Rule of Civil Procedure 23 and due process. No Class Member is relieved from the terms of the Settlement

Agreement, including the releases provided for, based on the contention or proof that such Class Member failed to receive actual or adequate notice. A full opportunity has been offered to the Class Members to object to the proposed Settlement and to participate in the approval hearing. It is hereby determined that all members of the Class are bound by this Judgment, except those persons listed in Exhibit 1 to this Judgment.

9. Any order entered regarding any fee and expense application, any appeal from any such order, or any reversal or modification of any such order shall not affect or delay the finality of the Final Judgment in this litigation.

10. Neither the Settlement Agreement, nor any act performed or document executed pursuant to or in furtherance of the Settlement Agreement: (a) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any released claim, or of any wrongdoing or liability of the United States; or (b) is or may be deemed to be or may be used as an admission or evidence that any claims asserted by plaintiffs were not valid or that the amount recoverable would not have exceeded the Aggregate Amount of $125,000,000 in any civil, criminal, or administrative proceeding in any court, administrative agency or other tribunal. The United States may file the Settlement Agreement or this Judgment in any other action that may be brought against it in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

11. The United States shall pay $125,000,000 into the PACER Class Action Settlement Trust upon the expiration of the period to appeal from this Order.

12. Without affecting the finality of this Judgment in any way, this Court hereby retains continuing jurisdiction over: (a) implementation of the Settlement and any award or

distribution from the Aggregate Amount paid by the United States in settlement of this litigation; (b) disposition of the PACER Class Action Settlement Trust; (c) hearing and determining any fee and expense application; and (d) all parties hereto for the purpose of construing, enforcing and administering the Settlement.

13. The Court finds that during the course of the Litigation, plaintiffs and the United States, and their respective counsel at all times complied with the requirements of Federal Rule of Civil Procedure 11.

14. In the event that the settlement does not become effective in accordance with the terms of the Settlement Agreement, then this Judgment shall be rendered null and void and shall be vacated; and in such event, all orders entered and releases delivered in connection with this Order and Final Judgment shall be null and void and shall be vacated, and the parties shall revert to their respective positions in the Litigation as of July 12, 2022.

15. Plaintiffs ask that the Court grant their request for 20% of the settlement fund to cover attorney's fees, notice and settlement costs, litigation expenses, and service awards. That request is granted. Specifically, the Court hereby (1) awards $10,000 to each class representative, (2) awards $29,654.98 to class counsel to reimburse litigation expenses, (3) orders that $1,077,000 of the common fund be set aside to cover notice and settlement-administration costs, and (4) awards the remaining amount ($23,863,345.02) to class counsel as attorney's fees.

16. Upon consideration of this submission and the entire record before the Court, and for the reasons stated in the Opinion issued this same day, the Court finds that the attorney's fees, costs and expenses, and service awards, as agreed by the parties, are fair and reasonable pursuant to paragraph VI(A) of the Settlement Agreement and Federal Rule of Civil Procedure 23(e)(2)(C)(iii), (h).

17. The parties are hereby authorized, without further approval of the Court, to unanimously agree to and adopt in writing amendments, modifications, and expansions of the Settlement Agreement, provided that such amendments, modifications, and expansions of the Settlement Agreement are not materially inconsistent with this Judgment, and do not materially limit the rights of the Members of the Class under the Settlement Agreement.

18. Without further order of the Court, the parties to the Settlement Agreement may agree to reasonable extensions of time to carry out any of the provisions of the Settlement Agreement.

19. The Court directs immediate entry of this Judgment by the Clerk of the Court.

20. The Court's orders entered during this litigation relating to the confidentiality of information shall survive the settlement and resolution and dismissal of this litigation.

SO ORDERED.

Paul L. Friedman

PAUL L. FRIEDMAN
United States District Judge

DATE: 3/20/24

EXHIBIT 1

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APPEAL,STAYED,TYPE−E

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

NATIONAL VETERANS LEGAL SERVICES PROGRAM et al v. UNITED STATES OF AMERICA
Assigned to: Judge Paul L. Friedman
Case in other court: USCA−Federal Circuit, 19−01083−SJ
USCA−Federal Circuit, 18−00154−CP
USCA −Federal Circuit, 18−00155−CP
USCA−Federal Circuit, 19−01081−SJ
USCA−DC Circuit, 21−05291
USCA−Federal Circuit, 24−01757
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

Plaintiff

NATIONAL VETERANS LEGAL SERVICES PROGRAM

represented by **Jonathan E. Taylor**
GUPTA WESSLER PLLC
1900 L Sreet, NW
Suite 312
Washington, DC 20036
(202) 888−1741
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meghan S.B. Oliver
MOTLEY RICE, LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464
843−216−9492
Email: moliver@motleyrice.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

William H. Narwold
1 Corporate Center
20 Church Street
17th Floor
Hartford, CT 06103
860−882−1676
Fax: 860−882−1682
Email: bnarwold@motleyrice.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Elizabeth S. Smith
MOTLEY RICE, LLC
401 9th Street, NW
Suite 1001
Washington, DC 20004
(202) 386−9627
Fax: (843) 216−9350
Email: esmith@motleyrice.com
ATTORNEY TO BE NOTICED

Deepak Gupta
GUPTA WESSLER LLP
2001 K Street, NW

Suite 850 North
Washington, DC 20006
202−888−1741
Fax: 202−888−7792
Email: deepak@guptawessler.com
ATTORNEY TO BE NOTICED

Plaintiff

NATIONAL CONSUMER LAW CENTER

represented by **Jonathan E. Taylor**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meghan S.B. Oliver
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

William H. Narwold
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Elizabeth S. Smith
(See above for address)
ATTORNEY TO BE NOTICED

Deepak Gupta
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

ALLIANCE FOR JUSTICE

represented by **Jonathan E. Taylor**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Meghan S.B. Oliver
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

William H. Narwold
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Elizabeth S. Smith
(See above for address)
ATTORNEY TO BE NOTICED

Deepak Gupta
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

UNITED STATES OF AMERICA represented by **Brenda A. Gonzalez Horowitz**
DOJ−USAO
U.S. Department of Justice
601 D Street NW
Washington, DC 20530
(202) 252−2512
Email: brenda.gonzalez.horowitz@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Derek S. Hammond
COMMODITY FUTURES TRADING COMMISSION
1155 21st Street, NW
Washington, DC 20581
202−418−5000
Email: dhammond@cftc.gov
TERMINATED: 07/03/2023
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jeremy S. Simon
DOJ−USAO
Patrick Henry Building
601 D. Street, N.W.
Washington, DC 20530
(202) 252−2528
Email: jeremy.simon@usdoj.gov
TERMINATED: 03/29/2023
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Robert Aaron Caplen
DOJ−USAO
601 D Street, NW
Washington, DC 20530
(202) 252−2523
Email: rcaplen@gmail.com
TERMINATED: 03/29/2023
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brian J. Field
SCHAERR JAFFE LLP
1717 K Street, NW
Suite 900
Washington, DC 20006
(202) 787−1060
Fax: (202) 776−0136
Email: bfield@schaerr−jaffe.com
TERMINATED: 06/03/2021

William Mark Nebeker
U.S. ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA
555 Fourth Street, NW
Washington, DC 20530
(202) 252−2536
Fax: (202) 252−2599
Email: mark.nebeker@usdoj.gov
TERMINATED: 06/02/2021

V.

Interested Party

ROSEMARIE HOWELL represented by **ROSEMARIE HOWELL**
9504 N.E. 5th Street
Vancouver, WA 98664
(360) 953−0798
PRO SE

Interested Party

ROB RAWSON represented by **ROB RAWSON**
P.O. Box 632
Sanford, FL 32772−0632
PRO SE

Interested Party

TROY LAW, PLLC represented by **John Troy**
TROY LAW, PLLC
41−25 Kissena Boulevard, Suite 110
Flushing, NY 11355
718−762−2332
Email: johntroy@troypllc.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Interested Party

ERIC ALAN ISAACSON represented by **ERIC ALAN ISAACSON**
6580 Avenida Mirola
La Jolla, CA 92037
(858) 263−9581
PRO SE

Movant

DON KOZICH represented by **DON KOZICH**
P.O. Box 2032
Fort Lauderdale, FL 33303−2032
(954) 709−0537
Email: dtkctr@gmail.com
PRO SE

Movant

MICHAEL T. PINES represented by **MICHAEL T. PINES**
619−771−5302
PRO SE

Amicus

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS represented by **Bruce D. Brown**
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1156 15th St, NW
Suite 1020
Washington, DC 20005
(202) 795−9301
Fax: (202) 795−9310
Email: bbrown@rcfp.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

AMERICAN ASSOCIATION OF LAW LIBRARIES

represented by **Sasha Samberg−Champion**
RELMAN COLFAX PLLC
1225 19th Street NW
Suite 600
Washington, DC 20036
202−728−1888
Email: ssamberg−champion@relmanlaw.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

JOSEPH I. LIEBERMAN

represented by **Mark Bailen**
LAW OFFICES OF MARK I BAILEN
1250 Connecticut Avenue, NW
Suite 700
Washington, DC 20036
(202) 656−0422
Fax: (202) 261−3508
Email: mb@bailenlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

AMERICAN SOCIETY OF NEWSPAPER EDITORS

represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

ASSOCIATED PRESS MEDIA EDITORS

represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

ASSOCIATION OF ALTERNATIVE NEWS MEDIA

represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

CENTER FOR INVESTIGATIVE REPORTING

represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

FIRST AMENDMENT COALITION

represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

FIRST LOOK MEDIA WORKS, INC.

represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

INTERNATIONAL DOCUMENTARY ASSOCIATION
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

INVESTIGATIVE REPORTING WORKSHOP
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

MEDIA CONSORTIUM
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

MPA
The Association of Magazine Media
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

ONLINE NEWS ASSOCIATION
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

RADIO TELEVISION DIGITAL NEWS ASSOCIATION
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

REPORTERS WITHOUT BORDERS
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

SEATTLE TIMES COMPANY
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

SOCIETY OF PROFESSIONAL JOURNALISTS
represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

TULLY CENTER FOR FREE SPEECH represented by **Bruce D. Brown**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

DEBORAH BEIM represented by **Sasha Samberg−Champion**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

THOMAS BRUCE represented by **Sasha Samberg−Champion**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

PHILLIP MALONE represented by **Sasha Samberg−Champion**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

JONATHAN ZITTRAIN represented by **Sasha Samberg−Champion**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

DARRELL ISSA represented by **Mark Bailen**
Congressman
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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)
09/10/2020	109	ENTERED IN ERROR.....Case randomly reassigned to Judge Christopher R. Cooper. Judge Ellen S. Huvelle is no longer assigned to the case. (rj) Modified on 9/11/2020 (rj). (Entered: 09/11/2020)
09/10/2020	110	Case directly reassigned to Judge Paul L. Friedman by consent. Judge Christopher R. Cooper is no longer assigned to the case. (rj) (Entered: 09/11/2020)
09/28/2020	111	MANDATE of USCA as to 107 Notice of Appeal to the Federal Circuit, filed by ALLIANCE FOR JUSTICE, NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER ; USCA Case Number 19−1081, 19−1083. (Attachments: # 1 USCA Judgment)(zrdj) (Entered: 09/29/2020)
12/11/2020		MINUTE ORDER: In view of the recent decision by the United States Court of Appeals for the Federal Circuit remanding this case for further proceedings, it is ORDERED that the parties file a joint status report on or before December 23, 2020 addressing how they wish to proceed. Signed by Judge Paul L. Friedman on 12/11/2020. (lceg) (Entered: 12/11/2020)
12/23/2020	112	Joint STATUS REPORT by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 12/23/2020)
12/29/2020		MINUTE ORDER: In light of the parties joint status report 112 , this matter is STAYED until June 25, 2021. The parties shall file a joint status report on or before June 18, 2021 updating the Court on the status of any mediation. Signed by Judge Paul L. Friedman on 12/29/2020. (lceg) (Entered: 12/29/2020)
12/29/2020		Set/Reset Deadlines: Status Report due by 6/18/2021. (tj) (Entered: 12/29/2020)
06/02/2021	113	NOTICE OF SUBSTITUTION OF COUNSEL by Robert Aaron Caplen on behalf of UNITED STATES OF AMERICA Substituting for attorney W. Mark Nebeker (Caplen, Robert) (Entered: 06/02/2021)
06/03/2021	114	NOTICE OF SUBSTITUTION OF COUNSEL by Jeremy S. Simon on behalf of UNITED STATES OF AMERICA Substituting for attorney Brian J. Field (Simon, Jeremy) (Entered: 06/03/2021)
06/16/2021	115	Joint STATUS REPORT by NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Narwold, William) (Entered: 06/16/2021)
06/16/2021		MINUTE ORDER: In light of 115 the parties' joint status report, this matter is STAYED until September 23, 2021. The parties shall file a joint status report on or before September 16, 2021, updating the Court on the progress of their discussions. Signed by Judge Paul L. Friedman on June 16, 2021. (lcaf) (Entered: 06/16/2021)
08/26/2021	116	MOTION to Intervene, MOTION to Modify by MICHAEL T. PINES. (Attachments: # 1 Declaration redacted)(ztd); ("Leave to file Granted" signed 8/26/2021 by Judge Paul L. Friedman) Modified on 10/1/2021 (znmw). Added MOTION for Sanctions on 10/1/2021 (znmw). (Entered: 08/27/2021)
08/26/2021	117	SEALED DOCUMENT (MOTION FOR INTERVENTION AND LEAVE TO FILE) filed by MICHAEL T. PINES. (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Declaration)(ztd);("Leave to File Granted − Document Under Seal" signed 8/26/2021 by Judge Paul L. Friedman) (Entered: 08/27/2021)
08/27/2021		MINUTE ORDER: Counsel for the parties are directed to file responses to 116 Mr. Pines' motion to intervene on or before September 10, 2021. Signed by Judge Paul L. Friedman on August 27, 2021. (lcaf) (Entered: 08/27/2021)

09/08/2021	118	MOTION for Extension of Time to *File Response to Motion for Intervention, to Modify Class Certification Order, and for Sanctions* by UNITED STATES OF AMERICA. (Attachments: # 1 Proposed Order)(Simon, Jeremy) Modified event on 9/9/2021 (ztd). (Entered: 09/08/2021)
09/09/2021	119	ORDER granting 118 defendant's motion for extension of time up to and including October 1, 2021 within which to respond to motion for intervention, to modify class certification order and for sanctions. Signed by Judge Paul L. Friedman on September 9, 2021. (MA) (Entered: 09/09/2021)
09/09/2021	120	Memorandum in opposition to re 118 MOTION for Extension of Time to File Response/Reply filed by MICHAEL T. PINES. (ztd) (Entered: 09/10/2021)
09/09/2021	121	NOTICE by MICHAEL T. PINES (ztd) (Entered: 09/10/2021)
09/10/2021	122	RESPONSE re 116 MOTION to Intervene MOTION for Leave to File filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 09/10/2021)
09/14/2021		MINUTE ORDER: The Court has reviewed 121 Mr. Pines' notice requesting reconsideration of 119 the Court's order granting the government an extension of time up to October 1, 2021 in which to respond to the motion to intervene. The Court concludes that Mr. Pines has not demonstrated that he will suffer prejudice as a result of the extension of time, and the government has established good cause for the extension of time. The Court therefore will not alter the deadline for the government's response to the motion to intervene. The government, in its response to the motion to intervene, is directed to also address the concerns about delay raised in 120 121 Mr. Pines' notices. Signed by Judge Paul L. Friedman on September 14, 2021. (lcaf) (Entered: 09/14/2021)
09/15/2021	123	Joint STATUS REPORT by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Narwold, William) (Entered: 09/15/2021)
09/17/2021		MINUTE ORDER: In light of the parties' representations concerning settlement discussions in 123 the joint status report, the stay in this case is extended through November 22, 2021. The parties shall file a joint status report on or before November 15, 2021, notifying the Court of the progress of their discussions. Signed by Judge Paul L. Friedman on September 17, 2021. (lcaf) (Entered: 09/17/2021)
10/01/2021	124	RESPONSE re 116 MOTION to Intervene MOTION for Leave to File filed by UNITED STATES OF AMERICA. (Simon, Jeremy) (Entered: 10/01/2021)
10/12/2021		MINUTE ORDER: The Court has reviewed the parties' briefs 122 124 in opposition to 116 Mr. Pines's Motion for Intervention, Motion to Modify Class Certification Order, and for Sanctions. On or before October 26, 2021, the parties are directed to file supplemental briefs addressing (1) whether, to the parties' knowledge, Mr. Pines is in fact a member of the class in this case; (2) if so, whether Mr. Pines has opted out of the class, and noting any applicable deadlines for opting out; and (3) setting forth the legal standard for a motion for intervention by a class member. Signed by Judge Paul L. Friedman on October 12, 2021. (lcaa) (Entered: 10/12/2021)
10/21/2021	125	Emergency MOTION for Order to Reactivate PACER Account by MICHAEL T. PINES. "Let this be filed," signed by Judge Paul L. Friedman on 10/21/2021. (znmw) (Entered: 10/25/2021)
10/26/2021	126	SUPPLEMENTAL MEMORANDUM to re Order,, *(Supplemental Brief In Response To Court Order Dated October 12, 2021)* filed by UNITED STATES OF AMERICA. (Simon, Jeremy) (Entered: 10/26/2021)
10/26/2021	127	RESPONSE TO ORDER OF THE COURT re Order,, *REGARDING MICHAEL PINESS MOTION FOR INTERVENTION, TO MODIFY THE CLASS DEFINITION, AND FOR SANCTIONS* filed by NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 10/26/2021)
11/01/2021	128	RESPONSE re 125 MOTION for Order *(Defendant's Response to Michael Pines' Motion to Reactivate Pines' PACER Account)* filed by UNITED STATES OF

		AMERICA. (Simon, Jeremy) (Entered: 11/01/2021)
11/15/2021	129	Joint STATUS REPORT by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Narwold, William) (Entered: 11/15/2021)
11/15/2021	131	PER CURIAM ORDER of USCA (certified copy) filed re: petitioner Michael T. Pines, granting motion for in forma pauperis; dismissing petition for writ of mandamus; dismissing as moot motion to reactivate Pacer account; USCA Case Number 21−5204. (znmw) (Entered: 11/16/2021)
11/16/2021		MINUTE ORDER: In light of the parties' representations concerning settlement discussions in 129 the Joint Status Report, the stay in this case is extended through January 27, 2022. The parties shall file a further joint status report on or before January 20, 2022 notifying the Court of the progress of their settlement efforts. Signed by Judge Paul L. Friedman on November 16, 2021. (lcaa) (Entered: 11/16/2021)
11/16/2021	130	MEMORANDUM OPINION AND ORDER denying 116 Mr. Pines pro se Motion for Intervention and for Leave to File Complaint in Intervention, Motion to Modify Class Certification Order, and for Sanctions; denying as moot Mr. Pines Motion for Pretrial Conference and to Appoint a Special Master; denying as moot 125 Mr. Pines Emergency Motion for Order to Reactivate PACER Account; and granting Mr. Pines Application to Proceed in District Court Without Prepaying Fees or Costs. The Clerk of the Court is directed to file that application on the docket in this case. Signed by Judge Paul L. Friedman on November 16, 2021. (MA) (Entered: 11/16/2021)
11/16/2021		Set/Reset Deadlines: Joint Status Report due by 1/20/2022 (hs) (Entered: 11/16/2021)
12/16/2021	132	NOTICE OF APPEAL as to 130 Memorandum & Opinion by MICHAEL T. PINES. Fee Status: IFP. Parties have been notified. (znmw) Modified fee status on 12/17/2021 (znmw). (Entered: 12/17/2021)
12/17/2021	133	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The fee was not paid because it was filed in forma pauperis re 132 Notice of Appeal. (znmw) (Entered: 12/17/2021)
12/27/2021		USCA Case Number 21−5291 for 132 Notice of Appeal filed by MICHAEL T. PINES. (zjf) (Entered: 12/27/2021)
01/20/2022	134	Joint STATUS REPORT by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Narwold, William) (Entered: 01/20/2022)
01/21/2022		MINUTE ORDER: In consideration of the joint status report 134 filed on January 20, 22, it is hereby ORDERED that the parties shall file a further joint status report on or before April 1, 2022, and that the stay of proceedings is extended through April 8, 2022. Signed by Judge Paul L. Friedman on January 21, 2022. (MA) (Entered: 01/21/2022)
04/01/2022	135	Joint STATUS REPORT by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 04/01/2022)
05/17/2022	136	Joint STATUS REPORT by UNITED STATES OF AMERICA. (Simon, Jeremy) (Entered: 05/17/2022)
05/18/2022		MINUTE ORDER: In consideration of the parties' 135 joint status report and 136 joint status report, it is hereby ORDERED that the parties shall file a further joint status report on or before June 30, 2022, and that the stay of proceedings is extended from April 8, 2022 through July 12, 2022. Signed by Judge Paul L. Friedman on May 18, 2022. (lcjr) (Entered: 05/18/2022)
06/29/2022	137	Joint STATUS REPORT by UNITED STATES OF AMERICA. (Simon, Jeremy) (Entered: 06/29/2022)
06/30/2022		MINUTE ORDER: In consideration of the parties' 137 joint status report, it is hereby ORDERED that the parties shall file a further joint status report on or before August 12, 2022, and that the stay of proceedings is extended from July 12, 2022, to August 26, 2022. Signed by Judge Paul L. Friedman on June 30, 2022. (ATM) (Entered:

		06/30/2022)
08/12/2022	138	Joint STATUS REPORT by UNITED STATES OF AMERICA. (Simon, Jeremy) (Entered: 08/12/2022)
08/12/2022		MINUTE ORDER: In consideration of the parties' 138 joint status report, it is hereby ORDERED that the plaintiffs shall file a motion for an order approving settlement notice to the class, pursuant to Fed. R. Civ. P. 23(e)(1), on or before September 26, 2022, and that the stay of proceedings is extended from August 12, 2022 to September 26, 2022. Signed by Judge Paul L. Friedman on August 12, 2022. (lcjr) (Entered: 08/12/2022)
09/22/2022	139	Joint STATUS REPORT by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) (Entered: 09/22/2022)
09/22/2022		MINUTE ORDER: In consideration of the parties' 139 joint status report, it is hereby ORDERED that the plaintiffs shall file a motion for an order approving settlement notice to the class, pursuant to Fed. R. Civ. P. 23(e)(1), on or before October 15, 2022, and that the stay of proceedings is extended from September 22, 2022 to October 15, 2022. Signed by Judge Paul L. Friedman on September 22, 2022. (ATM) (Entered: 09/22/2022)
10/11/2022	140	MOTION for Settlement *Preliminary Approval* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Text of Proposed Order Proposed Order)(Gupta, Deepak) (Entered: 10/11/2022)
10/11/2022	141	DECLARATION *of Deepak Gupta* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM re 140 MOTION for Settlement *Preliminary Approval* filed by ALLIANCE FOR JUSTICE, NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER. (Attachments: # 1 Exhibit Settlement Agreement, # 2 Exhibit Supplemental Settlement Agreement, # 3 Exhibit Proposed Notice Plan, # 4 Exhibit KCC (Administrator) Declaration)(Gupta, Deepak) (Entered: 10/11/2022)
10/28/2022	142	RESPONSE re 140 MOTION for Settlement *Preliminary Approval (Defendant's Response to Motion for Preliminary Approval of Class Settlement)* filed by UNITED STATES OF AMERICA. (Simon, Jeremy) (Entered: 10/28/2022)
11/14/2022	143	MANDATE of USCA as to 132 Notice of Appeal to DC Circuit Court filed by MICHAEL T. PINES ; USCA Case Number 21−5291. (Attachment: # 1 USCA Order September 28, 2022)(zjm) (Entered: 11/15/2022)
11/28/2022		MINUTE ORDER: The parties shall appear for a status conference on December 6, 2022 at 9:00 a.m. via Zoom videoconference, the details of which will be provided the morning of or in advance of the hearing. Signed by Judge Paul L. Friedman on November 28, 2022. (lceh) (Entered: 11/28/2022)
11/29/2022		Set/Reset Hearings: Status Conference set for 12/6/2022 at 9:00 AM before Judge Paul L. Friedman via zoom video. (tj) (Entered: 11/29/2022)
12/06/2022		Minute Entry for proceedings held Via Videoconference (ZOOM) before Judge Paul L. Friedman: Status Conference held on 12/6/2022.Parties Updated The Court In Regards To The Current Posture Of This Matter. Parties Will Confer And Contact The Court's Chambers In Regards To the Next Status Conference Date. (Court Reporter TAMMY NESTOR.) (mac) (Entered: 12/06/2022)
12/07/2022		MINUTE ORDER: The parties shall appear for a status conference on January 12, 2023 at 10:00 a.m. via Zoom videoconference, the details of which will be provided the morning of or in advance of the hearing. Signed by Judge Paul L. Friedman on December 7, 2022. (lceh) (Entered: 12/07/2022)
12/12/2022		Set/Reset Hearings: Status Conference set for 1/12/2023 at 10:00 AM before Judge Paul L. Friedman via zoom video. (tj) (Entered: 12/12/2022)

01/11/2023	144	STIPULATION *(Stipulated Supplement to Protective Order)* by UNITED STATES OF AMERICA. (Simon, Jeremy) (Entered: 01/11/2023)
01/11/2023		MINUTE ORDER: The status conference scheduled for January 12, 2023 at 10:00 a.m. is hereby VACATED. The Court will reschedule the status conference for a later date. Signed by Judge Paul L. Friedman on January 11, 2023. (lceh) (Entered: 01/11/2023)
01/13/2023	145	TRANSCRIPT OF PROCEEDINGS before Judge Paul L. Friedman held on 12/6/22; Page Numbers: 1−10. Court Reporter/Transcriber Tammy Nestor, Telephone number 2023543127, Transcripts may be ordered by submitting the Transcript Order Form 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 m ay be accessed via PACER. Other transcript formats, (multi−page, condensed, CD or ASCII) may be purchased from the court reporter. **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. Redaction Request due 2/3/2023. Redacted Transcript Deadline set for 2/13/2023. Release of Transcript Restriction set for 4/13/2023.(Nestor, Tammy) (Entered: 01/13/2023)
01/17/2023		MINUTE ORDER: The parties shall appear for a status conference on February 22, 2023 at 11:00 a.m. via Zoom videoconference, the details of which will be provided the morning of or in advance of the hearing. Signed by Judge Paul L. Friedman on January 17, 2023. (lceh) (Entered: 01/17/2023)
02/02/2023	146	ORDER approving 144 Stipulated Supplement to 41 Protective Order. Signed by Judge Paul L. Friedman on February 2, 2023. (lceh) (Entered: 02/02/2023)
02/22/2023		Minute Entry for proceedings held before Judge Paul L. Friedman: Status Conference held on 2/22/2023. Parties inform the court of the status of this action with regard to settlement. Next Status Conference is set for 4/5/2023 at 10:00 AM in before Judge Paul L. Friedman via zoom video. (Court Reporter: Sara Wick) (tj) (Entered: 02/22/2023)
03/29/2023	147	NOTICE OF SUBSTITUTION OF COUNSEL by Derek S. Hammond on behalf of All Defendants Substituting for attorney Jeremy S. Simon and Robert A. Caplen (Hammond, Derek) (Entered: 03/29/2023)
04/05/2023		Minute Entry for Zoom Status Conference proceeding held on 4/5/23 before Judge Paul L. Friedman. The parties updated the Court on the status of the case. A revised Motion for Settlement Preliminary Approval due within a week. Court Reporter: Stacy Heavenridge (zgf) (Entered: 04/05/2023)
04/12/2023	148	Amended MOTION for Settlement *Preliminary Approval* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Text of Proposed Order)(Gupta, Deepak) (Entered: 04/12/2023)
04/12/2023	149	DECLARATION *of Deepak Gupta* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM re 148 Amended MOTION for Settlement *Preliminary Approval* filed by ALLIANCE FOR JUSTICE, NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL CONSUMER LAW CENTER. (Attachments: # 1 Exhibit Settlement Agreement, # 2 Exhibit First Amendment to Settlement Agreement, # 3 Exhibit Second Amendment to Settlement Agreement, # 4 Exhibit Revised Notice Plan & Exhibits 1−6, # 5 Exhibit KCC Supplemental Declaration)(Gupta, Deepak) (Entered: 04/12/2023)

04/26/2023	150	RESPONSE re 148 Amended MOTION for Settlement *Preliminary Approval* filed by UNITED STATES OF AMERICA. (Hammond, Derek) (Entered: 04/26/2023)
04/27/2023	151	REPLY to opposition to motion re 148 Amended MOTION for Settlement *Preliminary Approval Reply in Further Support of Plaintiffs' Revised Motion for Preliminary Approval of Class Settlement [ECF No. 148]* filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Proposed Order)(Narwold, William) (Entered: 04/27/2023)
05/08/2023	152	NOTICE *of Submission of Revised Proposed Order and Revised Notice Documents* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM re 148 Motion for Settlement (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Revised Proposed Order)(Narwold, William) (Entered: 05/08/2023)
05/08/2023	153	ORDER granting plaintiffs' 148 Revised Motion for Preliminary Approval of Class Settlement. The Court shall convene a Settlement Hearing on October 12, 2023, at 10:00 a.m. in the Ceremonial Courtroom (Courtroom 20) at the United States District Court for the District of Columbia, 333 Constitution Avenue, NW, Washington, D.C. 20001. See Order for details. Signed by Judge Paul L. Friedman on May 8, 2023. (ATM) (Entered: 05/08/2023)
05/10/2023		Set/Reset Hearings: Settlement Conference set for 10/12/2023 at 10:00 AM in Ceremonial Courtroom before Judge Paul L. Friedman. (tj) (Entered: 05/10/2023)
06/07/2023	154	MOTION to Amend/Correct *the Opt−Out Deadline* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Proposed Order)(Narwold, William) (Entered: 06/07/2023)
06/07/2023	155	ORDER granting 154 Motion to Amend the Opt−Out Deadline. See Order for details. Signed by Judge Paul L. Friedman on June 7, 2023. (lceh) (Entered: 06/07/2023)
06/28/2023		Set/Reset Deadlines: Opt−Out deadline 8/20/2023. (tj) (Entered: 06/28/2023)
07/03/2023	156	NOTICE OF SUBSTITUTION OF COUNSEL by Brenda A. Gonzalez Horowitz on behalf of UNITED STATES OF AMERICA Substituting for attorney Derek S. Hammond (Gonzalez Horowitz, Brenda) (Entered: 07/03/2023)
08/08/2023	157	NOTICE of Appearance by John Troy on behalf of TROY LAW, PLLC (Troy, John) (Entered: 08/08/2023)
08/28/2023	158	MOTION for Settlement *Final Approval*, MOTION for Attorney Fees , *Costs, and Expenses* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Declaration of NVLSP, # 2 Declaration of NCLC, # 3 Declaration of AFJ, # 4 Declaration of Brian Fitzpatrick, # 5 Declaration of Deepak Gupta, # 6 Declaration of Meghan Oliver, # 7 Declaration of Gio Santiago, # 8 Text of Proposed Order)(Gupta, Deepak) (Entered: 08/28/2023)
09/12/2023	159	RESPONSE re 158 MOTION for Settlement *Final Approval* MOTION for Attorney Fees , *Costs, and Expenses* filed by UNITED STATES OF AMERICA. (Gonzalez Horowitz, Brenda) (Entered: 09/12/2023)
09/21/2023		MINUTE ORDER: In light of the 153 Order granting plaintiffs' 148 Revised Motion for Preliminary Approval of Class Settlement, plaintiffs' original 140 Motion for Preliminary Approval of Class Settlement is hereby DENIED AS MOOT. Signed by Judge Paul L. Friedman on September 21, 2023. (lceh) (Entered: 09/21/2023)
10/03/2023	160	REPLY to opposition to motion re 158 MOTION for Settlement *Final Approval* MOTION for Attorney Fees , *Costs, and Expenses* filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Attachments: # 1 Declaration of Brian Fitzpatrick, # 2 Declaration of William Rubenstein, # 3 Declaration of Deepak Gupta, # 4 Declaration of Meghan Oliver, # 5 Declaration of Gio Santiago)(Gupta, Deepak) (Entered: 10/03/2023)

