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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THINK COMPUTER FOUNDATION, an Ohio 501(c)3 non-profit corporation; THINK COMPUTER CORPORATION, a Delaware corporation, Plaintiffs, v. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS; UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA; and AMERICAN BAR ASSOCIATION, Defendants.	Case No. **COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF** JURY TRIAL DEMANDED

Plaintiffs Think Computer Foundation (the "Foundation") and Think Computer Corporation, collectively, "Plaintiffs," hereby allege and state as their claims against the Defendants as follows:

INTRODUCTION AND SUMMARY OF THE CASE

1. As the direct embodiment of Article III of the United States Constitution, the United States Courts (the "Courts") are a vital public resource and asset. According to publicly available statistics, from the period starting June 30, 2012 and ending June 30, 2013, the Courts handled 283,087 civil case filings and 69,642 criminal case filings nationwide at the district level. At the appellate level, the Courts saw 56,360 filings. These statistics represent typical caseload levels in recent years.

2. Individual federal court cases at the district and appellate levels are tracked and published on-line through an electronic filing system known somewhat interchangeably as CM/ECF and PACER, which are respectively acronyms for Case Management/Electronic Case Files (the system's "write" component) and Public Access to Court Electronic Records (the system's "read" component, used in this document to refer to the entire system for the sake of simplicity). PACER is managed, developed and maintained by Defendant Administrative Office of the United States Courts (the "AO"). The central PACER web site, http://www.pacer.gov, is one of many individual PACER web sites that the various district, bankruptcy and appellate courts each maintain with some degree of autonomy.

3. Throughout the nation, no matter the type or level of court, Defendant AO mandates and collects public access fees for electronic access to PACER web pages and court documents. Such fees are authorized by Congress, but only to the "extent necessary." For years, the AO has completely ignored this deliberate Congressional limitation and has exploited its limited authorization, transforming PACER into a highly profitable crutch to

prop up the Courts' budget. The AO's willful disregard of Congressional intent violates at least the E-Commerce Act of 2002 and promotes societal inequality.

4. The AO has imposed policies granting extremely limited free access to PACER to its least demanding users and certain select academics, in an attempt to gloss over, quell discussion around and otherwise excuse its unlawful activity.

5. The imposition of un-"necessary" fees on litigants and the public inherently biases the Courts in favor those parties with larger budgets, especially because PACER is designed in such a way that it functions in an unreliable and erratic manner, often billing users for the AO's programming mistakes. *Pro se* and *in forma pauperis* litigants are among the least able to afford such unlawful, unnecessary and erroneous fees, yet in a precedent-based system, access to court documents is necessary for the successful prosecution of a case.

6. Plaintiffs are active users of PACER and have paid roughly one thousand dollars in unlawful, unnecessary and erroneous fees to Defendant AO simply to access public information that Defendant AO incurs zero marginal cost to provide.

7. The Courts are further biased in favor of parties with large budgets, and against small businesses, through the imposition of specific local rules in each district and appellate court that serve to collectively prohibit corporate self-representation in the United States of America. Such local rules ("the Restrictive Local Rules"), including Civil Local Rules 3-9(b) and 5-1(b) in the Northern District of California, are unconstitutional, in violation of at least the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution.

8. The Restrictive Local Rules exist not to further the interests of justice, but as protectionist measures designed to solidify the economic monopoly of Defendant American Bar Association (the "ABA").

9. To remedy these present, on-going and continuous facial and applied constitutional violations, and to put an end to the ongoing harm caused by Defendants, Plaintiffs seek declaratory and injunctive relief invalidating Civil Local Rules 3-9(b), 5-1(b) and the Restrictive Local Rules, and striking down the AO's fee structure for PACER to the extent that it fails to comport with the E-Government Act of 2002 and/or other laws.

JURISDICTION

10. This action arises under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the Constitution of the United States.

11. This Court has original jurisdiction over these federal claims pursuant to 28 U.S.C. §§ 1331, 1337 and 1343.

12. This Court has authority to award the requested declaratory relief under 28 U.S.C. § 2201; the requested injunctive relief under 28 U.S.C. § 1343(3); and any attorney's fees under 42 U.S.C. § 1988.

VENUE

13. Venue is proper under 28 U.S.C. § 1391 in the Northern District of California because a substantial part of the actions or omissions giving rise to this case occurred within this District, and at least one Defendant resides or operates within this District.

THE PARTIES

Plaintiffs

14. Plaintiff Think Computer Foundation is an Ohio non-profit corporation recognized by the Internal Revenue Service as a tax-exempt organization under § 501(c)(3) of the Internal Revenue Code. The Foundation operates PlainSite (http://www.plainsite.org), a popular web site that compiles government information, including information from the Courts via PACER, in order to make such information more accessible to the general public

(or put another way, in "plain sight.") PlainSite is housed on servers physically located in Santa Clara County, in this District.

15. Plaintiff Think Computer Corporation is a Delaware corporation located at 1132 Boranda Avenue, Mountain View, CA 94040-3145 in Santa Clara County, in this District. Think Computer Corporation develops the PlainSite software and plays an active role in its management. Think Computer Corporation is also a litigant in this District and as such, is a frequent user of PACER.

Defendants

16. Defendant Administrative Office of the United States Courts ("AO") "serves the federal Judiciary in carrying out its constitutional mission to provide equal justice under law," according to its web site. The AO is a federal governmental entity headquartered in Washington, D.C. with offices in Richardson, Texas, and oversees PACER in all respects.

17. Defendant United States District Court for the Northern District of California (the "District Court") is a federal district court in the Ninth Circuit with control over its own Local Rules. According to is web site, "the boundaries of the Northern District of California encompass fifteen counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, San Francisco, San Mateo, Santa Clara, Santa Cruz, and Sonoma. The court has four courthouses (in San Francisco, Oakland, San Jose and Eureka), fourteen district judgeships (also known as Article III judgeships) and eleven magistrate judgeships."

18. Defendant American Bar Association is an Illinois corporation whose headquarters and principal place of business are located in Chicago, Illinois. The ABA is responsible for the accreditation of law schools within the United States, whose degrees are required to sit for state bar exams. According to the ABA web site, "Since 1952, the Council

of the Section of Legal Education and Admissions to the Bar of the American Bar Association has been recognized by the United States Department of Education as the national agency for the accreditation of programs leading to the J.D. degree in the United States." The ABA also writes various model rules and works in tandem with state bar associations to regulate the legal profession. The ABA conducts business in this District; the 2013 ABA Annual Meeting took place in San Francisco, California.

FACTUAL BACKGROUND

A. *The AO Defies Congress by Relying on PACER Fees for Revenue*

19. Defendant AO's fee schedule for PACER (the "Fee Schedule"), supposedly "Issued in accordance with 28 U.S.C. § 1913, 1914, 1926, 1930, 1932," and attached to this Complaint as Exhibit A, generally specifies that users must pay $0.10 per "page" for PACER data and $2.40 per audio file.

20. Many PACER documents are stored as Adobe Acrobat Portable Document Format (PDF) files, which are paginated. However, numerous non-PDF pages on PACER are not explicitly paginated, forcing the AO's PACER software developers to guess how many pages *might* be needed to print such pages, and to charge accordingly. The fee for many PACER documents, and especially reports, is therefore arbitrarily determined.

21. PACER frequently charges a fee even for web pages that indicate that PACER encountered an error and failed to return the user's requested information.

22. The Fee Schedule states, "No fee is charged for access to judicial opinions." This is false; PACER often charges $0.10 per page for access to judicial opinions.

23. Wendell Skidgel, Senior Attorney for Defendant AO, stated in a March 24, 2014 e-mail to Plaintiffs, "the Judicial Conference of the United States' policy regarding written opinions clearly states that the authoring judge determines which a *[sic]* document meets the

definition of a written opinion." This "policy," which in fact does not appear in the Fee Schedule, results in the arbitrary and unlawful levying of fees on users who have no obligation to pay them. Furthermore, the word "judge" does not appear anywhere in the Fee Schedule at all, suggesting a uniform, court-wide policy.

24. The distinction between opinions, orders, and other materials on PACER is entirely arbitrary. All non-sealed data on PACER is public, non-copyrightable information already in the public domain. Recent attempts by attorneys to enforce copyright law to cover their legal briefs have been struck down. *See White et al v. West Publishing Corporation et al*, Case No. 1:12-cv-01340 (S.D.N.Y. 2013).

25. The E-Government Act of 2002 (Public Law 107-347) was enacted on December 17, 2002, with an effective date for most provisions of April 17, 2003. § 205(e) of the E-Government Act of 2002 read:

> "(e) COST OF PROVIDING ELECTRONIC DOCKETING INFORMATION.—Section 303(a) of the Judiciary Appropriations Act, 1992 (28 U.S.C. 1913 note) is amended in the first sentence by striking 'shall hereafter' and inserting 'may, only to the extent necessary,'."

The relevant note attached to 28 U.S.C. § 1913 was therefore modified to read as follows:

> "(a) The Judicial Conference may, only to the extent necessary, prescribe reasonable fees, pursuant to sections 1913, 1914, 1926, 1930, and 1932 of title 28, United States Code, for collection by the courts under those sections for access to information available through automatic data processing equipment. These fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information."

The inclusion of the phrase "to promote public access to such information" is material to the limitation of "to the extent necessary," representing Congress's clear goal of making court information easily accessible to the general public, with as few obstacles as possible.

26. Researchers at the Princeton University Center for Information Technology Policy ("CITP") examined PACER's financial records for 2010. According to their findings,

"We examined the Courts' budget documents from the past few years, and we discovered that the Courts claim PACER expenses of roughly $25 million per year. But in 2010, PACER users paid about $90 million in fees to access the system."

27. Defendant AO's profit of $65 million from PACER fees in 2010 alone represents a gross abuse of Defendant AO's statutory authorization to collect fees "to the extent necessary." Yet even the quoted figure of $25 million per year grossly inflates the true market cost of operating an information system comparable in scope to PACER. Upon information and belief, such a system could be effectively run for under $1 million per year.

28. Plaintiffs' PlainSite web site, which surpasses PACER's functionality in a number of respects[1] while still mirroring its core purpose and much of its contents, cost less than $5,000 to develop using commodity hardware and open-source software, and costs less than $2,500 to run on an annual basis. PlainSite houses approximately 7 million dockets. Even if PlainSite were 100 times as large, with 700 million dockets, and were correspondingly 100 times as expensive, it would still only cost $250,000 at most to run on an annual basis—or ten times less than PACER in 2010.

29. Upon information and belief, PACER only stores data corresponding to approximately 50 million dockets.

30. On March 25, 2010, United States Senator Joseph I. Lieberman wrote to the United States Senate Committee on Appropriations, stating in part:

> "Since the passage of the E-Government Act, the vision of having information 'freely available to the greatest extent possible' is far from being met, despite the technological innovations that should have led to reduced costs in the past eight years. In fact, cost for these documents has gone up, from $.07 to $.08-per-page. The Judiciary has attempted to mitigate the shortcomings of the

[1] Unlike PACER, PlainSite is a universal docketing system that can track a case across courts and/or agencies, improving navigation. PlainSite also indexes parties, law firms, judges, assets, and attorneys, taking into account clerical errors, typographical errors, and ever-changing law firm names. According to server logs, Defendants use PlainSite on a daily basis, preferring its convenience and functionality to PACER.

> current fee approach in a variety of ways, including limiting charges to $2.40-per-document and the recent announcement that any charges less than $10-per-quarter will be waived. While these efforts should be commended, I continue to have concerns that these steps will not dramatically increase public access as long as the pay-per-access model continues."

31. Defendant AO reacted to Senator Lieberman by doubling down on its unlawful and discriminatory behavior. It notified PACER users of *another* price increase effective April 1, 2012, causing the cost per PACER "page" to increase from $0.08 to $0.10, the current price.

32. Due to Defendant AO's continuous, multi-year, willful abuse of its statutory authorization, users of PACER who have paid fees, including but not limited to Plaintiffs, are collectively owed refunds totaling several hundred million dollars.

33. Defendant AO's unlawful activities have directly contributed to the loss of at least one life, namely, open information activist Aaron Swartz.

34. Defendant AO launched a pilot program at certain law libraries nationwide in September, 2008 involving free access to PACER. Swartz was one member of a team of researchers affiliated with CITP, and personally assisted in the acquisition of PACER data (approximately 710,000 dockets plus associated documents) from the pilot program. Defendant AO reacted by suspending the pilot program on October 1, 2008 and referring the matter to the Federal Bureau of Investigation. *See* Exhibit B. Though criminal charges were never filed against Swartz directly regarding the PACER pilot program, Swartz was charged in a similar incident on July 14, 2011 involving academic (as opposed to legal) texts, despite the plain requests of the involved parties (namely, JSTOR) not to proceed with any charges. Under intense pressure due to the trumped-up criminal prosecution, and with dwindling financial resources due to typically outrageous attorney fees, Swartz committed suicide on January 11, 2013.

35. Upon information and belief, the criminal charges ultimately filed against Aaron Swartz were largely informed by and/or retribution for the 2008 PACER pilot program episode.

36. Upon information and belief, Defendant AO encouraged the United States Department of Justice to file criminal charges against Aaron Swartz.

37. Aaron Swartz's premature death was entirely avoidable.

B. ***Plaintiffs' Attempts to Clarify Their Own PACER Fees***

38. Plaintiffs have attempted on a number of occasions to clarify the reason why they must pay $0.10 per page to receive PACER error messages, documents that are clearly court opinions, or any court documents at all, including but not limited to judicial financial disclosure forms.

39. On February 9, 2012, the Foundation wrote an open letter to Defendant AO and Plaintiffs' representative in Congress, Anna Eshoo, highlighting the many problems with PACER's billing structure, including but not limited to its discriminatory nature.

40. Congresswoman Eshoo's March 21, 2012 response erroneously stated, "Currently, any individual may search PACER for free and can obtain copies of all final opinions (including convictions) without charge."

41. Defendant AO did not respond to the Foundation at all until Congresswoman Eshoo directed them to do so. The AO's eventual June 11, 2012 response from Michel Ishakian, Chief, Public Access and Records Management Division, contained the outright falsehood, later contradicted by Senior Attorney Skidgel, that "free access to judicial opinions is provided." *See* Exhibit C.

42. In her response, Ms. Ishakian also attempted to portray satisfaction with PACER as being at a "high level." This was typical of Ms. Ishakian, whose efforts on behalf of

Defendant AO have consisted primarily of whitewashing a broken system. A May 1, 2014 letter to the editor of the *ABA Journal* highlighted a different take:

> "PACER is evocative of our broken criminal justice system: willfully deficient, where justice is only available to those who can afford it. The real obstacle to change is the fear of government officials, who have become accustomed to the lack of transparency that has become the platform for their corrupt practices. Because fixing PACER is only the first step.
>
> What crimes does the government often charge, only to later drop? How many people like Aaron Swartz are there, bullied and threatened with inflated accusations? How often is a particular person a witness in a case, e.g., a known corrupt cop or expert witness? Those are questions only machine-readable bulk data, accessible to everyone for free, can answer.
>
> It is high time the chief justice of the United States—as the presiding officer of the Judicial Conference of the United States, the supervisory body with authority over both the Administrative Office of the United States Courts and PACER—takes action. And if he won't do his job, then Congress should.
>
> Eric Branson
> Denver"

43. Defendant AO has repeatedly refused to refund Plaintiffs' PACER fees for any reason, even when such fees were generated for error messages or court opinions, let alone any other kind of public domain information.

C. *The United States Courts Routinely Deny Small Businesses and Non-Profit Organizations "Access to Justice"*

44. "Access to Justice" is a buzzword frequently used in legal academic circles and the Courts that has largely become devoid of meaning as the price of legal services has skyrocketed beyond the affordability of much of the American middle class. Typical hourly rates for associates range from $300 to $400 per hour, while partners often charge in excess of $500 per hour. In 2012, median household income in the United States was $51,017, which, if entirely devoted to attorney fees (a ridiculous but common expectation), would pay for only 170 hours of an "inexpensive" associate's time, or only 102 hours of a partner's time—about enough time to research, draft, review and file one or two complex motions.

45. Self-representation is a right, grounded in 28 U.S.C. § 1654 since 1948, and 28 U.S.C. § 394 before that, long afforded to individuals in the United States. The statute itself uses the term "parties," but delegates authority to "the rules of such [United States] courts."

46. The landmark case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), linked the separate concepts of effective legal representation and affordability by ruling that state courts were required to provide counsel in criminal cases where defendants could not afford a lawyer. Of course, individuals are not required to hire lawyers. Yet corporations are.

47. Paradoxically, there is no inverse principle to *Gideon* for corporations involved in civil cases. If counsel is too expensive, a case cannot proceed.[2] This notable gap in the legal system, caused by a combination of the protectionist rules described herein and general market failure, eviscerates the legal rights of an enormous class of corporate persons and the underlying individual entrepreneurs, who tend to be those very persons most in need of the Courts' services.

48. The District Court's Civil Local Rule 3-9(b), under the heading "Parties," states:

> "(b) Corporation or Other Entity. A corporation, unincorporated association, partnership or other such entity may appear only through a member of the bar of this Court."

49. Small businesses, which are typically incorporated as corporations, are generally thought to be responsible more than 50% of the United States Gross Domestic Product (GDP), and "represent 99.7 percent of all employer firms" according to the United States Small Business Administration. *See* Exhibit D.

[2] Frequently, civil litigation is a "life-or-death" proposition for a small business; an unfavorable outcome, or the inability of the corporation to access the justice system at all, can mean the end of the business. "'Obviously Fourteenth Amendment cases dealing with state action have no application here, but if they did, we believe that to deprive civilian dependents of the safeguards of a jury trial here…would be as invalid under those cases as it would be in cases of a capital nature.' 361 U.S., at 246-247." *Gideon*, *supra*, at 348-349.

50. Plaintiff Think Computer Corporation is one such small business. In mid-2011 its main product, FaceCash®, became inoperable after financial industry lobbyists convinced the California legislature to begin regulating domestic money transmission for the first time in an unconstitutional manner. In order to continue as a business, Think Computer Corporation's only option was to sue over the constitutionality of the relevant state statute in this Court, and eventually, to attempt to protect itself from the resulting unfair competition that the new statute encouraged, as well. *See Think Computer Corp v. Venchiarutti et al*, Case No. 5:11-cv-05496-HRL (N.D. California 2011); *see also Think Computer Corp. v. Dwolla, Inc. et al*, Case No. 5:13-cv-02054-EJD (N.D. California 2013). Doing so required Think to spend large sums on attorney fees due to Civil Local Rule 3-9(b).

