2024-1757

Volume II (Appx3443-4323)

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 II (Appx3443-4323)

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Interested Party-Appellant

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

v.

UNITED STATES OF AMERICA,

Defendant.

Civil Action No. 16-745 (ESH)

ORDER

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

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

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

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

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

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

Date: March 31, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OPINION

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

BACKGROUND

I. FACTUAL BACKGROUND

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

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

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

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

[1] The facts set forth herein are undisputed.

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

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

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

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

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

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

Pub. L. 101-515, § 404, 104 Stat. 2101 (Nov. 5, 1990) (codified at 28 U.S.C. § 1913 note).[3]

Three aspects of this law are relevant to this litigation: (1) the Judicial Conference was given the authority (indeed, it was required) to charge reasonable fees for "access to information available through automatic data processing equipment,"[4] which covered its newly-developed PACER

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

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

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

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

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

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

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

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

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

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

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1992 H.R. Rep. at 58.

[7] The Judicial Conference Report explained that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. E-Government Act of 2002

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

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

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

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

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

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

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

2002 S. Rep. at 23.

D. EPA Fees After the E-Government Act

1. 2003–2006

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

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

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

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

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

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

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

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

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

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

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

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

2. 2006–2009

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. 2010–2016[15]

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

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

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

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

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

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

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

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

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

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

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

II. PROCEDURAL HISTORY

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

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

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

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

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

ANALYSIS

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

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

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

28 U.S.C. § 1913 note.

I. LEGAL STANDARD

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

Lieberman and Congressman Darrell Issa, ECF No. 63.

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

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

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

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

II. APPLICATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Technology. (*See* Attachment 1.)

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

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

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

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

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

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

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

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

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

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

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

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

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

  and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Date: March 31, 2018

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

Public Access and Records Management Division

AVAILABLE RESOURCES:

Summary of Resources QTRLY Rprt

			FY 2010 Actuals YB
1	PACER Fee Revenue - Prior Year Carry Forward (OXEEPAC)	$	34,381,874
2	PACER Fee Revenue - Current Year Receipts (OXEEPAC)	$	102,511,199
3	Print Fee Revenue - Prior Year Carry Forward (OXEEPAP)	$	516,534
4	Print Fee Revenue - Current Year Receipts (OXEEPAP)	$	187,118
5	**Total Available Resources**	**$**	**137,596,725**
6	***PROGRAM REQUIREMENTS:***		
7	**Public Access Services and Applications**		
8	EPA Program (OXEEPAX)	$	18,768,552
9	EPA Technology Infrastructure & Applications (OXEPTAX)	$	-
10	EPA Replication (OXEPARX)	$	-
11	**Public Access Services and Applications**	**$**	**18,768,552**
12	**Case Management/Electronic Case Files System**		
13	Development and Implementation (OXEECFP)	$	3,695,078
14	Operations and Maintenance (OXEECFO)	$	15,536,212
15	CM/ECF Futures (OXECMFD)	$	3,211,403
16	Appellete Operational Forum (OXEAOPX)changed from OXEACAX	$	144,749
17	District Operational Forum (OXEDCAX)	$	674,729
18	Bankruptcy Operational Forum (OXEBCAX)	$	492,912
19	**Subtotal, Case Management/Electronic Case Files System**	**$**	**23,755,083**
20	**Electronic Bankruptcy Noticing:**		
21	Electronic Bankruptcy Noticing (OXEBNCO)	$	9,662,400
22	**Subtotal, Electronic Bankruptcy Noticing**	**$**	**9,662,400**
23	**Telecommunications (PACER-Net & DCN)**		
24	PACER-Net (OXENETV)	$	10,337,076
25	DCN and Security Services (OXENETV)	$	13,847,748
26	PACER-Net & DCN (OXDPANV)	$	-

27	Security Services (OXDSECV)	$	-
28	**Subtotal, Telecommunications (PACER-Net & DCN)**	**$**	**24,184,824**
29	**Court Allotments**		
30	Court Staffing Additives(OXEEPAA)	$	228,373
31	Court Allotments (OXEEPAA) [incl. in program areas prior to FY 09]	$	1,291,335
32	CM/ECF Court Allotments (OXEECFA)	$	7,605,585
33	Courts/AO Exchange Program (OXEXCEX)	$	303,527
34	**Subtotal, Court Allotments**	**$**	**9,428,820**
35	**Total Program Requirements**	**$**	**85,799,679**
36	***Congressional Priorities:***		
37	**Victim Notification (Violent Crime Control Act)**		
38	Violent Crime Control Act Notification (OXJVCCD & OXJVCCO)	$	332,876
39	**Subtotal, Victim Notification (Violent Crime Control Act)**	**$**	**332,876**
40	**Web-based Juror Services**		
41	Web Based E-Juror Services O&M (OXEJMEO)	$	-
42	**Subtotal, Web-based Juror Services**	**$**	**-**
43	**Courtroom Technology (OXHCRTO-3000)**		
44	Courtroom Technology (OXHCRTO-3000)	$	24,731,665
45	**Subtotal, Courtroom Technology Program**	**$**	**24,731,665**
46	**State of Mississippi (OXEMSPX)**		
47	State of Mississippi (OXEMSPX)	$	120,988
48	**Subtotal, Mississippi State Courts**	**$**	**120,988**
49	**Total Congressional Priorities**	**$**	**25,185,529**
50	**Total Program & Congressional Priorities**	$	110,985,208
51	**Total EPA Carry Forward (Revenue less Disbursement)**	**$**	**26,611,517**
52	PACER FEE (OXEEPAC) Carry Forward	$	26,051,473
53	PRINT FEE (OXEEPAP) Carry Forward	$	-
54	**Total EPA Carry Forward**	**$**	**26,051,473**
55	Total Print Fee Revenue	$	703,652
56	Disbursed in (OXEEPAA) Allotments	$	143,608
57	PRINT FEE (OXEEPAP) Carry Forward	$	560,044

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

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

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

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

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

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

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

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

SO ORDERED.

Ellen S. Huvelle

ELLEN S. HUVELLE
United States District Judge

DATE: August 13, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OPINION

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

BACKGROUND

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

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

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

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

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

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

General. (*Id*. at 20.)

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

ANALYSIS

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

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

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

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

1. Controlling Question of Law

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

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

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

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

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

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

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

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

2. Substantial ground for difference of opinion

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

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

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

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

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

3. Materially advance the litigation

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

CONCLUSION

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

Ellen S. Huvelle

ELLEN S. HUVELLE
United States District Judge

DATE: August 13, 2018

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

NOTICE OF GRANT OF PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(B)

Notice is hereby given on this 28 day of November, 2018, that the plaintiffs' petition for permission to appeal the order entered on March 31, 2018 (ECF. No. 88) was granted by the United States Court of Appeals for the Federal Circuit. Both parties filed petitions for permission to appeal on August 22, 2018 (Fed. Cir. Nos. 18-154, 18-155), which were granted on October 16, 2018 (Fed. Cir. Nos. 19-1081, 19-1083). The order granting permission to appeal is attached.

Pursuant to Fed. R. App. P. Rule 5(d), plaintiffs file this notice to effect payment of the filing fee for the appeal.

Respectfully submitted,

/s/ Meghan S.B. Oliver

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November 28, 2018

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

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

v.

UNITED STATES,
Defendant-Petitioner

2018-154

On Petition for Permission to Appeal pursuant to 28 U.S.C. Section 1292(b) from the United States District Court for the District of Columbia in No. 1:16-cv-00745-ESH, Judge Ellen S. Huvelle.

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

v.

UNITED STATES,
Defendant-Respondent

2018-155

On Petition for Permission to Appeal pursuant to 28 U.S.C. Section 1292(b) from the United States District Court for the District of Columbia in No. 1:16-cv-00745-ESH, Judge Ellen S. Huvelle.

ON PETITION

Before PROST, *Chief Judge*, NEWMAN and LOURIE, *Circuit Judges*.

LOURIE, *Circuit Judge*.

O R D E R

The parties both petition for permission to appeal an order of the United States District Court for the District of Columbia concerning the extent to which fee revenue generated by the federal judiciary's Public Access to Court Electronic Records ("PACER") system may be used for purposes other than the operation of PACER.

This case arises out of a class action brought by National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice (collectively, "the plaintiffs") against the United States, alleging that fees charged for using PACER from 2010 to 2016 violated 28 U.S.C. § 1913 note, as amended by the E-Government Act of 2002. That provision states, in relevant part, "[t]he Judicial Conference may, only to the extent necessary, prescribe reasonable fees . . . for collection by the courts . . . for access to information available through automatic data processing equipment. . . . [These fees] shall be deposited as offsetting collections to the Judiciary Automation fund . . . to reimburse expenses incurred in providing these services." 28 U.S.C. § 1913 note.

After the district court denied the United States' motion to dismiss the complaint for failing to establish a cognizable claim for damages under the Little Tucker Act, 28 U.S.C. § 1346(a), the parties filed cross-motions for summary judgment of liability. The plaintiffs argued that the E-Government Act barred the judiciary from using PACER fees for anything other than the marginal cost of operating PACER. The government asserted that PACER fees can be spent on any expenditure involving the dissemination of information through electronic means.

The district court adopted neither party's position. Instead, it determined that revenue from the PACER system may be used only for "expenses incurred in providing services . . . that are part of providing the public with access to electronic information maintained and stored by the federal courts on its CM/ECF docketing system." *Nat'l Veterans Legal Servs. Program v. United States,* 291 F. Supp. 3d 123, 149 (D.D.C. Mar. 31, 2018). On this basis, the district court ruled that several categories of the judiciary's expenditures were impermissible but also rejected the plaintiffs' position that the class was entitled to fees paid in excess of the amount necessary to recoup the total marginal cost of operating PACER.

At the request of both parties, the district court certified its summary judgment order for interlocutory appeal and stayed further proceedings. The district court noted that the issue to be appealed was a purely legal one, that the issue was one of first impression, and that interlocutory appeal would materially advance the litigation because "before proceeding to a potentially lengthy and complicated damages phase based on an interpretation of the statute that could be later reversed on appeal, it is more efficient to allow the Federal Circuit an opportunity first to determine what the statute means."

Under 28 U.S.C. § 1292(b), a district court may certify that an order that is not otherwise appealable is one involving a controlling question of law as to which there is

substantial ground for difference of opinion and for which an immediate appeal may materially advance the ultimate termination of the litigation. Ultimately, this court must exercise its own discretion in deciding whether it will grant permission to appeal an interlocutory order. *See In re Convertible Rowing Exerciser Patent Litig.*, 903 F.2d 822, 822 (Fed. Cir. 1990). Having considered the petitions, we agree with the parties and the district court that interlocutory review is appropriate here.

Accordingly,

IT IS ORDERED THAT:

The petitions are granted.

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

s25

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 16-0745 (PLF)
UNITED STATES OF AMERICA,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The Court has before it a pro se Motion for Intervention and for Leave to File Complaint in Intervention, Motion to Modify Class Certification Order, and for Sanctions ("Pines Mot.") [Dkt. No. 116], filed by putative plaintiff-intervenor Michael T. Pines. Plaintiffs National Veterans Legal Services Program, et al., and defendant the United States oppose the motion. See Plaintiffs' Response to Michael Pines's Motion for Intervention, to Modify the Class Definition, and for Sanctions ("Pl. Opp.") [Dkt. No. 122]; Defendant's Response to Michael Pines's Motion for Intervention, to Modify the Class Certification Order, and for Sanctions ("Def. Opp.") [Dkt. No. 124]. Upon careful consideration of the parties' papers, the relevant rules, and the applicable case law, the Court will deny Mr. Pines's motion in all respects.

Mr. Pines has also submitted via email to the Clerk's Office several additional requests for relief, which he suggests are related to this case. Because the Court concludes that Mr. Pines is not entitled to intervene, it will deny as moot his other requests, with the exception of his application to proceed without prepaying fees or costs, which the Court will grant.

I. BACKGROUND

This case is proceeding as a class action on behalf 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." Nat'l Veterans Legal Servs. Program v. United States ("NVLSP Class Cert. Op."), 235 F. Supp. 3d 32, 39 (D.D.C. 2017). The United States confirms that Mr. Pines paid PACER fees during the class period and therefore is a member of the class. Defendant's Supplemental Brief in Response to Court Order Dated October 12, 2021 ("Def. Suppl.") [Dkt. No. 126] at 1. Plaintiffs represent that "[c]lass notice was successfully sent to the email address associated with Michael Pines's PACER account on May 19, 2017," and that Mr. Pines did not opt out by the deadline provided in that notice. Plaintiffs' Supplemental Brief in Response to This Court's Order ("Pl. Suppl.") [Dkt. No. 127] at 1-2.

Mr. Pines asserts that he learned of the class action sometime in August of 2020. Pines Mot. at 10, 12. He seeks to intervene because, he says, he "was precluded from negotiations so any settlement based on previous discussions would be improper as not negotiated fairly," id. at 10, and "the class action attorneys will not even allow him to participate in discussions outside of court or cooperate in other ways," id. at 12. He expresses concern that if the Court approves a class settlement, he may face "questions regarding res judicata and the scope of the class release" if he "raises similar claims – or claims based on similar facts – in a subsequent case." Id. at 9. Mr. Pines asserts that he is entitled to intervene as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, and in the alternative, that the Court should authorize permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. Id. at 11-12.

Mr. Pines also seeks to modify the class certification order, arguing that a class action is not "superior to other types of actions" in this case, Pines Mot. at 5, because "[t]he obvious way to calculate damages in light of court rulings to date," id. at 3, "would not result in

the class members receiving appropriate compensation," id. at 4. He further argues that "potential plaintiffs may have all kinds of claims against the government related to the operation of Pacer, and . . . there is not even a way to calculate the type of damages the class action seeks." Id. at 10. Finally, Mr. Pines asks the Court to award $25,000 in sanctions "against both plaintiff and defense counsel," because he was not "given the opportunity to participate when he demanded it in August 2020," and as a result, "he will have to spend large amounts of time" getting up to speed on the case. Id. at 13.

II. DISCUSSION

A. Intervention of Right

Rule 24(a)(2) of the Federal Rules of Civil Procedure grants a right of intervention to a party who, upon timely motion, "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." FED. R. CIV. P. 24(a)(2). Courts consider four factors in deciding whether a party has a right to intervene: (1) the timeliness of the motion; (2) whether the party claims an interest relating to the subject of the action; (3) whether disposition of the action without the party may impair or impede the applicant's ability to protect that interest; and (4) whether the party's interest is adequately represented by the existing parties. Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731-32 (D.C. Cir. 2003).

When a class member moves to intervene in a class action, the issue is "correctly framed . . . as whether the would-be intervenors [a]re adequately represented." Twelve John Does v. District of Columbia, 117 F.3d 571, 575 (D.C. Cir. 1997); see also In re Cmty. Bank of N. Va., 418 F.3d 277, 314 (3d Cir. 2005) ("In the class action context, the second and third prongs of

the Rule 24(a)(2) inquiry [concerning interest in the litigation and impairment of that interest] are satisfied by the very nature of Rule 23 representative litigation."). To prevail, therefore, Mr. Pines must show that "the named plaintiffs cannot [adequately] represent his interests," Barnes v. District of Columbia, 274 F.R.D. 314, 319 (D.D.C. 2011), either because they "have antagonistic or conflicting interests with the unnamed members of the class" or because they do not "appear able to vigorously prosecute the interests of the class through qualified counsel," Twelve John Does v. District of Columbia, 117 F.3d at 575.

Mr. Pines has not made such a showing. "When the Court certified the class in this case [], it necessarily found that 'the representative parties will fairly and adequately protect the interests of the class.'" Barnes v. District of Columbia, 274 F.R.D. at 316 (quoting FED. R. CIV. P. 23(a)(4)). Judge Huvelle, who presided over this case prior to her retirement, concluded that "the nonprofit organizations who are named plaintiffs in this case make particularly good class representatives," because "[t]hey are interested in reducing PACER fees not only for themselves but also for their constituents . . . . [they] exist to advocate for consumers, veterans, and other public-interest causes . . . . [and] organizational representatives with experience can provide more vigilant and consistent representation than individual representatives." NVLSP Class Cert. Op., 235 F. Supp. 3d at 42 (quotation marks omitted).

These characteristics remain salient to representing the interests of the class today. The class representatives have vigorously and effectively advocated on behalf of the class during the course of this litigation. They obtained a finding of liability against the United States in this Court, which the Federal Circuit affirmed on appeal. See Nat'l Veterans Legal Servs. Program v. United States, 291 F. Supp. 3d 123, 140 (D.D.C. 2018) ("[T]he Court . . . finds the defendant liable for certain costs that post-date the passage of the E-Government Act."); Nat'l Veterans Legal Servs. Program v. United States, 968 F.3d 1340, 1357 (Fed. Cir. 2020) ("[W]e agree with

the district court's determination that the government is liable for the amount of [PACER] fees used to cover [certain categories of] expenses."). The parties now are engaged in settlement discussions and recently represented that they "have reached an agreement in principle on proposed terms to resolve the matter, subject to Defendant obtaining approval of the proposed terms of settlement from the United States Department of Justice." Nov. 15, 2021 Joint Status Report [Dkt. No. 129] at 1. Nothing in Mr. Pines's submissions indicates that the named plaintiffs are in any way failing to fulfill their role on behalf of the class.

Mr. Pines's motion focuses instead on his desire to provide input on settlement negotiations and case strategy. Mr. Pines asserts that he "has been trying to work with counsel" and has "tried to discuss [a] settlement," but that "the class action attorneys will not even allow him to participate in discussions outside of court or cooperate in other ways." Pines Mot. at 12; see also Declaration of Michael T. Pines in Support of Motions to Modify Class Certification and to Intervene and for Sanctions ("Pines Decl.") [Dkt. No. 116-1] ¶ 96 ("Had I been permitted to be involved in settlement discussions, I had some ideas that might have been helpful."). As a class member, Mr. Pines is entitled to receive certain information about the class action, including information about opting out of the class and about any settlement or compromise. See FED. R. CIV. P. 23(c)(2), (e)(1). Mr. Pines "will have the right to object to any settlement [that] the parties may reach." Pl. Opp. at 3; see also FED. R. CIV. P. 23(e)(5). He is not, however, entitled to "work with counsel," Pines Mot. at 12, or "be involved in settlement discussions," Pines Decl. ¶ 96. The fact that Mr. Pines may disagree with class counsel's approach does not mean that class representation is inadequate, because a class action by its nature entails delegating certain litigation functions to class representatives and class counsel.

Mr. Pines also appears to disagree with the scope of the claims being pursued, noting that "people have suffered other types of damages caused by Pacer which the action does

not seek to redress." Pines Mot. at 2; see also id. at 8. Yet Judge Huvelle certified a single class claim in this case: "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." Jan. 24, 2017 Order [Dkt. No. 32] at 1. The fact that class counsel have not pursued other arguments that go beyond the certified claim does not suggest that their representation is deficient.

Even if Mr. Pines could show that class counsel and the named plaintiffs do not adequately represent his interests in this case, his motion is not timely. "A nonparty must timely move for intervention once it becomes clear that failure to intervene would jeopardize her interest in the action." Harrington v. Sessions (In re Brewer), 863 F.3d 861, 872 (D.C. Cir. 2017). According to plaintiffs, "[c]lass notice was successfully sent to the email address associated with Michael Pines's PACER account on May 19, 2017." Mr. Pines therefore should have been aware of this class action more than four years before he moved to intervene.

Mr. Pines asserts that he "only found out about this action in August 2020." Pines Mot. at 12. Even if Mr. Pines could show that he was not properly notified on May 19, 2017, he still allowed a year to elapse before seeking to intervene on August 11, 2021. He suggests that when he "heard nothing" from counsel, Pines Decl. ¶ 54, he "decided to take a new legal approach," id. ¶ 55, implying that he moved to intervene after it became apparent that he would not achieve his desired result by contacting class counsel. This does not justify a twelve-month delay while the case progressed and the parties engaged in settlement negotiations. See In re Lorazepam & Clorazepate Antitrust Litig. v. Mylan Labs ("In re Lorazepam"), 205 F.R.D. 363, 368 (D.D.C. 2001) (finding motion to intervene untimely where the purported intervenor "waited nine months to file th[e] motion, pointing to Class Counsel's [] refusals to cooperate as its only explanation for doing so"); Allen v. Bedolla, 787 F.3d 1218, 1222 (9th

Cir. 2015) (finding a motion to intervene untimely that was "filed after four years of ongoing litigation, on the eve of settlement, and threatened to prejudice settling parties by potentially derailing settlement talks").

Mr. Pines is not entitled to intervene as of right under Rule 24(a)(2) because he has not demonstrated that his interests are inadequately represented and because his motion to intervene is not timely.

B. Permissive Intervention

Pursuant to Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure, a court has discretion to permit a party to intervene upon timely motion where the intervening party "has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1)(B). The D.C. Circuit has articulated three requirements that a putative intervenor ordinarily must meet: "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." E.E.O.C. v. Nat'l Children's Ctr., Inc., 146 F.3d 1042, 1046 (D.C. Cir. 1998); see also Envt'l. Defense v. Leavitt, 329 F. Supp. 2d 55, 66 (D.D.C. 2004). A court's decision pursuant to Rule 24(b) is discretionary and a district court may "deny a motion for permissive intervention even if the movant establishe[s]" all three of these requirements. E.E.O.C. v. Nat'l Children's Ctr., Inc., 146 F.3d at 1048. In exercising its discretion, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(3).

The Court concludes that permissive intervention is not warranted under Rule 24(b). First, Mr. Pines's motion is not timely for the reasons set forth above. Second, while Mr. Pines's submission may share some "question[s] of law or fact in common with the main

action," E.E.O.C. v. Nat'l Children's Ctr., Inc., 146 F.3d at 1046, he also raises numerous issues and arguments that that go far beyond the scope of the class claim. See Pines Mot. at 8 ("[P]laintiffs who have claims against Pacer might have many varied claims . . . . They should have all their fees reimbursed."); Pines Decl. ¶ 94 (seeking $10,000 for each time Mr. Pines logged into PACER during the class period); Pines Decl. ¶¶ 3-6 ("I have been exposing bad conduct by the 'Too Big To Fail Banks' and the complicity of the federal and state governments since about 2010 . . . . As a result, I was disbarred, put in jail, prison, and mental hospitals but was innocent of any wrongdoing. The proposed legal action concerns this."); see also id. ¶¶ 39-42 (describing eviction action and subsequent court proceedings).

In addition, allowing Mr. Pines to intervene could seriously disrupt the settlement discussions, which may resolve this case, and therefore could derail a final resolution of the parties' rights. In the context of a motion to intervene in a class action, "the Court must strike [] a 'balance between keeping class litigation manageable and allowing affected parties to be adequately heard.'" In re Lorazepam, 205 F.R.D. at 367 (quoting Twelve John Does v. Disrict of Columbia, 117 F.3d at 575). As plaintiffs explain, this case has proceeded through class certification, summary judgment on liability, and an appeal to the Federal Circuit, and the parties are now engaged in mediation toward "a potential global settlement." Pl. Opp. at 1-2. Mr. Pines "now asks the Court to undo all this," id. at 2, by seeking to modify the class certification order despite "not identify[ing] any defect in the class definition or class claim," id. at 3.

Mr. Pines "has already shown [] willingness . . . to delay the proceedings," including by moving to decertify the class, seek sanctions, and raise factual issues and legal arguments outside the scope of the class claim. Barnes v. District of Columbia, 274 F.R.D. at 319 (finding that intervention would "unduly delay the adjudication of the original parties' rights" where the putative intervenor had filed a motion for declaratory judgment, a motion to stay

proceedings pending adjudication of his motions, and had requested "essentially all of the discovery" in the case). Mr. Pines suggests that if allowed to intervene he would "subpoena any and all emails by and among counsel to find out what they have said and what has happened," and acknowledges that "[i]t is difficult for Pines to determine what amount of excess costs and expenses he will incur." Pines Mot. at 13. He also suggests that he "intend[s] to object to any settlement and [counsel] might be wasting time and energy trying to settle until after the court heard the motion to decertify." Pines Decl. ¶ 52.

Given the advanced posture of this case, the nature of the intervention that Mr. Pines states that he intends to pursue, and the fact that Mr. Pines has not established that he is inadequately represented, the Court concludes that the "balance between keeping class litigation manageable and allowing affected parties to be adequately heard," In re Lorazepam, 205 F.R.D. at 367, weighs against intervention. The Court therefore will deny Mr. Pines's request.

C. Modification of Class Certification Order, Sanctions, and Other Relief

Because the Court concludes that Mr. Pines may not intervene in this case, it will deny as moot his requests to modify the class certification order and for sanctions.

Mr. Pines also submitted via email to the Clerk's Office a Motion for Pretrial Conference and to Appoint a Special Master, an Application to Proceed in District Court Without Prepaying Fees or Costs, and an Emergency Motion for Order to Reactivate PACER Account [Dkt. No. 125], which the Court granted leave to be filed on the docket. Because the Court denies Mr. Pines's motion to intervene, and Mr. Pines therefore is not a party to this case, it also denies as moot the motion for pretrial conference and to appoint a special master, and the motion to reactivate PACER account.

The Court will grant Mr. Pines's application to proceed without prepaying costs and will direct the Clerk's Office to file that application on the docket. That application would not be moot if Mr. Pines seeks to appeal this order. In addition, the Court finds that Mr. Pines has shown that he is unable to pay the filing fees in the court of appeals. See 28 U.S.C. § 1915(a)(1).

III. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Mr. Pines's pro se Motion for Intervention and for Leave to File Complaint in Intervention, Motion to Modify Class Certification Order, and for Sanctions [Dkt. No. 116] is DENIED; it is

FURTHER ORDERED that Mr. Pines's Motion for Pretrial Conference and to Appoint a Special Master is DENIED as moot; it is

FURTHER ORDERED that Mr. Pines's Emergency Motion for Order to Reactivate PACER Account [Dkt. No. 125] is DENIED as moot; and it is

FURTHER ORDERED that Mr. Pines's Application to Proceed in District Court Without Prepaying Fees or Costs is GRANTED and the Clerk of the Court is directed to file that application on the docket in this case.

SO ORDERED.

Paul L. Friedman

PAUL L. FRIEDMAN
United States District Judge

DATE: 11/16/21

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5204 **September Term, 2021**

1:16-cv-00745-PLF

Filed On: November 15, 2021

In re: Michael T. Pines,

Petitioner

BEFORE: Rao and Walker, Circuit Judges, and Sentelle, Senior Circuit Judge

O R D E R

Upon consideration of the corrected petition for writ of mandamus and the supplement thereto, the motion for leave to proceed in forma pauperis, the emergency motion to reactivate PACER account, and the opposition thereto, it is

ORDERED that the motion for leave to proceed in forma pauperis be granted. It is

FURTHER ORDERED that the petition for writ of mandamus be dismissed. Under the All Writs Act, 28 U.S.C. § 1651 (1982), federal courts may issue all writs "necessary or appropriate in aid of their respective jurisdictions." "[A]uthority under the All Writs Act 'extends to those cases which are within [a court's] appellate jurisdiction although no appeal has been perfected.'" In re Tennant, 359 F.3d 523, 527 (D.C. Cir. 2004) (internal citation omitted) (dismissing petition because court had "no future appellate jurisdiction that a writ of mandamus could protect"). Here, the Federal Circuit has exclusive jurisdiction over any appeal arising from the case which is the subject of the instant petition. See 28 U.S.C. § 1295(a)(2). Thus, there is no basis upon which the underlying case could be brought within this court's appellate jurisdiction. It is

FURTHER ORDERED that the emergency motion to reactivate PACER account be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Lynda M. Flippin
Deputy Clerk

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UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL SERVICES PROGRAM, et. al. Plaintiffs v. UNITED STATES OF AMERICA, Defendant		Case No. 1:16-cv-00745-PLF **NOTICE OF APPEAL**

Michael T. Pines appeals to the United States Court of Appeals for the District of Columbia from the order denying the Motions to Intervene and For Leave To File A Complaint In Intervention, Motion to Modify Class Certification Order, and for Sanctions entered on November 16, 2021.

Dated: December 16, 2021 /s/ Michael T. Pines

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5291 **September Term, 2022**

1:16-cv-00745-PLF

Filed On: November 14, 2022 [1973453]

National Veterans Legal Services Program,
et al.,

Appellees

v.

United States of America,

Appellee

Michael T. Pines,

Appellant

MANDATE

In accordance with the order of September 28, 2022, and pursuant to Federal Rule of Appellate Procedure 41, this constitutes the formal mandate of this court.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

Link to the order filed September 28, 2022

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5291 **September Term, 2022**

1:16-cv-00745-PLF

Filed On: September 28, 2022 [1966506]

National Veterans Legal Services Program,
et al.,

Appellees

v.

United States of America,

Appellee

Michael T. Pines,

Appellant

ORDER

By order filed July 22, 2022, appellant was directed to file their initial submissions by August 22, 2022. To date, no initial submissions have been received from appellant. Upon consideration of the foregoing, it is

ORDERED that this case be dismissed for lack of prosecution. See D.C. Cir. Rule 38.

The Clerk is directed to issue the mandate in this case by November 14, 2022.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Laura M. Morgan
Deputy Clerk

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-PLF

PLAINTIFFS' REVISED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

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

April 12, 2023

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INTRODUCTION

In the history of American litigation, this case is unique: a certified class action against the federal judiciary. The plaintiffs challenged the fees that the judiciary charges for access to records through its Public Access to Court Electronic Records system, or PACER. They sought to vindicate a single claim: that the judiciary violated the law by charging fees that exceeded the cost of providing the records. And they sought one form of relief: refunds.

After more than six years of hard-fought litigation, the plaintiffs have now secured a historic settlement under which the government must reimburse the vast majority of PACER users in full—100 cents on the dollar—for past PACER charges. The settlement creates a common fund of $125 million from which each class member will automatically be reimbursed up to $350 for any PACER fees paid between April 21, 2010, and May 31, 2018. Those who paid over $350 in fees during that period will receive their pro rata share of the remaining settlement funds. Any unclaimed funds after this initial distribution will be allocated evenly to all class members who collected their initial payment (subject to the caveat that no class member may receive more than the total fees that she paid). In addition to this remarkable monetary relief, the case has spurred the judiciary to eliminate fees for 75% of users going forward and prompted action in Congress to abolish the fees altogether.

By any measure, this litigation has been an extraordinary achievement—and even more so given the odds stacked against it. PACER fees have long been the subject of widespread criticism because they thwart equal access to justice and inhibit public understanding of the courts. But until this case was filed, litigation wasn't seen as a realistic path to reform. That was for three reasons. First, the judiciary has statutory authority to charge at least *some* fees, so litigation alone could never result in a free PACER system. Second, few lawyers experienced in complex federal litigation would be willing to sue the federal judiciary—and spend considerable time and resources challenging decisions made by the Judicial Conference of the United States—with little hope of

payment. Third, even if PACER fees could be shown to be excessive and qualified counsel could be secured, the fees were still assumed to be beyond the reach of litigation. The judiciary is exempt from the Administrative Procedure Act, so injunctive relief is unavailable. A lawsuit challenging PACER fees had been dismissed for lack of jurisdiction, and advocates had been unable for years to identify an alternative basis for jurisdiction, a cause of action, and a statutory waiver of sovereign immunity. So they devoted their efforts to other strategies: making some records freely available in a separate database, downloading records in bulk, and mounting public-information campaigns.

These efforts were important, but they didn't alter the PACER fee system. Despite public criticism—and despite being reproached in 2009 and 2010 by Senator Joe Lieberman, the sponsor of a 2002 law curtailing the judiciary's authority to charge fees—the Administrative Office of the U.S. Courts did not reduce PACER fees. To the contrary, the AO *increased* fees in 2012.

There things stood until 2016, when three nonprofits filed this suit under the Little Tucker Act, a post-Civil-War-era statute that "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, 1573 (Fed. Cir. 1996). Because the Act provides jurisdiction only for claims seeking money for past overpayments, the plaintiffs could not demand that the judiciary lower PACER fees going forward. They could seek only retroactive monetary relief.

Even with this limitation, this lawsuit has been a resounding success at every step. The plaintiffs defeated a motion to dismiss and obtained certification of a nationwide class by early 2017. Through discovery, they were then able to shine a light on how the AO had used the fees. Many things funded by the fees—such as flat screens for jurors—had nothing to do with PACER. This discovery in turn led to an unprecedented decision: In March 2018, this Court held that the AO had violated the law by using PACER fees to fund certain activities. Within months, the judiciary announced that these activities would "no longer be funded" with PACER fees. Gupta Decl. ¶ 18.

Success continued on appeal. In the Federal Circuit, the plaintiffs "attracted an impressive array of supporting briefs from retired judges, news organizations, civil rights groups, and the sponsor of the 2002 law"—all detailing the harms of high PACER fees. *See* Adam Liptak, *Attacking a Pay Wall that Hides Public Court Filings*, N.Y. Times, Feb. 4, 2019, https://perma.cc/LN5E-EBE9. Media outlets published editorials championing the lawsuit. *See, e.g.*, *Public Records Belong to the Public*, N.Y. Times, Feb. 7, 2019, https://perma.cc/76P8-WFF7. And before long, the AO announced that it was doubling the quarterly fee waiver for PACER, eliminating fees for approximately 75% of PACER users. Gupta Decl. ¶ 20. Then the plaintiffs secured a landmark Federal Circuit opinion unanimously affirming this Court's decision. *NVLSP v. United States*, 968 F.3d 1340 (Fed. Cir. 2020).

The litigation sparked widespread public interest in the need to reform PACER fees and jumpstarted legislative action that continues to this day. Following the Federal Circuit's decision, the House of Representatives passed a bipartisan bill to eliminate PACER fees, and a similar proposal with bipartisan support recently advanced out of the Senate Judiciary Committee. Gupta Decl. ¶ 22. The Judicial Conference, too, now supports legislation providing for free PACER access to noncommercial users. *Id.* Were Congress to enact such legislation into law, it would produce an outcome that the plaintiffs had no way of achieving through litigation alone.

As for fees already paid—the claims at issue here—they will be refunded. Under the settlement, the average PACER user will be fully reimbursed for all PACER fees paid during the class period. And class members will not need to submit a claim to be paid.

This is an extraordinarily favorable result for the class, and it easily satisfies Rule 23(e)(2)'s criteria. As we will explain, the plaintiffs ask the Court to enter an order (1) finding that settlement approval is likely and certifying the expanded settlement class, (2) approving the revised notice plan and directing that notice be provided, and (3) scheduling a hearing to consider final approval and a forthcoming request for fees, costs, and service awards for the class representatives.

BACKGROUND

A. Factual and procedural background

1. The legal framework for PACER fees

By statute, the judiciary has long had authority to impose PACER fees "as a charge for services rendered" to "reimburse expenses incurred in providing these services." 28 U.S.C. § 1913 note. But in 2002, Congress found that PACER fees (then $.07 per page) were "higher than the marginal cost of disseminating the information," creating excess fee revenue that the judiciary had begun using to fund other projects. S. Rep. 107–174, 107th Cong., 2d Sess. 23 (2002). Congress sought to ensure that records would instead be "freely available to the greatest extent possible." *Id.*

To this end, Congress passed the E-Government Act of 2002, which amended the statute by adding the words "only to the extent necessary." 28 U.S.C. § 1913 note. Despite this limitation, the AO twice increased PACER fees in the years after the E-Government Act's passage—first to $.08 per page, and then to $.10 per page—during a time when the costs of electronic data storage plunged exponentially. Gupta Decl. ¶ 4. This widening disparity prompted the Act's sponsor, Senator Lieberman, to reproach the AO for charging fees that were "well higher than the cost of dissemination," "against the requirement of the E-Government Act." ECF Nos. 52-8 & 52-9.

Excessive PACER fees have inflicted harms on litigants and the public alike. Whereas the impact of excess fees on the judiciary's $7-billion annual budget is slight, these harms are anything but: 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. And the AO had further compounded the harmful effects of high fees in recent years 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 could not afford to pay the fees.

2. District court proceedings

In April 2016, three nonprofit organizations—National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice—filed this lawsuit. From the start, the plaintiffs were represented by an expert team drawn from the law firms of Gupta Wessler PLLC, a litigation boutique with experience bringing complex cases against the federal government, and Motley Rice LLC, one of the nation's leading class-action firms. The plaintiffs asked the Court to determine that the PACER fee schedule violates the E-Government Act and to award a full recovery of past overcharges—the only relief available to them under the Little Tucker Act. *See* 28 U.S.C. § 1346(a). Because the judiciary is not subject to the APA, 5 U.S.C. §§ 701(b)(1)(B) & 704, the plaintiffs could not seek injunctive relief requiring the AO to lower PACER fees in the future.

This Court (Judge Ellen Huvelle) denied the government's motion to dismiss in December 2016. ECF No. 24 & 25. A month later, in January 2017, the Court certified a nationwide opt-out class of all individuals and entities who paid PACER fees between April 21, 2010 and April 21, 2016, excluding federal-government entities and class counsel. ECF Nos. 32 & 33. The Court certified the plaintiffs' illegal-exaction Little Tucker Act claim for classwide treatment and appointed Gupta Wessler and Motley Rice as co-lead class counsel. *Id.*

The plaintiffs then submitted a proposal for class notice and retained KCC Class Action Services (or KCC) as claims administrator. The Court approved the plan in April 2017, ECF No. 44, and notice was provided to the class in accordance with the Court's order. Of the approximately 395,000 people who received notice, only about 1,100 opted out of the class. Gupta Decl. ¶ 14.

Informal discovery followed. It revealed that the judiciary had used PACER fees on a variety of categories of expenses during the class period. These include not only what the judiciary labeled as "Public Access Services," but also "Case Management/Electronic Case Files System" (or CM/ECF); "Electronic Bankruptcy Notification"; "Communications Infrastructure, Services,

and Security" (or "Telecommunications"); "Court Allotments"; and then four categories of expenses falling under "Congressional Priorities"—"Victim Notification (Violent Crime Control Act)," "Web-based Juror Services," "Courtroom Technology," and "State of Mississippi."

Based on this discovery, the parties filed competing motions for summary judgment as to liability only, "reserving the damages determination for after formal discovery." ECF No. 52 at 1. The plaintiffs took the position that PACER fees could be charged only to the extent necessary to reimburse the marginal costs of operating PACER and that the government was liable because the fees exceeded that amount. The government, by contrast, took the position that all PACER fees paid by the class were permissible. It argued that the statute authorizes fees to recover the costs of any project related to disseminating information through electronic means.

In March 2018, this Court took a third view. As the Court saw it, "when Congress enacted the E-Government Act, it effectively affirmed the judiciary's use of [PACER] fees for all expenditures being made prior to its passage, specifically expenses related to CM/ECF and [Electronic Bankruptcy Notification]." *NVLSP v. United States*, 291 F. Supp. 3d 123, 148 (D.D.C. 2018). The Court thus concluded that the AO "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 [Services], and most of the expenditures for Courtroom Technology." *Id.* at 145–46.

In the months that followed, the AO took steps "to implement the district court's ruling" and "reduce potential future legal exposure." Gupta Decl. ¶ 18. It announced in July 2018 that these four categories would "no longer be funded" with PACER fees. *Id.* "The Judiciary will instead seek appropriated funds for those categories," as it does for over 98% of its budget. *Id.* A year later, the AO announced that it was doubling the quarterly fee waiver for PACER—from $15 to $30—which had the effect of eliminating PACER fees for approximately 75% of PACER users. *Id.* ¶ 20.

3. Appellate proceedings

Both parties sought permission for an interlocutory appeal from this Court's decision, and the Federal Circuit accepted both appeals. The parties adhered to their same interpretations of the statute on appeal. The plaintiffs' position was supported by a broad array of amici curiae—a group of prominent retired federal judges, Senator Lieberman, media organizations, legal-technology firms, and civil-liberties groups from across the ideological spectrum—detailing the harms caused by high PACER fees. *See* Liptak, *Attacking a Pay Wall that Hides Public Court Filings*. In response, the government defended the full amount of PACER fees, while strenuously arguing that the court lacked jurisdiction under the Little Tucker Act.

The Federal Circuit rejected the government's jurisdictional argument and largely affirmed this Court's conclusions. It "agree[d] with the district court's interpretation that § 1913 Note limits PACER fees to the amount needed to cover expenses incurred in services providing public access to federal court electronic docketing information." *NVLSP*, 968 F.3d at 1350. It also "agree[d] with the district court's determination that the government is liable for the amount of the [PACER] fees used to cover the Mississippi Study, VCCA Notifications, E-Juror Services, and most Courtroom Technology expenses" (those not "used to create digital audio recordings of court proceedings"). *Id.* at 1357–58. The Federal Circuit noted that CM/ECF was a "potential source of liability" because the court could not confirm whether all "those expenses were incurred in providing public access to federal court electronic docketing information." *Id.* The Federal Circuit left it to this Court's "discretion whether to permit additional argument and discovery regarding the nature of the expenses within the CM/ECF category and whether [PACER] fees could pay for all of them." *Id.*

Following the Federal Circuit's decision, federal lawmakers swung into action. The House of Representatives passed a bipartisan bill to eliminate PACER fees, and a similar proposal with bipartisan support recently advanced out of the Senate Judiciary Committee. Gupta Decl. ¶ 22.

B. Mediation and settlement negotiations

On remand, the case was reassigned to Judge Friedman, and the parties came together to discuss the path forward. They understood that litigating the case to trial would entail significant uncertainty and delay. *Id.* ¶ 23. Years of protracted litigation lay ahead. And the range of potential outcomes was enormous: On one side, the government argued that it owed zero damages because the plaintiffs could not prove that, but for the unlawful expenditures, PACER fees would have been lower (a litigating position that also made it difficult for the judiciary to lower fees while the case remained pending). *Id.* On the other side, the plaintiffs maintained that liability had been established for four categories of expenses and that some portion of the CM/ECF expenditures were likely improper as well. *Id.*

Hoping to bridge this divide and avoid a lengthy delay, the parties were able to agree on certain structural aspects of a potential settlement and then agreed to engage in mediation on the amount and details. *Id.* ¶ 24. On December 29, 2020, at the parties' request, this Court stayed the proceedings until June 25, 2021 to allow the parties to enter into private mediation. *Id.*

Over the next few months, the parties exchanged information and substantive memoranda, which provided a comprehensive view of the strengths and weaknesses of the case. *Id.* ¶ 25. The parties scheduled an all-day mediation for May 3, 2021, to be supervised by Professor Eric D. Green, an experienced and accomplished mediator agreed upon by the parties. *Id.*

With Professor Green's assistance, the parties made considerable progress during the session in negotiating the details of a potential classwide resolution. *Id.* ¶ 26. The government eventually agreed to structure the settlement as a common-fund settlement, rather than a claims-made settlement, and the plaintiffs' agreed to consider the government's final offer concerning the total amount of that fund. *Id.* But by the time the session ended, the parties still hadn't agreed on the total amount of the common fund or other important terms—including how the money would

be distributed, what to do with any unclaimed funds after the initial distribution, and the scope of the release. *Id.* ¶ 27 Professor Green continued to facilitate settlement discussions in the days and weeks that followed, and the parties were ultimately able to agree on the total amount of the common fund, inclusive of all settlement costs, attorneys' fees, and service awards. *Id.* The parties then spent several months continuing to negotiate other key terms, while this Court repeatedly extended its stay to allow the discussions to proceed. *Id.*

Further progress was slow, and at times the parties reached potentially insurmountable impasses. *Id.* ¶ 28. But over a period of many months, they were able to resolve their differences and reach an agreement, the final version of which was executed on July 27, 2022. *Id.* ¶ 28; Gupta Decl. Ex. A ("Agreement"). The parties executed a supplemental agreement in September 2022 making certain technical modifications to the agreement. Gupta Decl. Ex. B ("Supp. Agreement"). The parties executed a second supplemental agreement in April 2023, allowing for additional time that the administrator may need for distribution. Gupta Decl. Ex. C ("Second Supp. Agreement").

C. Overview of the settlement agreement

1. The settlement class

As clarified by the supplemental agreement, the settlement defines the class as all persons or entities who paid PACER fees between April 21, 2010, and May 31, 2018 ("the Class Period"), excluding opt-outs, federal agencies, and class counsel. Agreement ¶ 3; Supp. Agreement. The Class Period does not go beyond May 31, 2018 because the AO stopped using PACER fees to fund the four categories of prohibited expenses after this date.

This definition includes all members of the class initially certified by this Court in January 2017—those who paid PACER fees between April 21, 2010 and April 21, 2016—as well those who do not meet that definition, but who paid PACER fees between April 22, 2016 and May 31, 2018. Agreement ¶ 4. Because this second group of people are not part of the original class, they did not

receive notice or a right to opt out when the original class was certified. For that reason, under the settlement, these additional class members will receive notice and an opportunity to opt out. *Id.*

2. The settlement relief

The settlement provides for a total common-fund payment by the United States of $125 million, which covers the monetary relief for the class's claims, interest, attorneys' fees, litigation expenses, administrative costs, and any service awards to the class representatives. *Id.* ¶ 11.

Once this Court has ordered final approval of the settlement and the appeal period for that order has expired, the United States will pay this amount to the claims administrator (KCC) for deposit into a settlement trust. *Id.* ¶¶ 12, 16. This trust will be established and administered by KCC, which will be responsible for distributing proceeds to class members. *Id.* ¶ 16.

3. The released claims

In exchange for the relief provided by the settlement, class members agree to release all claims that they have against the United States for overcharges related to PACER usage during the Class Period. *Id.* ¶ 13. This release does not cover any of the claims now pending in *Fisher v. United States*, No. 15-1575 (Fed. Cl.), the only other pending PACER-fee related lawsuit of which the AO is aware. Agreement ¶ 13. The amount of settlement funds disbursed to any class member in this case, however, will be deducted from any recovery that the class member may receive in *Fisher*. *Id.*[1]

4. Notice to settlement class

Within 30 days of an order approving settlement notice to the class (or within 30 days of KCC's receipt of the necessary information from the AO, whichever is later), KCC will provide

[1] The individual plaintiff in *Fisher* alleges 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. The case did not challenge the PACER fee schedule itself, and it is not a certified class action.

notice via publication and email to all class members for whom the AO has an email address on file. *Id.* ¶ 29; Gupta Decl. Ex. D, Revised Proposed Notice Plan ("Proposed Notice Plan") ¶¶ 2-3. Within 45 days of the order approving settlement notice, KCC will send postcard notice via U.S. mail to all class members for whom the AO does not have an email address or for whom email delivery was unsuccessful. Agreement ¶ 29; Proposed Notice Plan ¶ 6. KCC will also provide the relevant case documents on a website it has maintained that is dedicated to the settlement (www.pacerfeesclassaction.com). Agreement ¶ 29; Proposed Notice Plan ¶ 4. The notice will include information on how accountholders can notify KCC that an entity paid PACER fees on their behalf; information on how payers can notify KCC that they paid PACER fees on an accountholder's behalf; an explanation of the procedures for allocating and distributing the trust funds; the date upon which the Court will hold a fairness hearing under Rule 23(e); and the date by which class members must file their written objections, if any, to the settlement. Agreement ¶ 29; Proposed Notice Plan at 2.

5. Opt-out rights for the April 22, 2016 to May 31, 2018 class members

The notice sent to the additional class members—those who paid fees only between April 22, 2016 and May 31, 2018, and thus are not part of the class already certified—will also inform them of their right to opt out and the procedures through which they may exercise that right. Proposed Notice Plan ¶ 7. The opt-out period for these additional class members will be 90 days. *Id.*

6. Allocation and payment

Under the settlement, class members will not have to submit a claim to receive their payment. Agreement ¶ 16. Instead, KCC will use whatever methods are most likely to ensure that class members receive payment and will make follow-up attempts if necessary. *Id.*

The settlement provides that the trust funds be distributed as follows: KCC will first retain from the trust all notice and administration costs actually and reasonably incurred. *Id.* ¶ 18. KCC

will then distribute any service awards approved by the Court to the named plaintiffs and any attorneys' fees and costs approved by the Court to class counsel. *Id.* After these amounts have been paid from the trust, the remaining funds ("Remaining Amount") will be distributed to class members. *Id.* The Remaining Amount will be no less than 80% of the $125 million paid by the United States. *Id.* In other words, the settlement entitles class members to at least $100 million.

First distribution. KCC will distribute the Remaining Amount to class members using the following formula: It will first allocate to each class member a minimum payment amount equal to the lesser of $350 or the total amount paid in PACER fees by that class member during the Class Period. *Id.* ¶ 19. Next, KCC will add up each minimum payment amount for each class member, producing the Aggregate Minimum Payment Amount. *Id.* KCC will then deduct this Aggregate Minimum Payment Amount from the Remaining Amount and allocate the remainder pro rata to all class members who paid more than $350 in PACER fees during the Class Period. *Id.*

Thus, under this formula: (a) each class member who paid no more than $350 in PACER fees during the Class Period will receive a payment equal to the total amount of PACER fees paid by that class member during the Class Period; and (b) each class member who paid more than $350 in PACER fees during the Class Period will receive a payment of $350 plus their allocated pro-rata share of the total amount left over after the Aggregate Minimum Payment is deducted from the Remaining Amount. *Id.* ¶ 20.

KCC will complete disbursement of each class member's share of the recovery within 180 days of receiving the $125 million from the United States, or within 180 days of receiving the necessary information from AO, whichever is later. Second. Supp. Agreement ¶ 21. KCC will complete disbursement of the amounts for attorneys' fees and litigation expenses to class counsel, and service awards to the named plaintiffs, within 30 days of receiving the $125 million. *Id.* KCC will keep an accounting of the disbursements made to class members, including the amounts, dates,

and status of payments made to each class member, and will make all reasonable efforts, in coordination with class counsel, to contact class members who do not deposit their payments within 90 days. Agreement ¶ 22.

Second distribution. If, despite these efforts, unclaimed or undistributed funds remain in the settlement trust 180 days after KCC has made the distribution described in paragraph 21 of the Second Supplemental Agreement, those funds ("the Remaining Amount After First Distribution") will be distributed in the following manner. Second Supp. Agreement ¶ 23. First, the only class members eligible for a second distribution will be those who (1) paid more than $350 in PACER fees during the Class Period and (2) deposited or otherwise collected their payment from the first distribution. *Id.* Second, KCC will determine the number of class members who satisfy these two requirements and are therefore eligible for a second distribution. *Id.* Third, KCC will then distribute to each such class member an equal allocation of the Remaining Amount After First Distribution, subject to the caveat that no class member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the class member paid during the Class Period. *Id.* Prior to making the second distribution, KCC will notify the AO that unclaimed or undistributed funds remain in the trust. *Id.* Class members who are eligible to receive a second distribution will have three months from the time of the distribution to collect their payments. Agreement ¶ 24. If unclaimed or undistributed funds remain in the settlement trust after this three-month period expires, those funds will revert to the U.S. Treasury. *Id.* Upon expiration of this three-month period, KCC will notify the AO of this reverter, and the AO will provide KCC with instructions to effectuate the reverter. *Id.*

7. Service awards, attorneys' fees, and costs

The plaintiffs intend to apply to this Court for a service award of up to $10,000 per class representative and for an award of attorneys' fees and expenses. *Id.* ¶ 28. The total amount

requested in service awards, fees, and expenses will not exceed 20% of the total common fund. *Id.* Approval of the settlement is not contingent on the Court granting these requests, and any amounts awarded by the Court will be paid out of the common fund. *Id.* As required by Rule 23(h), Class Members will receive notice of the motion for attorneys' fees and a right to object. *Id.*

8. Further settlement-related proceedings

Any class member may express her views to the Court supporting or opposing the fairness, reasonableness, and adequacy of the proposed settlement. Agreement ¶ 30. Counsel for the parties may respond to any objection within 21 days of receiving the objection. *Id.* ¶ 31. Any class member who submits a timely objection to the proposed settlement—that is, an objection made at least 30 days before the fairness hearing—may appear in person or through counsel at the fairness hearing and be heard to the extent allowed by the Court. *Id.* ¶ 32; Proposed Notice Plan ¶ 8.

After the deadlines for filing objections and responses have lapsed, the Court will hold the fairness hearing, during which it will consider any timely and properly submitted objections made by class members to the proposed settlement. Agreement ¶ 33. The Court will decide whether to enter a judgment approving the settlement and dismissing this lawsuit in accordance with the settlement agreement. *Id.* The parties will request that the Court schedule the fairness hearing no later than 150 days after entry of the Court's order approving settlement notice to the class. *Id.*

Within 90 days of a final order from this Court approving the settlement, the AO will provide KCC with the most recent contact information that it has on file for each class member, along with the information necessary to determine the amount owed to each class member. *Id.* ¶ 14. This information will be subject to the terms of the April 3, 2017 protective order entered by this Court (ECF No. 41) and the February 2, 2023 stipulated supplemental protective order entered by this Court (ECF No. 146). After receiving this information, KCC will then be responsible for administering payments from the settlement trust in accordance with the agreement. *Id.*

ARGUMENT

I. The Court should certify the settlement class.

The settlement defines the class as all persons or entities who paid PACER fees between April 21, 2010 and May 31, 2018, excluding opt-outs, federal agencies, and class counsel. *Id.* ¶ 3 & Supp. Agreement. The vast majority of this class—anyone who paid PACER fees between April 21, 2010 and April 21, 2016—are members of the class certified by this Court in 2017. ECF No. 32. These class members have already received notice of the litigation and an opportunity to opt out.

A small subset of the class, however, has not. Settlement class members who paid PACER fees between April 22, 2016 and May 18, 2018, but not at any point in the six years prior, were not part of the original class certified by this Court. So they have not yet received notice or a chance to opt out. The plaintiffs therefore request that this Court certify, for settlement purposes only, an additional class that encompasses everyone who falls under this definition. This class meets the requirements of Rule 23(a) and 23(b)(3) for the same reasons as the original class. *See* ECF No. 33.

II. Because the settlement provides an exceptional recovery for the class, the Court should find that approval of the settlement is likely and direct that notice be provided to class members under Rule 23(e)(1).

Rule 23(e) requires court approval of a class-action settlement. This entails a "three-stage process, involving two separate hearings." *Ross v. Lockheed Martin Corp.*, 267 F. Supp. 3d 174, 189–90 (D.D.C. 2017) (cleaned up). Before the Court may approve a class-action settlement, it "must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), in turn, requires that the settlement be "fair, reasonable, and adequate."

The first stage, then, is for the Court to "make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms," *Ross*, 267 F. Supp. 3d at 194—a process

often referred to as preliminary approval. *See Manual for Complex Litig.* § 21.632 (4th ed. updated 2022). If the Court preliminarily approves the settlement, the next stage is to direct that notice be "sent to the class describing the terms of the proposed settlement and explaining class members' options with respect to the settlement agreement . . . including the right to object to the proposed settlement." *Ross*, 267 F. Supp. 3d at 190; *see* William B. Rubenstein, *Newberg on Class Actions* § 13:1 (5th ed. updated 2022). The final stage involves a fairness hearing during which the Court examines the settlement and any objections to it, followed by a decision on whether to approve the settlement. *Id.*

This case is at the preliminary-approval stage. "Whether to preliminarily approve a proposed class action settlement lies within the sound discretion of the district court." *Stephens v. Farmers Rest. Grp.*, 329 F.R.D. 476, 482 (D.D.C. 2019). That discretion, however, "is constrained by the principle of preference favoring and encouraging settlement in appropriate cases." *In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 16 (D.D.C. 2019); *see also id.* ("Class action settlements are favored as a matter of public policy."); *United States v. MTU Am. Inc.*, 105 F. Supp. 3d 60, 63 (D.D.C. 2015) ("Settlement is highly favored."). When a case settles early in the litigation, before any class has been certified, "the agreement requires closer judicial scrutiny than settlements that are reached after class certification." *Stephens*, 329 F.R.D. at 482 (cleaned up). But where, as here, a class has already been certified and the settlement follows years of hard-fought litigation, "[c]ourts will generally grant preliminary approval of a class action settlement if it appears to fall within the range of possible approval and does not disclose grounds to doubt its fairness or other obvious deficiencies." *Id.*; *see Richardson v. L'Oréal USA, Inc.*, 951 F. Supp. 2d 104, 106 (D.D.C. 2013).

The criteria guiding the preliminary-approval determination are supplied by Rule 23(e)(2), which requires consideration of whether "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief

provided for the class is adequate"; and "(D) the proposal treats class members equitably relative to each other." In considering these factors, the Court will also look to "the opinion of experienced counsel." *Stephens*, 329 F.R.D. at 486; *see also* Fed. R. Civ. P. 23, Advisory Committee Note, 2018 Amendments (observing that the Rule's enumerated factors were not intended to "to displace any factor" rooted in the case law). Each of these factors strongly supports preliminary approval here.