10/04/2023	161	ORDER changing Settlement Hearing location. The Settlement Hearing will be held on October 12, 2023, at 10:00 a.m. (Eastern Daylight Time) in Courtroom 29 in the William B. Bryant Annex to the United States District Court for the District of Columbia, 333 Constitution Avenue N.W., Washington, D.C. 20001. See Order for details. Signed by Judge Paul L. Friedman on October 4, 2023. (lcak) (Entered: 10/04/2023)
10/04/2023	162	ORDER setting Settlement Hearing procedures. See Order for details. Signed by Judge Paul L. Friedman on October 4, 2023. (lcak) (Entered: 10/04/2023)
10/06/2023	163	OBJECTION re 162 Order, Memorandum & Opinion filed by DON KOZICH. (Attachments: # 1 Exhibits, # 2 Certificate of Service)(zjm) (Entered: 10/11/2023)
10/06/2023	164	MOTION for Leave to Appear by Telephone or Zoom by DON KOZICH. (See Docket Entry 163 to view document) (zjm) (Entered: 10/11/2023)
10/11/2023	165	RESPONSE re 163 OBJECTION *Final Approval* MOTION for Attorney Fees , *Costs, and Expenses* filed by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM. (Gupta, Deepak) Modified on 10/12/2023 to correct event/ docket link (zjm). (Entered: 10/11/2023)
10/11/2023		Set/Reset Hearings: Settlement Hearing set for 10/12/2023 at 10:00 AM in Courtroom 29A− In Person (Audio Line Available) before Judge Paul L. Friedman. (tj) (Entered: 10/11/2023)
10/11/2023		MINUTE ORDER granting Don Kozich's 164 Motion to Appear Telephonically or by Zoom. Zoom details will be sent in advance of the Settlement Hearing. Signed by Judge Paul L. Friedman on October 11, 2023. (lcak) (Entered: 10/11/2023)
10/11/2023	166	NOTICE *of Filing of Objections* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Exhibit Greenspan Objection, # 2 Exhibit Jiggetts Objection, # 3 Exhibit Miller Objection, # 4 Exhibit Kozich Objection, # 5 Exhibit Isaacson Objection, # 6 Exhibit Isaacson Written Statement)(Gupta, Deepak) (Entered: 10/11/2023)
10/12/2023		Minute Entry for proceedings held before Judge Paul L. Friedman: Settlement Hearing held on 10/12/2023. The court takes all filings and oral argument under consideration. (Court Reporter: Elizabeth Saint Loth.) (tj) (Entered: 10/12/2023)
10/13/2023	167	NOTICE of Appearance by Meghan S.B. Oliver on behalf of ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Oliver, Meghan) (Entered: 10/13/2023)
10/13/2023	168	NOTICE *Notice of Submission of Payment Notification Forms* by ALLIANCE FOR JUSTICE, NATIONAL CONSUMER LAW CENTER, NATIONAL VETERANS LEGAL SERVICES PROGRAM (Attachments: # 1 Exhibit 1 − Account Holder Notification Form, # 2 Exhibit 2 −Payer Notification Form, # 3 Exhibit 3 − USO Payment Notification − Email Template, # 4 Exhibit 4 − Dispute Form)(Narwold, William) (Entered: 10/13/2023)
03/20/2024	169	OPINION granting Plaintiffs' 158 Motion for Final Approval of Class Settlement and for Attorneys' Fees, Costs, and Service Awards. See Opinion for details. Signed by Judge Paul L. Friedman on March 20, 2024. (ATM) (Entered: 03/20/2024)
03/20/2024	170	FINAL JUDGMENT AND ORDER granting 158 Plaintiffs' Motion for Final Approval of Class Settlement and for Attorneys' Fees, Costs, and Service Awards. See Final Judgment and Order for details. Signed by Judge Paul L. Friedman on March 20, 2024. (ATM) (Entered: 03/20/2024)
04/18/2024	171	ENTERED IN ERROR.....NOTICE OF APPEAL TO DC CIRCUIT COURT as to 170 Memorandum & Opinion,, Order, 169 Memorandum & Opinion by ERIC ALAN ISAACSON. Filing fee $ 605, receipt number 207171. Fee Status: Fee Paid. Parties have been notified. (zjm) Modified on 4/24/2024 (zjm). (Entered: 04/24/2024)
04/24/2024	172	ENTERED IN ERROR.....Transmission of the Notice of Appeal, Order Appealed (Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid re 171 Notice of Appeal to DC Circuit Court. (zjm) Modified on 4/24/2024 (zjm).

		(Entered: 04/24/2024)
04/24/2024	173	NOTICE OF APPEAL to the Federal Circuit as to 170 Order, 169 Opinion by ERIC ALAN ISAACSON. Filing fee $ 605, receipt number 207171. Fee Status: Fee Paid. Parties have been notified. (zjm) (Entered: 04/24/2024)
04/24/2024	174	Transmission of the Notice of Appeal, Order Appealed (Opinion), and Docket Sheet to Federal Circuit. The appeal fee was paid re 173 Notice of Appeal to the Federal Circuit. (zjm) (Entered: 04/24/2024)
04/30/2024		USCA Case Number 24−1757 for 173 Notice of Appeal to the Federal Circuit filed by ERIC ALAN ISAACSON. (znmw) (Entered: 04/30/2024)
05/15/2024	175	TRANSCRIPT OF PROCEEDINGS, before Judge Paul L. Friedman, held on 10−12−2023; Page Numbers: 1 − 112. Date of Issuance: 5−15−2024. Court Reporter: Elizabeth SaintLoth, Telephone number: 202−354−3242. Transcripts may be ordered by submitting the Transcript Order Form 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. **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. Redaction Request due 6/5/2024. Redacted Transcript Deadline set for 6/15/2024. Release of Transcript Restriction set for 8/13/2024.(Saint−Loth, Elizabeth) (Entered: 05/15/2024)
05/24/2024	176	TRANSCRIPT OF STATUS CONFERENCE before Judge Paul L. Friedman held on 02/22/2023. Page Numbers: 1−13. Date of Issuance: 05/24/2024. Court Reporter: Sara Wick, telephone number 202−354−3284. Transcripts may be ordered by submitting the Transcript Order Form 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. **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. Redaction Request due 6/14/2024. Redacted Transcript Deadline set for 6/24/2024. Release of Transcript Restriction set for 8/22/2024.(Wick, Sara) (Entered: 05/24/2024)

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

DEEPAK GUPTA (D.C. Bar No. 495451)
JONATHAN E. TAYLOR (D.C. Bar No. 1015713)
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
Phone: (202) 888-1741
Fax: (202) 888-7792
deepak@guptawessler.com, jon@guptawessler.com

MICHAEL T. KIRKPATRICK (D.C. Bar No. 486293)
INSTITUTE FOR PUBLIC REPRESENTATION
Georgetown University Law Center
600 New Jersey Avenue, Suite 312
Washington, DC 20001
Phone: (202) 662-9535
Fax: (202) 662-9634
michael.kirkpatrick@law.georgetown.edu

WILLIAM H. NARWOLD (D.C. Bar No. 502352)
MOTLEY RICE LLC
3333 K Street NW, Suite 450
Washington, DC 20007
Phone: (202) 232-5504
Fax: (202) 232-5513
bnarwold@motleyrice.com

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.*

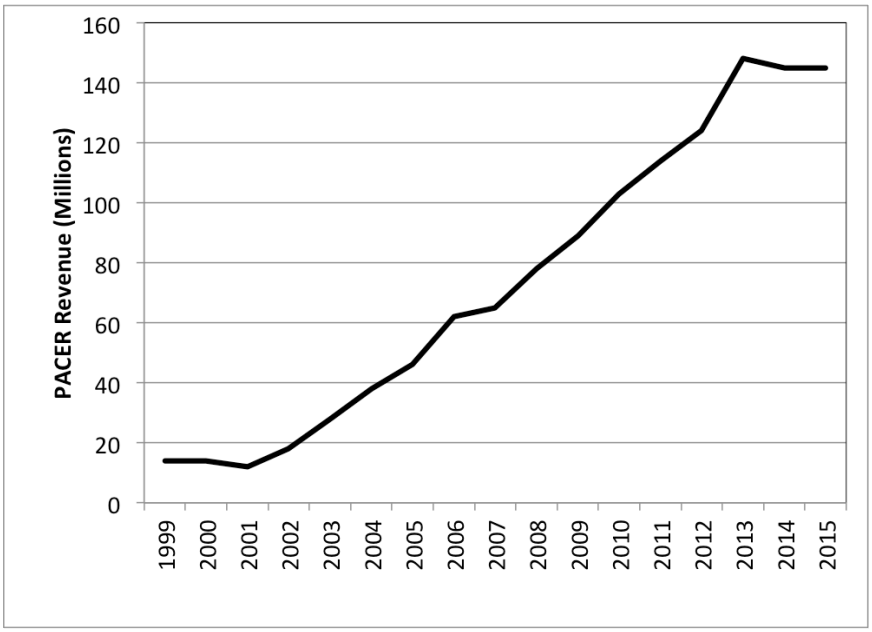
The AO again increases PACER fees. The AO responded by raising PACER fees once again, to $.10 per page beginning in 2012. It acknowledged that "[f]unds generated by PACER are used to pay the entire cost of the Judiciary's public access program, including telecommunications, replication, and archiving 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,

/s/ Deepak Gupta
DEEPAK GUPTA (D.C. Bar No. 495451)
JONATHAN E. TAYLOR (D.C. Bar No. 1015713)
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
Phone: (202) 888-1741
Fax: (202) 888-7792
deepak@guptawessler.com, jon@guptawessler.com

WILLIAM H. NARWOLD (D.C. Bar No. 502352)
MOTLEY RICE LLC
3333 K Street NW, Suite 450
Washington, DC 20007
Phone: (202) 232-5504
Fax: (202) 232-5513
bnarwold@motleyrice.com

MICHAEL T. KIRKPATRICK (D.C. Bar No. 486293)
INSTITUTE FOR PUBLIC REPRESENTATION
Georgetown University Law Center
600 New Jersey Avenue, Suite 312
Washington, DC 20001
Phone: (202) 662-9535
Fax: (202) 662-9634
michael.kirkpatrick@law.georgetown.edu

Attorneys for Plaintiffs

May 2, 2016

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.	)	

MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendant hereby moves, pursuant to Fed. R. Civ. P. 12(b)(1) and (6), to dismiss this action for failure to state a claim within this Court's jurisdiction and under the "first-to-file" rule. In the alternative, Defendant moves for summary judgment in its favor, pursuant to Fed. R. Civ. P. 56, because there is no genuine issue as to any material fact and the Defendant is entitled to judgment as a matter of law.

The Court is respectfully referred to the accompanying

memorandum, declarations and statement of material facts which accompany this motion.

Respectfully submitted,

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

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

By: /s/
W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney
555 4th Street, N.W.
Washington, DC 20530
(202) 252-2536

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,

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

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

By: /s/
W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney

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.	)	

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Civil Rule 7(h), the Defendant hereby provides the following statement of material facts as to which there is no genuine dispute:

1. 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.

2. 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. 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.

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.

5. 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).

6. 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.

Respectfully submitted,

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

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

By: /s/
W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney

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

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.	)	

ANSWER

For its answer to the class action complaint in t5he above action, Defendant admits, denies, and alleges as follows:

Introduction[1]

The allegations contained in Plaintiffs' opening paragraphs constitute conclusions of law, and Plaintiffs' characterization of its case, to which no answer is required.

1. Defendant denies the allegations contained in first, second and third sentences of paragraph 1 for lack of knowledge or information sufficient to form a belief as to their truth. Denies the allegations contained in the fourth sentence of paragraph 1.

[1] Where Defendant has included the headings from Plaintiffs' Complaint, it has done so merely for ease of reference. Defendant does not thereby admit that the headings are accurate.

2. Defendant denies the allegations contained in the first, second and third sentences of paragraph 2 for lack of knowledge or information sufficient to form a belief as to their truth. Denies the allegations contained in the fourth sentence of paragraph 2.

3. Defendant denies the allegations contained in first, second, third and fourth sentences of paragraph 3 for lack of knowledge or information sufficient to form a belief as to their truth. Denies the allegations contained in the fourth sentence of paragraph 3.

4. Defendant admits that the AO and the PACER Service Center administer PACER, but denies the allegation that the AO charges fees for access to public records.

Jurisdiction And Venue

5. The allegations contained in paragraph 5 constitute conclusions of law to which no answer is required.

6. The allegations contained in paragraph 6 constitute conclusions of law to which no answer is required.

Allegations

7. Denies the allegation contained in the first sentence of paragraph 7. Admits that PACER is managed by the AO, but denies the other allegations contained in the second sentence of

paragraph 7. Denies the allegation contained in the third and fourth sentence of paragraph 7. Admits that the current court fee is $0.10 per page with a maximum of $3.00 per document or case specific report, (excluding transcripts). Admits the charge for audio files is $2.40 per audio file and that there is no charge for opinions. Denies the allegations contained in the seventh sentence of paragraph 7. The allegations contained in the last sentence of paragraph 7 constitute conclusions of law to which no answer is required.

8. Defendant denies the allegations contained in the first sentence of paragraph 8. The allegations contained in the second sentence of paragraph 8 constitute conclusions of law to which no answer is required; to the extent that they may be deemed allegations of fact, they are denied. Defendant denies the allegations contained in the third sentence of paragraph 8.

9. Denied.

10. Defendant denies the allegations contained in the first sentence of paragraph 10, and denies the allegations in the second sentence of paragraph 10 that the discussion paper was an internal report on how the ECF system would be funded. Defendant denies the allegations contained in the third sentence of paragraph 10 with regard to any principles being emphasized.

Defendant denies the allegations contained in the fourth sentence of paragraph 10 that the AO contemplated how ECF could be funded.

11. Defendant denies the allegations contained in the first sentence of paragraph 11. The allegations contained in the second sentence of paragraph 11 constitute conclusions of law to which no answer is required; to the extent that it may be deemed an allegation of fact, it is denied.

12. Defendant admits the allegations of paragraph 12 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

13. Defendant Admits the allegations contained in the first sentence of paragraph 13 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents. Defendant denies the allegations contained in the remaining sentences of paragraph 13.

14. The allegations contained in the first sentence of paragraph 14 constitute Plaintiffs' characterization of the case, to which no answer is required; to the extent that it may be deemed an allegation of fact, it is denied. Defendant admits the allegations contained in the second sentence of paragraph 14 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

15. Defendant admits the allegations contained in paragraph 15 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

16. Defendant admits the allegations contained in paragraph 16 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

17. Defendant admits the allegations contained in paragraph 17 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations

are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

18. Defendant admits the allegations contained in paragraph 18 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

19. Defendant denies the allegation contained in the first sentence of paragraph 19. Admits the allegations contained in the second sentence of paragraph 18 to the extent supported by the source cited, which is the best evidence of its contents; otherwise denies the allegations; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents. Defendant denies the allegations contained in the remaining sentences of paragraph 19.

20. Defendant admits the allegations contained in paragraph 20 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

21. Defendant denies the allegations contained in the first sentence of paragraph 21, and admits the allegations contained in the second and third sentence of paragraph 21 to the extent supported by the sources cited, which are the best evidence of their contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

22. Admits the allegations contained in paragraph 22 to the extent supported by the source cited, which is the best evidence of its contents; otherwise denies the allegations.

23. Denied.

24. The allegations contained in the last sentence of paragraph 24 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact they are denied. Defendant admits the allegations contained in the rest of paragraph 24 to the extent supported by the sources cited, which are the best evidence of their contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

25. The allegations in the first sentence of paragraph 25 relate to a 10-year-old complaint that is not available on PACER

and are denied for lack of knowledge or information sufficient to form a belief as to their truth. The allegation contained in the last sentence of paragraph 25 constitutes a conclusion of law to which no response is required. Defendant admits the allegations contained in the other sentences in paragraph 25 to the extent supported by the source cited, which is the best evidence of its contents; otherwise the allegations are denied and the Court is respectfully referred to the cited document for a full, fair and accurate account of its contents.

26. The allegation contained in paragraph 26 constitutes a conclusion of law to which no response is required.

27. The allegation contained in paragraph 27 constitutes a restatement of Plaintiffs' case to which no response is required; to the extent that it may be deemed an allegation of fact, it is denied.

28. The allegations contained in paragraph 28 constitute conclusions of law to which no answer is required; to the extent that it may be deemed an allegation of fact, it is denied.

29. The allegations contained in paragraph 29, including parts i and ii, constitute conclusions of law to which no answer is required; to the extent that they may be deemed allegations of fact, they are denied.

30-34. The allegations contained in paragraphs 30 to 34 constitute conclusions of law to which no answer is required; to the extent that they may be deemed an allegation of fact, they are denied.

The remainder of the Complaint is Plaintiffs' prayer for relief. Defendant denies that Plaintiffs are entitled to the relief set forth in the prayer for relief or to any relief whatsoever.

Defendant denies each and every allegation not previously admitted or otherwise qualified.

Affirmative Defense(s)

Plaintiffs have failed timely to exhaust administrative remedies that were available to them and which they agreed to employ to contest their billings, and, as a result, they have also failed to mitigate damages.

WHEREFORE, defendant requests that the Court enter judgment in its favor, order that the complaint be dismissed, and grant defendant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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

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

By: /s/
W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney
555 4th Street, N.W.
Washington, DC 20530
(202) 252-2536
mark.nebeker@usdoj.gov

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

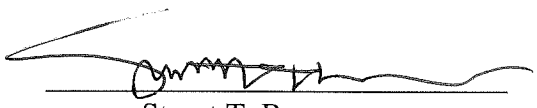
I, Stuart T. Rossman, declare as follows:

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

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

Exhibit 1

UniqueID: *100000001*

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and April 21, 2016, a class action lawsuit may affect your rights.

Nonprofit groups filed this lawsuit against the United States government, claiming that the government has unlawfully charged PACER users more than necessary to cover the cost of providing public access to federal court records. The lawsuit, *National Veterans Legal Services Program, et al. v. United States*, Case No. 1:16-cv-00745-ESH, is pending in the U.S. District Court for the District of Columbia. The Court decided this lawsuit should be a class action on behalf of a "Class," or group of people that could include you. There is no money available now and no guarantee that there will be.

Are you included? Records of the Administrative Office of the U.S. Courts indicate that you paid to access records through PACER (the Public Access to Court Electronic Records system) between April 21, 2010 and April 21, 2016. The Class includes everyone that paid PACER fees between April 21, 2010 and April 21, 2016, excluding class counsel in this case and federal government entities.

What is this lawsuit about? The lawsuit claims that Congress has authorized the federal courts to charge PACER fees only to the extent necessary to cover the costs of providing public access to court records, and that the federal courts are charging more than necessary to recover the costs of PACER. The lawsuit further alleges that the federal courts have used the excess PACER fees to pay for projects unrelated to providing public access to court records. The lawsuit seeks the recovery of the excessive portion of the fees. The government denies these claims and contends that the PACER fees are lawful. The Court has not decided who is right. The lawyers for the Class will have to prove their claims in court.

Who represents you? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC to represent the Class as "Class Counsel." You don't have to pay Class Counsel or anyone else to participate. If Class Counsel obtains money or benefits for the Class, they will ask the Court for an award of fees and costs, which will be paid by the United States government or out of any money recovered for the Class. By participating in the Class, you agree to pay Class Counsel up to 30 percent of the total recovery in attorneys' fees and expenses with the total amount to be determined by the Court.

What are your options? If you are a Class Member, you have a right to stay in the Class or be excluded from the lawsuit.

OPTION 1. Do nothing. Stay in the lawsuit. If you do nothing, you are choosing to stay in the Class. You will be legally bound by all orders and judgments of the Court, and you won't be able to sue the United States government for the claims made in this lawsuit. If money or benefits are obtained, you will be able to obtain a share. There is no guarantee that the lawsuit will be successful.

OPTION 2. Exclude yourself from the lawsuit. Alternatively, you have the right to not be part of this lawsuit by excluding yourself or "opting out" of the Class. If you exclude yourself, you cannot get any money from this lawsuit if any is obtained, but you will keep your right to separately sue the United States government over the legal issues in this case. If you do not wish to stay in the Class, you must request exclusion in one of the following ways:

1. Send an "Exclusion Request" in the form of a letter sent by mail, stating that you want to be excluded from *Nat'l Veterans Legal Services Program v. United States* Case No. 1:16-cv-00745-ESH. Be sure to include your name, address, telephone number, email address, and signature. You must mail your Exclusion Request, **postmarked by July __, 2017,** to: PACER Fees Class Action Administrator, P.O. Box 43434, Providence, RI 02940-3434.

2. Complete and submit online the Exclusion Request form found here by **July __, 2017.**

3. Send an Exclusion Request Form, available here, by mail. You must mail your Exclusion Request form, **postmarked by July __, 2017,** to: PACER Fees Class Action Administrator, P.O. Box 43434, Providence, RI 02940-3434.

If you choose to exclude yourself from the lawsuit, you should decide soon whether to pursue your own case because your claims may be subject to a statute of limitations which sets a deadline for filing the lawsuit within a certain period of time.

How do I find out more about this lawsuit? For a detailed notice and other documents about this lawsuit and your rights, go to www.PACERFeesClassAction.com, call 1-844-660-2215, write to PACER Fees Class Action Administrator, PO Box 43434, Providence, RI 02940-3434 or call Class Counsel at 1-866-274-6615.

1-844-660-2215 OR www.PACERFeesClassAction.com

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.

Civil Action No. 16-745 ESH

ORDER APPROVING PLAN OF CLASS NOTICE

WHEREAS, on January 24, 2017, this Court certified the following Class:

> 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.

Therefore, pursuant to Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure, and based upon the record and Plaintiffs' Unopposed Motion for Approval of Revised Plan of Class Notice and Class Notice Documents ("Plaintiffs' Motion," dkt. #42);

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion is GRANTED.

2. The Revised Email Notice of Pendency of Class Action Lawsuit ("Email Notice"); the Revised Postcard Notice of Pendency of Class Action Lawsuit ("Postcard Notice"); the long-form Notice of Pendency of Class Action available online ("Long-Form Notice"); the printable Exclusion Form; and the online Exclusion Form are hereby approved as to form. *See* Exhibits 1 and 2 to Notice of Filing of Revised Notice Documents ("Notice of Filing," dkt. #43); Exhibits 3, 4, and 5 to Plaintiffs' Motion.

3. To the extent they are not already produced, Defendant shall produce to Plaintiffs' counsel under the terms of the Stipulated Protective Order (dkt. #41) the available names, postal addresses, email addresses, phone numbers, and PACER-assigned account numbers of all individuals and entities who have paid PACER fees ("PACER Fee Database") during the class period. For purposes of this paragraph, "individuals and entities" is defined as all PACER users except the following: (1) any user who, during the quarter billed, is on the master Department of Justice list for that billing quarter; (2) any user with an @uscourts.gov email address extension; or (3) any user whose PACER bill is sent to and whose email address extension is shared with a person or entity that receives PACER bills for more than one account, provided that the shared email address extension is one of the following: @oig.hhs.gov, @sol.doi.gov, @state.gov, @bop.gov, @uspis.gov, @cbp.dhs.gov, @usss.dhs.gov, @irscounsel.treas.gov, @dol.gov, @ci.irs.gov, @ice.dhs.gov, @dhs.gov, @ssa.gov, @psc.uscourts.gov, @sec.gov, @ic.fbi.gov, @irs.gov, and @usdoj.gov.[1]

4. On or before the later of (a) thirty days after entry of this Order or (b) thirty days after Plaintiffs receive the PACER Fee Database from Defendant, KCC LLC (the "Claims Administrator") shall cause the Email Notice to be disseminated, in substantially the same form attached as Exhibit 1 to the Notice of Filing, by sending it out via email to potential class members. The Email Notice shall direct potential class members to a website maintained by the Claims Administrator. The sender of the email shall appear to recipients as "PACER Fees Class Action Administrator," and the subject line of the email will be "PACER Fees – Notice of Class Action Lawsuit."

[1] For example, accounting@dol.gov at 200 Constitution Avenue, NW, Washington, DC 20210 receives bills for johndoe1@dol.gov, johndoe2@dol.gov, and janedoe1@dol.gov. None of those email address (accounting@dol.gov, johndoe1@dol.gov, johndoe2@dol.gov, and janedoe1@dol.gov) would receive notice.

5. On or before the later of (a) thirty days after entry of this Order or (b) thirty days after Plaintiffs receive the PACER Fee Database from Defendant, the Claims Administrator shall make available to potential class members automated telephone support to handle any inquiries from potential class members.

6. On or before the later of (a) thirty days after entry of an Order approving this Plan, or (b) thirty days after Plaintiffs receive the PACER Fee Database from Defendant, Plaintiffs, through KCC, will establish and maintain a website in order to respond to inquiries by potential class members. The website shall include the complete text of the Long-Form Notice attached to Plaintiffs' Motion as Exhibit 3, the printable Exclusion Request form, the online Exclusion Request form, this Order, Plaintiffs' Class Action Complaint (dkt. #1), Defendant's Answer (dkt. #27), the Order on the Motion for Class Certification (dkt. #32), the Memorandum Opinion on the Motion for Class Certification (dkt. #33), and other relevant documents.

7. On or before the later of (a) forty-five days after entry of this Order or (b) forty-five days after Plaintiffs receive the PACER Fee Database from Defendant, the Claims Administrator shall cause the Postcard Notice to be disseminated, in substantially the same form attached as Exhibit 2 to the Notice of Filing, by sending it out via U.S. mail to all potential class members (1) without an email address and (2) for whom email delivery was unsuccessful. The Postcard Notice shall direct potential class members to the website maintained by the Claims Administrator.

8. On the later of (a) ninety days after entry of this Order or (b) ninety days after Plaintiffs receive the PACER Fee Database from Defendant, the opt-out period shall expire.

9. The Court finds that the dissemination of the Notice under the terms and in the format provided for in Plaintiffs' Motion and this Order constitutes the best notice practicable under the circumstances, that it is due and sufficient notice for all purposes to all persons entitled to such notice, and that it fully satisfies the requirements of due process and all other applicable laws.

IT IS SO ORDERED.

Dated: April 17, 2017

/s/ *Ellen Segal Huvelle*
The Honorable Ellen Segal Huvelle
United States District Judge

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 SUMMARY JUDGMENT AS TO LIABILITY

Deepak Gupta
Jonathan E. Taylor
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

William H. Narwold
Meghan S.B. Oliver
Elizabeth Smith
MOTLEY RICE LLC
401 9th St. NW, Suite 1001
Washington, DC 20004
(202) 232-5504
bnarwold@motleyrice.com

Counsel for Plaintiffs National Veterans Legal Services Program, National Consumer Law Center, Alliance for Justice and the Class

August 28, 2017

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INTRODUCTION

This class action challenges the legality of the fees that the federal judiciary charges people to access its Public Access to Court Electronic Records system, known as PACER. The plaintiffs contend that the fees far exceed the cost of providing the records and thus violate the E-Government Act of 2002, 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.

Now that the Court has certified this case as a class action and denied the government's motion to dismiss, two key questions remain: Has the Administrative Office of the U.S. Courts (or AO) violated the E-Government Act by charging more than necessary to recoup the total marginal cost of providing access to records through PACER? And if so, by how much? This motion addresses only the first question. It seeks summary adjudication of the defendant's liability, reserving the damages determination for after formal discovery.

The liability question is straightforward and ripe for resolution. In 2002, Congress found that PACER fees (then set at $.07 per page) were "higher than the marginal cost of disseminating the information." Taylor Decl., Ex. D, at 5. Congress sought to ensure that records would instead be "freely available to the greatest extent possible." *Id.* To this end, the E-Government Act prohibits the imposition of fees that are not "necessary" to "reimburse expenses in providing" access to the records. 28 U.S.C. § 1913 note. The only permissible reading of this language is that it bars the judiciary from charging more in PACER fees, in the aggregate, than the reasonable costs of administering the PACER system.

Despite the E-Government Act's express limitation, PACER fees have twice been *increased* since the Act's passage in 2002. This prompted the Act's sponsor, Senator Joe Lieberman, 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." Taylor Decl., Exs. G & H. Instead of complying with the law, the AO has used PACER fees to fund projects far removed from the costs of providing records upon request. For example, it has used the money to buy flat-screen TVs for jurors, to send required notices to bankruptcy creditors, and even to fund a study by the State of Mississippi for its own court system. This is more than enough to establish liability. Although the AO's violations are much more extensive than these isolated examples, this Court need not determine the full extent of the overcharge at this stage. Because PACER fees exceed the marginal costs of providing records, in violation of the E-Government Act, summary adjudication on liability is warranted.