51. In 2012, Plaintiff Think Computer Corporation would have turned a small profit were it not for the attorney fees necessitated by Civil Local Rule 3-9(b). The corporation posted a 2012 net loss of $41,226.95, having spent $52,552.95 on attorney fees throughout the fiscal year. In 2013, attorney fees of $36,778.75 constituted the vast majority (82.73%) of the corporation's $44,451.96 net loss.

52. Think Computer Foundation is primarily funded by Think Computer Corporation. For every dollar spent on avoidable and unnecessary attorney fees and not donated, the Foundation cannot use those same funds to further the goals of its charter.

53. Due to attorney fees necessitated by Civil Local Rule 3-9(b), the undersigned has not paid himself a salary as President & CEO of Plaintiff Think Computer Corporation since 2011.

54. Civil Local Rule 3-9(b) is frequently cited in rulings denying access to justice to small businesses and non-profit organizations that cannot afford or for any reason do not want counsel, as is the case with similar Restrictive Local Rules in other districts. *See Dr.*

JKL Ltd. v. HPC IT Education Center, 749 F. Supp. 2d 1038 (N.D. California 2010). *See also Walnut Creek Manor, LLC v. Mayhew Center, LLC*, Case No. 4:07-cv-05664-CW (N.D. California 2013).

55. The legal rationale for Restrictive Local Rules is inconsistent. The issue of corporate self-representation has hardly been given any serious consideration since the Supreme Court's cursory and tangential mention of the topic in *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194 (1993), two years prior to the advent of the commercial internet—a technological transformation that has changed how citizens and corporations alike interact with Government. Nonetheless, even in *Rowland*, the Supreme Court explained that while 28 U.S.C. § 1915 once made reference to "citizens"—a term that courts in the 1930s considered to be exclusive of corporations—it had been changed to "persons" in 1959. In the ruling, Footnote 2 surrounding this discussion points out that the change emanated from the Judicial Conference's concern that singling out aliens from citizens "may be unconstitutional." *Id*. Either way, Congress has never made any statutory determination that corporations should be exempt from the ability to represent themselves or appear *in forma pauperis*.

56. In *Palazzo v. Gulf Oil Corporation*, 764 F.2d 1381 (11th Cir. 1985), the Court ruled that a business owner, Frank Palazzo, could not represent the interests of his corporation despite his repeated attempts to do so. In its ruling, the Court cited a long string of precedential cases dating back to 1824, all consistently interpreting 28 U.S.C. § 1654 in the same limited fashion, excluding corporations from representing themselves "personally" due to the lack of a physical person that might appear.

57. One of the only federal court decisions to ever properly analyze the matter of corporate self-representation dates back to 1976, in which a District Judge of the Eastern

District of New York allowed a bankruptcy case to proceed with a corporation representing itself. *In the Matter of Holliday's Tax Services, Inc*., 417 F.Supp. 182 (E.D.N.Y. 1976). In this ruling, Judge Weinstein pointed out:

> "Were counsel freely available to lower and middle income persons in civil cases, the traditional rule requiring corporations, whether large or small, to appear by a lawyer would work no hardship. But the lack of a guarantee of counsel to persons of modest means like Mr. Holliday remains one of the scandals of our judicial system."

Id. at 183. Judge Weinstein continued:

> "The traditional rule is unnecessarily harsh and unrealistic when applied in bankruptcy to small, closely-held corporations. They are set up by the thousands. Many, such as the one before us, are in the name of the person doing business. In these instances, incorporation is merely a technicality, facilitating competitive economic activity by individuals. Failure of the 'corporation' is, for all practical purposes, the failure of the individual entrepreneur."

58. In 1958, Congress passed the Technical Amendments Act of 1958 (72 Stat. 1650), which amended the Internal Revenue Code of 1954 by creating a new sub-chapter S at the end of chapter 1. Since then, millions of "S corporations" have come into being. Instead of being taxed at the corporate level, as corporations typically are, businesses that have availed themselves of a sub-chapter S election pass all of their earnings (or losses) through to their shareholders for tax purposes, of whom there may be no more than 75 (though the initial limit was 10).

59. For subchapter-S corporation owners, the District Court's Civil Local Rule 3-9(b) and other Restrictive Local Rules lead to a situation involving taxation without representation, in which shareholders in—and frequently 100% owners of—sub-chapter S corporations are responsible for paying taxes not as corporations, but *as individuals, on their personal Internal Revenue Service Form 1040 tax return*, on both their income *and their business earnings*, yet are legally prohibited from representing their own individual business

interests. Put another way, an election to convert a sole proprietorship or partnership—each of which could appear *pro se* in a federal court without issue—to an S corporation solely for tax reasons has the undesired, unintended, and wholly arbitrary side-effect of waiving a business owner's First Amendment right to free speech in a court of law, solely because of Restrictive Local Rules such as Civil Local Rule 3-9(b).

60. Small businesses sometimes pay more taxes than the largest companies in the United States of America, whose lawyers exploit tax loopholes to move income overseas. For example, General Electric filed a 57,000 page tax return on $14 billion in profits in 2010, but paid no taxes. Restrictive Local Rules therefore prohibit those same small businesses who fund the Courts from making use of them, while large corporations who can afford counsel (perhaps thanks to their tax evasion schemes) get a free ride.

61. In *Citizens United v. Federal Election Com'n*, 130 S. Ct. 876 (2010), the Supreme Court ruled that "political speech does not lose First Amendment protection because its source is a corporation." *State v. Tennant*, West Virginia Supreme Court of Appeals (2012). Or, put another way, "the government may not suppress political speech on the basis of the speaker's corporate identity." *Morgan v. Swanson*, 659 F. 3d 359 (5th Cir. 2011). Yet this happens daily in federal courtrooms as corporations—but only the smallest ones—are kicked out simply by virtue of the fact that they are corporations who generally cannot afford counsel.

62. Corporations are no more themselves able to "decide" to "donate" to political candidates that they are able to "represent themselves." In each case, the corporation, comprised of individuals, acts through the actions of its officers and/or its board of directors. In this regard, the issues of political speech and courtroom speech are one in the same,

especially considering that many court cases involving businesses affected by Restrictive Local Rules also involve decidedly political issues.

63. Historical rationales for prohibiting corporate self-representation border on the absurd. "The reasons for requiring that a party, unless exercising his constitutional right to represent himself, be represented by an attorney are principally that the conduct of litigation by a non-attorney creates unusual burdens for his adversaries and the court, as well as for the party he would represent. 'The lay litigant frequently brings pleadings that are awkwardly drafted, motions that are inarticulately presented, [and] proceedings that are needlessly multiplicative.'[3] *Jones v. Niagara Frontier Transportation Authority*, 722 F.2d 20, 22 (2d Cir.1983); see also id. (the lay litigant also lacks many of the attorney's ethical responsibilities, such as to avoid litigating unfounded or vexatious claims)." *Berrios v. New York City Housing Authority*, 564 F. 3d 130 (2nd Cir. 2009). In no other context is any court permitted to deny justice to a party simply because that party's potential future activity *might* prove to be a nuisance. Such reasoning is *prima facie* evidence of discrimination against small businesses and those generally unable to afford what is typically overpriced legal counsel.

64. The notion that attorneys are more ethically bound and/or superior to laymen, and therefore uniquely able to represent corporations, is similarly without merit. Plaintiffs have encountered, and via PlainSite, documented, catalogued, and indexed, a wide variety of unscrupulous behavior on the part of lawyers, ranging from chronic over-billing, to forgery, to fraud, to outright malpractice, far too extensive to document here.

[3] Even if this were true, the Courts' various caseload issues could be resolved through better use of web-based error-checking technology, commonly found on commercial web sites that process much higher volumes of customer requests.

65. Attorneys practicing before every federal court routinely face sanctions from both judges and bar associations for unethical conduct, and more alarmingly, frequently escape the consequences of such conduct until it is so egregious that it is completely undeniable. For example, "Steele, Hansmeier, and Duffy ('Principals') are attorneys with shattered law practices. Seeking easy money, they conspired to operate this enterprise and formed the AF Holdings and Ingenuity 13 entities (among other fungible entities) for the sole purpose of litigating copyright-infringement lawsuits." *Ingenuity 13 LLC v. Doe*, Case No. 2:12-cv-8333-ODW(JCx) (C.D. California 2013). In other words, the present system favored by the Courts is one in which attorneys "Steele, Hansmeier, and Duffy" are presumed ethically sound enough to represent a corporation, but the average small business owner is not.

66. The effects of Restrictive Local Rules are disproportionately felt by small businesses. Due to the shareholder limitation, S corporations tend to be small, with less than $1 million per year in revenue, while larger companies opt for C corporation status. Large corporations that can afford to hire lawyers regardless of the situation, and will, are by definition not affected by the Restrictive Local Rules, further focusing their impact on the small business sector.

67. Restrictive Local Rules set the Courts apart from the rest of the legal world. Corporations are permitted to represent their own interests via officers or directors before the executive branch, such as in the context of the United States Patent and Trademark Office Trademark Trial and Appeal Board. Corporations are also permitted to represent themselves in small claims courts nationwide. In those venues, the supposedly unusual challenges of "needlessly multiplicative" and/or inarticulate pleadings are somehow managed.

68. In the aforementioned non-Court venues, *pro se* filers are permitted to file electronically as would anyone else. Yet Civil Local Rule 5-1(b) in this District mandates

that *pro se* filers must use paper until such time as a motion for electronic filing is approved by a judge. Attorneys can file electronically without any needed approval. In this way, the Courts actually *mandate* that *pro se* filers *must* file "needlessly multiplicative" motions.

69. Many legitimate cases involving corporate plaintiffs either cannot be prosecuted due to the prohibitive expense of counsel or due to the fact that many lawyers simply refuse to take the time to understand a plaintiff's needs without the promise of a large monetary incentive at some point during the proceedings. Therefore, the Restrictive Local Rules frequently quash meritorious civil claims before they ever see the inside of a courtroom.

70. Upon information and belief, the true purpose of the Restrictive Local Rules is to attempt to increase demand for attorneys, whose private interests are collectively represented by Defendant American Bar Association.

71. Upon information and belief, Defendant American Bar Association has conspired with the various Courts, including Defendant United States District Court for the Northern District of California, to impose Restrictive Local Rules. Many officials of the Courts are, by virtue of their position, also ABA members or officials.

72. *Pro se* and *in forma pauperis* litigants do not have lobbying or other special interest groups they can rely upon to represent their interests before Congress—for they are not a special interest; they are simply the American people. Minority rights and civil liberties special interest groups and organizations whose interests might overlap tend to focus on more acute and cohesive issues, leaving ordinary citizens without advocates.

73. Few lawyers, if any, are willing to sign their name to a complaint that could weaken the legal profession's monopoly, let alone a complaint that might be perceived as antagonistic toward the Courts. Even academic lawyers who might be interested in the

underlying legal principles generally plan to file other cases in the long term, and are loathe to take any action that might jeopardize a career as a successful legal academic.

CLAIMS FOR RELIEF

FIRST CLAIM

Against Defendant United States District Court for the Northern District of California For Violation of the Equal Protection Clause of the Fourteenth Amendment (42 U.S.C. § 1983)

74. Plaintiffs re-allege and incorporate by this reference each and every allegation set forth in this Complaint as if the same were fully set forth herein.

75. Civil Local Rules 3-9(b), 5-1(b) and similar Restrictive Local Rules in district and/or appellate courts nationwide are facially unconstitutional, as they violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

76. Civil Local Rules 3-9(b), 5-1(b) and similar Restrictive Local Rules in district and/or appellate courts nationwide, including but not limited to Defendant United States District Court for the Northern District of California, have the effect of granting equal protection under the law to only those corporations, limited liability companies, limited partnerships, and other such entities that can afford or otherwise desire counsel, amounting to only the largest corporations in the United States. In this manner, Civil Local Rules 3-9(b), 5-1(b) and similar Restrictive Local Rules discriminate against small businesses in an unconstitutional manner.

77. In 1976, District Judge Weinstein of the Eastern District of New York recognized the constitutional flaw in disallowing corporate representation:

> "'Equal' application of the law to all corporations, large and small, is, likewise, a specious rationale for the grossly inequitable treatment of small businesses. Equal-rights-to-sleep-under-bridges jurisprudence is no longer viewed with favor."

In the Matter of Holliday's Tax Services, Inc., *supra* at 184.

78. Defendants, acting under color of law for the purported goal of protecting the Courts, have enforced Civil Local Rules 3-9(b), 5-1(b) and similar Restrictive Local Rules on the supposed grounds that to do otherwise would mire the Courts in meritless and vexatious litigation, despite simultaneously allowing notorious copyright and patent trolls—all represented by counsel—to instigate a plethora of meritless and vexatious litigation.

79. Defendants have enforced Civil Local Rule 3-9(b) and similar Restrictive Local Rules merely for the convenience of the Courts and the economic benefit of the lawyers associated therewith. In the words of Judge Weinstein, "[A] person's day in court is more important than the convenience of the court." *Id*.

80. Defendants have enforced Civil Local Rule 3-9(b) and similar Restrictive Local Rules against sub-chapter S corporations, even though the Internal Revenue Code does not recognize such corporations as independent persons for the purposes of taxation, but more akin to a kind of property asset. The net effect is one of the Courts discriminating against certain kinds of property owners, who happen to pay for the Courts' operations, including the salaries of the Courts' employees, with the tax revenues derived from their property.

81. The taxation of small business owners who lack the right to self-representation of their business interests in the Courts is akin to the type of grievous injustice suffered by the British colonists of the mid-eighteenth century who founded this country. Notably, the American Revolution of 1765-1783, spurred by cries of "No taxation without representation," pre-dates the 1824 precedent used to justify the Courts' discrimination.

82. Defendants have enforced Civil Local Rule 5-1(b) and similar Restrictive Local Rules to actively discourage access to justice for *pro se* litigants.

83. Defendants, whose individual actors are mostly themselves attorneys, have made utterly meritless claims, wholly unsupported by data, with the force of law, presuming the

ethical nature of attorneys to be superior to the ethical nature of all other persons due to attorney "duties," in a manner that blatantly defiles the Equal Protection Clause.

84. Nullification of the Restrictive Local Rules would not preclude the hiring of attorneys by corporations at any point during legal proceedings, and might actually encourage the hiring of attorneys in matters that would have otherwise never have reached the Courts' various doorsteps.

85. All conditions precedent to the bringing of this action have occurred or have been exhausted.

86. Plaintiffs have incurred or will incur costs for attorneys and other necessary fees and costs which are recoverable in this action under the provisions of 42 U.S.C. § 1988.

87. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and a preliminary and permanent injunction invalidating and restraining enforcement of Civil Local Rules 3-9(b), 5-1(b) and similar Restrictive Local Rules.

SECOND CLAIM

Against Defendant United States District Court for the Northern District of California For Violation of the Due Process Clause of the Fourteenth Amendment (42 U.S.C. § 1983)

88. Plaintiffs re-allege and incorporate by this reference each and every allegation set forth in this Complaint as if the same were fully set forth herein.

89. Civil Local Rule 3-9(b) and similar Restrictive Local Rules in district and/or appellate courts nationwide are facially unconstitutional, as they violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

90. In applying and enforcing Restrictive Local Rules, the Courts evaluate civil claims not on their merits, but by the identities of their filers, without allowing certain of those filers, namely, unrepresented corporations, any opportunity for due process via the very judicial system that is specifically designed to evaluate the merits of claims.

91. Plaintiffs have incurred or will incur costs for attorneys and other necessary fees and costs which are recoverable in this action under the provisions of 42 U.S.C. § 1988.

92. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and a preliminary and permanent injunction invalidating and restraining enforcement of Civil Local Rules 3-9(b), 5-1(b) and similar Restrictive Local Rules.

THIRD CLAIM

Against Defendant Administrative Office of the United States Courts
For Violation of the Equal Protection Clause of the Fourteenth Amendment
(42 U.S.C. § 1983)

93. Plaintiffs re-allege and incorporate by this reference each and every allegation set forth in this Complaint as if the same were fully set forth herein.

94. Defendant AO's PACER Fee Schedule discriminates against low-income persons who cannot afford to pay extra, unlawful fees for access to information already in the public domain that is necessary to further their legal interests.

95. The existence of Defendant AO's $15.00-or-below per quarter PACER fee exemption demonstrates Defendant AO's awareness of the discriminatory nature of its PACER Fee Schedule.

96. Defendant AO's PACER system generally discriminates against any litigant who is unable to receive e-mail confirmations of every single electronic filing, since the free copy of each filing is contained in an e-mail link only sent once, at the time the filing is received by PACER's servers. In many if not all districts, *pro se* filers must fill out special forms that attorneys do not need to, in order to specifically request the ability to make use of electronic filing via PACER. "[T]he *pro se* party may not file electronically unless the *pro se* party moves for and is granted permission by the assigned judge to become an ECF user in that case." Civil Local Rule 5-1(b). This extra hurdle for *pro se* filers violates the Equal

Protection Clause on its face, and to the extent that *pro se* filers do not clear the hurdle, they end up on a playing field that much more tilted as they are required to pay $0.10 per page for access to their own case filings.

97. With some court cases involving many thousands of pages of documents, all priced at $0.10 per page, researching a single case might realistically cost several hundred dollars, making the $15.00-or-below per quarter PACER fee exemption practically worthless.

98. The Courts are clear about the need for *pro se* and *in forma pauperis* litigants to act according to the same rules as represented litigants—even if such action is financially impossible due to the Court's own unconstitutional policies.

99. Before accessing a single case, the need to possess a credit or debit card in order to merely sign up for PACER discourages low-income persons without access to such payment cards from pursuing their legal rights, discriminating against them on the basis of their ability to engage with the financial system, which is often the primary reason why low-income persons avail themselves of the Courts to start with. Discrimination against persons without access to the financial system, or without sufficient credit necessary to establish a payment card account, violates the Equal Protection Clause.

100. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and a preliminary and permanent injunction invalidating and restraining enforcement of Defendant AO's PACER Fee Schedule.

FOURTH CLAIM

Against Defendant Administrative Office of the United States Courts
For Violation of the Due Process Clause of the Fourteenth Amendment (42 U.S.C. § 1983)

101. Plaintiffs re-allege and incorporate by this reference each and every allegation set forth in this Complaint as if the same were fully set forth herein.

102. Defendant AO unlawfully levies fees for public access to PACER far in excess of what is "necessary" to promote public access, in violation of the E-Government Act of 2002.

103. Plaintiffs repeatedly requested refunds of their unlawfully-derived PACER fees from Defendant AO and were denied each time.

104. There exists no formal process by which one may appeal Defendant AO's refusal to refund PACER fees, effectively vesting ultimate authority in a single, unelected government bureaucrat.

105. By engaging in the conduct alleged hereinabove, Defendants have established customs, policies, patterns, and practices of enforcing and collecting PACER fees under color of law, and have deprived Plaintiffs of their due process rights, in violation of the Fourteenth Amendment to the United States Constitution.

106. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and a preliminary and permanent injunction invalidating Defendant AO's PACER Fee Schedule as being in violation of the E-Government Act of 2002, and restraining enforcement of Defendant AO's ability to collect any further PACER fees from Plaintiff or any other entity until such time as PACER's lifetime operational costs necessarily exceed Defendant AO's cumulative collections.

FIFTH CLAIM

Against Defendant United States District Court for the Northern District of California For Violation of Plaintiffs' First Amendment Rights (42 U.S.C. § 1983)

107. Plaintiffs re-allege and incorporate by this reference each and every allegation set forth in this Complaint as if the same were fully set forth herein.

108. Plaintiffs are corporations entitled to the right to political speech the same as any other person, regardless of venue.

109. By virtue of this action, Plaintiffs formally challenge the role of Defendant AO to use PACER as a general funding mechanism for the Courts in response to political maneuvering by Congress over several years. This action is therefore inherently political in nature, and constitutes a form of political speech.

110. Pursuant to Civil Local Rule 3-9(b) and similar Restrictive Local Rules, Plaintiffs are not permitted to speak about such issues, or any issue, in the venue of the United States Courts, except through an expensive proxy with a financial incentive to distort Plaintiffs' statements to the extent they may represent a threat to the legal profession. Plaintiffs' choice between forced government censorship or speech forced through a government-sanctioned proxy violates Plaintiffs' First Amendment rights.

111. All conditions precedent to the bringing of this action have occurred or have been exhausted.

112. Plaintiffs have incurred or will incur costs for attorneys and other necessary fees and costs which are recoverable in this action under the provisions of 42 U.S.C. § 1988.

113. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and a preliminary and permanent injunction invalidating and restraining enforcement of Civil Local Rules 3-9(b), 5-1(b) and similar Restrictive Local Rules.

SIXTH CLAIM

Against All Defendants For Violation of the Sherman Act (15 U.S.C. § 2)

114. Plaintiffs re-allege and incorporate by this reference each and every allegation set forth in this Complaint as if the same were fully set forth herein.

115. Through the imposition of Restrictive Local Rules, including but not limited to Local Rule 3-9(b), Defendants have "monopolize[d], or attempt[ed] to monopolize, or

combine[d] or conspire[d] with any other person or persons, to monopolize any part of the trade or commerce among the several States" in the field of legal services.

116. Legal services are frequently performed in interstate commerce, as evidenced by the profusion of *pro hac vice* filings in district and appellate courts. Such services are typically paid services for which the fees are often substantial.

117. Even the provisioning of intrastate legal services frequently affects interstate commerce. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

118. Observance of Restrictive Local Rules, including but not limited to Civil Local Rule 3-9(b), is compelled by the State. Local Rules carry the force of law.

119. The net effect of the Restrictive Local Rules, including but not limited to Civil Local Rule 3-9(b), is one of forcing corporations to hire attorneys even in cases where non-attorneys are perfectly willing and able of representing their corporations' interests in court.

120. The forced hiring of attorneys promoted by the Restrictive Local Rules is in complete alignment with Defendant ABA's goal of furthering law school education, seemingly no matter the literal cost to law students or the figurative cost to society at large.

121. Restrictive Local Rules encourage the imposition of exorbitant monopoly pricing by the attorneys and law firms who benefit from their existence.

122. Defendant ABA comprises various committees that work to create model rules, and coordinates with state bar associations and the Courts by virtue of the fact that every licensed attorney must be a member of a state bar association.

123. As Clifford Winston wrote in *The New York Times* on October 24, 2011, "It is worth recalling that two of the finest lawyers and civil rights advocates our country has ever produced, Abraham Lincoln and Clarence Darrow, would not be allowed to practice law

today under current [ABA] rules." It is therefore evident that Defendants' monopolistic policies, rules, and customs have produced absurd and detrimental consequences.

124. Defendant ABA signed a consent decree in 1996 stemming from its violation the Sherman Act (15 U.S.C. § 1), and then admitted to violating that same consent decree in 2006, when it agreed to pay a $185,000 fine to the United States Department of Justice. Defendant ABA therefore has an established history of anti-competitive behavior.

125. Plaintiffs have no adequate remedy at law.

126. Plaintiffs have incurred or will incur costs for attorneys and other necessary fees and costs which are recoverable in this action under the provisions of 42 U.S.C. § 1988.

127. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and a preliminary and permanent injunction invalidating and restraining enforcement of Civil Local Rules 3-9(b), 5-1(b) and similar Restrictive Local Rules.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request the following relief:

A. A declaratory judgment adjudicating that the Restrictive Local Rules, including but not limited to Civil Local Rules 3-9(b) and 5-1(b), violate the United States Constitution and are unenforceable;

B. A declaratory judgment adjudicating that the PACER Fee Schedule violates the E-Government Act of 2002 and is unenforceable;

C. A preliminary and permanent injunction enjoining Defendant AO from collecting any further PACER fees except to the extent "necessary" to promote public access;

D. An order instructing Defendant AO to immediately refund the unlawfully-collected PACER fees belonging to Plaintiffs and any other entities;

E. A judgment awarding Plaintiffs reasonable costs and expenses of this action, including attorneys' fees, in accordance with 42 U.S.C. § 1988 and other applicable law; and

F. Such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a trial by jury in this action of all issues so triable.

Respectfully submitted,

Dated: May 23, 2014

By: _____
Aaron Greenspan
President
THINK COMPUTER FOUNDATION

By: _____
Aaron Greenspan
President & CEO
THINK COMPUTER CORPORATION

CERTIFICATE OF SERVICE

The undersigned certifies that, on May 23, 2014, a true copy of the foregoing **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND JURY DEMAND** is being served via USPS Certified Mail to the following addresses:

Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

United States District Court for the Northern District of California
280 S. 1st Street
San Jose, CA 95113

American Bar Association
321 North Clark Street
Chicago, IL 60654

Dated: May 23, 2014

By: _____
Aaron Greenspan
President
THINK COMPUTER FOUNDATION

By: _____
Aaron Greenspan
President & CEO
THINK COMPUTER CORPORATION

EXHIBIT A

December 1, 2013 Administrative Office of the United States Courts PACER Fee Schedule

Electronic Public Access Fee Schedule

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

Effective December 1, 2013

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

Fees for Public Access to Court Electronic Records (PACER)

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

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

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

Fees for Courthouse Electronic Access

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

PACER Service Center Fees

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

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

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

Free Access and Exemptions

(8) Automatic Fee Exemptions

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

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

- No fee is charged for access to judicial opinions.

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

(9) Discretionary Fee Exemptions:

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

- In considering granting an exemption, courts must find:

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

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

- If the court grants an exemption:

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

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

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

Applicability to the United States and State and Local Governments

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

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

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

Judicial Conference Policy Notes

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

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

EXHIBIT B

Federal Bureau of Investigation File of
Aaron Swartz

(Rev. 05-01-2008)

UNCLASSIFIED

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 02/06/2009

To: Chicago **Attn:** North RA

From: Washington Field
CR-17 / NVRA
Contact: SA [redacted]

Approved By: [redacted]

Drafted By: [redacted]

b6
b7C
b7F

Case ID #: 288A-WF-238943 (Pending)

Title: UNSUB(S);
US COURTS - VICTIM;
COMPUTER INTRUSION - OTHER

Synopsis: To set lead to locate Aaron Swartz.

Enclosure(s): Attached is an [redacted] Report for Swartz.

b7E

Details: The U.S. Courts implemented a pilot project offering free access to federal court records through the PACER system at seventeen federal depository libraries. Library personnel maintain login and password security and provide access to users from computers within the library. PACER normally carries an eight cents per page fee, however, by accessing from one of the seventeen libraries, users may search and download data for free.

Between September 4, 2008 and September 22, 2008, PACER was accessed by computers from outside the library utilizing login information from two libraries participating in the pilot project. The Administrative Office of the U.S. Courts reported that the PACER system was being inundated with requests. One request was being made every three seconds.

The login information was compromised at the Sacramento County Public Law Library (SPLL) and the Seventh Circuit Court of Appeals Library (SCCA). The two accounts were responsible for downloading more than eighteen million pages with an approximate value of $1.5 million.

UNCLASSIFIED

To: Chicago From: Washington Field
Re: 288A-WF-238943, 02/06/2009

During the compromise, there was one continuous session with one log in and access was made every one to two seconds. The compromise took place during regular business hours. Data that was exfiltrated went to one of two Amazon IP addresses.

Investigation has determined that the Amazon IP address used to access the PACER system belongs to Aaron Swartz.

The following information was provided for the IP address:

Name: Aaron Swartz
Address: 349 Marshman Avenue
Highland Park, IL 60035
Telephone: 847-432-8857

A search in [redacted] and Swartz's personal webpage confirmed this information. Swartz's social security account number is 360-84-0493. The telephone subscriber for telephone number [redacted] is [redacted]

b7E
b6
b7C

NCIC report for Aaron Swartz was negative. A search for wages for Swartz at the Department of Labor was negative.

To: Chicago From: Washington Field
Re: 288A-WF-238943, 02/06/2009

LEAD(s):

Set Lead 1: (Action)

CHICAGO

AT NORTH RA

Washington Field Office requests that the North RA attempt to locate AARON SWARTZ, his vehicles, drivers license information and picture, and others, at 349 Marshman Avenue, Highland Park, IL 60035. Since SWARTZ is the potential subject of an ongoing investigation, it is requested that SWARTZ not be approached by Agents.

If there are any questions or concerns, please contact SA [redacted]

b6
b7C
b7F

♦♦

(Rev. 05-01-2008)

UNCLASSIFIED

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 02/06/2009

To: Chicago **Attn:** SSA [redacted]

From: Washington Field
CR-17 / NVRA
Contact: SA [redacted]

Approved By: [redacted]

Drafted By: [redacted]

b6
b7C
b7F

Case ID #: 288A-WF-238943 (Pending)

Title: UNSUB(S);
US COURTS - VICTIM;
COMPUTER INTRUSION - OTHER

Synopsis: To set lead to locate Aaron Swartz.

b7E

Enclosure(s): Attached is an [redacted] Report for Swartz.

Details: The U.S. Courts implemented a pilot project offering free access to federal court records through the PACER system at seventeen federal depository libraries. Library personnel maintain login and password security and provide access to users from computers within the library. PACER normally carries an eight cents per page fee, however, by accessing from one of the seventeen libraries, users may search and download data for free.

Between September 4, 2008 and September 22, 2008, PACER was accessed by computers from outside the library utilizing login information from two libraries participating in the pilot project. The Administrative Office of the U.S. Courts reported that the PACER system was being inundated with requests. One request was being made every three seconds.

The login information was compromised at the Sacramento County Public Law Library (SPLL) and the Seventh Circuit Court of Appeals Library (SCCA). The two accounts were responsible for downloading more than eighteen million pages with an approximate value of $1.5 million.

To: Chicago From: Washington Field
Re: 288A-WF-238943, 02/06/2009

During the compromise, there was one continuous session with one log in and access was made every one to two seconds. The compromise took place during regular business hours. Data that was exfiltrated went to one of two Amazon IP addresses.

Investigation has determined that the Amazon IP address used to access the PACER system belongs to Aaron Swartz.

The following information was provided for the IP address:

Name: Aaron Swartz
Address: 349 Marshman Avenue
Highland Park, IL 60035
Telephone: 847-432-8857

b7E

A search in [redacted] Swartz's personal webpage confirmed this information. Swartz's social security account number is 360-84-0493. The telephone subscriber for telephone number [redacted] is [redacted]

b6
b7C

NCIC report for Aaron Swartz was negative. A search for wages for Swartz at the Department of Labor was negative.

To: Chicago From: Washington Field
Re: 288A-WF-238943, 02/06/2009

LEAD(s):

Set Lead 1: (Action)

CHICAGO

AT CHICAGO, ILLINOIS

Washington Field Office requests that Chicago attempt to locate AARON SWARTZ, his vehicles, drivers license information and picture, and others, at 349 Marshman Avenue, Highland Park, IL 60035. Since SWARTZ is the potential subject of an ongoing investigation, it is requested that SWARTZ not be approached by Agents.

If there are any questions or concerns, please contact SA [redacted] b6 b7C b7F

♦♦

(Rev. 05-01-2008)

UNCLASSIFIED

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 02/24/2009

To: Washington Field **Attn:** CR-17 / NVRA
SA [redacted]

From: Chicago
North RA
Contact: SA [redacted] b6 b7C b7F

Approved By: [redacted]

Drafted By: [redacted]

Case ID #: 288A-WF-238943

Title: UNSUB(S);
US COURTS - VICTIM;
COMPUTER INTRUSION - OTHER

Synopsis: Lead covered by Chicago North RA

Enclosure(s): Illinois DL/ID Image of Swartz and [redacted] b7E
[redacted]

Details: Attempted to locate AARON SWARTZ, his vehicles, drivers license information and picture, and others at 349 Marshman Avenue, Highland Park, IL 60035.

Successfully located drivers license photo for SWARTZ. Drove by address in an attempt to locate SWARTZ or vehicles related to the residence, but was unsuccessful. House is set on a deep lot, behind other houses on Marshman Avenue. This is a heavily wooded, dead-end street, with no other cars parked on the road making continued surveillance difficult to conduct without severely increasing the risk of discovery. However, drivers license and [redacted] b7E information lists address above. Other family members are listed as current residence and four vehicles are currently registered to [redacted] b6 b7C who resides at above address. Illinois database checks for SWARTZ yielded negative results. SWARTZ has no arrests, no registered vehicles or property.

UNCLASSIFIED

To: Washington Field From: Chicago
Re: 288A-WF-238943, 02/24/2009

Chicago considers this lead covered.

To: Washington Field From: Chicago
Re: 288A-WF-238943, 02/24/2009

LEAD(s):

Set Lead 1: (Info)

WASHINGTON FIELD

AT WASHINGTON DC

Read and clear.

♦♦

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 02/19/2009

AARON SWARTZ has a profile on the website LINKEDIN, at www.linkedin.com/in/aaronsw. SWARTZ is listed as a writer, hacker and activist based in the San Francisco Bay Area. SWARTZ's education includes Stanford University, Sociology, 2004. SWARTZ's experience includes the following:

Founder of watchdog.net
2008 - Present

Tech Lead at Open Library
2007 - Present

Co-founder of reddit
November 2005 - January 2007

Metadata Advisor at Creative Commons
2002 - 2004

Member of RDF Core Working Group
1999 - 2000

Member of W3C
1999 - 2000

The website watchdog.net: the good government site with teeth states that "We're trying to build a hub for politics on the Internet". This plan includes pulling all information about politics, votes, lobbying records, and campaign finance reports together under one unified interface. SWARTZ posted blogs on 07/30/2008, 06/16/2008, 05/07/2008, 04/21/2008, 04/16/2008, 04/14/2008.

SWARTZ has a profile on the website FACEBOOK. His networks include Stanford '08 and Boston, MA. The picture used in his profile was also used in an article about SWARTZ in THE NEW YORK TIMES.

SWARTZ's personal webpage, www.aaronsw.com, includes a section titled "Aaron Swartz: a lifetime of dubious accomplishments". In 2007, SWARTZ began working full-time as a

member of the Long-Term Planning Committee for the Human Race (LTPCHR).

FEDERAL BUREAU OF INVESTIGATION

b6
b7C

Date of transcription 02/19/2009

On February 17, 2008, SA [redacted] received an email from [redacted] Administrative Office of the US Courts, with links to two published articles regarding the compromise of the PACER system.

On February 12, 2009, [redacted] published an article in THE NEW YORK TIMES titled "An Effort to Upgrade a Court Archive System to Free and Easy". For the article, [redacted] interviewed [redacted] and AARON SWARTZ regarding the compromise of the PACER system.

The following information is found in the article:

[redacted] urged fellow activists to go to the seventeen libraries offering the free trial, download as many court documents as they could, and send them to him for republication on the Web.

SWARTZ read [redacted] appeal and downloaded an estimated twenty percent (20%) of the PACER database.

[redacted] a Government Printing Office official, told librarians that the security of the PACER service was compromised and the FBI was conducting an investigation.

Lawyers for [redacted] and SWARTZ told them they had broken no laws.

On February 13, 2009, [redacted] and [redacted] published an article in The LEDE, NOTES ON THE NEWS, FROM THE NEW YORK TIMES titled "Steal These Federal Records - Okay, Not Literally".

The following information is found in the article:

[redacted] published an online manifesto about freeing PACER documents, where he called for a Thumb Drive Corps to go to libraries with small thumb drives, plug them into computers, download as many court documents as they could, and send them to [redacted] so that he can translate them into a format that GOOGLE's search software can read.

Investigation on 02/17/2009 at Manassas, VA

File # 288A-WF-238943 Date dictated N/A

by SA [redacted]

b6
b7C
b7F

b6
b7C

SWARTZ received software that downloaded documents from the PACER database from [redacted] at the BERKMAN CENTER FOR INTERNET AND SOCIETY AT HARVARD. SWARTZ improved this software, saved it on a thumb drive, and had a friend in California take the thumb drive to one of the free libraries and upload the program.

When the PACER system was shut down with no notice, [redacted] told SWARTZ "You need to talk to a lawyer. I need to talk to a lawyer."