A. The class representatives and class counsel have vigorously represented the class throughout this litigation.

The first factor examines the adequacy of representation. In certifying the class in January 2017, this Court found that the three named plaintiffs are "particularly good class representatives" and that "[t]here is no dispute about the competency of class counsel"—Gupta Wessler, a litigation boutique with deep (and rare) experience in complex cases seeking monetary relief against the federal government, and Motley Rice, one of the nation's leading class-action firms. ECF No. 33 at 14–16.

That is no less true today. Since this Court's finding of adequate representation, the named plaintiffs and class counsel have spent nearly six years vigorously representing the class. They did so first in this Court, obtaining informal discovery from the judiciary that paved the way for an unprecedented decision concluding that the AO had violated the law with respect to PACER fees. They continued to do so on appeal, attracting a remarkable set of amicus briefs and favorable press coverage, and ultimately securing a landmark Federal Circuit opinion affirming this Court's decision and rejecting arguments made by the Appellate Staff of the U.S. Department of Justice's Civil Division. And they did so finally in mediation, spending months negotiating the best possible settlement for the class. In short, the representation here is not just adequate, but exemplary.

B. The settlement is the product of informed, arm's-length negotiations.

The next factor examines the negotiation process. It asks whether the negotiations were made at arm's length or whether there is instead some indication that the settlement could have been the product of collusion between the parties.

Here, "both sides negotiated at arms-length and in good faith," and "the interests of the class members were adequately and zealously represented in the negotiations." *Blackman v. District of Columbia*, 454 F. Supp. 2d 1, 9 (D.D.C. 2006) (Friedman, J.). The plaintiffs were represented by class counsel, while lawyers at the Department of Justice and the AO appeared for the government. "Although the mediation occurred before formal fact discovery began," there had been "significant informal discovery," which ensured that "the parties were well-positioned to mediate their claims." *Radosti v. Envision EMI, LLC*, 717 F.Supp.2d 37, 56 (D.D.C. 2010); *see also Trombley v. Nat'l City Bank*, 759 F. Supp. 2d 20, 26 (D.D.C. 2011) (explaining that "formal discovery is not . . . required even for final approval of a proposed settlement" if "significant factual investigation [had been] made prior to negotiating a settlement"). "[T]he parties reached a settlement only after a lengthy mediation session that was presided over by an experienced mediator," *Radosti*, 717 F.Supp.2d at 56, and the settlement was approved by DOJ leadership and the judiciary's administrative body. Even in the ordinary case, where a settlement is "reached in arm's length negotiations between experienced, capable counsel after meaningful discovery," without government involvement, there is a "presumption of fairness, adequacy, and reasonableness." *Kinard v. E. Capitol Fam. Rental, L.P.*, 331 F.R.D. 206, 215 (D.D.C. 2019). The presumption here is at least as strong.

C. The settlement relief provided to class members is exceptional—particularly given the costs, risks, and delays of further litigation.

The third and "most important factor" examines "how the relief secured by the settlement compares to the class members' likely recovery had the case gone to trial." *Blackman*, 454 F. Supp.

2d at 9–10. This factor focuses in particular on "(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)." Fed. R. Civ. P. 23(e)(2); *see also In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d at 16.

The relief provided to class members is remarkable. The total value of the settlement is $125 million, and every class member will be fully reimbursed, up to $350, for all PACER fees that they paid during the Class Period. Those who paid more than $350 in fees during the Class Period will receive a payment of $350 plus their pro rata share of the remaining settlement funds. Further, any unclaimed funds after this initial distribution will be allocated evenly to all class members who collected their initial payment (capped at the total amount of fees that each class member paid during the Class Period). Because most class members paid less than $350 during the Class Period, the average class member will receive a full refund of all fees paid. This relief will also be provided in a highly efficient manner—through a common-fund settlement in which class members will not have to submit any claim or make any attestation to receive payment. Agreement ¶ 16.

This would be an excellent outcome for the class even if it were achieved after trial, but it is especially good given the significant costs, risks, and delays posed by pursuing further litigation against the federal court system. The $125 million common fund represents nearly 70% of the total expenditures determined by the Federal Circuit to have been unlawfully funded with PACER fees during the Class Period. Without a settlement, the case would be headed for years of litigation and likely another appeal, with no guarantee that the class would wind up with any recovery given the government's remaining argument against liability (that the plaintiffs could not prove that PACER fees would have been lower—or by how much—but for the unlawful expenditures). Although the plaintiffs and class counsel believe that the government's argument is incorrect (and further, that

the AO should be liable for some portion of the CM/ECF expenses), the uncertainty and complete lack of case law on this issue counsel in favor of compromise. Add to that the benefits provided by avoiding protracted litigation and time-and-resource-intensive discovery into the remaining issues, and this is a superb recovery for the class.

The settlement's provision for attorneys' fees and service awards is also reasonable. The settlement provides that the total amount requested in service awards, administrative costs, and attorneys' fees will be no more than 20% of the aggregate amount of the common fund; and that "the Court will ultimately determine whether the amounts requested are reasonable." *Id.* ¶¶ 18, 28. The settlement further provides that the plaintiffs will request service awards of no more than $10,000 per class representative. *Id.* ¶ 28.

This Court will have the opportunity to assess the reasonableness of any requested award once it is made. For now, it is enough to note that these provisions ensure that class counsel will request an amount in fees that is reasonable relative to the relief they obtained for the class. *See In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 98 (D.D.C. 2013) (Friedman, J.) ("[A] majority of common fund class action fee awards fall between twenty and thirty percent," and "even in megafund cases involving recoveries of $100 million or more, fees of fifteen percent are common.").

D. The settlement agreement treats class members equitably relative to each other.

The fourth factor examines whether the settlement treats class members equitably vis-à-vis one other. The settlement here does so. It reimburses every class member for up to $350 in fees paid during the Class Period and distributes the remaining funds in a way that is proportional to the overcharges paid by each class member. This formula for calculating payments is reasonable under the circumstances of this case. It advances the AO's longstanding policy goal of expanding public access for the average PACER user and, in doing so, approximates how the AO likely would

have chosen to reduce PACER fees during the Class Period had it been acting under a proper understanding of the law. Indeed, following this Court's summary-judgment decision, the AO doubled the size of the quarterly fee waiver, from $15 to $30. Gupta Decl. ¶ 20. Had it done the same over the Class Period, the total fee waiver available to all PACER users would have increased by $480. Reimbursing every PACER user for up to $350 in fees paid, with pro rata distributions to any users who paid more than that amount, is therefore fully in keeping with the AO's fee policy and a reasonable allocation of damages. The minimum payments also make it likelier that class members will collect their payments, thereby maximizing recovery to the class.

In addition, the settlement is equitable in allowing the class representatives to seek service awards of up to $10,000, while recognizing that this Court has discretion to award a smaller amount (or no award at all). *See Cobell v. Salazar*, 679 F.3d 909, 922 (D.C. Cir. 2012); *Abraha v. Colonial Parking, Inc.*, 2020 WL 4432250, at *6 (D.D.C. July 31, 2020) (preliminarily approving settlement where "all parties will receive payments according to the same distribution plan and formulas, except for a relatively small additional payment" of $15,000 per named plaintiff "to compensate them for their time and effort in this litigation"). Service awards "are not uncommon in common-fund-type class actions and are used to compensate plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73, 79 (D.D.C. 2011). The three nonprofits that prosecuted this case have been actively engaged in the litigation for more than six years—preparing declarations, receiving case updates, spending countless hours reviewing drafts and giving substantive feedback, and weighing in throughout the negotiation process, helping to produce a better outcome for all class members. Given their extraordinary contributions, it would be inequitable *not* to compensate them for their service.

E. The plaintiffs and class counsel support the settlement.

The final relevant factor is not enumerated in the text of Rule 23, but it is well-settled in the case law. Under this Court's cases, "the opinion of experienced and informed counsel should be afforded substantial consideration by a court in evaluating the reasonableness of a proposed settlement." *Prince v. Aramark Corp.*, 257 F. Supp. 3d 20, 26 (D.D.C. 2017). Counsel for both parties "are clearly of the opinion that the settlement in this action is fair, adequate, and reasonable," which only further confirms its reasonableness. *Cohen v. Chilcott*, 522 F.Supp.2d 105, 121 (D.D.C. 2007).

III. The notice and notice programs will provide class members the best notice practicable under the circumstances.

Due process requires that notice to class members be "reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank Tr. Co.*, 339 U.S. 306, 314 (1950). Rule 23(e)(1) similarly requires that notice be directed in a "reasonable manner to all class members who would be bound by the proposal." The proposed notice meets these requirements. It describes the lawsuit in plain English, including the key terms of the settlement, the procedures for objecting to it, and the date of the fairness hearing. Agreement ¶ 29. The notice sent to the additional class members—those who paid fees only between April 22, 2016 and May 31, 2018—will also inform them of their right to opt out and the procedures through which they may exercise that right. Proposed Notice Plan ¶ 7. Further, the notices will be distributed in a way that is designed to reach all class members: publication notice in the electronic newsletters of American Bankers Association, *Banking Journal*, *The Slant*, and a press release distributed via Cision PR Newswire; email notice to all class members for whom the AO has an email address on file; and postcard notice to all class members for whom the AO does not have an email address or for whom email delivery was unsuccessful. Agreement

¶ 29; Proposed Notice Plan ¶¶ 2, 3, 6. Relevant case documents will also be available on the settlement website. Agreement ¶ 29; Proposed Notice Plan ¶ 4.

CONCLUSION

This Court should grant the revised motion for preliminary approval and enter the proposed order.

Respectfully submitted,

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April 12, 2023

EXHIBIT A

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.

Civ. A. No. 16-0745 (PLF)

CLASS ACTION SETTLEMENT AGREEMENT

For the purpose of disposing of the plaintiffs' claims in this case without any further judicial proceedings on the merits and without there being any trial or final judgment on any issue of law or fact, and without constituting an admission of liability on the part of the defendant, and for no other purpose except as provided herein, the parties stipulate and agree as follows:

Background and Definitions

1. The plaintiffs challenge the lawfulness of fees charged by the federal government to access to records through the Public Access to Court Electronic Records program or "PACER." The lawsuit claims that the fees are set above the amount permitted by statute and seeks monetary relief under the Little Tucker Act, 28 U.S.C. § 1346(a) in the amount of the excess fees paid. The government contends that all such fees are lawful.

2. The complaint was filed on April 21, 2016. ECF No. 1. On January 24, 2017, this Court certified a nationwide class under Federal Rule of Civil Procedure ("Rule") 23(b)(3) and a single class claim alleging that PACER fees exceeded the amount authorized by statute and seeking

recovery of past overpayments. ECF Nos. 32, 33. The Court also appointed Gupta Wessler PLLC and Motley Rice LLC (collectively, "Class Counsel") as co-lead class counsel. *Id.*

3. "Plaintiffs" or "Class Members," as used in this agreement, are defined to include all persons or entities who paid PACER fees between April 22, 2010, and May 31, 2018 ("the Class Period"). Excluded from that class are: (i) entities that have already opted out; (ii) federal agencies; and (iii) Class Counsel.

4. The class originally certified by this Court consists only of individuals and entities who paid fees for use of PACER between April 21, 2010, and April 21, 2016 (with the same three exceptions noted in the previous paragraph). Plaintiffs who were not included in that original class definition—that is to say, PACER users who were not included in the original class and who paid fees for use of PACER between April 22, 2016, and May 31, 2018—shall be provided with notice of this action and an opportunity to opt out of the class.

5. On April 17, 2017, the Court entered an order approving the plaintiffs' proposed plan for providing notice to potential class members. ECF No. 44. The proposed plan designated KCC as Class Action Administrator ("Administrator"). Notice was subsequently provided to all Class Members included in the original class, and they had until July 17, 2017, to opt out of the class, as explained in the notice and consistent with the Court's order approving the notice plan. The notice referenced in paragraph 4 above shall be provided by the Administrator.

6. On March 31, 2018, the Court issued an opinion on the parties' cross-motions for summary judgment on liability. ECF No. 89; *see Nat'l Veterans Legal Servs. Program v. United States*, 291 F. Supp. 3d 123, 126 (D.D.C. 2018). While briefing cross-motions on liability, the parties "reserv[ed] the damages determination for" a later point "after formal discovery." *Id.* at 138.

7. On August 13, 2018, the Court certified its March 31, 2018, summary-judgment decision for interlocutory appeal to the Federal Circuit under 28 U.S.C. § 1292(b). ECF Nos. 104,

105; *see Nat'l Veterans Legal Servs. Program v. United States*, 321 F. Supp. 3d 150, 155 (D.D.C. 2018).

8. On August 6, 2020, the Federal Circuit affirmed this Court's decision on the parties' motions for summary judgment and remanded the case to this Court for further proceedings. *See Nat'l Veterans Legal Servs. Program v. United States*, 968 F.3d 1340, 1343 (Fed. Cir. 2020).

9. Following the Federal Circuit's decision, the parties agreed to engage in mediation to discuss the possibility of settling Plaintiffs' claims. On December 29, 2020, this Court stayed the proceedings through June 25, 2021, and it has repeatedly extended that stay since then as the parties have made progress on negotiating a global settlement.

10. On May 3, 2021, the parties participated in a day-long private mediation session in an attempt to resolve Plaintiffs' claims. Since then, the parties have engaged in numerous follow-up conversations via phone and email to come to an agreement on resolving the claims.

Common Fund Payment and Release

11. Plaintiffs have offered to settle this action in exchange for a common-fund payment by the United States in the total amount of one hundred and twenty-five million dollars ($125,000,000.00) (the "Aggregate Amount") inclusive of monetary relief for Plaintiffs' claims, interest, attorney fees, litigation expenses, administration costs, and any service awards to Class Representatives. Subject to this Court's approval, as set forth in paragraph 33, Plaintiffs' offer has been accepted by the United States.

12. Following the Court's order granting final approval of the settlement, as described in the "Fairness Hearing" portion of this agreement, and only after the appeal period for that order has expired, the United States shall pay the Aggregate Amount to the Administrator for deposit in the Settlement Trust, as referenced in paragraph 16.

13. Upon release of the Aggregate Amount from the U.S. Department of the Treasury's Judgment Fund, Plaintiffs and all Class Members release, waive, and abandon, 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. This release does not cover any claims based on PACER usage after May 31, 2018, nor any of the claims now pending in *Fisher v. United States*, No. 15-1575 (Fed. Cl.). But the amount of settlement funds disbursed to any Class Member in this case shall be deducted in full from any monetary recovery that the Class Member may receive in *Fisher*. The Administrative Office of the U.S. Courts ("Administrative Office") represents that, apart from *Fisher*, it is aware of no other pending PACER-fee lawsuit pertaining to claims based on PACER usage on or before May 31, 2018.

Information

14. Within 30 days of a final order approving the settlement, Class Counsel shall provide to the Administrative Office the PACER account numbers of Class Counsel and all individuals who have opted out of the Class. Within 90 days of a final order approving the settlement, the Administrative Office shall make available to the Administrator the records necessary to determine the total amount owed to each Class Member, and the last known address or other contact information of each Class Member contained in its records. Should the Administrative Office need more than 90 days to do so, it will notify the Administrator and Class Counsel and provide the necessary information as quickly as reasonably possible. The Administrator shall bear sole responsibility for making payments to Class Members, using funds drawn from the Settlement Trust, as provided below. In doing so, the Administrator will use the data that the Administrative Office

currently possesses for each Class Member, and the United States shall be free of any liability based on errors in this data (*e.g.*, inaccurate account information, incorrect addresses, etc.).

15. The PACER account information provided in accordance with the previous paragraph shall be provided pursuant to the terms of the Stipulated Protective Order issued in this lawsuit on April 3, 2017 (ECF No. 41) as modified to encompass such information and shall be subject to the terms of the Stipulated Protective Order. The parties agree to jointly request that the Court extend the Stipulated Protective Order to encompass such information prior to the 90-day period set forth in the previous paragraph.

Disbursement of the Aggregate Amount

16. The Administrator shall establish a Settlement Trust, designated the "PACER Class Action Settlement Trust," to disburse the proceeds of the settlement. The administration and maintenance of the Settlement Trust, including responsibility for distributing the funds to Class Members using methods that are most likely to ensure that Class Members receive the payments, shall be the sole responsibility of the Administrator. Class Members will not be required to submit a claim form or make any attestation to receive their payments. The only obligation of the United States in connection with the disbursement of the Aggregate Amount will be: (i) to transfer the Aggregate Amount to the Administrator once the Court has issued a final order approving the settlement and the appeal period for that order has expired, and (ii) to provide the Administrator with the requisite account information for PACER users, as referenced in paragraph 14. The United States makes no warranties, representations, or guarantees concerning any disbursements that the Administrator makes from the Settlement Trust, or fails to make, to any Class Member. If any Class Member has any disagreement concerning any disbursement, the Class Member shall resolve any such concern with the Administrator.

17. The Settlement Trust is intended to be an interest-bearing Qualified Settlement Fund within the meaning of Treasury Regulation § 1.468B-1. The Administrator shall be solely responsible for filing all informational and other tax returns as may be necessary. The Administrator shall also be responsible for causing payments to be made from the Settlement Trust for any taxes owed with respect to the funds held by the Settlement Trust. The Administrator shall timely make all such elections and take such other actions as are necessary or advisable to carry out this paragraph.

18. As approved by the Court, the Administrator shall disburse the proceeds of the settlement as follows: The Administrator shall retain from the Settlement Trust all notice and administration costs actually and reasonably incurred, which includes actual costs of publication, printing, and mailing the notice, as well as the administrative expenses actually incurred and fees reasonably charged by the Administrator in connection with providing notice and processing the submitted claims. The Administrator shall distribute any service awards approved by the Court to the named plaintiffs, and any attorney fees and costs approved by the Court to Class Counsel, as set forth in the "Fairness Hearing" portion of this agreement. After the amounts for attorney fees, expenses, service awards, and notice and administration costs have been paid from the Aggregate Amount, the remaining funds shall be distributed to the class ("Remaining Amount"). The Remaining Amount shall be no less than 80% of the Aggregate Amount, or $100,000,000.

19. ***First Distribution.*** The Administrator shall allocate the Remaining Amount among Class Members as follows: First, the Administrator shall allocate to each Class Member a minimum payment amount equal to the lesser of $350 or the total amount paid in PACER fees by that Class Member for use of PACER during the Class Period. Second, the Administrator shall add together each minimum payment amount for each Class Member, which will produce the Aggregate Minimum Payment Amount. Third, the Administrator shall then deduct the Aggregate Minimum Payment Amount from the Remaining Amount and allocate the remainder pro rata (based on the

amount of PACER fees paid in excess of $350 during the Class Period) to all Class Members who paid more than $350 in PACER fees during the Class Period.

20. Thus, under the formula for the initial allocation: (a) each Class Member who paid a total amount less than or equal to $350 in PACER fees for use of PACER during the Class Period would receive a payment equal to the total amount of PACER fees paid by that Class Member for PACER use during the Class Period; and (b) each Class Member who paid more than $350 in PACER fees for use of PACER during the Class Period would receive a payment of $350 plus their allocated pro-rata share of the total amount left over after the Aggregate Minimum Payment is deducted from the Remaining Amount.

21. The Administrator shall complete disbursement of each Class Member's individual share of the recovery, calculated in accordance with the formula set forth in the previous two paragraphs, within 90 days of receipt of the Aggregate amount, or within 21 days after receiving from the Administrative Office the information set forth in paragraph 14 above, whichever is later. The Administrator shall complete disbursement of the amounts for attorney fees and litigation expenses to Class Counsel, and service awards to the named plaintiffs, within 30 days of the receipt of the Aggregate Amount.

22. The Administrator shall keep an accounting of the disbursements made to Class Members, including the amounts, dates, and outcomes (*e.g.*, deposited, returned, or unknown) for each Class Member, and shall make all reasonable efforts, in coordination with Class Counsel, to contact Class Members who do not deposit their payments within 90 days of the payment being made to them.

23. ***Second Distribution.*** If, despite these efforts, unclaimed or undistributed funds remain in the Settlement Trust one year after the United States has made the payment set forth in paragraph 12, those funds ("the Remaining Amount After First Distribution") shall be distributed to

Class Members as follows. First, the only Class Members who will be eligible for a second distribution will be those who (1) paid a total amount of more than $350 in PACER fees for use of PACER during the Class Period, and (2) deposited or otherwise collected their payment from the first distribution, as confirmed by the Administrator. Second, the Administrator shall determine the number of Class Members who satisfy these two requirements and are therefore eligible for a second distribution. Third, the Administrator shall then distribute to each such Class Member an equal allocation of the Remaining Amount After First Distribution, subject to the caveat that no Class Member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the Class Member paid for use of PACER during the Class Period. The entire amount of the Remaining Amount After First Distribution will be allocated in the Second Distribution. To the extent a payment is made to a Class Member by the Administrator by check, any check that remains uncashed following one year after the United States has made the payment set forth in paragraph 12 shall be void, and the amounts represented by that uncashed check shall revert to the Settlement Trust for the Second Distribution. Prior to making the Second Distribution, the Administrator will notify in writing the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office at the following addresses that unclaimed or undistributed funds remain in the Settlement Trust.

If to the Administrative Office's Court Services Office:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Court Services Office
One Columbus Circle, N.E., Ste. 4-500
Washington, DC 20544

If to the Administrative Office's Office of General Counsel:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Office of General Counsel

One Columbus Circle, N.E. Ste. 7-290
Washington, DC 20544

24. Class Members who are eligible to receive a second distribution shall have three months from the time of the distribution to deposit or otherwise collect their payments. If, after this three-month period expires, unclaimed or undistributed funds remain in the Settlement Trust, those funds shall revert unconditionally to the U.S. Department of the Treasury. Upon expiration of this three month period, the Administrator will notify in writing the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office at the addresses referenced in paragraph 23 of this reverter. Instructions to effectuate the reverter will be provided to the Administrator following receipt of such notice, and the Administrator agrees to promptly comply with those instructions. The three-month period will run for all Class Members eligible to receive a second distribution from the date the earliest distribution is made of a second distribution to any Class Member eligible for such a distribution. Upon request, the Administrator will notify the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office of the date the three-month period commenced. To the extent a payment in connection with the Second Distribution is made to a Class Member by the Administrator by check, any check that remains uncashed following this three-month period shall be void, and the amounts represented by that uncashed check shall revert to the Settlement Trust for reverter to the United States.

25. The Class Representatives have agreed to a distribution structure that may result in a reverter to the U.S. Treasury for purposes of this settlement only.

26. Neither the parties nor their counsel shall be liable for any act or omission of the Administrator or for any mis-payments, overpayments, or underpayments of the Settlement Trust by the Administrator.

Fairness Hearing

27. As soon as possible and in no event later than 60 days after the execution of this agreement, Class Counsel shall submit to the Court a motion for an Order Approving Settlement Notice to the Class under Rule 23(e). The motion shall include (a) a copy of this settlement agreement, (b) the proposed form of the order, (c) the proposed form of notice of the settlement to be mailed to Class Members and posted on an internet website dedicated to this settlement by the Administrator, and (d) the proposed form of notice to be mailed to Class Members who were not included in the original class definition certified by the Court on January 24, 2017, as discussed in paragraph 4, and posted on the same website, advising them of their right to opt out. The parties shall request that a decision on the motion be made promptly on the papers or that a hearing on the motion be held at the earliest date available to the Court.

28. Under Rule 54(d)(2), and subject to the provisions of Rule 23(h), Plaintiffs will apply to the Court for an award of attorney fees and reimbursement of litigation expenses, and for service awards for the three Class Representatives in amounts not to exceed $10,000 per representative. These awards shall be paid out of the Aggregate Amount. When combined, the total amount of attorney fees, service awards, and administrative costs shall not exceed 20% of the Aggregate Amount. With respect to the attorney fees and service awards, the Court will ultimately determine whether the amounts requested are reasonable. The United States reserves its right, upon submission of Class Counsel's applications, to advocate before the Court for the use of a lodestar cross-check in determining the fee award, and for a lower service award for the Class Representatives should Plaintiffs seek more than $1,000 per representative. Plaintiffs' motion for an award of attorney fees and litigation expenses shall be subject to the approval of the Court and notice of the motion shall be provided to Class Members informing them of the request and their right to object to the motion, as required by Rule 23(h).

29. Within 30 days of the Court's entry of the Order Approving Settlement Notice to the Class, the Administrator shall mail or cause to be mailed the Notice of Class Action Settlement by email or first-class mail to all Class Members. Contemporaneous with the mailing of the notice and continuing through the date of the Fairness Hearing, the Administrator shall also display on an internet website dedicated to the settlement the relevant case documents, including the settlement notice, settlement agreement, and order approving the notice. The Notice of Class Action Settlement shall include an explanation of the procedures for allocating and distributing funds paid pursuant to this settlement, the date upon which the Court will hold a "Fairness Hearing" under Rule 23(e), and the date by which Class Members must file their written objections, if any, to the settlement.

30. Any Class Member may express to the Court his or her views in support of, or in opposition to, the fairness, reasonableness, and adequacy of the proposed settlement. If a Class Member objects to the settlement, such objection will be considered only if received no later than the deadline to file objections established by the Court in the Order Approving Settlement Notice to the Class. The objection shall be filed with the Court, with copies provided to Class Counsel and counsel for the United States, and the objection must include a signed, sworn statement that (a) identifies the case number, (b) describes the basis for the objection, including citations to legal authority and evidence supporting the objection, (c) contains the objector's name, address, and telephone number, and if represented by counsel, the name, address, email address, and telephone number of counsel, and (d) indicates whether objector intends to appear at the Fairness Hearing.

31. Class Counsel and counsel for the United States may respond to any objection within 21 days after receipt of the objection.

32. Any Class Member who submits a timely objection to the proposed settlement may appear in person or through counsel at the Fairness Hearing and be heard to the extent allowed by the Court. Any Class Members who do not make and serve written objections in the manner

provided in paragraph 30 shall be deemed to have waived such objections and shall forever be foreclosed from making any objections (by appeal or otherwise) to the proposed settlement.

33. After the deadlines for filing objections and responses to objections have lapsed, the Court will hold the Fairness Hearing at which it will consider any timely and properly submitted objections made by Class Members to the proposed settlement. The Court will decide whether to approve the settlement and enter a judgment approving the settlement and dismissing this lawsuit in accordance with the settlement agreement. The parties shall request that the Court schedule the Fairness Hearing no later than 150 days after entry of the Court's Order Approving Settlement Notice to the Class.

34. If this settlement is not approved in its entirety, it shall be void and have no force or effect.

Miscellaneous Terms

35. This agreement is for the purpose of settling Plaintiffs' claims in this action without the need for further litigation, and for no other purpose, and shall neither constitute nor be interpreted as an admission of liability on the part of the United States.

36. Each party fully participated in the drafting of this settlement agreement, and thus no clause shall be construed against any party for that reason in any subsequent dispute.

37. In the event that a party believes that the other party has failed to perform an obligation required by this settlement agreement or has violated the terms of the settlement agreement, the party who believes that such a failure has occurred must so notify the other party in writing and afford it 45 days to cure the breach before initiating any legal action to enforce the settlement agreement or any of its provisions.

38. The Court shall retain jurisdiction for the purpose of enforcing the terms of this settlement agreement.

39. Plaintiffs' counsel represent that they have been and are authorized to enter into this agreement on behalf of Plaintiffs and the class.

40. Undersigned defense counsel represents that he has been authorized to enter into this agreement by those within the Department of Justice with appropriate settlement authority to authorize the execution of this agreement.

41. This document constitutes a complete integration of the agreement between the parties and supersedes any and all prior oral or written representations, understandings, or agreements among or between them.

<REMAINDER OF PAGE LEFT BLANK; SIGNATURES PAGES TO FOLLOW>

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Attorneys for Plaintiffs

Date: 07/27/2022

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BRIAN P. HUDAK
Chief, Civil Division

By: _____ 7-12-22
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EXHIBIT B

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

STIPULATION AND FIRST AMENDMENT
TO CLASS ACTION SETTLEMENT AGREEMENT

Through this Stipulation and Amendment, the parties agree to the following modification to the Class Action Settlement Agreement, executed by counsel for Plaintiffs on July 27, 2022 and counsel for Defendant on July 12, 2022 (the "Agreement").

Paragraph 3 of the Agreement shall be replaced with the following language:

> 3. "Plaintiffs" or "Class Members," as used in this agreement, are defined to include all persons or entities who paid PACER fees between April 21, 2010, and May 31, 2018 ("the Class Period") regardless of when such persons or entities used the PACER system. Excluded from that class are: (i) persons or entities that have already opted out; (ii) federal agencies; and (iii) Class Counsel.

In addition, the parties agree that the phrases "who paid PACER fees between [date x] and [date y]" and "who paid fees for use of PACER between [date x] and [date y]," as used in paragraphs 3 and 4 of the Agreement, refer to the payment of PACER fees in the specified period rather than the use of PACER in the specified period. The parties further agree that each specified period in those paragraphs includes both the start and end dates unless otherwise specified.

Finally, in paragraph 27 of the Agreement, the parties agree that the reference to "60 days" shall be changed to "75 days."

The remainder of Agreement remains unchanged by this Stipulation and Amendment.

AGREED TO ON BEHALF OF PLAINTIFFS:

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Date: September 29, 2022

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EXHIBIT C

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

STIPULATION AND SECOND AMENDMENT
TO CLASS ACTION SETTLEMENT AGREEMENT

Through this Stipulation and Second Amendment, the parties agree to the following modification to the Class Action Settlement Agreement, executed by counsel for Plaintiffs on July 27, 2022 and counsel for Defendant on July 12, 2022 (the "Agreement").

Paragraph 21 of the Agreement shall be replaced with the following language:

21. The Administrator shall complete disbursement of each Class Member's individual share of the recovery, calculated in accordance with the formula set forth in the previous two paragraphs, within 180 days of receipt of the Aggregate amount, or within 180 days after receiving from the Administrative Office the information set forth in paragraph 14 above, whichever is later. The Administrator shall complete disbursement of the amounts for attorney fees and litigation expenses to Class Counsel, and service awards to the named plaintiffs, within 30 days of the receipt of the Aggregate Amount.

Paragraph 23 of the Agreement shall be replaced with the following language:

23. ***Second Distribution.*** If, despite these efforts, unclaimed or undistributed funds remain in the Settlement Trust 180 days after the Administrator has made the distribution described in paragraph 21, those funds ("the Remaining Amount After

First Distribution") shall be distributed to Class Members as follows. First, the only Class Members who will be eligible for a second distribution will be those who (1) paid a total amount of more than $350 in PACER fees for use of PACER during the Class Period, and (2) deposited or otherwise collected their payment from the first distribution, as confirmed by the Administrator. Second, the Administrator shall determine the number of Class Members who satisfy these two requirements and are therefore eligible for a second distribution. Third, the Administrator shall then distribute to each such Class Member an equal allocation of the Remaining Amount After First Distribution, subject to the caveat that no Class Member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the Class Member paid for use of PACER during the Class Period. The entire amount of the Remaining Amount After First Distribution will be allocated in the Second Distribution. To the extent a payment is made to a Class Member by the Administrator by check, any check that remains uncashed 180 days after the Administrator has made the distribution described in paragraph 21, shall be void, and the amounts represented by that uncashed check shall revert to the Settlement Trust for the Second Distribution. Prior to making the Second Distribution, the Administrator will notify in writing the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office at the following addresses that unclaimed or undistributed funds remain in the Settlement Trust.

If to the Administrative Office's Court Services Office:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Court Services Office
One Columbus Circle, N.E., Ste. 4-500
Washington, DC 20544

If to the Administrative Office's Office of General Counsel:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Office of General Counsel
One Columbus Circle, N.E. Ste. 7-290
Washington, DC 20544

The remainder of Agreement remains unchanged by this Stipulation and Second Amendment.

AGREED TO ON BEHALF OF PLAINTIFFS:

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Date: 04-12-23

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BRIAN P. HUDAK
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By: _____ 4-11-23

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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. 1:16-cv-00745-PLF

ORDER GRANTING PLAINTIFFS' REVISED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

After considering Plaintiffs' Revised Motion for Preliminary Approval of Class Settlement ("Plaintiffs' Motion"),

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion is GRANTED.

2. After a preliminary review, the Settlement appears to be fair, reasonable, and adequate. The Settlement: (a) resulted from arm's-length negotiations between experienced counsel overseen by an experienced mediator; (b) eliminates the risk, costs, delay, inconvenience, and uncertainty of continued litigation; (c) involves the previously certified Class of individuals and entities who paid PACER fees between April 21, 2010 and April 21, 2016, but also a proposed additional Settlement Class of individuals and entities who paid PACER fees between April 22, 2016 and May 31, 2018; (d) does not provide undue preferential treatment to Class Representatives or to segments of the Class; (e) does not provide excessive compensation to counsel for the Class; and (f) is therefore sufficiently fair, reasonable, and adequate to warrant providing notice of the Settlement

to the Class. Accordingly, the Court preliminarily approves the Settlement, subject to further consideration at the Settlement Hearing described below.

3. A hearing (the "Settlement Hearing") shall be held before this Court 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 for the following purposes:

a. to determine whether the Settlement is fair, reasonable, and adequate, and should be approved by the Court;
b. to determine whether judgment should be entered, dismissing the Complaint on the merits and with prejudice;
c. to consider the fee and expense application;
d. to consider Class Members' objections to the Settlement, or the application for fees and expenses, if any;
e. to rule upon such other matters as the Court may deem appropriate.

4. The Court may adjourn the Settlement Hearing without further notice to the members of the Class, and reserves the right to approve the Settlement with such modifications as may be agreed upon or consented to by the parties and without further notice to the Class where to do so would not impair Class Members' rights in a manner inconsistent with Rule 23 and due process of law. The Court further reserves the right to enter its judgment approving the Settlement, and dismissing the Complaint on the merits and with prejudice regardless of whether it has approved the fee and expense application.

5. The Court will consider comments or objections to the Settlement or the request for fees and expenses, only if such comments or objections and any supporting papers are submitted to the Court at least thirty days prior to the Settlement Hearing according to the procedure described in the website notice. Attendance at the Settlement Hearing is not necessary, but any person wishing to be heard orally in opposition to the Settlement is required to indicate in their written objection whether they intend to appear at the Settlement Hearing.

6. All opening briefs and documents in support of the Settlement and any fee and expense application, shall be filed no later than forty-five days before the Settlement Hearing. Replies to any objections shall be filed at least nine days prior to the Settlement Hearing.

7. The revised Settlement Class satisfies Rule 23 and is certified for the same reasons set forth in the Court's prior class certification order. The Settlement Class is defined as:

> All persons or entities who paid PACER Fees between April 21, 2010 and May 31, 2018, excluding persons or entities that have already opted out, federal agencies, and Class Counsel.

8. The notice documents advising the previously certified Class Members ("Initial Class Members") of the Settlement are hereby approved as to form and content. Exhibit 1 (2010-2016 email notice); Exhibit 3 (2010-2016 postcard notice).

9. The notice documents advising the Additional Class Members of the Settlement and providing for opt-out rights are hereby approved as to form and content. Exhibit 2 (2016-2018 email notice); Exhibit 4 (2016-2018 postcard notice).

10. The long-form website notice advising the Class Members of the Settlement and providing for opt-out rights for the Additional Class Members is hereby approved as to form and content. Exhibit 5.

11. The publication notice advising the Class Members of the Settlement and providing for opt-out rights for the Additional Class Members is hereby approved as to form and content. Exhibit 6.

12. The firm of KCC Class Action Services LLC ("KCC" or "Administrator") is appointed to supervise and administer the notice procedure.

13. To the extent they are not already produced, within fourteen days from the entry of this order, Defendant shall produce to Plaintiffs the names, postal addresses, email addresses, phone

numbers, PACER-assigned account numbers, and firm name of all individuals or entities with a PACER account that paid PACER fees during the class period ("Notice Data"). 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 received 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, @ussss.dhs.gov, @irscounsel.treas.gov, @dol.gov, @ci.irs.gov, @ice.dhs.gov, @ssa.gov, @psc.uscourts.gov, @sec.gov, @ic.fbi.gov, @irs.gov, and @usdoj.gov.[1]

14. Within thirty days from the later of (a) the date of this order, or (b) Plaintiffs' receipt of the Notice Data from Defendant, the Administrator shall provide the publication notice, in substantially the same form as Exhibit 6, to American Bankers Association ("ABA"), *Banking Journal, The Slant,* and Cision PR Newswire for publication.

15. Within thirty days from the later of (a) the date of this order, or (b) Plaintiffs' receipt of the Notice Data from Defendant, the Administrator shall cause the email notices to be disseminated, in substantially the same form as Exhibits 1 and 2, by sending them out via email to all Class Members. The Initial Class Members will be emailed Exhibit 1. The Additional Class Members will be emailed Exhibit 2. The email notices shall direct Class Members to a website maintained by the Administrator. The sender of the email shall appear to recipients as "PACER

[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 addresses (accounting@dol.gov, johndoe1@dol.gov, johndoe2@dol.gov, and janedoe1@dol.gov) would receive notice.

Fees Class Action Administrator," and the subject line of the email shall be "PACER Fees – Notice of Class Action Settlement."

16. Contemporaneous with the emailing of the notices and continuing through the date of the Settlement Hearing, the Administrator shall display on the internet website dedicated to this case, www.pacerfeesclassaction.com, the long-form notice in substantially the same form as Exhibit 5. The Administrator shall continue to maintain the website and respond to inquiries by Class Members as necessary. The website will include the printable Exclusion Request form, the online Exclusion Request form, Plaintiffs' Class Action Complaint, Defendant's Answer, the Order on the Motion for Class Certification, the Memorandum Opinion on the Motion for Class Certification, the District Court's summary judgment opinion, the Federal Circuit's summary judgment opinion, the Settlement Agreement, this order, and any other relevant documents. The website will include the ability for Class Members to check the status of their refund check if the Court grants final approval of the settlement and update their mailing address. The website will also allow accountholders to notify the Administrator that an entity paid PACER fees on their behalf, and will allow payers to notify the Administrator that they paid PACER fees on an accountholder's behalf. These changes must be made on the website no later than 60 days after dissemination of email notice.

17. Within thirty days from the entry of this order, the Administrator shall make available to Class Members telephone support to handle any inquiries from Class Members.

18. Within forty-five days from the later of (a) the date of this order, or (b) Plaintiffs' receipt of the Notice Data from Defendant, the Administrator shall cause the postcard notices to be disseminated, in substantially the same form as Exhibits 3 and 4 by sending them out via U.S. mail to all Class Members: (1) without an email address; or (2) for whom email delivery was unsuccessful. The Initial Class Members will be mailed Exhibit 3. The Additional Class Members will be mailed

Exhibit 4. The postcard notices will direct Class Members to the website maintained by the Administrator.

19. Additional Class Members can ask to be excluded from the settlement by: (1) sending an Exclusion Request in the form of a letter; (2) completing and submitting the online Exclusion Request form; or (3) sending an Exclusion Request form by mail. Ninety days after the entry of this order, the opt-out period for the Additional Class Members will expire.

20. Class Members can object to the Settlement or the request for fees and expenses by submitting their comments or objections and any supporting papers to the United States District Court for the District of Columbia according to the procedure described in the website notice. Such comments or objections must be submitted at least thirty days prior to the settlement hearing. Any response by the United States to Plaintiffs' request for fees and expenses, as reserved in paragraph 28 of the Settlement Agreement, must be submitted at least thirty days prior to the settlement hearing.

21. The Court finds that the dissemination of the notice under the terms and in the forms provided for 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.

5/8/23
Date

[signature]
The Honorable Paul L. Friedman
Senior 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-PLF

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

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August 28, 2023

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5. Declaration of Deepak Gupta, Gupta Wessler LLP
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TABLE OF AUTHORITIES

Cases

Rules

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INTRODUCTION

The plaintiffs ask the Court to grant final approval of this historic class-action settlement. Since the Court granted preliminary approval on May 8, 2023, the claims administrator has carried out the Court-approved notice program, sending individualized notice to approximately 500,000 class members and providing publication notice as well. The reception so far has been almost universally positive: As of this filing, the administrator has received only one objection and 34 valid opt-out requests. *See* KCC Decl. ¶ 21. The plaintiffs will update the Court on the number of opt-outs and objections, and respond to any additional objections, no later than October 3.

This settlement brings to an end a case that has generated more than seven years of hard-fought litigation, and that is unique in American history: a certified class action against the federal judiciary, concerning the fees that the judiciary charges for access to records through the Public Access to Court Electronic Records system, or PACER. Under the settlement, the government must reimburse the vast majority of PACER users in full—100 cents on the dollar—for past PACER charges. The settlement creates a common fund of $125 million from which each class member will automatically be reimbursed up to $350 for any PACER fees paid between April 21, 2010, and May 31, 2018. Those who paid over $350 in fees during that period will receive their pro rata share of the remaining settlement funds. Any unclaimed funds after this initial distribution will be allocated evenly to all class members who collected their initial payment (subject to the caveat that no class members may receive more than the total fees that they actually paid). In addition to this remarkable monetary relief, the case has spurred the judiciary to eliminate fees for 75% of users going forward and prompted action in Congress to abolish the fees altogether.

By any measure, this litigation has been an extraordinary achievement—and even more so given the odds stacked against it. PACER fees have long been the subject of widespread criticism because they thwart equal access to justice and inhibit public understanding of the courts. But until

this case was filed, litigation wasn't seen as a realistic path to reform. That was for three reasons. First, the judiciary has statutory authority to charge at least *some* fees, so litigation alone could never result in a free PACER system. Second, few lawyers experienced in complex federal litigation would be willing to sue the federal judiciary—and spend considerable time and resources challenging decisions made by the Judicial Conference of the United States—with little hope of payment. Third, even if PACER fees could be shown to be excessive and qualified counsel could be secured, the fees were still assumed to be beyond the reach of litigation. The judiciary is exempt from the Administrative Procedure Act, so injunctive relief is unavailable. A lawsuit challenging PACER fees had been dismissed for lack of jurisdiction, and advocates had been unable for years to identify an alternative basis for jurisdiction, a cause of action, and a statutory waiver of sovereign immunity. So they devoted their efforts to other strategies: making some records freely available in a separate database, downloading records in bulk, and mounting public-information campaigns.

These efforts were important, but they didn't challenge the lawfulness of PACER fees. Despite public criticism—and despite being reproached in 2009 and 2010 by Senator Lieberman, the sponsor of a 2002 law curtailing the judiciary's authority to charge fees—the Administrative Office of the U.S. Courts did not reduce PACER fees. Instead, the AO *increased* fees in 2012.

There things stood until 2016, when three nonprofits filed this suit under the Little Tucker Act, a post-Civil-War-era statute that "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, 1573 (Fed. Cir. 1996). Because the Act provides jurisdiction only for claims seeking money for past overpayments, the plaintiffs could not demand that the judiciary lower PACER fees going forward. They could seek only retroactive monetary relief.

Even with this built-in jurisdictional limitation, this lawsuit has been a resounding success. The plaintiffs defeated a motion to dismiss and obtained certification of a nationwide class by early

2017. Through discovery, they were then able to shine a light on how the AO had used the fees. Many things funded by the fees—such as flat screens for jurors—had nothing to do with PACER. This discovery in turn led to an unprecedented decision: In March 2018, this Court held that the AO had violated the law by using PACER fees to fund certain activities. Within months, the AO announced that these activities would "no longer be funded" with PACER fees. Gupta Decl. ¶ 18.

Success continued on appeal. In the Federal Circuit, the plaintiffs "attracted an impressive array of supporting briefs from retired judges, news organizations, civil rights groups, and the sponsor of the 2002 law"—all detailing the harms of high PACER fees. *See* Adam Liptak, *Attacking a Pay Wall that Hides Public Court Filings*, N.Y. Times, Feb. 4, 2019, https://perma.cc/LN5E-EBE9. Media outlets published editorials championing the lawsuit. *See, e.g.*, *Public Records Belong to the Public*, N.Y. Times, Feb. 7, 2019, https://perma.cc/76P8-WFF7. And before long, the AO announced that it was doubling the $15 quarterly fee waiver for PACER, eliminating fees for approximately 75% of PACER users. Gupta Decl. ¶ 20. Then the plaintiffs secured a landmark Federal Circuit opinion unanimously affirming this Court's decision. *NVLSP v. United States*, 968 F.3d 1340 (Fed. Cir. 2020).

The litigation sparked widespread public interest in the need to reform PACER fees and jumpstarted legislative action that continues to this day. Following the Federal Circuit's decision, the House of Representatives passed a bipartisan bill to eliminate PACER fees, and a similar proposal with bipartisan support advanced out of the Senate Judiciary Committee. Gupta Decl. ¶ 22. The Judicial Conference, too, now supports legislation providing for free PACER access to noncommercial users. *Id.* Were Congress to enact such legislation into law, it would produce an outcome that the plaintiffs had no way of achieving through litigation alone.

As for fees already paid—the claims at issue here—they will be refunded. Under the settlement, the average PACER user will be reimbursed for all PACER fees paid during the class period. And no class member will need to submit a claim to be paid.

This is an extraordinarily favorable result for the class, and it easily satisfies Rule 23(e)(2)'s criteria. This Court has already found that, on "a preliminary review," the settlement "appears to be fair, reasonable, and adequate" because it "(a) resulted from arm's-length negotiations between experienced counsel overseen by an experienced mediator; (b) eliminates the risks, costs, delay, inconvenience, and uncertainty of continued litigation; (c) involves the previously certified Class" and an "additional Settlement Class"; "(d) does not provide undue preferential treatment to Class Representatives or to segments of the Class"; and "(e) does not provide excessive compensation to counsel for the Class." ECF No. 153 at 1. Because a final review only confirms these findings, the plaintiffs respectfully request that the Court enter an order giving final approval to the settlement.

In addition, as authorized by the settlement, this motion seeks an award of attorneys' fees, settlement-administration and notice costs, litigation expenses, and service awards for the three class representatives in a total amount equal to 20% of the $125 million common fund. This request should be granted in full. The specific amounts sought are as follows: The motion seeks $29,654.98 in expenses because class counsel actually and reasonably incurred that amount to prosecute the case and achieve the settlement. The motion seeks $1,077,000 in settlement-administration and notice costs because the administrator initially agreed to perform its services for $977,000, and an additional $100,000 is needed due to unanticipated complexities. And the motion seeks an award of $10,000 per class representative to compensate them for their time working on the case and the responsibility that they have shouldered. Each of these requested amounts is reasonable. Class counsel seeks the remainder ($23,863,345.02) in attorneys' fees. This amount is approximately 19.1% of the common fund, which is below the average percentage fee awarded for funds of this size. Fitzpatrick Decl. ¶ 19. And the other factors that courts look to in assessing the reasonableness of a requested fee—including the degree of complexity and risk involved in the case, as well as the results obtained for the class—would, if anything, support a greater-than-average percentage here.

BACKGROUND

A. Factual and procedural background

1. The legal framework for PACER fees

By statute, the judiciary has long had authority to impose PACER fees "as a charge for services rendered" to "reimburse expenses incurred in providing these services." 28 U.S.C. § 1913 note. But in 2002, Congress found that PACER fees (then $.07 per page) were "higher than the marginal cost of disseminating the information," creating excess fee revenue that the judiciary had begun using to fund other projects. S. Rep. 107-174, at 23 (2002). Congress sought to ensure that records would instead be "freely available to the greatest extent possible." *Id.*

To this end, Congress passed the E-Government Act of 2002, which amended the statute by adding the words "only to the extent necessary." 28 U.S.C. § 1913 note. Despite this limitation, the AO twice increased PACER fees in the years after the E-Government Act's passage—first to $.08 per page, and then to $.10 per page—during a time when the costs of electronic data storage plunged exponentially. Gupta Decl. ¶ 4. This widening disparity prompted the Act's sponsor, Senator Lieberman, to reproach the AO for charging fees that were "well higher than the cost of dissemination," "against the requirement of the E-Government Act." ECF No. 52-8 at 3; ECF No. 52-9 at 1.

Excessive PACER fees have inflicted harms on litigants and the public alike. Whereas the impact of excess fees on the judiciary's $7-billion annual budget is slight, these harms are anything but: 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. And the AO had further compounded the harmful effects of high fees in recent years 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 could not afford to pay the fees.

2. District court proceedings

In April 2016, three nonprofit organizations—National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice—filed this lawsuit. From the start, the plaintiffs were represented by an expert team drawn from the law firms of Gupta Wessler LLP, a litigation boutique with experience bringing complex cases against the federal government, and Motley Rice LLC, one of the nation's leading class-action firms. The plaintiffs asked the Court to determine that the PACER fee schedule violates the E-Government Act and to award a full recovery of past overcharges—the only relief available to them under the Little Tucker Act. *See* 28 U.S.C. § 1346(a). Because the judiciary is not subject to the APA, 5 U.S.C. §§ 701(b)(1)(B) & 704, the plaintiffs could not seek injunctive relief requiring the AO to lower PACER fees in the future.

This Court (Judge Ellen Huvelle) denied the government's motion to dismiss in December 2016. ECF Nos. 24 & 25. A month later, in January 2017, the Court certified a nationwide opt-out class of all individuals and entities who paid PACER fees between April 21, 2010 and April 21, 2016, excluding federal-government entities and class counsel. ECF Nos. 32 & 33. The Court certified the plaintiffs' illegal-exaction Little Tucker Act claim for classwide treatment and appointed Gupta Wessler and Motley Rice as co-lead class counsel. *Id.*

The plaintiffs then submitted a proposal for class notice and retained KCC Class Action Services (or KCC) as claims administrator. The Court approved the plan in April 2017, ECF No. 44, and notice was provided to the class in accordance with the Court's order. Of the approximately 395,000 people who received notice, only about 1,100 opted out of the class. Gupta Decl. ¶ 14.

Informal discovery followed. It revealed that the judiciary had used PACER fees on a variety of categories of expenses during the class period. These include not only what the judiciary

labeled as "Public Access Services," but also "Case Management/Electronic Case Files System" (or CM/ECF); "Electronic Bankruptcy Notification"; "Communications Infrastructure, Services, and Security" (or "Telecommunications"); "Court Allotments"; and then four categories of expenses falling under "Congressional Priorities"—"Victim Notification (Violent Crime Control Act)," "Web-based Juror Services," "Courtroom Technology," and "State of Mississippi [Study]."

Based on this discovery, the parties filed competing motions for summary judgment as to liability only, "reserving the damages determination for after formal discovery." ECF No. 52 at 1. The plaintiffs took the position that PACER fees could be charged only to the extent necessary to reimburse the marginal costs of operating PACER and that the government was liable because the fees exceeded that amount. The government, by contrast, took the position that all PACER fees paid by the class were permissible. It argued that the statute authorizes fees to recover the costs of any project related to disseminating information through electronic means.

In March 2018, this Court took a third view. As the Court saw it, "when Congress enacted the E-Government Act, it effectively affirmed the judiciary's use of [PACER] fees for all expenditures being made prior to its passage, specifically expenses related to CM/ECF and [Electronic Bankruptcy Notification]." *NVLSP v. United States*, 291 F. Supp. 3d 123, 148 (D.D.C. 2018). The Court thus concluded that the AO "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 [Services], and most of the expenditures for Courtroom Technology." *Id.* at 145–46.

In the months that followed, the AO took steps "to implement the district court's ruling" and "reduce potential future legal exposure." Gupta Decl. ¶ 18. It announced in July 2018 that these four categories would "no longer be funded" with PACER fees. *Id.* "The Judiciary will instead seek appropriated funds for those categories," as it does for over 98% of its budget. *Id.* A year later, the

AO announced that it was doubling the quarterly fee waiver for PACER—from $15 to $30—which had the effect of eliminating PACER fees for approximately 75% of PACER users. *Id.* ¶ 20.

3. Appellate proceedings

Both parties sought permission for an interlocutory appeal from this Court's decision, and the Federal Circuit accepted both appeals. The parties adhered to their same interpretations of the statute on appeal. The plaintiffs' position was supported by a broad array of amici curiae—a group of prominent retired federal judges, Senator Lieberman, media organizations, legal-technology firms, and civil-liberties groups from across the ideological spectrum—detailing the harms caused by high PACER fees. *See* Liptak, *Attacking a Pay Wall that Hides Public Court Filings*. In response, the government defended the full amount of PACER fees, while strenuously arguing that the court lacked jurisdiction under the Little Tucker Act.

The Federal Circuit rejected the government's jurisdictional argument and largely affirmed this Court's conclusions. It "agree[d] with the district court's interpretation that § 1913 Note limits PACER fees to the amount needed to cover expenses incurred in services providing public access to federal court electronic docketing information." *NVLSP*, 968 F.3d at 1350. It also "agree[d] with the district court's determination that the government is liable for the amount of the [PACER] fees used to cover the Mississippi Study, VCCA Notifications, E-Juror Services, and most Courtroom Technology expenses" (those not "used to create digital audio recordings of court proceedings"). *Id.* at 1357–58. The Federal Circuit noted that CM/ECF was a "potential source of liability" because the court could not confirm whether all "those expenses were incurred in providing public access to federal court electronic docketing information." *Id.* The Federal Circuit left it to this Court's "discretion whether to permit additional argument and discovery regarding the nature of the expenses within the CM/ECF category and whether [PACER] fees could pay for all of them." *Id.*

Following the Federal Circuit's decision, federal lawmakers swung into action. The House of Representatives passed a bipartisan bill to eliminate PACER fees, and a similar proposal with bipartisan support advanced out of the Senate Judiciary Committee. Gupta Decl. ¶ 22.

B. Mediation and settlement negotiations

On remand, the case was reassigned to Judge Friedman, and the parties came together to discuss the path forward. They understood that litigating the case to trial would entail significant uncertainty and delay. Gupta Decl. ¶ 23. Years of protracted litigation lay ahead. And the range of potential outcomes was enormous: On one side, the government argued that it owed zero damages to the class because the plaintiffs could not prove that, but for the unlawful expenditures, PACER fees would have been lower (a litigating position that also made it difficult for the judiciary to lower fees while the case remained pending). *Id.* On the other side, the plaintiffs maintained that liability had already been established for four categories of expenses and that some portion of the CM/ECF expenditures were likely improper as well. *Id.*

Hoping to bridge this divide and avoid a lengthy delay, the parties were able to agree on certain structural aspects of a potential settlement and then agreed to engage in mediation on the amount and details. *Id.* ¶ 24. On December 29, 2020, at the parties' request, this Court stayed the proceedings until June 25, 2021 to allow the parties to enter into private mediation. *Id.*

Over the next few months, the parties exchanged information and substantive memoranda, which provided a comprehensive view of the strengths and weaknesses of the case. *Id.* ¶ 25. The parties scheduled an all-day mediation for May 3, 2021, to be supervised by Professor Eric D. Green, an experienced and accomplished mediator agreed upon by the parties. *Id.*

With Professor Green's assistance, the parties made considerable progress during the session in negotiating the details of a potential classwide resolution. *Id.* ¶ 26. The government eventually agreed to structure the settlement as a common-fund settlement, rather than a claims-

made settlement, and the plaintiffs agreed to consider the government's final offer concerning the total amount of that fund. *Id.* But by the time the session ended, the parties still hadn't agreed on the total amount of the common fund or other important terms—including how the money would be allocated and distributed to class members, what to do with any unclaimed funds after the initial distribution, and the scope of the release. *Id.* ¶ 27. Professor Green continued to facilitate settlement discussions in the days and weeks that followed, and the parties were ultimately able to agree on the total amount of the common fund, inclusive of all settlement costs, attorneys' fees, and service awards. *Id.* The parties then spent several months continuing to negotiate other key terms, while this Court repeatedly extended its stay to allow the discussions to proceed. *Id.*

Further progress was slow, and at times the parties reached potentially insurmountable impasses. *Id.* ¶ 28. A particular sticking point concerned the allocation of settlement funds. *Id.* Consistent with the parties' litigating positions, the plaintiffs argued that funds should be distributed pro rata to class members, while the government argued for a large minimum amount per class member, which it maintained was in keeping with the AO's statutory authority (and longstanding policy) to "distinguish between classes of persons" in setting PACER fees "to avoid unreasonable burdens and to promote public access to such information," 28 U.S.C. § 1913 note; Gupta Decl. ¶ 28. Over a period of many months, the parties were able to resolve their differences and reach a compromise on these competing approaches: a minimum payment of $350—the smallest amount the government would agree to—with a pro rata distribution beyond that amount. *Id.*

The final version of the settlement was executed on July 27, 2022. *Id.* ¶ 28; Gupta Decl. Ex. A ("Agreement"). The parties executed an amendment in September 2022 making certain technical modifications to the agreement, and a second amendment in April 2023 making further technical modifications. Gupta Decl. Ex. B ("First Supp. Agreement") & Ex. C ("Second Supp. Agreement").