Any other result would not only run afoul of the E-Government Act's text and contravene its purpose but would also raise two serious constitutional problems. The first is reflected in the background law limiting user fees throughout the federal government: Because only *Congress* may constitutionally impose taxes, the general rule is a user fee may not exceed the cost of providing the service "inuring directly to the benefit" of the person who pays that fee—unless Congress has "indicate[d] clearly its intention to delegate" its taxing power. *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 224 (1989). Here, Congress has done the opposite.

The second concern flows from the First Amendment right to access court records. "The Supreme Court has held that a government cannot profit from imposing" a fee "on the exercise of a First Amendment right." *Sullivan v. City of Augusta*, 511 F.3d 16, 38 (1st Cir. 2007) (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 113–14 (1943)). Hence, the general rule is that "fees used to defray administrative expenses are permissible, but only to the extent necessary for that purpose." *Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983). There is no reason for a more fee-friendly rule here, where Congress has imposed the same limitation ("only to the extent necessary") by statute.

BACKGROUND

A. Overview of PACER fees

PACER is a system that provides online access to federal judicial records and is managed by the AO. Pls.' Statement of Undisputed Material Facts (Statement) ¶ 1. The current fee to access records through PACER is set at $.10 per page (with a maximum of $3.00 for "any case document, docket sheet, or case-specific report") and $2.40 per audio file. *Id.* ¶¶ 2–4. Unless a 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. *Id.* ¶ 5.

B. History of PACER fees

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.* The AO set the fees at $.07 per page in 1998. Statement ¶ 10.

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 Electronic Case Filing system, known as ECF. *Id.* ¶ 9. The staff of the AO produced a paper discussing how the system would be funded. *Id.* 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." *Id.* Yet, just two pages later, the AO staff contemplated that ECF could be funded with "revenues generated from electronic public access fees"—that is, PACER fees. *Id.* The paper did not offer any statutory authority or legal reasoning 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." Taylor Decl., Ex. D, at 5 (S. Rep. No. 107–174, 2d Sess., at 23 (2002)); *see* Statement ¶ 11.[1]

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

[1] In the language of economics, marginal cost means "the increase in total cost that arises from an extra unit of production." N. Gregory Mankiw, *Principles of Economics* 268 (6th ed. 2012).

> 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 increased PACER fees. Rather than reduce or eliminate PACER fees, however, the AO increased them to $.08 per page in 2005. Statement ¶ 15. 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 (or JITF)—the account into which PACER fees and other funds (including "funds appropriated to the judiciary" for "information technology resources") are deposited, 28 U.S.C. § 612(c)(1)—could be used to pay the costs of technology-related expenses like ECF. *See id.*; Taylor Decl., Ex. E (Memorandum from Leonidas Ralph Mecham, Director of the Admin. Office, to Chief Judges & Clerks (Oct. 21, 2004)); *see also* Taylor Decl., Ex. I, at 3 (Letter from AO Director James Duff explaining: "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."). 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. Statement ¶ 16. But once again, the AO did not reduce or eliminate PACER fees. *Id.* ¶ 17. 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. *Id.*; Taylor Decl., Ex. G, at 3 (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." Statement ¶ 18. 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 Lieberman (the E-Government Act's sponsor) wrote the AO "to inquire if [it] is complying" with the law. Taylor Decl., Ex. H, at 1 (Letter from Sen. Lieberman to Hon. Lee Rosenthal (Feb. 27, 2009)); *see* Statement ¶ 19. He noted that the Act's "goal" was "to increase free public access to [judicial] records"—allowing fees to be charged only to recover "the marginal cost of disseminating the information"—yet "PACER [is] charging a higher rate" than it did when the law was passed. Taylor Decl., Ex. H, at 1. 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 AO's Director replied with a letter defending the AO position that it may use PACER fees to recoup non-PACER-related costs. Taylor Decl., Ex. I. The letter acknowledged that the Act "contemplates a fee structure in which electronic court information 'is freely available to the greatest extent possible.'" *Id.* at 1; *see* Statement ¶ 20. Yet the letter claimed that

Congress has "expand[ed] the permissible use of the fee revenue to pay for other services," Taylor Decl., Ex. I, at 2—when in fact it enacted the E-Government Act to do the opposite. 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." Taylor Decl., Ex. I, at 2. The letter did not provide any support (even from a committee report) for using fees to recover non-PACER-related expenses beyond ECF.

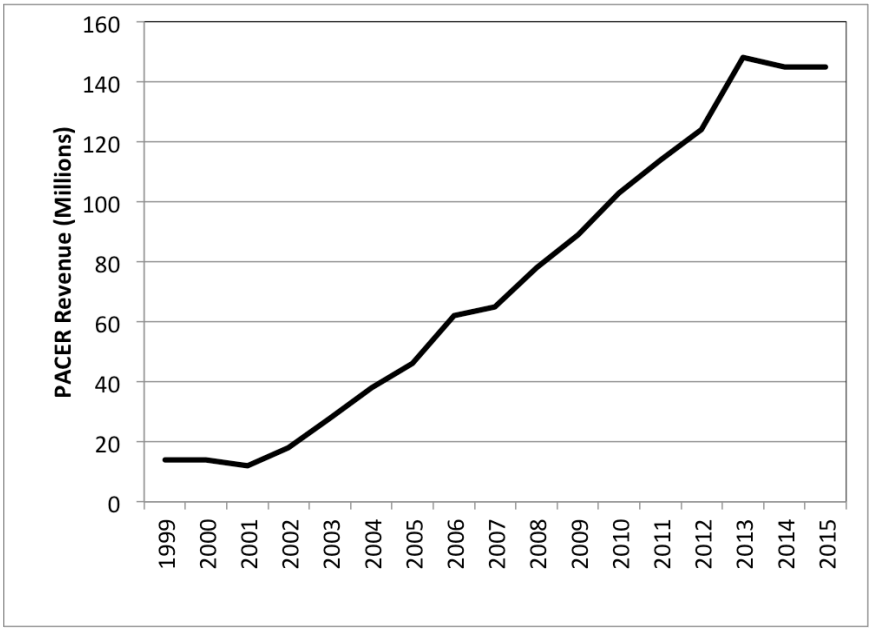
The following year, in his annual letter to the Appropriations Committee, Senator Lieberman expressed his "concerns" about the AO's interpretation. Taylor Decl., Ex. G, at 2.; Statement ¶ 21. "[D]espite the technological innovations that should have led to reduced costs in the past eight years," he observed, 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. Statement ¶ 22. 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." *Id.* But the AO claimed that the fees comply with the E-Government Act because they "are only used for public access." *Id.* It did not elaborate.

C. Use of PACER fees within the class period

From the beginning of fiscal year 2010 to the end of fiscal year 2016, the judiciary collected over $920 million in PACER fees, with the total annual amount collected increasing from $102.5 million in 2010 to $146.4 million in 2016. *Id.* ¶¶ 28, 46, 62, 80, 98, 116, 134.

The chart below—based entirely on data from the published version of the judiciary's annual budget, *see* ECF No. 8-3, and confirmed by documents provided by the AO in this litigation—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. G, at 3; *see also* Lee and Lissner Decl. ¶ 16 (explaining that the cost per gigabyte of storage fell by 99.9%—from $65.37 to $0.028—over this period).[2]



Indeed, the costs of operating the "Electronic Public Access Program"—according to the AO's own records—steeply declined over this period, going from nearly $19 million for fiscal

[2] 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, CRS, *Judiciary Appropriations FY2016*, at 1 (June 18, 2015), https://goo.gl/R8QARr.

year 2010 to less than $1 million for fiscal year 2016. Statement ¶¶ 29 & 135. Even including all other expenses designated by the AO as part of the costs of providing "Public Access Services"—including "[d]evelopment and [i]mplementation costs for CM/ECF," "expenses for CM/ECF servers," "costs associated with the support of the uscourts.gov website," and "[c]osts associated with managing the non-technical portion of the PACER Service Center"—the total annual expenses of providing these services ranged between $12 and $24 million over this period. *Id.* ¶¶ 29, 47–48, 63–64, 81–82, 99–100, 117–18, 135–36; *see* Taylor Decl., Ex. L.

The excess PACER fees have been used to fund a variety of programs beyond administering PACER itself. To highlight just a few, the AO used PACER fees to fund the following programs from fiscal year 2010 to 2016:

- $185 million on courtroom technology, Statement ¶¶ 31, 50, 66, 84, 102, 120, 138;
- $75 million to send notices to creditors in bankruptcy proceedings, *id.* ¶¶ 37, 54, 72, 90, 108, 126, 144;
- $9.5 million to provide web-based services to jurors, *id.* ¶¶ 70, 88, 106, 124, 142;
- $3.5 million to send notices to local law-enforcement agencies under the Violent Crime Control Act, *id.* ¶¶ 33, 52, 68, 86, 104, 122, 140; and
- $120,000 for the State of Mississippi study on "the feasibility of sharing the Judiciary's CM/ECF filing system at the state level," *id.* ¶ 35.

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 Gen. Gov. Appropriations for 2015, Part 6: Hearings Before a Subcomm. of the House Comm. on Appropriations*,

113th Cong. 152 (2014). And 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 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), https://goo.gl/5g3nzo; *see* Statement ¶ 26.

D. This case

In April 2016, three nonprofit organizations—National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice—filed this suit on behalf of themselves and a nationwide class of those similarly situated, asking this Court to determine that the PACER fee schedule violates the E-Government Act and to award a full recovery of past overcharges.

The Court denied a motion to dismiss in December 2016, rejecting the argument that the suit is barred because a different case had been brought based on PACER fees, and because the plaintiffs did not first present their challenge to the PACER Service Center. *See* ECF No. 25.

In January 2017, this Court certified this case as a class action under Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. The Court certified the following class: "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." ECF Nos. 32 & 33. The Court further certified 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." *Id.* The class notice period has now ended, and this motion follows the Court's scheduling order of January 24, 2017, *see* ECF No. 34, as modified on July 5, 2017.

ARGUMENT

I. The E-Government Act prohibits the AO from charging more in PACER fees than is necessary to recoup the total marginal cost of operating PACER.

A. The E-Government Act authorizes the AO to impose PACER fees "as a charge for services rendered"—meaning, as a charge "for electronic access to information" through PACER. 28 U.S.C. § 1913 note. But the AO may do so "only to the extent necessary" "to reimburse expenses in providing these services." *Id.* [3]

The best reading of this statutory language is that it prohibits the AO from charging more than is necessary to recoup the total marginal cost of providing access to records through PACER. That reading is supported not only by the plain text of the law, but also by its statutory history—Congress's decision to amend the law in 2002 to allow fees "only to the extent necessary." And the legislative history 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, so that records would be "freely available to the greatest extent possible." Statement ¶ 11.

Post-enactment history confirms this straightforward reading. 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,"

[3] "It is "of no moment" that this law was "codified as a statutory note," rather than as section text. *Conyers v. Merit Sys. Prot. Bd.* 388 F.3d 1380, 1382 n.2 (D.C. Cir. 2004). As noted on the website for the United States Code: "A provision of a Federal statute is the law whether the provision appears in the Code as section text or as a statutory note . . . The fact that a provision is set out as a note is merely the result of an editorial decision and has no effect on its meaning or validity." Office of the Law Revision Counsel, *Detailed Guide to the United States Code*, at IV(E), http://uscode.house.gov/detailed_guide.xhtml.

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." *Id.* ¶¶ 19, 21; 28 U.S.C. § 1913 note. In light of the fact that the Act's text, purpose, and history all point in the same direction, the statute cannot reasonably be read to authorize fees that exceed the costs of administering PACER.

B. Any doubt on this score is dispelled by the background law on federal user fees. Although courts have not yet interpreted the key language in the E-Government Act, there is a long line of cases interpreting an analogous statute: the Independent Offices Authorities Act (or IOAA). This statute authorizes agencies to charge a user fee for "each service or thing of value provided by [the] agency." 31 U.S.C. § 9701(a). Like the E-Government Act, the IOAA's goal is to make agency programs conferring benefits on recipients "self-sustaining to the extent possible." *Id.* It is not to turn them into profit centers to fund agency activities more broadly.

The IOAA's text requires that user fees be "fair" and "based on" four factors: (1) "the costs to the Government," (2) "the value of the service or thing to the recipient," (3) "public policy or interest served," and (4) "other relevant facts." *Id.* § 9701(b). Notwithstanding this potentially limitless language—which is far broader than that found in the E-Government Act—the Supreme Court has declined to read the Act "literally," and has instead interpreted it to forbid agencies from charging fees that exceed the costs of providing the service. *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 341 (1974); *see Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974). As the Court reasoned: "It would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read [the IOAA] narrowly as authorizing not a 'tax' but a 'fee.'" *Nat'l Cable Television*, 415 U.S. at 341.

To keep a "fee" from becoming a tax, it must be imposed only "for a service that confers a specific benefit upon an identifiable beneficiary." *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1180

(D.C. Cir. 1994). That is, "a user fee will be justified under the IOAA if there is a sufficient nexus between the agency service for which the fee is charged and the individuals who are assessed." *Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 182–83 (D.C. Cir. 1996). This means that the "agency may not charge more than the reasonable cost it incurs to provide [that] service." *Engine Mfrs. Ass'n*, 20 F.3d at 1180; *see Seafarers*, 81 F.3d at 185 ("[T]he measure of fees is the cost to the government of providing the service.").

The reason for this limitation is constitutional. *See Nat'l Cable Television*, 415 U.S. at 342 ("read[ing] the Act narrowly to avoid constitutional problems"). The IOAA permits "agencies to levy fees based on services rendered but not levy taxes, which is the exclusive domain of the legislature." *Jesse E. Brannen, III, P.C. v. United States*, 682 F.3d 1316, 1317 (11th Cir. 2012); *see Nat'l Ass'n of Broadcasters v. FCC*, 554 F.2d 1118, 1129 n.28 (D.C. Cir. 1976) ("Once agency charges exceed their reasonable attributable cost they cease being fees and become taxes levied, not by Congress, but by an agency," which is "prohibited."). Although Congress may constitutionally delegate its taxing authority, it "must indicate clearly its intention to delegate to the Executive [or the Judiciary] the discretionary authority to recover administrative costs not inuring directly to the benefit" of those paying the costs. *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 224 (1989); *see also Fla. Power & Light Co. v. United States*, 846 F.2d 765 (D.C. Cir. 1988).

Here, of course, Congress did not "indicate clearly" any "intention to delegate" taxing authority when it enacted the E-Government Act. If anything, it did the opposite: The Act's text shows that Congress passed the law to *eliminate* excessive PACER fees, not to authorize them. So even if the statutory text were somehow ambiguous, or if Congress could have used even clearer language to express its intention, any ambiguity should be resolved against interpreting the statute in a way that would raise constitutional questions. *See Gomez v. United States*, 490 U.S. 858,

864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

When Congress passed the E-Government Act in 2002, it was familiar with the IOAA's background rule of appropriations, as interpreted by the courts.[4] "Unless there is something in the statute or its legislative history to compel a different result," the settled approach is to read the more specific user-fees statute together with the IOAA as "part of an overall statutory scheme," and "look to the body of law developed under the IOAA for guidance in construing the other statute." 3 GAO, *Principles of Federal Appropriations Law* 12-172 (3d ed. 2008). There is nothing here to indicate that Congress intended a more permissive rule to apply to PACER fees. Quite the contrary, the Act's plain language, statutory history, and legislative history all demonstrate that Congress clearly intended for fees to be restricted to the costs of providing the service for which they are charged—providing access to court records upon demand—and nothing more.

C. This reading is further bolstered by a second constitutional principle: the First Amendment right of access to the courts, and access to court records more specifically. On top of the general limitations on user fees, courts have a special obligation not to assess fees that "unduly burden access to the judicial process." *Id.* 12-157. The Judicial Conference has itself recognized that "public access to federal court case files" implicates these "constitutional principles." Subcomm. on Privacy & Pub. Access to Electronic Case Files, Judicial Conference of the U.S., *Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files* (2001), https://goo.gl/G8n6qM (App. A-3) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–78 (1980)). And "[t]he Supreme Court has held that a government cannot profit from imposing" a fee "on the exercise of a First

[4] So was the AO: In a 1997 paper, 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." Statement ¶ 9.

Amendment right." *Sullivan v. City of Augusta*, 511 F.3d 16, 38 (1st Cir. 2007) (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 113–14 (1943)). When the imposition of a fee implicates First Amendment interests, "fees used to defray administrative expenses are permissible, but only to the extent necessary for that purpose." *Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983); *see also Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1981) (citing cases invalidating fees "in excess of costs of administration"). Notably, this First Amendment jurisprudence on fees mirrors the E-Government Act ("only to the extent necessary").

Thus, for example, when a state imposed a $200 fee "to use a particular piece of state property as a forum for political expression," the Second Circuit held that the "fee [could not] be sustained" because there was "no evidence that the administrative fee charged" was "equal to the cost incurred" for "processing plaintiffs' request to use the property." *Powers*, 723 F.2d at 1056; *see also Sullivan*, 511 F.3d at 38 (finding that a fee exceeded "the actual administrative expenses" and invalidating "the excessive amount charged"); *Fernandes*, 663 F.2d at 633 & n.11 (invalidating a fee for a permit because it exceeded the amount "needed to defray the costs of operating the permit system"). By contrast, the Supreme Court has upheld a parade-permit fee because it was "not a revenue tax," but was instead "limited" to what was necessary "to meet the expense incident to the administration of the [permit] and to the maintenance of public order" during the parade. *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941); *see also Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1165 (2d Cir. 1995) ("[F]ees that serve not as revenue taxes, but rather as means to meet the expenses incident to the administration of a regulation and to the maintenance of public order in the matter regulated are constitutionally permissible.").

Like the IOAA jurisprudence—and every relevant tool of statutory construction—this First Amendment precedent cuts against interpreting the E-Government Act to allow fees that exceed the marginal cost of providing access to records through PACER. Adopting such an

interpretation would raise serious constitutional concerns, because while the public has a First Amendment interest in accessing the courts, the AO has no legitimate interest in hindering access to court records by imposing an excessive fee in order to pay for other things that should be funded through the appropriations process. *See generally* Stephen Schultze, *The Price of Ignorance: The Constitutional Cost of Fees for Access to Electronic Public Court Records* (Aug. 25, 2017) (draft), http://ssrn.com/abstract=3026779; David Ardia, *Court Transparency and the First Amendment*, 38 Cardozo L. Rev. 835 (2017), https://ssrn.com/abstract=2883231. Indeed, excessive PACER fees inhibit public understanding of the courts and thwart equal access to justice, erecting a financial barrier that many ordinary citizens are unable to clear. As a result, it is hard to see how excess fees are anything other than an undue burden on public access to courts.

This does not necessarily mean that a statute would actually *be* unconstitutional if it were to expressly allow the judiciary to recoup more than the costs of administering PACER. It is enough that this reading of the E-Government Act would "raise[] a substantial constitutional question." *Peretz v. United States*, 501 U.S. 923, 930 (1991); *see* Antonin Scalia & Bryan Garner, *Reading Law* 247–48 (2012) ("[The constitutional-doubt canon] militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality.").

Rather than interpret the statute in a way that would raise multiple constitutional questions—and run headlong into two walls of precedent—this Court should follow the text and apply the law in the way that Congress intended: to prohibit the AO from "charg[ing] fees that are higher than the marginal cost of disseminating the information." Statement ¶ 11.

II. The AO has violated the E-Government Act by charging more in PACER fees than is necessary to recoup the total marginal cost of operating PACER.

There is no doubt that the AO is charging more in fees than is necessary to administer PACER and provide access to records to those who use the system. Congress made this observation when it enacted the E-Government Act, finding that "users of PACER are charged fees that are higher than the marginal cost of disseminating the information." Taylor Decl., Ex. D, at 5. This is even more true today. Since 1998, "the cost of a gigabyte of storage" has fallen "from $65.37 to $0.028, a reduction of over 99.9%," while "PACER's per-page fees increased 43%, from $0.07 to $0.10." Lee & Lissner Decl. ¶ 16. As Senator Lieberman has remarked: "[D]espite the technological innovations that should have led to reduced costs in the past eight years," the "cost for these documents has gone up" because the AO has used the fees to fund "initiatives that are unrelated to providing public access via PACER." Statement ¶ 21. Doing so is "against the requirement of the E-Government Act." *Id.* Indeed, our technical experts estimate that the true cost of retrieving a document from PACER—including the cost of data storage through a secure service used by many federal agencies—should be $0.0000006 per page (about one half of one ten-thousandth of a penny), meaning that the current fees actually collected by PACER could cover the costs associated with "215,271,893,258,900 requests, or approximately 1,825 pages per day for every person in the United States." Lee & Lissner Decl. ¶ 29.

During the class period, the AO has used PACER fees to: (1) upgrade courtroom technology, Statement ¶¶ 31, 50, 66, 84, 102, 120, 138; (2) send notices to creditors in bankruptcy proceedings, *id.* ¶¶ 37, 54, 72, 90, 108, 126, 144; (3) send notices to law-enforcement agencies under the Violent Crime Control Act, *id.* ¶¶ 33, 52, 68, 86, 104, 122, 140; (4) provide online services to jurors, *id.* ¶¶ 70, 88, 106, 124, 142; (5) cover "costs associated with the support of the uscourts.gov website," ¶ 118; and (6) fund a state-court study in Mississippi, *id.* ¶ 35.

None of these projects is remotely part of the marginal cost of making records available through PACER. None "bestows a benefit" on a PACER user that is "not shared by other members of society." *Nat'l Cable Television Ass'n*, 415 U.S. at 341 (interpreting the IOAA). Instead, each of these projects exists to benefit the public at large, or some other group of people. And the AO has admitted as much, asserting in this litigation that the costs of sending bankruptcy notices, for example, are recoverable through PACER because "[e]lectronic bankruptcy noticing improves the overall quality of electronic service *to the public*." Taylor Decl., Ex. M, at 45 (emphasis added); *see also id.* at 50 (attempting to justify spending PACER fees on law-enforcement notices under the Violent Crime Control Act because that program "improves the overall quality of electronic service *to the public* via an enhanced use of the Internet"); *id.* (same, for "E-Juror service"); *id.* at 42 (same, for uscourts.gov website); *id.* at 51 (attempting to justify spending PACER fees on courtroom technology on the theory that better technology "improves the ability to share case evidence with *the public in the courtroom* during proceedings"); *id.* at 53 (attempting to justify spending PACER fees on the Mississippi state-court study because "the costs associated with improving the overall quality of service *to the public* by studying whether CM/ECF could be shared with a state court").

As worthwhile as these projects may be, they "should be funded through direct appropriations," as Senator Lieberman has explained; they may not be funded by PACER users. Taylor Decl., Ex. G, at 3. Allowing the AO to make PACER users fund the judiciary's general electronic operations— including programs that confer no specific and direct benefit on those PACER users—takes the AO "far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House." *Nat'l Cable Television*, 415 U.S. at 341. Congress did not pass the E-Government Act to delegate taxing power to the Administrative Office.

What about the other categories of expenses on which the judiciary spends PACER fees, such as CM/ECF, infrastructure and telecommunications expenses, and "court allotments"? There is a short answer and a long answer. The short answer is that this Court need not decide these questions now because they go to damages rather than liability. The long answer is that the AO has thus far provided only very general information about these programs. Without more detailed information, it is impossible to say whether any of these costs may be recoverable through PACER fees. Some of these costs might be attributable to providing records through PACER, while many will not be. Formal discovery will reveal which expenses fall into the latter category, and which (if any) fall into the former.

For what it is worth, however, the principles we have laid out strongly indicate that CM/ECF and its associated costs may not be funded with PACER fees. To see why, consider an example from before the existence of the Internet. Suppose that the judiciary wanted to allow the public to access court records in the early 1900s, and to charge fees for providing such access. Under a fees-only-to-the-extent-necessary regime, the judiciary could charge fees as necessary to reimburse the costs of searching the files and providing copies of the records, as well as the labor costs associated with these specific services. But the judiciary could not charge fees to reimburse the costs of accepting documents for filing and storing them with the court in the first place, or overhead costs that are not part of the marginal cost of providing public access to the records (much like an agency, in responding to a public-records request today, may not charge a fee that exceeds "the direct costs of search, duplication, or review," 5 U.S.C. § 552 (a)(4)(A)(iv)). These expenses would exist irrespective of whether the records were made publicly accessible, because courts can only function as courts if they have a system for accepting and storing case filings. And the same is true of CM/ECF.

But this is for another day. For now, the only question is whether the AO is charging more than necessary to recoup the costs of operating PACER. The answer is plainly yes. Under even the most permissive conception of what the AO is permitted to charge under the E-Government Act, it is not charging "reasonable fees" "to the extent necessary" to make records available upon request. 28 U.S.C. § 1913 note. As an illustration of just how unreasonable PACER fees are, our experts Tom Lee and Mike Lissner calculate that, if the AO were to use the market leader for data storage, the "total yearly estimate for storing and serving PACER's dataset" (based on very generous estimates of the size of that dataset) would be "$227,399.84, or 0.16% of PACER's reported 2016 fee revenue." Lee & Lissner Decl. ¶ 28. Charging more than 600 times that amount is unreasonable and excessive under any standard.

CONCLUSION

This Court should grant the plaintiffs' motion for summary judgment as to liability.

Respectfully submitted,

/s/ Deepak Gupta

Deepak Gupta
Jonathan E. Taylor
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

William H. Narwold
Meghan S.B. Oliver
Elizabeth Smith
MOTLEY RICE LLC
401 9th St. NW, Suite 1001
Washington, DC 20004
(202) 232-5504

Counsel for Plaintiffs National Veterans Legal Services Program, National Consumer Law Center, Alliance for Justice, and the Class

August 28, 2017

EXHIBIT E

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.

EXHIBIT G

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

EXHIBIT H

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.

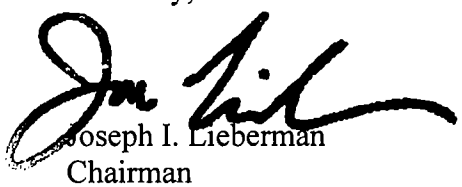
In addition I have concerns that not enough has been done to protect personal information contained in publicly available court filings, potentially violating another provision of the

[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."

EXHIBIT I

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

EXHIBIT J

Electronic Public Access Program Summary
December 2012

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

A PACER account is obtained by registering with the PACER Service Center, the Judiciary's centralized registration, user support and billing center. Registration information can be submitted via fax or the Internet, and there is no registration fee. At present, there are more than 1.4 million user accounts, with approximately 13,000 new accounts added each month. In fiscal year 2012 alone, PACER processed over 500 million requests for information.

As mandated by Congress, the public access program is funded entirely through user fees set by the Judicial Conference of the United States. The fees are published in the Electronic Public Access Fee Schedule, available on www.uscourts.gov and www.pacer.gov. Funds 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.

Court Websites
Each federal court uses its website, funded by fee revenue, to provide the public with access to information well beyond that which is required by the E-Government Act of 2002, such as court locations, contact information, local rules, standing or general orders, docket information, written opinions, and documents filed electronically. The courts are also using their websites to disclose information about judges' attendance at privately-funded seminars, orders issued on judicial conduct and disability complaints, and digital audio recordings of oral arguments heard by the court. Additionally, court websites provide general information concerning court operations, filing instructions, courthouse accessibility, interpreter services, job opportunities, jury information, and public announcements. Court websites are used to interact directly with the public through PACER, CM/ECF, on-line jury questionnaires, *pro se* filing tools, forms, and court calendars.

CM/ECF and the Next Generation

Implementation of the federal Judiciary's Case Management/Electronic Case Files system (CM/ECF) began in 2001 in the bankruptcy courts after several years of pilot programs in bankruptcy and district courts. CM/ECF not only replaced the courts' old electronic docketing and case management systems, but it also enabled courts to maintain case file documents in electronic format and to accept filings from court practitioners via the Internet. The CM/ECF system is now in use in all of the federal appellate, district, and bankruptcy courts, the Court of International Trade, and the Court of Federal Claims. Nearly 43 million cases are on CM/ECF, and more than 600,000 attorneys and others have filed documents over the Internet.

Attorneys are able to file documents directly with any federal court over the Internet. There are no added fees for filing documents using CM/ECF. The CM/ECF system uses standard office computer hardware, an Internet connection and a browser, and accepts documents in portable document format (PDF). The system is easy to use – filers prepare a document using conventional word processing software, then save it as a PDF file. After logging onto the court's web site with a court-issued CM/ECF password, and acknowledging that the filing complies with the redaction rules, the filer enters basic information relating to the case and document being filed, attaches the document, and submits it to the court. A notice verifying court receipt of the filing is generated automatically and immediately. All electronically filing parties[1] in the case automatically receive immediate e-mail notification of the filing.

Work on the Next Generation of CM/ECF (Next Gen) is well underway. The project is currently transitioning from its first phase – requirements definition – to its second phase – design and development. As part of the requirements definition phase, the Judiciary gathered extensive information from stakeholders both inside and outside the court system. The NextGen project included an Additional Stakeholders Functional Requirements Group (ASFRG) that focused on how the federal courts interact with others in the legal system. The group's 24 members included representatives from the Judiciary, the Department of Justice, the American Bar Association, the Internal Revenue Service, the Association of American Law Schools, and the National Association of Bankruptcy Trustees.

The group reached out to more than 60 constituent groups in a variety of ways, such as focus group meetings, interviews, conferences, surveys, and elicitation sessions at the courts and the Administrative Office. In all, more than 7,000 individual stakeholders provided input, most of which focused on the same core requirements sought in NextGen.

[1] Those parties who are not electronic filers receive notification via U.S. mail.

These core requirements include single sign-on, enhanced search capabilities, batch-filing features, and customizable reports. Nearly 500 of the ASFRG's requirements have been adopted and incorporated into the functional requirements documents being used to design NextGen. The final report of the ASFRG is available to the public on www.uscourts.gov.

The first releases of the Next Generation of CM/ECF are expected in 2014 and 2015, and the requirements prioritized for those releases are associated with time-saving and/or cost-saving functionality. The Next Generation of CM/ECF will also enable additional improvements to the PACER service, including an updated user interface.