Lawyers told [redacted] and SWARTZ that they appeared to have broken no laws. At that point, [redacted] sent SWARTZ a text message saying "You should just lay low for a while."

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 03/09/2009

AARON SWARTZ posted a weblog titled "NYT Personals" at http://www.aaronsw.com/weblog. In the weblog, SWARTZ quotes the NEW YORK TIMES article in which he was interviewed. SWARTZ also posts "Want to meet the man behind the headlines? Want to have the F.B.I. open up a file on you as well? Interested in some kind of bizarre celebrity product endorsement? I'm available in Boston and New York all this month".

Investigation on 03/09/2009 at Manassas, VA

File # 288A-WF-238943 Date dictated N/A

by SA [redacted]

b6
b7C
b7F

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 03/23/2009

On March 10, 2009, [redacted] of THE ADMINISTRATIVE OFFICE OF THE US COURTS (US COURTS) provided the following information:

US COURTS was relying on the Notice written on the login page of the PACER webpage, pacer.uscourts.gov, to advise users that unauthorized access to the PACER system is not allowed. When a user goes to the webpage and navigates to the login page, a Notice is shown at the bottom of the page that states "NOTICE: This is a Restricted Government web Site for official PACER use only. Unauthorized entry is prohibited and subject to prosecution under Title 18 of the U.S. Code. All activities and access attempts are logged."

When asked to clarify how a user knows what constitutes unauthorized access and how a user would have known that they had to be in one of the seventeen libraries to access PACER, [redacted] had [redacted] prepare a response.

[redacted] provided the following information:

AARON SWARTZ would have known his access was unauthorized because it was with a password that did not belong to him.

Library patrons did not sign up for accounts. One login and password were provided to each Federal Depository Library. Each library agreed to not share the password with any organization or individual user. Verification forms were signed by Depository Coordinators at each library and included statements regarding login and password security.

The Seventh Circuit Court of Appeals in Chicago had a one hour time limit on their public access computer and the computer was completely logged off after each session by a staff member.

[PACER homepage and login page print-outs, emails from [redacted] and [redacted] and Federal Depository Library/PACER Verification Forms are attached.]

Investigation on 03/10/2009 at Manassas, VA

File # 288A-WF-238943 Date dictated N/A

by SA [redacted]

b6
b7C
b7F

FD-302 (Rev. 10-6-95)

b6
b7C
b7F

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 04/14/2009

On 04/14/2009, SA [redacted] called (847) 432-8857 in an attempt to speak to AARON SWARTZ. A female answered the telephone and stated that SWARTZ was not available at that telephone number any longer and that SWARTZ did not have another number where he could be reached. SA [redacted] left a message for SWARTZ to return her call and the female stated that she would email that message to SWARTZ.

SWARTZ called SA [redacted] and left a message on her voicemail stating he could be reached at (847) 877-8895. This number is a T-Mobile cellular number and returned negative results [redacted] b7E

SA [redacted] spoke to SWARTZ, at telephone number (847) 877-8895, and explained that the FBI is looking for information on how SWARTZ was able to compromise the PACER system so that the US COURTS could implement repairs to the system and get PACER running again. SWARTZ stated that he would have to talk to his attorney first and would call SA [redacted] back at a later time.

Investigation on 04/14/2009 at Manassas, VA

File # 288A-WF-238943 Date dictated N/A

by SA [redacted]

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

b6
b7C
b7F

Date of transcription 04/15/2009

On 04/15/2009, SA [redacted] returned a telephone call to [redacted] who had left a voicemail message for SA [redacted] [redacted] telephone number is [redacted] and his email address is [redacted]

[redacted] asked if the FBI had an official investigation open or if this was just information gathering. SA [redacted] responded that there was an open investigation. [redacted] asked if he needed an attorney and SA [redacted] responded that she could not advise him on that matter. SA [redacted] told [redacted] that AARON SWARTZ was told in a conversation yesterday that we are looking for information into how the compromise occurred so that the US COURTS can get PACER operational again. [redacted] responded with "I can not tell you how Aaron did it." [redacted] was a [redacted] and understands the security system of PACER and can speak to that.

Investigation on 04/15/2009 at Manassas, VA

File # 288A-WF-238943 Date dictated N/A

by SA [redacted]

FD-302 (Rev. 10-6-95)

b6
b7C
b7F

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 04/16/2009

On 04/16/2009, SA [redacted] returned a telephone call to [redacted] in Boston, MA. [redacted] wanted assurance that if SWARTZ was interviewed, what he said would not be used to jeopardize him. SA [redacted] explained that assurance could not be given but that we were in an information gathering phase. [redacted] refused the interview without the assurance.

Investigation on 04/16/2009 at Manassas, VA

File # 288A-WF-238943 Date dictated N/A

by SA [redacted]

(Rev. 05-01-2008)

UNCLASSIFIED

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 04/20/2009

To: Cyber **Attn:** CIU-1/SSA [redacted]
SSA [redacted]

Washington Field

From: Washington Field
CR-17 / NVRA
Contact: SA [redacted] b6 b7C b7F

Approved By: [redacted]

Drafted By: [redacted]

Case ID #: 288A-WF-238943 (Closed)

Title: UNSUB(S);
US COURTS - VICTIM;
COMPUTER INTRUSION - OTHER

Synopsis: To close case.

Details: For background, the U.S. Courts implemented a pilot project offering free access to federal court records through the PACER system at seventeen federal depository libraries. From September 4 - 22, 2008, PACER was accessed by computers from outside the library utilizing login information from two libraries participating in the pilot project. The login information was compromised at the Sacramento County Public Law Library and the Seventh Circuit Court of Appeals Library. The two accounts were responsible for downloading more than eighteen million pages with an approximate value of $1.5 million.

Investigation determined that the Amazon IP address used to access the PACER system belongs to Aaron Swartz. Swartz refused an interview with the FBI. [redacted] Swartz on his website pacer.resource.org, was interview by the FBI on April 15, 2009. Both Swartz and [redacted] were interviewed by the New York Times, regarding the compromise of the PACER system. b6 b7C

UNCLASSIFIED

To: Cyber From: Washington Field
Re: 288A-WF-238943, 04/20/2009

b6
b7C

CCIPS Attorney [redacted] closed the office's case. Based on the CCIPS closing, Washington Field is closing this case as of this communication.

To: Cyber From: Washington Field
Re: 288A-WF-238943, 04/20/2009

LEAD(s):

Set Lead 1: (Info)

CYBER

AT CIU-1

Read and clear.

♦♦

EXHIBIT C

Correspondence with Defendant
Administrative Office of the United States
Courts and Congresswoman Anna Eshoo

Think Computer Foundation
20560 Shelburne Road
Shaker Heights, OH 44122

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web http://www.thinkcomputer.org

A 501(c)3 Non-Profit Foundation
EIN 34-1937820

Think Computer Foundation

February 9, 2012

Judicial Conference of the United States
c/o Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

To Whom It May Concern:

As a taxpayer, a litigant, and a software engineer, I want to formally register my extreme discontent with the Judicial Conference of the United States regarding the current state of the PACER and CM/ECF systems. I have noted the results of the April, 2010 user survey conducted by Pacific Consulting Group on behalf of the Federal Judiciary (http://www.pacer.gov/documents/assessment_slides.pdf), and I wish to present an alternative viewpoint that I have reason to believe is not being heard. If you are not the right individual to address the complaints contained herein, I hope you will forward this message to those who are best suited to respond.

PACER is not merely a system with "areas for improvement," as the aforementioned survey politely suggests. It is nothing short of a national disgrace. Lest you think I exaggerate, I hope you will allow me to explain the several aspects of the system's structural deficiencies, of which the public record indicates that you should already be aware.

1. PACER's Billing Model is Arbitrary and Capricious on Multiple Levels

PACER charges users a recurring fee on a per-page basis, where "pages" frequently fail to correspond to actual physical pages, and where the number of "pages" in a given document does not necessarily correspond in any way with the number of bytes required to transmit that document. For example, a blank page requires far fewer bytes to store and transmit than a page full of text or graphics. Since the Judiciary's expenses in operating PACER are proportional to bytes stored and transmitted, and not to some abstract notion of "pages," the fundamental basis for the system's billing system is completely arbitrary.

PACER charges users even when it fails to function and transmits little to no data accordingly. On a number of occasions, I have been charged eight cents for a search that produced no results.

Furthermore, PACER fails to distinguish in a systematized fashion between the authors of documents. This has the perverse effect of charging users for their own documents on a regular basis. I have several times been required to

pay for documents that I myself authored and submitted to PACER.

Perhaps most importantly, the price of eight cents per "page," soon to be ten cents, is additionally arbitrary and capricious. There is no fundamental or mathematically-justifiable reason why each "page" should cost eight or ten cents, as opposed to any other amount.

2. PACER's Billing Model Discriminates Against Impoverished, *Pro Se*, and *In Forma Pauperis* Litigants

PACER's present billing model, which involves charging users on a recurring, per-"page" basis, inherently discriminates against the poor, *pro se*, and *in forma pauperis* litigants—classes of citizens who arguably need the Court's assistance the most. The existence of a $10.00 threshold, below which access to PACER is free, does barely anything to offset the discriminatory nature of this system. Nor do fee caps on particularly long documents change the fact that the system's access rules are fundamentally unjust. They merely serve as an acknowledgement of that fact.

For a *pro se* litigant who has not yet been or will never be granted electronic access to case filings through CM/ECF (because *pro se* litigants are required, for some reason, to request a court order so that they may use CM/ECF), a handful of fifty-page legal documents, as part of a case to which the user is party, are enough to exceed the $10.00 threshold. Even *with* CM/ECF access, litigants must use PACER and pay the requisite fees to view dockets for their own cases. A single federal court case docket—even if a litigant is a party—viewed perhaps ten times over the course of a month might cost more than $10.00, let alone the hundreds or thousands of pages of accompanying documents. In a society where the disenfranchised are often unable to exercise their rights due to the high cost of litigation, PACER's fee structure serves only to further polarize individuals into two camps of those who can and those who cannot afford that cost.

Furthermore, while the Court expects *pro se* and *in forma pauperis* litigants to comply with the Federal Rules of Civil Procedure and applicable Local Rules, including formatting rules, it inhibits them from learning by example and from offering up their most compelling arguments by restricting and discouraging access to precedential cases. Law firms typically rely on private legal databases that are completely unaffordable for such litigants.

3. The Judicial Conference is in Violation of the E-Government Act of 2002

On January 27, 2009, Senator Joseph Lieberman sent a letter to the Judicial Conference inquiring as to its compliance with the E-Government Act of 2002. Specifically, Senator Lieberman wrote, "Seven years after the passage of the E-Government Act, it appears that little has been done to make these records freely available—with PACER charging a higher rate than 2002. Furthermore, the funds generated by these fees are still well higher than the cost of dissemination, as the Judiciary Information Technology Fund had a surplus of approximately $150 million in FY2006. Please explain whether the Judicial Conference is complying with Section 205(e) of the E-Government Act, how PACER fees are determined, and whether the Judicial Conference is only charging 'to the extent necessary' for records using the PACER system."

Ten years since Congress passed the E-Government Act of 2002, which states that the Judicial Conference may charge "reasonable" fees "only to the extent necessary," nothing has changed. The situation is arguably worse, as the

Judicial Conference has already authorized a fee *increase* for PACER access in the coming months. An increased fee is neither reasonable (in the context of exponentially declining data storage costs), nor necessary. Today, the entirety of PACER can be stored on a single computer available for sale at an Apple Store for less money than it would take to download a fraction of the cases on PACER.

Researchers at Princeton University have found further glaring inconsistencies regarding the implementation of PACER's fee structure. See "Using software to liberate U.S. case law" by Harlan Yu and Stephen Schultze (http://xrds.acm.org/article.cfm?aid=2043244).

4. The PACER Fee Structure Encourages Attorneys to Further Overcharge Their Clients

Litigation is prohibitively expensive for most Americans. While the reasons for this state of affairs are complex, the PACER fee structure imposed by the Judicial Conference does nothing to help matters. Attorneys routinely mark up the expenses they incur, turning their costs for photocopying, telephone calls, faxes, and PACER access into significant sources of additional profit. The Judiciary does not exist to line the pockets of attorneys, but rather, to serve the people. Accordingly, it should be mindful that its policies have unintended consequences.

5. Comparable and Superior Technologies Have Been Developed at Little to No Cost

PACER and CM/ECF are both based on proprietary computer software foundations that have undergone only trivial improvements over the past decade. Internet-based programming has changed significantly since the web-based version of PACER was initially developed, and although the pacer.gov facade recently benefitted from a facelift, that particular web site remains a facade, and the underlying database software was not affected in the least.

In contrast, PlainSite (http://www.plainsite.org), operated as a joint venture by Think Computer Corporation and Think Computer Foundation, started off as a personal side-project with a zero-dollar budget. It indexes approximately three-quarters of a million PACER documents, as well as Internal Revenue Service records regarding Section 527 Political Action Committees, among various other related records. PlainSite links disparate data sources in ways that PACER cannot, and was developed within approximately four months by three engineers with freely-available software. Its user interface is vastly superior to that of PACER and CM/ECF, and it further makes this information freely available to the public, either directly or via search engines.

The Judicial Conference should justify to the public why it requires a nine-figure sum of money to operate PACER, when non-profit organizations such as ours are capable of offering better, more modern, and more attractive services for free.

6. Numerous Court Functions Could and Should Be Automated Through Next-Generation Electronic Systems

According to presentations publicly available on the uscourts.gov web site, the Judicial Conference is very pleased with itself for its progress with PACER and CM/ECF. It has used public opinion surveys, sent to a heavily biased audience, to justify this sense of self-satisfaction. However, the fact remains that the federal court system is commonly regarded as a slow, bureaucratic nightmare.

Part of the reason for this nightmare is that judicial procedure has completely failed to keep pace with technology. Certifications that could be made instantly through web-based forms must be supplied instead as printed documents or PDF files. Even filing a lawsuit should no longer require the same antiquated format; relational databases are perfectly capable of accurately and comprehensively recording disputes between parties, as evidenced by electronic dispute resolution systems employed by private industry for a number of years.

Instead of issuing self-congratulatory press releases with accompanying fake news segments (such as the one at http://www.uscourts.gov/News/NewsView/10-10-04/Judiciary_Assesses_PACER_Services.aspx), the Judicial Conference should be looking toward the future to best discern how it can serve the public interest with an efficient court system that guarantees each citizen their Sixth Amendment right to a speedy trial.

7. Attorneys Are Afraid To Voice These Concerns Due To Fear of Retribution by Judges or Other Harm to Their Clients' Interests

I have personally discussed these issues with prominent attorneys and law professors. There is a general consensus that few, if any, attorneys are willing to explicitly state the points contained in this letter because of the potential ramifications that might ensue. Attorneys tend to be sensitive to their fiduciary duty to their clients, and accordingly they fear that taking any action not directly beneficial to a client might result in unnecessary liability of one form or another. It is therefore much easier and far safer for them to mark up PACER fees as expenses for large corporate clients, rather than highlight the multiple burdens such fees impose on the rest of society.

We live in a time of unprecedented inequality. The Judiciary is one of the few remaining institutions that is not itself completely corrupted by political donations or corporate lobbying. Instead of further polarizing the nation, the policies and procedures implemented by the Judicial Conference must guarantee equal treatment under the law to all parties, or our judicial system will never be capable of providing the kind of balance that the notion of justice inherently demands, and that the nation clearly needs.

Feel free to contact me with any questions at aaron.greenspan@plainsite.org, or +1 415 670 9350.

Sincerely,

Aaron Greenspan
President
Think Computer Foundation

CC: Senator Joseph Lieberman
Congresswoman Anna Eshoo

Congress of the United States
House of Representatives
Washington, D.C. 20515

Anna G. Eshoo
Fourteenth District
California

March 21, 2012

Mr. Aaron Greenspan, President and CEO
Think Computer Corporation
3260 Hillview Avenue
Palo Alto, California 94304-1220

Dear Mr. Greenspan,

Thank you for your e-mail about the Public Access to Court Electronic Records (PACER) system, and for sharing a copy of your recent letter to the Judicial Conference with me. I welcome your thoughts on this issue.

As you may know, Section 205(e) of the E-Government Act of 2002 (PL 107-347) states that the Judicial Conference may "to the extent necessary," proscribe reasonable fees for access to automated data processing systems such as PACER. I've noted your concern about these fees, as well as the importance of ensuring that PACER's level of accessibility is consistent with the public interest.

Currently, any individual may search PACER for free and can obtain copies of final opinions (including convictions) without charge. Individuals who obtain less than 100 pages per quarter are not assessed any fee whatsoever. This number will increase to 150 pages on April 1, 2012, meaning approximately 70-80% of all PACER users will pay no fees at all. I think these policies are reasonable and they ensure that no important criminal information is "hidden" from public view behind PACER's fee structure. All PACER revenues are wholly dedicated to the system's continuous operation and improvement—any excess revenues (or "profits") are held in an account for anticipated operational expenses, such as next generation Case Management and Filing systems.

I have passed your concerns on to the Judicial Conference directly, and will remain attentive for future legislative proposals which improve PACER access while also preserving the system's financial self-sufficiency. Should such legislation come before me in the House, your important thoughts will certainly inform my vote.

Most gratefully,

Anna G. Eshoo
Member of Congress

From: Aaron Greenspan <aarong@thinkcomputer.com>
Subject: **PACER Response Letter**
Date: May 9, 2012 12:23:06 PM PDT
To: Patty Kim <patty.kim@mail.house.gov>, David Grossman <David.Grossman@mail.house.gov>
Cc: clarine_nardi_riddle@lieberman.senate.gov, tara_yurgin@lieberman.senate.gov, marshall_wittmann@lieberman.senate.gov, todd_stein@lieberman.senate.gov, sherry_brown@lieberman.senate.gov, Carl Malamud <carl@malamud.com>, John Markoff <markoff@nytimes.com>, Nick Bilton <bilton@nytimes.com>, Lawrence Lessig <lessig@pobox.com>, Jonathan Zittrain <zittrain@law.harvard.edu>, Benjamin Edelman <bedelman@hbs.edu>

4 Attachments, 748 KB

Patty and David,

I received the Congresswoman's March 21, 2012 response (attached) to my concerns about PACER recently. Please convey my sincere appreciation that she took the time to examine and address the issues involved. Nonetheless, I would like to address two errors in her response, and a third point about general accessibility of PACER records.