C. Overview of the settlement agreement

1. The settlement class

As clarified by the first supplemental agreement, the settlement defines the class as all persons or entities who paid PACER fees between April 21, 2010, and May 31, 2018 ("the class period"), excluding opt-outs, federal agencies, and class counsel. Agreement ¶ 3; First Supp. Agreement. The class period does not go beyond May 31, 2018 because the AO stopped using PACER fees to fund the four categories of prohibited expenses after this date.

This definition includes all members of the class initially certified by this Court in January 2017—those who paid PACER fees between April 21, 2010 and April 21, 2016—as well those who do not meet that definition, but who paid PACER fees between April 22, 2016 and May 31, 2018. Agreement ¶ 4. Because people in this second group are not part of the original class, they did not receive notice or a right to opt out when the original class was certified. For that reason, under the settlement, these additional class members received notice and a right to opt out in 2023. *Id.*

2. The settlement relief

The settlement provides for a total common-fund payment by the United States of $125 million, which covers the monetary relief for the class's claims, interest, attorneys' fees, litigation expenses, administrative costs, and any service awards to the class representatives. *Id.* ¶ 11.

Once this Court has ordered final approval of the settlement and the appeal period for that order has expired, the United States will pay this amount to the claims administrator (KCC) for deposit into a settlement trust. *Id.* ¶¶ 12, 16. This trust will be established and administered by KCC, which will be responsible for distributing proceeds to class members. *Id.* ¶ 16.

3. The released claims

In exchange for the relief provided by the settlement, class members agree to release all claims that they have against the United States for overcharges related to PACER usage during the class period. *Id.* ¶ 13.[1]

4. Notice to settlement class and requests for exclusion

Over the past two months, KCC has sent court-approved settlement notice to over 500,000 PACER accountholders. KCC Decl. ¶¶ 8, 15. On July 6, it sent an initial batch of more than 336,000 email notices and over 100,000 postcard notices to those for whom email notice was not possible or successful. *Id.* ¶¶ 8–10. On August 7, KCC sent notice to an additional 184,478 accountholders who were inadvertently omitted from the first batch of notices. *Id.* ¶ 15. These 184,478 people were not prejudiced by the delay because they all received notice and opt-out rights in 2017, so they were not entitled to opt out of the settlement in 2023. Further, they all have 36 days to object to the settlement and 29 days to notify KCC that someone else paid PACER fees on their behalf. KCC also sent corrective notice on August 7 to an additional 53,446 accountholders who had received the wrong notice in the initial batch based on a data error. Instead of receiving notice providing only an opportunity to object to the settlement, and not also to opt out (which each of these accountholders had already been given in 2017), these accountholders received notice that mentioned an opportunity to opt out of the settlement. The corrective notice informed them of the mistake and included the court-approved text of the correct notice. *Id.* ¶ 16, Ex. G.

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[1] This release excluded the claims that were then pending in *Fisher v. United States*, No. 15-1575 (Fed. Cl.). Agreement ¶ 13. That unrelated case—which was voluntarily dismissed with prejudice on July 24, 2023—alleged that PACER overcharges users due to a systemic billing error concerning the display of some HTML docket sheets. The case did not challenge the PACER fee schedule and was not certified as a class action.

Of the approximately 500,000 PACER accountholders to whom settlement notice was sent, approximately 100,000 had an opportunity to request exclusion from the settlement class. *Id.* ¶¶ 8, 10. KCC has received a total of 50 exclusion requests (16 of which were invalid because they were submitted by individuals who had already a chance to opt out in 2017 or are federal employees who are excluded from the class definition). *Id.* ¶¶ 17, 21. Thirty-one of the 34 valid opt-out requests were received via the class website, while three were received by mail. *Id.* ¶ 21.

KCC also published notice in the *ABA Banking Journal eNewsletter* and distributed it via Cision PR Newswire. *Id.* ¶¶ 12–13. The press release has been posted in full 380 times online and on social media; has appeared on broadcast media, newspaper, and online news websites; and has also been posted on the class website at www.pacerfeesclassaction.com. *Id.* ¶¶ 12, 18.

5. Allocation and payment

Under the settlement, class members will not have to submit a claim to receive their payment. Agreement ¶¶ 4, 16. Instead, KCC will use whatever methods are most likely to ensure that class members receive payment and will make follow-up attempts if necessary. *Id.* These efforts include (1) sending checks to class members using PACER payment data maintained by the government; (2) allowing class members to notify KCC that someone else paid PACER fees on their behalf and is the proper recipient of any settlement funds; and (3) allowing individuals or entities to notify KCC that they paid PACER fees on behalf of someone else and are the proper recipients of settlement funds. Agreement ¶¶ 3, 19; KCC Decl. ¶¶ 18, 22.

The settlement provides that the trust funds be distributed as follows: KCC will first retain from the trust all notice and administration costs actually and reasonably incurred. Agreement ¶ 18. KCC will then distribute any service awards approved by the Court to the named plaintiffs and any attorneys' fees and costs approved by the Court to class counsel. *Id.* After these amounts have been paid from the trust, the remaining funds ("Remaining Amount") will be distributed to class

members. *Id.* The Remaining Amount will be no less than 80% of the $125 million paid by the United States. *Id.* In other words, the settlement entitles class members to a total of $100 million.

First distribution. KCC will distribute the Remaining Amount to class members using the following formula: It will first allocate to each class member a minimum payment amount equal to the lesser of $350 or the total amount paid in PACER fees by that class member during the class period. *Id.* ¶ 19. Next, KCC will add up each minimum payment amount for each class member, producing the Aggregate Minimum Payment Amount. *Id.* KCC will then deduct this Aggregate Minimum Payment Amount from the Remaining Amount and allocate the remainder pro rata to all class members who paid more than $350 in PACER fees during the class period. *Id.*

Thus, under this formula: (a) each class member who paid no more than $350 in PACER fees during the class period will receive a payment equal to the total amount of PACER fees paid by that class member during the class period; and (b) each class member who paid more than $350 in PACER fees during the class period will receive a payment of $350 plus their allocated pro-rata share of the total amount left over after the Aggregate Minimum Payment is deducted from the Remaining Amount. *Id.* ¶ 20.

KCC will complete disbursement of each class member's share of the recovery within 180 days of receiving the $125 million from the United States, or within 180 days of receiving the necessary information from AO, whichever is later. Second Supp. Agreement. KCC will complete disbursement of the amounts for attorneys' fees and litigation expenses to class counsel, and service awards to the named plaintiffs, within 30 days of receiving the $125 million. *Id.* KCC will keep an accounting of the disbursements made to class members, including the amounts, dates, and status of payments made to each class member, and will make all reasonable efforts, in coordination with class counsel, to contact class members who do not deposit their payments within 90 days. Agreement ¶ 22.

Second distribution. If, despite these efforts, unclaimed or undistributed funds remain in the settlement trust one year after the $125 million payment by the United States, those funds ("the Remaining Amount After First Distribution") will be distributed in the following manner. Second Supp. Agreement. First, the only class members eligible for a second distribution will be those who (1) paid more than $350 in PACER fees during the class period and (2) deposited or otherwise collected their payment from the first distribution. *Id.* Second, KCC will determine the number of class members who satisfy these two requirements and are therefore eligible for a second distribution. *Id.* Third, KCC will then distribute to each such class member an equal allocation of the Remaining Amount After First Distribution, subject to the caveat that no class member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the class member paid during the class period. *Id.* Prior to making the second distribution, KCC will notify the AO that unclaimed or undistributed funds remain in the trust. Agreement ¶ 24. Class members who are eligible to receive a second distribution will have three months from the time of the distribution to collect their payments. *Id.* If unclaimed or undistributed funds remain in the settlement trust after this three-month period expires, those funds will revert to the U.S. Treasury. *Id.* Upon expiration of this three-month period, KCC will notify the AO of this reverter, and the AO will provide KCC with instructions to effectuate the reverter. *Id.*

6. Service awards, attorneys' fees, and costs

As noted, the settlement authorizes the plaintiffs to request service awards of up to $10,000 per class representative and an award of attorneys' fees and litigation expenses, and for KCC to retain from the trust all notice and administration costs actually and reasonably incurred. *Id.* ¶ 18, 28. The total amount requested in service awards, fees, expenses, and costs does not exceed 20% of the total common fund. *Id.* Any amounts awarded by the Court will be paid out of the common fund. *Id.* As required by Rule 23(h), Class Members have the right to object these requests. *Id.*

7. Further settlement-related proceedings

Any class member may express her views to the Court supporting or opposing the fairness, reasonableness, and adequacy of the proposed settlement. Agreement ¶ 30. Counsel for the parties may respond to any objection within 21 days of receiving the objection. *Id.* ¶ 31. Any class member who submits a timely objection to the proposed settlement—that is, an objection made at least 30 days before the fairness hearing—may appear in person or through counsel at the fairness hearing and be heard to the extent allowed by the Court. *Id.* ¶ 32.

After the deadlines for filing objections and responses have lapsed, the Court will hold the fairness hearing, during which it will consider any timely and properly submitted objections made by class members to the proposed settlement. Agreement ¶ 33. The Court will decide whether to enter a judgment approving the settlement and dismissing this lawsuit in accordance with the settlement agreement. *Id.* The Court has scheduled the fairness hearing for October 12, 2023.

Within 90 days of a final order from this Court approving the settlement, the AO will provide KCC with the most recent contact information that it has on file for each class member, along with the information necessary to determine the amount owed to each class member. *Id.* ¶ 14. This information will be subject to the terms of the April 3, 2017 protective order entered by this Court (ECF No. 41), the extension of which the parties will be jointly requesting from this Court. Agreement ¶ 14. After receiving this information, KCC will then be responsible for administering payments from the settlement trust in accordance with the agreement. *Id.*

ARGUMENT

I. Because the settlement provides an exceptional recovery for the class, the Court should approve the settlement.

Rule 23(e) requires court approval of a class-action settlement. This entails a "three-stage process, involving two separate hearings." *Ross v. Lockheed Martin Corp.*, 267 F. Supp. 3d 174, 189–90

(D.D.C. 2017) (cleaned up). Before the Court may approve a class-action settlement, it "must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), in turn, requires that the settlement be "fair, reasonable, and adequate."

The settlement in this case has advanced past the first and second stages, with this Court having preliminarily approved it and notice having now been provided to the class. The third stage involves a fairness hearing during which the Court examines the settlement and any objections to it, followed by a decision on whether to approve the settlement. *Ross*, 267 F. Supp. 3d at 190.

In considering whether to give final approval to a settlement, the court's discretion is constrained by the "long-standing judicial attitude favoring class action settlements" and "the principle of preference favoring and encouraging settlement in appropriate cases." *Rogers v. Lumina Solar, Inc.*, 2020 WL 3402360, at *4 (D.D.C. June 19, 2020) (Brown, J.); see *In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 16 (D.D.C. 2019) ("Class action settlements are favored as a matter of public policy."); *United States v. MTU Am. Inc.*, 105 F. Supp. 3d 60, 63 (D.D.C. 2015) ("Settlement is highly favored."); *Ciapessoni v. United States*, 145 Fed. Cl. 685, 688 (2019) ("Settlement is always favored, especially in class actions where the avoidance of formal litigation can save valuable time and resources.").

The criteria guiding the final-approval determination are supplied by Rule 23(e)(2), which requires consideration of whether "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate"; and "(D) the proposal treats class members equitably relative to each other." In considering these factors, the Court will also look to "the opinion of experienced counsel." *Little v. Wash. Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 37 (D.D.C. 2018); *see also* Fed. R. Civ. P. 23,

Advisory Committee Note, 2018 Amendments (observing that the Rule's enumerated factors are not indented to "displace any factor" rooted in the case law). Because these are the same factors considered at the preliminary-approval stage, "settlement proposals enjoy a presumption of fairness afforded by a court's preliminary fairness determination." *Ciapessoni*, 145 Fed. Cl. at 688.

In its preliminary-approval order, this Court found that the settlement "appears to be fair, reasonable, and adequate" because it "(a) resulted from arm's-length negotiations between experienced counsel overseen by an experienced mediator; (b) eliminates the risks, costs, delay, inconvenience, and uncertainty of continued litigation; (c) involves the previously certified Class" and an "additional Settlement Class"; "(d) does not provide undue preferential treatment to Class Representatives or to segments of the Class"; and "(e) does not provide excessive compensation to counsel for the Class." ECF No. 153 at 1. Nothing has happened in the three-and-a-half months since this Court made those preliminary findings that would justify a contrary conclusion. Quite the opposite: Closer examination only confirms that each factor strongly supports final approval.

A. The class representatives and class counsel have vigorously represented the class throughout this litigation.

The first factor examines the adequacy of representation. In certifying the class in 2017, this Court found that the three named plaintiffs are "particularly good class representatives" and that "[t]here is no dispute about the competency of class counsel"—Gupta Wessler, a litigation boutique with deep (and rare) experience in complex cases seeking monetary relief from the federal government, and Motley Rice, one of the nation's leading class-action firms. ECF No. 33 at 14–16.

That is no less true today. Since this Court's finding of adequate representation, the named plaintiffs and class counsel have spent nearly seven years vigorously representing the class. They did so first in this Court, obtaining informal discovery from the judiciary that paved the way for an unprecedented decision concluding that the AO had violated the law with respect to PACER fees.

They continued to do so on appeal, attracting an impressive set of amicus briefs and favorable press coverage, and ultimately securing a landmark Federal Circuit opinion affirming this Court's decision and rejecting arguments made by the Appellate Staff of the U.S. Department of Justice's Civil Division. And they did so finally in mediation, spending months negotiating the best possible settlement for the class. In short, the representation here is not just adequate, but exemplary.

B. The settlement is the product of informed, arm's-length negotiations.

The next factor examines the negotiation process. It asks whether the negotiations were made at arm's length or whether there is instead some indication that the settlement could have been the product of collusion between the parties.

Here, "both sides negotiated at arms-length and in good faith," and "the interests of the class members were adequately and zealously represented in the negotiations." *Blackman v. District of Columbia*, 454 F. Supp. 2d 1, 9 (D.D.C. 2006) (Friedman, J.). The plaintiffs were represented by class counsel, while lawyers at the Department of Justice and the AO appeared for the government. "Although the mediation occurred before formal fact discovery began," there had been "significant informal discovery," which ensured that "the parties were well-positioned to mediate their claims." *Radosti v. Envision EMI, LLC*, 717 F.Supp.2d 37, 56 (D.D.C. 2010); *see also Trombley v. Nat'l City Bank*, 759 F. Supp. 2d 20, 26 (D.D.C. 2011) (explaining that "formal discovery is not . . . required even for final approval of a proposed settlement" if "significant factual investigation [had been] made prior to negotiating a settlement"). "[T]he parties reached a settlement only after a lengthy mediation session that was presided over by an experienced mediator," *Radosti*, 717 F.Supp.2d at 56, and the settlement was approved by DOJ leadership and the judiciary's administrative body. Even in the ordinary case, where a settlement is "reached in arm's length negotiations between experienced, capable counsel after meaningful discovery," without government involvement, there is a

"presumption of fairness, adequacy, and reasonableness." *Kinard v. E. Capitol Fam. Rental, L.P.*, 331 F.R.D. 206, 215 (D.D.C. 2019). The presumption here is at least as strong.

C. The settlement relief provided to class members is exceptional—particularly given the costs, risks, and delays of further litigation.

The third and "most important factor" examines "how the relief secured by the settlement compares to the class members' likely recovery had the case gone to trial." *Blackman*, 454 F. Supp. 2d at 9–10. This factor focuses in particular on "(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)." Fed. R. Civ. P. 23(e)(2); *see also In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d at 16.

The relief provided to class members is extraordinary. The total value of the settlement is $125 million, and class members will be fully reimbursed, up to $350, for all PACER fees that they paid during the class period. Those who paid more than $350 in fees during the class period will receive a payment of $350 plus their pro rata share of the remaining settlement funds. Further, any unclaimed funds after this initial distribution will be allocated evenly to all class members who collected their initial payment (capped at the total amount of fees that each class member paid during the class period). Because most class members paid less than $350 during the class period, the average class member will receive a full refund of all fees paid. This relief will also be provided in a highly efficient manner—through a common-fund settlement in which class members will not have to submit any claim or make any attestation to receive payment. Agreement ¶ 4.

This would be an excellent outcome for the class even if it were achieved after trial, but it is especially good given the significant costs, risks, and delays posed by pursuing further litigation against the federal court system. The $125 million common fund represents nearly 70% of the total

expenditures determined by the Federal Circuit to have been unlawfully funded with PACER fees during the class period. Without a settlement, the case would be headed for years of litigation and likely another appeal, with no guarantee that the class would wind up with any recovery given the government's remaining argument against liability (that the plaintiffs could not prove that PACER fees would have been lower—or by how much—but for the unlawful expenditures). Although the plaintiffs and class counsel believe that the government's argument is incorrect (and further, that the AO should be liable for some portion of the CM/ECF expenses), the uncertainty and complete lack of case law on this issue counsel in favor of compromise. Add to that the benefits provided by avoiding protracted litigation and time-and-resource-intensive discovery into the remaining issues, and this is a superb recovery for the class.

The settlement's provision for attorneys' fees and service awards is also reasonable, as we discuss in more detail later. The settlement provides that the total amount requested in service awards, litigation expenses, administrative costs, and attorneys' fees will be no more than 20% of the aggregate amount of the common fund; and that "the Court will ultimately determine whether the amounts requested are reasonable." *Id.* ¶¶ 18, 28. The settlement further provides that the plaintiffs will request service awards of no more than $10,000 per class representative. *Id.* ¶ 28.

D. The settlement agreement treats class members equitably relative to each other.

The fourth factor examines whether the settlement treats class members equitably vis-à-vis one other. The settlement here does so. It reimburses every class member for up to $350 in fees paid during the class period and distributes the remaining funds in a way that is proportional to the overcharges paid by each class member. This formula for calculating payments is reasonable under the circumstances. It advances the AO's longstanding policy goal of expanding public access for the average PACER user and, in doing so, approximates how the AO likely would have chosen

to reduce PACER fees during the class period had it been acting under a proper understanding of the law. Indeed, following this Court's summary-judgment decision, the AO doubled the size of the quarterly fee waiver, from $15 to $30. Gupta Decl. ¶ 20. Had it done the same over the class period, the total fee waiver available to all PACER users would have increased by $480. Reimbursing every PACER user for up to $350 in fees paid, with pro rata distributions to any users who paid more than that amount, is therefore fully in keeping with the AO's fee policy and a reasonable allocation of damages. The minimum payments also make it likelier that class members will collect their payments, thereby maximizing recovery to the class.

One class member has nevertheless objected to the settlement's plan of allocation—the only objection received to date. *See* Aug. 8, 2023 Letter from G. Miller. After emphasizing that he has "no problem with the total cash compensation or with the proposed maximum of 20% of the common fund for attorney fees, expenses, [service] awards," and costs, the objector takes issue with the formula for distribution because it "discriminates between larger and smaller claimants." *Id.* at 1. He acknowledges that such an approach is permissible when it can be justified. *Id.* at 1–2. Yet he contends that the line drawn in this case ($350) is substantively unfair and "seems based … on a wish to favor smaller users," which he derides as a "[r]edistribution of wealth." *Id.* at 2.

It is understandable that some class members may wonder why settlement funds are not distributed on a purely pro rata basis. But the objector is mistaken in assuming that there are no "valid reasons" for this. *Id.* To the contrary, there are at least three good reasons: *First*, the text of the E-Government Act—the statute on which the claims here are based—expressly authorizes the judiciary to "distinguish between classes of persons" in setting PACER fees "to avoid unreasonable burdens and to promote public access to such information." 28 U.S.C. § 1913 note. And the AO has long had a policy of doing just that. *Second*, the government's litigating position—and its position during the negotiation process—was that the plaintiffs, in order to prove liability and damages,

would need to show what PACER fees would have been in a but-for world in which the AO complied with the law. The government further maintained that, in keeping with the statutory text and longstanding AO policy, the Judicial Conference of the United States would have used the funds to increase the size of the fee waiver or otherwise expand public access to people burdened by the fees. Although the plaintiffs took a very different position—that liability had been established and damages should be calculated pro rata—the settlement reasonably reflects a blend of these approaches. It is partially pro rata. But, because settlement involves compromise, it is not exclusively pro rata. *Third*, the government insisted on the $350 initial payment as a condition of the settlement. Gupta Decl. ¶ 28. During negotiations, the plaintiffs and class counsel vigorously advocated for a pro-rata approach, and they were able to convince the government to reduce the minimum number to $350, but the government was unwilling to go further. *Id.* Faced with the choice between compromising and walking away, the plaintiffs chose to compromise. There was nothing unreasonable or unfair about doing so. To the contrary, courts routinely recognize that "a Plan of Allocation providing for a minimum payment, to incentivize claims distribution and avoid *de minimis* settlement payments, can be fair and reasonable." *In re Auto. Parts Antitrust Litig.*, 2019 WL 7877812, at *2 (E.D. Mich. Dec. 20, 2019).

In addition, as we explain later, the settlement is equitable in allowing the class representatives to seek service awards of up to $10,000, while recognizing that this Court has discretion to award a smaller amount (or no award at all). *See Cobell v. Salazar*, 679 F.3d 909, 922 (D.C. Cir. 2012). Service awards "are not uncommon in common-fund-type class actions and are used to compensate plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73, 79 (D.D.C. 2011). The three nonprofits that prosecuted this case have been actively engaged in the litigation for more than seven years—preparing declarations, receiving case updates, spending countless hours

reviewing drafts and giving substantive feedback, and weighing in throughout the negotiation process, helping to produce a better outcome for all class members. Given their extraordinary contributions, it would be inequitable *not* to compensate them for their service.

E. The plaintiffs and class counsel support the settlement.

The final relevant factor is not enumerated in the text of Rule 23, but it is well-settled in the case law. Under this Court's cases, "the opinion of experienced and informed counsel should be afforded substantial consideration by a court in evaluating the reasonableness of a proposed settlement." *Prince v. Aramark Corp.*, 257 F. Supp. 3d 20, 26 (D.D.C. 2017). Counsel for both parties "are clearly of the opinion that the settlement in this action is fair, adequate, and reasonable," which only further confirms its reasonableness. *Cohen v. Chilcott*, 522 F.Supp.2d 105, 121 (D.D.C. 2007); *see also* Burbank Decl. ¶¶ 7–8 (Director of Litigation at the National Veterans Legal Services Program setting forth her strong support for the settlement); Rossman Decl. ¶¶ 4–5 (Litigation Director of the National Consumer Law Center setting forth his strong support for the settlement).

II. The notice and notice programs provided class members with the best notice practicable under the circumstances.

Due process requires that notice to class members be "reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank Tr. Co.*, 339 U.S. 306, 314 (1950). Rule 23(e)(1) similarly requires that notice be directed in a "reasonable manner to all class members who would be bound by the proposal." The notice here meets these requirements. It described the lawsuit in plain English, including the key terms of the settlement, the procedures for objecting to it, and the date of the fairness hearing. Agreement ¶ 29; *see* ECF No. 153. The notice sent to the additional class members—those who paid fees only between April 22, 2016 and May 31, 2018—also informed them of their right to opt out and the procedures through which they may exercise that right. KCC

Decl. ¶ 8. Further, the notices were distributed in a way that was designed to reach all class members: email notice to all class members for whom the AO has an email address on file; postcard notice to all class members for whom the AO does not have an email address on file, or for whom email delivery was unsuccessful; and publication notice designed to reach individuals and entities whose contact information may not be in the AO's accountholder data. KCC Decl. ¶¶ 5, 8, 10, 12, 13, 15, 16. Relevant case documents are also available on the settlement website. KCC Decl. ¶ 18.

III. The requested attorneys' fee award is reasonable.

A. This Court should use the percentage-of-the-fund approach to assess the reasonableness of class counsel's fee request.

In class actions, "class counsel may request an award of fees from the common fund on the equitable notion that lawyers are entitled to reasonable compensation for their professional services from those who accept the fruits of their labors." *Moore v. United States*, 63 Fed. Cl. 781, 786 (2005); *see* Fed. R. Civ. P. 23(h) ("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."); *Applegate v. United States*, 52 Fed. Cl. 751, 755 (2002) ("For more than a century, … courts have awarded fees to an attorney who succeeds in creating, protecting or enhancing a common fund from which members of a class are compensated for a common injury."); *see also Health Republic Ins. Co. v. United States*, 58 F.4th 1365, 1371 (Fed. Cir. 2023). The district court has a "duty to ensure that [any such request] for attorneys' fees [is] reasonable." *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1265 (D.C. Cir. 1993).

Courts have identified two approaches for assessing the reasonableness of class counsel's fee request. 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*, 58 F.4th at 1371 (cleaned up). 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).

As between these two approaches, courts overwhelmingly prefer the percentage-of-the-fund approach in common-fund cases. *See* Fitzpatrick Decl. ¶ 10 (noting that this approach is used in about 90% of common-fund cases); *Manual for Complex Litig.* § 14.121 (4th ed. 2004) ("[T]he vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases."); *see also, e.g.*, *Voulgaris v. Array Biopharma, Inc.*, 60 F.4th 1259, 1263 (10th Cir. 2023) ("We have … express[ed] a preference for the percentage-of-the-fund approach."). The lodestar method, in contrast, is "used generally outside the common-fund context," *Health Republic*, 58 F.4th at 1371, such as when a defendant is obligated to pay fees under a fee-shifting statute.

Courts use the percentage-of-the-fund approach for good reason. It replicates the market, is easy to apply, and "helps to align more closely the interests of the attorneys with the interests of the parties by discouraging inflation of attorney hours and promoting efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system." *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 88 (D.C.C. 2013) (Friedman, J.) (cleaned up); *see Little*, 313 F. Supp. 3d at 38 (making same points); Fitzpatrick Decl. ¶¶ 9–12 (expanding on these points); Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev. 1151, 1159–63 (2021); *see also, e.g.*, *Nunez v. BAE Sys. San Diego Ship Repair Inc.*, 292 F. Supp. 3d 1018, 1055 (S.D. Cal. 2017) ("Many courts and commentators have recognized that the percentage of the available fund analysis is the preferred approach in class action fee requests because it more closely aligns the interests of the counsel and the class."); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) ("The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure."); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) ("The trend in

this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation," whereas "the lodestar [method] creates an unanticipated disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits." (cleaned up)); *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995) ("[U]se of the POF method in common fund cases is the prevailing praxis" due to its "distinct advantages.").

The preference for the percentage-of-the-fund approach is so strong that some circuits, like the D.C. Circuit, have essentially mandated its use in common-fund cases. *See Swedish Hosp.*, 1 F.3d at 1271 ("[A] percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases"); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1278 (11th Cir. 2021) ("[I]n common fund settlements like this one, an attorney's fee award shall be based upon a reasonable percentage of the fund established for the benefit of the class.") (cleaned up); *Rite Aid*, 396 F.3d at 306 ("[T]he percentage of common fund approach is the proper method of awarding attorneys' fees."). Although the Federal Circuit has not gone this far, *see Health Republic*, 58 F.4th at 1371, fee awards in the circuit are "typically based on some percentage of the common fund." *Moore*, 63 Fed. Cl. at 786; *see, e.g.*, *Mercier v. United States*, 156 Fed. Cl. 580, 591 (2021) (awarding fees as a percentage); *Kane Cnty. v. United States*, 145 Fed. Cl. 15, 18–20 (2019) (same); *Quimby v. United States*, 107 Fed. Cl. 126, 133–35 (2012) (same). This case calls for the same approach.

B. A fee of 19.1% of the common fund is reasonable.

The next question is whether the requested fee constitutes a reasonable percentage of the common fund. To help answer this question, courts within the Federal Circuit have devised a multifactor test, under which seven factors are relevant: "(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*, 58 F.4th at 1372 (quoting *Moore*, 63 Fed. Cl. at 787).

Here, each factor supports the requested fee. A thorough application of the multifactor test thus only confirms this Court's preliminary finding that the settlement—which authorizes class counsel to seek fees of up to 20% of the common fund (minus the amounts for expenses and service awards)—"does not provide excessive compensation to counsel for the Class." ECF No. 153 at 1.

1. The quality of counsel supports the requested fee.

On the first factor, there can be "little question about the skill and efficiency demonstrated by class counsel in this case." *Black Farmers*, 953 F. Supp. 2d at 92. Class counsel are a small team of lawyers from two preeminent law firms: Gupta Wessler, a litigation boutique with significant experience in complex cases seeking monetary relief against the federal government, and Motley Rice, a leading class-action firm. *See* Gupta Decl. ¶¶ 12, 45–48; Oliver Decl. ¶ 2. This Court has already recognized that these lawyers are "experienced," ECF No. 153 at 1, and that "[t]here is no dispute about the[ir] competency," ECF No. 33 at 15–16. Other courts have agreed. *See, e.g.*, *Steele v. United States*, 2015 WL 4121607, at *4 (D.D.C. June 30, 2015) (finding the same lawyers to be "accomplished attorneys" who have "demonstrated significant experience in handling class actions, including class actions … against the government," and appointing them as class counsel in an illegal-exaction case against the United States, while emphasizing that "the Court is thoroughly impressed by the[ir] qualifications"); *Mercier*, 156 Fed. Cl. at 591 (finding that Motley Rice "has extensive experience litigating class actions" and has "vigorously prosecuted" class actions against the federal government, achieving "excellent result[s]"); *Houser v. United States*, 114 Fed. Cl. 576 (2014) (certifying class of all federal bankruptcy judges represented by the same two Gupta Wessler lawyers, who later obtained a $56 million judgment).

Further, class counsel faced a formidable group of lawyers from the Department of Justice, who tenaciously defended this case on every possible ground, from jurisdiction to class certification to the merits. The government did so not only in this Court, but also in the Federal Circuit, where it presented arguments from the Civil Division's Appellate Staff. Defeating all of these arguments—and then successfully negotiating a historic settlement—"called for a host of skills by class counsel." *Black Farmers*, 953 F. Supp. 2d at 92; *see* Burbank Decl. ¶¶ 5, 7–8 (testifying to the quality and skill of class counsel's work); Rossman Decl. ¶¶ 2, 4 (same); Brooks Decl. ¶ 3 (same); Fitzpatrick Decl. ¶¶ 8, 20–21 (same); *see also In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & "ERISA" Litig.*, 4 F. Supp. 3d 94, 112 (D.D.C. 2013) ("[T]he best testament to their effectiveness was their ability to successfully resolve this exceedingly complex case and secure the … settlement … while battling opposing counsel at the very top of the defense bar."). The first factor thus strongly supports the requested fee.

2. The complexity and duration of the case supports the requested fee.

So does the second factor. Class counsel have been litigating this case for over seven years. They defeated a motion to dismiss, obtained certification of a nationwide class of hundreds of thousands of people, engaged in informal discovery, secured an unprecedented ruling from this Court on liability, successfully defended that ruling on appeal (both as to jurisdiction and liability), negotiated a historic settlement on remand, obtained preliminary approval of the settlement, and assisted class members with an unusually large and complex set of questions about the settlement-administration process—a process that is ongoing and that will only intensify once the settlement is administered. Moreover, the legal and practical questions that they have confronted have been extraordinarily complex and challenging. *See* Gupta Decl. ¶¶ 6–9 (detailing complexity of legal issues); Fitzpatrick Decl. ¶ 20 (same); Burbank Decl. ¶¶ 3, 8 (same, with a focus on illegal-exaction issues); Oliver Decl. ¶¶ 5–7 (detailing complexity of settlement-administration issues); KCC Decl.

¶¶ 15–17 (same). By any measure, then, the second factor supports the requested fee. *See Fed. Nat'l Mortg. Ass'n*, 4 F. Supp. 3d at 105 ("[T]he settlement certainly 'does not come too early to be suspicious.' Nor does it come 'too late to be a waste of resources.'").

3. The risk of nonrecovery supports the award.

Now for the third factor: litigation risk. When lawyers take a case on contingency, their percentage fee must compensate them "for the risk of nonpayment." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013). "The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Id.*

To say that this case was "unusually risky" is an understatement. *Id.* It involved a challenge to a fee schedule promulgated by the Judicial Conference of the United States, presided over by the Chief Justice. The challenge concerned a statute that had "never [been] interpreted by a court," *Black Farmers*, 953 F. Supp. 2d at 93, and that "nowhere explicitly requires payment of damages by the government for overcharging users," *NVLSP*, 968 F.3d at 1348; *see* ECF No. 105 at 5–7 (authorizing appeal because "there is a complete absence of any precedent from any jurisdiction," the government's argument "is not without merit," and "there would be no liability and the case would be over" if the argument were correct). The contours of the "relatively obscure cause of action" on which the plaintiffs relied had "remained unresolved in the courts" when the case was filed. Burbank Decl. ¶ 8. And, because the judiciary is not subject to the Administrative Procedure Act and bringing individual claims would not have been economically rational, the plaintiffs had to pursue a class action for money damages against the judiciary, which had no historical precedent. *See* Fitzpatrick Decl. ¶ 20 ("In all my years of studying class actions and litigation against the federal government, I am not aware of any previous class action that has successfully been brought against the federal judiciary."). All the while, class counsel went about their work, devoting thousands of hours to the case without receiving any compensation, or any guarantee of future

compensation. If this case doesn't carry with it a considerable risk of nonrecovery, it is hard to imagine a case that would.

As Professor Fitzpatrick puts it: "[E]very step of this lawsuit required a new trail to be cut. Not only procedurally—Did the Court have jurisdiction? Was there a cause of action? Did the judiciary have sovereign immunity?—but also on the merits—How should the E-Government Act be interpreted? How can any violation of it be proved? None of these questions were even 50-50 propositions for the class when this litigation began. People had been complaining about high PACER fees for years, but no one had invented a legal solution to the problem until class counsel did." Fitzpatrick Decl. ¶ 20. As this Court explained in a different class action against the federal government that also carried considerable risk: "The prospect of such litigation is daunting, and many attorneys would not have undertaken it." *Black Farmers*, 953 F. Supp. 2d at 93.

Of course, now that the "legal solution" that had escaped so many for so long is clear, Fitzpatrick Decl. ¶ 20, it might be easy to forget how risky this case was at the start. But that is only because "hindsight alters the perception of the suit's riskiness." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001). Properly understood, this factor emphatically supports the requested fee.

4. The fee that likely would have been negotiated between private parties in similar cases supports the requested fee.

The next factor only further confirms the fee's reasonableness. A contingency fee of 19.1% is a much smaller percentage than what the private market would bear. *See* Fitzpatrick Decl. ¶ 14 ("The request here is about 19% of the settlement. It is well known that this is well below what private parties negotiate when they hire lawyers on contingency."). For contingency cases, it is "typical" to have a fee arrangement "between 33 and 40 percent." *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998). That is exactly what the three named plaintiffs agreed to here. Before the case was filed, each signed a retainer agreement with class counsel that provided for a contingency fee

of up to 33% of the common fund. Gupta Decl. ¶ 65; *see Kane Cnty.*, 145 Fed. Cl. at 19 ("A fee of one third the total recovery is consistent with the fee that likely would have been negotiated by private parties. In fact, that was the fee negotiated between class counsel and the lead plaintiff.").

More importantly, when the class was certified in 2017, the notice informed class members: "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." *See* ECF Nos. 43-1 & 44. The notice also informed them of their right to opt out of the class. "A contingent fee that is reached by the free consent of private parties should be respected as fair as between them." *Quimby*, 107 Fed. Cl. at 134. That is all the more true here, where class members agreed to "a fee request *even greater* than" the 19.1% fee now sought by class counsel, and where many class members are "sophisticated parties like lawyers and large institutions." Fitzpatrick Decl. ¶ 26; *see Quimby*, 107 Fed. Cl. at 134 (relying on similar language and reasoning that, by choosing to participate in the class, "each member effectively accepted the offer of representation for a thirty percent contingency fee, and presumably concluded that a better deal could not be reached with their own counsel").

5. The reaction of class members to date supports the requested fee.

"The free consent of class members to a thirty percent fee perhaps explains the absence of objections" to date—the fifth factor. *See Quimby*, 107 Fed. Cl. at 134. Indeed, as of the filing of this motion, none of the hundreds of thousands of class members has signaled any objection to the settlement's fee provision (or for that matter, to the amount of the common fund). *See id.* (approving fee where "only one class member has objected to the [settlement's] terms related to attorneys' fees"); *Sabo v. United States*, 102 Fed. Cl. 619, 628–29 (2011) (explaining that a relative lack of objections "weigh[s] in favor of approv[al]"). And the class representatives fully support the fee request. *See*

Burbank Decl. ¶ 7; Rossman Decl. ¶ 5; Brooks Decl. ¶ 3. The lack of objections to the fee provision is particularly relevant here because, as just noted, class members are disproportionately likely to read and pay attention to legal filings, and to be aware of their legal rights. Thus, while it is possible that objections will be forthcoming, as of now, this factor provides additional support for the fee.

6. The percentage awarded in other cases supports the requested fee.

The sixth factor—comparing the percentage fee to other class actions—further supports the fee request. Generally speaking, a contingency fee of "one-third is a typical recovery." *Moore*, 63 Fed. Cl. at 787; *see, e.g., Kane Cnty.*, 145 Fed. Cl. at 19 ("[A]n award equal to one third of the common fund is commensurate with attorney fees awarded in other class action common fund cases."); *Quimby*, 107 Fed. Cl. at 133 ("A fee equal to thirty percent of the common fund totaling nearly $74 million is … within the typical range of acceptable attorneys' fees."); *Moore*, 63 Fed. Cl. at 787 (awarding 34% as "well within the acceptable range"); *Fed. Nat'l Mortg. Ass'n*, 4 F. Supp. 3d at 111 ("Both nationally and in this Circuit, 'a majority of common fund class action fee awards fall between twenty and thirty percent.'"); *see also* Fitzpatrick Decl. ¶ 15 (providing statistical averages).

A fee award of 19.1% is well within the norm for settlements of this size. It is "actually below the average percentage … for settlements between $69.6 and $175.5 million" (19.4%). Fitzpatrick Decl. ¶ 19; *see Equifax*, 999 F.3d at 1281 ("20.36 percent is well within the percentages permitted in other common fund cases, and even in other megafund cases"); *see also, e.g.*, *Mercier*, 156 Fed. Cl. at 592 (20% of $160 million fund); *Fed. Nat'l Mortg.*, 4 F. Supp. 3d at 112 (19% of $153 million fund); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *12 (D.D.C. July 16, 2001) (33% of $365 million fund). And the reasonableness of the percentage becomes even clearer when the amounts of older funds are adjusted for inflation. *See, e.g.*, *Quimby*, 107 Fed. Cl. at 133 (30% award of fund equal to $100 million in today's dollars according to the U.S. Bureau of Labor Statistics' CPI Inflation Calculator,

https://perma.cc/TEE4-BAJX). Professor Fitzpatrick's study, for example, analyzed data from 2006 to 2007 and found that, for settlements of between $72.5 million and $100 million—or about $110 million to $150 million today—the average award was 23.9%. *See* Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Studies 811, 839 (2010). An award of 19.1% of the common fund thus "clearly would be reasonable" in a typical case involving a $125-million fund today. *Black Farmers*, 953 F. Supp. 2d at 99. And, as already discussed, the "considerations … that reveal this case to be dissimilar" to the typical case would justify a *higher* percentage—not a lower one. *Id.*[2]

7. The size of the award supports the requested fee.

That leaves the last factor. Although the requested fee award is sizable ($23,863,345.02), it pales in comparison to the relief obtained for the class. And because "[t]he result is what matters" most in the end, when "a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); *see also Quimby*, 107 Fed. Cl. at 133.

As explained earlier, the relief that the settlement provides to class members is remarkable. The total value of the settlement is $125 million, and every class member will be reimbursed, up to

[2] A decade ago, this Court described a "megafund" as a recovery of "$100 million or more." *Black Farmers*, 953 F. Supp. 2d at 98. That amount would equal more than $140 million in today's dollars, so this case wouldn't qualify as a megafund even under that definition. Moreover, as Professor Fitzpatrick explains, lowering the percentage simply because the common fund is over $100 million could "actually make class counsel *better off* by resolving a case for less rather than more if it is not done only on the margin (e.g., only for the *portion* above $100 million)." Fitzpatrick Decl. ¶ 17. This case provides an example. If the common fund were $99 million instead of $125 million, the same requested fee would be about 24% of the fund—well within the typical range. It would be irrational to punish class counsel for doing better by the class. *See Synthroid*, 264 F.3d at 718 ("This means that [class] counsel … could have received [more] fees" had they not "obtained an extra $14 million for their clients … Why there should be such a notch is a mystery. Markets would not tolerate that effect."). In any event, as this Court observed (and as the data shows), "even in megafund cases involving recoveries of $100 million or more, fees of fifteen percent are common." *Black Farmers*, 953 F. Supp. 2d at 98 (cleaned up).

$350, for PACER fees that they paid between April 21, 2010 and May 31, 2018. Those who paid more than $350 in fees during that period will receive $350 plus their pro rata share of the remaining settlement funds. And the relief will be provided in a highly efficient manner. This would be a terrific outcome for the class even if it were achieved after trial, but it is especially good given the substantial costs, risks, and delays presented by pursuing further litigation against the federal judiciary—including the very real risk that the plaintiffs would ultimately not prevail at all. As compared to this result for the class, the requested fee is fair and reasonable.

C. A lodestar cross-check, although not required, would only confirm the reasonableness of the requested fee.

Courts sometimes use a "lodestar cross-check" to further inform the reasonableness of a percentage fee. *See Health Republic*, 58 F.4th at 1372, 1374 n.2; Fitzpatrick Decl. ¶ 22 (noting that a "significant minority of courts" do so). Such a cross-check is not required by D.C. Circuit or Federal Circuit precedent. The danger with the lodestar cross-check is that it "brings through the backdoor all of the bad things the lodestar method used to bring through the front door. Not only does the court have to concern itself again with class counsel's timesheets, but, more importantly, it reintroduces the very same misaligned incentives that the percentage method was designed to correct in the first place." Fitzpatrick Decl. ¶ 23. To illustrate, Professor Fitzpatrick hypothesizes a case in which "a lawyer had incurred a lodestar of $1 million in a class action case. If that counsel believed that a court would not award him a 25% fee if it exceeded twice his lodestar, then he would be *rationally indifferent* between settling the case for $8 million and $80 million (or any number higher than $8 million). Either way he will get the same $2 million fee. Needless to say, the incentive to be indifferent as to the size of the settlement is not good for class members." Fitzpatrick Decl. ¶ 24. 25.

When courts nevertheless elect to conduct a cross-check, they do so "by dividing the proposed fee award by a lodestar calculation, resulting in a lodestar multiplier." *Health Republic*, 58 F.4th at 1372 (cleaned up). Because the multiplier "attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work," *Rite Aid*, 396 F.3d at 306, courts that elect to perform a lodestar cross-check should "take care to explain how the application of a multiplier is justified by the facts of a particular case," while also considering the "multipliers used in comparable cases," *Health Republic*, 58 F.4th at 1375.

At the same time, courts must keep in mind that "the lodestar cross-check does not trump the primary reliance on the percentage of common fund method." *Rite Aid*, 396 F.3d at 307. This general principle has two relevant corollaries: The first is that the "multiplier need not fall within any pre-defined range." *Health Republic*, 58 F.4th at 1375; *see Rite Aid*, 396 F.3d at 307 ("[T]he resulting multiplier need not fall within any pre-defined range, provided that the District Court's analysis justifies the award."); *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) (rejecting the argument "that any percentage fee award exceeding a certain lodestar multiplier is excessive"). Were it otherwise, and the multiplier could serve to cap fees, it would "eliminate counsel's incentive to press for a higher settlement" in many cases, *Williams*, 658 F.3d at 636 (cleaned up)—and thus "reintroduce[] the very same misaligned incentives that the percentage method was designed to correct in the first place," Fitzpatrick Decl. ¶ 23. The second corollary is that "mathematical precision" is not required in a cross-check. *Rite Aid*, 396 F.3d at 306. "Requiring the Court to examine and evaluate [] detailed" time records "would defeat one of the primary benefits of the 'percentage of the fund' method"—conserving 'judicial resources" and preventing "delay in distribution of the common fund to the class." *Black Farmers*, 953 F. Supp. 2d at 101 n.8. Heeding these two corollary principles helps to ensure that the lodestar cross-check is used truly as a cross-check—and not just a way of "bring[ing] through the backdoor all of the bad things the lodestar

method used to bring through the front door." *See* Fitzpatrick Decl. ¶¶ 23–25 ; *see also Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 729 (2d Cir. 2023) (Jacobs, J., concurring) (noting that the cross-check, if it operates as a hard cap on fees, can provide "an incentive for counsel to prolong litigation and maximize billable hours to arrive at a lodestar that does not operate as a cap on a percentage award").

In this case, class counsel's lodestar is $6,031,678.25, yielding a lodestar multiplier of less than 3.96. *See* Gupta Decl. ¶ 64; Oliver Decl. ¶ 13. That is in line with a standard multiplier. *See* Fitzpatrick Dec. ¶ 27. As the Federal Circuit recently remarked, a multiplier of up to four is the "norm." *Health Republic*, 58 F.4th at 1375; *see also Black Farmers*, 953 F. Supp. 2d at 102 ("Multiples ranging up to four are frequently awarded in common fund cases when the lodestar method is applied." (cleaned up)); *Kane Cnty.*, 145 Fed. Cl. at 20 ("[A] multiplier of approximately 6.13 … is within the range courts have approved in common fund cases."); *Geneva Rock Prods.*, 119 Fed. Cl. at 595 ("[A]n award 5.39 times the lodestar is reasonable … given the complexity of the litigation, the diligent and skillful work by class counsel, and the pendency of the case for over six years."); *Milliron v. T-Mobile USA, Inc.*, 423 F. App'x 131, 135 (3d Cir. 2011) ("Although the lodestar multiplier need not fall within any pre-defined range, we have approved a multiplier of 2.99 in a relatively simple case." (cleaned up)). And a higher multiplier may be justified by the circumstances of a "particular case," including "the risk of nonpayment," the lack of significant "object[ion] to the award," and whether the notice indicated an "agreement by the class to a specified percentage." *Health Republic*, 58 F.4th at 1375–77.[3]

[3] This total figure includes $3,271,090.25 and $1,860,588.00 in lodestar incurred to date by Gupta Wessler and Motley Rice, respectively, as well as projected future work that will produce an additional lodestar of about $900,000. Gupta Decl. ¶ 62 ($400,000 for Gupta Wessler); Oliver Decl. ¶ 9 ($500,000 for Motley Rice). The past lodestar figures, standing alone, are "incomplete," *Black Farmers*, 953 F. Supp. 2d at 102, because they do not include work that class counsel will perform

All these features are present in this case. As one judge on this Court has explained: "The flaw with comparisons to fees in other cases, of course, is that they inevitably tend to focus on averages and medians and ranges. This case, however, was anything but average." *Fed. Nat'l Mortgage Ass'n*, 4 F. Supp. 3d at 112. The same point applies here. *Id.* Far from being a "relatively simple case," *Milliron*, 423 F. App'x at 135, "there is no question that this litigation was lengthy, highly complex, and vigorously contested," *Fed. Nat'l Mortg. Ass'n*, 4 F. Supp. 3d at 112. The "complexity and duration of the case," "high risk of nonpayment," and "skill and performance of the attorneys" distinguish this case from the ordinary case, justifying an above-average multiplier. *Id.* And the lack of significant "object[ion] to the award," and the notice language signaling an "agreement by the class to a specified percentage" that greatly *exceeds* the fee requested here, only

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going forward—including responding to inquiries from class members about legal issues, damages calculations, and the mechanics of the settlement; responding to potential objections and filing any replies in support of the settlement; preparing for and participating in the fairness hearing; handling any appeal; assisting class members during the settlement-administration process and ensuring that it is carried out properly; and addressing any unanticipated issues that may arise. *See Geneva Rock Prods., Inc. v. United States*, 119 Fed. Cl. 581, 595 (2015), *rev'd on other grounds sub nom. Longnecker Prop. v. United States*, 2016 WL 9445914 (Fed. Cir. Nov. 14, 2016) ("When cross-checking an award," the lodestar "must be augmented … to reflect the additional time that has been and will be spent by class counsel on the request for the court's approval of the settlement, the fairness hearing and supplemental submissions, and further settlement obligations"); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 746 Fed. App'x 655, 659 (9th Cir. 2018) (finding it appropriate for cross-check to "compar[e] the fee award to a lodestar that included projected work," such as work "defend[ing] against appeals and assist[ing] in implementing the settlement"). The projected figures here are based in part on an extrapolation of the settlement-related work performed in recent months and are appropriately included as part of the lodestar. *See, e.g., Martin v. Toyota Motor Credit Corp.*, 2022 WL 17038908, at *14 (C.D. Cal. Nov. 15, 2022) ("Class Counsel additionally estimate they will incur at least an additional $600,000 in fees … . Although this is merely a projection, the Court finds that projected fees are appropriate considerations in lodestar cross-checks." (cleaned up)); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *40 (N.D. Ga. Mar. 17, 2020), *aff'd in relevant part*, 999 F.3d 1247, 1278 (11th Cir. 2021) (explaining that a "reasonable estimate" of future time—there, 10,000 hours—may properly be included in conducting a lodestar cross-check, because, "[i]f the fee was lodestar-based, class counsel would be entitled to file supplemental applications for future time"; "[e]xcluding such time thus would misapply the lodestar methodology and needlessly penalize class counsel").

drive the point home. *Health Republic*, 58 F.4th at 1375–77; *see* Fitzpatrick Decl. ¶ 26 ("[A]t the outset of the litigation, would class members have objected to paying class counsel 19% of whatever was recovered here? We do not have to guess at the answer: despite the opportunity to opt out when they received the class certification notice advising them of a fee request *even greater* than this one, the original class—which … are largely sophisticated parties like lawyers and large institutions—decided not to opt out. … [N]ew class members are currently being given the same chance.").

In fact, "the risk of nonpayment" alone justifies the multiplier. *Health Republic*, 58 F.4th at 1375. A simple math exercise shows why. To "properly incentivize … contingency representation," a multiplier would have to at least be "the inverse of the riskiness of the case." Fitzpatrick Decl. ¶ 28. Here, there were at least three novel, fiercely contested, and independently case-dispositive issues: Is there jurisdiction (including a cause of action and waiver of sovereign immunity) for this claim? Can a class action for monetary relief be certified against the federal judiciary? And did the judiciary violate the statute, and do so in a way that created liability? If the government prevailed on even just one of these issues, there would no classwide liability and therefore no attorneys' fees. So if the government had even a 40% chance of prevailing on any of these independent issues, that would meant that the plaintiffs had little more than a 20% chance of obtaining any classwide relief when the case was filed—fully justifying a multiplier of five. And, if Professor Fitzpatrick were right that "[n]one of these questions were even 50-50 propositions for the class when this litigation began," the multiplier would have to be over eight to account for the risk. *Id.* ¶ 20. Hence his conclusion that, "in light of the extreme risks involved here," the multiplier is "below what would have been needed to properly incentivize this contingency representation." *Id.* ¶ 28.

"Applying a lodestar cross-check, therefore, confirms that the award sought by class counsel is neither unusual nor unreasonable." *Black Farmers*, 953 F. Supp. 2d at 102. To the contrary, the cross-check "yields an award consistent with the one derived from the application of the percentage

[method]," confirming the reasonableness of the requested fee. *Kane Cnty.*, 145 Fed. Cl. at 20. The litigation and settlement-administration expenses incurred by class counsel were reasonable and should be reimbursed from the common fund.

"In addition to being entitled to reasonable attorneys' fees, class counsel in common fund cases are also entitled to reasonable litigation expenses from that fund." *Fed. Nat'l Mortg. Ass'n*, 4 F. Supp. 3d at 113; *see Mercier*, 156 Fed. Cl. at 593 ("It 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."); Fed. R. Civ. P. 23(h); *see also, e.g.*, *Kane Cnty.*, 145 Fed. Cl. at 20–21.

Here, class counsel incurred $29,654.98 in expenses. Many of these expenses were for hiring the mediator and for travel costs, and each expense was actually and reasonably incurred. *See* Oliver Decl. ¶¶ 14–19. Accordingly, class counsel should be reimbursed for these reasonable, out-of-pocket expenses. *See Quimby*, 107 Fed. Cl. at 135.

In addition, the settlement authorizes KCC to retain from the common fund all notice and administration costs actually and reasonably incurred. KCC originally provided class counsel with a total not-to-exceed amount of $977,000, which we have revised to include an additional $100,000 to account for previously unanticipated complexities. *See* Oliver Decl. ¶ 19. We ask that this amount be set aside to cover current and "future administrative fees and costs." *Quimby*, 107 Fed. Cl. at 135.

IV. The Court should award each of the three class representatives $10,000 for their contributions to the case.

Finally, class counsel seeks service awards (also known as case-contribution awards) for each class representative. "Case contribution awards recognize the unique risks incurred and additional responsibility undertaken by named plaintiffs in class actions." *Mercier*, 156 Fed. Cl. at 589 (awarding $20,000 per representative). This Court has already recognized that "the nonprofit organizations who are named plaintiffs in this case make particularly good class representatives" because they

"have dual incentives to reduce PACER fees, both for themselves and for the constituents that they represent." ECF No. 33 at 14. It should now recognize that their service justifies a modest award.

The three named plaintiffs here took on considerable risk and responsibility when they agreed to serve as class representatives. They all "consulted regularly with counsel throughout the litigation and were actively involved in all material aspects of the lawsuit." *Mercier*, 156 Fed. Cl. at 589; *see* Rossman Decl. ¶¶ 2–3; Burbank Decl. ¶¶ 4–6; Brooks Decl. ¶ 2. In fact, the individuals at each organization who participated in the case are themselves lawyers, and they estimate that, for each organization, the full requested award may be justified based solely on the amount of attorney time spent working on the case. *See* Rossman Decl. ¶ 3; Burbank Decl. ¶ 6; Brooks Decl. ¶ 2.

Yet there is another reason to grant the requested awards here. Just as "it takes courage to be the public face of litigation against one's employer," *Mercier*, 156 Fed. Cl. at 589, it also takes courage for legal-advocacy organizations to be the public face of litigation against the federal-court system. *See* Rossman Decl. ¶ 2; Burbank Decl. ¶ 5. Thus, whether the Court wants to focus on "the contributions of the named representatives" or "the risks they bore," both were "unique." *Mercier*, 156 Fed. Cl. at 590. And together, they undoubtedly justify an award of $10,000 per representative.

CONCLUSION

This Court should grant the motion and enter the proposed order. In addition to approving the settlement, the Court should award 20% of the settlement fund to cover attorneys' fees, notice and settlement costs, litigation expenses, and service awards. Specifically, the Court should (1) award $10,000 to each class representative, (2) award $29,654.98 to class counsel to reimburse litigation expenses, (3) order that $1,077,000 of the common fund be set aside to cover notice and settlement-administration costs, and (4) award the remainder (19.1% of the settlement fund, or $23,863,345.02) to class counsel as attorneys' fees.

Respectfully submitted,

/s/ Deepak Gupta

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August 28, 2023

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

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 RENÉE BURBANK

I, Renée Burbank, declare as follows:

1. I am the Director of Litigation at the National Veterans Legal Services Program (NVLSP), a national 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, practices, and policies of the U.S. Department of Veterans Affairs and U.S. Department of Defense. NVLSP believes firmly in the importance of ensuring that veterans who are navigating the federal court system—like unrepresented or under-represented litigants in general—should have free and open access to judicial records.

2. Before joining NVLSP in July 2021, I was a Clinical Lecturer and Robert M. Cover Clinical Teaching Fellow at Yale Law School, teaching and supervising students in both the Veterans Legal Services Clinic and the Peter Gruber Rule of Law Clinic. In that capacity, I supervised advocacy on behalf of veterans and oversaw class-action litigation. While at Yale, I wrote a comprehensive article on illegal-exaction claims against the federal

government, *Illegal Exactions*, 87 TENN. L. REV. 315 (2020). The article has been cited multiple times in published decisions by the U.S. Court of Federal Claims. Before teaching at Yale, I was a litigator in the U.S. Department of Justice, where I worked on complex commercial litigation at both the trial and appellate levels. In that capacity, I served as lead or co-counsel on a variety of class actions brought against the federal government, including the landmark illegal-exaction case *Starr Int'l Co. v. United States*, 121 Fed. Cl. 428 (2015), *affirmed in part and vacated in part*, 856 F.3d 953 (Fed. Cir. 2017). I am a graduate of Harvard Law School (J.D., *cum laude*, 2009) and the University of Chicago (B.A., Honors in the College, 2004) and clerked for the Honorable David B. Sentelle of the U.S. Court of Appeals for the D.C. Circuit.