Access to Court Records

Registered PACER account holders can use a court's website or the PACER Case Locator to access court documents. The PACER Case Locator is a tool for locating court records that reside in U.S. district, bankruptcy, and appellate court CM/ECF databases across the country. Usage of the Case Locator continues to grow, with over 200,000 searches daily. Links to all courts and the PACER case locator are located at www.pacer.gov. Each court maintains its own CM/ECF database with case information. As a result, querying information from each court is comparable; however, the format and content from each court may differ slightly.

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:

> *Public Access Terminals* – Every courthouse has public access terminals in the clerk's office to provide access to PACER[2] and other services, such as credit counseling.
>
> *Digital Audio* – At its March 2010 meeting, the Judicial Conference endorsed a proposal from the Committee on Court Administration and Case Management to allow judges, who use digital audio recording as the official means of taking the record, to provide, at their discretion, access to digital audio recordings of court proceedings via PACER. The digital audio initiative, also known as CourtSpeak, continues to be successful, both in terms of public and court interest. Presently, nineteen bankruptcy courts and two district courts have implemented digital audio, and an additional 23 bankruptcy courts, five district courts, and the Court of

[2] Viewing court records at a public access terminal is free. Printing copies of documents from a public access terminal is $0.10 per page.

Federal Claims have begun implementation. The fee for an audio file is $2.40, regardless of the length of the recording.

Training and Education Program – In September 2010, the Judicial Conference approved a recommendation from the Committee on Court Administration and Case Management to establish a program involving the Government Printing Office (GPO), the American Association of Law Libraries (AALL), and the Administrative Office, that would provide training and education to the public about the PACER service, and would exempt from billing the first $50 of quarterly usage by a library participating in the program. The GPO and the AALL worked with the Administrative Office to develop three levels of training classes: training for trainers, training for library staff, and training for the public. There are currently 12 libraries participating in the program. In some instances, libraries are providing on-the-spot individual training. All training classes include instructions on *How to Create a PACER Account* and *How to Monitor PACER Usage*. Although some patrons expressed disappointment that they were not being allowed to use the library's PACER account, but instead had to use their own accounts, they did report being satisfied with the instructions provided. The AALL and the GPO continue to publicize the program to their communities.

PACER Training Application – The training site dcecf.psc.uscourts.gov enables the public to learn how to use PACER without registering or incurring any fees. In March 2012, the Administrative Office also launched video tutorials to assist the public in learning how to use PACER.

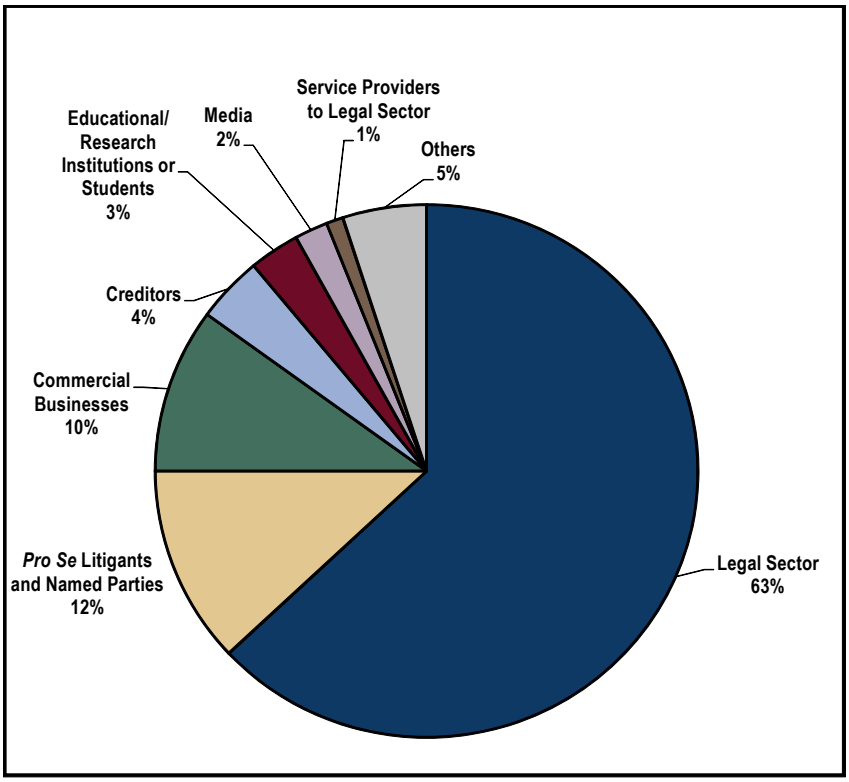
RSS – In addition to PACER access, which allows users to "pull" information from the courts, approximately 50 district courts and 80 bankruptcy courts are using a common, free internet tool, RSS, to "push" notification of docket activity to users who subscribe to their RSS feeds, much like a Congressional committee might notify its RSS subscribers of press releases, hearings, or markups.

Pro Se Bankruptcy Pathfinder – In August 2010, the CM/ECF Subcommittee of the Committee on Court Administration and Case Management approved a proposal to undertake a bankruptcy *pro se* pathfinder initiative, which is designed to assist *pro se* litigants in preparing the filings required at case opening, to reduce the time required to process *pro se* bankruptcy filings, to increase the quality of the data collected, and to employ new development tools today, which are selected for future federal Judiciary use. Three bankruptcy courts currently serve as beta courts: Central District of California, District of New Jersey, and District of New Mexico. It is anticipated that this software will be available for use by filers later this year.

Opinion Initiative with the Government Printing Office – 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 pilot courts are live, with over 600,000 individual court opinions available on FDSys. This has proved 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. Access to FDSys is available free of charge via the Internet at www.gpo.gov. Registration is not required.

PACER Users

PACER has a diverse user population, including: lawyers; *pro se* filers; government agencies; trustees; bulk collectors; researchers; educational institutions; commercial enterprises; financial institutions; the media; and the general public. The chart below is a breakdown of the PACER user population. The majority of "other" users are background investigators.



The largest user is the Department of Justice. Virtually all of the other high volume users are major commercial enterprises or financial institutions that collect massive amounts of data, typically for aggregation and resale.

Electronic Public Access Service Assessment
A comprehensive assessment of PACER services was completed in May 2010. The assessment provided insight into who uses PACER, areas that provide the highest level of satisfaction for those users, and areas that could be improved. The initial assessment was also used to inform the work of the Additional Stakeholders Functional Requirements Group (ASFRG) as it began identifying requirements for the Next Generation of CM/ECF. An on-line satisfaction survey was made available to all 325,000 active PACER users in late 2009. User types giving the highest overall satisfaction scores to PACER included creditors and service providers to the legal sector, followed by commercial businesses. Users in the legal sector and litigants—the two largest groups of PACER users—are also among the most satisfied. Users at educational and research institutions gave the lowest overall satisfaction rating. These are small groups of less-frequent users. The survey indicated that satisfaction rates climb steadily as frequency of use increases.

In addition to assessing satisfaction with the on-line component of PACER, users were asked to rate help-desk services provided by the PACER Service Center. Satisfaction was very high; over 95 percent of respondents who contacted the center during the study period indicated they are "satisfied" or "very satisfied" overall. However, about one-third of PACER users were not aware that the PACER Service Center is available to provide help with PACER. The assessment also revealed that 75 percent of users were satisfied with the value for the money they paid for PACER access, 15 percent were neutral, and 10 percent were dissatisfied.

As a result of the assessment, a number of short- and mid-term activities were implemented to improve user satisfaction with electronic public access services. These included:

- creating a new PACER Case Locator with expanded search capabilities to replace the U.S. Party/Case Index;
- redesigning the pacer.gov web page to include video tutorials;
- embarking on a program to provide public access to judicial opinions via the Government Printing Office's Internet-based FDSys Application;
- partnering with law libraries to provide training on the efficient and effective use of PACER;
- creating a free PACER training application, which is populated with actual court cases and case reports from the New York Western District Court;
- promoting the use of RSS feeds to "push" information to users;
- creating a mobile PACER application;
- redesigning the PACER bill and providing a tool to better manage billing for large organizations; and

- providing access to some audio recordings of judicial proceedings through PACER.

In April 2012, an initiative was undertaken to refresh the results from the initial assessment. This initiative is on track to meet its scheduled completion date of March 2013.

Basis and History of Fees

In 1988, the Judiciary sought funding through the appropriations process to provide electronic public access services. Rather than appropriate funds for this purpose, Congress specifically directed the Judiciary to fund electronic public access services through the collection of user fees. As a result, the electronic public access program relies exclusively on fee revenue. The statutory language specifically requires that the fees be used "to reimburse expenses incurred in providing these services."[3]

A study of policies and practices regarding use, release, and sale of data, recommended that the level of fees for a service should sustain the cost of the service. In 1991, a fee of $1.00 per minute for access to electronic information, via a dial-up bulletin board service, was set for the district and bankruptcy courts. Four years later, the fee was reduced to $0.75 per minute, and one year after that it was reduced to $0.60 per minute. The revenue generated from these fees was used exclusively to fund the full range of Electronic Public Access services, including PACER, the Appellate Bulletin Board system, the Voice Case Information System. The Voice Case Information System provided case information free of charge. Fee revenue also provided each court with hardware and software necessary to support public access services. This included more than 700 regular telephone lines, more than 200 toll-free telephone lines, and a personal computer for free public access at the front counter of all clerks' offices with 10 or more staff.

In 1997, the Judiciary addressed three issues pertaining to providing electronic public access to court information via the Internet. These issues were: (1) the establishment of an appropriate fee for Internet access to court electronic records; (2) the types of information for which a fee should be assessed; and (3) the technical approach by which PACER information should be provided over the Internet. An application of Internet technologies to the Judiciary's public access program was viewed as a way to make court and case information more widely available and to offer the opportunity to add additional information (local rules, court forms, court calendars and hours of operation) and services.

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[3] Judiciary Appropriations Act, 1991, Pub. L. No. 101-515,Title IV, § 404, 104 Stat. 2102 and Judiciary Appropriations Act, 1992, Pub. L. No. 102-140, Title III, § 303, 105 Stat. 782.

The Judiciary's analysis focused on finding the fairest, most easily understood, and most consistent method for charging. In 1998, the Judicial Conference adopted a per-page fee, as it was determined to be the simplest and most effective method for charging for public access via the Internet. The $0.07 per page electronic access fee[4] was calculated to produce comparable fees for large users in both the Internet and dial-up applications and thus maintain the then current public access revenue level while introducing new technologies to expand public accessibility to the PACER information. For infrequent PACER users, costs were reduced considerably by using the Internet.

In 2003, in the Congressional conference report that accompanied the Judiciary's FY 2004 appropriations act, Congress expanded the permitted uses of EPA funds to include Case Management/Electronic Case Files (CM/ECF) system costs. In order to provide sufficient revenue to fully fund currently identified CM/ECF system costs, in September 2004, the Judicial Conference approved an increase in the electronic public access fee from $0.07 to $0.08 per page, effective January 1, 2005.

Based on a recommendation from the Committee on Court Administration and Case Management, in September 2011, the Judicial Conference approved an increase in the fee from $0.08 to $0.10 per page, effective April 1, 2012, in order to give users adequate notice. The Committee noted that the fee had not been increased since 2005 and that, for the previous three fiscal years, the public access program's obligations had exceeded its revenue. The fee increase is being used to fund the Next Generation of CM/ECF and PACER. The Committee also recommended that the waiver of fees of $10 or less in a quarterly billing cycle be changed to $15 or less per quarter, so that approximately 75 percent of users would still receive fee waivers. Finally, in recognition of the current fiscal austerity for government agencies, the Committee recommended that the fee increase be suspended for local, state, and federal government entities for a period of three years. The Conference adopted all of the Committee's recommendations.

The Judiciary takes its responsibility to set the EPA fee very seriously. Since well before the E-Government Act, it has been the Judicial Conference's policy to set the electronic

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[4]The per-page charge applies to the number of pages that result from any search, including a search that yields no matches (one page for no matches). In the current PACER systems, billable pages are calculated in one of two ways: a formula is used to determine the number of pages for an HTML formatted report. Any information extracted from the CM/ECF database, such as the data used to create a docket sheet, is billed using a formula based on the number of bytes extracted (4320 Bytes). For a PDF document, the actual number of pages is counted to determine the number of billable pages.

public access fee to be commensurate with the costs of providing and enhancing services related to public access. Before the one-cent-per-page increase in 2004, the Conference had a history of lowering the fee, and Congressional appropriations to the Judiciary have never provided funding for the public access program. In 2001, the Judicial Conference established a fee of $0.10 per page to print copies of documents from public access terminals in the clerks' office. That fee has never been raised. A fee is not charged to view PACER documents from the public access terminals in federal courthouses. Finally, the per page fee has been capped at the charge for 30 pages (or $3.00) for documents, docket sheets, and case-specific reports.[5]

Free Information and Exemptions

There is a high cost to providing electronic public access, and as described above, Congress decided in 1991 that the funds needed to improve electronic access to court information were to be provided by the users of this information through reasonable fees rather than by all tax payers through appropriated funds. It is also important to note, however, that the public access program does provide a great deal of federal court information to the American public for no charge. For example:

- The Judiciary does not charge for access to judicial opinions;
- Parties to a court case receive a copy of filings in the case at no charge;
- The $0.10 per page fee is not charged for viewing case information or documents on PACER at the public access terminals in the courthouses;
- If an individual account does not reach $15 quarterly, no fee is charged at all; and in a given fiscal year, approximately 65-to-75 percent of active users have fee waivers for at least one quarter. Most of these users are litigants and their attorneys who are involved in a specific case;
- Consistent with Judicial Conference policy, courts may grant exemptions for payment of electronic public access fees. Approximately 20 percent of all PACER usage is performed by users who are exempt from any charge – including indigents, case trustees, academic researchers, CJA attorneys, and *pro bono* attorneys.

[5]The 30 page fee cap does not apply to non case-specific reports such as docket activity reports that include multiple cases and reports from the PACER Case Locator.

The vast majority (95 percent) of PACER accounts incur less than $500 in fees – or no fee at all – over the course of the year. This is a long-established pattern. Additionally, the public access program also 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 telephone inquiries.

Benefits of a Fee

In order to maintain the level of service presently provided through the public access program, the Judiciary would need appropriated funds to replace the fee revenue, and in this fiscal climate increased appropriations are not available. Fee revenue allows the Judiciary to pursue new technologies for providing public access, develop prototype programs to test the feasibility of new public access technologies, and develop enhancements to existing systems. By authorizing the fee, Congress has provided the Judiciary with revenue that is dedicated solely to promoting and enhancing public access. These fees are only used for public access, and are not subject to being redirected for other purposes. The fee, even a nominal fee, also provides a user with a tangible, financial incentive to use the system judiciously and efficiently, and in the absence of a fee the system can be abused.

Privacy

The Judiciary is committed to protecting private information in court filings from public access. It has been over a decade since the Judicial Conference began consideration of – and subsequently formulated – a privacy policy for electronic case files, and over four years since the enactment of Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure requiring that certain personal data identifiers not be included in court filings. These policies and rules have been integral to the success of the Judiciary's electronic public access program. Adherence to these policies and rules by litigants and attorneys is essential to ensure that personal identifier information is appropriately redacted from court filings. The Judicial Conference examined how the privacy rules were working in practice and found that overall the Judiciary's implementation of the privacy rules has been a tremendous success.

In 2001, the Judicial Conference adopted a policy on privacy and public access to electronic case files that allowed Internet-based access to civil and bankruptcy case filings; the policy required filers, however, to redact certain personal information (i.e., Social Security numbers, financial account numbers, names of minor children, and dates of birth). Following a pilot program and a Federal Judicial Center study on criminal case files, the Conference approved electronic access to criminal case files, with similar redaction requirements. The redaction requirements of the Conference's privacy policy were largely incorporated into the Federal Rules, effective December 1, 2007.

As noted above, a key tenet of these rules (as well as the precursor Conference policy) is that the redaction of personal identifiers lies with the filing party. The Advisory Committee Note accompanying Federal Rule of Civil Procedure 5.2 states: "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." Nonetheless, the Judicial Conference and the Administrative Office are obviously interested in ensuring that these privacy rules are adequate and appropriately followed. To this end, two Judicial Conference Committees – the Court Administration and Case Management Committee, and the Committee on Rules of Practice & Procedure – have worked jointly with the Federal Judicial Center to monitor and study the operation of the privacy rules and related policies and to address new issues that have arisen since their implementation. In addition, the Administrative Office took a number of steps to ensure that the privacy protections established in the federal rules can be more easily followed, including the establishment of a task force that developed a notice for the current CM/ECF system reminding litigants of their obligation under the law to redact personal identifier information and to require filers to affirm that they must comply with the redaction rules.

The Administrative Office continues to encourage courts to stress the rules' redaction requirements with those who file in the court. Options for informing the filers include various, readily available communications vehicles, such as the court's public website, newsletters, listserves, and Continuing Legal Education programs. Further, Judicial Conference Committees and the Administrative Office have asked individual courts to share information on actions they have taken to ensure compliance with the privacy rules, including promulgation of local rules or standing orders, modifications to local CM/ECF applications, and outreach efforts to the public and bar informing them of the redaction requirements. This type of information will assist the Administrative Office, as well as the Conference Committees, to be better informed of the scope of any non-compliance. Thus far, the Administrative Office has received an impressive response from the courts, which are addressing the privacy rules in a variety of ways, ranging from conducting education and awareness campaigns to issuing judicial orders to redact noncompliant filings.

E-Government Act Compliance

It is important to emphasize the effort and seriousness with which the Judiciary has implemented the E-Government Act's requirements. Section 205(d) of the Act 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 the case." The Judiciary has gone much further than "exploring" such a system. It designed and has now implemented that system in all courts, providing more than 1.4 million PACER users with access to over 500 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 $0.50 per page. This service saves litigants/lawyers and the public time and money by allowing them to file from any computer and also to download and review case information electronically, with all the attendant benefits.

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. No other court system in the world provides as much information to as many people in as efficient a manner. State court officials and court administrators from other countries contact the federal Judiciary frequently about our electronic public access model.

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

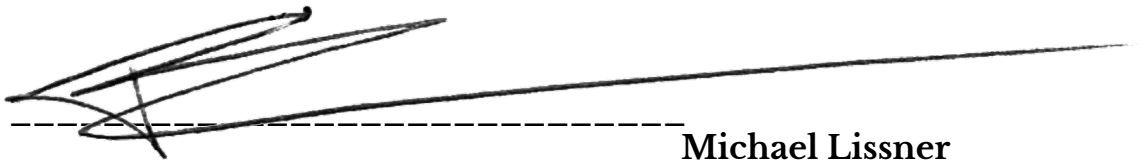
serving a record could be many orders of magnitude greater than the contemporary cost of performing this function.

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.

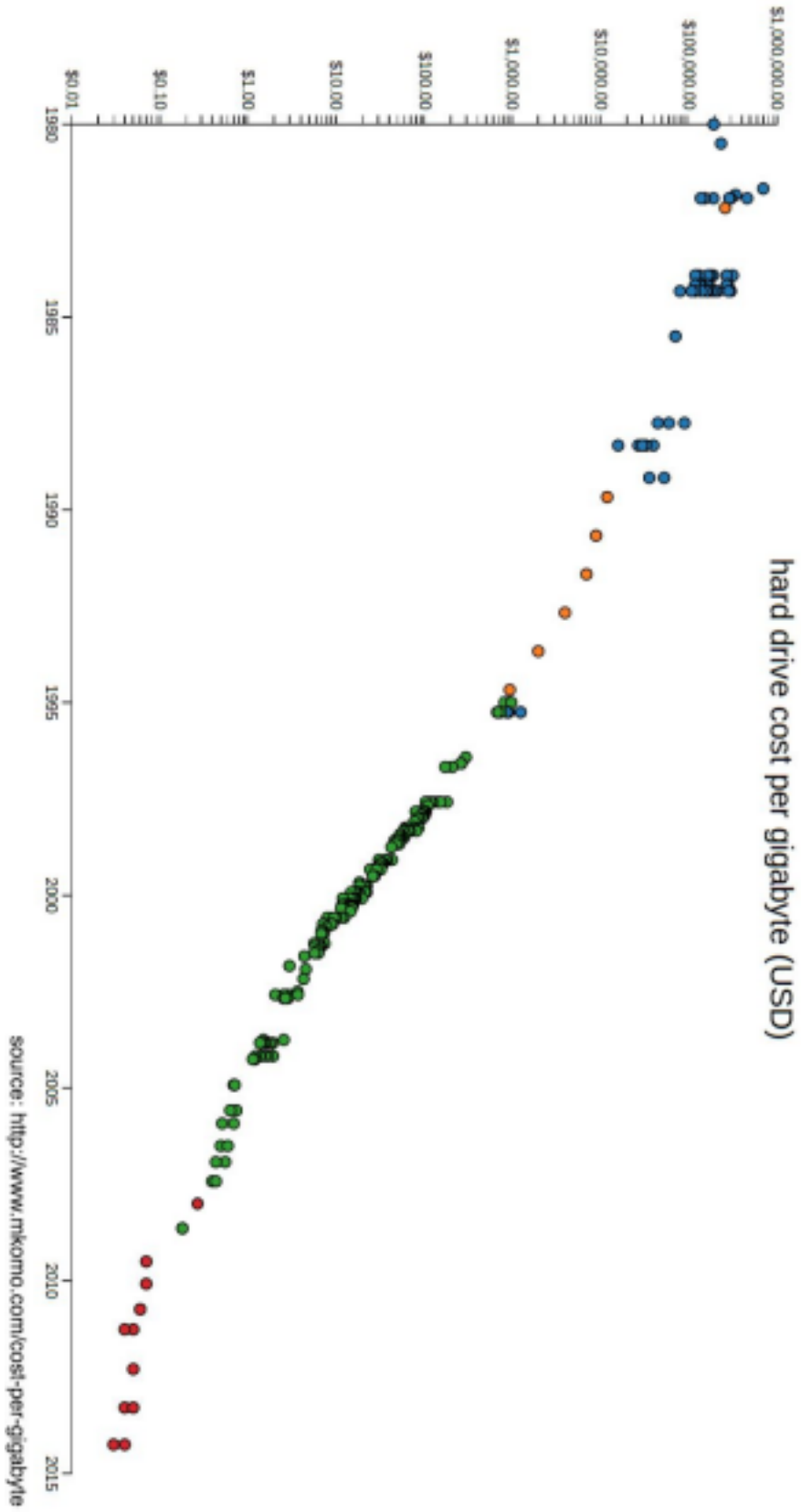
33. We declare under penalty of perjury that the foregoing is true and correct.

Executed on August 28, 2017.

Thomas Lee



Michael Lissner


hard drive cost per gigabyte (USD)
$0.01
$0.10
$1.00
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$1,000.00
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1980
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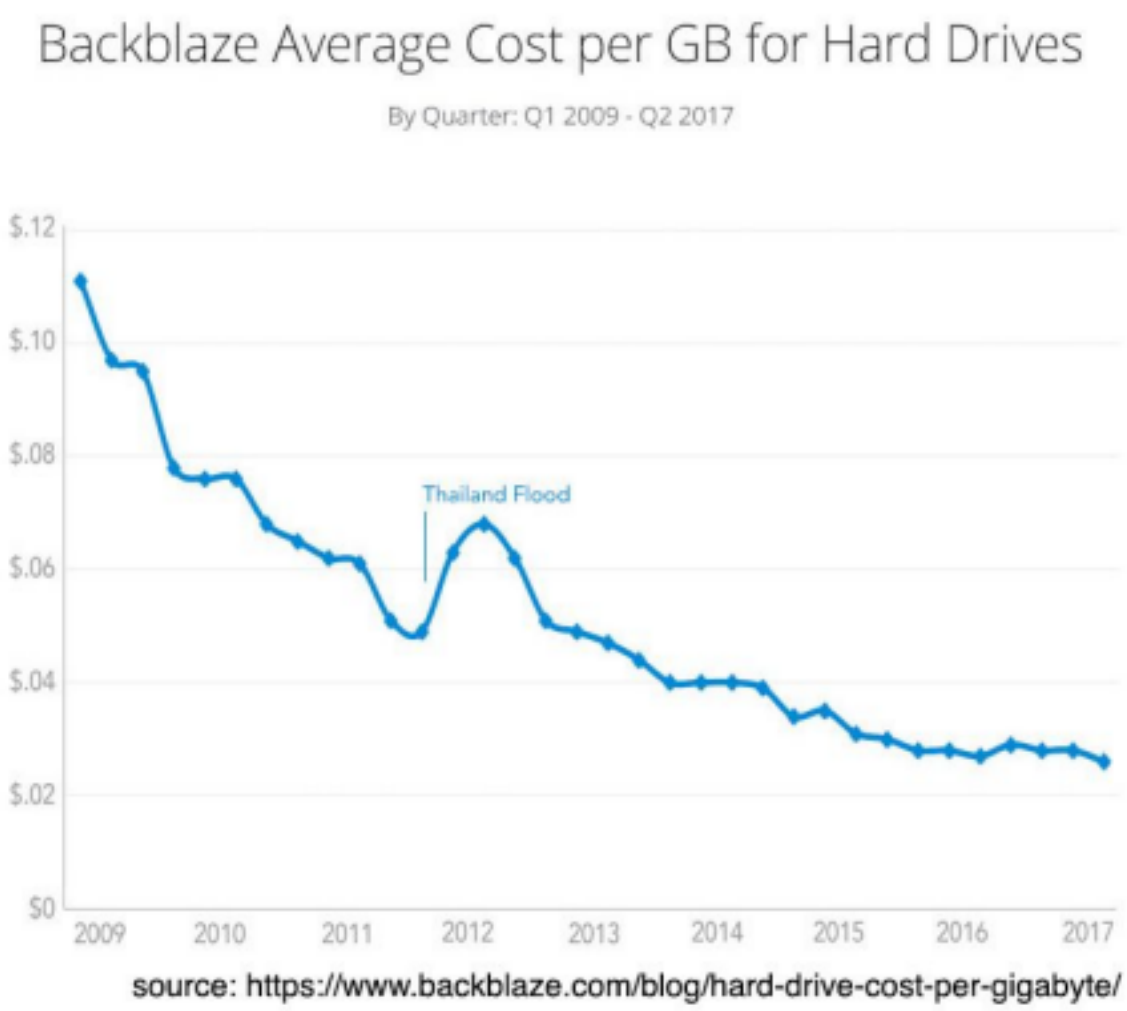
source: http://www.mkomo.com/cost-per-gigabyte


Backblaze Average Cost per GB for Hard Drives
By Quarter: Q1 2009 - Q2 2017
$.12
$.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/

Thomas Lee

50 Q St NE #2
Washington, DC 20002
(703) 944-7654
thomas.j.lee@gmail.com
https://github.com/sbma44

understanding / making / explaining technology
https://www.linkedin.com/in/tom-lee-a2112387/

EXPERIENCE

Mapbox — *Geocoding Lead*

JUNE 2010 - PRESENT

Guided Mapbox's location search team through a period of fast growth and into commercial success. Also performed a variety of legal, security and hardware tasks.

- Oversaw growth of geocoding business from 1% to 21% of revenue by line item, 39% to 71% by related-deal revenue. Shipped code, performed sales engineering, led hiring, participated in enterprise support, evaluated & managed compliance for licensed data.

- Managed federal government relations, including Congressional lobbying & testimony, agency meetings & writing op-eds on behalf of leadership. Liaised with relevant open data communities.

- Coordinated outside counsel during patent defense.

- Designed and implemented royalty tracking pipeline and mobile SDK battery test methodology. Assisted in design of mobile telemetry security systems. Authored first version of security protocols for participation in infosec events with hostile networks.

Sunlight Foundation — *CTO*

DECEMBER 2008 - JUNE 2010

Managed Sunlight Labs' twenty-two person technology department during its prime years of influence and size.

- Conceived, planned and executed mission-oriented technology projects.

- Represented Sunlight's positions on various government transparency measures in Congressional testimony, speaking engagements, writing, and media appearances.

- Expanded historically web dev-focused team to include political scientists, journalists, data analysts & mobile app developers.

- Primary author of grants and reports for bulk of Sunlight funding.

- Evaluated grant applications for potential funding. Managed relationships with peer organizations, funders and grantees.

SKILLS

writing · team management · software development · data analysis · speaking · system administration · information security · embedded systems

TECHNOLOGIES

Expert
Javascript / Node.js · Python / Django / Flask · SQL / PostgreSQL · bash / GNU · Docker · AWS / EC2 / ECS / CloudFormation / DynamoDB / ElastiCache / Kinesis / S3 · PHP / Drupal / Wordpress · AVR / Arduino · QGIS · GDAL · PostGIS · Mapbox

Productive
Perl · Ruby · HTML5 · CSS

Tourist
C · C++ · Swift/XCode · three.js

ORGANIZATIONS

OpenAddresses · FLOC · HacDC · DCist

EchoDitto — *Sr. Software Architect*

DECEMBER 2005 - DECEMBER 2008

Designed & implemented LAMP applications for campaigns and large nonprofits, primarily using the Drupal and WordPress frameworks.

- Assisted in requirement-gathering, copy editing and writing, strategy brainstorming, customer interaction and visual design.

- Developed variety of reporting mechanisms (SQL/Perl/Ruby).

- Launched, maintained and generated bulk of content for developer-focused EchoDitto Labs site.

Competitive Innovations — *Software Developer*

August 2002 - DECEMBER 2005

Created ASP.NET/Microsoft CMS-backed websites for committees and member offices in the U.S. House of Representatives; the U.S. Navy; George Washington University Law School; Miami Dade Community College; and the Corporate Executive Board.

- Interviewed, evaluated, trained and participated in the management of junior technical staff.

- Possessed security clearance as of December 2005.

SELECTED CLIPS

What Everyone Is Getting Wrong About Healthcare.gov
Wonkblog, Washington Post
http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/07/what-everyone-is-getting-wrong-about-healthcare-gov/

The Cost of Hashtag Revolution
The American Prospect
http://prospect.org/article/cost-hashtag-revolution

The Deleted Tweets of Politicians Find a New Home
Tell Me More (NPR)
http://www.npr.org/2012/06/06/154432624/the-deleted-tweets-of-politicians-find-a-new-home

Enhancing Accountability and Increasing Financial Transparency
U.S. Senate Committee on the Budget
https://www.budget.senate.gov/hearings/enhancing-accountability-and-increasing-financial-transparency

EDUCATION

University of Virginia — *BA, Cognitive Science*

1998-2002

Concentration in neuroscience, with work in the Levy Computational Neuroscience Lab. Computer Science minor. Echols Scholar.