First, the Congresswoman's statement that, "any individual may search PACER for free," is simply false. Every search of PACER costs money on a per-page basis. Even searches of PACER that return zero results cost money on a per-page basis--something that happens often because the search engine does not actually work (see attachment). In fact, I was recently charged by PACER for received an error message generated by the system (see attachment).

Second, the Congresswoman's highlight of the phrase "to the extent necessary" in Section 205(e) of the E-Government Act of 2002, followed by an admission that PACER collects "excess revenues (or 'profits')" in her next paragraph, only serves to emphasize my point. Congress has not authorized the courts to collect "excess revenues (or 'profits')," however those might be used, because by definition "excess" means that such revenues are BEYOND "the extent necessary." I would also emphasize once again that based on the costs associated with PlainSite, a system with similar scope, the expenses truly "necessary" to operate PACER are well under one million dollars annually. The PACER billing center likely costs more to operate than such costs. Therefore, it is my belief PACER is operating in continuous violation of the law to the detriment of the entire country, and has been for some time.

Third, just because PACER fees are waived for many users whose total fees are under a certain threshold does not mean that the system is accessible. PACER is designed in such a way that it is spread across more than 50 web sites--aside from being confusing, even attorneys registering in remote districts *pro hac vice* have considerable trouble accessing cases that they are entitled to file documents for because multiple usernames and credentials are required. Furthermore, for same day registration, a credit or debit card is required to sign up. Many citizens, including many of the Congresswoman's constituents, do not have a credit or debit card and have no means by which to obtain one. These people should not have impaired access to public records because they choose not to use certain banking services.

For my part, I'd like a refund for the fees I've paid to access my own cases, and to perform searches, if they are in fact supposed to be free.

Aaron

Aaron Greenspan
President & CEO
Think Computer Corporation

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e-mail aarong@thinkcomputer.com
web http://www.thinkcomputer.com

PACER Case Locator

All Court Types Party Search
Wed May 9 15:06:15 2012
No Records Found

User: ag4236 P
Client:
Search: All Court Types Party Search Name Aaron Greenspan All Courts Page: 1

No records found

Search Tip: To search for an individual party, use the name format: *last, first*. A comma should be included to separate the last name and the first name. See the help balloon for more information and example searches.

PACER Service Center **Receipt** 05/09/2012 15:06:16 27171271

User	ag4236 P
Client	
Description	All Court Types Party Search Name Aaron Greenspan All Courts Page: 1
Pages	1 ($0.10)

error.html (3.5 KB)

Congress of the United States
House of Representatives
Washington, D.C. 20515

Anna G. Eshoo
Fourteenth District
California

May 18, 2012

Mr. Aaron Greenspan, President and CEO
Think Computer Corporation
3260 Hillview Avenue
Palo Alto, California 94304-1220

Dear Mr. Greenspan,

I received your response to my letter of March 21st about your continuing interest in the PACER system.

I've referred your inquiries to the Judicial Conference and have asked them to respond to you directly. A copy of my letter is attached. I hope you will find their reply to be informative and useful.

Sincerely,

Anna G. Eshoo
Member of Congress

Congress of the United States
House of Representatives
Washington, D.C. 20515

Anna G. Eshoo
Fourteenth District
California

May 18, 2012

Ms. Cordia A. Strom, Assistant Director for Legislative Affairs
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Suite 7-110
Washington, D.C. 20544-0003

Dear Ms. Strom,

Enclosed please find correspondence between my constituent, Mr. Aaron Greenspan and myself—as well as an earlier letter which Mr. Greenspan sent to the Judicial Conference.

Earlier this month, Mr. Greenspan replied to my letter of March 21st with a separate set of inquiries that would be most appropriately addressed by a direct response from the Judicial Conference.

I would appreciate if you would please review his correspondence of May 9th and respond to him directly. Thank you in advance for your cooperation and timely response to this matter.

Most gratefully,

Anna G. Eshoo
Member of Congress

HONORABLE THOMAS F. HOGAN
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

MICHEL ISHAKIAN
Chief
Public Access and
Records Management Division

Office of Court Administration

June 11, 2012

Mr. Aaron Greenspan
President and CEO
Think Computer Corporation
3260 Hillview Avenue
Palo Alto, CA 94304-1220

Dear Mr. Greenspan:

Your recent e-mail inquiry (enclosed) to Representative Anna Eshoo's office was forwarded to me, as Chief of the Office of Court Administration's Electronic Public Access and Records Management Division, for response.

You raised concern about how the Electronic Public Access (EPA) fee revenue is used. In accordance with Congressional direction, EPA fee revenue is used exclusively to fund program expenses that support and enhance electronic public access to the courts. At the same time, the EPA program continues to provide a significant amount of federal court information to the public at no charge. For example, free access to judicial opinions is provided, and parties to a court case receive a free copy of filings in the case.

Your letter also expressed concern regarding your bill and requested a refund of the fees you had paid. Based on a review of your Public Access to Court Electronic Records (PACER) account, it appears that the charges you have incurred are in accordance with the Judiciary's policies and procedures. Usage of the PACER service is billed on a quarterly basis, and pursuant to Judicial Conference policy, no account is billed for usage of less than $15 in a quarter. Accordingly, the charges for your usage in the fourth quarter of 2011, which amounted to $9.52, were waived. The PACER registration form, which you completed, clearly states that a per-page charge applies to the number of pages resulting from any search, and that searches resulting in no matches incur a charge for one page of usage ($0.10 as of April 1, 2012). The fees that you have incurred for such searches have been appropriately applied in accordance with this policy, and therefore, I am denying your request for a refund of the fees you have paid, which total $52.96 for the first quarter of 2012. Should you seek a credit request in the future, please refer to the PACER Service Center's website http://www.pacer.gov/billing/ for instructions or call 1-800-676-6856 for assistance.

Your letter suggests that you believe the PACER registration process to be burdensome. We have made every effort to make the process as easily accessible as possible. Registration information for access to PACER can be submitted via fax or the Internet, and there is no registration fee. A credit card is not required for registration, and a login and password are sent to the registrant via the United States Postal Service within one business day. For same-day registration, a registrant must provide credit card and password security information. The credit card holder's name and billing address are then verified through Pay.gov before a login and password are issued to the user. These procedures ensure that the Judiciary has a valid billing address on file at the time of registration, as required by law, thus ensuring that persons using PACER can be properly billed for their use of the service.

Moreover, we continue to seek new ways to improve the process. The Judiciary recently completed gathering requirements for the Next Generation of Case Management/Electronic Case File (CM/ECF) system, which included an Additional Stakeholders Functional Requirements Group (ASFRG) that focused on how the federal courts interact with others in the legal system. The group's members (including representatives from the Judiciary, the Department of Justice, the American Bar Association, the Internal Revenue Service, the Association of American Law Schools, and the National Association of Bankruptcy Trustees) contacted more than 60 constituent groups for feedback regarding the present system and requirements for the future. Though all groups reported a high level of satisfaction with the current systems, and a desire that the next version not lose any current functionality, requests for role-based, streamlined access were clearly heard and are being included in the requirements for the Next Generation of CM/ECF. The ASFRG's final report has been published on the Judiciary's website at http://www.uscourts.gov/uscourts/FederalCourts/Publications/ASFRG-Final-Report.pdf.

If you have any additional questions or concerns, please contact Wendell Skidgel, Senior Attorney, at 202-502-3095 or by e-mail at Wendell_Skidgel@ao.uscourts.gov.

Sincerely,

Michel Ishakian

Enclosure

cc: Honorable Anna G. Eshoo

From: Wendell_Skidgel@ao.uscourts.gov
Subject: Re: Illegal and Erroneous PACER Fees
Date: March 24, 2014 at 3:46 PM
To: Aaron Greenspan aaron.greenspan@plainsite.org

Dear Mr. Greenspan,

Prior to downloading a document from the PACER service, a receipt is displayed. The receipt shows whether the document to be downloaded will, or will not, incur a charge. The user is thereby provided with an option to avoid incurring a fee by electing to not download the document.

If your account does not show a receipt prior to download a document, the PACER Service Center staff can assist you is setting that option for your account. They may be contacted at (210) 301-6440 or at (800) 676-6856.

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Sincerely,

Wendell Skidgel
Senior Attorney
DPS-CS-PRG

From: Aaron Greenspan <aaron.greenspan@plainsite.org>
To: Michel Ishakian <michel_ishakian@ao.uscourts.gov>, Wendell Skidgel <wendell_skidgel@ao.uscourts.gov>
Date: 03/17/2014 03:11 PM
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 06-7821AHM (AJWx)	Date	March 26, 2010
Title	ROSEMARY DORSETT v. SANDOZ, INC.		

Present: The Honorable	A. HOWARD MATZ, U.S. DISTRICT JUDGE	
Stephen Montes	Not Reported	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys **NOT** Present for Plaintiffs: Attorneys **NOT** Present for Defendants:

Proceedings: IN CHAMBERS (No Proceedings Held)

I. INTRODUCTION

This is a products liability case arising from the suicide death of Noe Carrasco, the son of Plaintiff Rosemary Dorsett. Defendant Sandoz, Inc. ("Sandoz") originally filed this motion on March 27, 2007, as a motion to dismiss on the ground that federal law preempted Plaintiff's claims. On April 2, 2007, the Court granted Plaintiff's ex parte application to convert the motion into a motion for summary judgment and gave Plaintiff additional time to respond. On February 14, 2008, the Court granted Sandoz's unopposed motion to stay this case pending the Supreme Court's decision in *Wyeth v. Levine*, — U.S. —, 129 S. Ct. 1187 (2009). While the case was stayed, the Court granted Plaintiff's motion to temporarily lift the stay to substitute Eli Lilly and Company ("Lilly") in place of one of the Doe defendants. Plaintiff then filed her operative pleading, the Second Amended Complaint ("SAC"), on January 6, 2009. *Wyeth* was decided on March 4, 2009 and the Court reopened the case on March 24, 2009. Thereafter, Lilly filed a motion for judgment on the pleadings on statute of limitations grounds, which the Court denied on October 28, 2009. Lilly has also filed a motion for summary judgment on the ground of federal preemption, presenting similar, though not identical, arguments to those of Sandoz. The Court will refer to Lilly and Sandoz collectively as "Defendants" when appropriate. For the following reasons, the Court DENIES Defendants' motions for summary judgment and finds that Plaintiff's claims are not preempted.[1]

[1]Docket Nos. 31 & 79.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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II. BACKGROUND[2]

A. Crux of This Case

[2]All the facts recited in this order are undisputed unless otherwise noted.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 06-7821AHM (AJWx)	Date	March 26, 2010
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On August 20, 2004, Carrasco committed suicide by shooting himself in the garage of his friend's home. Second Amended Complaint ("SAC") ¶ 5. Carrasco was 26 years old. He had been taking fluoxetine, the generic version of the drug Prozac, for approximately 36 days before his death. SAC ¶ 55.

Carrasco began taking fluoxetine on or about July 15, 2004. SAC ¶ 55; Mem. at 3. Fluoxetine, like Prozac, is a selective seratonin reuptake inhibitor ("SSRI"). Mem. at 3. SSRIs are a class of antidepressants used to treat depression, anxiety disorders, and some personality disorders.

Defendant Sandoz manufactures and markets generic fluoxetine. Its warning label for fluoxetine was identical to the label on its brand name equivalent, Prozac, manufactured by Lilly. At the time of Carrasco's death, the Sandoz label contained the following language, which was standard for all SSRIs:

> Suicide: The possibility of a suicide attempt is inherent in major depressive disorder and may persist until significant remission occurs. Close supervision of high-risk patients should accompany initial drug therapy. Prescriptions for Drug Z should be written for the smallest quantity of tablets consistent with good patient management, in order to reduce the risk of overdose.

As for Lilly, it asserts that its label was changed at some point in July 2004 (shortly before Carrasco's death) to include an enhanced warning, which stated, in part:

> **Clinical worsening and suicide risk** – Patients with major depressive disorder, both adult and pediatric, may experience worsening of their depression and/or the emergence of suicidal ideation and behavior (suicidality), whether or not they are taking antidepressant medications, and this risk may persist until significant remission occurs. Although there has been a longstanding concern that antidepressants may have a role in inducing worsening of depression and the emergence of suicidality in certain patients, a causal role for antidepressants in inducing such behaviors has not been established. **Nevertheless, patients being treated with antidepressants should be observed closely for clinical worsening and suicidality, especially at the**

> **beginning of a course of drug therapy, or at the time of dose changes, either increases or decreases.**

Lilly's Exs. X & Z; SUF ¶¶ 24, 27 (emphasis in original). The warning went on to state that "[a]lthough there has been a long-standing concern that antidepressants may have a role in inducing or worsening of depressions and emergence of suicidality in certain patients, a causal role for antidepressants in inducing such behaviors has not been established." *Id.* Sometime afterward—at the hearing, the parties represented that it was in December 2004—Sandoz placed this language in its label.

Plaintiff Rosemary Dorsett ("Dorsett") is Carrasco's mother. She alleges that Defendants failed to provide any warning through any medium about the association between fluoxetine and suicidality;[3] and that based upon the state of knowledge as it existed at the time, Defendants knew or should have known that fluoxetine was a substance associated with producing preoccupation about and acts of self-harm and could be dangerous and unsafe. SAC ¶¶ 55-57. According to Dorsett, Defendants should have provided "a stronger warning regarding the association between fluoxetine and suicidality through a variety of mediums, including but not limited to labeling, continuing education, symposiums, posters, advertisements. . . ." SAC ¶ 53. *See also* SAC ¶¶ 56-57. Dorsett has not provided a specific warning about a causal relationship between SSRIs and suicidality in adults that she says should have been placed on the label. *See infra*, p. 23-24.

Dorsett is suing for common law negligence, strict liability, breach of express warranty, and for survival. SAC ¶¶ 54-85. Defendants have moved for partial summary judgment of Plaintiff's failure-to-warn claims on the grounds that Plaintiff's state product-liability claims are preempted by the Federal Food, Drug and Cosmetic Act ("FDCA") and by regulations promulgated by the Food and Drug Administration ("FDA"). Defendants seek an order that as a matter of law they may not be held liable for their failure, as of July 2004, to include in the labeling for fluoxetine *any* warning regarding the risk of suicide beyond that which was approved by the FDA.

B. Statutory and Regulatory Background

The "essential purpose" of the FDCA is "to ensure that any product regulated by the

[3] "Suicidality" is suicidal thinking and behavior.

FDA is 'safe' and 'effective' for its intended use." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The FDA's mission is to "promote the public health by promptly and efficiently reviewing clinical research and taking appropriate action on the marketing of regulated products in a timely manner" and to "protect the public health by ensuring that . . . human and veterinary drugs are safe and effective." 21 U.S.C. § 393(b)(1), (2). The FDA fulfills its mission, in part, by overseeing the approval process for new drug products, regulating drug labeling content, and issuing public health advisories if the safety of a drug product comes into question.

In 1962, Congress amended the FDCA to require all drug manufacturers to submit a new drug application ("NDA") to the FDA for permission to market a new drug product. *See generally* 21 U.S.C. § 355; Public Law 87-781 (1962). Applications for new drugs must include scientific data showing the drug's safety as well as its effectiveness for its intended use. 21 U.S.C. § 355(b); 21 C.F.R. pt. 314.

In 1984, pursuant to the Hatch-Waxman Act, the FDA implemented an abbreviated new drug application procedure ("ANDA") for manufacturers of generic drug products. 21 U.S.C. § 355(j). By using the "innovator" drug as the basis for the generic drug's approval, ANDA applicants are not required to include clinical data to demonstrate the drug's safety and effectiveness. *Id*. Instead, ANDA applicants must demonstrate that their product is bioequivalent to (that is, performs in the same manner as) the innovator drug. *See generally* 21 C.F.R. § 320.

The statutory provision governing the ANDA procedure provides:

> An abbreviated application for a new drug shall contain. . .information to show that the labeling proposed for the new drug is the same as the labeling approved for the listed drug referred to in clause (i) except for changes required because of differences approved under a petition filed under subparagraph (C) or because the new drug and the listed drug are produced or distributed by different manufacturers.

21 U.S.C. § 355(j)(2)(A)(v). Thus, the ANDA procedure is only available for those generic drug products that are "the same as" an already-approved FDA drug. *See* 21 C.F.R. § 314.92(a)(1). "[T]he term 'same as' means identical in active ingredient(s), dosage form, strength, route of administration, and conditions of use . . . ." *See* 21 C.F.R. § 314.92(a)(1). This means that the packaging and labeling of the innovator drug and generic drug

must—with limited exceptions—be identical at the time the ANDA application is submitted.

In January 2006 the FDA issued a new final rule on the content and format of labeling, which went into effect in June 2006. Under both the new and old rule, the labeling "must contain a summary of the essential scientific information needed for the safe and effective use of the drug." 21 C.F.R. § 201.56(a)(1). Also, it "must be informative and accurate and neither promotional in tone nor false or misleading in any particular." 21 C.F.R. § 201.56(a)(2).

The FDA must withdraw approval if, after notice and hearing, subsequent evidence shows that the drug is unsafe, if the application contains any untrue statement of material fact, or for a number of other statutorily prescribed reasons. 21 U.S.C. § 355(e); 21 C.F.R. § 314.150(a). In addition, the FDA "may" seek to withdraw approval for a new or generic drug for a number of other reasons. 21 C.F.R. § 314.150(b). One of those reasons is if the labeling for the drug is "false or misleading in any particular" and the manufacturer did not correct the labeling after receiving notice from the FDA. 21 C.F.R. § 314.150(b)(3). The FDA may also seek to withdraw approval if the labeling for a generic drug "is no longer consistent with that for the listed drug," with two exceptions that are not relevant here. 21 C.F.R. § 314.150(b)(10).