3. In my capacity as Director of Litigation of NVLSP, I have advised many veterans on their legal rights, including in disputes with the federal government over fees and other payments, and I am quite familiar with the difficulties in obtaining monetary relief against the United States in court. In all, I have served as counsel in over two dozen class-action cases in my career—all of them involving claims against the federal government—and am familiar with the resources, time, and money required to successfully pursue class-action claims. I offer this declaration in support of the plaintiffs' motion for final approval of the class-action settlement in this case, including the plaintiffs' request for attorneys' fees and a service award for NVLSP.

4. NVLSP has actively served as a named plaintiff in this class action for more than seven years, since it was filed. When I joined NVLSP, the parties had already begun settlement discussions and made significant headway toward an eventual resolution, but they had not yet reached an agreement. Although I was already familiar with the public filings in the case because of my academic research on illegal-exaction law, I had to spend time getting

up to speed on additional developments so I could advise NVLSP on the negotiations and improve any eventual settlement for the benefit of the organization, its clients, and all PACER users. In addition to reviewing case filings and other relevant materials, I had several calls with class counsel, where I made suggestions that improved the terms of the settlement.

5. Before I joined NVLSP, Barton Stichman, our former Executive Director, reviewed and commented on draft pleadings, consulted on litigation strategy, provided a declaration in support of class certification, participated in discovery, received updates on motion practice and court rulings from class counsel, and actively engaged in the class-action settlement process. Mr. Stichman also engaged in substantial due diligence before deciding that NVSLP would join this litigation as a named plaintiff. As an organization that often represents others in litigation before the federal courts, the decision to sue the federal court system was not a decision NVLSP made lightly. The organization was well aware, at the time it decided to sue, that it would be challenging a fee structure set by the Judicial Conference of the United States, the judiciary's policymaking body. NVLSP would not have authorized its participation in this lawsuit had it not been convinced that class counsel were particularly skilled and that the aims of the litigation were in the public interest.

6. Since the settlement in this case was announced, NVLSP has received numerous inquiries from potential class members, possibly because NVLSP is listed first on the case caption, which has required additional attorney and administrative staff time. All told, I estimate that my attorney colleagues and I have spent more than 25 hours working on this litigation on NVLSP's behalf during the seven years that the case has been pending, with several more hours spent by non-attorney administrative staff. I understand that counsel will seek a service award for NVLSP of $10,000. At our market billing rates, the value of attorney time incurred by NVLSP greatly exceeds that amount.

7. Based on my active participation in this litigation and my expertise in illegal-exaction cases and class actions against the government, I am convinced that the proposed settlement in this case is fair, adequate, and reasonable. And, in light of the considerable risk, expense, and seven-year duration of this litigation, and the impressive results achieved, I find class counsel's request for attorneys' fees comprising about 19% of the common-fund to be reasonable under the circumstances. NVLSP fully supports the motion for final approval and the motion for fees, costs, and awards.

8. This was a uniquely risky and difficult case—a nationwide class action against the federal judiciary, seeking millions of dollars on the basis of an entirely novel legal theory, invoking a statute whose meaning had never been litigated, and based upon a relatively obscure cause of action. When this case was filed, many aspects of illegal-exaction claims remained unresolved in the courts, including basic concepts about the required elements of a claim, how damages are calculated, and even the legal basis for such claims. *See generally Illegal Exactions*, 87 TENN. L. REV. at 340–45 (describing areas of illegal-exaction case law still unresolved as of 2020). Class counsel, however, displayed exceptional tenacity and litigation skill in navigating these murky waters. Against all odds, the litigation succeeded at every turn. It sparked public interest in the need to reform PACER fees, spurred legislative action, and delivered a landmark settlement to which NVLSP is proud to have contributed. We are hopeful that this litigation will serve as a blueprint for holding the judiciary accountable and, over the long term, will contribute to transparency and openness in the federal courts.

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

Executed on August 18, 2023.

/s/ Renee Burbank
Renée Burbank

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 T. 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 through policy analysis, advocacy, litigation, expert-witness services, and training for consumer advocates throughout the nation. I am also the co-editor of NCLC's treatise, *Consumer Class Actions*, and for many years coordinated NCLC's annual symposium on class actions. In addition, I am a past Co-Chair of the Board of the National Association of Consumer Advocates, which publishes the *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 299 F.R.D. 160, first published in 1998 and updated most recently in 2023. I am a graduate of Harvard Law School (J.D., *cum laude*, 1978) and the University of Michigan (B.A. *magna cum laude*, 1975) and a visiting lecturer at the University of Michigan Law School, where I have regularly taught a seminar on class actions. In my capacity as Litigation Director of the NCLC, I have co-counseled with and advised many attorneys on class-action cases around the country and am well acquainted with the resources, time and money required to successfully pursue class-action claims. I offer this declaration in support of the plaintiffs'

motion for final approval of the class-action settlement in this case, including the plaintiffs' request for a service award for NCLC.

2. NCLC has actively served as a named plaintiff in this class action for more than seven years, since the inception of the case. As an organization that often participates in litigation before the federal courts, we did not make the decision to sue the federal judiciary lightly. We were well aware, at the time we decided to sue, that we would be challenging a fee structure set by the Judicial Conference of the United States, presided over by the Chief Justice. We would not have decided to authorize suit had we not been convinced that class counsel were exceptionally skilled and that the aims of the litigation were worthwhile and in the public interest. Before recommending that NCLC join this litigation, I led NCLC's extensive due diligence to determine the risks, obstacles, and merits of the case, in collaboration with NCLC's Litigation Steering Committee. This included an independent review of legal memoranda, detailed questions for class counsel, and careful consideration of the implications for pro se individuals and the intricacies of the PACER, ECF, and Next Gen systems, among other things.

3. Throughout this litigation, I reviewed and commented on draft pleadings, consulted on litigation strategy, provided a declaration in support of class certification, participated in discovery, received updates on motion practice and court rulings from class counsel, and actively engaged in the class-action settlement process. Over the past seven years, I have spent more than 25 hours working on this litigation on NCLC's behalf. I understand that counsel will seek a service award for NCLC of $10,000. At my current billing rates, the amount of attorney time incurred by NCLC greatly exceeds that amount.

4. This was a uniquely risky and difficult case—a nationwide class action against the federal judiciary, seeking millions of dollars on the basis of an entirely novel

legal theory, invoking a statute whose meaning had never been litigated. But class counsel were equal to the task and the tenacity and litigation skill they displayed was uniquely strong. Against all odds, the litigation succeeded at every turn. It sparked public interest in the need to reform PACER fees, spurred legislative action, and delivered a landmark settlement of which we are proud to have contributed.

5. In my view, based on my active participation in this litigation and my decades of experience with class-action settlements, the proposed settlement in this case is fair, adequate, and reasonable. I understand that class counsel is seeking a fee equal to about 19% of the common fund. In light of the considerable risk, expense, and duration of this litigation, and the impressive results achieved against all odds, I find the request to be reasonable under the circumstances and fully support it.

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

Executed on August 14, 2023.

/s/ Stuart T. Rossman

Stuart T. Rossman, BBO No. 430640

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 RAKIM BROOKS

I, Rakim Brooks, declare as follows:

1. I am the President of Alliance for Justice, a national alliance of approximately 150 public-interest member organizations that share a commitment to an equitable, just, and free society. Among other things, AFJ works to ensure that the federal judiciary advances core constitutional values and preserves unfettered access to justice for all Americans. I previously served as Campaign Manager for the ACLU's Systemic Equality Campaign and as an associate attorney at Susman Godfrey. I was also a member of the Biden-Harris Transition Team and previously served as a policy advisor for the U.S. Department of the Treasury during the Obama administration. I hold an A.B. from Brown University; an M.Phil in Politics from the University of Oxford, where I was a Rhodes Scholar; and a J.D. and M.B.A. from Yale Law School and the Yale School of Management. I clerked for Justice Edwin Cameron on the Constitutional Court of South Africa and on the U.S. Court of Appeals for the Ninth Circuit and the D.C. Circuit.

2. AFJ has served as a named plaintiff in this class action since its filing in April 2016, a period of more than seven years. For much of that time period, until his departure for a position at the U.S. Senate last year, AFJ's Legal Director Daniel Goldberg oversaw this litigation on AFJ's behalf. Among other things, Mr. Goldberg received updates on

motion practice and court rulings from class counsel, reviewed draft pleadings, consulted on strategy, and provided a declaration in support of class certification on AFJ's behalf. I understand that counsel will seek a service award for AFJ of $10,000. Although our organization did not keep formal time records, it is reasonable to estimate that the value of the attorney time incurred by AFJ over the seven-year life of this case exceeds that amount when calculated at market rates.

3. AFJ supports the proposed class-action settlement and accompanying request for fees, costs, and service awards. Almost by definition, this was a difficult, risky, and ambitious case: a first-ever nationwide class action for monetary relief against the federal judiciary. AFJ would never have decided to sue the federal judiciary lightly. But class counsel were equal to the task and the tenacity and litigation skill they displayed were impressive. Through this seven-year litigation battle, the plaintiffs and class counsel decreased barriers to information about the judicial system, brought information about the PACER paywall to light, spurred ongoing legislative action, created a blueprint for holding the judiciary accountable through litigation, and delivered a landmark monetary settlement to which AFJ is proud to have contributed.

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

Executed on August 17, 2023.

/s/ Rakim Brooks
Rakim Brooks

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

National Veterans Legal Services Program v. United States of America

No. 16-745

DECLARATION OF BRIAN T. FITZPATRICK

I. My background and qualifications

1. I am the Milton R. Underwood Chair in Free Enterprise and Professor of Law at Vanderbilt University in Nashville, Tennessee. I joined the Vanderbilt law faculty in 2007, after serving as the John M. Olin Fellow at New York University School of Law in 2005 and 2006. I graduated from the University of Notre Dame in 1997 and Harvard Law School in 2000. After law school, I served as a law clerk to The Honorable Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit and to The Honorable Antonin Scalia on the United States Supreme Court. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP. My C.V. is attached as Exhibit 1. I speak only for myself and not for Vanderbilt.

2. My teaching and research at Vanderbilt have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses. In addition, I have published a number of articles on class action litigation in such journals as the University of Pennsylvania Law Review, the Journal of Empirical Legal Studies, the Vanderbilt Law Review, the NYU Journal of Law & Business, the Fordham Law Review, and the University of Arizona Law Review. My work has been cited by numerous courts, scholars, and media outlets such as the New York Times, USA Today, and Wall Street Journal. I have also been invited to speak at symposia and other events about class action litigation, such as the ABA National Institutes on Class Actions in 2011, 2015, 2016, 2017, 2019, and 2023; the Annual Conference of the ABA's

Litigation Section in 2021; and the ABA Annual Meeting in 2012. Since 2010, I have also served on the Executive Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies. In 2015, I was elected to the membership of the American Law Institute. In 2021, I became the co-editor (with Randall Thomas) of THE CAMBRIDGE HANDBOOK ON CLASS ACTIONS: AN INTERNATIONAL SURVEY.

3. In December 2010, I published an article in the Journal of Empirical Legal Studies entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter "Empirical Study"). This article is what I believe to be the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published. Unlike other studies of class actions, which have been confined to one subject matter or have been based on samples of cases that were not intended to be representative of the whole (such as settlements approved in published opinions), my study attempted to examine *every* class action settlement approved by a federal court over a two-year period (2006-2007). *See id*. at 812-13. As such, not only is my study an unbiased sample of settlements, but the number of settlements included in my study is also several times the number of settlements per year that has been identified in any other empirical study of class action settlements: over this two-year period, I found 688 settlements. *See id*. at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools in 2009 and 2010. Since then, this study has

been relied upon regularly by a number of courts, scholars, and testifying experts.[1] I have attached this study as Exhibit 2 and will draw upon it in this declaration.

4. In addition to my empirical works, I have also published many law-and-economics papers on the incentives of attorneys and others in class action litigation. *See, e.g.*, Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev.

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[1] *See, e.g.*, *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (relying on article to assess fees); *Kuhr v. Mayo Clinic Jacksonville*, No. 3:19-cv-453-MMH-MCR, 2021 WL 1207878, at *12-13 (M.D. Fla. Mar. 30, 2021) (same); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2020 WL 6891417, at *3 (S.D.N.Y. Nov. 24, 2020) (same); *Shah v. Zimmer Biomet Holdings, Inc.*, No. 3:16-cv-815-PPS-MGG, 2020 WL 5627171, at *10 (N.D. Ind. Sept. 18, 2020) (same); *In re GSE Bonds Antitrust Litig.*, No. 19-cv-1704 (JSR), 2020 WL 3250593, at *5 (S.D.N.Y. June 16, 2020) (same); *In re Wells Fargo & Co. S'holder Derivative Litig.*, No. 16-cv-05541-JST, 2020 WL 1786159, at *11 (N.D. Cal. Apr. 7, 2020) (same); *Arkansas Teacher Ret. Sys. v. State St. Bank & Trust Co.*, No. CV 11-10230-MLW, 2020 WL 949885, 2020 WL 949885, at *52 (D. Mass. Feb. 27, 2020), *appeal dismissed sub nom. Arkansas Tchr. Ret. Sys. v. State St. Corp*., No. 20-1365, 2020 WL 5793216 (1st Cir. Sept. 3, 2020) (same); *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *34 (N.D. Ga. Jan. 13, 2020) (same); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. 3:07-cv-05634-CRB, 2019 WL 6327363, at *4-5 (N.D. Cal. Nov. 26, 2019) (same); *Espinal v. Victor's Cafe 52nd St., Inc.*, No. 16-CV-8057 (VEC), 2019 WL 5425475, at *2 (S.D.N.Y. Oct. 23, 2019) (same); *James v. China Grill Mgmt., Inc.*, No. 18 Civ. 455 (LGS), 2019 WL 1915298, at *2 (S.D.N.Y. Apr. 30, 2019) (same); *Grice v. Pepsi Beverages Co.*, 363 F. Supp. 3d 401, 407 (S.D.N.Y. 2019) (same); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2018 WL 6250657, at *2 (S.D.N.Y. Nov. 29, 2018) (same); *Rodman v. Safeway Inc.*, No. 11-cv-03003-JST, 2018 WL 4030558, at *5 (N.D. Cal. Aug. 23, 2018) (same); *Little v. Washington Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 38 (D.D.C. 2018) (same); *Hillson v. Kelly Servs. Inc.*, No. 2:15-cv-10803, 2017 WL 3446596, at *4 (E.D. Mich. Aug. 11, 2017) (same); *Good v. W. Virginia-Am. Water Co.*, No. 14-1374, 2017 WL 2884535, at *23, *27 (S.D.W. Va. July 6, 2017) (same); *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 385 (S.D.N.Y. 2017) (same); *Brown v. Rita's Water Ice Franchise Co. LLC*, No. 15–3509, 2017 WL 1021025, at *9 (E.D. Pa. Mar. 16, 2017) (same); *In re Credit Default Swaps Antitrust Litig.*, No. 13MD2476 (DLC), 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (same); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp 3d 1217, 1246 (D.N.M. 2016); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, No. 3:07-cv-5944 JST, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, No. MDL 2328, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11–cv–4462, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11–cv–4462, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 797 (N.D. Ill. 2015) (same); *In re Neurontin Marketing and Sales Practices Litig.*, 58 F.Supp.3d 167, 172 (D. Mass. 2014) (same); *Tennille v. W. Union Co.*, No. 09–cv–00938–JLK–KMT, 2014 WL 5394624, at *4 (D. Colo. Oct. 15, 2014) (same); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 349-51 (S.D.N.Y. 2014) (same); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Fed. Nat'l Mortg. Association Sec., Derivative, and "ERISA" Litig.*, 4 F. Supp. 3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Prod. Liab. Litig.*, No. 11–1546, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 98-99 (D.D.C. 2013) (same); *In re Se. Milk Antitrust Litig.*, No. 2:07–CV 208, 2013 WL 2155387, at *2 (E.D. Tenn., May 17, 2013) (same); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, No. 10 C 816, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

1151 (2021) (hereinafter "*A Fiduciary Judge*"); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043 (2010) (hereinafter "*Class Action Lawyers*"); Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009). Much of this work was discussed in a book published by the University of Chicago Press entitled THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019). The thesis of the book is that the so-called "private attorney general" is superior to the public attorney general in the enforcement of the rules that free markets need in order to operate effectively, and that courts should provide proper incentives to encourage such private attorney general behavior. I will also draw upon this work in this declaration.

5. I have been asked by class counsel to opine on whether the attorneys' fees they have requested here are reasonable in light of the empirical studies and research on economic incentives in class action litigation. In order to formulate my opinion, I reviewed a number of documents; I have attached a list of these documents in Exhibit 3 (and describe there how I refer to them herein). As I explain, based on my study of settlements across the country, I believe the request here is within the range of reason.

II. Case background

6. This is a novel lawsuit against a novel defendant. The defendant is the federal judiciary and the lawsuit alleged that the judiciary was overcharging citizens for access to electronic court records. The lawsuit was filed in 2016. It survived a motion to dismiss and class certification and then prevailed at summary judgment and before an interlocutory appeal in the Federal Circuit. In lieu of a trial on damages, the parties reached a class-wide settlement. The court certified a revised class and preliminarily approved the settlement on May 8, 2023. The parties are now asking the court to grant final approval of the settlement and class counsel is seeking a fee award.

7. The revised class includes, with minor exceptions, "all persons or entities who paid PACER fees between April 22, 2010, and May 31, 2018." Settlement Agreement ¶ 3. The class will release the defendant from "any and all claims, known or unknown, that were brought or could have been brought . . . for purported overcharges of any kind arising from their use of PACER during the Class Period" except any for any claims now pending in Fisher v. United States, No. 15-1575 (Fed. Cl.). *Id*. at ¶ 13. In exchange, the defendant will pay $125,000,000 in cash. *See id.* at ¶ 11. After deducting various transaction costs including attorneys' fees and expenses, the balance of this money will be distributed without claim forms in the following manner: first, class members will be repaid all of their PACER fees during the class period up to $350; then, the remaining monies will be divided *pro rata* relative to the amount of PACER fees each class member paid fees in excess of $350. *See id.* at ¶¶ 19-22. If payments go uncashed, they will be divided evenly among check-cashing class members who paid in excess of $350 in PACER fees during the class period; any uncashed monies thereafter will revert back to the defendant. *See id.* at ¶¶ 23-26.

8. Class counsel have now moved the court for an award of attorneys' fees equal to roughly 19% of the cash settlement. It is my opinion that the fee request is more than reasonable in light of the empirical studies and research on economic incentives in class action litigation, especially given the novelty, complexity, and risk of the litigation; the outstanding results obtained; and the high quality and creativity of class counsel's legal work.

III. Percentage versus lodestar method

9. When a class action reaches settlement or judgment and no fee shifting statute is triggered and the defendant has not agreed to pay class counsel's fees, class counsel is paid by the class members themselves pursuant to the common law of unjust enrichment. This is sometimes

called the "common fund" or "common benefit" doctrine. It requires the court to decide how much of their class action proceeds it is fair to ask class members to pay to class counsel.

10. At one time, courts that awarded fees in common fund class action cases did so using the familiar "lodestar" approach. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. Pa. L. Rev. 2043, 2051 (2010) (hereinafter "Class Action Lawyers"). Under this approach, courts awarded class counsel a fee equal to the number of hours they worked on the case (to the extent the hours were reasonable), multiplied by a reasonable hourly rate as well as by a discretionary multiplier that courts often based on the risk of non-recovery and other factors. *See id.* Over time, however, the lodestar approach fell out of favor in common fund class actions. It did so largely for two reasons. First, courts came to dislike the lodestar method because it was difficult to calculate the lodestar; courts had to review voluminous time records and the like. Second—and more importantly—courts came to dislike the lodestar method because it did not align the interests of class counsel with the interests of the class; class counsel's recovery did not depend on how much the class recovered, but, rather, on how many hours could be spent on the case. *See id.* at 2051-52. According to my empirical study, the lodestar method is now used to award fees in only a small percentage of class action cases, usually those involving fee-shifting statutes or those where the relief is entirely or almost entirely injunctive in nature. *See* Fitzpatrick, *Empirical Study*, *supra*, at 832 (finding the lodestar method used in only 12% of class action settlements). The other large-scale academic study of class action fees, authored over time by Geoff Miller and the late Ted Eisenberg, agrees with my findings. *See* Theodore Eisenberg et al., *Attorneys' Fees in Class Action Settlements: 2009-2013*, 92 N.Y.U. L. Rev. 937, 945 (2017) ("Eisenberg-Miller 2017") (finding lodestar method used less than 7% of the time since 2009); Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action*

Settlements: 1993-2008, 7 J. Empirical L. Stud. 248, 267 (2010) ("Eisenberg-Miller 2010") (finding lodestar method used only 13.6% of the time before 2002 and less than 10% of the time thereafter and before 2009).

11. The more common method of calculating attorneys' fees today is known as the "percentage" method. Under this approach, courts select a percentage of the settlement fund that they believe is fair to class counsel, multiply the settlement amount by that percentage, and then award class counsel the resulting product. The percentage approach has become the preferred method for awarding fees to class counsel in common fund cases precisely because it corrects the deficiencies of the lodestar method: it is less cumbersome to calculate, and, more importantly, it aligns the interests of class counsel with the interests of the class because the more the class recovers, the more class counsel recovers. *See* Fitzpatrick, *Class Action Lawyers, supra,* at 2052. These same reasons also drive private parties that hire lawyers on contingency—including sophisticated corporations—to use the percentage method over the lodestar method. *See, e.g.,* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012); Herbert M. Kritzer, RISKS, REPUTATIONS, AND REWARDS 39-40 (1998).

12. Although for many of these reasons the lodestar method has all but been abandoned in common fund cases in the D.C. Circuit, *see Swedish Hosp. Corp. v. Shalala,* 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("[W]e join . . . others . . . in concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases."), any appeals from this litigation go to the Federal Circuit and courts there still have discretion to use either the lodestar method or the percentage method, *see, e.g., Health Republic Ins. Co. v. United States*, 58 F.4th 63 1365, 1371 (2023) ("We have recognized that the Claims Court has discretion to decide what method to use."). Nonetheless, in light of the well-recognized disadvantages of the

lodestar method and the well-recognized advantages of the percentage method, it is my opinion that the percentage method should be used whenever the value of the settlement or judgment can be reliably calculated; the lodestar method should be used only where the value cannot be reliably calculated and the percentage method is therefore not feasible or when the method is required by law, such as by a fee-shifting statute. This is not just my view, but the view of other leading class action scholars. *See* Principles of the Law of Aggregate Litigation § 3.13 (2010) (cmt. b) ("Although many courts in common-fund cases permit use of either a percentage-of-the-fund approach or a lodestar . . . most courts and commentators now believe that the percentage method is superior."). Because this settlement consists of all cash, in my opinion the percentage method should be used here. I will therefore proceed under that method.

IV. Selecting the percentage

13. Courts usually examine a number of factors to select the right percentage under the percentage method. *See* Fitzpatrick, *Empirical Study, supra*, at 832. Neither the D.C. Circuit nor the Federal Circuit has "enumerated what facts must be considered when this method is used," but the Federal Circuit has cited the following factors that are commonly used by the Claims Court: "(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*, 58 F.4th at 1372. These factors are similar to those examined in this Court, *see, e.g., In re Baan Co. Securities Litig.*, 288 F.Supp.2d 14, 17 (D.D.C. 2003); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *11 (D.D.C. July 16, 2001), and I will therefore use them here. In my opinion,

the fee request is reasonable because it is supported by all the relevant factors that can be determined at this time.[2]

14. Consider first factors "(4) the fee that likely would have been negotiated between private parties in similar cases"; "(6) the percentage applied in other class actions"; and "(7) the size of the award." The request here is about 19% of the settlement. It is well known that this is well below what private parties negotiate when they hire lawyers on contingency. *See, e.g.,* Kritzer, SUPRA, at 39-40 (finding most percentages at one-third). Professor Kritzer's data is largely drawn from personal injury cases, but, even when sophisticated corporations hire lawyers on contingency for complex litigation like patent cases, they agree to pay more than 19%. *See, e.g.,* Schwartz, *supra*, at 360 (2012) (finding the average fixed percentage to be 38.6% and the average escalating percentage to rise from 28% upon filing to 40.2% through appeal).

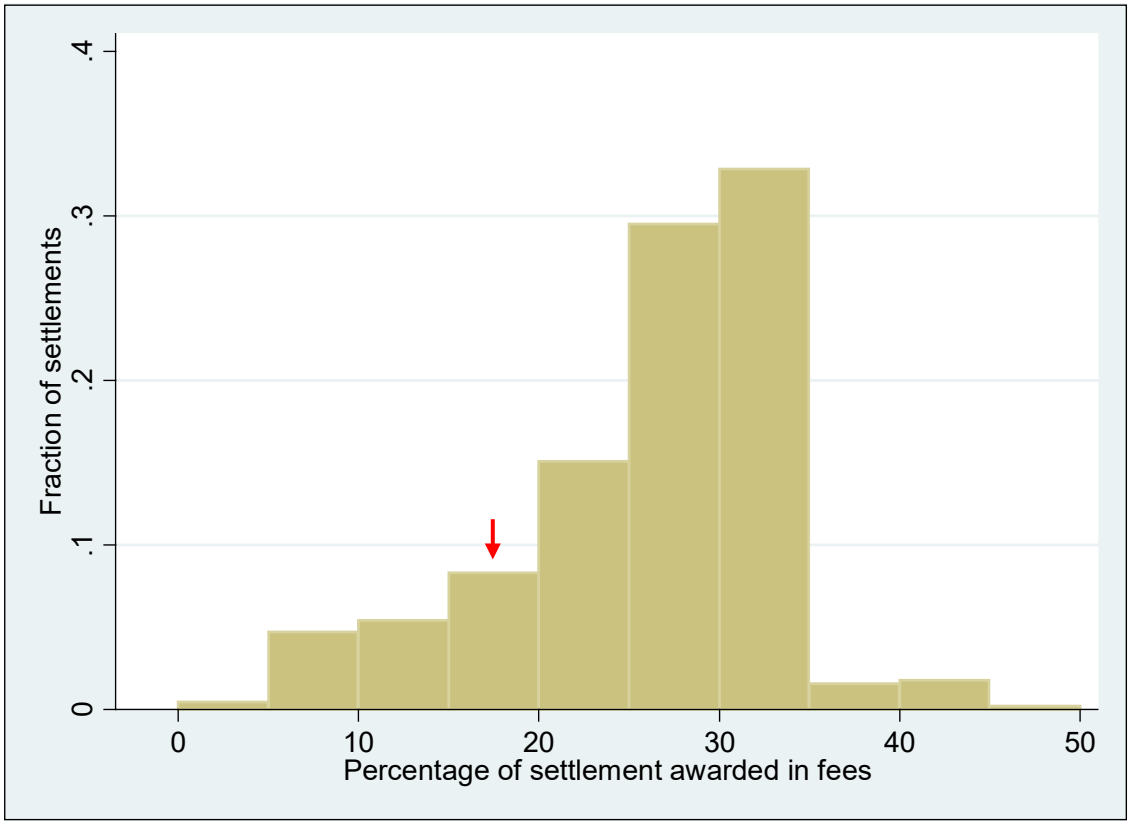
15. Although fee percentages tend to be lower in class actions than in individual litigation, the request here is below even what is typical in class actions. According to my empirical study, the most common percentages awarded by federal courts nationwide using the percentage method were 25%, 30%, and 33%, with a mean award of 25.4% and a median award of 25%. *See* Fitzpatrick, *Empirical Study, supra,* at 833-34, 838. This can be seen graphically in Figure 1, which shows the distribution of all of the percentage-method fee awards in my study.[3] In particular, the figure shows what fraction of settlements (y-axis) had fee awards within each five-point range of fee percentages (x-axis). The request here would fall into the bar depicted by the red arrow. Tallying up the other bars shows that *over 80%* of all percentage method fee awards

[2] The fifth factor—"(5) class members' objections to the settlement terms or fees requested by class counsel"—is not yet applicable because the deadline to file an objection has not yet passed.

[3] Although it would normally be instructive to examine fee awards within the circuit as well as those nationwide, no circuit sees fewer class actions than the D.C. and Federal Circuits. *See* Fitzpatrick, *Empirical Study, supra* at 822. Thus, in my opinion, intracircuit analysis would not be meaningful here.

were greater than or equal to the request here (and often much greater). This means that, if the request here is granted, it would fall into the *bottom fifth* of fees awarded by federal courts. My numbers largely agree with the other large-scale academic studies of class action fee awards, which, if anything, show even higher typical awards in more recent years. *See Eisenberg-Miller 2010*, *supra,* at 260 (finding mean and median of 24% and 25%, respectively through 2008); *Eisenberg-Miller 2017*, *supra*, at 951 (finding mean and median of 27% and 29% respectively, from 2009 to 2013). Thus, in my opinion, these factors clearly support the fee request.

Figure 1: Percentage-method fee awards among all federal courts, 2006-2007



16. But it should be noted that the settlement here is unusually large. Less than 10% of class action settlements total over $100 million in any given year. *See* Fitzpatrick, *Empirical Study, supra,* at 839. This is notable because some federal courts award lower percentages in cases where settlements are larger. *See id*. at 838, 842-44 (finding relationship statistically significant);

Eisenberg-Miller 2017, supra, at 947-48 (same); *Eisenberg-Miller 2010*, *supra*, at 263-65 (same). For several reasons, this does not change my opinion that this factor weighs in favor of the fee request.

17. First, I think the entire endeavor of lowering fee percentages simply because a settlement is large is misguided: it creates terrible incentives for class counsel. Indeed, it can actually make class counsel *better off* by resolving a case for less rather than more if it is not done only on the margin (e.g., only for the *portion* above $100 million). *See, e.g.*, *In re Synthroid I*, 264 F.3d 712, 718 (7th Cir. 2001) (Easterbrook, J.) ("This means that counsel for the consumer class could have received [more] fees had they settled for [less] but were limited . . . in fees because they obtained an extra $14 million for their clients . . . . Why there should be such a notch is a mystery. Markets would not tolerate that effect . . . ."). Consider the following example: if courts award class action attorneys 25% of settlements in cases that settle for less than $100 million, but 18% of settlements when they are over $100 million (the averages I found in my study, see below), then rational class action attorneys will prefer to settle cases for $90 million (*i.e.*, a $22.5 million fee award) than for $110 million (*i.e.*, a $19.8 million fee award). As Judge Easterbrook noted above, rational clients who want to maximize their own recoveries would never agree to such an arrangement. This is why studies even of sophisticated corporate clients do not report any such practice among them when they hire lawyers on contingency, even in the biggest cases like patent litigation. *See, e.g.,* Schwartz, *supra,* at 360; Fitzpatrick, *A Fiduciary Judge*, *supra*, at 1159-63. In my opinion, courts should not force a fee arrangement on class members that they would never choose themselves. To the contrary: courts are supposed to be serving as fiduciaries for absent class members. *See* William B. Rubenstein, Newberg and Rubenstein on Class Actions § 13.40 (6th ed. 2022) ("[T]he law requires the judge to act as a fiduciary" for class members). This is all

the more imperative in the Federal Circuit in light of factor (4): "the fee that likely would have been negotiated between private parties in similar cases." Private parties simply do not pay worse percentages for better results.

18. Second, while some courts have awarded lower fee percentages as settlement sizes increase, many other courts do not follow this practice. *See, e.g.*, *Allapattah Srvcs. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1213 (S.D. Fla. 2006) ("While some reported cases have advocated decreasing the percentage awarded as the gross class recovery increases, that approach is antithetical to the percentage of the recovery method adopted by the Eleventh Circuit . . . . . By not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little."); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1367 (S.D. Fla. 2011) (quoting *Allapattah*); *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, No. 8:10ML-02151-JVS, 2013 WL 12327929, at 17 n. 16 (C.D. Cal., Jun. 17, 2013) ("The Court also agrees with … other courts, e.g., *Allapattah Servs*., 454 F. Supp. 2d at 1213, which have found that decreasing a fee percentage based only on the size of the fund would provide a perverse disincentive to counsel to maximize recovery for the class"). Nothing in Federal Circuit or D.C. Circuit case law requires district courts to lower fee percentages because class counsel did a better job and recovered more for the class. Accordingly, it is my humble opinion that the Court should not exercise its discretion to do so here.

19. Nonetheless, if the Court wishes to go down this path, it is my opinion that the percentage requested here is still in line with those awarded in other class action cases. The settlement range from my study that this settlement falls into is the range between $100 million and $250 million (inclusive). According to my study, the mean and median fee percentages

awarded in settlements in this range were 17.9% and 16.9%, respectively. *See* Fitzpatrick, *Empirical Study, supra*, at 839. The fee request here is only slightly above these numbers and well within one standard deviation (5.2%, *see id.*) of the mean. Moreover, the fee request is actually below the average percentage from the Eisenberg-Miller studies in the relevant range used there, which is better centered around the fee request here. *See Eisenberg-Miller 2010, supra*, at 265 (finding mean of 19.4% and median of 19.9% for settlements between $69.6 and $175.5. million). In my opinion, this makes the request here a mainstream one even among settlements of the same size. Thus, no matter how you slice it, it is my opinion that these factors support the fee request.

20. Consider next the factors that go to the results obtained by class counsel in light of the risks presented by the litigation: "(1) the quality of counsel," "(2) the complexity and duration of the litigation," and "(3) the risk of nonrecovery." As I noted, the recovery here is very large, but whether or not it is a good recovery depends on the underlying damages the class might have recovered at trial discounted by the risks the class faced. According to class counsel, the absolute maximum possible recoverable damages here following the Federal Circuit's decision were around $500 million. Moreover, that total consists largely of expenditures for CM/ECF, which is a highly uncertain category of potential damages after the Federal Circuit's decision. Further, the defendant took the position that no damages of *any* kind had been established or could be established at trial. Thus, the class is recovering 25% of what they might have received at trial had everything gone their way. In my opinion, this recovery is outstanding in light of the risks the class faced from the very beginning of this litigation and continued to face going forward. As I noted at the outset, this was a novel lawsuit against a novel defendant. I am very familiar with the challenges that lawyers face when they try to sue the federal government for money. I teach a unit on it every year in Federal Courts. As I tell my students (and paraphrasing *The Great Gatsby*): the federal government

is very different from you and me. The federal government has defenses that no one else has. But even that understates what class counsel was up against here. When I teach Federal Courts, I teach suing the Executive branch. Suing the Judicial branch is almost unheard of. In all my years of studying class actions and litigation against the federal government, I am not aware of any previous class action that has successfully been brought against the federal judiciary. Thus, every step of this lawsuit required a new trail to be cut. Not only procedurally—Did the Court have jurisdiction? Was there a cause of action? Did the judiciary have sovereign immunity?—but also on the merits—How should the E-Government Act be interpreted? How can any violation of it be proved? None of these questions were even 50-50 propositions for the class when this litigation began. People had been complaining about high PACER fees for years, but no one had invented a legal solution to the problem until class counsel did. In my opinion, recovering 25% of the class's maximum possible losses in the face of these risks is nothing short of remarkable.

21. Truth be told, all of the above, as impressive as it is, understates class counsel's success here. Shortly after class counsel won their appeal, the government eliminated PACER fees for 75% of users and Congress reinvigorated efforts to make PACER free. Yet, class counsel is not seeking any percentage of those benefits. Moreover, few class action lawyers are willing to litigate their cases through summary judgment and an appeal; the typical class action settles in only three years. *See* Fitzpatrick, *Empirical Study, supra*, at 820. Yet, class counsel is seeking a typical-to-less-than-typical fee percentage. Thus, all these factors, too, clearly support class counsel's fee request.

V. The lodestar crosscheck?

22. Class counsel's lodestar is not one of the factors listed above. Nonetheless, a significant minority of courts use the so-called "lodestar crosscheck" with the percentage method,

see Fitzpatrick, *Empirical Study*, *supra*, at 833 (finding that only 49% of courts consider lodestar when awarding fees with the percentage method); *Eisenberg-Miller 2017*, *supra*, at 945 (finding percent method with lodestar crosscheck used 38% of the time versus 54% for percent method without lodestar crosscheck), and the Federal Circuit recently hinted that its courts might want to do it, too. *See Health Republic*, 58 F.4th at 1374 n.2 ("We need not decide whether a lodestar cross-check would be required . . . had there been no class notices requiring it. It is evident, however, that the policies that govern [a] percentage-of-the-fund attorney's fee . . . might well call for a lodestar cross-check . . . as a general matter."). As such, I wish to say a few words about it.

23. To begin with, in my opinion, economic theory shows that the lodestar crosscheck is a mistake. It brings through the backdoor all of the bad things the lodestar method used to bring through the front door. Not only does the court have to concern itself again with class counsel's timesheets, but, more importantly, it reintroduces the very same misaligned incentives that the percentage method was designed to correct in the first place. *See* Fitzpatrick, *A Fiducairy Judge, supra*, at 1167.

24. Consider the following examples. Suppose a lawyer had incurred a lodestar of $1 million in a class action case. If that counsel believed that a court would not award him a 25% fee if it exceeded twice his lodestar, then he would be *rationally indifferent* between settling the case for $8 million and $80 million (or any number higher than $8 million). Either way he will get the same $2 million fee. Needless to say, the incentive to be indifferent as to the size of the settlement is not good for class members. Or suppose counsel believed that the most he could wring from the defendant in this example was $16 million. In order to reap the maximum 25% fee with the lodestar crosscheck, he would have to generate an additional $1 million in lodestar before agreeing

to the settlement; this would give him incentive to *drag the case out* before sealing the deal. Again, dragging cases along for nothing is not good for class members.

25. This is why the marketplace does not use the lodestar crosscheck when they hire lawyers on contingency. Professor Schwartz did not report any crosscheck agreements in his study of patent litigation. Professor Kritzer has never reported any in his studies of contingency fees more broadly. The Seventh Circuit thinks it is so irrational it has all but banned the practice for the same reason it banned the bigger-recovery-begets-smaller-fee practice I discussed above. *See Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) (holding that "a lodestar check is not . . . required methodology" because "[t]he . . . argument . . . that any percentage fee award exceeding a certain lodestar multiplier is excessive . . . echoes the 'megafund' cap we rejected in *Synthroid*"). To the extent the court should be guided by factor (4)—"the fee that likely would have been negotiated between private parties in similar cases"—it should therefore not be guided by the lodestar crosscheck.

26. I nonetheless understand the very human temptation to use the lodestar crosscheck. When class action lawyers generate significant returns on their time—what some courts, in hindsight, call "windfalls"—it invites public and media scrutiny. But when other entrepreneurs and investors succeed in their ventures, no one asks them: How many hours did you spend on this venture? What effective hourly rate did you earn? Should we take some of it away from you because it is "too high"? Class action lawyers are investors just like any others; they just invest their time and resources for others (the class members) with no hope of payment unless they achieve some form of success for those others. In my opinion, courts should not bow to the pressure and ask these questions of class counsel, either. Rather, courts should only ask what is best for class counsel's incentives vis-à-vis class members. For example, at the outset of this

litigation, would class members have objected to paying class counsel 19% of whatever was recovered here? We do not have to guess at the answer: despite the opportunity to opt out when they received the class certification notice advising them of a fee request *even greater* than this one, the original class—which, it should be noted, are largely sophisticated parties like lawyers and large institutions—decided not to opt out: "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." *See* ECF Nos. 43-1, 44. And the new class members are currently being given the same chance.

27. But because class counsel put their lodestar into the record, I will briefly address whether class counsel would reap some sort of "windfall" if their fee request were granted. Class counsel's lodestar has thus far summed to some $5.13 million. Based on the complexity of the case and the large number of questions already received from class members about the settlement, as well as the possibility of responding to objections and handling a potential appeal therefrom, they anticipate another $900,000 in time to get through the end of the settlement distribution, resulting in a total estimated lodestar of about $6.03 million. If the fee request is granted, class counsel would therefore receive a multiplier of around 3.9. Although this would be above average, *see* Fitzpatrick, *Empirical Study, supra*, at 834; *Eisenberg-Miller 2010, supra*, at 274, it would be well within the range of previous cases. *See Health Republic*, 58 F.4th at 1374 ("A number of courts have surveyed relevant fee awards and noted a norm of implicit multipliers in the range of 1 to 4."); *see also, e.g.*, *Lloyd v. Navy Fed. Credit Union*, 2019 WL 2269958, at *13 (S.D. Cal. May 28, 2019) (awarding fee even though "[t]he Court is aware that a lodestar cross-check would likely result in a multiplier of around 10.96"); *In re Doral Financial Corp. Securities Litigation*, No. 05-cv-04014-RO (S.D.N.Y. Jul. 17, 2007) (ECF 65) (same with 10.26 multiplier); *Beckman*

v. KeyBank, N.A., 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC*, No. 11-cv-00011 (D.N.J., Jan. 26, 2015) (awarding fee with 8.91 multiplier); *Raetsch v. Lucent Tech., Inc.*, No. 05-cv-05134 (D.N.J., Nov. 8., 2010) (same with 8.77 multiplier); *Thacker v. Chesapeake Appalachia, L.L.C.*, No. 07-cv-00026 (E.D.Ky. Mar. 3, 2010) (same with 8.47 multiplier); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. 05-11148-PBS, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (same with 8.3 multiplier); *Hainey v. Parrott*, 2007 WL 3308027, at *1 (S.D. Ohio Nov. 6, 2007) (same with 7.47 multiplier); *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 732 (3rd Cir.2001) (same with of 7 multiplier); *In re Rite Aid Corp. Sec. Litig.*, 362 F.Supp.2d 587 (E.D.Pa.2005) (same with 6.96 multiplier); *Steiner v. American Broadcasting Co.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) (affirming fee with 6.85 multiplier); *In re IDB Communication Group, Inc., Sec. Litig.*, No. 94-3618 (C.D.Cal. Jan. 17, 1997) (awarding fee with 6.2 multiplier); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (same with 6 multiplier); *In re RJR Nabisco*, 1992 WL 210138 (same); *In re Charter Communications, Inc., Securities Litigation*, 2005 WL 4045741, *18 (E.D.Mo. 2005) (same with 5.61 multiplier); *Roberts v. Texaco, Inc*., 979 F.Supp. 185, 197 (S.D.N.Y.1997) (same with 5.5 multiplier); *Di Giacomo v. Plains All Am. Pipeline*, 2001 WL 3463337 at *10 (S.D.Tex. Dec.18, 2001) (same with 5.3 multiplier).

28. Moreover, in light of the extreme risks involved here, the multiplier that would result here would actually be below what would have been needed to properly incentivize this contingency representation; that number is the inverse of the riskiness of the case. *See* William J. Lynk, *The Courts and the Plaintiff's Bar: Awarding the Attorney's Fee in Class-Action Litigation*,

23 J. Legal Stud. 185, 209 & n.18 (1994) ("[T]he multiplier must be [divided by] p*, the probability of winning an efficiently prosecuted case . . . ."). Finally, it bears noting that class counsel have been litigating this case for seven years without any payment at all. It is hardly a "windfall" to work seven years without payment only then to end up paid less than the multiple that would be justified by the risks you successfully surmounted during those seven years. Thus, in my opinion, even the lodestar crosscheck supports class counsel's fee request.

VI. Conclusion

29. For all these reasons, it is my opinion that class counsel's fee request is reasonable in light of the empirical studies and research on economic incentives.

30. My compensation in this matter is a flat fee in no way dependent on the outcome of class counsel's fee petition.

August 28, 2023

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EXHIBIT 1

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ACADEMIC APPOINTMENTS

VANDERBILT UNIVERSITY LAW SCHOOL, *Milton R. Underwood Chair in Free Enterprise*, 2020 to present
- *FedEx Research Professor*, 2014-2015
- *Professor of Law*, 2012 to present
- *Associate Professor*, 2010-2012; *Assistant Professor*, 2007-2010
- Classes: Civil Procedure, Complex Litigation, Federal Courts
- Hall-Hartman Outstanding Professor Award, 2008-2009
- Vanderbilt's Association of American Law Schools Teacher of the Year, 2009

HARVARD LAW SCHOOL, *Visiting Professor*, Fall 2018
- Classes: Civil Procedure, Litigation Finance

FORDHAM LAW SCHOOL, *Visiting Professor*, Fall 2010
- Classes: Civil Procedure

EDUCATION

HARVARD LAW SCHOOL, J.D., *magna cum laude*, 2000
- Fay Diploma (for graduating first in the class)
- Sears Prize, 1999 (for highest grades in the second year)
- *Harvard Law Review*, Articles Committee, 1999-2000; Editor, 1998-1999
- *Harvard Journal of Law & Public Policy*, Senior Editor, 1999-2000; Editor, 1998-1999
- Research Assistant, David Shapiro, 1999; Steven Shavell, 1999

UNIVERSITY OF NOTRE DAME, B.S., Chemical Engineering, *summa cum laude*, 1997
- First runner-up to Valedictorian (GPA: 3.97/4.0)
- Steiner Prize, 1997 (for overall achievement in the College of Engineering)

CLERKSHIPS

HON. ANTONIN SCALIA, Supreme Court of the United States, 2001-2002

HON. DIARMUID O'SCANNLAIN, U.S. Court of Appeals for the Ninth Circuit, 2000-2001

EXPERIENCE

NEW YORK UNIVERSITY SCHOOL OF LAW, Feb. 2006 to June 2007
John M. Olin Fellow

HON. JOHN CORNYN, United States Senate, July 2005 to Jan. 2006
Special Counsel for Supreme Court Nominations

SIDLEY AUSTIN LLP, Washington, DC, 2002 to 2005
Litigation Associate

BOOKS

THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS: AN INTERNATIONAL SURVEY (Cambridge University Press 2021) (ed., with Randall Thomas)

THE CONSERVATIVE CASE FOR CLASS ACTIONS (University of Chicago Press 2019) (winner of the Pound Institute's 2022 Civil Justice Scholarship Award)

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Entrapment of the Little Guy: Resisting the Erosion of Investor, Employee and Consumer Protections, Institute for Law and Economic Policy, San Diego, CA (Jan. 27, 2023)

A New Source of Data for Non-Securities Class Actions, William & Mary Law School, Williamsburg, VA (Nov. 10, 2022)

Can Courts Avoid Politicization in a Polarized America?, American Bar Association Annual Meeting, Chicago, IL (Aug. 5, 2022) (panelist)

A New Source of Data for Non-Securities Class Actions, Seventh Annual Civil Procedure Workshop, Cardozo Law School, New York, NY (May 20, 2022)

Resolution Issues in Class Actions and Mass Torts, Miami Law Class Action & Complex Litigation Forum, University of Miami School of Law, Miami, FL (Mar. 11, 2022) (panelist)

Developments in Discovery Reform, George Mason Law & Economics Center Fifteenth Annual Judicial Symposium on Civil Justice Issues, Charleston, SC (Nov. 16, 2021) (panelist)

Locality Litigation and Public Entity Incentives to File Lawsuits: Public Interest, Politics, Public Finance or Financial Gain?, George Mason Law & Economics Center Symposium on Novel Liability Theories and the Incentives Driving Them, Nashville, TN (Oct. 25, 2021) (panelist)

A Fiduciary Judge's Guide to Awarding Fees in Class Actions, University of California Hastings College of the Law, San Francisco, CA (Nov. 3, 2020)

A Fiduciary Judge's Guide to Awarding Fees in Class Actions, The Judicial Role in Professional Regulation, Stein Colloquium, Fordham Law School, New York, NY (Oct. 9, 2020)

Objector Blackmail Update: What Have the 2018 Amendments Done?, Institute for Law and Economic Policy, Fordham Law School, New York, NY (Feb. 28, 2020)

Keynote Debate: The Conservative Case for Class Actions, Miami Law Class Action & Complex Litigation Forum, University of Miami School of Law, Miami, FL (Jan. 24, 2020)

The Future of Class Actions, National Consumer Law Center Class Action Symposium, Boston, MA (Nov. 16, 2019) (panelist)

The Conservative Case for Class Actions, Center for Civil Justice, NYU Law School, New York, NY (Nov.11, 2019)

Deregulation and Private Enforcement, Class Actions, Mass Torts, and MDLs: The Next 50 Years, Pound Institute Academic Symposium, Lewis & Clark Law School, Portland, OR (Nov. 2, 2019)

Class Actions and Accountability in Finance, Investors and the Rule of Law Conference, Institute for Investor Protection, Loyola University Chicago Law School, Chicago, IL (Oct. 25, 2019) (panelist)

Incentivizing Lawyers as Teams, University of Texas at Austin Law School, Austin, TX (Oct. 22, 2019)

"Dueling Pianos": A Debate on the Continuing Need for Class Actions, Twenty Third Annual National Institute on Class Actions, American Bar Association, Nashville, TN (Oct. 18, 2019) (panelist)

A Debate on the Utility of Class Actions, Contemporary Issues in Complex Litigation Conference, Northwestern Law School, Chicago, IL (Oct.16, 2019) (panelist)

Litigation Funding, Forty Seventh Annual Meeting, Intellectual Property Owners Association, Washington, DC (Sep. 26, 2019) (panelist)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, International Class Actions Conference, Vanderbilt Law School, Nashville, TN (Aug. 24, 2019)

A New Source of Class Action Data, Corporate Accountability Conference, Institute for Law and Economic Policy, San Juan, Puerto Rico (April 12, 2019)

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, Ninth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 14, 2018)

MDL: Uniform Rules v. Best Practices, Miami Law Class Action & Complex Litigation Forum, University of Miami Law School, Miami, FL (Dec. 7, 2018) (panelist)

Third Party Finance of Attorneys in Traditional and Complex Litigation, George Washington Law School, Washington, D.C. (Nov. 2, 2018) (panelist)

MDL at 50 - The 50th Anniversary of Multidistrict Litigation, New York University Law School, New York, New York (Oct. 10, 2018) (panelist)

The Discovery Tax, Law & Economics Seminar, Harvard Law School, Cambridge, Massachusetts (Sep. 11, 2018)

Empirical Research on Class Actions, Civil Justice Research Initiative, University of California at Berkeley, Berkeley, California (Apr. 9, 2018)

A Political Future for Class Actions in the United States?, The Future of Class Actions Symposium, University of Auckland Law School, Auckland, New Zealand (Mar. 15, 2018)

The Indian Class Actions: How Effective Will They Be?, Eighth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 19, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 8, 2017) (panelist)

Critical Issues in Complex Litigation, Contemporary Issues in Complex Litigation, Northwestern Law School (Nov. 29, 2017) (panelist)

The Conservative Case for Class Actions, Consumer Class Action Symposium, National Consumer Law Center, Washington, DC (Nov. 19, 2017)

The Conservative Case for Class Actions—A Monumental Debate, ABA National Institute on Class Actions, Washington, DC (Oct. 26, 2017) (panelist)

One-Way Fee Shifting after Summary Judgment, 2017 Meeting of the Midwestern Law and Economics Association, Marquette Law School, Milwaukee, WI (Oct. 20, 2017)

The Conservative Case for Class Actions, Pepperdine Law School Malibu, CA (Oct. 17, 2017)

One-Way Fee Shifting after Summary Judgment, Vanderbilt Law Review Symposium on The Future of Discovery, Vanderbilt Law School, Nashville, TN (Oct. 13, 2017)

The Constitution Revision Commission and Florida's Judiciary, 2017 Annual Florida Bar Convention, Boca Raton, FL (June 22, 2017)

Class Actions After Spokeo v. Robins*: Supreme Court Jurisprudence, Article III Standing, and Practical Implications for the Bench and Practitioners*, Northern District of California Judicial Conference, Napa, CA (Apr. 29, 2017) (panelist)

The Ironic History of Rule 23, Conference on Secrecy, Institute for Law & Economic Policy, Naples, FL (Apr. 21, 2017)

Justice Scalia and Class Actions: A Loving Critique, University of Notre Dame Law School, South Bend, Indiana (Feb. 3, 2017)

Should Third-Party Litigation Financing Be Permitted in Class Actions?, Fifty Years of Class Actions—A Global Perspective, Tel Aviv University, Tel Aviv, Israel (Jan. 4, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 2, 2016) (panelist)

The Ideological Consequences of Judicial Selection, William J. Brennan Lecture, Oklahoma City University School of Law, Oklahoma, City, Oklahoma (Nov. 10, 2016)

After Fifty Years, What's Class Action's Future, ABA National Institute on Class Actions, Las Vegas, Nevada (Oct. 20, 2016) (panelist)

Where Will Justice Scalia Rank Among the Most Influential Justices, State University of New York at Stony Brook, Long Island, New York (Sep. 17, 2016)

The Ironic History of Rule 23, University of Washington Law School, Seattle, WA (July 14, 2016)

A Respected Judiciary—Balancing Independence and Accountability, 2016 Annual Florida Bar Convention, Orlando, FL (June 16, 2016) (panelist)

What Will and Should Happen to Affirmative Action After Fisher v. Texas, American Association of Law Schools Annual Meeting, New York, NY (January 7, 2016) (panelist)

Litigation Funding: The Basics and Beyond, NYU Center on Civil Justice, NYU Law School, New York, NY (Nov. 20, 2015) (panelist)

Do Class Actions Offer Meaningful Compensation to Class Members, or Do They Simply Rip Off Consumers Twice?, ABA National Institute on Class Actions, New Orleans, LA (Oct. 22, 2015) (panelist)

Arbitration and the End of Class Actions?, Quinnipiac-Yale Dispute Resolution Workshop, Yale Law School, New Haven, CT (Sep. 8, 2015) (panelist)

The Next Steps for Discovery Reform: Requester Pays, Lawyers for Civil Justice Membership Meeting, Washington, DC (May 5, 2015)

Private Attorney General: Good or Bad?, 17th Annual Federalist Society Faculty Conference, Washington, DC (Jan. 3, 2015)

Liberty, Judicial Independence, and Judicial Power, Liberty Fund Conference, Santa Fe, NM (Nov. 13-16, 2014) (participant)

The Economics of Objecting for All the Right Reasons, 14th Annual Consumer Class Action Symposium, Tampa, FL (Nov. 9, 2014)

Compensation in Consumer Class Actions: Data and Reform, Conference on The Future of Class Action Litigation: A View from the Consumer Class, NYU Law School, New York, NY (Nov. 7, 2014)

The Future of Federal Class Actions: Can the Promise of Rule 23 Still Be Achieved?, Northern District of California Judicial Conference, Napa, CA (Apr. 13, 2014) (panelist)

The End of Class Actions?, Conference on Business Litigation and Regulatory Agency Review in the Era of Roberts Court, Institute for Law & Economic Policy, Boca Raton, FL (Apr. 4, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, University of Missouri School of Law, Columbia, MO (Mar. 7, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, George Mason Law School, Arlington, VA (Mar. 6, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, Roundtable for Third-Party Funding Scholars, Washington & Lee University School of Law, Lexington, VA (Nov. 7-8, 2013)

Is the Future of Affirmative Action Race Neutral?, Conference on A Nation of Widening Opportunities: The Civil Rights Act at 50, University of Michigan Law School, Ann Arbor, MI (Oct. 11, 2013)

The Mass Tort Bankruptcy: A Pre-History, The Public Life of the Private Law: A Conference in Honor of Richard A. Nagareda, Vanderbilt Law School, Nashville, TN (Sep. 28, 2013) (panelist)

Rights & Obligations in Alternative Litigation Financing and Fee Awards in Securities Class Actions, Conference on the Economics of Aggregate Litigation, Institute for Law & Economic Policy, Naples, FL (Apr. 12, 2013) (panelist)

The End of Class Actions?, Symposium on Class Action Reform, University of Michigan Law School, Ann Arbor, MI (Mar. 16, 2013)

Toward a More Lawyer-Centric Class Action?, Symposium on Lawyering for Groups, Stein Center for Law & Ethics, Fordham Law School, New York, NY (Nov. 30, 2012)

The Problem: AT & T as It Is Unfolding, Conference on *AT & T Mobility v. Concepcion*, Cardozo Law School, New York, NY (Apr. 26, 2012) (panelist)

Standing under the Statements and Accounts Clause, Conference on Representation without Accountability*,* Fordham Law School Corporate Law Center, New York, NY (Jan. 23, 2012)

The End of Class Actions?, Washington University Law School, St. Louis, MO (Dec. 9, 2011)

Book Preview Roundtable: Accelerating Democracy: Matching Social Governance to Technological Change, Searle Center on Law, Regulation, and Economic Growth, Northwestern University School of Law, Chicago, IL (Sep. 15-16, 2011) (participant)

Is Summary Judgment Unconstitutional? Some Thoughts About Originalism, Stanford Law School, Palo Alto, CA (Mar. 3, 2011)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Northwestern Law School, Chicago, IL (Feb. 25, 2011)

The New Politics of Iowa Judicial Retention Elections: Examining the 2010 Campaign and Vote, University of Iowa Law School, Iowa City, IA (Feb. 3, 2011) (panelist)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Washington University Law School, St. Louis, MO (Oct. 1, 2010)

Twombly *and* Iqbal *Reconsidered,* Symposium on Business Law and Regulation in the Roberts Court, Case Western Reserve Law School, Cleveland, OH (Sep. 17, 2010)

Do Class Action Lawyers Make Too Little?, Institute for Law & Economic Policy, Providenciales, Turks & Caicos (Apr. 23, 2010)

Originalism and Summary Judgment, Georgetown Law School, Washington, DC (Apr. 5, 2010)

Theorizing Fee Awards in Class Action Litigation, Washington University Law School, St. Louis, MO (Dec. 11, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Conference on Empirical Legal Studies, University of Southern California Law School, Los Angeles, CA (Nov. 20, 2009)

Originalism and Summary Judgment, Symposium on Originalism and the Jury, Ohio State Law School, Columbus, OH (Nov. 17, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Meeting of the Midwestern Law and Economics Association, University of Notre Dame Law School, South Bend, IN (Oct. 10, 2009)

The End of Objector Blackmail?, Stanford-Yale Junior Faculty Forum, Stanford Law School, Palo Alto, CA (May 29, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, University of Minnesota School of Law, Minneapolis, MN (Mar. 12, 2009)

The Politics of Merit Selection, Symposium on State Judicial Selection and Retention Systems, University of Missouri Law School, Columbia, MO (Feb. 27, 2009)

The End of Objector Blackmail?, Searle Center Research Symposium on the Empirical Studies of Civil Liability, Northwestern University School of Law, Chicago, IL (Oct. 9, 2008)

Alternatives To Affirmative Action After The Michigan Civil Rights Initiative, University of Michigan School of Law, Ann Arbor, MI (Apr. 3, 2007) (panelist)

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Former clerk on Justice Antonin Scalia and his impact on the Supreme Court, THE CONVERSATION (Feb. 24, 2016)

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10 Percent Fraud, WASHINGTON TIMES (Nov. 15, 2002)

OTHER PRESENTATIONS

Abstention, Tennessee Attorney General's Office Continuing Legal Education, Nashville, TN (Apr. 13, 2022)

Does the Way We Choose our Judges Affect Case Outcomes?, American Legislative Exchange Council 2018 Annual Meeting, New Orleans, Louisiana (August 10, 2018) (panelist)

Oversight of the Structure of the Federal Courts, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, United States Senate, Washington, D.C. (July 31, 2018)

Where Will Justice Scalia Rank Among the Most Influential Justices, The Leo Bearman, Sr. American Inn of Court, Memphis, TN (Mar. 21, 2017)

Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit, Subcommittee on Courts, Intellectual Property, and the Internet, United States House of Representatives, Washington, D.C. (Mar. 16, 2017)

Supreme Court Review 2016: Current Issues and Cases Update, Nashville Bar Association, Nashville, TN (Sep. 15, 2016) (panelist)

A Respected Judiciary—Balancing Independence and Accountability, Florida Bar Annual Convention, Orlando, FL (June 16, 2016) (panelist)

Future Amendments in the Pipeline: Rule 23, Tennessee Bar Association, Nashville, TN (Dec. 2, 2015)

The New Business of Law: Attorney Outsourcing, Legal Service Companies, and Commercial Litigation Funding, Tennessee Bar Association, Nashville, TN (Nov. 12, 2014)

Hedge Funds + Lawsuits = A Good Idea?, Vanderbilt University Alumni Association, Washington, DC (Sep. 3, 2014)

Judicial Selection in Historical and National Perspective, Committee on the Judiciary, Kansas Senate (Jan. 16, 2013)

The Practice that Never Sleeps: What's Happened to, and What's Next for, Class Actions, ABA Annual Meeting, Chicago, IL (Aug. 3, 2012) (panelist)

Life as a Supreme Court Law Clerk and Views on the Health Care Debate, Exchange Club, Nashville, TN (Apr. 3, 2012)

The Tennessee Judicial Selection Process—Shaping Our Future, Tennessee Bar Association Leadership Law Retreat, Dickson, TN (Feb. 3, 2012) (panelist)

Reexamining the Class Action Practice, ABA National Institute on Class Actions, New York, NY (Oct. 14, 2011) (panelist)

Judicial Selection in Kansas, Committee on the Judiciary, Kansas House of Representatives (Feb. 16, 2011)

Judicial Selection and the Tennessee Constitution, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Mar. 24, 2009)

What Would Happen if the Judicial Selection and Evaluation Commissions Sunset?, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Feb. 24, 2009)

Judicial Selection in Tennessee, Chattanooga Bar Association, Chattanooga, TN (Feb. 27, 2008) (panelist)

Ethical Implications of Tennessee's Judicial Selection Process, Tennessee Bar Association, Nashville, TN (Dec. 12, 2007)

PROFESSIONAL ASSOCIATIONS

Member, American Law Institute
Referee, Journal of Legal Studies
Referee, Journal of Law, Economics and Organization
Referee, Journal of Empirical Legal Studies
Referee, Supreme Court Economic Review
Reviewer, Aspen Publishing
Reviewer, Cambridge University Press
Reviewer, University Press of Kansas
Reviewer, Palgrave Macmillan
Reviewer, Oxford University Press
Reviewer, Routledge
Member, American Bar Association
Member, Tennessee Advisory Committee to the U.S. Commission on Civil Rights, 2009-2015
Board of Directors, Tennessee Stonewall Bar Association, 2012-2022
American Swiss Foundation Young Leaders' Conference, 2012
Bar Admission, District of Columbia & California (inactive)

COMMUNITY ACTIVITIES

Board of Directors, Beacon Center, 2018-present; Board of Directors, Nashville Ballet, 2011-2017 & 2019-2022; Nashville Talking Library for the Blind, 2008-2009

EXHIBIT 2

JOURNAL OF EMPIRICAL LEGAL STUDIES

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An Empirical Study of Class Action Settlements and Their Fee Awards

*Brian T. Fitzpatrick**

This article is a comprehensive empirical study of class action settlements in federal court. Although there have been prior empirical studies of federal class action settlements, these studies have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). By contrast, in this article, I attempt to study every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first attempt to collect a complete set of federal class action settlements for any given year. I find that district court judges approved 688 class action settlements over this two-year period, involving nearly $33 billion. Of this $33 billion, roughly $5 billion was awarded to class action lawyers, or about 15 percent of the total. Most judges chose to award fees by using the highly discretionary percentage-of-the-settlement method, and the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Fee percentages were strongly and inversely associated with the size of the settlement. The age of the case at settlement was positively associated with fee percentages. There was some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located, with lower percentages in securities cases and in settlements from the Second and Ninth Circuits. There was no evidence that fee percentages were associated with whether the class action was certified as a settlement class or with the political affiliation of the judge who made the award.