MICHAEL JAY LISSNER

mike@free.law • (909) 576-4123 • 2121 Russell St., Suite B, Berkeley, CA 94705

EXPERIENCE

Executive Director and Lead Developer **2013-Present**
Free Law Project **Emeryville, CA**

Founded Free Law Project as a 501(c)(3) non-profit. My responsibilities as founder/director include identifying and pursuing grants and contracts, handling the marketing and accounting needs of the organization, and developing solutions for our stakeholders.

Free Law Project has been awarded grants or contracts from Columbia University, Georgia State University, University of Baltimore School of Law, and The John S. and James L. Knight Foundation, and has partnered with Google, Inc. and the Center for Internet and Technology Policy at Princeton University.

I am the lead developer for several of Free Law Project's biggest initiatives, including:

- The first ever full-text search interface for documents from the PACER system, containing nearly 20M records;
- The creation of the largest archive of American oral argument recordings, consisting of nearly one million minutes of recordings;
- The development of a comprehensive database of American judges;
- The curation of 4M court opinions, which are available via a powerful search interface, as bulk data, or via the first ever API for legal opinions;
- The creation of a web scraping infrastructure that has gathered more than 1M documents from court websites.

This work has enabled a number of research papers, made legal research more competitive, provided a useful resource to journalists, and helped innumerable people to engage in the legal system.

New Product Designer/Developer **2012-2013**
Recommind, Inc. **San Francisco, CA**

- Worked with the new products team to design and develop new enterprise-class products for AMLAW-50 law firms.
- Led design of new API-driven document sharing platform from initial concept to final specification, seeking stakeholder approval from upper management, sales, product management, and development teams. This process was guided by the creation of paper prototypes and low fidelity wireframe diagrams, culminating in high fidelity mock-ups and a written specification.

Solutions Developer **2010-2012**
Recommind, Inc. **San Francisco, CA**

- Designed and developed new features, products and processes for internal team of technical consultants.
- Implemented distributed search systems for top international law firms.
- Collaborated with internal and external stakeholders to gather requirements and scope work.
- Developed custom crawlers and search indexes for systems with millions of records.

Technology Intern **Summer, 2009**
Center for Democracy and Technology **San Francisco, CA**
Wrote design specification and began implementation of location privacy enhancements for the new Android operating system.

Systems Analyst and Community Researcher **2005-2008**
Community Services Bureau **Contra Costa County**
- Designed and implemented system for reporting educational outcomes and program metrics to senior management.
- Researched and wrote federally-mandated annual assessment of community needs.
- Worked with contractors to administer departmental databases and systems.
- Discovered and responsibly-disclosed security vulnerabilities in department systems, protecting tens of thousands of child and parent records.
- Tracked and reported daily enrollment of more than 2,000 children.

EDUCATION

School of Information, UC Berkeley **2008-2010**
- Masters in Information Management and Systems (MIMS), with a focus on Internet Law and Policy and a certificate in Management of Technology from Haas School of Business
- Theoretical coursework in information privacy, policy and economics, intellectual property law, and technology strategy
- Technical coursework in security, networking, programming paradigms, distributed computing, API design, and information architecture
- Taught Web Architecture summer seminar to class of twenty undergraduates including fundamentals of networking, dynamic websites, and browsers

University of California, Berkeley Extension **2005-2008**
- Unix/Linux fundamentals
- System administration programming, with focus on shell scripting and Python
- Advanced Java programming

Pitzer College, Claremont, California **2000-2004**
- Bachelor of Arts in English and World Literature with a minor in Spanish Language and Literature
- Coursework in economics, mathematics and C++ programming

PROJECTS & RESEARCH

CourtListener.com
My capstone project at UC Berkeley and now a core initiative of Free Law Project, CourtListener.com is an open-source legal research tool that provides daily awareness and raw data to users via custom email alerts, Atom feeds, podcasts, a RESTful API, and bulk data. CourtListener currently:
- Hosts the RECAP Archive, a collection of nearly 20M PACER documents;
- Has 4M Boolean-searchable opinions in its corpus;
- Has more nearly 700 days of oral argument audio;
- Has a comprehensive database of American judges;
- Receives thousands of API hits per day;
- Tracks every high court in the country, adding their opinions as they are published.

https://www.courtlistener.com | https://github.com/freelawproject/courtlistener

Seal Rookery

The Free Law Project Seal Rookery is a small project to collect and distribute all government seals in the United States. Currently, the project has more than 200 judicial seals.
https://github.com/freelawproject/seal-rookery

Selected Policy, Legal and Security Papers

- CourtListener.com: A platform for researching and staying abreast of the latest in the law
- Wikipedia.org: Jacobsen v. Katzer, Zeran v. AOL
- The Layered FTC Approach to Online Behavioral Advertising
- Technology Revolution and the Fourth Amendment
- Transparent Panacea: Why Open Email is Fraught with Problems
- Proactive Methods for Secure Design
- Breaking reCAPTCHA
- Facebook's Battle Sign: A Security Analysis

http://michaeljaylissner.com/projects-and-papers/

Additional Websites and Projects

michaeljaylissner.com | free.law | github.com/freelawproject

ADDITIONAL

Distance Travel

- **Summer, 2013-2014:** Completed south-bound thru-hike of Te Araroa Trail in New Zealand (2,000 miles). The Te Araroa Trail is considered one of the most-challenging long-distance trails in the world.
- **Summer, 2010:** Completed south-bound bike tour of California coast (1,000 miles).
- **Summer, 2005:** Completed north-bound thru-hike of Pacific Crest Trail from Mexico to Canada via Sierra and Cascade mountains (2,500 miles).

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,

/s/ Deepak Gupta

DEEPAK GUPTA
JONATHAN E. TAYLOR
GUPTA WESSLER PLLC
1900 L Street NW, Suite 312
Washington, DC 20036
Phone: (202) 888-1741
deepak@guptawessler.com

WILLIAM H. NARWOLD
MEGHAN S.B. OLIVER

ELIZABETH SMITH
MOTLEY RICE LLC
401 9th St. NW, Suite 1001
Washington, DC 20004
Phone: (202) 232-5504
bnarwold@motleyrice.com

Attorneys for Plaintiffs

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 CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendant, by and through the undersigned counsel, respectfully moves this Court to grant summary judgment in its favor as to liability in this matter. The grounds for the requested relief are set forth in the accompanying memorandum in support, the statement of material facts as to which there is no genuine dispute, and the accompanying exhibits.

November 17, 2017

Respectfully submitted,

JESSIE K. LIU
D.C. Bar #472845
United States Attorney

DANIEL F. VAN HORN
D.C. BAR # 924092
Chief, Civil Division

By: */s/ W. Mark Nebeker*
W. MARK NEBEKER (D.C. Bar #396739)
BRIAN J. FIELD (D.C. Bar #985577)
Assistant United States Attorneys
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-2536
mark.nebeker@usdoj.gov

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

JESSIE K. LIU
D.C. Bar #472845
United States Attorney

DANIEL F. VAN HORN
D.C. BAR # 924092
Chief, Civil Division

By: */s/ W. Mark Nebeker*
W. MARK NEBEKER (D.C. Bar #396739)
BRIAN J. FIELD (D.C. Bar #985577)
Assistant United States Attorneys
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-2536
mark.nebeker@usdoj.gov

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Plaintiffs, a class of individuals and entities charged for using Defendant's Public Access to Court Electronic Records ("PACER") system, ask this Court to grant summary judgment in their favor on liability in this matter. *See* Pls.' Mot. for Summ. J. at 1 (ECF No. 52) (hereinafter, "Pls.' Mot."). In Plaintiffs' estimation, the Defendant violated the E-Government Act of 2002 by charging PACER fees that "far exceed the cost of providing the records[.]" Pls.' Mot. 1. This contention is rooted in Plaintiffs' belief that the E-Government Act bars Defendant from charging any fee "that exceed[s] the cost of administering PACER." Pls.' Mot. 12. Not so. Indeed, Plaintiffs' understanding runs counter to the plain text of the E-Government Act, as well as Congress' repeated approval of Defendant's use of funds obtained through PACER. For these reasons, as well as the others discussed herein, this Court should deny Plaintiffs' Motion and instead grant summary judgment in Defendant's favor.

From 1991 to 2002, Congress required the Judicial Conference to prescribe reasonable fees for services that provide electronic access to court data. *See* Pub. L. No. 102-140, § 303. Through the E-Government Act of 2002, Congress eliminated this requirement. Instead, the E-Government Act authorized the Judicial Conference to charge fees for public access services, as it deemed necessary. *See* Pub. L. No. 107-347. Accordingly, there can be no real debate that Congress expressly granted the Judicial Conference authority to determine the appropriate level of fees to enhance public access beyond just the costs associated with administering PACER.

In the instant dispute, the question becomes whether the E-Government Act's elimination of the fee requirement was intended to require the Judicial Conference to set a PACER fee to cover only "the cost of administering PACER," as Plaintiffs contend, *see* Pls.' Mot. 12, or whether it was intended to grant the Judicial Conference discretion in setting fees and determining when to

charge such fees to fund its public access services and the services Congress expects will be funded from these fees.

As discussed herein the relevant statutory text and legislative history reveal that the E-Government Act was intended to provide the Judicial Conference with the discretion to determine when it would charge PACER fees and the amount of those fees, with the goal of providing certain information through the Internet and increasing free public access where possible. This is made abundantly clear by the fact that the only funding Congress created for such public access services were the fees charged for PACER access. Moreover, Congress' treatment of the funds collected and deposited into the Judiciary Automation Fund, as required by Congress both before and after the passage of the E-Government Act, only confirms further that the funds received have been properly used for more than just PACER access

BACKGROUND

PACER fees find their origin in a 1988 decision of the Judicial Conference to authorize "an experimental program of electronic access for the public to court information in one or more district, bankruptcy, or appellate courts[.]" Rep. of Proceedings of the Judicial Conference of the United States at 83 (Sept. 18, 1988) (attached to Decl. of W. Skidgel, Jr. (hereinafter, "Skidgel Decl.") as Ex. A). The Judicial Conference further authorized the Committee on Judicial Improvement "to establish access fees during the pendency of the program." *Id.* Shortly thereafter, in 1989, the Judicial Conference voted to recommend that Congress credit to the judiciary's appropriations account any fees generated by providing electronic public access to court records. *See* Rep. of Proceedings of the Judicial Conference of the United States at 19 (Mar. 14, 1989) (Skidgel Decl. Ex. B). In the Judiciary Appropriations Act of 1990, Congress did exactly that—establishing the Judiciary's right to retain revenues from fees generated through the provision of court records to the public. *See* Pub. L. No. 101-162, § 406(b). In 1990, the Judicial Conference

approved an initial rate schedule for electronic public access to court data via the PACER system. *See* Rep. of Proceedings of the Judicial Conference of the United States at 21 (Mar. 13, 1990) (Skidgel Decl. Ex. C).

In the Judicial Appropriations Act of 1991, Congress instituted a requirement that the Judicial Conference set a schedule of "reasonable fees … for access to information available through automatic data processing equipment." Pub. L. No. 101-515, § 404. In doing so, Congress determined that PACER users, rather than taxpayers generally, should fund public access initiatives. Congress further required that the Judicial Conference submit each such fee schedule to Congress at least thirty days before its effective date. *See id.* Additionally, Congress directed that all such fees collected for services rendered be deposited into the Judiciary Automation Fund ("JAF")[1] to reimburse expenses incurred in providing such services to the public. *See id.*

In the Judicial Appropriations Act of 1992, Congress expressly required that the Judicial Conference "shall hereafter 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."[2] Pub. L. No. 102-140.

[1] The Judiciary Automation Fund was subsequently renamed the Judiciary Information Technology Fund. *See* 28 U.S.C. § 612.

[2] Notably, the cited portions of the United States Code do not present the limitations that Plaintiffs would seek to add to the "reasonable[ness]" of the prescribed fees; rather in those statutes, there are limitations as follows:

- Under 28 U.S.C. § 1913, fees in the Courts of Appeals must be "prescribed from time to time by the Judicial Conference of the United States … reasonable and uniform in all the circuits." 28 U.S.C. § 1913.
- Under 28 U.S.C. § 1914, establishing filing fees at specific amounts in district courts, and "such additional fees only as are prescribed by the Judicial Conference of the United States. 28 U.S.C. § 1914(a)-(b).

Similarly, the House Appropriations Committee report for the Judicial Appropriations Act of 1993 expressly stated that charging fees for public access was "desirable." H. Rep. No. 102-709. In the following years, the Judicial Conference expanded the fee schedule to cover access to public records in appellate courts and the Court of Federal Claims. *See* Rep. of Proceedings of the Judicial Conference of the United States at 44–45 (Sept. 20, 1993) (Skidgel Decl. Ex. D); Rep. of Proceedings of the Judicial Conference of the United States at 16 (Mar. 15, 1994) (Skidgel Decl. Ex. E). Similarly, Congress required that the public access fee schedule be expanded to cover multidistrict litigation. *See* Pub. L. No. 104-317, § 403. In 1996, the Judicial Conference also approved a reduction in the fee for electronic public access for dial-up Internet connections. *See* Rep. of Proceedings of the Judicial Conference of the United States at 16 (Mar. 13, 1996) (Skidgel Decl. Ex. F).

In the following years, Congress repeatedly expressed its intention that the Judicial Conference use the fees generated from electronic public access services to improve and update various public access platforms. For instance, the Senate Committee on Appropriations Report for the Judicial Appropriations Act of 1997 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

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- Under 28 U.S.C. § 1926, fees and costs in the Courts of Federal Claims are limited to those "the Judicial Conference prescribes." 28 U.S.C. § 1926(b).
- Under 28 U.S.C. § 1930, specific fees are established for bankruptcy proceedings, and other fees are contemplated under title 11 if those fees are prescribed by the Judicial Conference and are "of the same kind as the Judicial Conference prescribes under section 1914(b) of [Title 28]." 28 U.S.C. § 1930(b) and (e).

> documents, electronic filings, enhanced use of the Internet, and electronic bankruptcy noticing.

S. Rep. No. 104-676 at 89.

The Judicial Conference's decision to charge a per-page fee for public access also pre-dates the E-Government Act. Indeed, in 1998, the Judicial Conference determined that with the introduction of Internet technology to the Judiciary's current public access program, it would include a per-page fee for access, while also introducing new technologies to expand public accessibility to information via PACER. Specifically, the Judicial Conference established a fee of $0.07 per page for access to certain court records on PACER. *See* Rep. of Proceedings of the Judicial Conference of the United States at 64–65 (Sept. 15, 1998) (Skidgel Decl. Ex. G). In 2001, the Judicial Conference provided that attorneys of record and parties in a case would receive one copy of all filed documents without charge and also that no fee will be owed until an individual account holder accrues more than $10 in a calendar year. *See* Rep. of Proceedings of the Judicial Conference of the United States at 12–13 (Mar. 14, 2001) (Skidgel Decl. Ex. H). In 2002, the Judicial Conference established a fee cap for accessing any single document, where there will be no charge after the first thirty pages of a document. *See* Rep. of Proceedings of the Judicial Conference of the United States at 11 (Mar. 13, 2002) (Skidgel Decl. Ex. I).

In 2002, Congress passed the E-Government Act of 2002. *See* Pub. L. No. 107-347. The E-Government Act amended existing law to remove the requirement that the Judicial Conference "shall hereafter" prescribe fees for public access to, instead, provide that the Judicial Conference "may, only to the extent necessary, prescribe reasonable fees." *Id*. The E-Government Act also included several directives. For instance, it required that all federal courts have websites with certain general court information (*e.g.*, courthouse location, contact information, local rules, general orders, docket information), that all court opinions issued after April 16, 2005, be available

in text-searchable format, and that an annual report be provided to Congress identifying any court requesting a deferral from these requirements. *See id*, § 205. Thus, for the first time, Congress required the Judiciary to make information available through the Internet. Left unspecified, however, in the text of the E-Government Act was any source of funding for providing this information other than the "reasonable fees prescribed by the Judicial Conference for electronic access to information stored in automated data processing equipment." Pub. L. No. 102-140, § 303(a); Pub. L. No.107-347, § 205.

In 2003, Congress expanded the operations for which the Judicial Conference should use public access fees. Specifically, the House Appropriations Committee stated that it "expect[ed] the fee for the Electronic Public Access program to provide for Case Management Electronic Case File ('CM/ECF') system enhancement and operational costs." H. Rep. No. 108-221 at 116; see H. Rep. No. 108-401 ("the conferees adopt the House report language concerning Electronic Public Access fees."). Similarly, the Senate Appropriations Committee stated that it was "impressed and encouraged" by the "new and innovative" CM/ECF system and that it expected a report on "the savings generated by this program at the earliest date possible." S. Rep. No. 108-144 at 118.[3] In order to provide sufficient revenue to support the CM/ECF enhancements and operational costs that Congress expected (and "expect[ed]" would be funded with fees from the "Electronic Public Access program"), the Judicial Conference issued a new rate schedule, charging $0.08 per page. *See* Rep. of Proceedings of the Judicial Conference of the United States at 12 (Sept. 21, 2004) (Skidgel Decl. Ex. J). Notably, even before the E-Government Act, Congress expressed its intention that the Judiciary will spend PACER receipts beyond just the cost of supporting PACER.

[3] The Conference Report for the Omnibus Appropriations Act of 2004 expressly "adopt[ed] the language in the House Report concerning Electronic Public Access fees." 149th Cong. Rec. H12312-01 at H12515.

In fact, the Senate Committee on Appropriations Report for the Judicial Appropriations Act of 1999 provided that 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 the availability of public access." S. Rep. No. 105-235, at 114.

In 2007, the Administrative Office of the U.S. Courts ("AO") submitted the Judiciary's Fiscal Year ("FY") 2007 Financial Plan to both the House and Senate Appropriations Committees providing for, among other things, "expanded use of the Electronic Public Access ('EPA') revenues." Judiciary FY07 Financial Plan (Mar. 14, 2007) (Skidgel Decl. Ex. K). On May 2, 2007, the Appropriations Committees sent letters to the AO, stating that the Committees had "reviewed the information included and ha[d] no objection to the financial plan including the following proposal[ ]: … the expanded use of [EPA] Receipts." Ltr. from Sens. Durbin and Brownback (May 2, 2007) (Skidgel Decl. Ex. L); Ltr. from Rep. Serrano (May 2, 2007) (Skidgel Decl. Ex. M) (hereinafter, "2007 Letters"). Similarly, the AO submitted its FY07 Financial Plan to both Appropriations Committees, outlining various courtroom technology installations and maintenance that would be funded through EPA revenues. Judiciary FY07 Financial Plan at 43 (Mar. 14, 2007) (Skidgel Decl. Ex. K). These expenditures were approved through the Financial Services and General Government Appropriations Act of 2008. *See* Pub. L. No. 110-161.

In 2011, the Judicial Conference again amended the PACER fee schedule, raising the per-page cost to $0.10. *See* Rep. of Proceedings of the Judicial Conference of the United States at 16 (Sept. 13, 2011) (Skidgel Decl. Ex. N). In doing so, the Judicial Conference expressly noted the existing statutory and policy requirements of charging fees commensurate with the cost of providing existing services and developing enhanced services. *See id.* Notably, the Judicial

Conference recognized that it had not increased PACER access fees since 2005 and also that its EPA obligations during the past three fiscal years had exceeded revenue. *See id.*

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings and evidence "show[] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Once the moving party has satisfied its burden, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but … must set forth specific facts showing that there is a genuine issue for trial." *Id.*

ARGUMENT

I. DEFENDANT HAS COMPLIED WITH THE E-GOVERNMENT ACT

This dispute presents two widely divergent readings of the same statutory text. As discussed below, Defendant's reading and application of this statute is supported by the statute's text, its legislative history, and Congressional actions in the years since it was passed. In contrast, Plaintiffs rely on a strained reading of the statutory text and subsequent legislative history to arrive at their desired end. Specifically, Plaintiffs contend that the E-Government Act expressly bars Defendant from charging any PACER fees beyond just those fees necessary to keep the PACER system operating.[4] And Plaintiffs further allege that the current PACER fees must be deemed

[4] In fact, notwithstanding that Congress directed public access fees to be used for the CM/ECF system, *see supra* at 6, Plaintiffs reject even the notion that PACER fees may be used for this system, *see* Pls.' Mot. 9.

excessive based on the way in which Defendant has spent the money received from these fees. Both arguments miss the mark and this Court should grant summary judgment in Defendant's favor.

A. The Text of the E-Government Act Confirms That Defendant's PACER Fees are Lawful

Plaintiffs appear to operate under the misimpression that the E-Government Act is the lone source of Defendant's authorization to charge PACER fees. Yet, Defendant's authorization to charge such fees predates the E-Government Act, with that Act merely amending the existing authorization to charge reasonable fees that Defendant deems necessary for providing PACER access and other public access services. *See* Pub. L. No. 102-140; *see also* 28 U.S.C. § 1913 note. In the E-Government Act, Congress amended Pub. L. No. 102-140, § 303 to read:

> (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 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 (a) as a charge for services rendered shall be deposited as offsetting collections to the Judicial Automation Fund pursuant to 28 U.S.C. § 612(c)(1)(A) to reimburse expenses incurred in providing these services.

Pub. L. No. 107-347, § 205(e); 28 U.S.C. § 1913 note.

In order to understand the E-Government Act properly, it must be read in the context of the previous statutory requirements regarding PACER fees and public access services.

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.

[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.

Second, it is important to understand the ways in which the E-Government Act amended existing statutory language. The plain text of Public Law 102-140, as amended by the E-Government Act, states that Defendant "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. Notably, this authorization makes no mention of PACER. Rather, the fees may be charged for providing information "through automatic data processing equipment." *See id.* Further, 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." *Id.* Continuing, Congress crafted an oversight role for itself with respect to these fees: "The Judicial Conference and the Director shall transmit each schedule of fees prescribed" by the preceding provision "at least 30 days before the schedule becomes effective." *Id.* Finally, Congress directed that these fees be accounted for by being "deposited as offsetting collections to the Judiciary Automation Fund … to reimburse expenses incurred in providing these services." *Id.* Accordingly, the plain text of the E-Government Act authorizes the Judicial Conference to charge fees, as it deems necessary, for the provision of information to the public through electronic means.

"As always, in interpreting a statute," the starting point is "the text of the statute itself." *Murphy Exploration and Prod. Co. v. U.S. Dep't of Interior*, 252 F.3d 473, 480 (D.C. Cir. 2001) (citing *Carter v. United States*, 530 U.S. 255 (2000)). When interpreting a statute, courts operate under the "cardinal principle of statutory construction" to "give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). A plain reading of this text confirms that the Defendant's PACER fees are lawful.

Rather than relying on "the text of the statute itself," *Murphy Exploration*, 252 F.3d at 480, Plaintiffs ask this Court to act as legislator and add words to the statute that Congress did not include. Indeed, Plaintiffs suggest that the "only permissible reading of this language is that it bars the Judicial Conference from charging more in PACER fees, in the aggregate, than the reasonable costs of administering the PACER system." Pls.' Mot. 1. But the text includes no such limitation. Rather, Plaintiffs cobble together various clauses of this statutory language to reach their desired conclusion. *See* Pls.' Mot. 1 (quoting portions of 28 U.S.C. § 1913 note). Ultimately, Plaintiffs wish Congress to have stated that "[t]he Judicial Conference may, only to the extent necessary [to fund PACER], prescribe reasonable fees" and that "all fees hereafter collected as a charge for [PACER] shall be deposited as offsetting collections to the Judiciary Automation Fund … to reimburse expenses incurred in providing [PACER.]" But that is not what Congress provided. In fact, as discussed in Part I.B below, such a reading runs directly counter to the clear Congressional intent of the E-Government Act—not to mention the fact that this reading ignores that the E-Government Act never mentions PACER in any way. *See infra* at Part I.B.[7]

In addition to the language of the E-Government Act itself, the lawfulness of Defendant's PACER fees is further confirmed by the language Congress did *not* include in the E-Government Act. Specifically, Plaintiffs suggest that the "liability question" in this matter "is straightforward" because in 2002 "Congress found that PACER fees (then set at $.07 per page) were 'higher than the marginal cost of disseminating the information.'" Pls.' Mot. 5. But the Congressional Report

[7] Notably, the brief of *amici* Reporters Committee for Freedom of the Press and Seventeen Media Organizations relies on the same misunderstanding. Specifically, *amici* suggest that the E-Government Act imposes a "limitation on fees for access to court records through PACER," notwithstanding that nothing in the E-Government Act includes such a limitation. *Amici* Br. of Reporters Committee at 2 (ECF No. 59). Accordingly, *amici*'s arguments fail for the same reasons as do Plaintiffs'.

on which Plaintiffs rely goes on to note that this fee was made "[p]ursuant to existing law." *See* S. Rep. No. 107-174 at 5. Had Congress intended the E-Government Act to change that "existing law," it would have expressly done so.

In fact, Congress made clear in the E-Government Act that it knew how to require the Judicial Conference to take action. For instance, the Act included several express requirements, including, *inter alia*, that all courts have operating websites within several years and that the websites include certain specific categories of information. *See* Pub. L. No. 107-347, § 205(a), (f). Congress further required that the courts "update[ ]" this information "regularly." *Id.* § 205(b)(1). But Congress did not include any express directives regarding the amount of fees that the Judicial Conference could charge for PACER access. And where Congress chose not to use similar language imposing requirements onto Defendant with regard to PACER, courts are not to read such requirements into the text. *See Russello v. United States*, 464 U.S. 16, 23 (1983). Thus, where, as here, Congress affirmatively established duties on the Judiciary by clear language, *see* Pub. L. No. 107-347, § 205(a)(1)-(7) (the chief judges "shall cause to be established and maintained … a website that contains … the following [seven categories of] information"), but has not required the reduction of fees if they exceed actual costs of providing a specific service, there is a presumption that Congress omitted such a requirement knowingly, *see Russello*, 464 U.S. at 23.

In fact, Congress showed in other statutory provisions that it knew how to include exactly the type of language that Plaintiffs ask the Court to read into the E-Government Act. Specifically, Plaintiffs place great weight on the E-Government Act's "offsetting collections" language, suggesting that they are entitled to recoup "reasonable" fees paid if it turns out that the fees collected exceed the cost of providing the on-line access to documents, because the legislation at

issue provides that "the fees … collected … 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." Pls.' Mot. 5. Plaintiffs appear to argue that this language requires that fees deposited not be used for anything other than PACER and that fees may be collected only as necessary to reimburse the cost of PACER.

This reading, however, is cast into doubt by at least two other statutory provisions. For instance, in two other portions of Public Law 102-140, Congress used similar language with no hint that the amount of the fees collected would be altered by including a requirement that receipts "shall be deposited as offsetting collections[.]" Specifically, in Section 111, Congress effected specific changes to the bankruptcy fees allowed under 28 U.S.C. § 1930(a), increasing certain fees by exact dollar amounts and calling for precise percentages of the fees collected to be "deposited as offsetting collections to the appropriation "United States Trustee System Fund[.]" Pub. L. No. 102-140, § 111. If Plaintiffs' reading of such language were correct, this statutory language would have an internal conflict. In Plaintiffs' estimation, such fees may only be charged to the extent necessary to "offset[ ]" expenses. But if that were correct, it would raise serious questions about whether bankruptcy fees may still be charged at the statutorily required rates if the receipts exceed expenses. Of course, such a reading must be rejected. *See Nat'l Ass'n of Mortg. Brokers v. Bd. of Govs. of Fed. Reserve Sys.*, 773 F. Supp. 2d 151, 168 (D.D.C. 2011) ("it is a cardinal principle of statutory construction that the statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant") (quoting *TRW, Inc. v. Andrews*, 534 U.S. 19, 21 (2001)).

Additionally, for a second time in the statute, Congress used the "offsetting collections" language with no suggestion that this language would affect the amount of fees collected.

Specifically, Congress increased the fees collected by the Security and Exchange Commission ("SEC"): "upon enactment of this Act, the rate of fees under [15 U.S.C. § 77f(b)] shall increase [to a certain percent] and such increase shall be deposited as an offsetting collection to this appropriation to recover costs of services of the securities registration process: Provided further, That such fees shall remain available until expended.") Again, Plaintiffs' reading of such statutory language would require that this "offsetting" language be read to require the fees to be deemed unlawful if the receipts exceed the "costs of the services." *Id.* But as that would require the SEC to reduce fees below the statutorily required level, such a reading cannot be countenanced.

Indeed, when Congress concluded that estimated fees collected by the Federal Trade Commission may exceed what an agency should be permitted to spend in a given fiscal year, it provided an explicit limitation. *See* Pub. L. No. 102-140, § 111 ("fees made available to the Federal Trade Commission shall remain available until expended, but … any fees in excess of $13,500,000 shall not be available until fiscal year 1993"). Ultimately, Congress knew how to place limits on an agency's ability to collect and expend fees with express language, none of which did it do in the E-Government Act of 2002.[8]

In sum, it is clear both from the language that Congress included (and did *not* include) in the E-Government Act that the most accurate way to read the Act is that: (1) Defendant may charge "reasonable" fees for access to information available through automatic data processing equipment (e.g., information available on-line, including through PACER access); (2) those fees may be

[8] Instead, Congress required the AO to submit a "comprehensive financial plan for the Judiciary allocating all sources of available funds including appropriations, fee collections, and carryover balances, to include a separate and detailed plan for the Judiciary Information Technology fund." Pub. L. No. 110–161. Never has Congress responded to such a plan by limiting expenditures; rather, as discussed herein, it has frequently encouraged spending in areas such as courtroom technology.

prescribed to the extent necessary; (3) Defendant may provide PACER access without fees for certain classes of users; and (4) receipts from PACER fees shall be deposited in a specific fund and accounted for as offsets for services rendered, but they should be deposited in that fund regardless of the artificial limitations proposed by Plaintiffs.

But as noted earlier, Plaintiffs would instead have this Court believe that Congress *meant* the E-Government Act to read as follows: "(a) The Judicial Conference may, only to the extent necessary [to pay for PACER], prescribe reasonable fees …[and] (b) … All fees hereafter collected by the Judiciary under paragraph (a) as a charge for services rendered [PACER] 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 [PACER]."

That is, of course, not what Congress included in the E-Government Act and the Court should reject Plaintiffs' attempt to have this Court act as legislator and add text to the E-Government Act.