FDA regulations also provide for changes to approved drug labels initiated by the manufacturer.[4] *See* 21 C.F.R. § 314.70 (concerning supplements and other changes to an approved application); 21 C.F.R. § 314.97 (applying §§ 314.70 and 314.71 to approved abbreviated applications). Under the so-called Changes Being Effected ("CBE") regulation, after the FDA receives a supplemental application from a manufacturer, the manufacturer may distribute products with changes in the labeling that "add or strengthen a contraindication, warning, precaution, or adverse reaction" or "add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the

[4] Prior to 1965, "the FDA regulations applicable to drugs prohibited companies from adding warnings or other information without prior approval." *Caraker v. Sandoz Pharma. Corp.*, 172 F. Supp. 2d 1018, 1034 (S.D. Ill. 2001) (citing 25 Fed. Reg. 12,592, at 12,595 (1960)).

drug product." 21 C.F.R. §§ 314.70(c)(6)(iii) (effective to June 29, 2006).[5] *See Wyeth*, 129 S. Ct. at 1196 (discussing the CBE process). If the FDA disapproves the supplemental application, it may order the manufacturer to cease any distribution that may have begun. 21 C.F.R. § 314.70(c)(7).

Finally, the regulations require manufacturers to revise their labeling to "include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug; a causal relationship need not have been proved." 21 C.F.R. § 201.57(e) (effective to Jun. 29, 2006), *cited in Cartwright v. Pfizer, Inc.*, 369 F. Supp. 2d 876, 883 (E.D. Tex. 2005).[6]

C. SSRIs, Suicidality, and SSRI Litigation

In the past two decades there has been significant debate and inquiry in the medical, pharmaceutical and regulatory communities about the link between SSRIs and suicide. *See* Def. Ex. 7, Memorandum from Thomas P. Laughren, M.D., Director of Division of Psychiatry Products, FDA Center for Drug Evaluation and Research, to Members of the Psychopharmacologic Drugs Advisory Committee ("PDAC") (November 16, 2006). This section of this Order summarizes scientific and regulatory developments, this Court's opinion in *Motus v. Pfizer,* 127 F. Supp. 2d 1085 (C.D. Cal. 2000), and the changes that have occurred since *Motus*.

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[5]The regulation was amended in 2008 to specify that a manufacturer may only change its label "to reflect newly acquired information." Supplemental Applications Proposing Labeling Changes for Approved Drugs, Biologics, and Medical Devices, 73 Fed. Reg. 49,603, at 49,609 (Aug. 22, 2008) (to be codified at 21 C.F.R. pts. 314, 601, and 814). The Court will base its decision on the regulations as they existed at the time of Carrasco's death in 2004, but, as the Supreme Court has noted, the addition to the regulation does not change the preemption analysis. *Wyeth v. Levine*, — U.S. —, 129 S. Ct. 1187, 1196-97 (2009).

[6]This section of the C.F.R. was amended in a new rule affecting prescription drugs, issued on January 24, 2006 and effective on June 30, 2006. *See* section C.1 *infra*. The new language reads " reasonable evidence of *a causal association* with a drug; a causal relationship need not have been definitely established." 21 C.F.R. § 201.57(e) (effective to Jun. 30, 2006) (emphasis added).

1. Pre-2000 SSRI suicidality knowledge and labeling.

As noted above, for many decades antidepressant drug labels, presumably including Sandoz's fluoxetine label at the time Noe Carrasco was given his prescription,[7] carried the following standard language:

> Suicide: The possibility of a suicide attempt is inherent in major depressive disorder and may persist until significant remission occurs. Close supervision of high-risk patients should accompany initial drug therapy. Prescriptions for Drug Z should be written for the smallest quantity of tablets consistent with good patient management, in order to reduce the risk of overdose.

Pl.'s Ex. 11, Memo from Thomas Laughren, M.D., FDA Center for Drug Evaluation and Research, to Members of the PDAC at 1 (January 5, 2004). As Dr. Laughren noted, this warning "does not explicitly warn of the possibility that antidepressant drugs may have a causal role in the emergence of suicidality early in treatment." *Id.* Concern about the connection between suicide and SSRIs intensified in 1990, when a Harvard Medical School psychiatrist published a paper suggesting that some patients became suicidal as a result of their treatment with Fluoxetine (Prozac). Def. Ex. 7 at 2. As Dr. Laughren of the FDA noted, however, demonstrating a causal link between increased risk of suicide and SSRIs may be elusive because "depression is a serious disorder that itself is associated with suicidality." Def. Ex. 7 at 3.

In the 1990s, the FDA considered and rejected citizen petitions requesting that the FDA revise the labeling of SSRIs – including Prozac – to include warnings about an increased risk of suicide or suicidal thoughts. *Motus*, 127 F. Supp. 2d at 1089-90. In its July 1991 denial of a citizen petition, the FDA stated that "[t]he data and information available at this time do not indicate that Prozac causes suicidality or violent behavior . . . ." *Motus*, 127 F. Supp. 2d at 1089. In its June 1992 decision, the FDA stated that evidence was "not sufficient to reasonably conclude that the use of Prozac is possibly associated with suicidal ideation and behavior." *Id*. at 1090. In a February 17, 1995 letter, the FDA drew Lilly's attention to an article in the British Journal of Medicine by Susan S. Jick, et al., which found that fluoxetine treatment was associated with a higher relative risk of suicide than the other

[7] The Court cannot find in the record any evidence of precisely what was said in the label on the product he was given.

antidepressants in that study. Pl. Ex. 44. The letter stated, "Although the study was less than ideal for addressing this question and included no other selective serotonin reuptake inhibitors, it may be desirable to inform prescribers of this finding." *Id.* Lilly declined to include a suicidality warning in its label at that time, and the FDA took no regulatory action against it. SGI & Lilly's Response to SGI ¶¶ 114-115. In its June 1997 response to a citizen petition, the FDA stated that "no credible scientific evidence has caused the agency to depart from its conclusion that the current Prozac labeling appropriately reflects the level of concern about Prozac and suicidality." *Id*.

2. The Court's opinion in *Motus v. Pfizer*, 127 F. Supp. 2d 1085 (C.D. Cal. 2000).

In 2000, this Court denied a motion for summary judgment based on a claim of preemption in a failure-to-warn case involving another antidepressant, Zoloft. Because Defendants have relied heavily on what they perceive as the differences between this case and *Motus*, the Court will summarize *Motus* and review the scientific and regulatory developments since 2000.

Victor Motus took Zoloft sometime in November 1998, and on November 12, 1998, he committed suicide. *Motus*, 127 F. Supp. 2d at 1086. His widow sued Pfizer, the manufacturer. Pfizer argued that under conflict preemption principles, Motus's state law-based failure to warn claims were preempted, because the FDA had considered and rejected the inclusion of suicide warnings in Zoloft's labeling. *Id*. at 1087. This Court disagreed.

The FDA had instructed Pfizer to use specific text in its labeling. That text is the "standard language" quoted above and used in the Sandoz label at the time Carrasco was given his prescription. In reaching the conclusion that Pfizer had not established impossibility of compliance with state law requirements, the Court agreed with prevailing court opinions that FDA standards for labeling were minimum standards. *Id*. at 1092. Construing the regulations, the Court found that they permitted Pfizer to strengthen Zoloft's warnings without prior FDA approval. *Id*. at 1093-94. In light of FDA decisions rejecting stronger warnings for Prozac, this Court wrote:

> Moreover, and perhaps most importantly, although FDA did not require Pfizer to include suicide-related warnings in Zoloft's label, FDA has not prohibited Pfizer from doing so. On the occasions cited by Pfizer that FDA considered

> links between suicide and SSRIs, FDA did find that the evidence did not support requiring manufacturers to include additional suicide-related warnings. But FDA never stated that it would be impermissible to include additional warnings. This is consistent with the regulatory provision governing warning labels, 21 C.F.R. § 201.57(e), which indicates only those warnings that must be included in drug labeling, but does not prohibit any warnings.

Id. at 1096.

Pfizer had produced evidence that in 1991, 1992, and 1997 the FDA refused to require suicide warnings for Prozac (fluoxetine), the SSRI in question in this case. *See Motus*, 127 F. Supp. 2d at 1089-90. The Court also reviewed Pfizer's "independent" expert-prepared evidence in support of the proposition that stronger warnings would over-deter the use of Zoloft, and concluded that there was "an absence of persuasive evidence establishing a threat of overdeterrence." *Id*. at 1097-98. Pfizer had also proffered a comment by a doctor on the PDAC committee to the effect that there was concern in the scientific community that modifications to the labeling "might" result in a reduction in use, thereby ultimately causing overall injury to the public health, but that he was making no statement as to the correctness of the different positions on the debate on this question. *Id*. at 1098. The Court found that this statement by the PDAC member did not demonstrate "that FDA has found or has relied on a finding that strengthened suicide warnings would overdeter SSRI use." *Id.*

3. SSRI-suicidality knowledge and labeling to August 2004.

Over the years, as new drug applicants submitted information to the FDA, additional scientific data about the risks of suicide was developed. *See* Memorandum from Thomas P. Laughren, M.D., to Members of PDAC and Peds AC (Jan. 5, 2004), Lilly's Ex. U. Between 1995 and 2003, the FDA found no increased risk of suicidality from Prozac in adults, but the parties dispute the thoroughness of the FDA's analysis. *See* SGI ¶¶ 19, 128-132. Although the FDA and its advisors had been studying the relationship between SSRIs and suicidality for some time, its consideration of this issue reached an "important milestone" in September 2003, when it received a report from GlaxoSmithKline ("Glaxo") that pediatric patients taking Paxil were at an increased risk for suicide. *Id.* at 11. After PDAC assessed Glaxo's data, the FDA issued a public health advisory, warning that "preliminary data suggested an

excess of reports for suicidality in pediatric patients." *Id*. at 12.[8] However, on January 5, 2004, the FDA's Dr. Thomas Laughren issued a memorandum stating that "there does not appear to be an increased risk of completed suicide associated with assignment to either active drug or placebo in *adults* with [major depressive disorder]." Lilly's Ex. U, SUF ¶ 22 (emphasis added).

In August 2003, Wyeth (the manufacturer of Effexor) voluntarily enhanced its suicide precaution with respect to pediatric patients without any repercussions by the FDA. SGI ¶ 135. Later on, in May 2006, Glaxo *sua sponte* issued its own adult suicide warning using the CBE process, and the FDA did not object to Glaxo's label change. SGI ¶¶ 163-64. As noted above, the CBE regulation allowed Glaxo to "add or strengthen a contraindication, warning, precaution, or adverse reaction" or to "add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the drug product . . . ." 21 C.F.R. §§ 314.70(c)(6)(iii)(A) & (C).

Since late 2003, the FDA has been strengthening and refining its warning labels for SSRIs. In March 2004, the FDA sent a letter to Lilly instructing it to revise its Prozac warning label regarding suicidality. Lilly's Ex. X. That month, the FDA also issued a Public Health Advisory entitled "Worsening Depression and Suicidality in Patients Being Treated by Anti-Depressant." Lilly's Ex. Y; SUF ¶¶ 26-27. In that advisory the FDA noted that it "asked manufacturers of the following antidepressant drugs [which included fluoxetine] to include in their labeling a Warning statement that recommends close supervision of adult and pediatric patients treated with those agents for worsening depression or the emergence of suicidality." *Id.* The FDA's recommended "Warning Information" stated, in part:

> Health care providers should carefully monitor patients receiving antidepressants for possible worsening of depression or suicidality...Although FDA has not concluded that these drugs cause worsening depression or suicidality, health care providers should be aware that worsening of symptoms could be due to the underlying disease or might be the result of drug therapy.

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[8] The Health Advisory was addressed to Health Care Professionals. It discussed increased reports of suicide and suicidality among pediatric patients who were being treated with some antidepressant drugs (including Fluoxetine) and emphasized that the drugs should be used with caution. Plaintiff's Ex. 57.

Id. Lilly incorporated the recommended changes in July 2004. SUF ¶¶ 27.

At no point prior to Carrasco's suicide in August 2004 did Lilly request to add suicide or suicidality language to the Prozac warning label. SUF ¶¶ 206-07. Consequently, of course, the FDA never rejected any such request.

4. SSRI-suicidality knowledge and labeling after Carrasco's August 2004 death.

On September 3, 2004, two weeks after Carrasco's suicide, the FDA issued a letter to all generic fluoxetine manufacturers, including Sandoz, instructing them to revise their labels to include the stronger suicide warning that Lilly had already incorporated in July 2004. Pl.'s Ex. 3. The FDA mandatory warning label stated, in relevant part:

> **Clinical worsening and suicide risk** – Patients with major depressive disorder, both adult and pediatric, may experience worsening of their depression and/or the emergence of suicidal ideation and behavior (suicidality), whether or not they are taking antidepressant medications, and this risk may persist until significant remission occurs. Although there has been a longstanding concern that antidepressants may have a role in inducing worsening of depression and the emergence of suicidality in certain patients, a causal role for antidepressants in inducing such behaviors has not been established. **Nevertheless, patients being treated with antidepressants should be observed closely for clinical worsening and suicidality, especially at the beginning of a course of drug therapy, or at the time of dose changes, either increases or decreases.**

Pl.'s Ex. 3 at 6 (emphasis in original).

In January, February and March of 2005, the FDA issued letters to manufacturers mandating, for the first time, a black box warning concerning the increased risk of suicidality for children and adolescents. In March 2005, Sandoz submitted revised warning labels to the FDA. The new Sandoz label included a black-box warning stating, in relevant part:

> **Antidepressants increased the risk of suicidal thinking and behavior (suicidality) in short-term studies in children and adolescents with major Major Depressive Disorder (MDD) and other psychiatric disorders. Anyone considering the use of fluoxetine or any other antidepressant in a child or adolescent must balance this risk with the clinical need. Patients who are started on therapy should be observed closely for clinical worsening, suicidality, or unusual changes in behavior.**

Pl.'s Ex. 4 (emphasis in original). On Sandoz's label, the warning following the black box stated:

> **Clinical worsening and suicide risk**: Patients with major depressive disorder, both adult and pediatric, may experience worsening of their depression and/or the emergence of suidical ideation and behavior (suicidality), whether or not they are taking antidepressant medications, and this risk may persist until significant remission occurs. There has been a long standing concern that antidepressants may have a role in inducing worsening of depression and the emergence of suicidality in certain patients. Antidepressants increased the risk of suicidal thinking and behavior (suicidality) in short-term studies in children and adolescents with Major Depressive Disorder (MDD) and other psychiatric disorders.

Pl.'s Ex. 4 at 8 (emphasis in original).

As is apparent in the evolution of warnings from 2003 to 2005, the initial focus of PDAC's inquiry and of FDA and manufacturer revisions to warning labels was on pediatric patients. However, in 2005, the FDA began a "comprehensive review of 295 individual antidepressant trials that included over 77,000 adult patients with major depressive disorder (MDD) and other psychiatric disorders, to examine the risk of suicidality in adults who are prescribed antidepressants." Third Supp. Authority Ex 1 at 8.[9] On December 13, 2006, the

[9]Press Release, U.S. FDA, "FDA Proposes New Warnings About Suicidal Thinking, Behavior in Young Adults Who Take Antidepressant Medications." (May 2, 2007).

PDAC met to consider the FDA's meta-analysis of the data. Def. Ex. 8.[10] According to the minutes of the PDAC meeting, the PDAC found that the FDA's analysis demonstrated that "the finding of increased short-term risk for suicidality with antidepressant treatment in pediatric patients does appear to extend into the younger adults." Def. Ex. 8 at 247. The PDAC also found that "beyond age 30, antidepressants begin to show an expected protective effect for suicidality, which is most pronounced beyond age 65." Def. Ex. 8 at 247. Finally, the PDAC "was clear to note that age is a possible proxy to a different causation which the FDA needs to further investigate." Def. Ex. 8 at 247. The PDAC meeting concluded with a vote recommending the revision of labeling to include extension to young adults and further recommending that the label change be extended into the black box. Def. Ex. 8 at t 248. The PDAC decided to leave it to the FDA to determine the precise age limit for a required warning. Mem. Ex. 9 at 249.

Based on the PDAC's recommendation, the FDA on August 2, 2007 approved revisions to labels to incorporate the PDAC's recommendations. Lilly's SUF ¶ 37. These remain the suicidality warnings as they exist today. The FDA's new black box warning states, in relevant part:

> **Suicidality & Antidepressant Drugs—Antidepressants increased the risk compared to placebo of suicidal thinking and behavior (suicidality) in children, adolescents, and young adults in short-term studies of major depressive disorder (MDD) and other psychiatric disorders. Anyone considering the use of [Insert established name] or any other antidepressant in a child, adolescent, or young adult must balance this risk with the clinical need. Short-term studies did not show an increase in the risk of suicidality with antidepressants compared to placebo in adults beyond age 24; there was a reduction in risk with antidepressants compared to placebo in adults aged 65 and older. . . .**

SUF ¶ 37 (emphasis in original). The warning following the black box is similar to that

[10]According to the briefing material for the PDAC's meeting on December 13, 1006, the meta-analysis involved 372 placebo-controlled antidepressant trials and almost 100,000 patients. Def. Ex. 7, Thomas P Laughren, M.D., FDA Center for Drug Evaluation and Research, to Members of the PDAC (Nov. 16, 2006).

inside the black box, with the addition of the age-bracket information:

> **WARNINGS – Clinical worsening and suicide risk**
> Patients with major depressive disorder, both adult and pediatric, may experience worsening of their depression and/or the emergence of suicidal ideation and behavior (suicidality), whether or not they are taking antidepressant medications, and this risk may persist until significant remission occurs. Suicide is a known risk of depression and certain other psychiatric disorders, and these disorders themselves are the strongest predictors of suicide. There has been a long standing concern, however, that antidepressants may have a role in inducing worsening of depression and the emergence of suicidality in certain patients during the early phases of treatment. Pooled analyses of short-term placebo-controlled trials of antidepressant drugs. . . showed that these drugs increase the risk of suicidal thinking and behavior (suicidality) in children, adolescents, and young adults (ages 18-24) with major depressive disorder and other psychiatric disorders. Short-term studies did not show an increase in the risk of suicidality with antidepressants compared to placebo in adults beyond age 24; there was a reduction in risk with antidepressants compared to placebo in adults aged 65 and older.

Pl.'s Ex. 6 (emphasis in original).