I. Introduction

Class actions have been the source of great controversy in the United States. Corporations fear them.[1] Policymakers have tried to corral them.[2] Commentators and scholars have

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[1]See, e.g., Robert W. Wood, Defining Employees and Independent Contractors, Bus. L. Today 45, 48 (May–June 2008).

[2]See Private Securities Litigation Reform Act (PSLRA) of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); Class Action Fairness Act of 2005, 28 U.S.C. §§ 1453, 1711–1715 (2006).

suggested countless ways to reform them.[3] Despite all the attention showered on class actions, and despite the excellent empirical work on class actions to date, the data that currently exist on how the class action system operates in the United States are limited. We do not know, for example, how much money changes hands in class action litigation every year. We do not know how much of this money goes to class action lawyers rather than class members. Indeed, we do not even know how many class action cases are resolved on an annual basis. To intelligently assess our class action system as well as whether and how it should be reformed, answers to all these questions are important. Answers to these questions are equally important to policymakers in other countries who are currently thinking about adopting U.S.-style class action devices.[4]

This article tries to answer these and other questions by reporting the results of an empirical study that attempted to gather all class action settlements approved by federal judges over a recent two-year period, 2006 and 2007. I use class action settlements as the basis of the study because, even more so than individual litigation, virtually all cases certified as class actions and not dismissed before trial end in settlement.[5] I use federal settlements as the basis of the study for practical reasons: it was easier to identify and collect settlements approved by federal judges than those approved by state judges. Systematic study of class action settlements in state courts must await further study;[6] these future studies are important because there may be more class action settlements in state courts than there are in federal court.[7]

This article attempts to make three contributions to the existing empirical literature on class action settlements. First, virtually all the prior empirical studies of federal class action settlements have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). In this article, by contrast, I attempt to collect every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first to attempt to collect a complete set of federal class action settlements for

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[3]See, e.g., Robert G. Bone, Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness, 83 B.U.L. Rev. 485, 490–94 (2003); Allan Erbsen, From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions, 58 Vand. L. Rev. 995, 1080–81 (2005).

[4]See, e.g., Samuel Issacharoff & Geoffrey Miller, Will Aggregate Litigation Come to Europe?, 62 Vand. L. Rev. 179 (2009).

[5]See, e.g., Emery Lee & Thomas E. Willing, Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions 11 (Federal Judicial Center 2008); Tom Baker & Sean J. Griffith, How the Merits Matter: D&O Insurance and Securities Settlements, 157 U. Pa. L. Rev. 755 (2009).

[6]Empirical scholars have begun to study state court class actions in certain subject areas and in certain states. See, e.g., Robert B. Thompson & Randall S. Thomas, The Public and Private Faces of Derivative Suits, 57 Vand. L. Rev. 1747 (2004); Robert B. Thompson & Randall S. Thomas, The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions, 57 Vand. L. Rev. 133 (2004); Findings of the Study of California Class Action Litigation (Administrative Office of the Courts) (First Interim Report, 2009).

[7]See Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 56 (2000).

any given year.[8] As such, this article allows us to see for the first time a complete picture of the cases that are settled in federal court. This includes aggregate annual statistics, such as how many class actions are settled every year, how much money is approved every year in these settlements, and how much of that money class action lawyers reap every year. It also includes how these settlements are distributed geographically as well as by litigation area, what sort of relief was provided in the settlements, how long the class actions took to reach settlement, and an analysis of what factors were associated with the fees awarded to class counsel by district court judges.

Second, because this article analyzes settlements that were approved in both published and unpublished opinions, it allows us to assess how well the few prior studies that looked beyond securities cases but relied only on published opinions capture the complete picture of class action settlements. To the extent these prior studies adequately capture the complete picture, it may be less imperative for courts, policymakers, and empirical scholars to spend the considerable resources needed to collect unpublished opinions in order to make sound decisions about how to design our class action system.

Third, this article studies factors that may influence district court judges when they award fees to class counsel that have not been studied before. For example, in light of the discretion district court judges have been delegated over fees under Rule 23, as well as the salience the issue of class action litigation has assumed in national politics, realist theories of judicial behavior would predict that Republican judges would award smaller fee percentages than Democratic judges. I study whether the political beliefs of district court judges are associated with the fees they award and, in doing so, contribute to the literature that attempts to assess the extent to which these beliefs influence the decisions of not just appellate judges, but trial judges as well. Moreover, the article contributes to the small but growing literature examining whether the ideological influences found in published judicial decisions persist when unpublished decisions are examined as well.

In Section II of this article, I briefly survey the existing empirical studies of class action settlements. In Section III, I describe the methodology I used to collect the 2006–2007 federal class action settlements and I report my findings regarding these settlements. District court judges approved 688 class action settlements over this two-year period, involving over $33 billion. I report a number of descriptive statistics for these settlements, including the number of plaintiff versus defendant classes, the distribution of settlements by subject matter, the age of the case at settlement, the geographic distribution of settlements, the number of settlement classes, the distribution of relief across settlements, and various statistics on the amount of money involved in the settlements. It should be noted that despite the fact that the few prior studies that looked beyond securities settlements appeared to oversample larger settlements, much of the analysis set forth in this article is consistent with these prior studies. This suggests that scholars may not need to sample unpublished as well as published opinions in order to paint an adequate picture of class action settlements.

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[8]Of course, I cannot be certain that I found every one of the class actions that settled in federal court over this period. Nonetheless, I am confident that if I did not find some, the number I did not find is small and would not contribute meaningfully to the data reported in this article.

In Section IV, I perform an analysis of the fees judges awarded to class action lawyers in the 2006–2007 settlements. All told, judges awarded nearly $5 billion over this two-year period in fees and expenses to class action lawyers, or about 15 percent of the total amount of the settlements. Most federal judges chose to award fees by using the highly discretionary percentage-of-the-settlement method and, unsurprisingly, the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Using regression analysis, I confirm prior studies and find that fee percentages are strongly and inversely associated with the size of the settlement. Further, I find that the age of the case is positively associated with fee percentages but that the percentages were not associated with whether the class action was certified as a settlement class. There also appeared to be some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all other areas, and district courts in some circuits—the Ninth and the Second (in securities cases)—awarded lower fee percentages than courts in many other circuits. Finally, the regression analysis did not confirm the realist hypothesis: there was no association between fee percentage and the political beliefs of the judge in any regression.

II. Prior Empirical Studies of Class Action Settlements

There are many existing empirical studies of federal securities class action settlements.[9] Studies of securities settlements have been plentiful because for-profit organizations maintain lists of all federal securities class action settlements for the benefit of institutional investors that are entitled to file claims in these settlements.[10] Using these data, studies have shown that since 2005, for example, there have been roughly 100 securities class action settlements in federal court each year, and these settlements have involved between $7 billion and $17 billion per year.[11] Scholars have used these data to analyze many different aspects of these settlements, including the factors that are associated with the percentage of

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[9]See, e.g., James D. Cox & Randall S. Thomas, Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions, 106 Colum. L. Rev. 1587 (2006); James D. Cox, Randall S. Thomas & Lynn Bai, There are Plaintiffs and . . . there are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements, 61 Vand. L. Rev. 355 (2008); Theodore Eisenberg, Geoffrey Miller & Michael A. Perino, A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions after *Goldberger v. Integrated Resources, Inc.*, 29 Wash. U.J.L. & Pol'y 5 (2009); Michael A. Perino, Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions (St. John's Legal Studies, Research Paper No. 06-0034, 2006), available at <http://ssrn.com/abstract=870577> [hereinafter Perino, Markets and Monitors]; Michael A. Perino, The Milberg Weiss Prosecution: No Harm, No Foul? (St. John's Legal Studies, Research Paper No. 08-0135, 2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133995> [hereinafter Perino, Milberg Weiss].

[10]See, e.g., RiskMetrics Group, available at <http://www.riskmetrics.com/scas>.

[11]See Cornerstone Research, Securities Class Action Settlements: 2007 Review and Analysis 1 (2008), available at <http://securities.stanford.edu/Settlements/REVIEW_1995-2007/Settlements_Through_12_2007.pdf>.

the settlements that courts have awarded to class action lawyers.[12] These studies have found that the mean and median fees awarded by district court judges are between 20 percent and 30 percent of the settlement amount.[13] These studies have also found that a number of factors are associated with the percentage of the settlement awarded as fees, including (inversely) the size of the settlement, the age of the case, whether a public pension fund was the lead plaintiff, and whether certain law firms were class counsel.[14] None of these studies has examined whether the political affiliation of the federal district court judge awarding the fees was associated with the size of awards.

There are no comparable organizations that maintain lists of nonsecurities class action settlements. As such, studies of class action settlements beyond the securities area are much rarer and, when they have been done, rely on samples of settlements that were not intended to be representative of the whole. The two largest studies of class action settlements not limited to securities class actions are a 2004 study by Ted Eisenberg and Geoff Miller,[15] which was recently updated to include data through 2008,[16] and a 2003 study by Class Action Reports.[17] The Eisenberg-Miller studies collected data from class action settlements in both state and federal courts found from court opinions published in the Westlaw and Lexis databases and checked against lists maintained by the CCH Federal Securities and Trade Regulation Reporters. Through 2008, their studies have now identified 689 settlements over a 16-year period, or less than 45 settlements per year.[18] Over this 16-year period, their studies found that the mean and median settlement amounts were, respectively, $116 million and $12.5 million (in 2008 dollars), and that the mean and median fees awarded by district courts were 23 percent and 24 percent of the settlement, respectively.[19] Their studies also performed an analysis of fee percentages and fee awards. For the data through 2002, they found that the percentage of the settlement awarded as fees was associated with the size of the settlement (inversely), the age of the case, and whether the

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[12]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–24, 28–36; Perino, Markets and Monitors, supra note 9, at 12–28, 39–44; Perino, Milberg Weiss, supra note 9, at 32–33, 39–60.

[13]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–18, 22, 28, 33; Perino, Markets and Monitors, supra note 9, at 20–21, 40; Perino, Milberg Weiss, supra note 9, at 32–33, 51–53.

[14]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 14–24, 29–30, 33–34; Perino, Markets and Monitors, supra note 9, at 20–28, 41; Perino, Milberg Weiss, supra note 9, at 39–58.

[15]See Theodore Eisenberg & Geoffrey Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27 (2004).

[16]See Theodore Eisenberg & Geoffrey Miller, Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008, 7 J. Empirical Legal Stud. 248 (2010) [hereinafter Eisenberg & Miller II].

[17]See Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 169 (Mar.–Apr. 2003).

[18]See Eisenberg & Miller II, supra note 16, at 251.

[19]Id. at 258–59.

district court went out of its way to comment on the level of risk that class counsel had assumed in pursuing the case.[20] For the data through 2008, they regressed only fee awards and found that the awards were inversely associated with the size of the settlement, that state courts gave lower awards than federal courts, and that the level of risk was still associated with larger awards.[21] Their studies have not examined whether the political affiliations of the federal district court judges awarding fees were associated with the size of the awards.

The Class Action Reports study collected data on 1,120 state and federal settlements over a 30-year period, or less than 40 settlements per year.[22] Over the same 10-year period analyzed by the Eisenberg-Miller study, the Class Action Reports data found mean and median settlements of $35.4 and $7.6 million (in 2002 dollars), as well as mean and median fee percentages between 25 percent and 30 percent.[23] Professors Eisenberg and Miller performed an analysis of the fee awards in the Class Action Reports study and found the percentage of the settlement awarded as fees was likewise associated with the size of the settlement (inversely) and the age of the case.[24]

III. Federal Class Action Settlements, 2006 and 2007

As far as I am aware, there has never been an empirical study of all federal class action settlements in a particular year. In this article, I attempt to make such a study for two recent years: 2006 and 2007. To compile a list of all federal class settlements in 2006 and 2007, I started with one of the aforementioned lists of securities settlements, the one maintained by RiskMetrics, and I supplemented this list with settlements that could be found through three other sources: (1) broad searches of district court opinions in the Westlaw and Lexis databases,[25] (2) four reporters of class action settlements—*BNA Class Action Litigation Report*, *Mealey's Jury Verdicts and Settlements*, *Mealey's Litigation Report*, and the *Class Action World* website[26]—and (3) a list from the Administrative Office of Courts of all district court cases

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[20]See Eisenberg & Miller, supra note 15, at 61–62.

[21]See Eisenberg & Miller II, supra note 16, at 278.

[22]See Eisenberg & Miller, supra note 15, at 34.

[23]Id. at 47, 51.

[24]Id. at 61–62.

[25]The searches consisted of the following terms: ("class action" & (settle! /s approv! /s (2006 2007))); (((counsel attorney) /s fee /s award!) & (settle! /s (2006 2007)) & "class action"); ("class action" /s settle! & da(aft 12/31/2005 & bef 1/1/2008)); ("class action" /s (fair reasonable adequate) & da(aft 12/31/2005 & bef 1/1/2008)).

[26]See <http://classactionworld.com/>.

coded as class actions that terminated by settlement between 2005 and 2008.[27] I then removed any duplicate cases and examined the docket sheets and court orders of each of the remaining cases to determine whether the cases were in fact certified as class actions under either Rule 23, Rule 23.1, or Rule 23.2.[28] For each of the cases verified as such, I gathered the district court's order approving the settlement, the district court's order awarding attorney fees, and, in many cases, the settlement agreements and class counsel's motions for fees, from electronic databases (such as Westlaw or PACER) and, when necessary, from the clerk's offices of the various federal district courts. In this section, I report the characteristics of the settlements themselves; in the next section, I report the characteristics of the attorney fees awarded to class counsel by the district courts that approved the settlements.

A. Number of Settlements

I found 688 settlements approved by federal district courts during 2006 and 2007 using the methodology described above. This is almost the exact same number the Eisenberg-Miller study found over a *16*-year period in both federal *and* state court. Indeed, the number of annual settlements identified in this study is *several times* the number of annual settlements that have been identified in any prior empirical study of class action settlements. Of the 688 settlements I found, 304 were approved in 2006 and 384 were approved in 2007.[29]

B. Defendant Versus Plaintiff Classes

Although Rule 23 permits federal judges to certify either a class of plaintiffs or a class of defendants, it is widely assumed that it is extremely rare for courts to certify defendant classes.[30] My findings confirm this widely held assumption. Of the 688 class action settlements approved in 2006 and 2007, 685 involved plaintiff classes and only three involved

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[27]I examined the AO lists in the year before and after the two-year period under investigation because the termination date recorded by the AO was not necessarily the same date the district court approved the settlement.

[28]See Fed. R. Civ. P. 23, 23.1, 23.2. I excluded from this analysis opt-in collective actions, such as those brought pursuant to the provisions of the Fair Labor Standards Act (see 29 U.S.C. § 216(b)), if such actions did not also include claims certified under the opt-out mechanism in Rule 23.

[29]A settlement was assigned to a particular year if the district court judge's order approving the settlement was dated between January 1 and December 31 of that year. Cases involving multiple defendants sometimes settled over time because defendants would settle separately with the plaintiff class. All such partial settlements approved by the district court on the same date were treated as one settlement. Partial settlements approved by the district court on different dates were treated as different settlements.

[30]See, e.g., Robert H. Klonoff, Edward K.M. Bilich & Suzette M. Malveaux, Class Actions and Other Multi-Party Litigation: Cases and Materials 1061 (2d ed. 2006).

defendant classes. All three of the defendant-class settlements were in employment benefits cases, where companies sued classes of current or former employees.[31]

C. Settlement Subject Areas

Although courts are free to certify Rule 23 classes in almost any subject area, it is widely assumed that securities settlements dominate the federal class action docket.[32] At least in terms of the number of settlements, my findings reject this conventional wisdom. As Table 1 shows, although securities settlements comprised a large percentage of the 2006 and 2007 settlements, they did not comprise a majority of those settlements. As one would have

Table 1: The Number of Class Action Settlements Approved by Federal Judges in 2006 and 2007 in Each Subject Area

	Number of Settlements	
Subject Matter	*2006*	*2007*
Securities	122 (40%)	135 (35%)
Labor and employment	41 (14%)	53 (14%)
Consumer	40 (13%)	47 (12%)
Employee benefits	23 (8%)	38 (10%)
Civil rights	24 (8%)	37 (10%)
Debt collection	19 (6%)	23 (6%)
Antitrust	13 (4%)	17 (4%)
Commercial	4 (1%)	9 (2%)
Other	18 (6%)	25 (6%)
Total	304	384

NOTE: Securities: cases brought under federal and state securities laws. Labor and employment: workplace claims brought under either federal or state law, with the exception of ERISA cases. Consumer: cases brought under the Fair Credit Reporting Act as well as cases for consumer fraud and the like. Employee benefits: ERISA cases. Civil rights: cases brought under 42 U.S.C. § 1983 or cases brought under the Americans with Disabilities Act seeking nonworkplace accommodations. Debt collection: cases brought under the Fair Debt Collection Practices Act. Antitrust: cases brought under federal or state antitrust laws. Commercial: cases between businesses, excluding antitrust cases. Other: includes, among other things, derivative actions against corporate managers and directors, environmental suits, insurance suits, Medicare and Medicaid suits, product liability suits, and mass tort suits.

SOURCES: Westlaw, PACER, district court clerks' offices.

[31]See Halliburton Co. v. Graves, No. 04-00280 (S.D. Tex., Sept. 28, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Aug. 29, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Sept. 17, 2007).

[32]See, e.g., John C. Coffee, Jr., Reforming the Security Class Action: An Essay on Deterrence and its Implementation, 106 Colum. L. Rev. 1534, 1539–40 (2006) (describing securities class actions as "the 800-pound gorilla that dominates and overshadows other forms of class actions").

expected in light of Supreme Court precedent over the last two decades,[33] there were almost no mass tort class actions (included in the "Other" category) settled over the two-year period.

Although the Eisenberg-Miller study through 2008 is not directly comparable on the distribution of settlements across litigation subject areas—because its state and federal court data cannot be separated (more than 10 percent of the settlements were from state court[34]) and because it excludes settlements in fee-shifting cases—their study through 2008 is the best existing point of comparison. Interestingly, despite the fact that state courts were included in their data, their study through 2008 found about the same percentage of securities cases (39 percent) as my 2006–2007 data set shows.[35] However, their study found many more consumer (18 percent) and antitrust (10 percent) cases, while finding many fewer labor and employment (8 percent), employee benefits (6 percent), and civil rights (3 percent) cases.[36] This is not unexpected given their reliance on published opinions and their exclusion of fee-shifting cases.

D. Settlement Classes

The Federal Rules of Civil Procedure permit parties to seek certification of a suit as a class action for settlement purposes only.[37] When the district court certifies a class in such circumstances, the court need not consider whether it would be manageable to try the litigation as a class.[38] So-called settlement classes have always been more controversial than classes certified for litigation because they raise the prospect that, at least where there are competing class actions filed against the same defendant, the defendant could play class counsel off one another to find the one willing to settle the case for the least amount of money.[39] Prior to the Supreme Court's 1997 opinion in *Amchem Products, Inc. v. Windsor*,[40] it was uncertain whether the Federal Rules even permitted settlement classes. It may therefore be a bit surprising to learn that 68 percent of the federal settlements in 2006 and 2007 were settlement classes. This percentage is higher than the percentage found in the Eisenberg-Miller studies, which found that only 57 percent of class action settlements in

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[33]See, e.g., Samuel Issacharoff, Private Claims, Aggregate Rights, 2008 Sup. Ct. Rev. 183, 208.

[34]See Eisenberg & Miller II, supra note 16, at 257.

[35]Id. at 262.

[36]Id.

[37]See Martin H. Redish, Settlement Class Actions, The Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process, 73 U. Chi. L. Rev. 545, 553 (2006).

[38]See Amchem Prods., Inc v Windsor, 521 U.S. 591, 620 (1997).

[39]See Redish, supra note 368, at 557–59.

[40]521 U.S. 591 (1997).

state and federal court between 2003 and 2008 were settlement classes.[41] It should be noted that the distribution of litigation subject areas among the settlement classes in my 2006–2007 federal data set did not differ much from the distribution among nonsettlement classes, with two exceptions. One exception was consumer cases, which were nearly three times as prevalent among settlement classes (15.9 percent) as among nonsettlement classes (5.9 percent); the other was civil rights cases, which were four times as prevalent among nonsettlement classes (18.0 percent) as among settlements classes (4.5 percent). In light of the skepticism with which the courts had long treated settlement classes, one might have suspected that courts would award lower fee percentages in such settlements. Nonetheless, as I report in Section III, whether a case was certified as a settlement class was not associated with the fee percentages awarded by federal district court judges.

E. The Age at Settlement

One interesting question is how long class actions were litigated before they reached settlement. Unsurprisingly, cases reached settlement over a wide range of ages.[42] As shown in Table 2, the average time to settlement was a bit more than three years (1,196 days) and the median time was a bit under three years (1,068 days). The average and median ages here are similar to those found in the Eisenberg-Miller study through 2002, which found averages of 3.35 years in fee-shifting cases and 2.86 years in non-fee-shifting cases, and

Table 2: The Number of Days, 2006–2007, Federal Class Action Cases Took to Reach Settlement in Each Subject Area

Subject Matter	*Average*	*Median*	*Minimum*	*Maximum*
Securities	1,438	1,327	392	3,802
Labor and employment	928	786	105	2,497
Consumer	963	720	127	4,961
Employee benefits	1,162	1,161	164	3,157
Civil rights	1,373	1,360	181	3,354
Debt collection	738	673	223	1,973
Antitrust	1,140	1,167	237	2,480
Commercial	1,267	760	163	5,443
Other	1,065	962	185	3,620
All	1,196	1,068	105	5,443

SOURCE: PACER.

[41]See Eisenberg & Miller II, supra note 16, at 266.

[42]The age of the case was calculated by subtracting the date the relevant complaint was filed from the date the settlement was approved by the district court judge. The dates were taken from PACER. For consolidated cases, I used the date of the earliest complaint. If the case had been transferred, consolidated, or removed, the date the complaint was filed was not always available from PACER. In such cases, I used the date the case was transferred, consolidated, or removed as the start date.

medians of 4.01 years in fee-shifting cases and 3.0 years in non-fee-shifting cases.[43] Their study through 2008 did not report case ages.

The shortest time to settlement was 105 days in a labor and employment case.[44] The longest time to settlement was nearly 15 years (5,443 days) in a commercial case.[45] The average and median time to settlement varied significantly by litigation subject matter, with securities cases generally taking the longest time and debt collection cases taking the shortest time. Labor and employment cases and consumer cases also settled relatively early.

F. The Location of Settlements

The 2006–2007 federal class action settlements were not distributed across the country in the same way federal civil litigation is in general. As Figure 1 shows, some of the geographic circuits attracted much more class action attention than we would expect based on their docket size, and others attracted much less. In particular, district courts in the First, Second, Seventh, and Ninth Circuits approved a much larger share of class action settlements than the share of all civil litigation they resolved, with the First, Second, and Seventh Circuits approving nearly double the share and the Ninth Circuit approving one-and-one-half times the share. By contrast, the shares of class action settlements approved by district courts in the Fifth and Eighth Circuits were less than one-half of their share of all civil litigation, with the Third, Fourth, and Eleventh Circuits also exhibiting significant underrepresentation.

With respect to a comparison with the Eisenberg-Miller studies, their federal court data through 2008 can be separated from their state court data on the question of the geographic distribution of settlements, and there are some significant differences between their federal data and the numbers reflected in Figure 1. Their study reported considerably higher proportions of settlements than I found from the Second (23.8 percent), Third (19.7 percent), Eighth (4.8 percent), and D.C. (3.3 percent) Circuits, and considerably lower proportions from the Fourth (1.3 percent), Seventh (6.8 percent), and Ninth (16.6 percent) Circuits.[46]

Figure 2 separates the class action settlement data in Figure 1 into securities and nonsecurities cases. Figure 2 suggests that the overrepresentation of settlements in the First and Second Circuits is largely attributable to securities cases, whereas the overrepresentation in the Seventh Circuit is attributable to nonsecurities cases, and the overrepresentation in the Ninth is attributable to both securities and nonsecurities cases.

It is interesting to ask why some circuits received more class action attention than others. One hypothesis is that class actions are filed in circuits where class action lawyers

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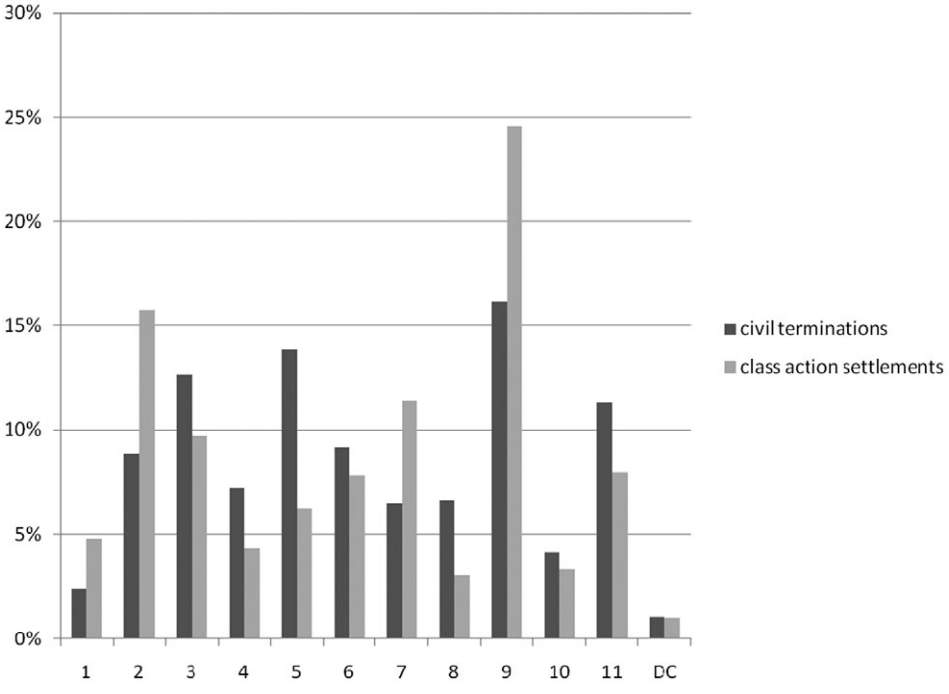
[43]See Eisenberg & Miller, supra note 15, at 59–60.

[44]See Clemmons v. Rent-a-Center W., Inc., No. 05-6307 (D. Or. Jan. 20, 2006).

[45]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006).

[46]See Eisenberg & Miller II, supra note 16, at 260.

Figure 1: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



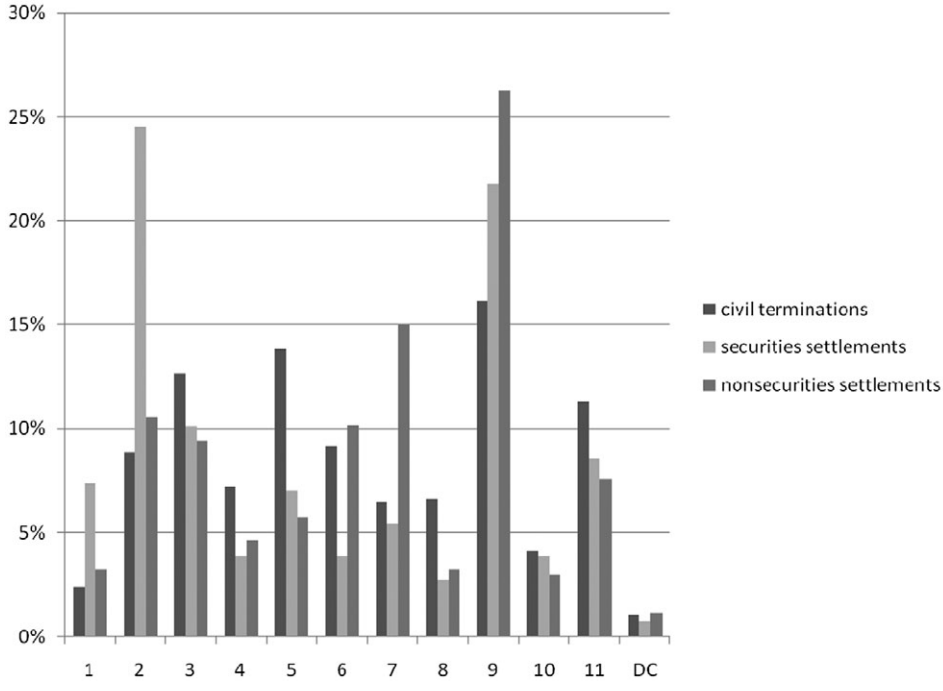
SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

believe they can find favorable law or favorable judges. Federal class actions often involve class members spread across multiple states and, as such, class action lawyers may have a great deal of discretion over the district in which file suit.[47] One way law or judges may be favorable to class action attorneys is with regard to attorney fees. In Section III, I attempt to test whether district court judges in the circuits with the most over- and undersubscribed class action dockets award attorney fees that would attract or discourage filings there; I find no evidence that they do.

Another hypothesis is that class action suits are settled in jurisdictions where defendants are located. This might be the case because although class action lawyers may have discretion over where to file, venue restrictions might ultimately restrict cases to jurisdic-

[47]See Samuel Issacharoff & Richard Nagareda, Class Settlements Under Attack, 156 U. Pa. L. Rev. 1649, 1662 (2008).

Figure 2: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

tions in which defendants have their corporate headquarters or other operations.[48] This might explain why the Second Circuit, with the financial industry in New York, sees so many securities suits, and why other circuits with cities with a large corporate presence, such as the First (Boston), Seventh (Chicago), and Ninth (Los Angeles and San Francisco), see more settlements than one would expect based on the size of their civil dockets.

Another hypothesis might be that class action lawyers file cases wherever it is most convenient for them to litigate the cases—that is, in the cities in which their offices are located. This, too, might explain the Second Circuit's overrepresentation in securities settlements, with prominent securities firms located in New York, as well as the

[48]See 28 U.S.C. §§ 1391, 1404, 1406, 1407. See also Foster v. Nationwide Mut. Ins. Co., No. 07-04928, 2007 U.S. Dist. LEXIS 95240 at *2–17 (N.D. Cal. Dec. 14, 2007) (transferring venue to jurisdiction where defendant's corporate headquarters were located). One prior empirical study of securities class action settlements found that 85 percent of such cases are filed in the home circuit of the defendant corporation. See James D. Cox, Randall S. Thomas & Lynn Bai, Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses, 2009 Wis. L. Rev. 421, 429, 440, 450–51 (2009).

overrepresentation of other settlements in some of the circuits in which major metropolitan areas with prominent plaintiffs' firms are found.

G. Type of Relief

Under Rule 23, district court judges can certify class actions for injunctive or declaratory relief, for money damages, or for a combination of the two.[49] In addition, settlements can provide money damages both in the form of cash as well as in the form of in-kind relief, such as coupons to purchase the defendant's products.[50]

As shown in Table 3, the vast majority of class actions settled in 2006 and 2007 provided cash relief to the class (89 percent), but a substantial number also provided in-kind relief (6 percent) or injunctive or declaratory relief (23 percent). As would be

Table 3: The Percentage of 2006 and 2007 Class Action Settlements Providing Each Type of Relief in Each Subject Area

Subject Matter	*Cash*	*In-Kind Relief*	*Injunctive or Declaratory Relief*
Securities ($n = 257$)	100%	0%	2%
Labor and employment ($n = 94$)	95%	6%	29%
Consumer ($n = 87$)	74%	30%	37%
Employee benefits ($n = 61$)	90%	0%	34%
Civil rights ($n = 61$)	49%	2%	75%
Debt collection ($n = 42$)	98%	0%	12%
Antitrust ($n = 30$)	97%	13%	7%
Commercial ($n = 13$)	92%	0%	62%
Other ($n = 43$)	77%	7%	33%
All ($n = 688$)	89%	6%	23%

NOTE: Cash: cash, securities, refunds, charitable contributions, contributions to employee benefit plans, forgiven debt, relinquishment of liens or claims, and liquidated repairs to property. In-kind relief: vouchers, coupons, gift cards, warranty extensions, merchandise, services, and extended insurance policies. Injunctive or declaratory relief: modification of terms of employee benefit plans, modification of compensation practices, changes in business practices, capital improvements, research, and unliquidated repairs to property.

SOURCES: Westlaw, PACER, district court clerks' offices.

[49]See Fed. R. Civ. P. 23(b).

[50]These coupon settlements have become very controversial in recent years, and Congress discouraged them in the Class Action Fairness Act of 2005 by tying attorney fees to the value of coupons that were ultimately redeemed by class members as opposed to the value of coupons offered class members. See 28 U.S.C. § 1712.

expected in light of the focus on consumer cases in the debate over the anti-coupon provision in the Class Action Fairness Act of 2005,[51] consumer cases had the greatest percentage of settlements providing for in-kind relief (30 percent). Civil rights cases had the greatest percentage of settlements providing for injunctive or declaratory relief (75 percent), though almost half the civil rights cases also provided some cash relief (49 percent). The securities settlements were quite distinctive from the settlements in other areas in their singular focus on cash relief: every single securities settlement provided cash to the class and almost none provided in-kind, injunctive, or declaratory relief. This is but one example of how the focus on securities settlements in the prior empirical scholarship can lead to a distorted picture of class action litigation.

H. Settlement Money

Although securities settlements did not comprise the majority of federal class action settlements in 2006 and 2007, they did comprise the majority of the money—indeed, the *vast majority* of the money—involved in class action settlements. In Table 4, I report the total amount of ascertainable value involved in the 2006 and 2007 settlements. This amount

Table 4: The Total Amount of Money Involved in Federal Class Action Settlements in 2006 and 2007

	Total Ascertainable Monetary Value in Settlements (and Percentage of Overall Annual Total)			
Subject Matter	*2006* (n = *304*)		*2007* (n = *384*)	
Securities	$16,728	76%	$8,038	73%
Labor and employment	$266.5	1%	$547.7	5%
Consumer	$517.3	2%	$732.8	7%
Employee benefits	$443.8	2%	$280.8	3%
Civil rights	$265.4	1%	$81.7	1%
Debt collection	$8.9	<1%	$5.7	<1%
Antitrust	$1,079	5%	$660.5	6%
Commercial	$1,217	6%	$124.0	1%
Other	$1,568	7%	$592.5	5%
Total	$22,093	100%	$11,063	100%

NOTE: Dollar amounts are in millions. Includes all determinate payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.

SOURCES: Westlaw, PACER, district court clerks' offices.

[51]See, e.g., 151 Cong. Rec. H723 (2005) (statement of Rep. Sensenbrenner) (arguing that consumers are "seeing all of their gains go to attorneys and them just getting coupon settlements from the people who have allegedly done them wrong").

includes all determinate[52] payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.[53] I did not attempt to assign a value to any relief that was not valued by the district court (even if it may have been valued by class counsel). It should be noted that district courts did not often value in-kind or injunctive relief—they did so only 18 percent of the time—and very little of Table 4—only $1.3 billion, or 4 percent—is based on these valuations. It should also be noted that the amounts in Table 4 reflect only what defendants *agreed to pay*; they do not reflect the amounts that defendants *actually paid* after the claims administration process concluded. Prior empirical research has found that, depending on how settlements are structured (e.g., whether they awarded a fixed amount of money to each class member who eventually files a valid claim or a pro rata amount of a fixed settlement to each class member), defendants can end up paying much less than they agreed.[54]

Table 4 shows that in both years, around three-quarters of all the money involved in federal class action settlements came from securities cases. Thus, in this sense, the conventional wisdom about the dominance of securities cases in class action litigation is correct. Figure 3 is a graphical representation of the contribution each litigation area made to the total number and total amount of money involved in the 2006–2007 settlements.

Table 4 also shows that, in total, over $33 billion was approved in the 2006–2007 settlements. Over $22 billion was approved in 2006 and over $11 billion in 2007. It should be emphasized again that the totals in Table 4 understate the amount of money defendants agreed to pay in class action settlements in 2006 and 2007 because they exclude the unascertainable value of those settlements. This understatement disproportionately affects litigation areas, such as civil rights, where much of the relief is injunctive because, as I noted, very little of such relief was valued by district courts. Nonetheless, these numbers are, as far as I am aware, the first attempt to calculate how much money is involved in federal class action settlements in a given year.

The significant discrepancy between the two years is largely attributable to the 2006 securities settlement related to the collapse of Enron, which totaled $6.6 billion, as well as to the fact that seven of the eight 2006–2007 settlements for more than $1 billion were approved in 2006.[55] Indeed, it is worth noting that the eight settlements for more than $1

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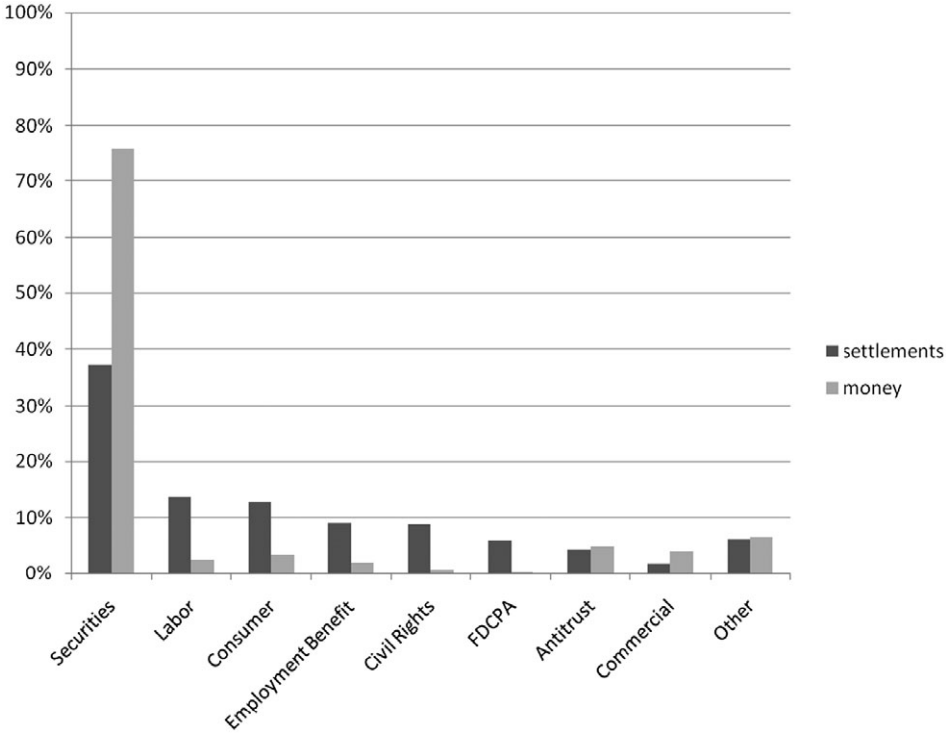
[52]For example, I excluded awards of a fixed amount of money to each class member who eventually filed a valid claim (as opposed to settlements that awarded a pro rata amount of a fixed settlement to each class member) if the total amount of money set aside to pay the claims was not set forth in the settlement documents.

[53]In some cases, the district court valued the relief in the settlement over a range. In these cases, I used the middle point in the range.

[54]See Hensler et al., supra note 7, at 427–30.

[55]See In re Enron Corp. Secs. Litig., MDL 1446 (S.D. Tex. May 24, 2006) ($6,600,000,000); In re Tyco Int'l Ltd. Multidistrict Litig., MDL 02-1335 (D.N.H. Dec. 19, 2007) ($3,200,000,000); In re AOL Time Warner, Inc. Secs. & "ERISA" Litig., MDL 1500 (S.D.N.Y. Apr. 6, 2006) ($2,500,000,000); In re: Diet Drugs Prods. Liab. Litig., MDL 1203 (E.D. Pa. May 24, 2006) ($1,275,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel I), No. 01-1855 (S.D.N.Y. Dec. 26, 2006) ($1,142,780,000); In re Royal Ahold N.V. Secs. & ERISA Litig., 03-1539 (D. Md. Jun. 16, 2006)

Figure 3: The percentage of 2006–2007 federal class action settlements and settlement money from each subject area.



SOURCES: Westlaw, PACER, district court clerks' offices.

billion accounted for almost $18 billion of the $33 billion that changed hands over the two-year period. That is, a mere 1 percent of the settlements comprised over 50 percent of the value involved in federal class action settlements in 2006 and 2007. To give some sense of the distribution of settlement size in the 2006–2007 data set, Table 5 sets forth the number of settlements with an ascertainable value beyond fee, expense, and class-representative incentive awards (605 out of the 688 settlements). Nearly two-thirds of all settlements fell below $10 million.

Given the disproportionate influence exerted by securities settlements on the total amount of money involved in class actions, it is unsurprising that the average securities settlement involved more money than the average settlement in most of the other subject areas. These numbers are provided in Table 6, which includes, again, only the settlements

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($1,100,000,000); Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) ($1,075,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel II), No. 05-1659 (S.D.N.Y. Dec. 26, 2006) ($1,074,270,000).

Table 5: The Distribution by Size of 2006–2007 Federal Class Action Settlements with Ascertainable Value

Settlement Size (in Millions)	*Number of Settlements*
[$0 to $1]	131 (21.7%)
($1 to $10]	261 (43.1%)
($10 to $50]	139 (23.0%)
($50 to $100]	33 (5.45%)
($100 to $500]	31 (5.12%)
($500 to $6,600]	10 (1.65%)
Total	605

NOTE: Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

Table 6: The Average and Median Settlement Amounts in the 2006–2007 Federal Class Action Settlements with Ascertainable Value to the Class

Subject Matter	*Average*	*Median*
Securities ($n = 257$)	$96.4	$8.0
Labor and employment ($n = 88$)	$9.2	$1.8
Consumer ($n = 65$)	$18.8	$2.9
Employee benefits ($n = 52$)	$13.9	$5.3
Civil rights ($n = 34$)	$9.7	$2.5
Debt collection ($n = 40$)	$0.37	$0.088
Antitrust ($n = 29$)	$60.0	$22.0
Commercial ($n = 12$)	$111.7	$7.1
Other ($n = 28$)	$76.6	$6.2
All ($N = 605$)	$54.7	$5.1

NOTE: Dollar amounts are in millions. Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

with an ascertainable value beyond fee, expense, and class-representative incentive awards. The average settlement over the entire two-year period for all types of cases was almost $55 million, but the median was only $5.1 million. (With the $6.6 billion Enron settlement excluded, the average settlement for all ascertainable cases dropped to $43.8 million and, for securities cases, dropped to $71.0 million.) The average settlements varied widely by litigation area, with securities and commercial settlements at the high end of around $100

million, but the median settlements for nearly every area were bunched around a few million dollars. It should be noted that the high average for commercial cases is largely due to one settlement above $1 billion;[56] when that settlement is removed, the average for commercial cases was only $24.2 million.

Table 6 permits comparison with the two prior empirical studies of class action settlements that sought to include nonsecurities as well as securities cases in their purview. The Eisenberg-Miller study through 2002, which included both common-fund and fee-shifting cases, found that the mean class action settlement was $112 million and the median was $12.9 million, both in 2006 dollars,[57] more than double the average and median I found for all settlements in 2006 and 2007. The Eisenberg-Miller update through 2008 included only common-fund cases and found mean and median settlements in federal court of $115 million and $11.7 million (both again in 2006 dollars),[58] respectively; this is still more than double the average and median I found. This suggests that the methodology used by the Eisenberg-Miller studies—looking at district court opinions that were published in Westlaw or Lexis—oversampled larger class actions (because opinions approving larger class actions are, presumably, more likely to be published than opinions approving smaller ones). It is also possible that the exclusion of fee-shifting cases from their data through 2008 contributed to this skew, although, given that their data through 2002 included fee-shifting cases and found an almost identical mean and median as their data through 2008, the primary explanation for the much larger mean and median in their study through 2008 is probably their reliance on published opinions. Over the same years examined by Professors Eisenberg and Miller, the Class Action Reports study found a smaller average settlement than I did ($39.5 million in 2006 dollars), but a larger median ($8.48 million in 2006 dollars). It is possible that the Class Action Reports methodology also oversampled larger class actions, explaining its larger median, but that there are more "mega" class actions today than there were before 2003, explaining its smaller mean.[59]

It is interesting to ask how significant the $16 billion that was involved annually in these 350 or so federal class action settlements is in the grand scheme of U.S. litigation. Unfortunately, we do not know how much money is transferred every year in U.S. litigation. The only studies of which I am aware that attempt even a partial answer to this question are the estimates of how much money is transferred in the U.S. "tort" system every year by a financial services consulting firm, Tillinghast-Towers Perrin.[60] These studies are not directly

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[56]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) (approving $1,075,000,000 settlement).

[57]See Eisenberg & Miller, supra note 15, at 47.

[58]See Eisenberg & Miller II, supra note 16, at 262.

[59]There were eight class action settlements during 2006 and 2007 of more than $1 billion. See note 55 supra.

[60]Some commentators have been critical of Tillinghast's reports, typically on the ground that the reports overestimate the cost of the tort system. See M. Martin Boyer, Three Insights from the Canadian D&O Insurance Market: Inertia, Information and Insiders, 14 Conn. Ins. L.J. 75, 84 (2007); John Fabian Witt, Form and Substance in the Law of

comparable to the class action settlement numbers because, again, the number of tort class action settlements in 2006 and 2007 was very small. Nonetheless, as the tort system no doubt constitutes a large percentage of the money transferred in all litigation, these studies provide something of a point of reference to assess the significance of class action settlements. In 2006 and 2007, Tillinghast-Towers Perrin estimated that the U.S. tort system transferred $160 billion and $164 billion, respectively, to claimants and their lawyers.[61] The total amount of money involved in the 2006 and 2007 federal class action settlements reported in Table 4 was, therefore, roughly 10 percent of the Tillinghast-Towers Perrin estimate. This suggests that in merely 350 cases every year, federal class action settlements involve the same amount of wealth as 10 percent of the entire U.S. tort system. It would seem that this is a significant amount of money for so few cases.

IV. Attorney Fees in Federal Class Action Settlements, 2006 and 2007

A. Total Amount of Fees and Expenses

As I demonstrated in Section III, federal class action settlements involved a great deal of money in 2006 and 2007, some $16 billion a year. A perennial concern with class action litigation is whether class action lawyers are reaping an outsized portion of this money.[62] The 2006–2007 federal class action data suggest that these concerns may be exaggerated. Although class counsel were awarded some $5 billion in fees and expenses over this period, as shown in Table 7, only 13 percent of the settlement amount in 2006 and 20 percent of the amount in 2007 went to fee and expense awards.[63] The 2006 percentage is lower than the 2007 percentage in large part because the class action lawyers in the Enron securities settlement received less than 10 percent of the $6.6 billion corpus. In any event, the percentages in both 2006 and 2007 are far lower than the portions of settlements that contingency-fee lawyers receive in individual litigation, which are usually at least 33 percent.[64] Lawyers received less than 33 percent of settlements in fees and expenses in virtually every subject area in both years.

Counterinsurgency Damages, 41 Loy. L.A.L. Rev. 1455, 1475 n.135 (2008). If these criticisms are valid, then class action settlements would appear even more significant as compared to the tort system.

[61]See Tillinghast-Towers Perrin, U.S. Tort Costs: 2008 Update 5 (2008). The report calculates $252 billion in total tort "costs" in 2007 and $246.9 billion in 2006, id., but only 65 percent of those costs represent payments made to claimants and their lawyers (the remainder represents insurance administration costs and legal costs to defendants). See Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update 17 (2003).

[62]See, e.g., Brian T. Fitzpatrick, Do Class Action Lawyers Make Too Little? 158 U. Pa. L. Rev. 2043, 2043–44 (2010).

[63]In some of the partial settlements, see note 29 supra, the district court awarded expenses for all the settlements at once and it was unclear what portion of the expenses was attributable to which settlement. In these instances, I assigned each settlement a pro rata portion of expenses. To the extent possible, all the fee and expense numbers in this article exclude any interest known to be awarded by the courts.

[64]See, e.g., Herbert M. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DePaul L. Rev. 267, 284–86 (1998) (reporting results of a survey of Wisconsin lawyers).

Table 7: The Total Amount of Fees and Expenses Awarded to Class Action Lawyers in Federal Class Action Settlements in 2006 and 2007

	Total Fees and Expenses Awarded in Settlements (and as Percentage of Total Settlement Amounts) in Each Subject Area	
Subject Matter	*2006 (n = 292)*	*2007 (n = 363)*
Securities	$1,899 (11%)	$1,467 (20%)
Labor and employment	$75.1 (28%)	$144.5 (26%)
Consumer	$126.4 (24%)	$65.3 (9%)
Employee benefits	$57.1 (13%)	$71.9 (26%)
Civil rights	$31.0 (12%)	$32.2 (39%)
Debt collection	$2.5 (28%)	$1.1 (19%)
Antitrust	$274.6 (26%)	$157.3 (24%)
Commercial	$347.3 (29%)	$18.2 (15%)
Other	$119.3 (8%)	$103.3 (17%)
Total	$2,932 (13%)	$2,063 (20%)

NOTE: Dollar amounts are in millions. Excludes settlements in which fees were not (or at least not yet) sought (22 settlements), settlements in which fees have not yet been awarded (two settlements), and settlements in which fees could not be ascertained due to indefinite award amounts, missing documents, or nonpublic side agreements (nine settlements).