B. The E-Government Act's Legislative History Confirms that Defendant's PACER Fees are Lawful

To the extent that there remains any doubt about what Congress meant through the portions of the E-Government Act at issue here, the legislative history supports Defendant's reading. *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002) ("where the language is subject to more than one interpretation and the meaning of Congress is not apparent from the language itself," courts may "look to the general purpose of Congress in enacting the statute and to its legislative history for helpful clues"). Notably, though, the Court "must avoid an interpretation that undermines congressional purpose considered as a whole when alternative interpretations consistent with the legislative purpose are available." *Id.*

In the Senate Appropriations Committee Report on the E-Government Act,[9] the Committee explained that the purpose behind changing from a *requirement* to charge fees ("shall") to an *ability* to charge fees ("may") was 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, § 205(e) (emphasis added). The Senate Committee Report proceeded to discuss PACER as just *one* example of the ways in which the AO disseminates information to the public. *See id.* In so doing, this Report confirms that the statutory text at issue is not limited to PACER alone, but rather confirms that PACER is merely one component of Defendant's responsibility for disseminating information to the public.

Further, Congressional treatment of Defendant's PACER fees since the E-Government Act was passed confirms this reading. Indeed, less than a year after the E-Government Act was passed, both the House and Senate Appropriations Committees expressly directed the AO to use PACER fees to update the CM/ECF system.[10] *See* S. Rep. No. 108-144 at 118; H. Rep. No. 108-221 at 116. And several years later, the AO informed Congress that it planned to use receipts from PACER fees to fund courtroom technology and to perform infrastructure maintenance. *See* Judiciary FY07

[9] The House Appropriations Committee Report on the E-Government Act is silent as to the purpose behind the language in question. *See* H. Rep. No. 107-787.

[10] Notably, Congress indicated that it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. the following are direct costs associated with development and maintenance of CM/ECF: Software Development, Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize or replace CM/ECF. Skidgel Decl. ¶ 17.

Financial Plan at 43 (Mar. 14, 2007) (Skidgel Decl. Ex. K). In response, the Committees expressly endorsed these expenditures. *See* 2007 Letters (Skidgel Decl. Exs. L & M).[11]

Similarly, the March 25, 2010 letter from Senator Lieberman on which Plaintiffs heavily rely, *see* Pls.' Mot. 1–2, confirms Defendant's understanding of the E-Government Act. Specifically, Senator Lieberman emphasized that the goal of the Act was to change from a mandatory fee to a discretionary fee. *See* Pls.' Mot. Ex. G at 4. And in this letter itself, Senator Lieberman confirms that Defendant "asked for *and received* written consent from the Appropriations Committees to 'expand use of [EPA] receipts to support courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance." *Id.* (emphasis added). Statements made by Senator Lieberman years later do not change this fact.[12]

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[11] Much has been made in this litigation about television monitors in certain federal district courtrooms, which were purchased with PACER funds. But Congress was notified about this use of PACER funds and did not respond with any objection. *See* Judiciary FY07 Financial Plan at 43 (Mar. 14, 2007) (Skidgel Decl. Ex. K). Moreover, proving a method for jurors and the general public to see case documents in a courtroom is entirely consistent with Defendant's charge to "make [such records] available to the public." 28 U.S.C. § 1913 note.

[12] Plaintiffs also suggest that Senator Lieberman's letter "reproach[ed] the AO for continuing to charge fees 'well higher than the cost of dissemination.'" Pls.' Mot. 1; Taylor Decl. Exs. G & H. And while the Court may review the text of Senator Lieberman's letter to determine whether he, in fact, "reproach[ed]" the AO, that is largely beside the point. The statutory text confirms the Defendant's reading of the E-Government Act and Senator Lieberman's isolated statements years later do nothing to change that fact. *See Sullivan v. Finkelstein*, 496 U.S. 617, 631 (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."). Indeed, not only do "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," but "even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117–18 (1980). Ultimately, the letter from Sen. Lieberman expressly confirms that Congress "consent[ed]" to the exact "use of [EPA] receipts to support courtroom technology" about which Plaintiffs now complain. *See* Taylor Decl. Ex. G. Any attempt to twist Senator Lieberman's words from 2010 to suggest a different legislative intent behind the E-Government Act—one that is not supported by the statute's text—should be disregarded. The same fate befalls the *amici* brief that Senator Lieberman filed in this action. *See* ECF No. 56. That brief, which attempts to offer evidence of legislative intent fifteen years after the E-Government Act's passage,

C. Defendant's Use of PACER Fees is Lawful

In addition to arguing that the E-Government Act expressly limits the permissible fees charged for PACER access, Plaintiffs go to great lengths to argue by implication that Defendant must be violating the E-Government Act because, in Plaintiffs' estimation, it is spending PACER funds on improper things. But in each instance, Plaintiffs are either relying on faulty information or fail to realize that the expenditures are being made at the behest of Congress.

As noted earlier, Plaintiffs place great weight on the televisions that were placed into various courtrooms to provide jurors and the general public with the ability to view electronic records during judicial proceedings. *See supra* n.11. Plaintiffs similarly raise questions with the use of PACER fees to "(2) send notices to creditors in bankruptcy proceedings … ; (3) send notices to law-enforcement agencies under the Violent Crime Control Act … ; (4) provide online services to jurors … ; (5) cover 'costs associated with support for the uscourts.gov website,' … ; and (6) fund a state-court study in Mississippi." Pls.' Mot. 17. Not only are Plaintiffs misguided with respect to the televisions, *see supra* n. 11, but they fail to recognize that each of these identified items have been subject to Congressional approval. For instance, it was the Report from the House Committee on Appropriations regarding the Appropriations Act of 1997, which 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 the availability of public access," including "electronic bankruptcy noticing." H. Rep. No. 104-676 at 89. Similarly, in 1998, the Report of the Senate Committee on Appropriations expressed that the Committee "expect[ed] that available balances from public

cannot be read to supersede the clear text of the statute and actions of Congress at the time of the Act's passage.

access fees in the judiciary automation fund [would] be used to enhance availability of public access." *See* S. Rep. No 105-235 at 114. The Judiciary relied on these and similar reports to develop a system for probation and pretrial services that would electronically notify local law enforcement agencies of changes to the case history and to create a web-based juror notice system. Additionally, for the "study in Mississippi," the AO undertook a study in accordance with the Senate Committee on Appropriations' Report of July 2006, which expressed the Committee's support for the Federal Judiciary sharing its case management electronic case filing system at the State level and encouraged the Judiciary to study whether sharing such technology, including electronic billing processes, is viable. *See* S. Rep. No. 109-293 at 176. Notably, these expenditures were also approved by the Committees on Appropriations from both the House and Senate. *See* 2007 Letters (Skidgel Decl. Exs. L & M).

II. PLAINTIFFS' MISCELLANEOUS ARGUMENTS LACK MERIT

Plaintiffs also rely on a scattering of miscellaneous arguments in their challenge to the PACER fees, none of which has merit.

A. Independent Offices Authorities Act

Plaintiffs ask the Court to adopt their reading of the E-Government Act based also on an analogy to the 1982 Independent Offices Authorities Act ("IOAA"). *See* Pls.' Mot. 12 (suggesting that the IOAA is an "analogous statute"). This statute authorizes agencies to charge a user fee for "each service or thing of value provided by [the] agency," 31 U.S.C. § 9701(a), but limits the fees that may be charged to fees that are "fair" and "based on" the cost to the Government, the value of the service, public policy and "other relevant facts[,]" *id.* Plaintiffs suggest that this language, read alongside the E-Government Act, shows a "clear[ ] inten[tion] for fees to be restricted to the costs of providing the services for which they are charged … and nothing more." Pls.' Mot. 14.

Plaintiffs are misguided for several reasons. First, they suggest that "[l]ike the E-Government Act, the IOAA's goal is to make agency programs conferring benefits on recipients 'self-sustaining to the extent possible.'" Pls.' Mot. 12 (quoting 31 U.S.C. § 9701(a)). But it is worth noting that the E-Government Act does not include any similar language as to that which Congress included in IOAA regarding the goal of "self-sustain[ment]." Moreover, Plaintiffs appear to suggest that this 1982 Act operates as an across-the-board restriction on any fee that an agency charges for any service where, according to Plaintiffs, there is a *per se* bar on agencies "charging fees that exceed the costs of providing the service." Pls.' Mot. 12. Not only is that unsupported by the cases on which Plaintiffs rely, it is belied by the fact that Congress routinely sets fee levels in statutes, irrespective of the exact cost of providing the underlying service. *See supra* at 14–15 (discussing several statutorily enacted fees).

Moreover, the AO is not subject to the IOAA; but even if it were, it is not subject to the IOAA regarding the portion of the E-Government Act at issue here. If the two statutes are in conflict, the E-Government Act, coming twenty years after the IOAA, would govern, allowing more discretion in the assessments of fees that can provide the services called for in the E-Government Act. Indeed, a repeal by implication may be found when earlier and later statutes are irreconcilable. *See Gallenstein v. United States*, 975 F.2d 286, 290–91 (6th Cir.1992) (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (Courts may infer a statutory repeal if such a construction is necessary in order that the words of the later statute shall have meaning). Here, the E-Government Act expressly required courts to establish websites with specific information, including courthouse addresses and text-searchable opinions, but included no separate funding beyond that collected as

a reasonable fee for electronic access to court records. The clear intent was to permit the free access to such information even if the funds had to come from PACER fees to cover the costs.

Although the IOAA states generally that the head of an agency may establish fees, the fees at issue here are expressly provided for in another statute, which directs that the *Judicial Conference*, not the Director, may prescribe fees. Additionally, the D.C. Circuit held in *Capital Cities Communications, Inc. v. FCC*, 554 F.2d 1135 (D.C. Cir. 1976), that the IOAA does not authorize an agency to vary its fees among beneficiaries. *Id.* at 1138. In contrast, the Judiciary's enabling statute, specifically allowed for varying fees among beneficiaries when it stated: "Judicial Conference shall hereafter prescribe reasonable fees …. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees." Pub. L. No. 102-140, § 303. The section on exempting persons and classes of persons, and distinguishing between classes was not changed by the E-Government Act.

Furthermore, according to the Government Accountability Office's Principles of Federal Appropriations Law, which Plaintiffs reference, *see* Pls.' Mot. 14, "[f]ees incident to litigation in the courts are also commonplace, but they implicate certain constitutional considerations and are prescribed under statutes other than the IOAA." *See* Government Accountability Office, *Principles of Federal Appropriations Law,* 2008 WL 6969303; *see also* 28 U.S.C. §§ 1911 (Supreme Court), 1913 (courts of appeals), 1914 (district courts), 1926 (Court of Federal Claims), 1930 (bankruptcy fees). Thus, notwithstanding the IOAA, these provisions permit reasonable fees to be charged to those seeking access to the courts. *See, e.g.*, *Lumbert v. Illinois Dep't of Corrections*, 827 F.2d 257 (7th Cir. 1987).

Ultimately, Plaintiffs' reliance on the IOAA is misguided as it offers no insight into either the E-Government Act or the statutory authorization for Defendant to charge PACER fees. If

anything, the IOAA language only confirms further that Congress knows how to tether an agency's charge of fees to the costs of providing a particular service. This Court may, and indeed should, cast aside Plaintiffs reliance on the IOAA.

B. First Amendment

Notwithstanding that their Complaint does not include a claim that PACER fees somehow violate the First Amendment, Plaintiffs now suggest that the First Amendment should guide the Court's resolution of how much may be charged for electronic access to Court records. *See* Pls.' Mot. 2, 14–16. But Plaintiffs fail to identify any authority for this proposition. Indeed, Plaintiffs are misguided in their belief that PACER fees create a barrier to access, as they are able to view all electronically filed records free of charge through terminals available at the courthouse.[13] Moreover, the cases on which Plaintiffs rely are inapposite, addressing fees sought to be collected for utilizing a public forum for purposes of engaging in First Amendment protected speech or other

[13] Similarly, *amici* appear to fall into the same trap. The brief of the Reporters Committee for Freedom of the Press and Seventeen Media Organizations, for instance, bases its argument on the notion that "accuracy and fairness in the news media's reporting" is aided through "unfettered and inexpensive access to court documents." *Amici* Br. of Reporters Committee at 2 (ECF No. 59). But as noted, all such records are readily available through terminals at the courthouse and, to the extent that *amici* are suggesting that there is a First Amendment right to access court filings *electronically*, they fail to offer any support for such a proposition. *See id.* at 9–10 (citing cases discussing First Amendment right to access court documents, none of which suggests a First Amendment right to *free electronic* access). The brief of the American Association of Law Libraries similarly focuses on an "essential" need for "[p]ublic access to federal court proceedings and records[.]" *Amici* Br. of Am. Assoc. of Law Libraries, *et al*. at 2 (ECF No. 61). But *amici* similarly fail to note that court records are freely accessible at the courthouse and that provisions exist for individuals to obtain free access through fee waiver requests. Ultimately, the American Association of Law Libraries offers no legal basis for concluding that the current PACER fees violate any statutory provisions. Rather, they appear simply to be using their brief to complain about the process for obtaining fee waivers. Ultimately, this Court may reject the American Association of Law Libraries' arguments, as they provide no basis for concluding that Defendant has violated any statutory provisions relevant to PACER fees.

exercise of the free exercise clause. Plaintiff's hint that somehow the First Amendment could prohibit the charging of fees as a convenience is unsupported.

The Complaint makes no mention of the First Amendment as a basis for Plaintiffs claims, nor do the cases they cite offer any support for the suggestion that the First Amendment would support a requirement to limit fees to electronic access to Court information. Plaintiffs rely on several cases that address only the collection of fees as a prerequisite to engaging in free speech. *See, e.g.*, *Sullivan v. City of Augusta*, 511 F.3d 16, 38 (1st Cir. 2007) (permit requirements for demonstration too onerous to pass First Amendment scrutiny); *Eastern Connecticut Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983) (invalidating permit processing fees and insurance requirements for demonstration on public property). These cases involved fees collected as a precondition to granting a permit for the plaintiffs to engage in expressive activity and have no bearing here. Likewise, *Murdock v. Penn.*, 319 U.S. 105, 113–14 (1943) (Jehovah's Witnesses door to door distribution of literature and soliciting people to purchase religious books and pamphlets) and *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1165 (2d Cir. 1995) (approving flat annual registration fee of $80 for all professional fundraisers as nominal and reasonably connected to administrative costs, including enforcement, of registration system, and concluding fee did not violate First Amendment), involved limitations placed on expressive conduct and have no relevance here.[14]

[14] Similarly, Plaintiffs rely on *Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1981) (discussing rights under free exercise clause); *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (appeal of conviction for taking part in a parade or procession upon a public street without a license); and *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1165 (2d Cir. 1995) (approving flat annual registration fee of $80 for all professional fundraisers as nominal and reasonably connected to administrative costs, including enforcement, of registration system, and concluding fee did not violate First Amendment). Pl. Mot. at 15. Those cases also support only a right freedom of expression and have no bearing on the instant dispute.

Indeed, Plaintiffs admit that the First Amendment would not act as a bar to adoption of fees above and beyond the cost to administer PACER. Pls.' Mot. 16 ("This does not necessarily mean that a statute would actually be unconstitutional if it were to expressly allow the judiciary to recoup more than the costs of administering PACER."). Thus, the First Amendment argument posited by Plaintiffs is nothing but an admission that the Judicial Conference has the power to charge the reasonable fees for access to Court information and that what remains is whether the fees charged are in compliance with the E-Government Act. In short, the imposition of a lesser fee is not compelled by the First Amendment.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court deny Plaintiffs' Motion for Summary Judgment and, instead, grant summary judgment in Defendant's favor.

November 17, 2017

Respectfully submitted,

JESSIE K. LIU
D.C. Bar #472845
United States Attorney

DANIEL F. VAN HORN
D.C. BAR # 924092
Chief, Civil Division

By: */s/ W. Mark Nebeker*
W. MARK NEBEKER (D.C. Bar #396739)
BRIAN J. FIELD (D.C. Bar #985577)
Assistant United States Attorneys
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-2536
mark.nebeker@usdoj.gov

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

DECLARATION OF Wendell A. Skidgel Jr.

I, Wendell A. Skidgel Jr., declare as follows:

1. I have Bachelor's Degrees in Mathematics and Computer Science from Eastern Nazarene College and a Juris Doctorate with a concentration in Intellectual Property from Boston University School of Law. In addition to serving as an attorney at the Administrative Office of the United States Courts for the past eleven years, I served as the Systems Manager at a Federal Appellate Court for more than five years and served as an IT Director at a Federal Bankruptcy Court. Based on my personal experiences and knowledge gained through my official duties, I make the following declarations.

2. Exhibit A is a true and correct copy of pages 1 and 83 from the Rep. of Proceedings of the Judicial Conference of the United States (Sept. 18, 1988).

3. Exhibit B is a true and correct copy of pages 1, 19 and 20 from the Rep. of Proceedings of the Judicial Conference of the United States (Mar. 14, 1989).

4. Exhibit C is a true and correct copy of pages 1 and 21 from the Rep. of Proceedings of the Judicial Conference of the United States (Mar. 13, 1990).

5. Exhibit D is a true and correct copy of pages 1, 44, and 45 from the Rep.

of Proceedings of the Judicial Conference of the United States (Sept. 20, 1993).

6. Exhibit E is a true and correct copy of pages 1 and 16 from the Rep. of Proceedings of the Judicial Conference of the United States (Mar. 15, 1994).

7. Exhibit F is a true and correct copy of pages 1 and 16 from the Rep. of Proceedings of the Judicial Conference of the United States (Mar. 12, 1996).

8. Exhibit G is a true and correct copy of pages 1, 64, and 65 from the Rep. of Proceedings of the Judicial Conference of the United States (Sept. 15, 1998).

9. Exhibit H is a true and correct copy of pages 1, 12, and 13 from the Rep. of Proceedings of the Judicial Conference of the United States (Mar. 14, 2001).

10. Exhibit I is a true and correct copy of pages 1 and 11 from the Rep. of Proceedings of the Judicial Conference of the United States (Mar. 13, 2002).

11. Exhibit J is a true and correct copy of pages 1 and 12 from the Rep. of Proceedings of the Judicial Conference of the United States (Sept. 21, 2004).

12. Exhibit K is a true and correct copy of pages 1 and 39-46 from the Judiciary's FY2007 Financial Plan (March 14, 2007). Based on my knowledge working at the Administrative Office of the United States Courts, before Electronic Public Access (EPA) funds are used for a new purpose or program, the proposed use is included in the Judiciary's Financial Plan which is submitted to Congress. EPA funds are not expended on the proposed use until the Judiciary receives explicit approval/consent from Congress.

13. Exhibit L is a true and correct copy of a Letter from Sens. Durbin and Brownback (May 2, 2007).

14. Exhibit M is a true and correct copy of a Letter from Rep. Serrano (May 2, 2007).

15. Exhibit N is a true and correct copy of pages 1 and 16 from the Rep. of Proceedings of the Judicial Conference of the United States (Sept. 13, 2011).

16. Exhibits A thru J and N were all obtained from the uscourts.gov website: www.uscourts.gov/about-federal-courts/reports-proceedings-judicial-conference-us.

17. Software development, software maintenance, software and hardware implementation, computer operations, technical and operational training, and efforts to modernize/upgrade/replace are costs inherently associated with a robust multi-user computer systems, such as CM/ECF.

18. Telecommunication costs directly associated with a multi-user computer system include communications hardware (such as network circuits, routers, and switches) and network management devices. When a multi-user system, such as CM/ECF, is available to the public via the internet, costs associated with network security, security hardware and software, intrusion detection, and other security services are required.

19. Through EPA 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). Funding 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.

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

Executed on November 11,2017.

/s/ Wendell A. Skidgel Jr.

Wendell A. Skidgel, Jr.

EXHIBIT A

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.

EXHIBIT B

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

EXHIBIT C

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

March 13, 1990

The Judicial Conference of the United States convened on March 13, 1990, 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
Chief Judge Charles L. Brieant,
Southern District of New York

Third Circuit:

Chief Judge A. Leon Higginbotham
Judge William J. Nealon, Jr.,
Middle District of Pennsylvania

Fourth Circuit:

Chief Judge Sam J. Ervin, III
Judge Frank A. Kaufman,
District of Maryland

COMMITTEE ON JUDICIAL IMPROVEMENTS

AUTOMATION

The Judicial Conference approved the 1990 update to the Long Range Plan for Automation in the United States Courts. The Conference declined to delegate authority to the Judicial Improvements Committee to approve the annual updates of the Plan on the Conference's behalf.

MISCELLANEOUS FEES

The Conference amended the schedules of fees to be charged in the district and bankruptcy courts to establish the following rates for electronic access to court data on the PACER system, barring congressional objection. PACER allows 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.

Yearly Subscription Rate:

Commercial - $60 per court
Non-profit - $30 per court

Per Minute Charge:

Commercial - $1.00
Non-profit - $0.50

Under language included in the judiciary's appropriations act for the fiscal year 1990 (Public Law 101-162), the judiciary will be entitled to retain the fees collected for PACER services in the bankruptcy courts. The Conference agreed to seek similar legislative language to permit the judiciary to retain the fees collected for district court PACER services.

EXHIBIT D

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 20, 1993

The Judicial Conference of the United States convened in Washington, D.C., on September 20, 1993, 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 Stephen G. Breyer
Judge Francis J. Boyle,
District of Rhode Island

Second Circuit:

Chief Judge Jon O. Newman
Judge Charles L. Brieant,
Southern District of New York

Third Circuit:

Chief Judge Dolores K. Sloviter
Chief Judge John F. Gerry,
District of New Jersey

Fourth Circuit:

Chief Judge Sam J. Ervin, III
Judge W. Earl Britt,
Eastern District of North Carolina

Fifth Circuit:

Chief Judge Henry A. Politz
Chief Judge Morey L. Sear,
Eastern District of Louisiana

Committee on Court Administration and Case Management, the Judicial Conference supported in principle the substance of section 3 of the proposed Act, but referred to the Committee on Rules of Practice and Procedure the issue of whether the matter is more appropriately within the authority of federal rules. The Rules Committee is to report on the matter to the March 1994 session of the Judicial Conference.

The Judicial Conference agreed with the recommendation of the Court Administration and Case Management Committee to support section 5(b) of the proposed Act, which would amend 28 U.S.C. § 1915(d) by adding "failure to state a claim upon which relief can be granted" as a cause for dismissal.

Section 5 of the proposed Civil Justice Reform Act of 1993 would amend the Civil Rights of Institutionalized Persons Act (42 U.S.C. § 1997(e)) to direct the courts to continue any action brought by an inmate pursuant to 42 U.S.C. § 1983 for up to 180 days in order to extend the period required for exhausting administrative remedies. On recommendation of the Committee, which was concerned about the impact of this section on the manner in which many courts process these types of cases, the Conference opposed the amendment. As an alternative, the Conference offered the provisions included in the judiciary's "housekeeping bill," which would allow a case to be continued for up to 120 days rather than the 180 days contemplated by the proposed Act. Further, the housekeeping provisions would allow a judge to determine if the administrative procedures are "otherwise fair and effective," eliminating the need to wait for certification by the Attorney General.

MISCELLANEOUS FEE SCHEDULES

At its March 1990 session, the Judicial Conference approved an amendment to the miscellaneous fee schedules for district and bankruptcy courts to provide a fee for electronic access to court data (JCUS-Mar 90, p.21). The Committee on Court Administration and Case Management believed that the policy with respect to fees for similar services in the federal courts should be consistent and, accordingly, there should be a fee for electronic access to court data for the courts of appeals.

However, while the costs of implementing a billing system in the courts of appeals for the Public Access to Electronic Records System (PACER) used by the district and bankruptcy courts (or for a similar alternative public access system) would be modest, only a small number of appellate courts offer PACER, and the usage rates of the appellate PACER system are low. 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.

Thus, on recommendation of the Committee, the Judicial Conference agreed to amend the miscellaneous fee schedule for appellate courts promulgated under 28 U.S.C. § 1913 to provide a fee for usage of electronic access to court data, but to limit the application of the fee to users of PACER and other similar electronic access systems, with no fee to be applied to users of ACES/EDOS at the present time. The Conference further agreed to delegate to the Director of the Administrative Office the authority to determine the appropriate date to implement the fee, to ensure that usage rates warrant the administrative expense of collecting the fee and that the appropriate software and the billing and fee collection procedures are developed prior to implementation in the appellate courts.

INTERPRETER TEST APPLICATION FEES

Since 1985, the Administrative Office, which is responsible under 28 U.S.C. § 1827 for the development and administration of interpreter certification examinations, has contracted with the University of Arizona to perform this function. Due to concerns raised about the legal validity of language in the contract permitting the contractor to collect and budget funds without clear statutory authorization, the Judicial Conference approved a recommendation by the Court Administration and Case Management Committee that legislation be sought to authorize the Administrative Office to prescribe fees for the development and administration of interpreter certification examinations and permit a contractor to collect fees and apply them as payment for services under the contract.

FILING BY FACSIMILE

After consideration of the conflicting recommendations of three of its Committees, the Judicial Conference referred to the Committee on Rules of Practice and Procedure, in coordination with the Court Administration and Case Management and the Automation and Technology Committees, the question of whether, and under what technical guidelines, filing by facsimile on a routine basis should be permitted. A report on the issue should be made to the September 1994 Judicial Conference.

ARBITRATION

At the request of the Committee on Court Administration and Case Management, the Judicial Conference reconsidered its March 1993 decision not to support legislation authorizing the expansion of mandatory arbitration (JCUS-MAR 93, p. 12). The Conference again declined to support the enactment of legislation that would provide authorization to all federal courts to utilize mandatory arbitration at the courts' discretion.

EXHIBIT E

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

March 15, 1994

The Judicial Conference of the United States convened in Washington, D.C., on March 15, 1994, 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 Stephen G. Breyer
Judge Francis J. Boyle,
District of Rhode Island

Second Circuit:

Chief Judge Jon O. Newman
Judge Charles L. Brieant,
Southern District of New York

Third Circuit:

Chief Judge Dolores K. Sloviter
Chief Judge John F. Gerry,
District of New Jersey

Fourth Circuit:

Chief Judge Sam J. Ervin, III
Judge W. Earl Britt,
Eastern District of North Carolina

Fifth Circuit:

Chief Judge Henry A. Politz
Chief Judge Morey L. Sear,
Eastern District of Louisiana

COMPUTER INTEGRATED COURTROOM SYSTEM

Computer integrated courtroom systems allow participants in a court proceeding "real-time" access to a transcript as it is being reported, enabling them to read testimony immediately after it is given. Such systems are substantially more expensive than other transcription methods because of the increased cost of the equipment and the reporter, who must be more highly skilled. In light of today's tight budgetary climate, on recommendation of the Committee on Court Administration and Case Management, the Judicial Conference disapproved the use of computer integrated courtroom system/real-time reporting systems as a method of recording proceedings in bankruptcy courts.

MISCELLANEOUS FEE SCHEDULE FOR COURT OF FEDERAL CLAIMS

The miscellaneous fee schedules for the district, bankruptcy and appellate courts provide a fee for usage of electronic access to court data and do not exempt federal agencies from such fees (JCUS-MAR 90, p. 21; JCUS-SEP 93, pp. 44-45). On recommendation of the Committee, the Judicial Conference approved a corresponding amendment to the miscellaneous fee schedule for the Court of Federal Claims promulgated under 28 U.S.C. § 1926.

VIDEO-CONFERENCING

The Judicial Conference approved a Committee recommendation to authorize the Middle District of Louisiana to conduct, at no cost to the judiciary, a one-year pilot project for video-conferencing prisoner civil rights and habeas corpus cases. The Conference also endorsed a Committee recommendation that a sunset date of September 30, 1995, be established for all video-conferencing pilot projects.

COURT INTERPRETING BY TELEPHONE

Based upon the successful results of a pilot program on the feasibility of interpreting by telephone, the Committee recommended that the Conference approve the use of basic telephone technology as a method of providing interpreting services in short proceedings such as pretrial hearings,

EXHIBIT F

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.

EXHIBIT G

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

SEPTEMBER 15, 1998

WASHINGTON, D.C.

JUDICIAL CONFERENCE OF THE UNITED STATES
CHIEF JUSTICE WILLIAM H. REHNQUIST,
PRESIDING
LEONIDAS RALPH MECHAM, SECRETARY

MISCELLANEOUS FEE SCHEDULES

Internet Fee for Electronic Access to Court Information. The miscellaneous fee schedules for the appellate, district and bankruptcy courts, the U.S. Court of Federal Claims, and the Judicial Panel on Multidistrict Litigation provide a fee for public access to court electronic records (PACER) (28 U.S.C. §§ 1913, 1914, 1926, 1930 and 1932). 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. On the Committee's recommendation, the Judicial Conference approved an amendment to the miscellaneous fee schedules for the appellate, district and bankruptcy courts, the U.S. Court of Federal Claims, and the Judicial Panel on Multidistrict Litigation to establish an Internet PACER fee of $.07 per page for public users obtaining PACER information through a federal judiciary Internet site.

The Committee also 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. On recommendation of the Committee, the Judicial Conference agreed to include the following language as addenda to the same miscellaneous fee schedules:

a. The Judicial Conference has prescribed a fee for access to court data obtained electronically from the public dockets of individual case records in the court, except as provided below.

b. Courts may provide other local court information at no cost. For example:

- 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.

Court of Federal Claims. In September 1997, the Judicial Conference approved an amendment to the district court and bankruptcy court miscellaneous fee schedules to increase the fee for exemplifications to twice the amount of the fee for certifications (JCUS-SEP 97, p. 59). The miscellaneous fee schedule for the United States Court of Federal Claims also contains a provision on fees for exemplifications and certifications, which was inadvertently excluded from this Conference action. At this session, the Conference approved a Committee recommendation that the Conference amend Item 3 of the United States Court of Federal Claims miscellaneous fee schedule to make the fee for certification of any document or paper, where the certification is made directly on the document or by separate instrument, $5 [4] and the fee for exemplification of any document or paper twice the amount of the fee for certification.