5. The FDA's evolving position on preemption

Starting in 2001, the FDA began to take a position in favor of preemption in SSRI litigation. After this Court's decision in *Motus*, the FDA submitted an *amicus* brief in support of preemption in Pfizer's appeal.[11] Prior to its *Motus* brief, the FDA had not

[11]Def. Ex. 1, FDA *Amicus* Brief, *Motus v. Pfizer, Inc.*, Nos. 02-55372, 02-55498 (9th Cir. Sep. 19, 2002). The Ninth Circuit affirmed this Court's decision to dismiss for lack of proximate cause and did not reach the preemption issue. *Motus v. Pfizer, Inc.*, 358 F.3d 659 (9th Cir. 2004).

intervened on its own initiative in private tort litigation on behalf of manufacturers.[12] Following *Motus*, the FDA submitted four more *amicus* briefs: in *Dowhal v. SmithKline Beecham Consumer Healthcare*, No. S109306 (Cal. July 18, 2003), *Kallas v. Pfizer*, No. 2:04CV0998 PGC (D. Utah Sept. 15, 2005), *Colacicco v. Apotex, Inc.*, No. 05-5500-MMB (E.D. Pa. May 10, 2006), and the appeal in *Colacicco v. Apotex, Inc.*, No. 06-3107 (3d Cir. Dec. 4, 2006).[13] Not long after its submission in the *Colacicco* appeal, the FDA issued a detailed position paper on preemption in a 2006 regulatory preamble. Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 201, 314, & 601).

In *Wyeth*, the Supreme Court found that the FDA's position in its 2006 preamble "does not merit deference" for several reasons: the FDA did not provide notice to States and interested parties of its "sweeping position" on the FDA's pre-empting effect; the preamble was "at odds with what evidence we have of Congress' purposes; and it reverses the FDA's own longstanding position without providing a reasoned explanation . . . ." *Wyeth v. Levine*, — U.S. —, 129 S. Ct. 1187, 1201 (2009). After the *Wyeth* decision, the FDA withdrew its *amicus* briefs in the *Colacicco* case, which was the only one of the above-listed cases still pending. Thus, this Court will give no weight whatsoever to the position the FDA articulated in these *amicus* briefs and in the 2006 preamble.

III. LEGAL STANDARDS FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) provides for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party bears the initial burden of demonstrating the absence of a "genuine issue of material fact for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A fact is material if it could affect the

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[12]In 1996 the Supreme Court invited the FDA to intervene as amicus in a case involving a medical device. In that case, the FDA took the position that preemption should not apply to the tort claims at issue. *See* Brief for the United States as Amicus Curiae Supporting Respondents/Cross-Petitioners, *Medtronic v. Lohr*, 518 U.S. 470 (Nos. 95-754, 95-886) (March 13, 1996).

[13]Def. Exs. 2-5.

outcome of the suit under the governing substantive law. *Id.* at 248. The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

"When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co., Inc. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party's case. *See Celotex*, 477 U.S. at 325. Thus, "[s]ummary judgment for a defendant is appropriate when the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial.'" *Cleveland v. Policy Mgmt Sys. Corp.*, 526 U.S. 795, 805-06 (1999) (citing *Celotex*, 477 U.S. at 322).

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ.P. 56(e). Summary judgment will be entered against the non-moving party if that party does not present such specific facts. *Id*. Only admissible evidence may be considered in deciding a motion for summary judgment. *Id*.; *Beyene v. Coleman Sec. Serv., Inc.*, 854 F.2d 1179, 1181 (9th Cir.1988).

"[I]n ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (quoting *Anderson*, 477 U.S. at 255). But the non-moving party must come forward with more than "the mere existence of a scintilla of evidence." *Anderson*, 477 U.S. at 252. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

IV. DISCUSSION

A. Standards for Federal Preemption

In this section the Court will merely reiterate what it said in *Motus*. This analysis does not necessarily take into account other courts' *post-Motus* characterizations of the scope or nature of pre-emption.

The Supreme Court has explained that there are three ways in which federal law will preempt a state law:

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. . . .
> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." . . . Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "Where . . . the field which Congress is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be "clear and manifest." . . .
> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, . . . or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

English v. General Elec. Co., 496 U.S. 72, 78-79 (1990) (citations omitted) (holding that nuclear fuel production employee's state law claim for intentional infliction of emotional distress was not preempted by the Energy Reorganization Act). These categories are not "rigidly distinct;" in particular, "conflict" and "field" preemption often overlap. *Id.* at 79 n.5.

The party contending that a claim is preempted bears the burden of establishing preemption. *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1526 n.6 (9th Cir. 1995). The Supreme Court has established a presumption against finding preemption, especially where state or local regulation of matters related to health and safety are concerned. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)("[T]he historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress."); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Inc. Co.*, 514 U.S. 645, 654-55 (1995); *Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707, 715 (1985).

B. The Supreme Court's Decision in *Wyeth*

In *Wyeth*, the Supreme Court addressed the question of whether the FDA's regulation of drug labeling under federal law preempts a plaintiff's state law tort claim for failure to provide an adequate warning. *Wyeth v. Levine*, — U.S. —, 129 S. Ct. 1187, 1194 (2009). Levine sued Wyeth, a major drug manufacturer in Vermont state court, alleging common law negligence and strict liability for failure to adequately warn of the risks of intravenous administration of an anti-nausea drug. Levine alleged that as a result of that failure her arm had to be amputated. *Id.* at 1191. The jury verdict for plaintiff was upheld by the Vermont Supreme Court. *Wyeth* appealed to the United States Supreme Court, asserting that it could not be found liable under state tort law because Levine's claims were subject to both conflict preemption—*i.e.*, Wyeth claimed it could not comply with both the state-law duties on which Levine based her claims and its federal labeling duties—and to "obstruction preemption"— *i.e.*, requiring Wyeth to comply with a state-law duty to provide a stronger warning "would obstruct the purposes and objectives of federal drug-labeling regulation," *Id.*, at 1199.

On the issue of conflict preemption, the *Wyeth* Court held that the tort claims were not preempted, because "absent clear evidence that the FDA would not have approved a change to [the drug's] label, we will not conclude that it was impossible for [the manufacturer] to comply with both federal and state requirements." *Id.* at 1198. The Court found it very unlikely that the FDA would bring an enforcement action against a manufacturer for strengthening a warning pursuant to its authority to do so under the CBE regulation. It stated, "And the very idea that the FDA would bring an enforcement action against a manufacturer for strengthening a warning pursuant to the CBE regulation is difficult to accept—neither Wyeth nor the United States has identified a case in which the FDA has

done so." *Id.* at 1197. The Court explained that the "manufacturer bears responsibility for the content of its label at all times. It is charged both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug is on the market . . . . Thus, when the risk of gangrene from [the method of drug administration] became apparent, Wyeth had a duty to provide a warning that adequately described that risk and the CBE regulation permitted it to provide such a warning before receiving the FDA's approval." *Id.* at 1198. The Court also relied on the findings that the FDA had not intended to prohibit a more stringent warning and that the manufacturer had not presented data to the FDA specifying dangers of such a warning, or proposing a warning that the FDA rejected. *Id.* *Compare* SGI ¶¶ 206-207 (stating that prior to Carrasco's suicide, Lilly never proposed and the FDA never rejected a request by Lilly to add suicide or suicidality language to its warning labels).

The Supreme Court also rejected Wyeth's "obstruction pre-emption" argument that "requiring it to comply with a state-law duty to provide a stronger warning about IV-push administration would obstruct the purposes and objective of federal drug labeling regulation." The Court found "no merit in this argument, which relies on an untenable interpretation of congressional intent and an overbroad view of an agency's power to preempt state law." *Id.* at 1199. (*See* section II C(5), *supra*.) Although the Court noted "that an agency regulation with the force of law can pre-empt conflicting state requirements," it went on to reject the FDA's reliance on its 2006 "Preamble": "We are faced with no such regulation in this case, but rather with an agency's mere assertion that state law is an obstacle to achieving its statutory objectives." *Id.* at 1200-01.

The parties have cited various lower courts' decisions on FDA preemption since *Wyeth*. The overwhelming weight of the authority has rejected pre-emption claims by both brand-name and generic drugs. The most recent decision to find no pre-emption for generic manufacturers is *Demahy v. Actavis, Inc.*, 593 F.3d 428 (5th Cir. 2010). The most recent decision to find no preemption for a brand name manufacturer in connection with an SSRI suicide case (involving Paxil) is *Mason v. SmithKline Beecham Corp.*, — F.3d —, 2010 WL 605922 (7th Cir. Feb. 23, 2010).

C. Both Defendants' Claims on Conflict Preemption

The Defendants argue that *Wyeth* does not foreclose preemption here because there is stronger evidence in this case than in *Wyeth* that the FDA would have refused to permit a

more stringent label.

Preemption may be implied where compliance with both federal and state requirements is impossible. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). The Defendants argue that federal law precluded them from including any additional warnings of a risk of suicide or suicidality in their labeling. They assert that additional warnings of a risk of suicide/suicidality in SSRI drug labeling would have rendered the label misbranded under the FDCA and the FDA regulations. *See* 21 U.S.C. §§ 352(a),(f). Sandoz additionally argues that regulations prohibit generic manufacturers from changing a label without prior FDA approval.

The risk of FDA enforcement action against Sandoz would have rendered compliance impossible as of July 15, 2004, when Carrasco began taking fluoxetine, only if there was "clear evidence that the FDA would not have approved a change" to Prozac's label. *Wyeth*, 129 S. Ct. at 1198. Like the defendant in *Motus*, the Defendants here rely on the fact that prior to Carrasco's prescription, the FDA had rejected citizen petitions to add a warning to the Prozac label about the risk of suicide. Defendants also point to a 2002 FDA decision to the effect that, based on a review of all SSRI drugs, the scientific evidence did not show an association between SSRIs and suicide, as well as a January 2004 FDA memorandum stating that there did not appear to be an increased risk of suicide in adults from use of SSRIs.

The FDA's rejections of citizen petitions in the 1990s do not constitute clear evidence that warnings of such an association in July 2004 would have been false and misleading, and hence not permitted. As this Court concluded in *Motus*, the FDA's rejection of those petitions constituted determinations that the warnings should not be *mandated*; they were not determinations that manufacturers could not choose to add warnings that they believed were scientifically substantiated. *Motus* at 1096.

In the period between 2002 and Carrasco's prescription, the FDA's position was changing and had changed, at least in part because of GlaxoSmithKline's report to the FDA in September 2003 that company studies showed an increased risk for pediatric patients. As a result of the Glaxo report, the FDA replaced its prior opposition to any possible warning with the position that there was no evidence to support a finding of increased risk of suicidality in adults, as evidenced in the January 5, 2004 Dr. Laughren memorandum. Lilly's SUF ¶ 22. However, in March 2004, the FDA issued a Public Health Advisory asking manufacturers to include in their labeling a warning recommending close supervision

of adult and pediatric patients treated with those agents for worsening depression or the emergence of suicidality." Def. Ex. 6 at 231. Therefore, unlike in 2002 and earlier, by March 2004 the FDA accepted that scientific evidence did show an association between SSRIs and suicide in pediatric patients and it was in the process of determining whether such an association existed for adult patients as well.

Given these developments in the state of scientific knowledge in the SSRI industry leading up to July 2004, it cannot be said that there is clear evidence that in July 2004 the FDA would have prohibited additional suicidality warning language.[14]

Defendants do not offer evidence of any instances where additional safety warnings for an approved drug, whether through a labeling change or some other medium, rendered a drug "misbranded." On the contrary, there have been several notable instances in which SSRI drug manufacturers' strengthened warnings were *not* rejected as "misbranding" by the FDA. For example, in 2003, amid concerns that the SSRI Effexor caused increased risk of suicide among pediatric patients, the drug's manufacturer, Wyeth, unilaterally added additional warnings to its labels and issued a "Dear Health Care Professional" letter noting the warnings to practitioners. Pl.'s Ex. 10. In 2006, GlaxoSmithKline, manufacturer of Paxil, unilaterally strengthened the suicide and suicidality warnings in Paxil's label to warn of an increased risk for young adults and issued a "Dear Health Care Professional" letter notifying practitioners of the new warning. Pl.'s Ex. 12. These manufacturers' actions were consistent with their obligation under the regulations to revise their labeling to "include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug." 21 C.F.R. § 201.57(e) (effective to Jun. 29, 2006)." Defendant has provided the Court with no evidence that the FDA took any action against either Wyeth or GlaxoSmithKline for "misbranding" their products. On the contrary, after these manufacturers voluntarily strengthened the warnings on their labels, the FDA issued new *mandatory* labeling requirements to reflect the same conclusions about the risk of suicidality in pediatric patients and, later, in young adult patients. Pl.'s Exs. 10 & 12. At the hearing,

[14]At the hearing, Lilly relied on the FDA's August 2007 warning label change, which stated, "Short-term studies did not show an increase in the risk of suicidality with antidepressants compared to placebo in adults beyond age 24." SUF ¶ 37. However, this language, from 2007, does not provide "clear evidence" that the FDA would not have approved a broader suicidality warning that pertained to young adults in 2004. *See Wyeth*, 129 S. Ct. at 1198.

counsel for Lilly attempted to distinguish Wyeth's and GlaxoSmithKline's actions, saying that their enhanced warning labels were based on data for Effexor and Paxil, not Prozac, and that the studies focused primarily on pediatric patients. *See* Pl.'s Supp. Exs. 56 & 75. Lilly's counsel is incorrect. Though the Wyeth studies and warning pertained to pediatric patients, Ex. 56, the GlaxoSmithKline warning also addressed adult patients, Ex. 75 at 12. Moreover, and more fundamentally, Lilly's argument fails because Lilly ignores its burden here. To establish a preemption defense, a drug manufacturer must produce "clear evidence that the FDA would not have approved a change to [the drug's] label." *Wyeth*, 129 S.Ct. at 1198. A mere possibility that the FDA might not have allowed an enhanced suicidality warning for Prozac, despite allowing it for Effexor and Paxil, is not enough to warrant preemption.

As stated in *Cartwright v. Pfizer, Inc.,* 369 F. Supp. 2d 876, 885-86 (E.D. Tex. 2005), "Given the hearings by both Congress and the FDA regarding suicidality, the FDA's PDAC's recent decision to recommend black box warnings regarding suicidality in children and adolescents, and the numerous experts who have concluded that there is a link between SSRIs, like Zoloft, and suicidality, it would be inconceivable to this Court to argue that an additional warning regarding suicidality would be false or misleading." Defendants offer nothing but theoretical assumptions of what the FDA would have done , and that is not enough to warrant a finding of preemption. *See Witczak v. Pfizer, Inc.*, 377 F. Supp. 2d 726, 731 (D. Minn. 2005) (finding no direct conflict where Pfizer's claim of direct conflict rests on "speculative hypotheticals") (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring)).

Providing additional warning to a drug label is a far cry from the types of labeling that the FDA has deemed "misbranded." *Cf. United States v. Snoring Relief Labs, Inc.,* 210 F.3d 1081 (9th Cir. 2000) (holding that an over-the-counter anti-snoring mouthpiece was misbranded because of inadequate directions for safe use); *United States v. Johnson*, 471 F.3d 764 (7th Cir. 2006) (affirming criminal sentence of petitioner who sold misbranded repackaged cough suppressant labeled "for research and development only" to Internet customers for recreational use); *United States v. Lane Labs-U.S.A., Inc.,* 427 F.3d 219 (3d Cir. 2005) (affirming district court award of restitution to customers who purchased misbranded topical skin cream and dietary supplement claiming to treat HIV and cancer).

As previously noted, Plaintiff has not proffered the precise language she thinks should have been used. So Defendants have presented a challenge to plaintiff's general allegation of failure to warn. That challenge is, like the one in *Motus*, "overbroad." *Motus*, 127 F.

Supp. 2d at 1095. As the Court previously concluded:

> Although certain suicide warnings could violate federal law because they were false or misleading or were not based on "the essential scientific information needed" for safe use, the Court does not think that any and every suicide-related warning that might be required under state law is necessarily false or misleading, or not based on "the essential scientific information needed" for safe use.

Id. Plaintiff *has* provided examples of warnings that are stronger than the one Defendants provided in July 2004, but still fall short of warning of an actual "association" between SSRIs and suicidality in adults. (Defendants claim such a warning would be preempted.) For example, Dorsett points to the warning that has been on Sandoz's labeling since September 2004: "Patients with major depressive disorder, both adult and pediatric, may experience worsening of their depression and/or the emergence of suicidal ideation and behavior (suicidality), whether or not they are taking antidepressant medications, and this risk may persist until significant remission occurs." Opp'n at 4; Pl.'s Ex. 3.

The theoretical possibility that the FDA might have found a given warning to be misleading is insufficient to support a finding that Defendants faced a direct conflict between state and federal law. What matters is not whether manufacturers perceive a potential conflict that might subject them to FDA enforcement action, but whether there is clear evidence that the FDA would not have approved any stronger warning—and Defendants have not shown that.

D. Sandoz's Claim Unique to Generics

Sandoz makes another argument, one unique to it: FDA regulations prohibited it from making *any* changes to Fluoxetine labeling that would deviate from that of the "innovator" (or "listed") drug—*i.e.*, , Prozac—because generic drug manufacturers may not make any change in a warning label without prior FDA approval. This contention was not addressed in *Wyeth*. It lacks merit.

Supplements and other changes to an approved generic drug application are governed

by 21 C.F.R. § 314.97. That section states: "The applicant shall comply with the requirements of §§ 314.70 and 314.71 regarding the submission of supplemental applications and other changes to an approved abbreviated application." In turn, the CBE regulation in section 314.70(c) allows manufacturers to distribute products with strengthened warnings upon FDA's receipt of a supplemental application. 21 C.F.R. § 314.70(c)(6)(iii).

Sandoz argues that section 314.70(c) does not apply to generic manufacturers, because generic labels must match those of the innovator drug.[15] It argues that a generic manufacturer may change its warnings only if the FDA approves the changed labels for both the generic and innovator drugs. In support of this contention, Sandoz cites the statutory requirement that generic drug applicants must "show that the labeling proposed for the new drug is the same as the labeling approved for the listed drug," 21 U.S.C. § 355(j)(2)(A)(v). Recently, the Fifth Circuit rejected the argument proffered by Sandoz, noting that "[w]hile Congress plainly intended for a generic drug manufacturer to submit labeling identical to—or the 'same as'—the brand name drug when seeking ANDA approval, the statutory scheme is silent as to the manufacturer's obligations after the ANDA is granted." *Demahy*, 593 F.3d at 436. *See also Laisure-Radke v. Par Pharm., Inc.*, 426 F. Supp. 2d 1163, 1169 (W.D. Wash. 2006) ("[O]nce a generic manufacturer holds an approved ANDA for a particular product, it can add or strengthen a contraindication, warning, precaution, or adverse reaction at any time without prior FDA approval.").