SOURCES: Westlaw, PACER, district court clerks' offices.

It should be noted that, in some respects, the percentages in Table 7 overstate the portion of settlements that were awarded to class action attorneys because, again, many of these settlements involved indefinite cash relief or noncash relief that could not be valued.[65] If the value of all this relief could have been included, then the percentages in Table 7 would have been even lower. On the other hand, as noted above, not all the money defendants agree to pay in class action settlements is ultimately collected by the class.[66] To the extent leftover money is returned to the defendant, the percentages in Table 7 understate the portion class action lawyers received relative to their clients.

B. Method of Awarding Fees

District court judges have a great deal of discretion in how they set fee awards in class action cases. Under Rule 23, federal judges are told only that the fees they award to class counsel

[65]Indeed, the large year-to-year variation in the percentages in labor, consumer, and employee benefits cases arose because district courts made particularly large valuations of the equitable relief in a few settlements and used the lodestar method to calculate the fees in these settlements (and thereby did not consider their large valuations in calculating the fees).

[66]See Hensler et al., supra note 7, at 427–30.

must be "reasonable."[67] Courts often exercise this discretion by choosing between two approaches: the lodestar approach or the percentage-of-the-settlement approach.[68] The lodestar approach works much the way it does in individual litigation: the court calculates the fee based on the number of hours class counsel actually worked on the case multiplied by a reasonable hourly rate and a discretionary multiplier.[69] The percentage-of-the-settlement approach bases the fee on the size of the settlement rather than on the hours class counsel actually worked: the district court picks a percentage of the settlement it thinks is reasonable based on a number of factors, one of which is often the fee lodestar (sometimes referred to as a "lodestar cross-check").[70] My 2006–2007 data set shows that the percentage-of-the-settlement approach has become much more common than the lodestar approach. In 69 percent of the settlements reported in Table 7, district court judges employed the percentage-of-the-settlement method with or without the lodestar cross-check. They employed the lodestar method in only 12 percent of settlements. In the other 20 percent of settlements, the court did not state the method it used or it used another method altogether.[71] The pure lodestar method was used most often in consumer (29 percent) and debt collection (45 percent) cases. These numbers are fairly consistent with the Eisenberg-Miller data from 2003 to 2008. They found that the lodestar method was used in only 9.6 percent of settlements.[72] Their number is no doubt lower than the 12 percent number found in my 2006–2007 data set because they excluded fee-shifting cases from their study.

C. Variation in Fees Awarded

Not only do district courts often have discretion to choose between the lodestar method and the percentage-of-the-settlement method, but each of these methods leaves district courts with a great deal of discretion in how the method is ultimately applied. The courts

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[67]Fed. R. Civ. P. 23(h).

[68]The discretion to pick between these methods is most pronounced in settlements where the underlying claim was not found in a statute that would shift attorney fees to the defendant. See, e.g., In re Thirteen Appeals Arising out of San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995) (permitting either percentage or lodestar method in common-fund cases); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (same); Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513, 516 (6th Cir. 1993) (same). By contrast, courts typically used the lodestar approach in settlements arising from fee-shifting cases.

[69]See Eisenberg & Miller, supra note 15, at 31.

[70]Id. at 31–32.

[71]These numbers are based on the fee method described in the district court's order awarding fees, unless the order was silent, in which case the method, if any, described in class counsel's motion for fees (if it could be obtained) was used. If the court explicitly justified the fee award by reference to its percentage of the settlement, I counted it as the percentage method. If the court explicitly justified the award by reference to a lodestar calculation, I counted it as the lodestar method. If the court explicitly justified the award by reference to both, I counted it as the percentage method with a lodestar cross-check. If the court calculated neither a percentage nor the fee lodestar in its order, then I counted it as an "other" method.

[72]See Eisenberg & Miller II, supra note 16, at 267.

that use the percentage-of-the-settlement method usually rely on a multifactor test[73] and, like most multifactor tests, it can plausibly yield many results. It is true that in many of these cases, judges examine the fee percentages that other courts have awarded to guide their discretion.[74] In addition, the Ninth Circuit has adopted a presumption that 25 percent is the proper fee award percentage in class action cases.[75] Moreover, in securities cases, some courts presume that the proper fee award percentage is the one class counsel agreed to when it was hired by the large shareholder that is now usually selected as the lead plaintiff in such cases.[76] Nonetheless, presumptions, of course, can be overcome and, as one court has put it, "[t]here is no hard and fast rule mandating a certain percentage . . . which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case."[77] The court added: "[i]ndividualization in the exercise of a discretionary power [for fee awards] will alone retain equity as a living system and save it from sterility."[78] It is therefore not surprising that district courts awarded fees over a broad range when they used the percentage-of-the-settlement method. Figure 4 is a graph of the distribution of fee awards as a percentage of the settlement in the 444 cases where district courts used the percentage method with or without a lodestar cross-check and the fee percentages were ascertainable. These fee awards are exclusive of awards for expenses whenever the awards could be separated by examining either the district court's order or counsel's motion for fees and expenses (which was 96 percent of the time). The awards ranged from 3 percent of the settlement to 47 percent of the settlement. The average award was 25.4 percent and the median was 25 percent. Most fee awards were between 25 percent and 35 percent, with almost no awards more than 35 percent. The Eisenberg-Miller study through 2008 found a slightly lower mean (24 percent) but the same median (25 percent) among its federal court settlements.[79]

It should be noted that in 218 of these 444 settlements (49 percent), district courts said they considered the lodestar calculation as a factor in assessing the reasonableness of the fee percentages awarded. In 204 of these settlements, the lodestar multiplier resulting

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[73]The Eleventh Circuit, for example, has identified a nonexclusive list of 15 factors that district courts might consider. See Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 772 n.3, 775 (11th Cir. 1991). See also In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 265 (D.N.H. 2007) (five factors); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (six factors); Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) (seven factors); In re Royal Ahold N.V. Sec. & ERISA Litig., 461 F. Supp. 2d 383, 385 (D. Md. 2006) (13 factors); Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988) (12 factors); In re Baan Co. Sec. Litig., 288 F. Supp. 2d 14, 17 (D.D.C. 2003) (seven factors).

[74]See Eisenberg & Miller, supra note 15, at 32.

[75]See Staton v. Boeing Co., 327 F.3d 938, 968 (9th Cir. 2003).

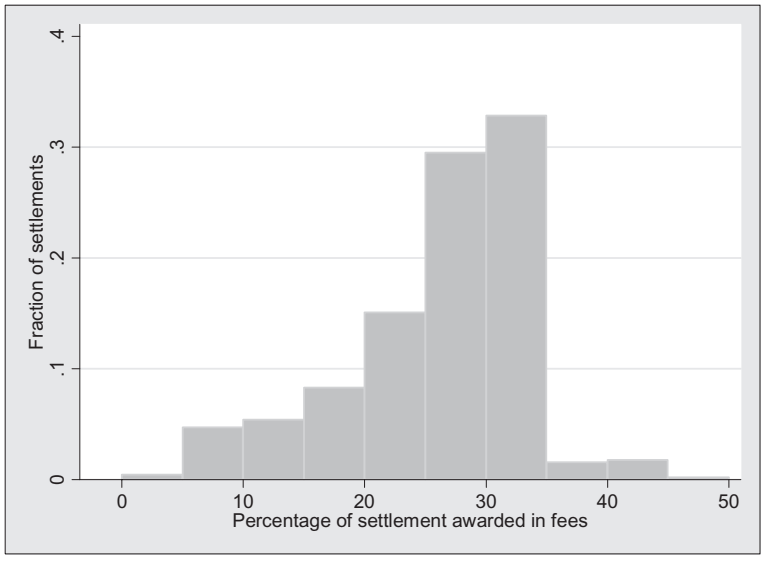
[76]See, e.g., In re Cendant Corp. Litig., 264 F.3d 201, 282 (3d Cir. 2001).

[77]*Camden I Condo. Ass'n*, 946 F.2d at 774.

[78]*Camden I Condo. Ass'n*, 946 F.2d at 774 (alterations in original and internal quotation marks omitted).

[79]See Eisenberg & Miller II, supra note 16, at 259.

Figure 4: The distribution of 2006–2007 federal class action fee awards using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

from the fee award could be ascertained. The lodestar multiplier in these cases ranged from 0.07 to 10.3, with a mean of 1.65 and a median of 1.34. Although there is always the possibility that class counsel are optimistic with their timesheets when they submit them for lodestar consideration, these lodestar numbers—only one multiplier above 6.0, with the bulk of the range not much above 1.0—strike me as fairly parsimonious for the risk that goes into any piece of litigation and cast doubt on the notion that the percentage-of-the-settlement method results in windfalls to class counsel.[80]

Table 8 shows the mean and median fee percentages awarded in each litigation subject area. The fee percentages did not appear to vary greatly across litigation subject areas, with most mean and median awards between 25 percent and 30 percent. As I report later in this section, however, after controlling for other variables, there were statistically significant differences in the fee percentages awarded in some subject areas compared to others. The mean and median percentages for securities cases were 24.7 percent and 25.0 percent, respectively; for all nonsecurities cases, the mean and median were 26.1 percent and 26.0 percent, respectively. The Eisenberg-Miller study through 2008 found mean awards ranging from 21–27 percent and medians from 19–25 percent,[81] a bit lower than the ranges in my

[80]It should be emphasized, of course, that these 204 settlements may not be representative of the settlements where the percentage-of-the-settlement method was used without the lodestar cross-check.

[81]See Eisenberg & Miller II, supra note 16, at 262.

Table 8: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Subject Matter	*Mean*	*Median*
Securities ($n = 233$)	24.7	25.0
Labor and employment ($n = 61$)	28.0	29.0
Consumer ($n = 39$)	23.5	24.6
Employee benefits ($n = 37$)	26.0	28.0
Civil rights ($n = 20$)	29.0	30.3
Debt collection ($n = 5$)	24.2	25.0
Antitrust ($n = 23$)	25.4	25.0
Commercial ($n = 7$)	23.3	25.0
Other ($n = 19$)	24.9	26.0
All ($N = 444$)	25.7	25.0

Sources: Westlaw, PACER, district court clerks' offices.

2006–2007 data set, which again, may be because they oversampled larger settlements (as I show below, district courts awarded smaller fee percentages in larger cases).

In light of the fact that, as I noted above, the distribution of class action settlements among the geographic circuits does not track their civil litigation dockets generally, it is interesting to ask whether one reason for the pattern in class action cases is that circuits oversubscribed with class actions award higher fee percentages. Although this question will be taken up with more sophistication in the regression analysis below, it is worth describing here the mean and median fee percentages in each of the circuits. Those data are presented in Table 9. Contrary to the hypothesis set forth in Section III, two of the circuits most oversubscribed with class actions, the Second and the Ninth, were the only circuits in which the mean fee awards were *under* 25 percent. As I explain below, these differences are statistically significant and remain so after controlling for other variables.

The lodestar method likewise permits district courts to exercise a great deal of leeway through the application of the discretionary multiplier. Figure 5 shows the distribution of lodestar multipliers in the 71 settlements in which district courts used the lodestar method and the multiplier could be ascertained. The average multiplier was 0.98 and the median was 0.92, which suggest that courts were not terribly prone to exercise their discretion to deviate from the amount of money encompassed in the lodestar calculation. These 71

Table 9: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Circuit	*Mean*	*Median*
First ($n = 27$)	27.0	25.0
Second ($n = 72$)	23.8	24.5
Third ($n = 50$)	25.4	29.3
Fourth ($n = 19$)	25.2	28.0
Fifth ($n = 27$)	26.4	29.0
Sixth ($n = 25$)	26.1	28.0
Seventh ($n = 39$)	27.4	29.0
Eighth ($n = 15$)	26.1	30.0
Ninth ($n = 111$)	23.9	25.0
Tenth ($n = 18$)	25.3	25.5
Eleventh ($n = 35$)	28.1	30.0
DC ($n = 6$)	26.9	26.0

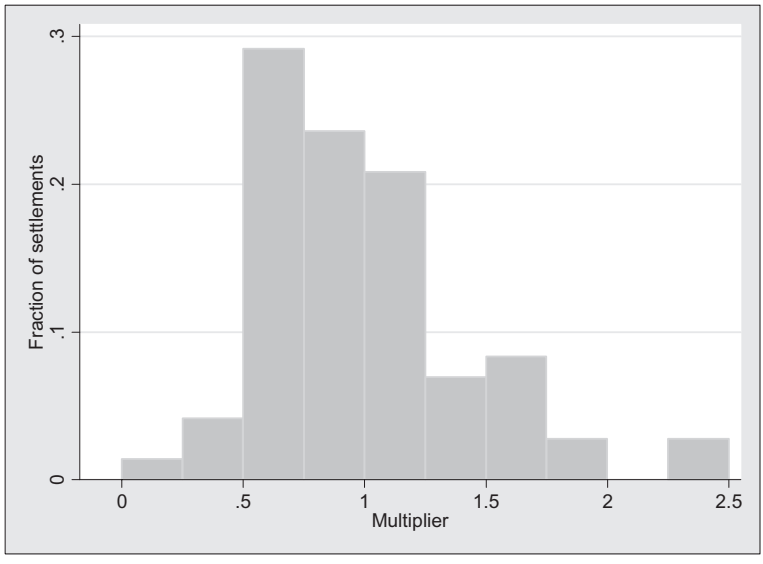
Sources: Westlaw, PACER, district court clerks' offices.

settlements were heavily concentrated within the consumer (median multiplier 1.13) and debt collection (0.66) subject areas. If cases in which district courts used the percentage-of-the-settlement method with a lodestar cross-check are combined with the lodestar cases, the average and median multipliers (in the 263 cases where the multipliers were ascertainable) were 1.45 and 1.19, respectively. Again—putting to one side the possibility that class counsel are optimistic with their timesheets—these multipliers appear fairly modest in light of the risk involved in any piece of litigation.

D. Factors Influencing Percentage Awards

Whether district courts are exercising their discretion over fee awards wisely is an important public policy question given the amount of money at stake in class action settlements. As shown above, district court judges awarded class action lawyers nearly $5 billion in fees and expenses in 2006–2007. Based on the comparison to the tort system set forth in Section III, it is not difficult to surmise that in the 350 or so settlements every year, district court judges

Figure 5: The distribution of lodestar multipliers in 2006–2007 federal class action fee awards using the lodestar method.



SOURCES: Westlaw, PACER, district court clerks' offices.

are awarding a significant portion of all the annual compensation received by contingency-fee lawyers in the United States. Moreover, contingency fees are arguably the engine that drives much of the noncriminal regulation in the United States; unlike many other nations, we regulate largely through the ex post, decentralized device of litigation.[82] To the extent district courts could have exercised their discretion to award billions more or billions less to class action lawyers, district courts have been delegated a great deal of leeway over a big chunk of our regulatory horsepower. It is therefore worth examining how district courts exercise their discretion over fees. This examination is particularly important in cases where district courts use the percentage-of-the-settlement method to award fees: not only do such cases comprise the vast majority of settlements, but they comprise the vast majority of the money awarded as fees. As such, the analysis that follows will be confined to the 444 settlements where the district courts used the percentage-of-the-settlement method.

As I noted, prior empirical studies have shown that fee percentages are strongly and inversely related to the size of the settlement both in securities fraud and other cases. As shown in Figure 6, the 2006–2007 data are consistent with prior studies. Regression analysis, set forth in more detail below, confirms that after controlling for other variables, fee percentage is strongly and inversely associated with settlement size among all cases, among securities cases, and among all nonsecurities cases.

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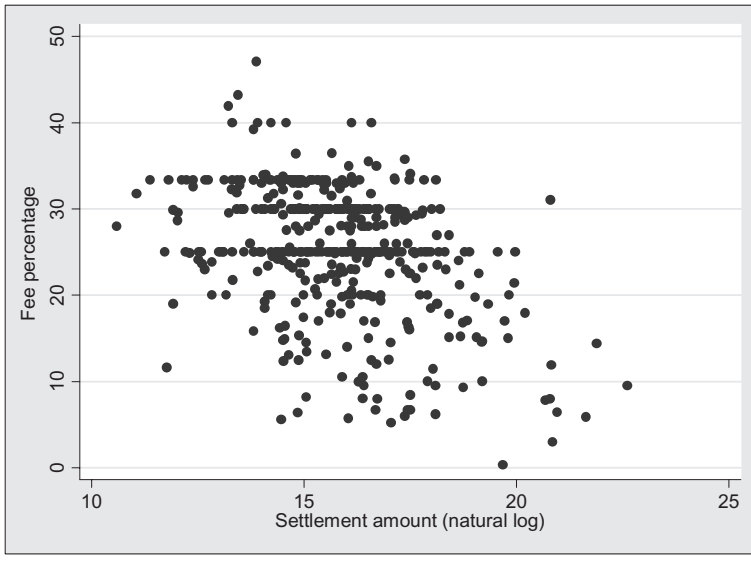
[82]See, e.g., Samuel Issacharoff, Regulating after the Fact, 56 DePaul L. Rev. 375, 377 (2007).

Figure 6: Fee awards as a function of settlement size in 2006–2007 class action cases using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

As noted above, courts often look to fee percentages in other cases as one factor they consider in deciding what percentage to award in a settlement at hand. In light of this practice, and in light of the fact that the size of the settlement has such a strong relationship to fee percentages, scholars have tried to help guide the practice by reporting the distribution of fee percentages across different settlement sizes.[83] In Table 10, I follow the Eisenberg-Miller studies and attempt to contribute to this guidance by setting forth the mean and median fee percentages, as well as the standard deviation, for each decile of the 2006–2007 settlements in which courts used the percentage-of-the-settlement method to award fees. The mean percentages ranged from over 28 percent in the first decile to less than 19 percent in the last decile.

It should be noted that the last decile in Table 10 covers an especially wide range of settlements, those from $72.5 million to the Enron settlement of $6.6 billion. To give more meaningful data to courts that must award fees in the largest settlements, Table 11 shows the last decile broken into additional cut points. When both Tables 10 and 11 are examined together, it appears that fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent, and by the time $500 million was reached, they plunged well below 15 percent, with most awards at that level under even 10 percent.

[83]See Eisenberg & Miller II, supra note 16, at 265.

Table 10: Mean, Median, and Standard Deviation of Fee Awards by Settlement Size in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
[$0 to $0.75] ($n = 45$)	28.8%	29.6%	6.1%
($0.75 to $1.75] ($n = 44$)	28.7%	30.0%	6.2%
($1.75 to $2.85] ($n = 45$)	26.5%	29.3%	7.9%
($2.85 to $4.45] ($n = 45$)	26.0%	27.5%	6.3%
($4.45 to $7.0] ($n = 44$)	27.4%	29.7%	5.1%
($7.0 to $10.0] ($n = 43$)	26.4%	28.0%	6.6%
($10.0 to $15.2] ($n = 45$)	24.8%	25.0%	6.4%
($15.2 to $30.0] ($n = 46$)	24.4%	25.0%	7.5%
($30.0 to $72.5] ($n = 42$)	22.3%	24.9%	8.4%
($72.5 to $6,600] ($n = 45$)	18.4%	19.0%	7.9%

SOURCES: Westlaw, PACER, district court clerks' offices.

Table 11: Mean, Median, and Standard Deviation of Fee Awards of the Largest 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
($72.5 to $100] ($n = 12$)	23.7%	24.3%	5.3%
($100 to $250] ($n = 14$)	17.9%	16.9%	5.2%
($250 to $500] ($n = 8$)	17.8%	19.5%	7.9%
($500 to $1,000] ($n = 2$)	12.9%	12.9%	7.2%
($1,000 to $6,600] ($n = 9$)	13.7%	9.5%	11%

SOURCES: Westlaw, PACER, district court clerks' offices.

Prior empirical studies have not examined whether fee awards are associated with the political affiliation of the district court judges making the awards. This is surprising because realist theories of judicial behavior would predict that political affiliation would influence fee decisions.[84] It is true that as a general matter, political affiliation may influence district court judges to a lesser degree than it does appellate judges (who have been the focus of most of the prior empirical studies of realist theories): district court judges decide more routine cases and are subject to greater oversight on appeal than appellate judges. On the other hand, class action settlements are a bit different in these regards than many other decisions made by district court judges. To begin with, class action settlements are almost never appealed, and when they are, the appeals are usually settled before the appellate court hears the case.[85] Thus, district courts have much less reason to worry about the constraint of appellate review in fashioning fee awards. Moreover, one would think the potential for political affiliation to influence judicial decision making is greatest when legal sources lead to indeterminate outcomes and when judicial decisions touch on matters that are salient in national politics. (The more salient a matter is, the more likely presidents will select judges with views on the matter and the more likely those views will diverge between Republicans and Democrats.) Fee award decisions would seem to satisfy both these criteria. The law of fee awards, as explained above, is highly discretionary, and fee award decisions are wrapped up in highly salient political issues such as tort reform and the relative power of plaintiffs' lawyers and corporations. I would expect to find that judges appointed by Democratic presidents awarded higher fees in the 2006–2007 settlements than did judges appointed by Republican presidents.

The data, however, do not appear to bear this out. Of the 444 fee awards using the percentage-of-the-settlement approach, 52 percent were approved by Republican appointees, 45 percent were approved by Democratic appointees, and 4 percent were approved by non-Article III judges (usually magistrate judges). The mean fee percentage approved by Republican appointees (25.6 percent) was slightly *greater* than the mean approved by Democratic appointees (24.9 percent). The medians (25 percent) were the same.

To examine whether the realist hypothesis fared better after controlling for other variables, I performed regression analysis of the fee percentage data for the 427 settlements approved by Article III judges. I used ordinary least squares regression with the dependent variable the percentage of the settlement that was awarded in fees.[86] The independent

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[84]See generally C.K. Rowland & Robert A. Carp, Politics and Judgment in Federal District Courts (1996). See also Max M. Schanzenbach & Emerson H. Tiller, Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform, 75 U. Chi. L. Rev. 715, 724–25 (2008).

[85]See Brian T. Fitzpatrick, The End of Objector Blackmail? 62 Vand. L. Rev. 1623, 1640, 1634–38 (2009) (finding that less than 10 percent of class action settlements approved by federal courts in 2006 were appealed by class members).

[86]Professors Eisenberg and Miller used a square root transformation of the fee percentages in some of their regressions. I ran all the regressions using this transformation as well and it did not appreciably change the results. I also ran the regressions using a natural log transformation of fee percentage and with the dependent variable natural log of the fee amount (as opposed to the fee percentage). None of these models changed the results

variables were the natural log of the amount of the settlement, the natural log of the age of the case (in days), indicator variables for whether the class was certified as a settlement class, for litigation subject areas, and for circuits, as well as indicator variables for whether the judge was appointed by a Republican or Democratic president and for the judge's race and gender.[87]

The results for five regressions are in Table 12. In the first regression (Column 1), only the settlement amount, case age, and judge's political affiliation, gender, and race were included as independent variables. In the second regression (Column 2), all the independent variables were included. In the third regression (Column 3), only securities cases were analyzed, and in the fourth regression (Column 4), only nonsecurities cases were analyzed.

In none of these regressions was the political affiliation of the district court judge associated with fee percentage in a statistically significant manner.[88] One possible explanation for the lack of evidence for the realist hypothesis is that district court judges elevate other preferences above their political and ideological ones. For example, district courts of both political stripes may succumb to docket-clearing pressures and largely rubber stamp whatever fee is requested by class counsel; after all, these requests are rarely challenged by defendants. Moreover, if judges award class counsel whatever they request, class counsel will not appeal and, given that, as noted above, class members rarely appeal settlements (and when they do, often settle them before the appeal is heard),[89] judges can thereby virtually guarantee there will be no appellate review of their settlement decisions. Indeed, scholars have found that in the vast majority of cases, the fees ultimately awarded by federal judges are little different than those sought by class counsel.[90]

Another explanation for the lack of evidence for the realist hypothesis is that my data set includes both unpublished as well as published decisions. It is thought that realist theories of judicial behavior lose force in unpublished judicial decisions. This is the case because the kinds of questions for which realist theories would predict that judges have the most room to let their ideologies run are questions for which the law is ambiguous; it is

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appreciably. The regressions were also run with and without the 2006 Enron settlement because it was such an outlier ($6.6 billion); the case did not change the regression results appreciably. For every regression, the data and residuals were inspected to confirm the standard assumptions of linearity, homoscedasticity, and the normal distribution of errors.

[87]Prior studies of judicial behavior have found that the race and sex of the judge can be associated with his or her decisions. See, e.g., Adam B. Cox & Thomas J. Miles, Judging the Voting Rights Act, 108 Colum. L. Rev. 1 (2008); Donald R. Songer et al., A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals, 56 J. Pol. 425 (1994).

[88]Although these coefficients are not reported in Table 8, the gender of the district court judge was never statistically significant. The race of the judge was only occasionally significant.

[89]See Fitzpatrick, supra note 85, at 1640.

[90]See Eisenberg & Miller II, supra note 16, at 270 (finding that state and federal judges awarded the fees requested by class counsel in 72.5 percent of settlements); Eisenberg, Miller & Perino, supra note 9, at 22 ("judges take a light touch when it comes to reviewing fee requests").

Table 12: Regression of Fee Percentages in 2006–2007 Settlements Using Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Settlement amount (natural log)	−1.77	−1.76	−1.76	−1.41	−1.78
	(−5.43)**	(−8.52)**	(−7.16)**	(−4.00)**	(−8.67)**
Age of case (natural log days)	1.66	1.99	1.13	1.72	2.00
	(2.31)**	(2.71)**	(1.21)	(1.47)	(2.69)**
Judge's political affiliation (1 = Democrat)	−0.630	−0.345	0.657	−1.43	−0.232
	(−0.83)	(−0.49)	(0.76)	(−1.20)	(−0.34)
Settlement class		0.150	0.873	−1.62	0.124
		(0.19)	(0.84)	(−1.00)	(0.15)
1st Circuit		3.30	4.41	0.031	0.579
		(2.74)**	(3.32)**	(0.01)	(0.51)
2d Circuit		0.513	−0.813	2.93	−2.23
		(0.44)	(−0.61)	(1.14)	(−1.98)**
3d Circuit		2.25	4.00	−1.11	—
		(1.99)**	(3.85)**	(−0.50)	
4th Circuit		2.34	0.544	3.81	—
		(1.22)	(0.19)	(1.35)	
5th Circuit		2.98	1.09	6.11	0.230
		(1.90)*	(0.65)	(1.97)**	(0.15)
6th Circuit		2.91	0.838	4.41	—
		(2.28)**	(0.57)	(2.15)**	
7th Circuit		2.55	3.22	2.90	−0.227
		(2.23)**	(2.36)**	(1.46)	(−0.20)
8th Circuit		2.12	−0.759	3.73	−0.586
		(0.97)	(−0.24)	(1.19)	(−0.28)
9th Circuit		—	—	—	−2.73
					(−3.44)**
10th Circuit		1.45	−0.254	3.16	—
		(0.94)	(−0.13)	(1.29)	
11th Circuit		4.05	3.85	4.14	—
		(3.44)**	(3.07)**	(1.88)*	
DC Circuit		2.76	2.60	2.41	—
		(1.10)	(0.80)	(0.64)	
Securities case		—			—
Labor and employment case		2.93		—	2.85
		(3.00)**			(2.94)**
Consumer case		−1.65		−4.39	−1.62
		(−0.88)		(−2.20)**	(−0.88)
Employee benefits case		−0.306		−4.23	−0.325
		(−0.23)		(−2.55)**	(−0.26)
Civil rights case		1.85		−2.05	1.76
		(0.99)		(−0.97)	(0.95)
Debt collection case		−4.93		−7.93	−5.04
		(−1.71)*		(−2.49)**	(−1.75)*
Antitrust case		3.06		0.937	2.78
		(2.11)**		(0.47)	(1.98)**

Table 12 *Continued*

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Commercial case		−0.028		−2.65	0.178
		(−0.01)		(−0.73)	(0.05)
Other case		−0.340		−3.73	−0.221
		(−0.17)		(−1.65)	(−0.11)
Constant	42.1	37.2	43.0	38.2	40.1
	(7.29)**	(6.08)**	(6.72)**	(4.14)**	(7.62)**
N	427	427	232	195	427
R^2	.20	.26	.37	.26	.26
Root MSE	6.59	6.50	5.63	7.24	6.48

NOTE: **significant at the 5 percent level; *significant at the 10 percent level. Standard errors in Column 1 were clustered by circuit. Indicator variables for race and gender were included in each regression but not reported.

SOURCES: Westlaw, PACER, district court clerks' offices, Federal Judicial Center.

thought that these kinds of questions are more often answered in published opinions.[91] Indeed, most of the studies finding an association between ideological beliefs and case outcomes were based on data sets that included only published opinions.[92] On the other hand, there is a small but growing number of studies that examine unpublished opinions as well, and some of these studies have shown that ideological effects persisted.[93] Nonetheless, in light of the discretion that judges exercise with respect to fee award decisions, it hard to characterize *any* decision in this area as "unambiguous." Thus, even when unpublished, I would have expected the fee award decisions to exhibit an association with ideological beliefs. Thus, I am more persuaded by the explanation suggesting that judges are more concerned with clearing their dockets or insulating their decisions from appeal in these cases than with furthering their ideological beliefs.

In all the regressions, the size of the settlement was strongly and inversely associated with fee percentages. Whether the case was certified as a settlement class was not associated

[91]See, e.g., Ahmed E. Taha, Data and Selection Bias: A Case Study, 75 UMKC L. Rev. 171, 179 (2006).

[92]Id. at 178–79.

[93]See, e.g., David S. Law, Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit, 73 U. Cin. L. Rev. 817, 843 (2005); Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 Vand. L. Rev. 71, 109 (2001); Donald R. Songer, Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 Judicature 307, 312 (1990). At the trial court level, however, the studies of civil cases have found no ideological effects. See Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States, 7 J. Empirical Legal Stud. 175, 192–93 (2010); Denise M. Keele et al., An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions, 6 J. Empirical Legal Stud. 213, 230 (2009); Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. Legal Stud. 257, 276–77 (1995). With respect to criminal cases, there is at least one study at the trial court level that has found ideological effects. See Schanzenbach & Tiller, supra note 81, at 734.

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with fee percentages in any of the regressions. The age of the case at settlement was associated with fee percentages in the first two regressions, and when the settlement class variable was removed in regressions 3 and 4, the age variable became positively associated with fee percentages in nonsecurities cases but remained insignificant in securities cases. Professors Eisenberg and Miller likewise found that the age of the case at settlement was positively associated with fee percentages in their 1993–2002 data set,[94] and that settlement classes were not associated with fee percentages in their 2003–2008 data set.[95]

Although the structure of these regressions did not permit extensive comparisons of fee awards across different litigation subject areas, fee percentages appeared to vary somewhat depending on the type of case that settled. Securities cases were used as the baseline litigation subject area in the second and fifth regressions, permitting a comparison of fee awards in each nonsecurities area with the awards in securities cases. These regressions show that awards in a few areas, including labor/employment and antitrust, were more lucrative than those in securities cases. In the fourth regression, which included only nonsecurities cases, labor and employment cases were used as the baseline litigation subject area, permitting comparison between fee percentages in that area and the other nonsecurities areas. This regression shows that fee percentages in several areas, including consumer and employee benefits cases, were lower than the percentages in labor and employment cases.

In the fifth regression (Column 5 of Table 12), I attempted to discern whether the circuits identified in Section III as those with the most overrepresented (the First, Second, Seventh, and Ninth) and underrepresented (the Fifth and Eighth) class action dockets awarded attorney fees differently than the other circuits. That is, perhaps district court judges in the First, Second, Seventh, and Ninth Circuits award greater percentages of class action settlements as fees than do the other circuits, whereas district court judges in the Fifth and Eighth Circuits award smaller percentages. To test this hypothesis, in the fifth regression, I included indicator variables only for the six circuits with unusual dockets to measure their fee awards against the other six circuits combined. The regression showed statistically significant association with fee percentages for only two of the six unusual circuits: the Second and Ninth Circuits. In both cases, however, the direction of the association (i.e., the Second and Ninth Circuits awarded *smaller* fees than the baseline circuits) was opposite the hypothesized direction.[96]

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[94]See Eisenberg & Miller, supra note 15, at 61.

[95]See Eisenberg & Miller II, supra note 16, at 266.

[96]This relationship persisted when the regressions were rerun among the securities and nonsecurities cases separately. I do not report these results, but, even though the First, Second, and Ninth Circuits were oversubscribed with securities class action settlements and the Fifth, Sixth, and Eighth were undersubscribed, there was no association between fee percentages and any of these unusual circuits except, again, the inverse association with the Second and Ninth Circuits. In nonsecurities cases, even though the Seventh and Ninth Circuits were oversubscribed and the Fifth and the Eighth undersubscribed, there was no association between fee percentages and any of these unusual circuits except again for the inverse association with the Ninth Circuit.

The lack of the expected association with the unusual circuits might be explained by the fact that class action lawyers forum shop along dimensions other than their potential fee awards; they might, for example, put more emphasis on favorable class-certification law because there can be no fee award if the class is not certified. As noted above, it might also be the case that class action lawyers are unable to engage in forum shopping at all because defendants are able to transfer venue to the district in which they are headquartered or another district with a significant connection to the litigation.

It is unclear why the Second and Ninth Circuits were associated with lower fee awards despite their heavy class action dockets. Indeed, it should be noted that the Ninth Circuit was the baseline circuit in the second, third, and fourth regressions and, in all these regressions, district courts in the Ninth Circuit awarded smaller fees than courts in many of the other circuits. The lower fees in the Ninth Circuit may be attributable to the fact that it has adopted a presumption that the proper fee to be awarded in a class action settlement is 25 percent of the settlement.[97] This presumption may make it more difficult for district court judges to award larger fee percentages. The lower awards in the Second Circuit are more difficult to explain, but it should be noted that the difference between the Second Circuit and the baseline circuits went away when the fifth regression was rerun with only nonsecurities cases.[98] This suggests that the awards in the Second Circuit may be lower *only* in securities cases. In any event, it should be noted that the lower fee awards from the Second and Ninth Circuits contrast with the findings in the Eisenberg-Miller studies, which found no intercircuit differences in fee awards in common-fund cases in their data through 2008.[99]

V. Conclusion

This article has attempted to fill some of the gaps in our knowledge about class action litigation by reporting the results of an empirical study that attempted to collect all class action settlements approved by federal judges in 2006 and 2007. District court judges approved 688 class action settlements over this two-year period, involving more than $33 billion. Of this $33 billion, nearly $5 billion was awarded to class action lawyers, or about 15 percent of the total. District courts typically awarded fees using the highly discretionary percentage-of-the-settlement method, and fee awards varied over a wide range under this method, with a mean and median around 25 percent. Fee awards using this method were strongly and inversely associated with the size of the settlement. Fee percentages were positively associated with the age of the case at settlement. Fee percentages were not associated with whether the class action was certified as a settlement class or with the

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[97]See note 75 supra. It should be noted that none of the results from the previous regressions were affected when the Ninth Circuit settlements were excluded from the data.

[98]The Ninth Circuit's differences persisted.

[99]See Eisenberg & Miller II, supra note 16, at 260.

political affiliation of the judge who made the award. Finally, there appeared to be some variation in fee percentages depending on subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all of the other litigation areas, and district courts in the Ninth Circuit and in the Second Circuit (in securities cases) awarded lower fee percentages than district courts in several other circuits. The lower awards in the Ninth Circuit may be attributable to the fact that it is the only circuit that has adopted a presumptive fee percentage of 25 percent.

EXHIBIT 3

Documents reviewed:

- Memorandum Opinion (document 25, filed 12/5/16)
- Memorandum Opinion (document 33, filed 1/24/17)
- Memorandum Opinion (document 89, filed 3/31/18)
- Opinion, No. 19-1081 (Fed. Cir., Aug. 6, 2020)
- Plaintiffs' Revised Motion for Preliminary Approval of Class Settlement (document 148, filed 4/12/23)
- Revised Declaration of Deepak Gupta (document 149, filed 4/12/23), including Exhibit A ("Settlement Agreement")
- Order Granting Plaintiffs' Revised Motion for Preliminary Approval of Class Settlement (document 153, filed 5/8/23)

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 DEEPAK GUPTA

I, Deepak Gupta, declare as follows:

1. I am the founding principal of Gupta Wessler LLP, one of the two law firms appointed as lead class counsel by this Court on January 24, 2017. *See* ECF Nos. 32 & 33. Along with my partner Jonathan E. Taylor and our co-counsel at Motley Rice LLC, I have represented the plaintiffs throughout this litigation. I am submitting this declaration in support of the plaintiffs' motion for final approval of the class settlement and for attorneys' fees, costs, and service awards. This declaration is accompanied by four exhibits: a copy of the executed settlement agreement (Exhibit A), a copy of the executed supplemental agreement (Exhibit B), a copy of a second amendment making further technical modifications (Exhibit C), a copy of my law firm biographical page (Exhibit D), and a copy of my colleague Jonathan Taylor's biographical page (Exhibit E).

Background on PACER Fees

2. The Administrative Office of the U.S. Courts (AO) requires people to pay fees to access records through its Public Access to Court Electronic Records system, commonly known as

PACER. This lawsuit was brought to challenge the lawfulness of those fees for one reason: the fees far exceed the cost of providing the records.

3. By statute, the federal judiciary has long had the authority to impose PACER fees "as a charge for services rendered" to "reimburse expenses incurred in providing these services." 28 U.S.C. § 1913 note. But in 2002, Congress found that PACER fees (then set at $.07 per page) were "higher than the marginal cost of disseminating the information." S. Rep. 107-174, at 23 (2002). Congress sought to ensure that records would instead be "freely available to the greatest extent possible." *Id.* To this end, Congress passed the E-Government Act of 2002, which amended the statute by authorizing fees "only to the extent necessary." 28 U.S.C. § 1913 note.

4. Despite this statutory limitation designed to *reduce* PACER fees, the AO twice *increased* PACER fees in the years after the E-Government Act's passage—first to $.08 per page and then to $.10 per page. And it did so over a period when the costs of electronic data storage plunged exponentially.

5. The result has been a widely unpopular PACER fee regime that has hindered equal access to justice, imposed serious barriers for low-income and *pro se* litigants, discouraged academic research and journalism, and thus inhibited public understanding of the courts. 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 could not afford to pay the fees.

6. I first became aware of the practical problems and dubious legality of PACER fees, and first considered whether litigation could be brought to address the issue, when I was a staff attorney at the nonprofit Public Citizen Litigation Group between 2005 and 2011. Government transparency was among the group's specialties, and I followed the efforts of Carl Malamud of Public.Resource.org, who led a sustained campaign to draw public attention to PACER fees and

persuade the AO to make PACER free. As I recall, my colleagues and I considered the possibility of bringing litigation to challenge PACER fees but were unable to identify a viable legal path.

7. Until this case was filed, litigation against the federal judiciary was not seen as a realistic way to bring about reform of the PACER fee regime, for at least three main reasons. First, the judiciary has statutory authority to charge at least *some* amount in fees, so litigation alone could never result in a free PACER system—the ultimate goal of reformers. Second, few practicing litigators, let alone those who specialize in complex federal litigation, were likely to be eager to sue the federal judiciary and challenge policy decisions made by the Judicial Conference of the United States. They were even less likely to commit considerable time and resources to litigation when the prospect of recovery was so uncertain. Third, even if PACER fees could be shown to be excessive and even if qualified counsel could be secured, the fees were still assumed to be beyond the reach of litigation. The judiciary is exempt from the Administrative Procedure Act, so injunctive relief is unavailable. And advocates were unable to identify an alternative basis for jurisdiction, a cause of action, and a waiver of sovereign immunity to challenge PACER fees in court.

8. I am aware of only one previous lawsuit directly challenging the PACER fee schedule; that suit was dismissed for lack of jurisdiction. *See Greenspan v. Admin. Office*, No. 14-cv-2396 (N.D. Cal.). I am also aware of one previous effort to challenge the AO's policy on fee waivers, which also foundered on jurisdiction. 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. Pub. 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 they "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." *Id.* at 1035. The Ninth Circuit held that it could not review the denial. *Id.* at 1040.

9. With litigation seemingly unavailable as a pathway, advocates for PACER reform had largely devoted their efforts to grassroots and technological strategies: making certain records available in an online database that could be accessed for free, downloading records in bulk, or mounting public-information campaigns to expand access. At one point, for example, when the judiciary initiated a free trial of PACER at several libraries, Carl Malamud encouraged activists "to push the court records system into the 21st century by simply grabbing enormous chunks of the database and giving the documents away." John Schwartz, *An Effort to Upgrade a Court Archive System to Free and Easy*, N.Y. Times (Feb. 12, 2009). An enterprising 22-year-old activist named Aaron Swartz managed to download millions of documents before the AO responded by pulling the plug on the free trial and calling in the FBI to investigate Swartz. *Id.* This heavy-handed response was seen by many as motivated by a desire to protect fee revenue at the expense of public access. Today, the Free Law Project and the Center for Information Technology Policy at Princeton University operate a searchable collection of millions of PACER documents and dockets that were gathered using their RECAP software, which allows users to share the records they download.

10. These efforts have been important in raising public awareness, and ameliorating the effects of PACER fees, but they have not eliminated or reduced the fees themselves. To the contrary, the fees have only continued on their seemingly inexorable—and indefensible—rise.

Overview of this Litigation

11. Then came this case. On April 21, 2016, three nonprofits filed this lawsuit, asking this Court to declare that the PACER fee schedule violates the E-Government Act and to award a full recovery of past overcharges during the limitations period. They sued 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, 1573 (Fed. Cir. 1996). Because that Act provides jurisdiction only for claims seeking monetary relief based on past overcharges, and because the judiciary is not subject to the APA, *see* 5 U.S.C. §§ 701(b)(1)(B) & 704, the plaintiffs could not seek any injunctive relief or other relief requiring the judiciary to lower PACER fees going forward. They therefore limited their requested relief to retroactive monetary relief.

12. From the start, the plaintiffs were represented by a team of lawyers at our firm, Gupta Wessler LLP, a litigation boutique with experience bringing complex cases involving the federal government, and Motley Rice LLC, one of the nation's leading class-action firms. By the time that we filed this lawsuit together (as further detailed in my declaration in support of class certification, ECF No. 8-1, and as described further below), the two law firms together had an unparalleled combination of experience and expertise in prosecuting class claims for monetary relief against the federal government.

13. In its first year, the litigation met with early success when this Court (Judge Ellen Huvelle) denied the government's motion to dismiss in December 2016. ECF Nos. 24 & 25. A month later, on January 24, 2017, the Court certified a nationwide opt-out class of all individuals and entities who paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding federal-government entities and class counsel. ECF Nos. 32 & 33. The Court certified the plaintiffs' Little Tucker Act illegal-exaction claim for classwide treatment and appointed my firm and Motley Rice as co-lead class counsel. *Id.*

14. The plaintiffs then submitted a proposal for class notice and retained KCC Class Action Services (KCC) as claims administrator. ECF Nos. 37 & 42. The Court approved the plan in April 2017, ECF No. 44, and notice was provided to the class in accordance with the Court's order. Of the approximately 395,000 people who received notice, about 1,100 opted out of the class.

15. Informal discovery followed. It revealed that the judiciary had used PACER fees on a variety of categories of expenses during the class period. These include not only a category labeled by the judiciary as "Public Access Services," but also the following categories of expenses: "Case Management/Electronic Case Files System" (CM/ECF); "Electronic Bankruptcy Notification" (EBN); "Communications Infrastructure, Services, and Security" (or "Telecommunications"); "Court Allotments"; and then four categories of expenses falling under the heading "Congressional Priorities"—"Victim Notification (Violent Crime Control Act)," "Web-based Juror Services," "Courtroom Technology," and "State of Mississippi."

16. The parties subsequently filed competing motions for summary judgment as to liability only, "reserving the damages determination for after formal discovery." ECF No. 52 at 1. The plaintiffs took the position that PACER fees could be charged only to the extent necessary to reimburse the marginal costs of operating PACER and that the government was liable because the fees exceeded that amount. The government, by contrast, took the position that all PACER fees paid by the class were permissible. It argued that the statute authorizes fees to recover the costs of any project related to "disseminating information through electronic means." ECF No. 89 at 24.

17. On March 31, 2018, this Court took a third view. As the Court saw it, "when Congress enacted the E-Government Act, it effectively affirmed the judiciary's use of [such] fees for all expenditures being made prior to its passage, specifically expenses related to CM/ECF and [Electronic Bankruptcy Notification]." *NVLSP v. United States*, 291 F. Supp. 3d 123, 148 (D.D.C. 2018). The Court thus concluded that the AO "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 [Services], and most of the expenditures for Courtroom Technology." *Id.* at 145–46.

18. Within months, the judiciary took steps "to implement the district court's ruling" and "to begin transitioning disallowed expenditures from the [PACER] program to courts' Salaries

and Expenses appropriated funding." *See FY 2018 Judiciary Report Requirement on PACER, July 2018*, at 4, attached to Letter from Dir. Duff to Hons. Frelinghuysen, Graves, Lowey, & Quigley (July 19, 2018), https://perma.cc/CP8S-XRVQ. In July 2018, the AO's Director informed the House Appropriations Committee that, "beginning in FY 2019, Courtroom Technology, Web-based Juror Services, and Violent Crime Control Act Notification categories will no longer be funded" with PACER fees, "to reduce potential future legal exposure." *Id.* "The Judiciary will instead seek appropriated funds for those categories." *Id.*

19. Meanwhile, both parties sought permission for an interlocutory appeal from this Court's decision, and the U.S. Court of Appeals for the Federal Circuit accepted both appeals to decide the scope of the statutory authorization to charge fees. The parties adhered to their same interpretations of the statute on appeal. In addition, the government argued that the court lacked jurisdiction, so the class was not entitled to damages even assuming that the AO had violated the statute.

20. On appeal, the plaintiffs "attracted an impressive array of supporting briefs from retired judges, news organizations, civil rights groups," the "sponsor of the 2002 law" (Senator Joseph Lieberman) and legal-technology firms—all detailing the practical harms caused by excessive PACER fees. Adam Liptak, *Attacking a Pay Wall that Hides Public Court Filings*, N.Y. Times (Feb. 4, 2019), https://perma.cc/LN5E-EBE9. Prominent media outlets, like the *New York Times*, published editorials championing the lawsuit. *See Public Records Belong to the Public*, N.Y. Times (Feb. 7, 2019), https://perma.cc/76P8-WFF7. And by the end of 2019, the judiciary announced that it was doubling the quarterly fee waiver for PACER from $15 to $30, which had the effect of eliminating PACER fees for approximately 75% of PACER users. *See* Kimberly Robinson, *Judiciary Doubles Fee Waiver for PACER Access to Court Records*, Bloomberg Law (Sept. 17, 2019), https://perma.cc/CHF3-XVTT; Theresa A. Reiss, Cong. Research Serv., LSB10672, *Legislative & Judicial Developments*

Affecting Public Access to Court Electronic Records (PACER) 1 (Feb. 1, 2022), https://perma.cc/WT8K-G64X.

21. In August 2020, the Federal Circuit unanimously rejected the government's jurisdictional argument and largely affirmed this Court's conclusions. It "agree[d] with the district court's interpretation that § 1913 Note limits PACER fees to the amount needed to cover expenses incurred in services providing public access to federal court electronic docketing information." *NVLSP v. United States*, 968 F.3d 1340, 1350 (Fed. Cir. 2020). It also "agree[d] with the district court's determination that the government is liable for the amount of the [PACER] fees used to cover the Mississippi Study, VCCA Notifications, E-Juror Services, and most Courtroom Technology expenses" (specifically, those that were not "used to create digital audio recordings of court proceedings"). *Id.* at 1357–58. The Federal Circuit noted that CM/ECF was "one other potential source of liability," because the court was not able to confirm whether all "those expenses were incurred in providing public access to federal court electronic docketing information." *Id.* The court left it to this Court's "discretion whether to permit additional argument and discovery regarding the nature of the expenses within the CM/ECF category and whether [PACER] fees could pay for all of them." *Id.*

22. Following the Federal Circuit's decision, the House of Representatives passed a bipartisan bill to eliminate PACER fees, and a similar proposal with bipartisan support advanced out of the Senate Judiciary Committee. *See* Reiss, *Legislative & Judicial Developments Affecting PACER* at 1–2; Senate Judiciary Committee, *Judiciary Committee Advances Legislation to Remove PACER Paywall, Increase Accessibility to Court Records* (Dec. 9, 2021), https://perma.cc/8WBB-FTDY; Nate Raymond, *Free PACER? Bill to end fees for online court records advances in Senate*, Reuters (Dec. 9, 2021), https://perma.cc/H29N-C52M. Notes from a closed March 2022 meeting showed that "[t]he Judicial Conference of the United States [also now] supported offering free public access to the

federal court records system for noncommercial users." Craig Clough, *Federal Judiciary Policy Body Endorses Free PACER Searches*, Law360 (May 31, 2022), https://perma.cc/YP8M-Q5CK.

The Settlement Negotiations

23. On remand, the case was reassigned to Judge Paul Friedman, and the parties came together to discuss the path forward. They understood that, were the case to remain on a litigation track, there would be significant uncertainty and delay. Years of protracted litigation lay ahead, including a lengthy formal discovery process that could require the judiciary to painstakingly reconstruct line-item expenses and likely a second appeal and a trial on damages. And the range of potential outcomes was enormous: On one side, the government maintained that it owed *no* damages because the plaintiffs could not prove that, but for the unlawful expenditures, PACER fees would have been lower—a litigating position that also made it difficult for the judiciary to lower fees during the pendency of the litigation. The government further maintained that, in any event, the full category of CM/ECF was properly funded with PACER fees. On the other side, the plaintiffs maintained that liability had been established, and that some portion of CM/ECF was likely improper.

24. Hoping to bridge this divide and avoid years of litigation, the parties were able to agree on certain structural aspects of a potential settlement, and they agreed to engage in mediation on the amount and details. On December 29, 2020, at the parties' request, Judge Friedman stayed the proceedings until June 25, 2021 to allow the parties to enter into private mediation.

25. Over the next few months, the parties prepared and exchanged information and substantive memoranda, with detailed supporting materials, which together provided a balanced and comprehensive view of the strengths and weaknesses of the case. The parties scheduled an all-day mediation for May 3, 2021, to be supervised by Professor Eric D. Green, a retired Boston University law professor and one of the nation's most experienced and accomplished mediators.

26. With Professor Green's assistance, the parties made considerable progress during the session in negotiating the details of a potential classwide resolution. The government eventually agreed to structure the settlement as a common-fund settlement, rather than a claims-made settlement, and the plaintiffs agreed to consider the government's final offer concerning the total amount of that fund, inclusive of all settlement costs, attorneys' fees, and service awards.

27. But by the time the session had ended, the parties still hadn't reached agreement on the total amount of the settlement or several other key terms—including how the funds would be distributed, what to do with any unclaimed funds after the initial distribution, and the scope of the release. Professor Green continued to facilitate settlement discussions in the days and weeks that followed, and the parties were able to agree on the total amount of the common fund, inclusive of all settlement costs, attorneys' fees, and service awards. The parties then spent several months continuing to negotiate other key terms, while this Court repeatedly extended its stay to allow the discussions to proceed.

28. Further progress was slow, and at times the parties reached what could have been insurmountable impasses. A particular sticking point concerned the allocation of settlement funds. Consistent with the parties' starkly differing litigating positions on both liability and damages, the plaintiffs argued that funds should be distributed pro rata to class members, while the government vigorously insisted that any settlement include a large minimum amount per class member, which it maintained was in keeping with the AO's longstanding policy and statutory authority to "distinguish between classes of persons" in setting PACER fees—including providing waivers—"to avoid unreasonable burdens and to promote public access to such information," 28 U.S.C. § 1913 note. Over a period of many months, the parties were able to resolve their differences and reach a compromise of these competing approaches: a minimum payment of $350—the smallest amount that the government would agree to—with a pro rata distribution beyond that amount.

The final version of the agreement was executed on July 27, 2022. *See* Ex. A. The parties later executed two supplemental agreements making certain technical modifications to the agreement. *See* Ex. B & C.

The Parties' Settlement

29. As clarified by the supplemental agreement, the settlement defines the class as all persons or entities who paid PACER fees between April 21, 2010, and May 31, 2018 ("the class period"), excluding opt-outs, federal agencies, and class counsel. Ex. A ¶ 3 & Ex. B. This definition includes all members of the class initially certified by this Court in January 2017—those who paid PACER fees between April 21, 2010 and April 21, 2016—as well those who do not meet that definition, but who paid PACER fees between April 22, 2016 and May 31, 2018. Ex. A ¶ 4. Because this second group of people are not part of the original class, they did not receive notice or an opportunity to opt out when the original class was certified. For that reason, under the settlement, these additional class members will receive notice and an opportunity to opt out. *Id.*

30. The settlement provides for a total common-fund payment by the United States of $125 million, which covers monetary relief for the class's claims, interest, attorneys' fees, litigation expenses, administrative costs, and any service awards to the class representatives. *Id.* ¶ 11. Once this Court has ordered final approval of the settlement and the appeal period for that order has expired, the United States will pay this amount to the claims administrator (KCC) for deposit into a settlement trust (to be called the "PACER Class Action Settlement Trust"). *Id.* ¶¶ 12, 16. This trust will be established and administered by KCC, which will be responsible for distributing proceeds to class members. *Id.* ¶ 16. In exchange for their payments, class members agree to release all claims that they have against the United States for overcharges related to PACER usage during the class period. *Id.* ¶ 13. This release does not cover any of the claims now pending in *Fisher v. United States*, No. 15-1575 (Fed. Cl.), the only pending PACER-fee related lawsuit of which the AO is aware. Ex.

A ¶ 13. The amount of settlement funds disbursed to any class member in this case, however, will be deducted from any monetary recovery that the class member may receive in *Fisher*. *Id.*

31. Within 90 days of a final order from this Court approving the settlement, the AO will provide KCC with the most recent contact information that it has on file for each class member, and with the information necessary to determine the amount owed to each class member. *Id.* ¶ 14. This information will be subject to the terms of the April 3, 2017 protective order entered by this Court (ECF No. 41), the extension of which the parties will be jointly requesting from this Court. Ex. A ¶ 14. After receiving this information, KCC will then be responsible for administering payments from the settlement trust in accordance with the agreement. *Id.*

32. Under the settlement, class members will not have to submit a claim or to receive their payment. *Id.* Instead, KCC has and will continue to use whatever methods are most likely to ensure that class members receive payment and will make follow-up attempts if necessary. *Id.*

33. The settlement provides that the trust funds be distributed as follows: KCC will first retain from the trust all notice and administration costs actually and reasonably incurred. *Id.* ¶ 18. KCC will then distribute any service awards approved by the Court to the named plaintiffs and any attorneys' fees and costs approved by the Court to class counsel. *Id.* After these amounts have been paid from the trust, the remaining funds ("Remaining Amount") will be distributed to class members. *Id.* The Remaining Amount will be no less than 80% of the $125 million paid by the United States. *Id.* In other words, the settlement entitles class members to at least $100 million.

34. ***First distribution.*** KCC will distribute the Remaining Amount to class members like so: It will allocate to each class member a minimum payment amount equal to the lesser of $350 or the total amount paid in PACER fees by that class member during the class period. *Id.* ¶ 19. KCC will add up each minimum payment amount for each class member, producing the Aggregate Minimum Payment Amount. *Id.* It will then deduct this Aggregate Minimum Payment

Amount from the Remaining Amount and allocate the remainder pro rata to all class members who paid more than $350 in PACER fees during the class period. *Id.*

35. Thus, under this formula: (a) each class member who paid no more than $350 in PACER fees during the class period will receive a payment equal to the total amount of PACER fees paid by that class member during the class period; and (b) each class member who paid more than $350 in PACER fees during the class period will receive a payment of $350 plus their allocated pro-rata share of the total amount left over after the Aggregate Minimum Payment is deducted from the Remaining Amount. *Id.* ¶ 20.

36. KCC will complete disbursement of each class member's share of the recovery within 90 days of receiving the $125 million from the United States, or within 21 days after receiving the necessary information from AO, whichever is later. *Id.* ¶ 21. KCC will complete disbursement of the amounts for attorneys' fees and litigation expenses to class counsel, and service awards to the named plaintiffs, within 30 days of receiving the $125 million. *Id.* KCC will keep an accounting of the disbursements made to class members, including the amounts, dates, and status of payments made to each class member, and will make all reasonable efforts, in coordination with class counsel, to contact class members who do not deposit their payments within 90 days. *Id.* ¶ 22.