The Court of Federal Claims was also omitted from action taken by the Conference in March 1993 amending the miscellaneous fee schedule for district courts to increase the fees for admission to practice and for duplicate admission certificates and certificates of good standing (JCUS-MAR 93, p. 6). Since the miscellaneous fee schedule for the Court of Federal Claims contains similar provisions, at this session the Conference approved the Committee's recommendation that the Conference raise the attorney admission fee, prescribed in Item 4 of the United States Court of Federal Claims miscellaneous fee schedule, to $50 and the fee for a duplicate certificate of admission or certificate of good standing to $15, provided that legislation permitting the judiciary to retain any increase in fees collected under the miscellaneous fee schedules is enacted.

CONSOLIDATION - SOUTHERN DISTRICT OF WEST VIRGINIA

At its March 1998 session, the Judicial Conference adopted procedures for combining functions in the district and bankruptcy courts. The procedures provide for the review of requests for the consolidation of district and bankruptcy

[4]The Judicial Conference, in September 1996, approved an inflationary increase of this fee to $7.00, provided legislation is enacted permitting the judiciary to retain the resulting increase (JCUS-SEP 96, p. 54).

EXHIBIT H

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

MARCH 14, 2001
WASHINGTON, D.C.

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

COMMITTEE ACTIVITIES

Since its last report in September 2000, the Committee on Codes of Conduct received 25 new written inquiries and issued 26 written advisory responses. During this period, the average response time for requests was 19 days. The Chairman received and responded to 23 telephonic inquiries. In addition, individual Committee members responded to 135 inquiries from their colleagues.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

MISCELLANEOUS FEE SCHEDULES

Electronic Public Access. Pursuant to 28 U.S.C. §§ 1913, 1914, 1926(a), 1930(b) and 1932, the Judicial Conference is authorized to prescribe fees to be collected by the appellate and district courts, the Court of Federal Claims, the bankruptcy courts, and the Judicial Panel on Multidistrict Litigation, respectively. While the various fees included in these miscellaneous fee schedules are often court-specific, the fees pertaining to electronic public access (EPA) to court information cut across fee schedule lines. The Judicial Conference approved a Court Administration and Case Management Committee recommendation that EPA fees be removed from the various courts' fee schedules and reissued in an independent miscellaneous EPA fee schedule that would apply to all court types.

The Committee also recommended three substantive amendments to the EPA fee schedule. The first amendment concerned the user fee for Internet access to the judiciary's new case management/electronic case files (CM/ECF) system. Pursuant to section 404 of Public Law No. 101-515, which directs the Judicial Conference to prescribe reasonable fees for public access to information available in electronic form, the judiciary established a seven cents per page fee for Internet access to electronic court records that will apply to CM/ECF when it is introduced (JCUS-SEP 98, p. 64). In response to

concerns about the effect of these fees on open access to court records, especially with regard to litigants, the Committee recommended that the schedule be amended to state that attorneys of record and parties in a case (including pro se litigants) receive one free electronic copy of all filed documents, 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. The Committee further recommended that no fee under this provision be owed until an individual account holder accrued charges of more than $10 in a calendar year. This would allow free access to over 140 electronic pages, providing a basic level of public access consistent with the services historically provided by the courts. After discussion, the Conference adopted the Committee's recommendations.

The Committee's second proposal was for the establishment of a new fee of 10 cents per page for printing paper copies of documents through public access terminals at clerks' offices. This proposed fee, set at a level commensurate with the costs of providing existing services and developing enhanced services, is less than the 50 cents per page fee currently being charged for retrieving and copying court records and would therefore encourage the use of public access terminals and reduce demands on clerks' offices. The Conference approved the Committee's recommendation.

Lastly, the Committee recommended, and the Conference approved, the establishment of a Public Access to Court Electronic Records (PACER) Service Center search fee of $20. The PACER Service Center provides registration, billing, and technical support for the judiciary's EPA systems and receives numerous requests daily for particular docket sheets from individuals who do not have PACER accounts. This fee would be consistent with the fees currently imposed "for every search of the records of the court, and for certifying the results thereof" in the other fee schedules.

Reproduction of Recordings. The miscellaneous fee schedules for the appellate, district, and bankruptcy courts include a provision requiring that a fee be charged for "reproduction of magnetic tape recordings, either cassette or reel-to-reel...including the cost of materials." The Committee recommended that this fee be modified to account for the expanded variety of media technologies, including the use of digital equipment, rather than magnetic tape recordings. In addition, the Committee recommended that the current exemption from the fee for the federal government be eliminated when the requested record is available through the judiciary's CM/ECF system. Approving the Committee's recommendations, the Conference amended

EXHIBIT I

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

MARCH 13, 2002
WASHINGTON, D.C.

accommodate a recent high-profile case filed in the Eastern District of Virginia (*see supra*, "Privacy and Public Access to Electronic Case Files," pp. 5-6). At this session, the Conference approved the Committee's recommendation to allow such exceptions on a permanent basis.

JURY WHEEL DATA

To ensure that juries are selected randomly from a fair cross section of the community, the Administrative Office provides Census Bureau data for every jury division in each federal district showing racial, ethnic and gender composition of the general voting-age population to serve as a basis for comparison to jury wheel samplings. However, two recent court rulings have found that because an individual must be a citizen to be eligible to serve as a juror, the relevant population with which to make these comparisons is the voting-age population of *citizens*, rather than the voting-age population of *all persons*. Finding that the voting-age citizen population would provide a more precise basis for comparison against jury wheel samplings, the Committee recommended, and the Conference approved, the use of such data in lieu of voting-age general population data for district courts to complete Part IV of the Form JS-12, "Report on the Operation of the Jury Selection Plan." The Conference directed the Administrative Office to make any necessary amendments to the form to comport with this change.

ELECTRONIC PUBLIC ACCESS FEE SCHEDULE

The Electronic Public Access Fee Schedule imposes a fee of seven cents per page for case file data obtained via the Internet (JCUS-SEP 98, p. 64; JCUS-MAR 01, pp. 12-13). This 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. Concerns have been raised that this can result in a relatively high charge for a small usage. Balancing user concerns with the need to generate sufficient revenue to fund the program, the Committee recommended that the Judicial Conference amend Section I of the Electronic Public Access Fee Schedule to cap the charge for accessing any single document via the Internet at the fee for 30 pages. The Conference adopted the Committee's recommendation.

EXHIBIT J

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

SEPTEMBER 21, 2004
WASHINGTON, D.C.

JUDICIAL CONFERENCE OF THE UNITED STATES
CHIEF JUSTICE WILLIAM H. REHNQUIST,
PRESIDING
LEONIDAS RALPH MECHAM, SECRETARY

Appellate Attorney Admission Fee. The Conference adopted a recommendation of the Committee to establish an appellate attorney admission fee of $150 to be incorporated into the Court of Appeals Miscellaneous Fee Schedule. This fee is in addition to any attorney admission fee charged and retained locally pursuant to Federal Rule of Appellate Procedure 46(a)(3). The proceeds from the new fee will be deposited into the judiciary's fee account.

Central Violations Bureau (CVB) Processing Fee. The Central Violations Bureau processes the payments of approximately 400,000 petty offense citations every year that are issued by various government agencies for violations on federal property. No fee has been charged for the considerable work the CVB does in processing these cases. On recommendation of the Committee, the Judicial Conference agreed to seek legislation establishing a processing fee of $25 for cases processed through the CVB and allowing the proceeds to be retained by the judiciary.[4]

Public Access to Court Electronic Records (PACER) Internet Fee. Congress has specified that electronic public access (EPA) fees be used to enhance electronic public access, which is currently available through the PACER program. More recently, in the congressional conference report accompanying the judiciary's FY 2004 appropriations act, Congress expanded the permitted uses of EPA funds to include case management/electronic case files (CM/ECF) system operational costs. In order to provide sufficient revenue to fully fund currently identified case management/electronic case files system costs, the Conference adopted a recommendation of the Committee to amend Item 1 of the Electronic Public Access Fee Schedule to increase the fee for public users obtaining information through a federal judiciary Internet site from seven to eight cents per page.

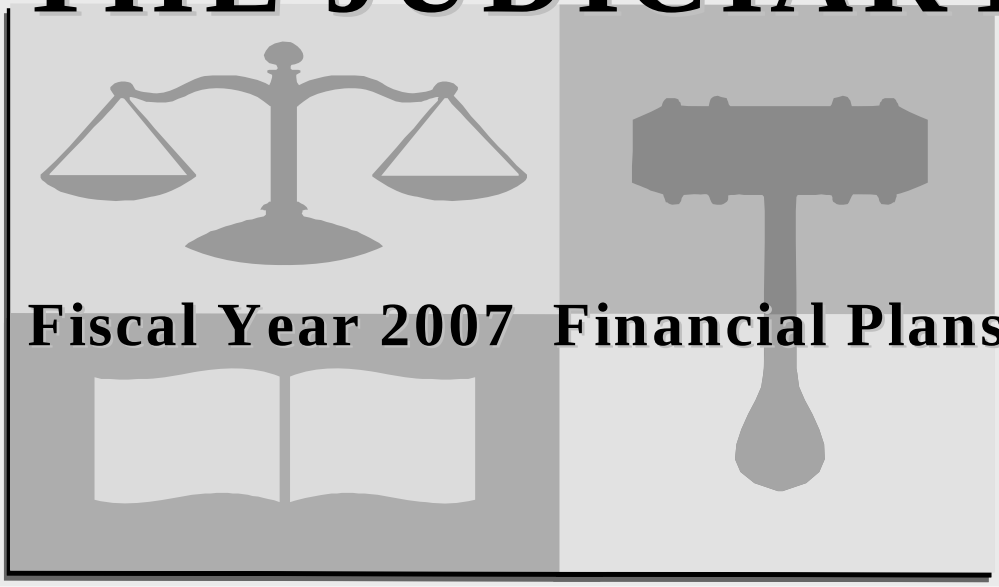
SHARING ADMINISTRATIVE SERVICES

An independent study is currently being conducted on ways to deliver administrative services to the courts in a more efficient and cost-effective manner. In order to help contain costs in the short-term while the study is being completed, the Committee on Court Administration and Case Management recommended that the Judicial Conference strongly urge all

[4]The Consolidated Appropriations Act of 2005 also provided the Judicial Conference with the authority to prescribe and retain a fee for the processing of violations through the CVB.

EXHIBIT K

THE JUDICIARY



Fiscal Year 2007 Financial Plans

MARCH 14, 2007

Fiscal Year 2007 Financial Plan
JUDICIARY INFORMATION TECHNOLOGY FUND

The Judiciary Information Technology Fund (JITF) was established by Congress in fiscal year 1990 (28 U.S.C. § 612) to assist the Judiciary in implementing its automation initiatives. The authority of the JITF was extended indefinitely in the fiscal year 1998 Commerce, Justice, State, Judiciary, and Related Agencies Appropriations Act (P.L. 105-119). The JITF was authorized "without fiscal year limitation," which allows the Judiciary to carry forward funds for projects that incur obligations over multiple years. The fund makes it possible to implement the *Long-Range Plan for Information Technology in the Federal Judiciary* and to manage the information technology (IT) program over a multi-year planning cycle while maximizing efficiencies and benefits.

The JITF provides the judiciary with a funds management tool which allows more effective and efficient planning, budgeting, and use of appropriated funds for IT activities. In keeping with the judiciary's IT mission, these activities include the design, development, acquisition, implementation, and maintenance of systems for the collection, management, manipulation, dissemination, and protection of information used by the judiciary, the bar, and the public. All IT expenses for the appellate, district, and bankruptcy courts, as well as for the probation and pretrial services offices, must be made from the fund.

Each fiscal year, current year requirements are financed via the JITF from a variety of sources:

- deposits from the courts' Salaries and Expenses account;
- fee collections from the Electronic Public Access program;
- unobligated balances in the fund resulting from prior year financial plan savings (unencumbered);
- proceeds from the sale of excess equipment;
- court allotments for non-IT purposes that are reprogrammed locally by the courts for IT initiatives under the budget decentralization program; and
- voluntary deposits from non-mandatory judiciary users of the fund (such as the Court of International Trade, the U.S. Sentencing Commission, and the Administrative Office).

The following table displays JITF requirements and funding sources for fiscal years 2006 and 2007.

Obligations ($000s)	Fiscal Year 2006 Financial Plan	Fiscal Year 2006 Actuals	Fiscal Year 2007 Financial Plan	Percent Change Plan to Plan
Salaries and Expenses	$ 288,267		$ 289,275	0.4%
Encumbered Carryforward (slippage)	$ 61,020		$ 53,759	-11.9%
Subtotal, Salaries and Expenses	$ 349,287	$ 289,653	$ 343,034	-1.8%
Electronic Public Access Program	$ 20,153	$ 11,560	$ 27,229	35.1%
Court of International Trade	$ 313	$ 148	$ 357	14.1%
U. S. Sentencing Commission	$ 1,901	$ 0	$ 1,901	0.0%
Administrative Office of the U. S. Courts	$ 727	$ 727	$ 726	-0.1%
Total Obligations:	**$ 372,381**	**$ 302,088**	**$ 373,247**	**0.2%**

The following section outlines JITF programs funded from each of the judiciary accounts.

SALARIES AND EXPENSES

The Salaries and Expenses financial plan includes available funding of $298.3 million for the fiscal year 2007 plan as detailed below.

Sources of Funding ($000)	**FY 2006 Financial Plan**	**FY 2007 Financial Plan**	**Percent Change**
Deposit from the Salaries and Expenses Account	$ 251,460	$ 223,693	-11.0%
Fiscal year 2006 balances (savings)	$ 0	$ 24,210	
Utilization of EPA Receipts	$ 36,807	$ 41,372	12.4%
Subtotal Current Year Obligations	**$ 288,267**	**$ 289,275**	**3.0%**

Note: Encumbered project slippage is shown separately on page 44.

Current Year Spending ($000)	**FY 2006 Financial Plan**	**FY 2007 Financial Plan**	**Percent Change**
Court Allotments	$ 80,154	$ 88,900	10.9%
IT Infrastructure and Project Development	$ 120,833	$ 118,641	-1.8%
Courtroom Technologies	$ 13,561	$ 17,808	31.3%
Telecommunications	$ 47,563	$ 38,628	-18.8%
Automation Support Personnel	$ 26,156	$ 25,298	-3.3%
Subtotal, Final Plan (excluding slippage)	**$ 288,267**	**$ 289,275**	**0.3%**

The content of each program activity included in the Salaries and Expenses plan is outlined below:

1) Court Allotments: $88,900,000

This category provides for the non-salary information technology formula allotments to fund court information technology and data communications/local area network equipment and infrastructure, including the cyclical replacement of this equipment, and other information technology operating expenses and telecommunication needs.

The information technology infrastructure formula is updated regularly to reflect changing IT needs of the courts. Considerations for the refreshed formula include how, when, and where technology is being used by the courts as well as updated information on life-cycle replacement periods for desktop/laptop personal computers and peripheral equipment, and emerging technologies that may benefit the courts. The refined and additional elements contained in the formula are not new requirements; rather, they reflect the courts' current IT infrastructure needs.

SALARIES AND EXPENSES continued

2) <u>IT Infrastructure and Project Development</u>: $118,641,000

This funding supports seven separate and distinct IT program components. The Judicial Conference's Information Technology Committee has endorsed using these program components to provide a better overview of the cost drivers in the JITF program. These requirements support the judiciary's IT systems and infrastructure, and provide judges and staff with the tools they need to perform their day-to-day work.

IT Infrastructure and Project Development by Program Component			
IT Program Component	**FY 2006 Financial Plan**	**FY 2007 Financial Plan**	**Percent Change**
Court Administration and Case Management	$ 20,753	$ 14,778	-28.8%
Judicial Statistical and Reporting Systems	$ 3,183	$ 2,131	-33.1%
Probation/Pretrial Services Management Systems	$ 9,094	$ 12,285	35.1%
Financial Systems	$ 14,955	$ 14,706	-1.7%
Human Resources Systems	$ 9,778	$ 15,622	59.8%
Management Information Systems	$ 10,084	$ 9,509	-5.7%
Infrastructure and Collaboration Tools	$ 52,986	$ 49,610	-6.4%
Subtotal	**$120,833**	**$ 118,641**	**-1.8%**

Court Administration and Case Management Systems**: **$14.8 million
This category encompasses systems that manage cases and case files for appellate, district and bankruptcy courts and the Central Violations Bureau. Other systems also include juror qualification, management, and payment; the management and administration of library functions (e.g., acquisitions, cataloging, serial control); and the operations and maintenance for the Central Violations Bureau which provides case management and financial information for petty offense and misdemeanor cases initiated by violation notices.

Via this financial plan submission, the Judiciary seeks 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.

Judicial Statistical and Reporting Systems*: *$2.1 million
This category includes systems to support the operations and maintenance and ongoing systems development for gathering and reporting statistics in the Judiciary; financial disclosures by judges and Judiciary employees (for completing financial reports required by the Ethics in Government Act of 1978); inter-circuit assignments for courts of appeals and district courts; bankruptcy administrator management and reporting to manage cases, oversee the trustees' activity, and provide reports to federal judges; the law clerk hiring process; and electronic document capabilities for the federal rule-making process.

SALARIES AND EXPENSES continued:

Probation/Pretrial Services Management Systems: $12.3 million
This program provides probation and pretrial services personnel case management and decision support tools as well as tools to access critical case information while working in the field. Support is also provided for storage and sharing of electronic documents, collection, analysis, and reporting of client data, and the IT needs of the Federal Law Enforcement Training Center.

Financial Systems: ***$14.7 million***
In addition to the financial accounting system, this program includes systems to support the local court budgeting process, make payments for private counsel and expert services, track and monitor criminal debt imposed by the court, handle cash receipting, report court payroll information, and handle travel expenses.

Human Resources Systems: $15.6 million
This program encompasses systems for personnel, payroll, and retirement related services, judges' retirement, fair employment practices reporting, and integration of all human resources-related items as well as efforts to reduce travel-based training. It also includes equipment to produce educational news programming for the Judiciary, the public, and Congress. The cornerstone of providing these human resources services for the courts is to integrate all human resources-related items into a single user experience through the exploitation of internet architecture and online distributed processing ensuring timely, accurate and integrated processing of personnel and payroll information.

Management Information Systems: $9.5 million
This category includes a collection of systems and activities to support the procurement process, the Judiciary's national web sites, collection of survey information, the national records management program, the Court Operations Support Center, and the *Guide to Judiciary Policies and Procedures*. Also included are systems to manage facilities projects and to support planning and decision-making with staffing, financial, and workload data.

Infrastructure and Collaboration Tools: $49.6 million
These tools provide support to the national IT program including testing, training, and support; maintenance and replacement of servers; e-mail messaging (including licenses, server maintenance and replacement, and help desk services); IT security and national gateways (including security support services); mainframe computer and national software licenses; IT project management; information systems architecture (and assessment of new technologies); local court grants for technology innovation; portal technology; and infrastructure for identity management services.

SALARIES AND EXPENSES continued:

3) Courtroom Technologies: $17,808,000

These funds equip courtrooms with a variety of technologies to improve the quality and efficiency of certain aspects of courtroom proceedings. These technologies include video evidence presentation systems, video conferencing systems, and electronic methods of taking the record. The use of technology in the courtroom facilitates case management, reduces trial time, litigation costs and improves fact-finding, jury understanding and access to court proceedings.

Through the implementation of CM/ECF, court case files are becoming fully electronic, and that technology is revolutionizing trial processes. To fully realize the benefits of electronic case files in the courtroom, the Judicial Conference Committee on Court Administration and Case Management recommends the expanded use of available balances derived from electronic public access fees in the Judiciary Information Technology Fund to fund court allotments for the much needed implementation of a cyclical equipment replacement and maintenance program for courtroom technologies.

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.

4) Telecommunications: $38,628,000

These funds support the judiciary's telecommunications program, and allow the judiciary to fund recurring expenses such as long distance and FTS charges, maintenance and follow-on service, relocation/reconfiguration of existing systems; and purchase or replacement of existing court systems including systems for new courthouses and prospectus alterations projects. The telecommunications program allows the judiciary to maintain telecommunications services for the appellate, district, and bankruptcy courts and for probation and pretrial services offices, and procure telecommunications equipment for new courthouses and for courthouses undergoing major repairs and alteration. Funds are provided directly to the courts for annual recurring requirements such as charges for local, commercial long distance, and cellular services. The judiciary also incurs recurring charges for FTS long distance services for both voice and data transmission.

5) Automation Support Program: $25,298,000

These funds provide for staffed operations at the Administrative Office including salaries, contractual services, and other operating expenses to provide support to the courts for data communications, network applications, and other information technology systems. The FTEs associated with these Administrative Office reimbursable positions are approved annually by the Executive Committee of the Judicial Conference. Since 1995, the number of automation support positions has declined from a high of 230 to the current 197.

Salaries and Expenses Encumbered Financing Requirements (Project Slippage)

The Salaries and Expenses financial plan also includes several areas where information technology obligations that were included in the fiscal year 2006 financial plan were delayed and the requirements, along with the funds, carried forward into fiscal year 2007. In order to provide appropriate comparisons between fiscal years, these encumbered funds are being displayed separately. A summary of the planned uses of these funds is provided below.

Financing ($000s):

	FY 2006 Financial Plan	FY 2007 Financial Plan	Percent Change
Judiciary Information Technology Fund Slippage	**$ 61,020**	**$ 53,759**	**-11.9%**

These slipped requirements include funding from project development efforts, operations and maintenance initiatives, and courtroom technology projects. The slippage is broken out as follows:

- **IT Infrastructure and Project Development $21.9 million**:
  Includes funding associated with equipment for the new bankruptcy judges, and slippage from schedule delays affecting contractual outsourcing, training, national licenses, the judiciary data center, records management, and local initiatives. A summary of slippage by IT program component is as follows:
  - Court administration and case management $1.0 million;
  - Judicial statistical and reporting systems $1.3 million;
  - Probation and pretrial services case management $0.04 million; financial systems $2.8 million;
  - Human resources systems $1.2 million;
  - Management information systems $1.9 million; and
  - Information collaboration tools $13.7 million.

- **Courtroom Technology $7.5 million:**
  Includes equipment and maintenance associated with planned installations for new bankruptcy judges and from fiscal year 2006 schedule delays.

- **Telecommunications $7.3 million**:
  Includes $6.4 million in funding for telecommunications equipment as a result of slippage in the building schedule**,** the transition to Networx, and $0.9 million from the remaining emergency communication supplemental funding.

- **Service Delivery Alternative $16.9 million:**
  Includes funding for the service delivery alternative (including deferred cyclical server maintenance funding) to identify and evaluate alternate delivery models for IT systems with the aim of selecting and implementing more cost-effective models that would reduce the number of servers nationwide.

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.

EXHIBIT L

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

EXHIBIT M

Congress of the United States
House of Representatives
Committee on Appropriations
Washington, DC 20515–6015

May 2, 2007

Mr. James Duff
Director
Administrative Office of the U.S. Courts
One Columbus Circle NE
Washington, DC 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 14th, 2007 in accordance with section 113 of Public Law 110-5.

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 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 that differs from that detailed in the March 14, 2007 document would be subject to prior approval of the house Committee on Appropriations.

Sincerely,

José E. Serrano
Chairman
Subcommittee on Financial Services
and General Government

cc: The Honorable Ralph Regula,
Ranking Member

EXHIBIT N

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 13, 2011

The Judicial Conference of the United States convened in Washington, D.C., on September 13, 2011, 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 Sandra L. Lynch
Chief Judge Mark L. Wolf,
District of Massachusetts

Second Circuit:

Chief Judge Dennis Jacobs
Chief Judge Carol Bagley Amon,
Eastern District of New York

Third Circuit:

Chief Judge Theodore A. McKee
Judge Harvey Bartle III,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge William B. Traxler, Jr.
Judge James P. Jones,
Western District of Virginia

Fifth Circuit:

Chief Judge Edith Hollan Jones
Chief Judge Sarah S. Vance,
Eastern District of Louisiana

5. Sale of Monthly Listing of Court Orders and Opinions	$19	$22
7. Returned Check Fee	$45	$53
9. Audio Recording	$26	$30
10. Document Filing/Indexing	$39	$46
11. Record Retrieval Fee	$45	$53

Judicial Panel on Multidistrict Litigation Miscellaneous Fee Schedule

Item	Current Fee	New Fee
1. Record Search	$26	$30
2. Certification	$9	$11
4. Record Retrieval Fee	$45	$53
5. Returned Check Fee	$45	$53

Electronic Public Access Fees. Pursuant to statute and Judicial Conference policy, the electronic public access (EPA) fee is set to be commensurate with the costs of providing existing services and developing enhanced services. Noting that the current fee has not increased since 2005 and that for the past three fiscal years the EPA program's obligations have exceeded its revenue, the Committee recommended that the EPA fee be increased from $.08 to $.10 per page. The Committee also recommended that the current waiver of fees of $10 or less in a quarterly billing cycle be changed to $15 or less per quarter so that 75 to 80 percent of all users would still receive fee waivers. Finally, in recognition of the current fiscal austerity for government agencies, the Committee recommended that the fee increase be suspended for local, state, and federal and government entities for a period of three years. The Conference adopted the Committee's recommendations.

COURTROOM SHARING

Based on a comprehensive study of district courtroom usage conducted by the FJC at the Committee's request, the Judicial Conference adopted courtroom sharing policies for senior district judges and magistrate judges in new courthouse and/or courtroom construction (JCUS-SEP 08,

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 STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE AND RESPONSE
TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 7(h), Defendant submits the following list of material facts as to which there is no genuine dispute:

1. PACER fees find their origin in a 1988 decision of the Judicial Conference to authorize "an experimental program of electronic access for the public to court information in one or more district, bankruptcy, or appellate courts[.]" Rep. of Proceedings of the Judicial Conference of the United States at 83 (Sept. 18, 1988)

2. The Judicial Conference authorized the Committee on Judicial Improvement "to establish access fees during the pendency of the program." *Id.*

3. In 1989, the Judicial Conference voted to recommend that Congress credit to the judiciary's appropriations account any fees generated by providing electronic public access to court records. *See* Rep. of Proceedings of the Judicial Conference of the United States at 19 (Mar. 14, 1989).

4. In the Judiciary Appropriations Act of 1990, Congress established the judiciary's right to retain revenues from fees generated through the provision of court records to the public. *See* Pub. L. No. 101-162, § 406(b).

5. In 1990, the Judicial Conference approved an initial rate schedule for electronic public access to court data via the PACER system. *See* Rep. of Proceedings of the Judicial Conference of the United States at 21 (Mar. 13, 1990).

6. In the Judicial Appropriations Act of 1991, Congress instituted a requirement that the Judicial Conference set a schedule of "reasonable fees … for access to information available through automatic data processing equipment." Pub. L. No. 101-515, § 404.

7. Through the Judicial Appropriations Act of 1991, Congress determined that PACER users, rather than taxpayers generally, should fund public access initiatives. Congress further required that the Judicial Conference submit each such fee schedule to Congress at least thirty days before its effective date. *See* Pub. L. No. 101-515, § 404.

8. Congress directed that all such fees collected for services rendered be deposited into the Judiciary Automation Fund ("JAF")[1] to reimburse expenses incurred in providing such services to the public. Pub. L. No. 101-515, § 404.

9. In the Judicial Appropriations Act of 1992, Congress expressly required that the Judicial Conference "shall hereafter 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." Pub. L. No. 102-140.

[1] The Judiciary Automation Fund was renamed the Judiciary Information Technology Fund. *See* 28 U.S.C. § 612.

10. Congress also allowed that fees need not be collected for all access; rather 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. *Id.*

11. The House Appropriations Committee report for the Judicial Appropriations Act of 1993 expressly stated that charging fees for public access was "desirable." H. Rep. No. 102-709.

12. The Judicial Conference later expanded the fee schedule to cover access to public records in appellate courts and the Court of Federal Claims. *See* Rep. of Proceedings of the Judicial Conference of the United States at 44–45 (Sept. 20, 1993); Rep. of Proceedings of the Judicial Conference of the United States at 16 (Mar. 15, 1994).

13. Congress also required that the public access fee schedule be expanded to cover multidistrict litigation. *See* Pub. L. No. 104-317, § 403.

14. In 1996, the Judicial Conference also approved a reduction in the fee for electronic public access for dial-up Internet connections. *See* Rep. of Proceedings of the Judicial Conference of the United States at 16 (Mar. 13, 1996).

15. Congress repeatedly expressed its intention that the Judicial Conference use the fees generated from electronic public access services to improve and update various public access platforms. For instance, the Senate Committee on Appropriations Report for the Judicial Appropriations Act of 1997 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 [EPA] 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.

S. Rep. No. 104-676 at 89.

16. In 1998, the Judicial Conference determined that with the introduction of Internet technology to the judiciary's current public access program, it would include a per-page fee for access, while introducing new technologies to expand public accessibility to information via PACER. Specifically, the Judicial Conference established a fee of $0.07 per page for access to certain court records on PACER. *See* Rep. of Proceedings of the Judicial Conference of the United States at 64–65 (Sept. 15, 1998)

17. In 2001, the Judicial Conference provided that attorneys of record and parties in a case would receive one copy of all filed documents without charge and also that no fee will be owed until an individual account holder accrues more than $10 in a calendar year. *See* Rep. of Proceedings of the Judicial Conference of the United States at 12–13 (Mar. 14, 2001)

18. In 2002, the Judicial Conference established a fee cap for accessing any single document, where there will be no charge after the first thirty pages of a document. *See* Rep. of Proceedings of the Judicial Conference of the United States at 11 (Mar. 13, 2002).

19. In 2002, Congress passed the E-Government Act of 2002. *See* Pub. L. No. 107-347.

20. The E-Government Act amended existing law to remove the requirement that the Judicial Conference "shall hereafter prescribe fees" for public access to, instead, provide that the Judicial Conference "may, only to the extent necessary, prescribe reasonable fees." Pub. L. No. 107-347.

21. The E-Government Act also included several directives, including that all federal courts have websites with certain general court information (*e.g.*, courthouse location, contact information, local rules, general orders, docket information), that all court opinions issued after

April 16, 2005, be available in text-searchable format, and that an annual report be provided to Congress identifying any court requesting a deferral from these requirements. *See* Pub. L. No. 107-347, § 205.

22. The E-Government Act did not include any provisions regarding sources of funding for providing this information other than the "reasonable fees prescribed by the Judicial Conference for electronic access to information stored in automated data processing equipment." Pub. L. No. 102-140, § 303(a); Pub. L. No. 104-347, § 205.