37. ***Second distribution.*** If, despite these efforts, unclaimed or undistributed funds remain in the trust one year after the $125 million payment by the United States, those funds ("the Remaining Amount After First Distribution") will be distributed in the following manner. *Id.* ¶ 23. First, the only class members eligible for a second distribution will be those who (1) paid more than $350 in PACER fees during the class period, and (2) deposited or otherwise collected their payment from the first distribution. *Id.* Second, KCC will determine the number of class members who satisfy these two requirements and are therefore eligible for a second distribution. *Id.* Third, KCC will then distribute to each such class member an equal allocation of the Remaining Amount After

First Distribution, subject to the caveat that no class member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the class member paid during the class period. *Id.* Prior to making the second distribution, KCC will notify the AO that unclaimed or undistributed funds remain in the trust. *Id.* ¶ 24. Class members who are eligible to receive a second distribution will have three months from the time of the distribution to collect their payments. *Id.* If unclaimed or undistributed funds remain in the settlement trust after this three-month period expires, those funds will revert to the U.S. Treasury. *Id.* Upon expiration of this three-month period, KCC will notify the AO of this reverter, and the AO will provide KCC with instructions to effectuate the reverter. *Id.*

38. ***Fairness hearing.*** The agreement further provides that, within 75 days of its execution—that is, by October 11, 2022—the plaintiffs will submit to the Court a motion for an order approving settlement notice to the class under Rule 23(e). *Id.* ¶ 27, Ex. B.

39. Consistent with the agreement, the plaintiffs are applying to this Court for an award of attorneys' fees and reimbursement of litigation expenses, and for service awards for the class representatives in amounts not to exceed $10,000 per representative. Ex. A ¶ 28. As noted above, these awards will be paid out of the settlement trust and will not exceed 20% of the $125 million paid by the United States. *Id.* The motion for an award of attorneys' fees and litigation expenses is subject to this Court's approval, and class members have the right to object to the motion. *Id.*

40. Within 30 days of the order approving settlement notice to the class (or within 30 days of KCC's receipt of the necessary information from the AO, if later), KCC provided notice via email to class members for whom the AO has an email address. *Id.* ¶ 29; Ex. C ¶ 2. Within 45 days of the order approving settlement notice, KCC sent postcard notice via U.S. mail to all class members for whom the AO does not have an email address or for whom email delivery was unsuccessful. Ex. A ¶ 29; Ex. C ¶ 5. KCC has also provided the relevant case documents on a

website it has maintained that is dedicated to the settlement (www.pacerfeesclassaction.com). Ex. A ¶ 29; Ex. C ¶ 3. The notice included an explanation of the procedures for allocating and distributing the trust funds, the date upon which the Court will hold a fairness hearing under Rule 23(e), and the date by which class members must file their written objections, if any, to the settlement. Ex. A ¶ 29. The notice sent to the additional class members—those who are not part of the class already certified by this Court—also informed them of their right to opt out and the procedures through which they may exercise that right. Ex. C ¶ 6. The opt-out period for these additional class members is 90 days. *Id.*

41. Any class member may express their views supporting or opposing the fairness, reasonableness, and adequacy of the proposed settlement. Ex. A ¶ 30. Counsel for the parties may respond to any objection within 21 days after receipt of the objection. *Id.* ¶ 31. Any class member who submits a timely objection to the proposed settlement—that is, an objection made at least 30 days before the fairness hearing—may appear in person or through counsel at the fairness hearing and be heard to the extent allowed by the Court. *Id.* ¶ 32; Ex. C ¶ 7.

42. After the deadlines for filing objections and responses have lapsed, the Court will hold the fairness hearing at which it will consider any timely and properly submitted objections made by class members to the proposed settlement. Ex. A ¶ 33. The Court will decide whether to enter a judgment approving the settlement and dismissing this lawsuit in accordance with the settlement agreement. *Id.*

* * *

43. This settlement is the result of more than seven years of hard-fought litigation, including more than a year of careful negotiation by the parties. It is, in my view and the view of the three class representatives, an excellent settlement for the class. Before this case was filed, there was no historical precedent for bringing suit against the federal judiciary—*in* the federal judiciary—

based on fees charged *by* the federal judiciary. Now there is. If approved, the settlement will deliver real relief to every single class member: a full refund of up to $350 for any PACER fees that each class member paid during the class period, plus additional amounts for class members who paid more than $350 in PACER fees during that period. According to data provided by the government, this means that the vast majority of class members will receive a full refund—100 cents on the dollar—for the PACER fees that they paid during the class period.

44. And the settlement will provide this relief quickly. Whereas litigating the case to a final judgment would take years—with no guarantee of *any* recovery for class members given the government's legal position—the settlement will produce a final judgment in a matter of months. Moreover, although the settlement does not include injunctive relief, that is only because this relief is unavailable against the judiciary. After this litigation was filed, however, Congress began taking steps to eliminate PACER fees, and there is now a Federal Circuit decision that interprets (and imposes limits on) the statute authorizing fees, while making clear that PACER users have a cause of action to challenge such fees in the future. It is hard to imagine a better result for the class.

Class Counsel's Experience and Qualifications

45. Throughout the seven years of this hard-fought litigation, the plaintiffs were represented by two law firms appointed by the Court as lead class counsel: Gupta Wessler LLP and Motley Rice LLC. The firms worked together on all aspects of the litigation, with our team at Gupta Wessler taking the lead role on briefing, argument, research, and legal analysis, and Motley Rice taking a lead role in case management, discovery, and settlement administration.

46. I am the founding principal of Gupta Wessler LLP, a boutique law firm that focuses on Supreme Court, appellate, and complex litigation on behalf of plaintiffs and public-interest clients. I am also a Lecturer on Law at Harvard Law School, where I teach the Harvard Supreme Court Litigation Clinic and regularly teach courses on the American civil-justice system. I am a

public member of the American Law Institute and an elected member of the Administrative Conference of the United States. Over more than two decades, I have led high-stakes litigation before the U.S. Supreme Court, all thirteen federal circuits, and numerous state and federal courts nationwide. I have also testified before the U.S. Senate, the U.S. House of Representatives, and the Presidential Commission on the Supreme Court. Much of my advocacy has focused on ensuring access to justice for consumers, workers, and communities injured by corporate or governmental wrongdoing. My biographical page is attached as Exhibit D.

47. My colleague Jonathan Taylor played a key role on all aspects of this litigation, from conceptualizing the case with me at the outset, to presenting oral argument on summary judgment in the district court, to putting the finishing touches on the motion for final approval. When the case was filed, Mr. Taylor was an associate at the firm; he is now a principal. Mr. Taylor is a graduate of Harvard Law School who clerked for a federal circuit judge before joining Gupta Wessler. He has presented oral argument in the majority of federal circuits and has been the principal author of dozens of briefs filed in the U.S. Supreme Court and all levels of the state and federal judiciaries. His law firm biography is attached as Exhibit E.

48. Class actions and litigation involving the federal government are a particular focus of my work and my firm's work. Mr. Taylor and I have both argued numerous appeals on class-action issues at all levels of the federal courts, and much of our firm's docket is occupied by appeals arising from class actions. Our firm also initiates select class-action cases, like this one, from the ground up—typically in collaboration with large, sophisticated class-action firms like Motley Rice.

49. By the time that Gupta Wessler and Motley Rice filed this lawsuit together, we were able to draw from a considerable body of collective experience successfully bringing class actions for monetary relief against the federal government—a relatively rare form of litigation. Among other things, my colleague Jonathan Taylor and I had successfully represented a nationwide

certified class of all of the nation's federal bankruptcy judges and their surviving spouses, estates, and beneficiaries, resulting in a judgment against the United States for $56 million in illegally withheld judicial pay and benefits. *Houser v. United States*, No. 13–607C (Fed. Cl.). While still at Public Citizen, I had successfully represented a nationwide class of veterans challenging the Army Air Force Exchange Service's withholding of federal benefits to collect old debts arising out of purchases of military uniforms, recovering $7.4 million in illegal charges. *Briggs v. Army & Air Force Exchange Service*, No. C 07–05760 (N.D. Cal.). And, together with Motley Rice, we were already representing a recently certified class of tax-return prepares in this Court, seeking the recovery of millions of dollars in unlawfully excessive fees paid to the IRS. In each one of these cases, the claims sought recovery of illegal exactions from the federal government on a class basis, with jurisdiction premised on the Tucker Act or the Little Tucker Act. *Steele v. United States*, No. 14-cv-01523-RCL (D.D.C.). This experience is further detailed below.

50. ***Bankruptcy Judges' Compensation Litigation.*** In November 2012, I was approached by the National Conference of Bankruptcy Judges about whether I would agree to represent the nation's federal bankruptcy judges in preparation for class-action litigation over salary and benefits that the United States allegedly owed to the judges and their beneficiaries. Over a number of years, Congress had violated the U.S. Constitution's Compensation Clause with respect to the salaries of federal district judges. The bankruptcy judges wanted to explore potential statutory claims, under the Tucker Act, arising from those constitutional violations. The Conference had appointed members of a litigation committee, led by Chief Bankruptcy Judge Barbara Houser of the Northern District of Texas (herself a former experienced complex litigator).

51. This committee of federal bankruptcy judges conducted a nationwide search for the counsel most qualified to represent them. They sought lawyers experienced in both litigation with the federal government and class actions, and capable of handling any appellate proceedings. After

soliciting recommendations and interviewing several firms, they chose our firm to represent them and asked me to serve as lead counsel.

52. As a result, our firm served as sole counsel to a certified nationwide class of current and former federal bankruptcy judges and their surviving spouses, life-insurance beneficiaries, and estates in *Houser v. United States*, No. 13–607C (Fed. Cl.)—one of the few certified class actions of federal judges in U.S. history. We litigated the case from start to finish, ultimately securing a judgment of approximately $56 million in November 2014 in the Court of Federal Claims, and working thereafter to administer a comprehensive claims process.

53. I served as lead class counsel in *Houser*, working closely with Jonathan Taylor. The case required us to interact on a constant basis with our counterparts at the Department of Justice. Our formal litigation work eventually included successful briefing and argument on the government's motion to dismiss, cross-motions for summary judgment on liability, a motion for class certification, and a class-notice plan. Our work did not end with the certification of a class and the court's determination of liability. To the contrary, we retained damages experts, vetted the government's damages calculations, continued to respond to class members' inquiries, and negotiated with the government over a stipulated judgment and a class-claims process that delivered our clients one hundred cents on the dollar.

54. In recognition of our successful efforts in the litigation, Mr. Taylor and I both received the President's Award from the National Conference of Bankruptcy Judges. On March 22, 2016, *The American Lawyer* reported on our role in this litigation, observing that "[i]t's hard to imagine a higher compliment than being hired to represent federal judges" in this important class-action litigation against the United States.

55. ***IRS Tax Preparer Fees Litigation.*** We currently serve as co-counsel for the plaintiffs in *Steele v. United States*, No. 14-cv-01523-RCL (D.D.C.), another case in this Court with

many similarities to this litigation. In that case, we represent a certified nationwide class of tax-return preparers suing the federal government under the Little Tucker Act for excessive user fees.

56. As in the litigation here, the plaintiffs in *Steele* bring an illegal-exaction claim against the government. A team from the national class-action firm Motley Rice LLC (co-lead in this case) serves as lead counsel in *Steele*, and brought us into the case because of our relevant expertise with litigation involving the federal government. On June 30, 2015, Judge Lamberth issued a decision appointing our team as interim class counsel in *Steele*. In his decision, he noted that he was "thoroughly impressed by the qualifications" of counsel—including previous work on "class actions against the government" and "illegal exaction claims." *Steele*, Dkt. 37, at 7. On February 9, 2016, Judge Lamberth certified a nationwide class and named us class counsel. *Steele*, Dkt. 54

57. ***Experience Defending the Federal Government in Litigation.*** Before founding Gupta Wessler in 2012, I served as Senior Litigation Counsel in the U.S. Department of the Treasury, setting up the new Consumer Financial Protection Bureau (CFPB), and then in the Office of the General Counsel at the CFPB, where I successfully defended the agency in litigation. That work included serving as lead counsel in a successful defense in this Court—against an APA and Fifth Amendment challenge—of federal regulations that established nationwide licensing and regulation of mortgage brokers for the first time. *Neighborhood Assistance Corp. of Am. v. Consumer Fin. Prot. Bureau*, 907 F. Supp. 2d 112 (D.D.C. 2012). I was also responsible for setting up the new agency's appellate litigation and amicus programs and working with the Office of the Solicitor General on cases before the U.S. Supreme Court. Finally, my duties included advising senior government officials on issues of constitutional and administrative law, including issues related to the launch of the new federal agency. *See* Deepak Gupta, *The Consumer Protection Bureau and the Constitution*, 65 ADMIN. L. REV. 945 (2013).

58. Before my stint in government service (and following my federal judicial clerkship), I spent seven years at Public Citizen Litigation Group in Washington, DC—one of the nation's preeminent public-interest organizations. There, as a staff attorney and director of the Consumer Justice Project, I focused on litigating cutting-edge class actions and appeals nationwide. I also spent my first year at the organization as the Alan Morrison Supreme Court Fellow, working on litigation before the U.S. Supreme Court.

59. ***Veterans' Withholding Litigation.*** Much of my litigation at Public Citizen involved the federal government. In *Briggs v. Army & Air Force Exchange Service*, No. C 07–05760, 2009 WL 113387 (N.D. Cal. Jan. 16, 2009), for example, I successfully represented a nationwide class of veterans challenging the government's illegal withholding of federal benefits to collect old debts arising out of purchases of military uniforms. I took the lead in briefing and arguing several issues relevant to this litigation—including Little Tucker Act jurisdiction, and the interaction between the class-action device and the special venue rules applicable to the federal government. My co-counsel and I ultimately obtained a $7.4 million settlement for our clients.

60. I also served as lead counsel for three national consumer groups in a successful and groundbreaking APA unreasonable-delay suit against the U.S. Department of Justice, resulting in the creation and implementation of the National Motor Vehicle Title Information System. *See Pub. Citizen, et al v. Mukasey*, 2008 WL 4532540 (N.D. Cal.).

61. Finally, I served as co-counsel in a case in which we successfully represented survivors of Hurricanes Katrina and Rita in an APA and constitutional due-process challenge to FEMA's denial of federal disaster assistance. *See Ass'n of Comty. Orgs. for Reform Now v. Fed. Emergency Mgmt. Agency*, 463 F. Supp. 2d 26 (D.D.C. 2006).

Class Counsel's Hours, Lodestar, and Multiplier

62. The information in this declaration regarding the time spent on the case by Gupta Wessler LLP attorneys and other professional support staff is based on contemporaneous daily time records regularly prepared and maintained by the firm. I reviewed these time records in connection with the preparation of this declaration. The purpose of this review was to confirm both the accuracy of the time entries as well as the necessity for, and reasonableness of, the time and expenses committed to the litigation.

63. Below is a summary lodestar chart which lists (1) the name of each timekeeper in my firm who worked on this case; (2) their title or position (e.g., principal, associate, paralegal) in the firm; (3) the total number of hours they worked on the case from its inception through and including August 28, 2023; (4) their current hourly rate; and (5) their lodestar (not including projected future work on class-action settlement administration). The chart also includes a projected $400,000 that we conservatively estimate for time that will be incurred address post-settlement issues and inquiries.

Name	Title	Total Hours	Current Rate	Total Lodestar
Deepak Gupta	Principal	1497.5	1150	$1,722,125.00
Jonathan E. Taylor	Principal	1519	975	$1,481,025.00
Rachel Bloomekatz	Principal	5.73	875	$5,013.75
Peter Romer-Friedman	Principal	3.00	875	$2,625.00
Daniel Wilf-Townsend	Associate	12.60	700	$8,820.00
Joshua Matz	Associate	6.40	700	$4,480.00
Neil Sawhney	Associate	3.30	700	$2,310.00
Robert Friedman	Associate	2.60	700	$1,820.00
Stephanie Garlock	Paralegal	27.55	350	$9,642.50

Mahek Ahmad	Paralegal	52.75	350	$18,462.50
Rana Thabata	Paralegal	24.62	350	$8,617.00
Nabila Abdallah	Paralegal	17.57	350	$6,149.50
Total Past Lodestar				$3,271,090.25
Gupta Wessler Projected Post-Settlement Lodestar				$400,000
Total Gupta Wessler Lodesar				$3,671,090.25
Total Lodestar for Both Law Firms				$6,031,678.25

64. Our firm's total lodestar is thus $3,671,090.25. As reflected in the contemporaneously filed Declaration of Meghan S.B. Oliver, Motley Rice calculates $1,860,588.00 in lodestar plus future projected lodestar of $500,000, for a total of $2,360,588. The total lodestar for both firms is thus $6,031,678.25. Because we are seeking a total fee award of $23,863,345.02—the amount equal to 20% of the $125 million common fund, minus the requested costs, expenses, and service awards—the multiplier in this case is approximately 3.956.

65. Before this case was filed, each named plaintiff signed a retainer agreement with class counsel that provided for a contingency fee of up to 33% of the common fund.

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

Executed in Washington, DC, on August 28, 2023.

/s/ Deepak Gupta
Deepak Gupta

EXHIBIT A

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.

Civ. A. No. 16-0745 (PLF)

CLASS ACTION SETTLEMENT AGREEMENT

For the purpose of disposing of the plaintiffs' claims in this case without any further judicial proceedings on the merits and without there being any trial or final judgment on any issue of law or fact, and without constituting an admission of liability on the part of the defendant, and for no other purpose except as provided herein, the parties stipulate and agree as follows:

Background and Definitions

1. The plaintiffs challenge the lawfulness of fees charged by the federal government to access to records through the Public Access to Court Electronic Records program or "PACER." The lawsuit claims that the fees are set above the amount permitted by statute and seeks monetary relief under the Little Tucker Act, 28 U.S.C. § 1346(a) in the amount of the excess fees paid. The government contends that all such fees are lawful.

2. The complaint was filed on April 21, 2016. ECF No. 1. On January 24, 2017, this Court certified a nationwide class under Federal Rule of Civil Procedure ("Rule") 23(b)(3) and a single class claim alleging that PACER fees exceeded the amount authorized by statute and seeking

recovery of past overpayments. ECF Nos. 32, 33. The Court also appointed Gupta Wessler PLLC and Motley Rice LLC (collectively, "Class Counsel") as co-lead class counsel. *Id.*

3. "Plaintiffs" or "Class Members," as used in this agreement, are defined to include all persons or entities who paid PACER fees between April 22, 2010, and May 31, 2018 ("the Class Period"). Excluded from that class are: (i) entities that have already opted out; (ii) federal agencies; and (iii) Class Counsel.

4. The class originally certified by this Court consists only of individuals and entities who paid fees for use of PACER between April 21, 2010, and April 21, 2016 (with the same three exceptions noted in the previous paragraph). Plaintiffs who were not included in that original class definition—that is to say, PACER users who were not included in the original class and who paid fees for use of PACER between April 22, 2016, and May 31, 2018—shall be provided with notice of this action and an opportunity to opt out of the class.

5. On April 17, 2017, the Court entered an order approving the plaintiffs' proposed plan for providing notice to potential class members. ECF No. 44. The proposed plan designated KCC as Class Action Administrator ("Administrator"). Notice was subsequently provided to all Class Members included in the original class, and they had until July 17, 2017, to opt out of the class, as explained in the notice and consistent with the Court's order approving the notice plan. The notice referenced in paragraph 4 above shall be provided by the Administrator.

6. On March 31, 2018, the Court issued an opinion on the parties' cross-motions for summary judgment on liability. ECF No. 89; *see Nat'l Veterans Legal Servs. Program v. United States*, 291 F. Supp. 3d 123, 126 (D.D.C. 2018). While briefing cross-motions on liability, the parties "reserv[ed] the damages determination for" a later point "after formal discovery." *Id.* at 138.

7. On August 13, 2018, the Court certified its March 31, 2018, summary-judgment decision for interlocutory appeal to the Federal Circuit under 28 U.S.C. § 1292(b). ECF Nos. 104,

105; *see Nat'l Veterans Legal Servs. Program v. United States*, 321 F. Supp. 3d 150, 155 (D.D.C. 2018).

8. On August 6, 2020, the Federal Circuit affirmed this Court's decision on the parties' motions for summary judgment and remanded the case to this Court for further proceedings. *See Nat'l Veterans Legal Servs. Program v. United States*, 968 F.3d 1340, 1343 (Fed. Cir. 2020).

9. Following the Federal Circuit's decision, the parties agreed to engage in mediation to discuss the possibility of settling Plaintiffs' claims. On December 29, 2020, this Court stayed the proceedings through June 25, 2021, and it has repeatedly extended that stay since then as the parties have made progress on negotiating a global settlement.

10. On May 3, 2021, the parties participated in a day-long private mediation session in an attempt to resolve Plaintiffs' claims. Since then, the parties have engaged in numerous follow-up conversations via phone and email to come to an agreement on resolving the claims.

Common Fund Payment and Release

11. Plaintiffs have offered to settle this action in exchange for a common-fund payment by the United States in the total amount of one hundred and twenty-five million dollars ($125,000,000.00) (the "Aggregate Amount") inclusive of monetary relief for Plaintiffs' claims, interest, attorney fees, litigation expenses, administration costs, and any service awards to Class Representatives. Subject to this Court's approval, as set forth in paragraph 33, Plaintiffs' offer has been accepted by the United States.

12. Following the Court's order granting final approval of the settlement, as described in the "Fairness Hearing" portion of this agreement, and only after the appeal period for that order has expired, the United States shall pay the Aggregate Amount to the Administrator for deposit in the Settlement Trust, as referenced in paragraph 16.

13. Upon release of the Aggregate Amount from the U.S. Department of the Treasury's Judgment Fund, Plaintiffs and all Class Members release, waive, and abandon, 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. This release does not cover any claims based on PACER usage after May 31, 2018, nor any of the claims now pending in *Fisher v. United States*, No. 15-1575 (Fed. Cl.). But the amount of settlement funds disbursed to any Class Member in this case shall be deducted in full from any monetary recovery that the Class Member may receive in *Fisher*. The Administrative Office of the U.S. Courts ("Administrative Office") represents that, apart from *Fisher*, it is aware of no other pending PACER-fee lawsuit pertaining to claims based on PACER usage on or before May 31, 2018.

Information

14. Within 30 days of a final order approving the settlement, Class Counsel shall provide to the Administrative Office the PACER account numbers of Class Counsel and all individuals who have opted out of the Class. Within 90 days of a final order approving the settlement, the Administrative Office shall make available to the Administrator the records necessary to determine the total amount owed to each Class Member, and the last known address or other contact information of each Class Member contained in its records. Should the Administrative Office need more than 90 days to do so, it will notify the Administrator and Class Counsel and provide the necessary information as quickly as reasonably possible. The Administrator shall bear sole responsibility for making payments to Class Members, using funds drawn from the Settlement Trust, as provided below. In doing so, the Administrator will use the data that the Administrative Office

currently possesses for each Class Member, and the United States shall be free of any liability based on errors in this data (*e.g.*, inaccurate account information, incorrect addresses, etc.).

15. The PACER account information provided in accordance with the previous paragraph shall be provided pursuant to the terms of the Stipulated Protective Order issued in this lawsuit on April 3, 2017 (ECF No. 41) as modified to encompass such information and shall be subject to the terms of the Stipulated Protective Order. The parties agree to jointly request that the Court extend the Stipulated Protective Order to encompass such information prior to the 90-day period set forth in the previous paragraph.

Disbursement of the Aggregate Amount

16. The Administrator shall establish a Settlement Trust, designated the "PACER Class Action Settlement Trust," to disburse the proceeds of the settlement. The administration and maintenance of the Settlement Trust, including responsibility for distributing the funds to Class Members using methods that are most likely to ensure that Class Members receive the payments, shall be the sole responsibility of the Administrator. Class Members will not be required to submit a claim form or make any attestation to receive their payments. The only obligation of the United States in connection with the disbursement of the Aggregate Amount will be: (i) to transfer the Aggregate Amount to the Administrator once the Court has issued a final order approving the settlement and the appeal period for that order has expired, and (ii) to provide the Administrator with the requisite account information for PACER users, as referenced in paragraph 14. The United States makes no warranties, representations, or guarantees concerning any disbursements that the Administrator makes from the Settlement Trust, or fails to make, to any Class Member. If any Class Member has any disagreement concerning any disbursement, the Class Member shall resolve any such concern with the Administrator.

17. The Settlement Trust is intended to be an interest-bearing Qualified Settlement Fund within the meaning of Treasury Regulation § 1.468B-1. The Administrator shall be solely responsible for filing all informational and other tax returns as may be necessary. The Administrator shall also be responsible for causing payments to be made from the Settlement Trust for any taxes owed with respect to the funds held by the Settlement Trust. The Administrator shall timely make all such elections and take such other actions as are necessary or advisable to carry out this paragraph.

18. As approved by the Court, the Administrator shall disburse the proceeds of the settlement as follows: The Administrator shall retain from the Settlement Trust all notice and administration costs actually and reasonably incurred, which includes actual costs of publication, printing, and mailing the notice, as well as the administrative expenses actually incurred and fees reasonably charged by the Administrator in connection with providing notice and processing the submitted claims. The Administrator shall distribute any service awards approved by the Court to the named plaintiffs, and any attorney fees and costs approved by the Court to Class Counsel, as set forth in the "Fairness Hearing" portion of this agreement. After the amounts for attorney fees, expenses, service awards, and notice and administration costs have been paid from the Aggregate Amount, the remaining funds shall be distributed to the class ("Remaining Amount"). The Remaining Amount shall be no less than 80% of the Aggregate Amount, or $100,000,000.

19. ***First Distribution.*** The Administrator shall allocate the Remaining Amount among Class Members as follows: First, the Administrator shall allocate to each Class Member a minimum payment amount equal to the lesser of $350 or the total amount paid in PACER fees by that Class Member for use of PACER during the Class Period. Second, the Administrator shall add together each minimum payment amount for each Class Member, which will produce the Aggregate Minimum Payment Amount. Third, the Administrator shall then deduct the Aggregate Minimum Payment Amount from the Remaining Amount and allocate the remainder pro rata (based on the

amount of PACER fees paid in excess of $350 during the Class Period) to all Class Members who paid more than $350 in PACER fees during the Class Period.

20. Thus, under the formula for the initial allocation: (a) each Class Member who paid a total amount less than or equal to $350 in PACER fees for use of PACER during the Class Period would receive a payment equal to the total amount of PACER fees paid by that Class Member for PACER use during the Class Period; and (b) each Class Member who paid more than $350 in PACER fees for use of PACER during the Class Period would receive a payment of $350 plus their allocated pro-rata share of the total amount left over after the Aggregate Minimum Payment is deducted from the Remaining Amount.

21. The Administrator shall complete disbursement of each Class Member's individual share of the recovery, calculated in accordance with the formula set forth in the previous two paragraphs, within 90 days of receipt of the Aggregate amount, or within 21 days after receiving from the Administrative Office the information set forth in paragraph 14 above, whichever is later. The Administrator shall complete disbursement of the amounts for attorney fees and litigation expenses to Class Counsel, and service awards to the named plaintiffs, within 30 days of the receipt of the Aggregate Amount.

22. The Administrator shall keep an accounting of the disbursements made to Class Members, including the amounts, dates, and outcomes (*e.g.*, deposited, returned, or unknown) for each Class Member, and shall make all reasonable efforts, in coordination with Class Counsel, to contact Class Members who do not deposit their payments within 90 days of the payment being made to them.

23. ***Second Distribution.*** If, despite these efforts, unclaimed or undistributed funds remain in the Settlement Trust one year after the United States has made the payment set forth in paragraph 12, those funds ("the Remaining Amount After First Distribution") shall be distributed to

Class Members as follows. First, the only Class Members who will be eligible for a second distribution will be those who (1) paid a total amount of more than $350 in PACER fees for use of PACER during the Class Period, and (2) deposited or otherwise collected their payment from the first distribution, as confirmed by the Administrator. Second, the Administrator shall determine the number of Class Members who satisfy these two requirements and are therefore eligible for a second distribution. Third, the Administrator shall then distribute to each such Class Member an equal allocation of the Remaining Amount After First Distribution, subject to the caveat that no Class Member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the Class Member paid for use of PACER during the Class Period. The entire amount of the Remaining Amount After First Distribution will be allocated in the Second Distribution. To the extent a payment is made to a Class Member by the Administrator by check, any check that remains uncashed following one year after the United States has made the payment set forth in paragraph 12 shall be void, and the amounts represented by that uncashed check shall revert to the Settlement Trust for the Second Distribution. Prior to making the Second Distribution, the Administrator will notify in writing the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office at the following addresses that unclaimed or undistributed funds remain in the Settlement Trust.

If to the Administrative Office's Court Services Office:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Court Services Office
One Columbus Circle, N.E., Ste. 4-500
Washington, DC 20544

If to the Administrative Office's Office of General Counsel:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Office of General Counsel

One Columbus Circle, N.E. Ste. 7-290
Washington, DC 20544

24. Class Members who are eligible to receive a second distribution shall have three months from the time of the distribution to deposit or otherwise collect their payments. If, after this three-month period expires, unclaimed or undistributed funds remain in the Settlement Trust, those funds shall revert unconditionally to the U.S. Department of the Treasury. Upon expiration of this three month period, the Administrator will notify in writing the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office at the addresses referenced in paragraph 23 of this reverter. Instructions to effectuate the reverter will be provided to the Administrator following receipt of such notice, and the Administrator agrees to promptly comply with those instructions. The three-month period will run for all Class Members eligible to receive a second distribution from the date the earliest distribution is made of a second distribution to any Class Member eligible for such a distribution. Upon request, the Administrator will notify the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office of the date the three-month period commenced. To the extent a payment in connection with the Second Distribution is made to a Class Member by the Administrator by check, any check that remains uncashed following this three-month period shall be void, and the amounts represented by that uncashed check shall revert to the Settlement Trust for reverter to the United States.

25. The Class Representatives have agreed to a distribution structure that may result in a reverter to the U.S. Treasury for purposes of this settlement only.

26. Neither the parties nor their counsel shall be liable for any act or omission of the Administrator or for any mis-payments, overpayments, or underpayments of the Settlement Trust by the Administrator.

Fairness Hearing

27. As soon as possible and in no event later than 60 days after the execution of this agreement, Class Counsel shall submit to the Court a motion for an Order Approving Settlement Notice to the Class under Rule 23(e). The motion shall include (a) a copy of this settlement agreement, (b) the proposed form of the order, (c) the proposed form of notice of the settlement to be mailed to Class Members and posted on an internet website dedicated to this settlement by the Administrator, and (d) the proposed form of notice to be mailed to Class Members who were not included in the original class definition certified by the Court on January 24, 2017, as discussed in paragraph 4, and posted on the same website, advising them of their right to opt out. The parties shall request that a decision on the motion be made promptly on the papers or that a hearing on the motion be held at the earliest date available to the Court.

28. Under Rule 54(d)(2), and subject to the provisions of Rule 23(h), Plaintiffs will apply to the Court for an award of attorney fees and reimbursement of litigation expenses, and for service awards for the three Class Representatives in amounts not to exceed $10,000 per representative. These awards shall be paid out of the Aggregate Amount. When combined, the total amount of attorney fees, service awards, and administrative costs shall not exceed 20% of the Aggregate Amount. With respect to the attorney fees and service awards, the Court will ultimately determine whether the amounts requested are reasonable. The United States reserves its right, upon submission of Class Counsel's applications, to advocate before the Court for the use of a lodestar cross-check in determining the fee award, and for a lower service award for the Class Representatives should Plaintiffs seek more than $1,000 per representative. Plaintiffs' motion for an award of attorney fees and litigation expenses shall be subject to the approval of the Court and notice of the motion shall be provided to Class Members informing them of the request and their right to object to the motion, as required by Rule 23(h).

29. Within 30 days of the Court's entry of the Order Approving Settlement Notice to the Class, the Administrator shall mail or cause to be mailed the Notice of Class Action Settlement by email or first-class mail to all Class Members. Contemporaneous with the mailing of the notice and continuing through the date of the Fairness Hearing, the Administrator shall also display on an internet website dedicated to the settlement the relevant case documents, including the settlement notice, settlement agreement, and order approving the notice. The Notice of Class Action Settlement shall include an explanation of the procedures for allocating and distributing funds paid pursuant to this settlement, the date upon which the Court will hold a "Fairness Hearing" under Rule 23(e), and the date by which Class Members must file their written objections, if any, to the settlement.

30. Any Class Member may express to the Court his or her views in support of, or in opposition to, the fairness, reasonableness, and adequacy of the proposed settlement. If a Class Member objects to the settlement, such objection will be considered only if received no later than the deadline to file objections established by the Court in the Order Approving Settlement Notice to the Class. The objection shall be filed with the Court, with copies provided to Class Counsel and counsel for the United States, and the objection must include a signed, sworn statement that (a) identifies the case number, (b) describes the basis for the objection, including citations to legal authority and evidence supporting the objection, (c) contains the objector's name, address, and telephone number, and if represented by counsel, the name, address, email address, and telephone number of counsel, and (d) indicates whether objector intends to appear at the Fairness Hearing.

31. Class Counsel and counsel for the United States may respond to any objection within 21 days after receipt of the objection.

32. Any Class Member who submits a timely objection to the proposed settlement may appear in person or through counsel at the Fairness Hearing and be heard to the extent allowed by the Court. Any Class Members who do not make and serve written objections in the manner

provided in paragraph 30 shall be deemed to have waived such objections and shall forever be foreclosed from making any objections (by appeal or otherwise) to the proposed settlement.

33. After the deadlines for filing objections and responses to objections have lapsed, the Court will hold the Fairness Hearing at which it will consider any timely and properly submitted objections made by Class Members to the proposed settlement. The Court will decide whether to approve the settlement and enter a judgment approving the settlement and dismissing this lawsuit in accordance with the settlement agreement. The parties shall request that the Court schedule the Fairness Hearing no later than 150 days after entry of the Court's Order Approving Settlement Notice to the Class.

34. If this settlement is not approved in its entirety, it shall be void and have no force or effect.

Miscellaneous Terms

35. This agreement is for the purpose of settling Plaintiffs' claims in this action without the need for further litigation, and for no other purpose, and shall neither constitute nor be interpreted as an admission of liability on the part of the United States.

36. Each party fully participated in the drafting of this settlement agreement, and thus no clause shall be construed against any party for that reason in any subsequent dispute.

37. In the event that a party believes that the other party has failed to perform an obligation required by this settlement agreement or has violated the terms of the settlement agreement, the party who believes that such a failure has occurred must so notify the other party in writing and afford it 45 days to cure the breach before initiating any legal action to enforce the settlement agreement or any of its provisions.

38. The Court shall retain jurisdiction for the purpose of enforcing the terms of this settlement agreement.

39. Plaintiffs' counsel represent that they have been and are authorized to enter into this agreement on behalf of Plaintiffs and the class.

40. Undersigned defense counsel represents that he has been authorized to enter into this agreement by those within the Department of Justice with appropriate settlement authority to authorize the execution of this agreement.

41. This document constitutes a complete integration of the agreement between the parties and supersedes any and all prior oral or written representations, understandings, or agreements among or between them.

<REMAINDER OF PAGE LEFT BLANK; SIGNATURES PAGES TO FOLLOW>

AGREED TO ON BEHALF OF PLAINTIFFS:

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Attorneys for Plaintiffs

Date: 07/27/2022

AGREED TO FOR THE UNITED STATES:

MATTHEW M. GRAVES, D.C. Bar #481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: _____ 7-12-22
JEREMY S. SIMON, D.C. BAR #447956 Dated
Assistant United States Attorney
601 D. Street, NW
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Jeremy.Simon@usdoj.gov

Attorneys for the United States of America

EXHIBIT B

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

STIPULATION AND FIRST AMENDMENT
TO CLASS ACTION SETTLEMENT AGREEMENT

Through this Stipulation and Amendment, the parties agree to the following modification to the Class Action Settlement Agreement, executed by counsel for Plaintiffs on July 27, 2022 and counsel for Defendant on July 12, 2022 (the "Agreement").

Paragraph 3 of the Agreement shall be replaced with the following language:

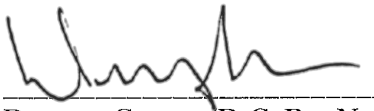
> 3. "Plaintiffs" or "Class Members," as used in this agreement, are defined to include all persons or entities who paid PACER fees between April 21, 2010, and May 31, 2018 ("the Class Period") regardless of when such persons or entities used the PACER system. Excluded from that class are: (i) persons or entities that have already opted out; (ii) federal agencies; and (iii) Class Counsel.

In addition, the parties agree that the phrases "who paid PACER fees between [date x] and [date y]" and "who paid fees for use of PACER between [date x] and [date y]," as used in paragraphs 3 and 4 of the Agreement, refer to the payment of PACER fees in the specified period rather than the use of PACER in the specified period. The parties further agree that each specified period in those paragraphs includes both the start and end dates unless otherwise specified.

Finally, in paragraph 27 of the Agreement, the parties agree that the reference to "60 days" shall be changed to "75 days."

The remainder of Agreement remains unchanged by this Stipulation and Amendment.

AGREED TO ON BEHALF OF PLAINTIFFS:



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Attorneys for Plaintiffs

Date: September 29, 2022

AGREED TO FOR THE UNITED STATES:

MATTHEW M. GRAVES, D.C. Bar No. 481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: _____ 9-29-22

JEREMY S. SIMON, D.C. Bar No. 447956 Dated
Assistant United States Attorney
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Jeremy.Simon@usdoj.gov

Attorneys for the United States of America

EXHIBIT C

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

STIPULATION AND SECOND AMENDMENT
TO CLASS ACTION SETTLEMENT AGREEMENT

Through this Stipulation and Second Amendment, the parties agree to the following modification to the Class Action Settlement Agreement, executed by counsel for Plaintiffs on July 27, 2022 and counsel for Defendant on July 12, 2022 (the "Agreement").

Paragraph 21 of the Agreement shall be replaced with the following language:

21. The Administrator shall complete disbursement of each Class Member's individual share of the recovery, calculated in accordance with the formula set forth in the previous two paragraphs, within 180 days of receipt of the Aggregate amount, or within 180 days after receiving from the Administrative Office the information set forth in paragraph 14 above, whichever is later. The Administrator shall complete disbursement of the amounts for attorney fees and litigation expenses to Class Counsel, and service awards to the named plaintiffs, within 30 days of the receipt of the Aggregate Amount.

Paragraph 23 of the Agreement shall be replaced with the following language:

23. ***Second Distribution.*** If, despite these efforts, unclaimed or undistributed funds remain in the Settlement Trust 180 days after the Administrator has made the distribution described in paragraph 21, those funds ("the Remaining Amount After

First Distribution") shall be distributed to Class Members as follows. First, the only Class Members who will be eligible for a second distribution will be those who (1) paid a total amount of more than $350 in PACER fees for use of PACER during the Class Period, and (2) deposited or otherwise collected their payment from the first distribution, as confirmed by the Administrator. Second, the Administrator shall determine the number of Class Members who satisfy these two requirements and are therefore eligible for a second distribution. Third, the Administrator shall then distribute to each such Class Member an equal allocation of the Remaining Amount After First Distribution, subject to the caveat that no Class Member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the Class Member paid for use of PACER during the Class Period. The entire amount of the Remaining Amount After First Distribution will be allocated in the Second Distribution. To the extent a payment is made to a Class Member by the Administrator by check, any check that remains uncashed 180 days after the Administrator has made the distribution described in paragraph 21, shall be void, and the amounts represented by that uncashed check shall revert to the Settlement Trust for the Second Distribution. Prior to making the Second Distribution, the Administrator will notify in writing the Administrative Office's Office of General Counsel and the Administrative Office's Court Services Office at the following addresses that unclaimed or undistributed funds remain in the Settlement Trust.

If to the Administrative Office's Court Services Office:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Court Services Office
One Columbus Circle, N.E., Ste. 4-500
Washington, DC 20544

If to the Administrative Office's Office of General Counsel:

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
Office of General Counsel
One Columbus Circle, N.E. Ste. 7-290
Washington, DC 20544

The remainder of Agreement remains unchanged by this Stipulation and Second Amendment.

AGREED TO ON BEHALF OF PLAINTIFFS:

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Attorneys for Plaintiffs

Date: 04-12-23

AGREED TO FOR THE UNITED STATES:

MATTHEW M. GRAVES, D.C. Bar No. 481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: _____ 4-11-23
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EXHIBIT D

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Legal Assistant: Mahek Ahmad, mahek@guptawessler.com

Deepak Gupta is the founding principal of Gupta Wessler, where his practice focuses on Supreme Court, appellate, and complex litigation on behalf of plaintiffs and public-interest clients. He is also a Lecturer at Harvard Law School, where he teaches the Harvard Supreme Court Litigation Clinic and seminars on forced arbitration, the civil justice system, and public interest entrepreneurship.

Over more than two decades, Deepak has led high-stakes litigation before the U.S. Supreme Court, all thirteen federal circuits, and state supreme courts from Alaska to West Virginia. He has also testified before the U.S. Senate, the U.S. House of Representatives, and the Presidential Commission on the Supreme Court. Much of Deepak's advocacy has focused on ensuring access to justice for consumers, workers, and communities injured by corporate or governmental wrongdoing. His varied clients have included national nonprofits, labor unions, state and local governments, public officials ranging from federal judges to members of Congress, professional athletes, distinguished artists and scientists, and people from all walks of life.

Deepak is "known as a skilled appellate lawyer" (*New York Times*) and "an all-star progressive Supreme Court litigator" (*Washington Post*) and has been described as "one of the emerging giants of the appellate and the Supreme Court bar," a "heavy hitter," a "principled" and "incredibly talented lawyer" (*Law 360*), and a "progressive legal rock star." *(New York Law Journal). Chambers USA* cites his "impressive" and "highly rated appellate practice," describing him as "an incredible oral advocate" who "writes terrific briefs" and maintains a "vibrant appellate practice focused on public interest cases and plaintiff-side representations." Deepak is consistently ranked as one of the "Best Lawyers" for Supreme Court cases by *Washingtonian* magazine; he is the only non-corporate lawyer on that list. Fastcase has honored Deepak as "one of the country's top litigators," noting that "what sets him apart" is his legal creativity. The *National Law Journal* has singled out Deepak's "calm, comfortable manner that conveys confidence" in oral argument. And *Empirical SCOTUS* cited one of Deepak's briefs as the single most readable in a recent U.S. Supreme Court term.

Deepak's Supreme Court and appellate advocacy has been recognized with several national awards, including the 2022 Appellate Advocacy Award from the National Civil Justice Institute, which "recognizes excellence in appellate advocacy in America," the Steven J. Sharpe Award for Public Service from the American Association for Justice, and the President's Award from the National Conference of Bankruptcy Judges.

Deepak is a veteran advocate before the U.S. Supreme Court, where he has filed over one hundred briefs and regularly presents oral argument. Highlights include:

- Deepak recently argued and won a landmark victory for access to justice in *Ford Motor Co. v. Montana Eighth Judicial District*, 141 S. Ct. 1017 (2021), in which the Supreme Court ruled that people injured by mass-market products can establish personal jurisdiction to sue out-of-state corporations where their injury occurred, bucking a trend of jurisdiction-limiting decisions stretching back four decades.

- In *Smith v. Berryhill,* 139 S.Ct. 1285 (2019), Deepak argued at the Court's invitation in support of a judgment left undefended by the Solicitor General. He is the first Asian-American to be appointed by the U.S. Supreme Court to argue a case.

- In 2017, Deepak's firm was counsel for parties in three argued merits cases before the Court; he was lead counsel in two, prevailing in both. In *Expressions Hair Design v. Schneiderman*, 137 S.Ct. 1144 (2017), he successfully argued a First Amendment challenge to a law designed to keep consumers in the dark about the cost of credit cards. And in *Hernández v. Mesa*, 137 S.Ct. 2003 (2017), he represented the family of a Mexican teenager killed in a cross-border shooting by a border patrol agent, successfully obtaining reversal of the Fifth Circuit's 15-0 en banc ruling that the officer was entitled to qualified immunity.

- Deepak argued *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011), a watershed case on corporations' use of forced arbitration to prevent consumers and workers from banding together to seek justice.

As an appellate advocate, Deepak is frequently sought out by trial lawyers to defend their most consequential victories or resurrect worthy claims on appeal—often after years of hard-fought litigation. He is currently defending several nine-figure and eight-figure verdicts on appeal, including $275-million and $185-million verdicts against Monsanto (over toxic chemical exposure), and a $200-million verdict against UnitedHealth (over insurance bad faith). He also serves as outside counsel to the American Association for Justice.

In addition to his appellate advocacy, Deepak designs and prosecutes class actions and other legal challenges from the ground up. Highlights include:

- In *National Veterans Legal Services Program v. United States*, Deepak is lead counsel in a nationwide class action in which he persuaded the Federal Circuit that the federal judiciary has been charging people millions of dollars in unlawful fees for online access to court records. The case recently culminated in a $125 million settlement that reimburses the majority of PACER users by 100 cents on the dollar.

- In another one-of-a-kind class action, Deepak represented all of the nation's bankruptcy judges, recovering $56 million in back pay for Congress's violation of the Judicial Compensation Clause. *The American Lawyer* observed: "it's

hard to imagine a higher compliment than being hired to represent federal judges."

Deepak also frequently leads high-stakes administrative and constitutional cases involving the federal government. In recent years, he has:

- persuaded the D.C. Circuit to issue a rare emergency injunction halting an attempted government takeover of the Open Technology Fund, an internet-freedom nonprofit;
- represented environmental groups in a successful procedural challenge to a midnight rule that would have crippled the ability of the incoming EPA leadership to rely on science in setting public-health standards;
- obtained a ruling striking down the Trump Administration's decision to halt IRS collection of nonprofit donor information by dark-money groups;
- established that the Acting Director of the Bureau of Land Management had been serving unlawfully for 424 days; and
- persuaded the Second Circuit, in *Citizens for Responsibility and Ethics v. Trump*, that President Trump's competitors in the hotel and restaurant industry had standing to sue him for accepting payments in violation of the Constitution's Emoluments Clauses.

Before founding his law firm in 2012, Deepak was Senior Counsel for Litigation and Senior Counsel for Enforcement Strategy at the newly created Consumer Financial Protection Bureau. As the first appellate litigator hired under Elizabeth Warren's leadership, he launched the new agency's amicus program, defended its regulations, and worked with the Solicitor General's office on Supreme Court cases.

For seven years previously, Deepak was an attorney at Public Citizen Litigation Group, where he founded and directed the Consumer Justice Project and was the Alan Morrison Supreme Court Assistance Project Fellow. Before that, Deepak worked on voting rights at the Civil Rights Division of the U.S. Department of Justice; prisoners' rights at the ACLU's National Prison Project; and religious freedom at Americans United for Separation of Church and State. He clerked for Judge Lawrence K. Karlton of the

U.S. District Court for the Eastern District of California and studied law at Georgetown, Sanskrit at Oxford, and philosophy at Fordham.

Deepak is a member of the American Law Institute and the Administrative Conference of the United States. He sits on the boards of the National Consumer Law Center, the Alliance for Justice, the Open Markets Institute, the Lawyers' Committee for Civil Rights Under Law, the People's Parity Project, the Civil Justice Research Initiative at UC Berkeley, the Biden Institute, and the Institute for Consumer Antitrust Studies. He is a judge of the American Constitution Society's Annual Richard D. Cudahy Writing Competition on Regulatory and Administrative Law.

Deepak's publications include *Arbitration as Wealth Transfer*, 5 Yale L. & Pol'y Rev. 499 (2017) (with Lina Khan), *Leveling the Playing Field on Appeal: The Case for a Plaintiff-Side Appellate Bar*, 54 Duq. L. Rev. 383 (2016), and *The Consumer Protection Bureau and the Constitution*, 65 Admin L. Rev. 945 (2013), as well as shorter pieces for *The New York Times*, SCOTUSblog, and *Trial* magazine. He has appeared in broadcast and print media including CNN, MSNBC, FOX News, ABC's *World News* and *Good Morning America*, NPR's *All Things Considered* and *Marketplace*, and *The New York Times*, *Washington Post*, *Los Angeles Times*, *Wall Street Journal*, and *USA Today*.

EXHIBIT E

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Jonathan E. Taylor is a principal at Gupta Wessler, where he represents plaintiffs and public-interest clients in Supreme Court, appellate, and constitutional litigation.

Since joining the firm a few months after it was founded in 2012, Jon has presented oral argument in the majority of federal circuits and has been the principal author of dozens of briefs filed in the U.S. Supreme Court and all levels of the state and federal judiciaries.

In 2021, Jon served as counsel of record in the U.S. Supreme Court in *Lombardo v. City of St. Louis*, in which he successfully obtained an unheard-of opinion summarily vacating a pro-officer decision on the merits of a police-excessive-force case. Jon was awarded the 2021 National Law Journal Rising Star award for his stellar appellate advocacy.

Among Jon's recent arguments are a Ninth Circuit appeal defending a $102 million class-action judgment against Walmart for violations of California labor law; a D.C. Circuit appeal for a certified class of tax-return preparers challenging the legality of

over $250 million in IRS-imposed fees; Third and Seventh Circuit appeals resulting in landmark decisions expanding the availability of paid-military leave; a summary-judgment hearing for a nationwide class of PACER users challenging the judiciary's fee structure for accessing court filings; a First Circuit appeal successfully defending Boston and Brookline's public-carry restrictions against a Second Amendment challenge; an Eighth Circuit appeal upholding a punitive-damages award against a constitutional attack; an Eighth Circuit appeal successfully reinstating a a jury's finding of negligence by GM in the design of a seat-belt system, and ordering a new trial on damages only; and an Eighth Circuit appeal successfully defeating a claim of immunity in a constitutional challenge to a city's "pay-to-play" system, in which people arrested for minor infractions are jailed if they can't afford to pay fees.

As these cases illustrate, Jon's work has spanned a wide range of topics—including the First Amendment, Second Amendment, Fourth Amendment, due process, Article III standing, personal jurisdiction, class certification, civil rights, administrative law, and a broad array of issues involving consumers' and workers' rights. He has represented classes of consumers and workers, tort victims, federal judges, members of Congress, national nonprofits, military reservists, former NFL players, retail merchants, and the families of people killed by police violence. Jon was also part of the litigation team that sued Donald Trump for violating the Constitution's Emoluments Claims.

Jon is from St. Louis, Missouri, and is a *cum laude* graduate of Harvard Law School. He joined the firm following his clerkship with Judge Ronald Lee Gilman of the U.S. Court of Appeals for the Sixth Circuit. In 2014, Jon received the President's Award from the National Conference of Bankruptcy Judges for his work helping to obtain a $56 million judgment on behalf of a nationwide class of federal bankruptcy judges.