23. In 2003, the House Appropriations Committee stated that it "expect[ed] the fee for the Electronic Public Access program to provide for Case Management Electronic Case File ("CM/ECF") system enhancement and operational costs." H. Rep. No. 108-221 at 116; *see also* H. Rep. No. 108-401 ("the conferees adopt the House report language concerning Electronic Public Access fees.").

24. Similarly, the Senate Appropriations Committee stated that it was "impressed and encouraged" by the "new and innovative" CM/ECF system and that it expected a report on "the savings generated by this program at the earliest date possible." S. Rep. No. 108-144 at 118.

25. In order to provide sufficient revenue to support the CM/ECF operational and maintenance costs that Congress expected, the Judicial Conference issued a new rate schedule, charging $0.08 per page. *See* Rep. of Proceedings of the Judicial Conference of the United States at 12 (Sept. 21, 2004).

26. The Senate Committee on Appropriations Report for the Judicial Appropriations Act of 1999 provides that 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 the availability of public access." S. Rep. No. 105-235, at 114.

27. In 2007, the Administrative Office of the U.S. Courts ("AO") submitted the Judiciary's Fiscal Year ("FY") 2007 Financial Plan to both the House and Senate Appropriations Committees that, among other things, provided for "expanded use of the Electronic Public Access ('EPA') revenues." Judiciary FY07 Financial Plans (Mar. 14, 2007).

28. On May 2, 2007, the Appropriations Committees sent letters to the AO, stating that the Committees had "reviewed the information included and ha[d] no objection to the financial plan including the following proposal[ ]: … the expanded use of [EPA] Receipts." Ltr. from Sens. Durbin and Brownback (May 2, 2007); Ltr. from Rep. Serrano (May 2, 2007).

29. The AO submitted its FY 2007 Financial Plan to both Appropriations Committees, outlining various courtroom technology installations and maintenance that would be funded through EPA revenues. Declaration of Wendell A. Skidgel Jr. ("Skidgel Decl."), Ex. K at 43. These expenditures were approved through the Financial Services and General Government Appropriations Act of 2008. Pub. L. No. 110–161.

30. In 2011, the Judicial Conference amended the PACER fee schedule, raising the per-page cost to $0.10. *See* Rep. of Proceedings of the Judicial Conference of the United States at 16 (Sept. 13, 2011).

31. The Judicial Conference noted, in raising the PACER fee schedule to $0.10 per page, the existing statutory and policy requirements of charging fees commensurate with the cost of providing existing services and developing enhanced services. *See id.*

32. The Judicial Conference also recognized that it had not increased PACER access fees since 2005 and also that its EPA obligations during the past three fiscal years had exceeded revenue. *See id.*

* * *

Pursuant to Local Rule 7(h), Defendant submits the following response to Plaintiffs' Statement of Undisputed Material Facts. As many of Plaintiffs' statements consist of immaterial facts, mischaracterizations of the record, and improper argument, all in violation of Local Rule 7(h), the fact that Defendant denies any of Plaintiffs' statements does not preclude this Court from granting Defendant's Cross-Motion for Summary Judgment. The following responds to each numbered paragraph included in Plaintiffs' Statement of Undisputed Material Facts:

1.-4. Admitted.

5. Denied, except to admit that no fee is owed for electronic access to court data or audio files via PACER until the account holder accrues charges of more than $15. A person accessing an electronically filed document for the first time who is a party in a case does not incur a fee; no fee is charged for access to judicial opinions; and no fee is charged for viewing case information or documents at courthouse public access terminals. Taylor Decl. Ex. A at 2.

6.-8. Admitted

9. Defendant admits that the language similar to that cited can be found in Exhibit B to the Taylor Declaration, but also notes that each page of the document (Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues, and the Road Ahead – Discussion Draft) contains a footer stating:

> This paper was prepared by staff of the Administrative Office of the United States Courts, with substantial assistance from judges and court staff, to aid the deliberations of the Judicial Conference of the United States and its committees. The ideas expressed in this paper do not necessarily reflect the policies of the

> Conference or any committee thereof, any court of the United States, or the Administrative Office.

Taylor Decl. Ex. B.

10.-11. Admitted.

12. Defendant admits that language similar to that cited can be found in the cited statute, but denies that Plaintiffs' selective quotations from the statute present a fair reading of the enactment. *See* Pub. L. No. 107-347, § 205; Pub. L. No. 102-140, § 303; Pub. L. No. 101-515, § 404; 28 U.S.C. § 612.

13. Defendant admits that Plaintiffs have accurately quoted the selected language from the Congressional enactment found in the note to 28 U.S.C § 1913, but denies that these selective quotations present a fair reading of the enactments reflected in the legislation. *See, e.g.*, Pub. L. No. 102-140, § 303; Pub. L. No. 104-317, § 403; Pub. L. No. 107-347, § 205.

14. Defendant admits that, where a per-page fee was charged, it was not reduced, but notes that the Judiciary did, as contemplated in the E-Government Act, increase the amount of data it made freely available. Taylor Decl. Ex. L.

15. Defendant admits this statement and notes that "[t]his increase is predicated upon Congressional guidance that the judiciary is expected to use Pacer fee revenue to fund CM/ECF operations and maintenance." Taylor Decl. Ex. E.

16. Defendant admits this statement, except to note that the correct terminology for what Plaintiffs call a surplus is an unobligated available balance, as allowed for in the legislation creating the Judiciary Information Technology Fund ("JITF"). 28 U.S.C. § 612; Pub. L. No. 101-162, § 404(b)(1).

17. Defendant admits that Plaintiffs have accurately quoted the selected language from the cited document, but denies that their selective quotations from the document present a fair reading

of the contents, noting, for instance, that Plaintiffs have omitted the following language from Exhibit F (JITF annual report): "in accordance with authorizing legislation"; "with the authorization of Congress." Taylor Decl. Ex. F. Defendant further notes that the "Judiciary asked for and received written consent from the Appropriations Committees to use Electronic Public Access ('EPA') receipts to support courtroom technology allotments." Ltr. from Sen. Lieberman (Taylor Decl. Ex. G at 4), *see also* Ltr. from Sens. Durbin and Brownback (May 2, 2007) (Skidgel Decl. Ex. L); Ltr. from Rep. Serrano (May 2, 2007) (Skidgel Decl. Ex. M).

18. Defendant admits that Plaintiffs have accurately quoted the selected language from the cited testimony, but denies that their selective quotations from the testimony present a fair reading of the contents, noting, for instance, that Plaintiffs have omitted the pertinent part of Judge Gibbons' statement that reads: "*Congress has authorized* the Judiciary to utilize these fees to run the PACER program as well as to offset some costs in our information technology program that would otherwise have to be funded with appropriated funds. The 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." *See* www.uscourts.gov/file/3563/download (emphasis added).

19. Admitted.

20. Plaintiffs claim that the sole support that Director Duff offered for the view that the Judiciary was charging PACER fees only to the extent necessary was a 2004 conference report is false. Director Duff explained that "many services and documents are provided to the public for free, and charges that are imposed are the minimum possible only to recover costs." Ltr. from Hon. Lee Rosenthal and James C. Duff to Sen. Lieberman (Mar. 26, 2009) (Taylor Decl. Ex. I). The letter further explained: "And that as such, the Judiciary believed it was 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." *Id.* The Director also reminded Senator Lieberman that eighteen years earlier, Congress mandated that the Judiciary charge user fees for electronic access to court files as a way to pay for this service." *Id.* And that, "[s]ince 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 and an Electronic Bankruptcy Noticing ('EBN') system." *Id.* The letter included a citation to H. Rep. No. 108-401, at 614 (adopting the language of H. Rep. No. 108-221).

21. Admitted, except to note that Plaintiffs fail to disclose that in the cited annual letter to the Appropriations Committee, Senator Lieberman expressly acknowledged that "the judiciary asked for and received written consent from the House and Senate Appropriations Committees, to "expand use of [EPA] receipts to support courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance." Taylor Decl. Ex. G.

22. Admitted, except to note that Plaintiffs state that in the EPA program Summary (Taylor Decl. Ex. J) the AO posits 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." Defendant notes that the preceding sentences state, in part:

> In order to maintain the level of service presently provided through the public access program, the Judiciary would need appropriated funds to replace the fee revenue, and in this fiscal climate increased appropriations are not available. Fee revenue allows the Judiciary to pursue new technologies for providing public access, develop prototype programs to test the feasibility of new public access technologies, and develop enhancements to existing systems. By authorizing the fee, Congress has provided the Judiciary with revenue that is dedicated solely to promoting and enhancing public access. These fees are only used for public access, and are not subject to being redirected for other purposes. The fee, even a nominal

> fee, also provides a user with a tangible, financial incentive to use the system judiciously and efficiently, and in the absence of a fee the system can be abused.

Taylor Decl. Ex. J.

23. Defendant admits the assertions in this paragraph, but also notes that all of the 2012 expenditures listed in Plaintiffs' Exhibit K, were contained in the Judiciary's 2012 spending plan, and were approved by Congress. *See* Taylor Decl. Ex. K (Defendant's 2012 spending plan, and Plaintiff's 2012 House and Senate Appropriations Reports).

24. The first sentence is a characterization rather than a fact, which characterization is not supported by the citation; the second sentence is admitted, but Defendant notes that the spending amounts made "information available to the public electronically" and were included in the Judiciary's yearly spending plan, was approved by Congress. *See* Judiciary FY07 Financial Plans (Mar. 14, 2007) (Skidgel Decl. Ex. K); 2007 spending plan, Ltr. from Sens. Durbin and Brownback (May 2, 2007) (Skidgel Decl. Ex. L); Ltr. from Rep. Serrano (May 2, 2007) (Skidgel Decl. Ex. M)); S. Rep. No. 105-235 at 114 (stating that "[t]he Committee ... expects that available balances from public access fees in the judiciary automation fund will be used to enhance availability of public access.)"

25. Defendant admits this assertion and notes that this was done in accordance with Congressional directives, and is consistent with Public Law 102-140, which states that fees collected shall be used "to reimburse expenses incurred in providing these services." Pub. L. No. 102-140.

26. Defendant admits this assertion and notes that the Judiciary requested and received written consent from the Congressional Appropriators to use EPA funds for courtroom technology. *See* Judiciary FY07 Financial Plans (Mar. 14, 2007) (Skidgel Decl. Ex. K); 2007 spending plan,

Ltr. from Sens. Durbin and Brownback (May 2, 2007) (Skidgel Decl. Ex. L); Ltr. from Rep. Serrano (May 2, 2007) (Skidgel Decl. Ex. M)).

28. Defendant admits this assertion and notes that the Judiciary spent $110,985,208, which was $8.4 million more than was received in Fiscal Year 2010.

29. The cost of the EPA program in 2010 was $110,985,208, not $18,768,552 as Plaintiffs claim. *See* Taylor Decl. Ex. L. at 2 (line 50). It appears that Plaintiffs' assertion resulted from extracting a number from a place-holder subheading, under the Public Access Services and Applications Heading, to argue that the EPA program subheadings represent the only expenses PACER fees should fund. However, every expenditure in the Quarterly Report comprises public access services and are part of the Judiciary's Electronic Public Access Program. Taylor Decl. Ex. L.

30. Denied, except as admitted in the paragraphs that follow. Plaintiffs offer no citation in support of this enumerated paragraph and Plaintiffs appear to confuse the EPA program (which encompasses all the electronic public access services the Judiciary provides) with the text of line item 8, which is a description attached to Budget Organization Code ("BOC") OXEEPAX but is not an accurate representation of the services and programs funded through the Judiciary's EPA program. Taylor Decl. Ex. L. at 1–2 lines 6–50 (listing the expenditures for the Judiciary's entire EPA program).

31. Admitted.

32. Defendant admits this assertion and notes that Congress specifically authorized the use of EPA funds for courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. Skidgel Decl. Exs. K at 43, L, & M.

33. Admitted.

34. Defendant admits this assertion and notes that Congress indicated that it "expects the Judiciary to utilize available balances derived from [EPA] 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[,]" H. Rep. No 104-676 at 89, and that the overall quality of service to the public will be improved with the availability of enhancements such as … enhanced use of the Internet," *id.*

35. Admitted.

36. Defendant admits this assertion and notes that Congress did "urge[] 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.

37. Admitted.

38. Defendant admits this assertion and notes that Congress indicated that it "expects the Judiciary to utilize available balances derived from [EPA] 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 bankruptcy noticing." H. Rep. No. 104-676 at 89.

39.-40. Admitted.

41. Defendant admits this assertion and notes that Congress indicated that it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Furthermore, the following are direct costs associated with development and maintenance of CM/ECF: Software Development,

Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize or replace CM/ECF. Skidgel Decl. ¶ 17.

42. Admitted.

43. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] 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, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Telecommunication costs, (including communications hardware, maintenance and security services) are direct costs associated with CM/ECF, PACER, and the other public access services the Judiciary provides. Skidgel Decl. ¶ 18.

44. Admitted.

45. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] 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, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Through EPA 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). Funding 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. Skidgel Decl. ¶ 19.

46. Admitted.

47. The cost of the EPA program in 2011 was $108,665,271, not $3,363,770 as Plaintiffs claim. *See* Taylor Decl. Ex. L. at 4 (line 64). It appears that Plaintiffs' assertion results from extracting a number from a placeholder subheading, under the Public Access Services and Applications Heading, to argue that the EPA program subheadings represent the only expenses PACER fees should fund. However, every expenditure in the Quarterly Report comprises public access services and are part of the Judiciary's Electronic Public Access Program. Accordingly, they are properly funded by PACER fees. *See* Taylor Decl. Ex. L.

48. Denied. Plaintiffs appear to be confusing the EPA program (which encompasses all the electronic public access services the Judiciary provides) with the text of line item 12, which is a description attached to BOC OXEEPAX but is not an accurate representation of the services and programs funded through the Judiciary's EPA program. *See* Taylor Decl. Ex. L. at 3–4 lines 9–64 (listing the expenditures for the Judiciary's entire EPA program).

49. Denied, except as admitted in the paragraphs that follow. Plaintiffs offer no citation in support of this enumerated paragraph.

50. Admitted.

51. Defendant admits this assertion and notes that Congress specifically authorized the use of EPA funds for courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. Skidgel Decl. Exs. K at 43, L, & M.

52. Admitted.

53. Defendant admits this assertion and notes that Congress indicated that it "expects the Judiciary to utilize available balances derived from [EPA] 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." H. Rep. No. 104-676 at 89, and, that the overall quality of service to the public will be improved with the availability of enhancements such as ... enhanced use of the Internet." *Id.*

54. Admitted.

55. Defendant admits this assertion and notes that Congress indicated that it "expects the Judiciary to utilize available balances derived from [EPA] 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 bankruptcy noticing." H. Rep. No. 104-676 at 89.

56. Admitted.

57. Defendant admits this assertion and notes that Congress indicated that it "expects the fee for the [EPA] program to provide for [CM/ECF] Files system enhancements and

operational costs." H. Rep. No. 108-221 at 116. Furthermore, Software Development, Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize or replace CM/ECF are direct costs associated with development and maintenance of CM/ECF. Skidgel Decl. ¶ 17.

58. Admitted.

59. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] 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, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Telecommunication costs, (including communications hardware, maintenance and security services) are direct costs associated with CM/ECF, PACER, and the other public access services the Judiciary provides. Skidgel Decl. ¶ 18.

60. Admitted.

61. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the

Judiciary to utilize available balances derived from [EPA] 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, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Through EPA 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). Funding 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. Skidgel Decl. ¶ 19.

62. Admitted.

63. The cost of the EPA program in 2012 was $120,176,766, not $3,547,279 as Plaintiffs claim. *See* Taylor Decl. Ex. L. at 7 (line 57). It appears that Plaintiffs' assertion resulted from extracting a number from a placeholder subheading, under the Public Access Services Heading, to argue that the EPA program subheadings represent the only expenses PACER fees should fund. However, every expenditure in the Quarterly Report comprises public access services and are part of the Judiciary's Electronic Public Access Program. Accordingly, they are properly funded by PACER fees. *See* Taylor Decl. Ex. L.

64. Denied. Plaintiffs appear to be confusing the EPA program (which encompasses all the electronic public access services the Judiciary provides) with the text of line item 11, which is a description attached to BOC OXEEPAX but is not an accurate representation of

the services and programs funded through the Judiciary's EPA program. *See* Taylor Decl. Ex. L. at 6–7 lines 9–57 (listing the expenditures for the Judiciary's entire EPA program).

65. Denied, except as admitted in the paragraphs that follow. Plaintiffs offer no citation in support of this enumerated paragraph.

66. Admitted.

67. Defendant admits this assertion and notes that Congress specifically authorized the use of EPA funds for courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. Skidgel Decl. Exs. K at 43, L & M.

68. Admitted.

69. Defendant admits this assertion and notes that Congress indicated that it "expects the Judiciary to utilize available balances derived from [EPA] 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." H. Rep. No. 104-676 at 89. And that the overall quality of service to the public will be improved with the availability of enhancements such as ... enhanced use of the Internet." *Id.*

70. Admitted.

71. Defendant admits this assertion and notes that providing prospective jurors with electronic copies of court documents is consistent with Congress' expectation for "the Judiciary to utilize available balances derived from [EPA] 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 ... enhanced use of the Internet." H. Rep. No. 104-676 at 89.

72. Admitted.

73. Defendant admits this assertion and notes that Congress indicated that it "expects the Judiciary to utilize available balances derived from [EPA] 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 bankruptcy noticing." H. Rep. No. 104-676 at 89.

74. Admitted.

75. Defendant admits this assertion and notes that Congress indicated that it "expects the fee for the [EPA] program to provide for [CM/ECF] system enhancements and operational costs." H. Rep. No. 108-221 at 116. Furthermore, Software Development, Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize or replace CM/ECF are direct costs associated with development and maintenance of CM/ECF. Skidgel Decl. ¶ 17.

76. Admitted.

77. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] 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, [and] enhanced use of the Internet." H. Rep. No. 104-676 at

89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Telecommunication costs, (including communications hardware, maintenance and security services) are direct costs associated with CM/ECF, PACER, and the other public access services the Judiciary provides. Skidgel Decl. ¶ 18.

78. Admitted.

79. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] 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, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Through EPA 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). Funding 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. Skidgel Decl. ¶ 19.

80. Admitted.

81. The cost of the EPA program in 2013 was $143,339,525, not $4,652,972 as Plaintiffs claim. *See* Taylor Decl. Ex. L. at 11 (line 66). It appears that Plaintiffs' assertion resulted from extracting a number from a placeholder subheading, under the Public Access Services Heading, to argue that the EPA program subheadings represent the only expenses PACER fees should fund. However, every expenditure in the Quarterly Report comprises public access services and are part of the Judiciary's Electronic Public Access Program. Accordingly, they are properly funded by PACER fees. *See* Taylor Decl. Ex. L.

82. Denied. Plaintiffs appear to be confusing the EPA program (which encompasses all the electronic public access services the Judiciary provides) with the text of line item 14, which is a description attached to BOC OPCEPAX but is not an accurate representation of the services and programs funded through the Judiciary's EPA program. *See* Taylor Decl. Ex. L. at 9–11 lines 12–66. (listing the expenditures for the Judiciary's entire EPA program).

83. Denied, except as admitted in the paragraphs that follow. Plaintiffs offers no citation in support of this enumerated paragraph.

84. Admitted.

85. Defendant admits this assertion and notes that Congress specifically authorized the use of EPA funds for courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. Skidgel Decl. Exs. K at 43, L, & M.

86. Admitted.

87. Defendant admits this assertion and notes that providing prospective jurors with electronic copies of court documents is consistent with Congress' expectation for "the Judiciary to utilize available balances derived from [EPA] 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 ... enhanced use of the Internet." H. Rep. No. 104-676 at 89.

88. Admitted.

89. Defendant admits this assertion and notes that providing prospective jurors with electronic copies of court documents is consistent with Congress' expectation for "the Judiciary to utilize available balances derived from [EPA] 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 ... enhanced use of the Internet." H. Rep. No. 104-676 at 89.

90. Admitted.

91. Defendant admits this assertion and notes that providing prospective jurors with electronic copies of court documents is consistent with Congress' expectation for "the Judiciary to utilize available balances derived from [EPA] 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 ... enhanced use of the Internet." H. Rep. No. 104-676 at 89.

92. Admitted.

93. Defendant admits this assertion and notes that Congress indicated that it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Furthermore, Software Development,

Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize or replace CM/ECF are direct costs associated with development and maintenance of CM/ECF. Skidgel Decl. ¶ 17.

94. Admitted.

95. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] 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, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Telecommunication costs, (including communications hardware, maintenance and security services) are direct costs associated with CM/ECF, PACER, and the other public access services the Judiciary provides. Skidgel Decl. ¶ 18.

96. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] 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, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303.

97. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] 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, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Through EPA 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). Funding 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. Skidgel Decl. ¶ 19.

98. Admitted.

99. Denied. The cost of the EPA program in 2014 was $142,855,084, not $3,547,279 as Plaintiffs claim. *See* Taylor Decl. Ex. L. at 13 (line 57). It appears that Plaintiffs' assertion resulted from extracting a number from a placeholder subheading, under the Public Access Services Heading, to argue that the EPA program subheadings represent the only expenses PACER fees should fund. However, every expenditure in the Quarterly Report comprises public access services and are part of the Judiciary's Electronic Public Access Program. Accordingly, they are properly funded by PACER fees. *See* Taylor Decl. Ex. L.

100. Denied. Plaintiffs appear to be confusing the EPA program (which encompasses all the electronic public access services the Judiciary provides) with the text of line item 10, which is a description attached to BOC OPCEPAX but is not an accurate representation of the services and programs funded through the Judiciary's EPA program. *See* Taylor Decl. Ex. L. at 12–13 lines 8–56 (listing the expenditures for the Judiciary's entire EPA program).

101. Denied, except as admitted in the paragraphs that follow. Plaintiffs offer no citation in support of this enumerated paragraph.

102. Admitted.

103. Defendant admits this assertion and notes that Congress specifically authorized the use of EPA funds for courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. Skidgel Decl. Exs. K at 43, L, & M.

104. Admitted.

105. Defendant admits this assertion and notes that Congress indicated that it: "expects the Judiciary to utilize available balances derived from [EPA] 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." H. Rep. No. 104-676 at

89. And, that the overall quality of service to the public will be improved with the availability of enhancements such as ... enhanced use of the Internet" *Id.*

106. Admitted.

107. Defendant admits this assertion and notes that providing prospective jurors with electronic copies of court documents is consistent with Congress' expectation for "the Judiciary to utilize available balances derived from [EPA] 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 … enhanced use of the Internet." H. Rep. No. 104-676 at 89.

108. Admitted.

109. Defendant admits this assertion and notes that Congress indicated that it: "expects the Judiciary to utilize available balances derived from [EPA] 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 bankruptcy noticing." H. Rep. No. 104-676 at 89.

110. Admitted.

111. Defendant admits this assertion and notes that Congress indicated that it: "expects the fee for the [EPA] program to provide for [CM/ECF] system enhancements and operational costs." H. Rep. No. 108-221 at 116. Furthermore, Software Development, Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize or replace

CM/ECF are direct costs associated with development and maintenance of CM/ECF. Skidgel Decl. ¶ 17.

112. Admitted.

113. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] 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, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Telecommunication costs, (including communications hardware, maintenance and security services) are direct costs associated with CM/ECF, PACER, and the other public access services the Judiciary provides. Skidgel Decl. ¶ 18.

114. Admitted.

115. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] 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, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303.. Through EPA 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). Funding 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. Skidgel Decl. ¶ 19.

116. Admitted.

117. Denied. The cost of the [EPA] program in 2015 was $147,722,744, not $2,575,977 plus $642,160 as plaintiffs claim. *See* Taylor Decl. Ex. L. at 16 (line 60). It appears that Plaintiffs' assertion resulted from extracting a number from a placeholder subheading, under the Public Access Services Heading, to argue that the EPA program subheadings represent the only expenses PACER fees should fund. However, every expenditure in the Quarterly Report comprises public access services and are part of the Judiciary's EPA program. Accordingly, they are properly funded by PACER fees. *See* Taylor Decl. Ex. L.

118. Denied. Plaintiffs appear to be confusing the EPA program (which encompasses all the electronic public access services the Judiciary provides) with the text of line item 12, which is a description attached to BOC OXEEPAX but is not an accurate representation of the services and programs funded through the Judiciary's EPA program. *See* Taylor Decl. Ex. L. at 14–16 lines 10–60 (listing the expenditures for the Judiciary's entire EPA program).

119. Denied, except as admitted in the paragraphs that follow. Plaintiffs offer no citation in support of this enumerated paragraph.

120. Admitted.

121. Defendant admits this assertion and notes that Congress specifically authorized the use of EPA funds for courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. Skidgel Decl. Exs. K at 43, L, & M.

122. Admitted.

123. Defendant admits this assertion and notes that Congress indicated that it "expects the Judiciary to utilize available balances derived from [EPA] 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," and "that the overall quality of service to the public will be improved with the availability of enhancements such as ... enhanced use of the Internet." H. Rep. No. 104-676 at 89.

124. Admitted.

125. Defendant admits this assertion and notes that providing prospective jurors with electronic copies of court documents is consistent with Congress' expectation for "the Judiciary to utilize available balances derived from [EPA] 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 ... enhanced use of the Internet." H. Rep. No. 104-676 at 89.

126. Admitted.

127. Defendant admits this assertion and notes that Congress indicated that it: "expects the Judiciary to utilize available balances derived from [EPA] 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 bankruptcy noticing." H. Rep. No. 104-676 at 89.

128. Admitted.

129. Defendant admits this assertion and notes that Congress indicated that it: "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Furthermore, Software Development, Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize or replace CM/ECF are direct costs associated with development and maintenance of CM/ECF. Skidgel Decl. ¶ 17.

130. Admitted.

131. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] 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, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for

services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Telecommunication costs, (including communications hardware, maintenance and security services) are direct costs associated with CM/ECF, PACER, and the other public access services the Judiciary provides. Skidgel Decl. ¶ 18.

132. Admitted.

133. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] 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, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Through EPA 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). Funding 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. Skidgel Decl. ¶ 19.

134. Admitted.

135. Denied. The cost of the Electronic Public Access Program in 2016 was $150,814,134, not $748,495 plus $2,443,614 as plaintiffs claim. Taylor Decl. Ex. L. at 19 (line 60). It appears that Plaintiffs' assertion resulted from extracting a number from a placeholder subheading, under the Public Access Services Heading, to argue that the EPA program subheadings represent the only expenses PACER fees should fund. However, every expenditure in the Quarterly Report comprises public access services and are part of the Judiciary's EPA program. Accordingly, they are properly funded by PACER fees. *See* Taylor Decl. Ex. L.

136. Denied. Plaintiffs appear to be confusing the EPA program (which encompasses all the electronic public access services the Judiciary provides) with the text of line item 12, which is a description attached to BOC OPCEPAX but is not an accurate representation of the services and programs funded through the Judiciary's EPA program. *See* Taylor Decl. Ex. L. at 17–19 lines 10–60 (listing the expenditures for the Judiciary's entire EPA program).

137. Denied, except as admitted in the paragraphs that follow. Plaintiffs offer no citation in support of this enumerated paragraph.

138. Admitted.

139. Defendant admits this assertion and notes that Congress specifically authorized the use of EPA funds for courtroom technology allotments for installation, cyclical replacement of equipment, and infrastructure maintenance. Skidgel Decl. Exs. K at 43, L, & M.

140. Admitted.

141. Defendant admits this assertion and notes that Congress indicated that it: "expects the Judiciary to utilize available balances derived from [EPA] 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 bankruptcy noticing." H. Rep. No. 104-676 at 89.

142. Admitted.

143. Defendant admits this assertion and notes that providing prospective jurors with electronic copies of court documents is consistent with Congress' expectation for "the Judiciary to utilize available balances derived from [EPA] 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 ... enhanced use of the Internet." H. Rep. No. 104-676 at 89.

144. Admitted.

145. Defendant admits this assertion and notes that Congress indicated that it: "expects the Judiciary to utilize available balances derived from [EPA] 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 bankruptcy noticing." H. Rep. No. 104-676 at 89.

146. Admitted.

147. Defendant admits this assertion and notes that Congress indicated that it: "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Furthermore, Software Development, Implementation, Operations, Maintenance, Training on CM/ECF and attempts to modernize

or replace CM/ECF are direct costs associated with development and maintenance of CM/ECF. Skidgel Decl. ¶ 17.

148. Admitted.

149. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] 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, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Telecommunication costs, (including communications hardware, maintenance and security services) are direct costs associated with CM/ECF, PACER, and the other public access services the Judiciary provides. Skidgel Decl. ¶ 18.

150. Admitted.

151. Defendant admits this assertion and notes that Congress indicated it "expects the fee for the [EPA] program to provide for [CM/ECF] Case Files system enhancements and operational costs." H. Rep. No. 108-221 at 116. Congress also stated that it "expects the Judiciary to utilize available balances derived from [EPA] 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, [and] enhanced use of the Internet." H. Rep. No. 104-676 at 89. Congress also stated that "[a]ll fees … collected by the Judiciary … as a charge for services rendered shall be deposited as offsetting collections … reimburse expenses incurred in providing these services." Pub. L. No. 102-140, § 303. Through EPA 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). Funding 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. Skidgel Decl. ¶ 19.

152. This purported fact exceeds the Court's limitation on the subject of the current briefing (*i.e.* motions as to liability), because it addresses what damages, if any, may exist. Defendant reserves the right to seek discovery into such an issue, should it be deemed significant. Moreover, the purported fact is not material to liability (or damages) because it alone does not reflect the cost of disseminating court information through PACER or otherwise in that the CM/ECF system is more than a data storage system. Accordingly, reliance on cost of data storage alone, without factoring in the other costs associated with PACER and CM/ECF (*e.g.*, security), does not provide a meaningful analysis of the relevant expenses. Indeed, Plaintiffs' own experts, (Lee and Lissner) readily admit 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." Lee & Lissner Decl. at 10 (ECF No. 52-15).

November 17, 2017

Respectfully submitted,

JESSIE K. LIU
D.C. Bar #472845
United States Attorney

DANIEL F. VAN HORN
D.C. BAR # 924092
Chief, Civil Division

By: */s/ W. Mark Nebeker*
W. MARK NEBEKER (D.C. Bar #396739)
BRIAN J. FIELD (D.C. Bar #985577)
Assistant United States Attorneys
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-2536
mark.nebeker@usdoj.gov