Jon's experience at the firm includes the following significant matters:

- Jon presented oral argument in the Eighth Circuit and prepared the firm's successful briefing in *Bavlsik v. General Motors*, an appeal from a district court order vacating a jury's finding of negligence by General Motors in the design of a seat-belt system, following a rollover collision that left the plaintiff quadriplegic. After obtaining reversal in the Eighth

Circuit—which reinstated the jury's negligence finding and ordered a new trial on damages only—Jon served as counsel of record for the firm's brief in opposition in the U.S. Supreme Court, defeating GM's petition for certiorari. Brief in Opposition | Eighth Circuit Opinion | Eighth Circuit Opening Brief | Reply Brief | Oral Argument Audio

- Jon presented oral argument in the D.C. Circuit on behalf of a certified class of tax-return preparers challenging the legality of fees imposed by the IRS. The district court invalidated the fees—which total more than $250 million—as unauthorized. The case is *Montrois v. United States*, and the firm represents the class along with co-counsel from Motley Rice. D.C. Circuit Brief | Oral Argument Audio | Opinion Granting Summary Judgment | Motion for Summary Judgment | Opinion Granting Motion for Reconsideration | Motion for Reconsideration | Class Certification Opinion | Motion for Class Certification | Amended Complaint

- Jon presented oral argument in the First Circuit on behalf of the Town of Brookline, Massachusetts, successfully defending against a Second Amendment challenge to its restrictions on the public carry of firearms. He was also a principal author of the firm's appellate brief, which argues that the restrictions are constitutional because they rest on a seven-century Anglo-American tradition of public-carry regulations. First Circuit Brief

- Jon presented argument and was a principal author of the firm's briefing in *National Veterans Legal Services Program v. United States* (District Court for the District of Columbia), a certified nationwide class action challenging the federal judiciary's PACER fee structure as excessive. In March 2018, the court had a three-hour summary-judgment hearing in which Jon presented argument for the class. Shortly after the hearing, the court held that the judiciary had misused PACER fees during the class period, exceeding the scope of its statutory authorization to charge fees "only to the extent necessary" to recoup the costs of providing records through PACER. Our firm has been appointed class counsel in the case, along with co-counsel from Motley Rice. The lead plaintiffs are three nonprofit legal organizations (National Veterans Legal Services Program, National Consumer Law Center, and Alliance for Justice). Summary-Judgment Opinion | Motion for Summary Judgment | Reply in Support

of Motion for Summary Judgment | Opinion Certifying Class | Class-Certification Motion | Class-Certification Reply | Opinion Denying Motion to Dismiss | Opposition to Motion to Dismiss | Complaint

- Jon played a lead role in *Houser v. United States* (U.S. Court of Federal Claims), in which the firm represented a class of current and former federal bankruptcy judges and their beneficiaries in a suit against the federal government under the Constitution's Judicial Compensation Clause. His work helped obtain class certification and a $56 million judgment on behalf of his clients. Jon also took the lead in coordinating the administration of the class claims process with the Department of Justice. The National Conference of Bankruptcy Judges presented Jon with its President's Award for his work on the case. Summary Judgment Brief | Complaint

- Jon presented oral argument in the Eighth Circuit and prepared the firm's appellate brief in *Webb v. City of Maplewood*, concerning a constitutional challenge to a Missouri city's "pay-to-play" system, in which people arrested for minor municipal infractions are placed in jail if they can't afford to pay fees. Along with co-counsel from ArchCity Defenders and Tycko & Zavareei, the firm successfully defeated the city's claim to immunity in an interlocutory appeal to the Eighth Circuit. Eighth Circuit Opinion | Eighth Circuit Brief | Oral Argument Audio

- Jon has been a principal brief writer in all of the firm's First Amendment challenges to state credit-card surcharge laws brought in the wake of a $7 billion swipe-fee antitrust settlement with the major credit-card companies, including the firm's successful briefing in the U.S. Supreme Court in *Expressions Hair Design v. Schneiderman*. Jon's work helped obtain victories in California, Florida, and New York, where courts struck down the laws as unconstitutional. The cases are *Expressions Hair Design* (U.S. Supreme Court, Second Circuit), *Dana's Railroad Supply v. Bondi* (Eleventh Circuit), *Rowell v. Pettijohn* (Fifth Circuit), and *Italian Colors v. Harris* (Ninth Circuit). Petitioners' Brief (Expressions) | Petitioners' Reply (Expressions) | Supreme Court Opinion | Petition for Certiorari (Expressions)| Petition for Certiorari (Rowell) | Second Circuit Brief | Eleventh Circuit Brief | Eleventh Circuit Reply | Eleventh Circuit Opinion | Fifth

Circuit Brief | Fifth Circuit Reply | Ninth Circuit Brief | Ninth Circuit Opinion | More Filings in These Matters

- Jon was one of the lead authors of the firm's briefing in the U.S. Supreme Court in *Hernández v. United States*, a case arising out of a close-range, cross-border shooting of an unarmed Mexican teenager by a U.S. border patrol agent standing on U.S. soil. After granting the firm's petition, a unanimous Supreme Court reversed the en banc Fifth Circuit's 15-0 holding that the border guard was entitled to qualified immunity. Supreme Court Opinion | Petitioners' Brief | Petitioners' Reply | Petition for Certiorari | Reply Brief | Supplemental Brief

- Jon is part of the litigation team that has sued Donald Trump in two cases for violating the Constitution's Foreign and Domestic Emoluments Clauses. The first case, brought on behalf of businesses who compete with Trump for governmental patrons, is *Citizens for Responsibility and Ethics in Washington v. Trump* and is currently on appeal to the Second Circuit. The second case, brought on behalf of Maryland and the District of Columbia, is *District of Columbia v. Trump* and is currently proceeding in the District of Maryland, where the district court has denied Trump's motion to dismiss for lack of standing and held that the case is justiciable. Second Circuit Brief | Opinion on Justiciability (Maryland) | Opposition to Motion to Dismiss (Maryland) | More Filings in These Matters

- Jon played a leading role in the firm's briefing in *Chevron v. Donziger* (Second Circuit), a RICO action brought by Chevron in an effort to avoid paying an $8.6 billion Ecuadorian judgment holding the company accountable for decades of pollution of the Amazon rainforest. Petition for Certiorari | Petition for Rehearing | Opening brief | Reply Brief | Post-Argument Letter Brief | Motion for Judicial Notice | Motion to Dismiss for Lack of Subject Matter Jurisdiction | Reply in Support of Motion to Dismiss | More Filings in This Matter

- Jon played a key role in the firm's representation of 34 former NFL players currently challenging the proposed global settlement of all claims against the NFL related to brain injuries caused by professional football. He was a primary author of the firm's petition for certiorari in the U.S. Supreme

Court. The case is *In re National Football League Players Concussion Injury Litigation* (U.S. Supreme Court, Third Circuit). Petition for Certiorari | Petitioners' Reply Brief | Third Circuit Opening Brief | Third Circuit Reply Brief

- Jon has written *amicus* briefs on behalf of Everytown for Gun Safety, the nation's largest gun-violence-prevention organization, in more than half a dozen Second Amendment cases threatening common-sense gun laws, including *Peruta v. San Diego County*, in which the en banc Ninth Circuit adopted the firm's historical analysis, as well as *Wrenn v. District of Columbia* (D.C. Circuit), *Grace v. District of Columbia* (D.C. Circuit), *Kolbe v. Hogan* (en banc Fourth Circuit), *Silvester v. Harris* (Ninth Circuit), *Peña v. Lindley* (Ninth Circuit), and *Norman v. Florida* (Florida Supreme Court). The briefs in these cases oppose challenges to public-carry regulations in California and the District of Columbia, as well as Maryland's assault-weapons ban and California's 10-day waiting period and "microstamping" law. Peruta Amicus Brief | Peruta En Banc Opinion | Grace Amicus Brief | Wrenn Amicus Brief | Kolbe Amicus Brief (en banc) | Kolbe Amicus Brief (petition stage) | Kolbe En Banc Opinion | Silvester Amicus Brief | Silvester Opinion | Peña Amicus Brief | Norman Opinion

- Jon has written two U.S. Supreme Court *amicus* briefs on behalf of the co-sponsors of the Fair Housing Act of 1968 and other current and former Members of Congress, explaining why Congress intended the Act to permit disparate-impact liability. His work was quoted in a New Yorker article discussing the issue. In June 2015, the Supreme Court issued a surprise opinion upholding disparate-impact liability, in which Justice Kennedy adopted the firm's historical analysis. Texas Department of Housing Amicus Brief | Mount Holly Amicus Brief | U.S. Supreme Court Opinion in Texas Department of Housing

- Jon played a key role in the firm's high-profile petition for en banc review in *Carrera v. Bayer* (Third Circuit), a controversial class-action case about the ascertainability requirement. Jon's efforts helped persuade four judges to dissent from the denial of en banc review and to call on the Federal Rules Committee to examine the issue. Jon has continued to focus on ascertainability issues since *Carrera*, most recently successfully opposing a petition filed by former

Solicitor General Paul Clement in *Soutter v. Equifax* (Fourth Circuit). Carrera Petition | Soutter Answer to Interlocutory Appeal Petition

- Jon has been the lead author of briefs filed in a number of important appeals concerning workers' and consumers' rights, including *Alaska Trustee v. Ambridge* (Supreme Court of Alaska), in which he successfully obtained a ruling that the Fair Debt Collection Practices Act covers foreclosures, and *Mais v. Gulf Coast Collection Bureau* (Eleventh Circuit), concerning the meaning of the Telephone Consumer Protection Act's "prior express consent" requirement. He presented oral argument in both cases. He also presented argument before the Ninth Circuit in *Koby v. ARS National Services*, in which he argued a novel question of class-action jurisdiction, successfully objecting to a nationwide class-action settlement that sought to extinguish millions of claims in exchange for nothing. Ambridge Brief | Alaska Supreme Court Opinion in Ambridge | Oral Argument Video in Ambridge | Mais Brief | Mais Answer to Interlocutory Appeal Petition | Objector's Brief in Koby | Objector's Reply Brief in Koby | Ninth Circuit Opinion in Koby | Oral Argument Video in Koby

- Jon was also a principal drafter in several other cases concerning workers' and consumers' rights, such as *Brady v. Deloitte & Touche* (Ninth Circuit), an appeal from decertification of a class of unlicensed audit employees at Deloitte & Touche who allege overtime violations; *Kingery v. Quicken Loans* (Fourth Circuit), an appeal addressing what it means for a credit-reporting agency to "use" a credit score for purposes of the Fair Credit Reporting Act; *Cole v. CRST* (Ninth Circuit), a petition involving the application of the Supreme Court's *Tyson Foods* decision to California wage-and-hour class actions; and *Dreher v. Experian* (Fourth Circuit), in which Jon twice helped defeat petitions for interlocutory review raising questions of Article III standing, class certification is statutory-damages cases, and application of the Supreme Court's decision in *Safeco v. Burr*. Brady Reply Brief (other briefing in this case filed under seal) | Cole Rule 23(f) Petition | Kingery Opening Brief | Kingery Reply Brief | Dreher Answer to Rule 23(f) Petition | Dreher Answer to § 1292(b) Petition

- Jon was the primary draftsman of the firm's brief opposing certiorari in *American Express v. Italian Colors* (U.S. Supreme Court), a major antitrust case asking whether courts must enforce arbitration even when doing so would preclude the plaintiffs from vindicating their federal statutory rights. Jon also assisted the firm's co-counsel, former Solicitor General Paul Clement, in writing the merits brief and helped coordinate amicus briefs in support of the respondents filed by the United States, 22 States, and various scholars, trade groups, and public-interest organizations. Brief in Opposition

- Jon was a primary drafter of *amicus* briefs filed on behalf of leading nonprofit organizations in two important Supreme Court cases. The first is *Tyson Foods v. Bouaphakeo*, in which the Supreme Court adopted the firm's argument for why the Court should not decertify a class of workers at a slaughterhouse seeking overtime compensation improperly denied to them. The second is *Sheriff v. Gillie*, in which the firm represents three consumer-advocacy groups supporting a challenge to debt-collecting law firms' misleading practice of using Attorney General letterhead to collect debts owed to the state constituted clear violations of the Fair Debt Collection Practices Act. Brief of Nonprofit Organizations in Tyson | U.S. Supreme Court Opinion in Tyson | Brief of Consumer-Advocacy Groups in Gillie

- Jon wrote an *amicus* brief on behalf of former Congressman Patrick Kennedy, the author and lead sponsor of the Mental Health Parity and Addiction Equity Act, in an important test case concerning the Act's scope, in which the Second Circuit held that the Act applies to claims administrators. The case is called *New York State Psychiatric Association v. UnitedHealth* (Second Circuit). Amicus Brief of Former Congressman Kennedy | Second Circuit Opinion

- Jon helped draft the firm's merits briefing in *McBurney v. Young* (U.S. Supreme Court), a constitutional challenge under the Privileges and Immunities Clause and dormant Commerce Clause to a provision of the Virginia Freedom of Information Act denying non-residents the same right of access to public records that Virginia affords its own citizens. Merits Brief for Petitioners | Merits Reply for Petitioners

Before his judicial clerkship, Jon spent a year at Public Citizen Litigation Group on a Redstone Fellowship from Harvard. While there, Jon worked with Deepak Gupta to prepare for his Supreme Court argument in *AT&T Mobility v. Concepcion*, served as principal author of a Supreme Court amicus brief concerning the False Claims Act, wrote a Ninth Circuit brief in a consumer case, and helped advise a public-health nonprofit on federal preemption of food-labeling laws. Jon also worked as an intern at Public Citizen during law school, where he worked with Deepak Gupta and Brian Wolfman on their successful Supreme Court merits brief in *Mohawk Industries v. Carpenter* and assisted with the brief filed on behalf of Senators John McCain and Russell Feingold in *Citizens United v. Federal Election Commission*.

Jon has previously worked on microfinance and antipoverty issues in Ethiopia, studied Spanish in Chile, and helped prepare a Medicaid fraud case against drug companies as an intern in the Missouri Attorney General's Office. During law school, he helped teach legal writing as a member of the Board of Student Advisers, competed in the Upper-Level Ames Moot Court Competition, and had the Best Appellee Brief in his first-year legal writing section. Jon received his undergraduate degree, *magna cum laude*, from the University of Southern California, where he was elected to Phi Beta Kappa, was awarded a Presidential Scholarship, and was a National Merit Scholar. He is a member of the bar of the District of Columbia and the Supreme Court of the United States.

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. 1:16-cv-00745-PLF

DECLARATION OF MEGHAN S.B. OLIVER

I, Meghan S.B. Oliver, declare as follows:

1. I am a member of the law firm of Motley Rice LLC ("Motley Rice"). I submit this declaration in support of Class Counsel's application for an award of attorneys' fees in connection with services rendered in the above-captioned class action, as well as for reimbursement of expenses incurred by my firm in connection with the action. I have personal knowledge of the matters set forth herein, based upon my active participation in all pertinent aspects of this litigation, my review of the firm's litigation files, and consultation with other Motley Rice personnel who worked on this case. I could and would testify competently to matters set forth herein if called upon to do so.

2. Motley Rice has served as counsel in this litigation since it was filed on April 21, 2016, and has served as Co-Class Counsel since its appointment on January 24, 2017. In this capacity, my firm (often in conjunction with Co-Class Counsel) performed the following tasks,

among others: conducted a factual and legal investigation of the claims asserted; reviewed, drafted, and assisted with district-court and appellate filings; assisted in preparation for district-court and appellate oral arguments; participated in hearings; conducted limited formal and informal discovery; drafted notice documents; participated in mediation; negotiated the settlement; supervised all notice, notification, and dispute procedures implemented by the class administrator, KCC; and responded to hundreds of contacts and inquiries from class members.

3. The information in this declaration regarding the time spent on the case by Motley Rice attorneys and other professional support staff is based on contemporaneous daily time records regularly prepared and maintained by my firm. The information in this declaration regarding expenses is based on the records of my firm, which are regularly prepared and maintained in the ordinary course of business. These records are prepared from expense vouchers, check records, and other source materials that are an accurate record of the expenses incurred. I reviewed these time and expense records in connection with the preparation of this declaration.

4. The purpose of this review was to confirm both the accuracy of the time entries and expenses as well as the necessity for, and reasonableness of, the time and expenses committed to the litigation. Time billed by any timekeeper who spent fewer than 20 hours working on the case has been excluded from my firm's lodestar.

5. The administration of this settlement to date has been novel and complex, and has required more attorney work than is typical in a class-action settlement. This settlement differs in a number of ways from typical class-action settlements. First, there is no claims procedure. Notice has been made using PACER billing data maintained by the Administrative Office of the U.S. Courts (the AO), and settlement payments also will be made based on that data in order to maximize distribution of settlement funds. This has proved to be a complicated process. For

example, the class members are the *payers* of the PACER fees, but the data maintained by the government reflects accountholder information. Sometimes the accountholders did not pay the PACER fees themselves. The most common scenario where that mismatch occurs is an employer (e.g., a law firm or corporation) directly paying its employees' PACER fees.

6. To make every effort to ensure that class members receive proper proceeds from the settlement, my firm worked with KCC to design a website that permits (1) someone who paid PACER fees on someone else's behalf (e.g., a law firm paying PACER fees incurred by its attorneys) to so notify the claims administrator (Category 1 Notification); and (2) someone whose PACER fees were paid by someone else (e.g., a lawyer at a law firm that paid its attorneys' PACER fees) to so notify the claims administrator (Category 2 Notification). Category 1 Notifications trigger a dispute procedure. For example, if a law firm submits a Category 1 Notification on the class website that it paid PACER fees for a dozen specified accounts held by individual attorneys at the firm, each of those dozen attorneys will receive an email informing them that someone has notified the claims administrator that they paid that individual's PACER fees. Those individuals will then have 10 days to dispute the accuracy of that notification. Those disputes will be resolved before any distribution of settlement proceeds. As of August 24, 2023, we have received 33 Category 1 Notifications, 386 Category 2 Notifications, and 1 dispute. The website will accept notifications through September 5, 2023.

7. Class Counsel has learned through this notification process that PACER account identifiers changed in 2014 from alphanumeric identifiers (e.g., AB1234) to seven-numeric-digit identifiers (e.g., 1234567). The data initially provided by the government did not include any alphanumeric identifiers. This presents a problem for some payers (i.e., employers who paid on behalf of their employees) whose accounting records from 2010 – 2014 reflect only alphanumeric

identifiers. We modified the website to permit submission of alphanumeric identifiers, and the government agreed in mid-August to provide a cross-walk reference permitting former alphanumeric account numbers to be linked to the replacement seven-digit account identifiers. They have not yet provided that data.

8. Last, given the nature of the claims in this case—that public access to court records should be free to the greatest extent possible—Class Counsel have made every effort to make nearly all of the filings in this case available at no cost on the class website.

9. To account for what is expected to be extensive attorney work in the coming months, handling class member contacts, notifications and disputes, I expect that my firm will spend roughly an additional 750 hours over the next six months, or roughly $500,000 in lodestar. That estimate is based on the nature of the work and time spent on these tasks since notice was sent in July.

10. As a result of this review, I believe that the time reflected in the firm's lodestar calculation and the expenses for which payment is sought as set forth in this declaration are reasonable in amount and were necessary for the effective and efficient prosecution and resolution of the litigation.

11. The current hourly rates for the attorneys and professional support staff in my firm are the usual and customary rates set by the firm in complex litigation. These hourly rates are the same as, or comparable to, the rates accepted by courts in other complex class-action litigation. My firm's rates are set based on, among other factors, periodic analysis of rates charged by firms performing comparable work and that have been approved by courts. Different timekeepers within the same employment category (e.g., members, associates, staff attorneys, paralegals, etc.) may have different rates based on a variety of factors, including years of practice, years at the firm, year

in the current position (e.g., years as a member), relevant experience, and the rates of similarly experienced peers at our firm or other firms. For personnel who are no longer employed by my firm, the "current rate" used in the lodestar calculation is based upon the rate for that individual in his or her final year of employment at Motley Rice.

Hours and Lodestar Information

12. Below is a summary lodestar chart which lists (1) the name of each timekeeper in my firm who devoted more than 20 hours to the case; (2) their title or position (e.g., member, associate, paralegal); (3) the total number of hours they worked on the case from its inception through and including August 17, 2023; (4) their current hourly rate; and (5) their lodestar (at both current and historical rates).

Name	Title	Total Hours	Current Rate	Total Lodestar
Narwold, William	Member	714.75	$1,250	$893,437.50
Oliver, Meghan	Member	570.45	$950	$541,927.50
Tinkler, William	Associate	139.15	$550	$76,532.50
Loper, Charlotte	Associate	348.40	$525	$182,910.00
Bobbitt, Ebony	Associate	86.90	$525	$45,622.50
Rublee, Laura	Staff Attorney	184.20	$500	$92,100.00
Janelle, Alice	Legal Secretary	48.60	$380	$18,468.00
Shaarda, Lynn	Paralegal	27.40	$350	$9,590.00

13. The total number of hours expended by Motley Rice in this case from inception through August 17, 2023 is 2,119.85 hours. The total resulting lodestar for my firm is $1,860,588.00 based on current rates.

Expense Information

14. My firm's lodestar figures are based on the firm's hourly rates, which do not include charges for expense items. Expense items are billed separately, and such charges are not duplicated in my firm's hourly rates.

15. My firm seeks an award of $29,654.98 for expenses and charges incurred in connection with the prosecution of the case from its inception through August 17, 2023.

16. **Mediator:** $9,925.00. Motley Rice paid Resolutions LLC for the plaintiffs' portion of mediation services, specifically provided by Professor Eric D. Green.

17. **Travel, Food, and Lodging Expenses:** In connection with the prosecution of this case, my firm spent a total of $8,496.86 on out-of-town travel, including travel costs such as airfare, lodging, and meals while traveling.

18. **Other Expenses:** The following is additional information about certain other categories of expenses:

a. Court Fees: $938.40 were paid to the Federal Circuit for my attorney admission fee, and for *pro hac vice* applications to this Court.

b. Online Legal and Factual Research: $7,605.08 was paid to Westlaw and Lexis/Nexis for online legal research and cite-checking of briefs.

c. Photocopying and Printing: $2,464.24. This includes copies and binders made in-house for hearings and the everyday prosecution of this case. It also includes the cost of a professional printer for the appellate filings in this case.

d. Telephone: $146.35. These charges were for long-distance telephone and conference calling.

e. Postage & Express Mail: $79.05.

19. In addition to the expenses incurred by my firm, Class Counsel seeks an award of $977,000 for notice and distribution of the settlement fund. This is based on notice expenses already incurred, and an estimate provided by KCC in late 2022 for settlement notice and distribution. Given complications experienced to date, we seek an additional $100,000 to account for unexpected complexities in the notification and dispute process and distribution of the settlement fund.

Dated: August 28, 2023

Respectfully submitted,

Meghan S.B. Oliver

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. 1:16-cv-00745-PLF

DECLARATION OF GIO SANTIAGO REGARDING IMPLEMENTATION OF SETTLEMENT NOTICE PROGRAM

I, Gio Santiago, declare as follows:

1. My name is Gio Santiago. I have personal knowledge of the matters set forth herein.

2. I am a Senior Project Manager of Client Services at KCC Class Action Services, LLC ("KCC").

3. This declaration details the implementation of the settlement notice program ordered by the Court on May 8, 2023, and described in the Declaration of Christie K. Reed Regarding Notice Procedures (ECF# 141-4, filed on October 11, 2022) and the Supplemental Declaration of Christie K. Reed Regarding Revised Notice Procedures (ECF# 149-5, filed on April 12, 2023) ("Notice Plan").

NOTICE PLAN IMPLEMENTATION

4. KCC previously provided notice to approximately 395,081 individuals and entities,[1] identified via PACER billing records, who paid PACER billing fees between April 21,

[1] "[I]ndividuals 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 received PACER bills for more than one account, provided that the shared email address extension

2010 and April 21, 2016 ("Original Class Members"). The Parties subsequently agreed to extend the class period through May 31, 2018.

Data Analysis

5. On June 7, 2023, the Defendant provided contact information for approximately 368,966 Original Class Members who paid PACER fees for the first time between April 22, 2010 and April 21, 2016. Defendant also provided additional contact information for approximately 210,267 Class Members who paid PACER fees for the first time between April 22, 2016 and May 31, 2018 ("New Class Members").

6. KCC used this information to identify the total number of unique Original and New Class Members to create the class mailing list, removing Original Class Members who previously opted out of the Class.

7. KCC identified 368,966 Original Class Members and 138,023 New Class Members on the final Notice List.

Individual Notice

8. Beginning on July 6, 2023, an email notice was sent to 238,040 Original Class Member email addresses and 98,163 New Class Member email addresses identified in the Notice List. The notice content was included in the body of the email, rather than as an attachment, to avoid spam filters and improve deliverability. The email contained a link to the settlement website. The email delivery was attempted three times to maximize the probability that it would be received. Original Class Members who previously received notice and the opportunity to opt out in 2017 were sent an email Notice that provided them with the right to object to the settlement. New Class Members who were not provided with notice in 2017 were sent an email Notice that provided them with the right to opt out or object. A true and correct copy of the Email Notice that was sent to

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is one of the following: @oig.hhs.gov, @sol.doi.gov, @state.gov, @bop.gov, @uspis.gov, @cbp.dhs.gov, @ussss.dhs.gov, @irscounsel.treas.gov, @dol.gov, @ci.irs.gov, @ice.dhs.gov, @ssa.gov, @psc.uscourts.gov, @sec.gov, @ic.fbi.gov, @irs.gov, and @usdoj.gov. 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 addresses (accounting@dol.gov, johndoe1@dol.gov, johndoe2@dol.gov, and janedoe1@dol.gov) would receive notice.

Original Class Members is attached as **Exhibit A**. A true and correct copy of the Email Notice that was sent to New Class Members is attached as **Exhibit B**.

9. Since emailing the Notice to Class Members, KCC has received 70,557 email bounce-backs. These email bounce-backs were matched to the Notice List and a single-postcard notice was mailed to the corresponding postal address for each Class Member.

10. Beginning on July 21, 2023, a single-postcard notice was sent to 79,305 Original Class Members and 20,924 New Class Members. Original Class Members who previously received notice and the opportunity to opt out in 2017 were sent a single-postcard Notice that provided them with the right to object to the settlement. New Class Members who were not provided with notice in 2017 were sent a single-postcard Notice that provided them with the right to opt out or object. A true and correct copy of the single-postcard Notice that was sent to Original Class Members is attached as **Exhibit C**. A true and correct copy of the single-postcard Notice that was sent to New Class Members is attached as **Exhibit D**.

11. Since mailing the single-postcard Notices to Class Members, KCC has received 2,371 Notices returned by the USPS as undeliverable. Of these 1,328 have been re-mailed to new addresses obtained using credit and other public source databases.

Publication Notice

12. On July 6, 2023, KCC caused a press release to be distributed via Cision PR Newswire. The press release was issued nationwide to a variety of media, as well as to a curated list of journalists who requested to receive and commonly provide news and information about the banking industry. As of August 22, 2023, the press release has been picked up[2] a total of 380 times with exposure to potential audience of 179,636,668. The press release appeared on broadcast media, newspaper and online news websites within industries such as media and information, financial, and general news. A true and correct copy of the press release as it was posted on Cision PR Newswire's website is attached as **Exhibit E**.

[2] A pick up is a full text posting of the press release online and in social media.

13. On August 11, 2023 and August 25, 2023, KCC caused a notice, consisting of a headline, call to action, and link to the settlement website, to be published in the electronic newsletter of American Bankers Association ("ABA") *Banking Journal*. The *ABA Banking Journal eNewsletter* is delivered to over 13,250 subscribers. A true and correct copy of the notices as they appeared in *Banking Journal* is attached as **Exhibit F**.

14. Despite KCC's efforts and those made by Class Counsel, *The Slant* (*Bank Director's* e-newsletter), refused to publish the class action settlement notice.

Complexities & Complications

15. On July 26, 2023 it was discovered that 184,478 records received notice of pendency of the action in 2017, but had not received notice of the settlement. These records were matches between the 2017 class data and the 2023 original class member data. As a result, these records were considered duplicates in the system and were inadvertently excluded from the notice group. These records should have received the Notice that was sent to Original Class Members. In response, on August 7, 2023, KCC caused the Original Class Member notice (Exhibit A & Exhibit C) to be sent to these class members. Because these individuals had an opportunity to opt out in 2017, this Notice did not contain the option to opt out of the settlement.

16. On July 14, 2023 it was discovered that 53,446 records were mistakenly sent the notice that provided an opportunity to opt out. All of these individuals received notice and an opportunity to opt out in 2017. In response, on August 7, 2023, KCC caused a corrective notice to be emailed to these class members. A true and correct copy of the corrective email notice is attached as **Exhibit G**.

17. KCC researched internally and confirmed ten opt outs were submitted online from Class Members included in these 53,446 records. KCC immediately corrected its records and removed the ability for these Class Members to submit an opt out request online. As a result, seven of the Class Members who opted out received a corrective notice explaining the situation. A true and correct copy of the corrective email notice to opt outs is attached as **Exhibit H**. The remaining

three Class Members were federal agencies and Counsel determined corrective notice was not required. These ten opt outs are not included in the opt out totals in section 21 below.

Website

18. KCC has made continuous updates to the case-specific website that was established during the class certification stage. At the website, www.pacerfeesclassaction.com, Class Members are able to obtain additional information and documents about the settlement, including answers to frequently asked questions, the class notice, and nearly all filings from both the district-court proceedings and the federal circuit at no charge. In addition, users are able to update their address, submit an exclusion request form, designate someone else as the payer of their invoices, notify KCC that they paid fees on someone else's behalf, and dispute when someone claims they paid fees on their behalf.

19. During implementation, it was discovered that PACER changed user account numbers in 2014 from alphanumeric identifiers to seven-digit identifiers. The data that KCC received contained only seven-digit identifiers and the website was set-up accordingly. However, some individuals did not possess the new seven-digit identifiers making it impossible for them to submit a payee designation, payor request or dispute. Upon being notified of this constraint, Class Counsel contacted the Defendant to request a list of all corresponding alphanumeric identifiers. This information has not yet been received. Anticipating receiving the data, KCC added a functionality to the website that allowed people to enter their seven-digit identifiers or alphanumeric identifiers so payee designations, payor requests and disputes may be processed. Once Defendant provides the corresponding alphanumeric identifiers, KCC will match them to the corresponding seven-digit account numbers and distribute an email notifying accountholders of the opportunity to dispute, as appropriate.

Toll-Free Number

20. On June 7, 2023 KCC established a case-specific toll-free number to allow Class Members to call to learn more about the case in the form of frequently asked questions. The toll-

free number also allows Class Members to request to have additional information mailed to them. As of August 24, 2023, KCC has received a total of 247 calls to the telephone line.

Opt Outs

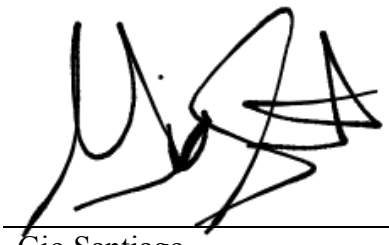
21. The exclusion deadline was August 20, 2023. As of August 24, 2023, KCC has received 39 opt out requests in 2023. Of these, 31 were submitted online and 8 were received via postal mail. One additional request was mailed to the Court. KCC expects additional timely-filed exclusion forms may arrive via postal mail over the next few weeks. A list of the exclusion requests is attached as **Exhibit I**. Of the nine total mailed requests, six were received for accounts that had an opportunity to opt out in 2017, and thus are untimely and not valid. Those requests are noted as untimely in **Exhibit I**.

Payment Designations & Disputes

22. As of August 24, 2023, KCC has received 419 Payment Designation Requests, of which 386 have been submitted by account holders informing KCC that someone paid PACER fees on their behalf and 33 have been submitted by entities informing KCC that it paid PACER fees on behalf of an account holder. In addition, KCC has received 1 Payment Dispute Notification. KCC expects additional Payment Designation Requests and Payment Dispute Notifications to be filed prior to the Final Approval Hearing.

I, Gio Santiago, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 25, 2023.



Gio Santiago

EXHIBIT

A

Account ID: <<Claim8>>
PIN: <<PIN>>

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and May 31, 2018, a proposed class action settlement may affect your rights.

Nonprofit groups filed this lawsuit against the United States, 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-PLF, is pending in the U.S. District Court for the District of Columbia. This notice is to inform you that the parties have decided to settle the case for $125,000,000. This amount is referred to as the common fund. The settlement has been preliminarily approved by the Court.

Why am I receiving this notice? You are receiving this notice because you may have paid PACER fees between April 21, 2010 and May 31, 2018. This notice explains that the parties have entered into a proposed class action settlement that may affect you. You may have legal rights and options that you may exercise before the Court decides to grant final approval of the settlement.

What is this lawsuit about? The lawsuit alleges that federal courts have been charging unlawfully excessive PACER fees. It alleges 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 federal court records, and that the fees for use of PACER exceed its costs. The lawsuit further alleges that the excess PACER fees have been used to pay for projects unrelated to PACER. The government denies these claims and contends that the fees are lawful. The parties have agreed to settle.

Who represents me? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC to represent the Class as Class Counsel. You do not have to pay Class Counsel or anyone else in order to participate. Class Counsel's fees and expenses will be deducted from the common settlement fund. You may hire your own attorney, if you wish, at your own expense.

What are my options?

OPTION 1. Do nothing. If you are an accountholder and directly paid your own PACER fees, you do not have to do anything to receive money from the settlement. You will automatically receive a check for your share of the common fund assuming the Court grants final approval of the settlement. If someone directly paid PACER fees on your behalf, you should direct your payment to that individual or entity at www.pacerfeesclassaction.com no later than Tuesday, September 5th, 2023. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds.

OPTION 2. Object or go to a hearing. If you paid PACER fees, you may object to any aspect of the proposed settlement. Your written objection must be sent by Tuesday, September 12th, 2023 and submitted as set out in the *Notice of Proposed Class Action Settlement* referred to below. You also may request in writing to appear at the Fairness Hearing on Thursday, October 12th, 2023.

How do I get more information? This is only a summary of the proposed settlement. For a more detailed *Notice of Proposed Class Action Settlement*, additional information on the lawsuit and proposed settlement, and a copy of the Settlement Agreement, visit www.pacerfeesclassaction.com, call 866-952-1928, or write to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA, 90030-1134.

EXHIBIT B

Account ID: <<Claim8>>
PIN: <<PIN>>

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and May 31, 2018, a proposed class action settlement may affect your rights.

Nonprofit groups filed this lawsuit against the United States, claiming that the government has unlawfully charged users of PACER (the Public Access to Court Electronic Records system) 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-PLF, is pending in the U.S. District Court for the District of Columbia. This notice is to inform you that the parties have decided to settle the case for $125,000,000. This amount is referred to as the common fund. The settlement has been preliminarily approved by the Court.

Why am I receiving this notice? You are receiving this notice because you may have first paid PACER fees between April 22, 2016 and May 31, 2018. This notice explains that the parties have entered into a proposed class action settlement that may affect you. You may have legal rights and options that you may exercise before the Court decides to grant final approval to the settlement.

What is this lawsuit about? The lawsuit alleges that federal courts have been charging unlawfully excessive PACER fees. It alleges 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 federal court records, and that the fees for use of PACER exceed its costs. The lawsuit further alleges that the excess PACER fees have been used to pay for projects unrelated to PACER. The government denies these claims and contends that the fees are lawful. The parties have agreed to settle.

Who represents me? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC to represent the Class as Class Counsel. You do not have to pay Class Counsel or anyone else to participate. Class Counsel's fees and expenses will be deducted from the common fund. 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. You may hire your own attorney, if you wish, at your own expense.

What are my options?

OPTION 1. Do nothing. Stay in the settlement. By doing nothing, you remain part of this class action settlement. If you are an accountholder and directly paid your own PACER fees, you do not have to do anything further to receive money from the settlement. You will be legally bound by all orders and judgments of this Court, and will automatically receive a check for your share of the common fund assuming the Court grants final approval of the settlement. By doing nothing you give up any rights to sue the United States government separately about the same claims in this lawsuit. If someone directly paid PACER fees on your behalf, you should direct your payment to that individual or entity at www.pacerfeesclassaction.com no later than Tuesday, September 5th, 2023. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds.

OPTION 2. Exclude yourself from the settlement. Alternatively, you have the right to not be part of this settlement by excluding yourself or "opting out" of the settlement and Class. If you exclude yourself, you cannot get any money from the settlement, 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 *National Veterans Legal Services Program, et al. v. United States,* Case No. 1:16-cv-00745-PLF. Be sure to include your name, address, telephone number, email address, and signature. You must mail your Exclusion Request, **postmarked by Sunday, August 20th, 2023** to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.
2. Complete and submit online the Exclusion Request form found [here] by Sunday, August 20th, 2023.
3. Send an "Exclusion Request" Form, available [here], by mail. You must mail your Exclusion Request form, **postmarked by Sunday, August 20th, 2023** to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.

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.

OPTION 3. Stay in the Class and object or go to a hearing. If you paid PACER fees and do not opt out of the settlement, you may object to any aspect of the proposed settlement. Your written objection must be **sent by Tuesday, September 12th, 2023** and submitted as set out in the *Notice of Proposed Class Action Settlement* referred to below. You also may request in writing to appear at the Fairness Hearing on Thursday, October 12th, 2023.

How do I get more information? This is only a summary of the proposed settlement. For a more detailed *Notice of Proposed Class Action Settlement*, additional information on the lawsuit and proposed settlement, and a copy of the Settlement Agreement, visit www.pacerfeesclassaction.com, call 866-952-1928, or write to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.

EXHIBIT C

PACER Fees Class Action Administrator
P.O. Box 301134
Los Angeles, CA 90030-1134

To All PACER Users Who Paid Fees to Access Federal Court Records Between April 21, 2010 and May 31, 2018.

Your Rights Might Be Affected By a Proposed Class Action Settlement.

The back of this card provides a summary of the action.

VISIT THE SETTLEMENT WEBSITE BY SCANNING THE PROVIDED QR CODE

USO

«Barcode»
Postal Service: Please do not mark barcode

Account ID: <<Claim8>>
PIN: <<PIN>>

USO-«Claim8»-«CkDig»
«FirstName» «LastName»
«Addr1» «Addr2»
«City», «State»«FProv» «Zip»«FZip»
«FCountry»

***National Veterans Legal Services Program, et al. v. United States*, 1:16-cv-00745-PLF**

Nonprofit groups filed a class action lawsuit against the United States claiming that the government has unlawfully charged PACER users more than necessary to cover the costs of providing public access to federal court records through PACER. This notice is to inform you that the parties have decided to settle the case for $125,000,000. This amount is referred to as the common fund. The settlement has been preliminarily approved by the Court.

Why am I receiving this notice? You are receiving this notice because you may have paid PACER fees between April 21, 2010 and May 31, 2018. This notice explains that the parties have entered into a proposed class action settlement that may affect you. You may have legal rights and options that you may exercise before the Court decides to grant final approval to the settlement

What is this lawsuit about? The lawsuit alleges that federal courts have been charging unlawfully excessive PACER fees. It alleges 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 federal court records, and that the fees for use of PACER exceed its costs. The lawsuit further alleges that the excess PACER fees have been used to pay for projects unrelated to PACER. The government denies these claims and contends that the fees are lawful. The parties have agreed to settle.

Who represents me? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC as Class Counsel. You may hire your own attorney, if you wish, at your own expense.

What are my options? If you are an accountholder and directly paid your own PACER fees, you do not have to do anything to receive a share of the common fund. You will automatically receive a check for your share of the common fund assuming the Court grants final approval of the settlement. If someone directly paid PACER fees on your behalf, you should direct your payment to that individual or entity at the website below no later than Tuesday, September 4th, 2023. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds. You may object to any aspect of the proposed settlement. You must object by Tuesday, September 12th, 2023. If you object, you may also request to appear at the Fairness Hearing on Thursday, October 12th, 2023.

For more information: 866-952-1928 or www.pacerfeesclassaction.com

By Order of the U.S. District Court, Dated: May 8, 2023

EXHIBIT D

PACER Fees Class Action Administrator
P.O. Box 301134
Los Angeles, CA 90030-1134

To All PACER Users Who Paid Fees to Access Federal Court Records Between April 22, 2016 and May 31, 2018.

Your Rights Might Be Affected By a Proposed Class Action Settlement.

The back of this card provides a summary of the action.

VISIT THE SETTLEMENT WEBSITE BY SCANNING THE PROVIDED QR CODE

USO

«Barcode»
Postal Service: Please do not mark barcode

Account ID: <<Claim8>>
PIN: <<PIN>>

USO-«Claim8»-«CkDig»
«FirstName» «LastName»
«Addr1» «Addr2»
«City», «State»«FProv» «Zip»«FZip»
«FCountry»

***National Veterans Legal Services Program, et al. v. United States,* 1:16-cv-00745-PLF**

Nonprofit groups filed a class action lawsuit against the United States claiming that the government has unlawfully charged PACER users more than necessary to cover the costs of providing public access to federal court records through PACER. This notice is to inform you that the parties have decided to settle the case for $125,000,000. This amount is referred to as the common fund. The settlement has been preliminarily approved by the Court.

Why am I receiving this notice? You are receiving this notice because you may have paid PACER fees for the first time between April 22, 2016 and May 31, 2018. This notice explains that the parties have entered into a proposed class action settlement that may affect you. You may have legal rights and options that you may exercise before the Court decides to grant final approval to the settlement

What is this case about? The lawsuit alleges that federal courts have been charging unlawfully excessive PACER fees. It alleges 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 federal court records, and that the fees for use of PACER exceed its costs. The lawsuit further alleges that the excess PACER fees have been used to pay for projects unrelated to PACER. The government denies these claims and contends that the fees are lawful. The parties have agreed to settle.

Who represents me? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC as Class Counsel. You may hire your own attorney, if you wish, at your own expense. 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 my options? If you are an accountholder and directly paid your own PACER fees, you do not have to do anything to receive a share of the common fund. You will receive a check for your share of the common fund assuming the Court grants final approval of the settlement. If someone directly paid PACER fees on your behalf, you should direct your payment to that individual or entity at the website below no later than Monday, September 4th, 2023. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds. By participating in the settlement, you will be legally bound by all orders and judgments of the Court, and you will give up any rights to sue the United States separately about the same claims in this lawsuit. *If you do not want to be part of the settlement and the Class,* you must ask to be excluded by Sunday, August 20th, 2023. If you ask to be excluded, you will not be able to get any money from this lawsuit. You will not be bound by any of the Court's decisions and you will keep your right to sue the United States separately about the claims in this lawsuit. If you do not ask to be excluded, you may object to any aspect of the proposed settlement. You must object by Tuesday, September 12th, 2023. You may also request to appear at the Fairness Hearing on Thursday, October 12th, 2023.

For more information: 866-952-1928 or www.pacerfeesclassaction.com

By Order of the U.S. District Court, Dated: May 8, 2023

EXHIBIT E

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and May 31, 2018, a proposed class action settlement may affect your rights.

NEWS PROVIDED BY
PACER Fees Class Action Administrator →
06 Jul, 2023, 08:00 ET

WASHINGTON, July 6, 2023 /PRNewswire/ -- The following statement is being issued by the PACER Fees Class Action Administrator regarding notice of proposed class action settlement in *National Veterans Legal Services Program, et al. v. United States*:

YOU ARE HEREBY NOTIFIED, pursuant to Rule 23 of the Federal Rules of Civil Procedure and Order of the United States District Court for the District of Columbia, that the parties in *National Veterans Legal Services Program, et al. v. United States* have reached a settlement for $125,000,000, and your rights may be affected. The Court has not granted final approval of this settlement.

The Court previously certified a class 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." Members of that class were provided an opportunity to opt out in 2017.

If you paid PACER fees between April 21, 2010 and April 21, 2016, you may appear at the fairness hearing on October 12, 2023 to object to the settlement if you choose, and you may receive a settlement payment.

If you paid PACER fees for the first time between April 22, 2016 and May 31, 2018, you may choose to exclude yourself from the settlement, or you may remain a member of the class. If you choose to remain a member of the class, you may appear at the fairness hearing on October 12, 2023 to object to the settlement, and you may receive a settlement payment, but you give up your right to sue the United States government about the same claims in this lawsuit. If you exclude yourself, you cannot get any money from the settlement, but you will keep your right to separately sue the United States government over the legal issues in this case. More information about how to request exclusion and an exclusion request form can be found on the website at www.pacerfeesclassaction.com.

Settlement Payments: Settlement payments will be made by a settlement claims administrator based on PACER billing records reflecting accountholder information maintained by the Administrative Office of the U.S. Courts. If you are not a PACER accountholder, but directly paid PACER fees on behalf of someone else (e.g., a law firm or company paying fees on behalf of employees), you may be a class member, and may notify the claims administrator that you paid PACER fees on someone else's behalf www.pacerfeesclassaction.com. That notification must be made no later than September 5, 2023. If you are an accountholder and someone else directly paid your PACER fees on your behalf, you should direct payment to that person or entity at www.pacerfeesclassaction.com. You must direct payment no later than September 5, 2023. If you are an accountholder and directly paid your own PACER fees, you will automatically be mailed a check. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds.

Each class member (i.e., payer of PACER fees) will receive a minimum payment amount equal to the lesser of $350 or the total amount paid in PACER fees by that class member for use of PACER during the Class Period (April 21, 2010 through and including May 31, 2018). The remainder will be allocated pro rata (based on the amount of PACER fees paid in excess of $350 during the Class Period) to all class members who paid more than $350 in PACER fees during the Class Period.

If there are unclaimed or undistributed funds, there will be a second distribution. The only class members who are eligible for a second distribution are those who: (1) paid a total amount of more than $350 in PACER fees for use of PACER during the Class Period; and (2) deposited or otherwise collected their payment from the first distribution. The administrator shall determine how many class members meet this requirement, and then distribute to each class member an equal allocation of the unclaimed or undistributed funds. No class member may receive a total recovery (combining the first and second distributions) that exceeds the total amount of PACER fees that the class member paid for use of PACER during the Class Period.

This is only a summary of the proposed settlement. For a more detailed *Notice of Proposed Class Action Settlement*, additional information on the lawsuit and proposed settlement, and a copy of the settlement agreement, visit www.pacerfeesclassaction.com, call 1-866-952-1928, or write to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.

DATED: July 6, 2023
BY ORDER OF THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

SOURCE PACER Fees Class Action Administrator

PRN Top Stories Newsletters

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Select Country

Submit

By signing up you agree to receive content from us.
Our newsletters contain tracking pixels to help us deliver unique content based on each subscriber's engagement and interests. For more information on how we will use your data to ensure we send you relevant content please visit our PRN Consumer Newsletter Privacy Notice. You can withdraw your consent at any time in the footer of every email you'll receive.

Appx4308

EXHIBIT F

ABA BANKING JOURNAL

August 11, 2023

This *ABA Banking Journal* newsletter is a free, twice-monthly supplement to the *ABA Banking Journal* magazine intended to help you stay on top of industry and policy news. You can also stay abreast of banking news by visiting aba.com/BankingJournal, home to ABA Daily Newsbytes and other email bulletins.

Industry News

Democratic senators urge Fed to review bank merger policy

Senate Banking Committee Chairman Sherrod Brown (D-Ohio) and three Democratic committee members recently urged the Federal Reserve to review and reconsider its approach to large bank mergers, including the agency's framework for evaluating a merger's impact on financial stability.
Learn More...

State bankers associations urge CFPB to delay 1071 implementation

The CFPB should extend a court-ordered stay of its Section 1071 final rule to cover all FDIC-insured banks while the U.S. Supreme Court considers a separate legal challenge concerning the bureau, 50 state bankers associations said.
Learn More...

Fed announces new supervisory program for crypto, nonbank partnerships

The Federal Reserve announced that the banks it supervises must first receive a written notification of supervisory nonobjection from the agency before engaging with tokens using distributed ledger technology or similar technologies to facilitate payments.
Learn More...

FinCEN to launch contact center, guide for BOI reporting compliance

FinCEN will establish a contact center to assist small business owners in filing beneficial ownership reports, respond to questions from the public, and reduce regulatory burden, U.S. Treasury Undersecretary for Terrorism and Financial Intelligence Brian Nelson said.
Learn More...

FHFA weighing changes to rollout for new credit score models

The Federal Housing Finance Agency this week responded to recent industry communications expressing concerns about implementation timeframes for credit score reforms.
Learn More...

ABA, associations: Proposed auditor standards vague, overly broad

A group of 20 trade associations, including ABA, joined together to raise concerns with a proposal to expand the requirements for auditors to identify, evaluate and communicate all company violations of laws and regulations.
Learn More...

Policy News

DOJ proposes rule on digital accessibility for state, local governments

The Justice Department recently week issued a notice of proposed rulemaking to revise the regulation implementing Title II of the Americans with Disabilities Act to establish specific requirements for making state and local governments' web content and mobile applications accessible.

Learn More...

Fed's Bowman: Further rate hikes likely

Additional increases in the federal funds rate will likely be needed to lower inflation to the Federal Reserve's 2% goal, Fed Governor Michelle Bowman said.

Learn More...

ABA, TBA ask CFPB to delay 1071 compliance dates for all banks

In the wake of a judge's order delaying compliance dates with the CFPB's Section 1071 final rule for Texas Bankers Association and ABA members, TBA and ABA today asked CFPB Director Rohit Chopra to use his discretion to apply the stay to all FDIC-insured banks.

Learn More...

Fed's Harker suggests holding rates at current level

The economy may have reached the point where the Federal Open Markets Committee can hold off further increases in the federal funds rate and let the monetary policy actions it has already taken run their course, said Patrick Harker, president of the Federal Reserve Bank of Philadelphia.

Learn More...

Missouri associations: Credit card routing bill seeks big government intervention

The Credit Card Competition Act would leave consumers with fewer choices and decreased access to credit while local banks and credit unions would be harmed by even more government intervention, the top executives of three Missouri banker and credit union associations said in an op-ed for The Missouri Times.

Learn More...

FHA proposes removing face-to-face requirement for borrowers in default

The Federal Housing Administration proposed making permanent a pandemic-related rule that waives the Department of Housing and Urban Development's requirement for mortgagees to meet in person with borrowers who are in default on their mortgage payments.

Learn More...

Notice of Proposed Class Action Settlement in PACER Fees Class Action

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and May 31, 2018, a proposed class action settlement may affect your rights.
Learn More

Training

August 14 - September 8
Facilitated Training: Marketing Planning

August 17
Webinar: Techniques for Building a Powerful Fraud Network

August 22
Webinar: Making a Difference in Rural Communities and Overlooked Areas

August 23
Webinar: 2023 Lights, Camera, Save! Contest

August 29
Webinar: #BanksNeverAskThat – Everything You Need to Know

August 30
Webinar: ABA's Guide to Section 1071 – A Quick Recap and a Deeper Dive

September 4 - November 26
Facilitated Training: IRA Online Institute

September 7
Webinar: Estate Planning for the Family-Owned Business Part 2 (Tax Planning)

1333 New Hampshire Avenue NW
Washington, DC 20036
1-800-BANKERS (800-226-5377)

American Bankers Association

ABA BANKING JOURNAL

August 25, 2023

This *ABA Banking Journal* newsletter is a free, twice-monthly supplement to the *ABA Banking Journal* magazine intended to help you stay on top of industry and policy news. You can also stay abreast of banking news by visiting aba.com/BankingJournal, home to ABA Daily Newsbytes and other email bulletins.

Industry News

Keeping bankers smart on cybersecurity

Reinforcing employee cyber risk awareness is as critical to the maturity of your program as the products in your cyber tool set.

Learn More...

How the rating agencies missed the mark: Reassessing recent analyses of the banking sector

In light of the August 2023 downgrade by Moody's of several U.S. banks, as well as commentary by Fitch Ratings on the banking sector, ABA's Office of the Chief Economist is providing a brief assessment of the rating agency comments and highlighting critical flaws in some of the assumptions impacting their analyses.

Learn More...

NFIB: Small business concern about bank health fades

Small-business owners' concerns about the health of their bank have eased significantly in recent months, with more than half saying they are not concerned at all, according to a new survey of small-business attitudes about banking by the National Federation of Independent Business.

Learn More...

Survey: The changing role of bank marketing

The role of the bank marketing function is continuing to evolve to become more critical to overall enterprise, according to a new ABA survey of bank marketers. However, a considerable gap still exists between the broad and growing responsibilities of the function compared to how marketing is measured and evaluated.
Learn More...

Rising rates lead banks to rethink credit and liquidity

Banks are taking steps to reexamine their relationships with depositors, borrowers.
Learn More...

ABA Data Bank: Consumers believe Fed policies are driving disinflation

Consumers believe supply-side issues were the most important factors driving the pandemic-era surge in inflation, according to a recent Liberty Street Economics blog post.
Learn More...

Policy News

ABA, BPI caution against CRA rule changes

Two recent policy developments could fundamentally alter banks' Community Reinvestment Act programs, and policymakers should avoid finalizing proposed changes to the CRA rules until these issues are resolved, ABA and the Bank Policy Institute said in a letter to regulators.
Learn More...

Bipartisan support grows for ABA-backed ACRE Act

Nearly two dozen lawmakers from both political parties have signed on as cosponsors to ABA-backed legislation that would make it easier for farmers, ranchers and rural families to access affordable real estate credit.
Learn More...

ABA: Proposed quality control rule for AVMs would overburden banks

A proposed interagency rule to regulate the quality of algorithmic models used in real estate valuations would likely overburden — and therefore discourage — the very technology it is seeking to regulate, ABA said.
Learn More...

ABA urges proper implementation of new ISSB climate standard

ABA urged the ISSB to focus on the development of resources and coordination of industry-specific activities related to implementing recently released corporate disclosure standards on general sustainability and climate-related issues.
Learn More...

SEC to reopen public comment on investment advisers proposal

The Securities and Exchange Commission announced it would reopen public comment for a proposed rule that seeks to enhance protections of customer assets managed by registered investment advisers.
Learn More...

ABA urges support for affordable housing tax credit bills

Bipartisan legislation to create a neighborhood homes tax credit would address the needs of families throughout the country who are struggling to purchase homes as costs continue to rise and the supply of homes remains limited, ABA said in comments to committee leaders in the House and Senate.
Learn More...

Training

August 29
Webinar: Mid-Year Bank Risk Review: Analyzing Challenges and Opportunities

August 29
Webinar: #BanksNeverAskThat – Everything You Need to Know

August 30
Webinar: ABA's Guide to Section 1071 – A Quick Recap and a Deeper Dive

September 4 - November 26
Facilitated Training: IRA Online Institute

September 6
Webinar: Simplifying ATM Security Through an As a Service Strategy

September 7
Webinar: Estate Planning for the Family-Owned Business Part 2 (Tax Planning)

September 11 - October 27
Facilitated Training: Analyzing Bank Performance

September 11 - November 10
Facilitated Training: Legal Foundations in Banking

September 12
Webinar: ABA Fall Outlook Webinar

September 14
Virtual Conference: Diversity, Equity and Inclusion Summit

September 21
Webinar: How to Create an Inclusive Client Experience

September 26
Webinar: Pentegra Talks About the Benefits of Fiduciary Benchmarking Reports

1333 New Hampshire Avenue NW
Washington, DC 20036
1-800-BANKERS (800-226-5377)

American Bankers Association

EXHIBIT G

Account ID: <<Claim8>>
PIN: <<PIN>>

On July 6th, 2023, you received notice informing you of the proposed class action settlement in *National Veterans Legal Services Program, et al. v. United States*, Case No. 1:16-CV-00745-PLF. You were inadvertently sent the notice intended for accounts that paid PACER fees for the first time between April 22, 2016 and May 31, 2018. Because you paid PACER fees between April 21, 2010 and April 21, 2016, you should have received the below notice instead.

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and May 31, 2018, a proposed class action settlement may affect your rights.

Nonprofit groups filed this lawsuit against the United States, 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-PLF, is pending in the U.S. District Court for the District of Columbia. This notice is to inform you that the parties have decided to settle the case for $125,000,000. This amount is referred to as the common fund. The settlement has been preliminarily approved by the Court.

Why am I receiving this notice? You are receiving this notice because you may have paid PACER fees between April 21, 2010 and May 31, 2018. This notice explains that the parties have entered into a proposed class action settlement that may affect you. You may have legal rights and options that you may exercise before the Court decides to grant final approval of the settlement.

What is this lawsuit about? The lawsuit alleges that federal courts have been charging unlawfully excessive PACER fees. It alleges 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 federal court records, and that the fees for use of PACER exceed its costs. The lawsuit further alleges that the excess PACER fees have been used to pay for projects unrelated to PACER. The government denies these claims and contends that the fees are lawful. The parties have agreed to settle.

Who represents me? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC to represent the Class as Class Counsel. You do not have to pay Class Counsel or anyone else in order to participate. Class Counsel's fees and expenses will be deducted from the common settlement fund. You may hire your own attorney, if you wish, at your own expense.

What are my options?

OPTION 1. Do nothing. If you are an accountholder and directly paid your own PACER fees, you do not have to do anything to receive money from the settlement. You will automatically receive a check for your share of the common fund assuming the Court grants final approval of the settlement. If someone directly paid PACER fees on your behalf, you should direct your payment to that individual or entity at www.pacerfeesclassaction.com no later than Tuesday, September 5th, 2023. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds.

OPTION 2. Object or go to a hearing. If you paid PACER fees, you may object to any aspect of the proposed settlement. Your written objection must be sent by Tuesday, September 12th, 2023 and submitted as set out in the *Notice of Proposed Class Action Settlement* referred to below. You also may request in writing to appear at the Fairness Hearing on Thursday, October 12th, 2023.

How do I get more information? This is only a summary of the proposed settlement. For a more detailed *Notice of Proposed Class Action Settlement*, additional information on the lawsuit and proposed settlement, and a copy of the Settlement Agreement, visit www.pacerfeesclassaction.com, call 866-952-1928, or write to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.

EXHIBIT H

Account ID: <<Claim8>>
PIN: <<PIN>>

On July 6th, 2023, you received notice informing you of the proposed class action settlement in *National Veterans Legal Services Program, et al. v. United States*, Case No. 1:16-CV-00745-PLF. You were inadvertently sent the notice intended for accounts that paid PACER fees for the first time between April 22, 2016 and May 31, 2018. This notice mistakenly informed you that you had the option to opt out of the class. According to our records, you paid PACER fees between April 21, 2010 and April 21, 2016 and were previously provided an opportunity to opt out. That opt-out period expired July 17, 2017. Thus, you are no longer eligible to opt out of the class and your opt-out request will not be processed. Because you paid PACER fees between April 21, 2010 and April 21, 2016 you should have received the below notice instead. This notice does *not* provide an option to opt out.

If you paid fees to access federal court records on PACER at any time between April 21, 2010 and May 31, 2018, a proposed class action settlement may affect your rights.

Nonprofit groups filed this lawsuit against the United States, 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-PLF, is pending in the U.S. District Court for the District of Columbia. This notice is to inform you that the parties have decided to settle the case for $125,000,000. This amount is referred to as the common fund. The settlement has been preliminarily approved by the Court.

Why am I receiving this notice? You are receiving this notice because you may have paid PACER fees between April 21, 2010 and May 31, 2018. This notice explains that the parties have entered into a proposed class action settlement that may affect you. You may have legal rights and options that you may exercise before the Court decides to grant final approval of the settlement.

What is this lawsuit about? The lawsuit alleges that federal courts have been charging unlawfully excessive PACER fees. It alleges 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 federal court records, and that the fees for use of PACER exceed its costs. The lawsuit further alleges that the excess PACER fees have been used to pay for projects unrelated to PACER. The government denies these claims and contends that the fees are lawful. The parties have agreed to settle.

Who represents me? The Court has appointed Gupta Wessler PLLC and Motley Rice LLC to represent the Class as Class Counsel. You do not have to pay Class Counsel or anyone else in order to participate. Class Counsel's fees and expenses will be deducted from the common settlement fund. You may hire your own attorney, if you wish, at your own expense.

What are my options?

OPTION 1. Do nothing. If you are an accountholder and directly paid your own PACER fees, you do not have to do anything to receive money from the settlement. You will automatically receive a check for your share of the common fund assuming the Court grants final approval of the settlement. If someone directly paid PACER fees on your behalf, you should direct your payment to that individual or entity at www.pacerfeesclassaction.com no later than Tuesday, September 5th, 2023. If you accept payment of any settlement proceeds, you are verifying that you paid the PACER fees and are the proper recipient of the settlement funds.

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How do I get more information? This is only a summary of the proposed settlement. For a more detailed *Notice of Proposed Class Action Settlement*, additional information on the lawsuit and proposed settlement, and a copy of the Settlement Agreement, visit www.pacerfeesclassaction.com, call 866-952-1928, or write to: PACER Fees Class Action Administrator, P.O. Box 301134, Los Angeles, CA 90030-1134.

EXHIBIT I

ClaimID	Year First Notice Sent	Timeliness
10034328-7	2023	Timely
10035184-0	2023	Timely
10037459-0	2023	Timely
10040932-6	2023	Timely
10041843-0	2023	Timely
10049120-0	2023	Timely
10049953-8	2023	Timely
10061501-5	2023	Timely
10065649-8	2023	Timely
10066366-4	2023	Timely
10083140-0	2023	Timely
10084333-6	2023	Timely
10085991-7	2023	Timely
10095277-1	2023	Timely
10113350-2	2023	Timely
10116080-1	2023	Timely
10118614-2	2023	Timely
10132009-4	2023	Timely
10133913-5	2023	Timely
10141727-6	2023	Timely
10147158-0	2023	Timely
10152565-6	2023	Timely
10173016-0	2023	Timely
10176126-0	2023	Timely
10182150-6	2023	Timely
10185685-7	2023	Timely
10189089-3	2023	Timely
10192998-6	2023	Timely
10196979-1	2023	Timely
10197284-9	2023	Timely
10203395-1	2023	Timely
10010161-5	2017	Untimely
10016846-9	2023	Timely
10052120-7	2023	Timely
10133913-5	2023	Timely
10156028-1	2017	Untimely
10162264-3	2017	Untimely
10274162-0	2017	Untimely
10192346-5	2017	Untimely
10320639-6	2017	Untimely