The ANDA process merely frees a manufacturer from the pre-approval clinical trial requirements so long as it can prove that the generic is bioequivalent to the innovator drug. *Schering Corp. v. Food and Drug Admin.*, 866 F. Supp. 821, 823 (D.N.J. 1994), *judgment aff'd*, 51 F.3d 390 (3d Cir. 1995). After the bifurcated application process, generic drug manufacturers and brand name drug manufacturers are treated the same. By the plain text of 21 C.F.R. § 314.97, the CBE process applies to both generic and brand name manufacturers. Both are permitted to distribute drugs containing changes within thirty days of the FDA's

[15]At the hearing, Plaintiff's counsel directed the Court's attention to Sandoz's (then called "Geneva Pharmaceuticals, Inc.") Application to Market a New Drug, where the company representative signed a statement agreeing to "comply with all applicable laws and regulations that apply to approved applications, including . . . [r]egulations on making changes in application in 21 CFR 314.70, 314.71, and . . . 314.97 . . . ." Pl.'s Supp. Ex. 112 at 2. This document is not dispositive of the question of whether section 314.70 applies to Sandoz, but it does lend some support to Plaintiff's position.

receipt of the supplement, and generic and brand name manufacturers alike are required to revise the labeling to "include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug; a causal relationship need not have been proved." 21 C.F.R. § 314.70(c)(4); 21 C.F.R. § 201.57(e) (effective to Jun. 29, 2006).[16]

Sandoz nevertheless argues that the Court should find that the FDA has consistently interpreted section 314.70 to be inapplicable to generic manufacturers, and that the Court should defer to this interpretation.[17] In support of this position, Sandoz refers the Court to several guidance documents issued by the FDA. *See* Abbreviated New Drug Applications Regulations, 57 Fed. Reg. 17950, 17961 (Apr. 28, 1992) (to be codified at 21 C.F.R. pts. 2, 5, 10, 310, 314, 320, and 433) ("[T]he ANDA product's labeling must be the same as the listed drug product's labeling . . . . After approval of an ANDA, if an ANDA holder believes that new safety information should be added, it should provide adequate supporting information to FDA, and FDA will determine whether the labeling for the generic and listed drugs should be revised."); the FDA's withdrawn *Amicus Curiae* brief in *Colacicco v. Apotex, Inc*., No. 06-3107 (3rd. Cir. Dec 4, 2006) ("*Colacicco II Amicus* Br.") at 8, n.4; Supplemental Applications Proposing Labeling Changes for Approved Drugs, Biologics, and Medical Devices, 73 Fed. Reg. 2848, 2849 n.1 (proposed Jan. 16, 2008) ("CBE changes are not available for generic drugs approved under an abbreviated new drug application under 21 U.S.C. 355(j). To the contrary, a generic drug manufacturer is required to conform to the approved labeling for the listed drug.").

First of all, it is not clear that these pronouncements merit consideration. The *Colacicco amicus* brief has been withdrawn and the 2008 proposed regulation was never adopted. With respect to the comments in the 1992 regulation, the one circuit court to have analyzed these comments—the Fifth Circuit—found that the comments did not speak directly to the ability of a generic manufacturer to use the CBE regulation to revise a

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[16]In a memo dated January 5, 2004 to the members of the FDA's Pharmacological Drugs Advisory Committee ("PDAC"), FDA Psychiatric Drug Products Team Leader Dr. Thomas P. Laughren specifically noted that "sponsors have the authority to make changes of this nature, i.e. that are perceived to strengthen labeling from the standpoint of safety, without prior approval of FDA." (Pl.'s Ex. 11 at 11).

[17]The Supreme Court in *Wyeth* did not explicitly address the issue of deference to the FDA on the issue of preemption for generics, so the Court will address this issue here.

warning label. *Demahy v. Actavis*, 593 F.3d 428, 442 (5th Cir. 2010). According to the Fifth Circuit, FDA's comment that "if an ANDA holder believes that new safety information should be added, it should provide adequate supporting information to FDA, and FDA will determine whether the labeling for the generic and listed drugs should be revised," 57 Fed. Reg. at 17961, means only that "the FDA is the ultimate arbiter for all changes—whether prompted by a pioneer manufacturer or a generic one." 593 F.3d at 442. "*Every* submitted change requires FDA approval, even one that takes effect immediately through the CBE process." *Id.* Thus, the one presently valid document interpreting the ANDA regulatory scheme does not necessarily prescribe that the CBE process is inapplicable to generic manufacturers.

Moreover, even if the 1992 comments, described on page 26, are read to exclude generic manufacturers from using the CBE process, they would not be entitled to deference in this interpretation. An agency's interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)); *accord Federal Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008). Here, section 314.97 makes it clear that the CBE regulation in section 314.70 applies to generic drug manufacturers. Section 314.70, in turn, does not contain any language exempting generic drug manufacturers. The position that Sandoz ascribes to the FDA impermissibly stretches the meaning of the provisions at issue, and is inconsistent with sections 314.97 and 201.57(e).

Not only is there no support in the plain text of the regulations for Sandoz's position, there is no support in the Congressional history of the Hatch-Waxman Act of 1984 for shielding generic manufacturers from liability for their warnings. In *Foster v. American Home Products Corp.*, 29 F.3d 165 (4th Cir. 1994), the Fourth Circuit addressed this issue directly:

> Although generic manufacturers must include the same labeling information as the equivalent name brand drug, they are also permitted to add or strengthen warnings and delete misleading statements on labels, even without prior FDA approval. The statutory scheme governing premarketing approval for drugs simply does not evidence Congressional intent to insulate generic drug manufacturers from liability for misrepresentations made regarding their products, or to otherwise alter state products liability law. Manufacturers of generic

> drugs, like all other manufacturers, are responsible for the representations they make regarding their products.

Foster, 29 F.3d at 170. *See also Demahy*, 593 F.3d at 449; *Mensing v. Wyeth, Inc.*, 588 F.3d 603, 607-08 (8th Cir. 2009) (no preemption for a generic manufacturer of a diabetes drug). Like the Fourth, Fifth, and Eighth Circuits, this Court finds the argument distinguishing generic manufacturers from their brand name counterparts unpersuasive.[18]

E. Both Defendants' Claims of Frustration of Congressional Purpose (Obstacle Preemption).

The Defendants also assert what is known as obstacle preemption. Under this doctrine, a court will find preemption where "'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). If the purposes of a Congressional statute cannot be accomplished if state law were allowed to operate, then the state law must yield. *Crosby*, 530 U.S. at 373.

The Defendants argue that allowing state failure-to-warn lawsuits would frustrate the FDA's objectives by interfering with the agency's role in ensuring the accuracy of prescription drug labeling and by over-deterring use of SSRI drugs. This argument was effectively foreclosed by the holding in *Wyeth* that a state failure-to-warn claim did not obstruct the purposes and objectives of federal drug labeling regulation. *Wyeth*, 129 S. Ct. at 1199-1204. The Court held that the manufacturer had not demonstrated that "failure-to-warn claims like Levine's obstruct the federal regulation of drug labeling." *Id.* at 1204. Both *Wyeth* and this case involve failure-to-warn claims, and there is no

[18]Sandoz also cites, and at the hearing relied heavily upon, 21 C.F.R. § 314.150(b)(10). This section merely provides that the FDA "may" initiate a hearing for the withdrawal of a drug's approval if the labeling is "no longer consistent with that for the listed drug;" it does not *require* that the generic drug label be *identical* at all times with the listed drug label. Sandoz cites no evidence to show that the FDA in fact has ever acted under § 314.150(b)(10) to withdraw approval for a strengthened generic drug warning on the grounds that the stronger warning has rendered the generic drug labeling "no longer consistent" with that of the listed drug.

meaningful basis on which to distinguish this case from *Wyeth.*

V. CONCLUSION

FDA labeling regulations and state law adequacy of warning duties have coexisted from the time the FDCA was first enacted. Under California law "a manufacturer discharges its duty to warn if it provides adequate warnings to the physician about any known or reasonably knowable dangerous side effects." *Motus v. Pfizer, Inc.*, 196 F. Supp. 2d 984, 990-91 (C.D. Cal. 2001) (citing *Carlin v. The Superior Court of Sutter County*, 13 Cal. 4th 1104, 1112-13 (1996). Likewise, the FDA requires manufacturers to proactively revise their labels upon learning of "reasonable evidence" of "an association of a serious hazard with a drug" (after June 2006, a "causal association). 21 C.F.R. § 201.57(e). A direct and positive conflict would arise "if a state, by positive law, required a drug manufacturer to include a warning that the FDA had previously rejected as scientifically unsubstantiated, [so] that inclusion could expose the manufacturer to liability for misbranding." *Souther v. Eli Lilly & Co. (In re Zyprexa Products Liability Litigation)*, 489 F. Supp. 2d 230, 275(E.D.N.Y. 2007) (citing 21 U.S.C. § 352). Here, there is no such conflict between the state law duty and the FDA's standard. Even assuming a difference in the state and federal standards, a jury verdict of negligence, which imposes damages but does not compel a manufacturer to change its labels, does not necessarily create a direct and positive conflict. *See id.* at 276-77 (citing *Bates v. Dow Agrisciences LLC*, 544 U.S. 431, 444 (2005) ("None of these common-law rules requires that manufacturers label or package their products in any particular way.")).

Based on the evidence before it, the Court cannot find that it would have been impossible for Defendants to comply with federal and state law or that the application of state law would frustrate Congress's purpose in enacting the FDCA. The Defendants have not provided evidence that state law here "actually conflicts with federal law." *English*, 496 U.S. at 78-79. Absent clear Congressional intent to do so, the Court will not foreclose the traditionally available state law remedy for which the FDCA provides no substitute. *See Medtronic, Inc.*, 518 U.S. at 487 (plurality opinion) ("It is, to say the least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.' ") (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)); *Bates*, 544 U.S. at 449 ("If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."); *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 97 n.9 (2d

Cir. 2006) ("An agency cannot supply, on Congress's behalf, the clear legislative statement of intent required to overcome the presumption against preemption.") (citations omitted). Thus, the Defendants have failed to meet their burden of establishing preemption.

Accordingly, the Court DENIES Defendants' motions for partial summary judgment.[19]

Initials of Preparer : SMO

[19]Docket No. 31 & 79.

EXHIBIT D

United States Small Business Administration Office of Advocacy Frequently Asked Questions Flyer

SBA Office of Advocacy
www.sba.gov/advo

Frequently Asked Questions

Advocacy: the voice of small business in government

What is a small business?

The Office of Advocacy defines a small business as an independent business having fewer than 500 employees. (The definition of "small business" used in government programs and contracting varies by industry; see **www.sba.gov/size**.)

How important are small businesses to the U.S. economy?

Small firms:

- Represent 99.7 percent of all employer firms.
- Employ about half of all private sector employees.
- Pay 43 percent of total U.S. private payroll.
- Have generated 65 percent of net new jobs over the past 17 years.
- Create more than half of the nonfarm private GDP.
- Hire 43 percent of high tech workers (scientists, engineers, computer programmers, and others).
- Are 52 percent home-based and 2 percent franchises.
- Made up 97.5 percent of all identified exporters and produced 31 percent of export value in FY 2008.
- Produce 16.5 times more patents per employee than large patenting firms.

Source: U.S. Dept. of Commerce, Census Bureau and Intl. Trade Admin.; Advocacy-funded research by Kathryn Kobe, 2007 (**archive.sba.gov/advo/research/rs299tot.pdf**) and CHI Research, 2003 (**archive.sba.gov/advo/research/rs225tot.pdf**); U.S. Dept. of Labor, Bureau of Labor Statistics.

How many small businesses are there?

In 2009, there were 27.5 million businesses in the United States, according to Office of Advocacy estimates. The latest available Census data show that there were 5.9 million firms with employees in 2008 and 21.4 million without employees in 2008. Small firms with fewer than 500 employees represent 99.9 percent of the total (employers and nonemployers), as the most recent data show there were 18,469 large businesses in 2008.

Source: Office of Advocacy estimates based on data from the U.S. Dept. of Commerce, Census Bureau, and trends from the U.S. Dept. of Labor, Bureau of Labor Statistics, Business Employment Dynamics.

What is small firms' share of employment?

Small businesses employ about half of U.S. workers. Of the 120.9 million nonfarm private sector workers in 2008, small firms employed 59.7 million and large firms employed 61.2 million. About half of small firm employment is in second-stage companies (10-99 employees), and half is in firms that are 15 years or older. Small firms' share of employment in rural areas is slightly higher than in urban areas; their share of part-time workers (22 percent) is similar to large firms' share (19 percent). Small firms' employment share remains steady since some small firms grow into large firms over time.

Source: U.S. Dept. of Commerce, Census Bureau: Statistics of U.S. Businesses, Current Population Survey, and Business Dynamics Statistics; and the Edward Lowe Foundation (**http://youreconomy.org**).

What share of net new jobs do small businesses create?

Small firms accounted for 65 percent (or 9.8 million) of the 15 million net new jobs created between 1993 and 2009. Much of the job growth is from fast-growing high-impact firms, which represent about 5–6 percent of all firms and are on average 25 years old.

Source: U.S. Dept. of Labor, Bureau of Labor Statistics, Business Employment Dynamics; Advocacy-funded research by Zoltan Acs, William Parsons and Spencer Tracy, 2008 (**archive.sba.gov/advo/research/rs328tot.pdf**).

How many businesses open and close each year?

An estimated 552,600 new employer firms opened for business in 2009, and 660,900 firms closed. This amounts to an annual turnover of about 10 percent. Nonemployer firms have turnover rates three times as high, mostly because it is much easier for them to go into business and cease operations.

Starts and Closures of Employer Firms, 2005–2009

Category	2005	2006	2007	2008	2009
Births	644,122	670,058	668,395	626,400e	552,600e
Closures	565,745	599,333	592,410	663,900e	660,900e
Bankruptcies	39,201	19,695	28,322	43,546	60,837

Notes: e = Advocacy estimate. Bankruptcies include nonemployer firms.
Source: U.S. Dept. of Commerce, Census Bureau; Administrative Office of the U.S. Courts; U.S. Dept. of Labor, Business Employment Dynamics (BED). Estimates based on Census data and BED trends.

What is the survival rate for new firms?

Seven out of 10 new employer firms survive at least 2 years, half at least 5 years, a third at least 10 years, and a quarter stay in business 15 years or more. Census data report that 69 percent of new employer establishments born to new firms in 2000 survived at least 2 years, and 51 percent survived 5 or more years. Survival rates were similar across states and major industries. Bureau of Labor Statistics data on establishment age show that 49 percent of establishments survive 5 years or more; 34 percent survive 10 years or more; and 26 percent survive 15 years or more.

Source: U.S. Dept. of Commerce, Census Bureau, Business Dynamics Statistics; U.S. Dept. of Labor, Bureau of Labor Statistics, BED.

How are credit conditions for small firms?

Credit conditions are improving. In mid-2010, commercial banks began to ease the tight lending conditions on small businesses that had begun in early 2007. And credit has continued to flow, as loans under $1 million totalled $695 billion in FY 2009. Also, after declining over the past few years, venture capital investment dollars increased in mid-2010.

Source: Federal Reserve Board, Senior Loan Officer Opinion Survey and Call Report data; National Venture Capital Association.

Updated January 2011

How are small businesses financed?

Small businesses rely heavily upon owner investment and bank credit, averaging about $80,000 a year for young firms. Startups rely about equally on the owners' cash injections into the business and bank credit; young firms receive about three-quarters of their funds from banks via loans, credit cards, and lines of credit. One-tenth of startups and about a third of young firms do not use capital injections.

Source: Kauffman Foundation, *An Overview of the Kauffman Firm Survey: Results from the 2004–2008 Data,* (Alicia Robb, E.J. Reedy, Janice Ballou, David DesRoches, Frank Potter, Zhanyun Zhao), May 2010.

How do regulations affect small firms?

The smallest firms (fewer than 20 employees) spend 36 percent more per employee than larger firms to comply with federal regulations. The disparity is greatest in two areas: very small firms spend four and a half times as much per employee to comply with environmental regulations and three times more per employee on tax compliance than their largest counterparts.

Annual Cost of Federal Regulations by Firm Size

Type of Regulation	Cost per Employee for Firms with:		
	Fewer than 20 Employees	20–499 Employees	500 or More Employees
All Regulation	$10,585	$7,454	$7,755
Economic	4,120	4,750	5,835
Environmental	4,101	1,294	883
Tax Compliance	1,584	760	517
Occupational Safety and Homeland Security	781	650	520

Source: *The Impact of Regulatory Costs on Small Firms,* an Advocacy-funded study by Nicole Crain and Mark Crain, 2010 (archive.sba.gov/advo/research/rs371tot.pdf).

Whom do I contact about regulations?

To learn about pending regulation, visit Advocacy's Regulatory Alerts webpage, www.sba.gov/advocacy/815; to comment on pending regulations, email advocacy@sba.gov. To report unfair regulatory enforcement, contact SBA's National Ombudsman at ombudsman@sba.gov.

What is the role of women, minority, and veteran entrepreneurs?

Of the 27.1 million nonfarm businesses in 2007, women owned 7.8 million businesses, which generated $1.2 trillion in revenues, employed 7.6 million workers, and paid $218 billion in payroll. Another 4.6 million firms were 50 percent women owned. Minorities owned 5.8 million firms, which generated $1 trillion in revenues and employed 5.9 million people. Hispanic Americans owned 8.3 percent of all U.S. businesses; African Americans, 7.1 percent; Asian Americans, 5.7 percent; American Indians and Alaska Natives, 0.9 percent; and Native Hawaiian or other Pacific Islanders, 0.1 percent. Veterans owned 2.4 million businesses in 2007, generating $1.2 trillion in receipts; another 1.2 million firms were 50 percent veteran owned. About 7 percent of veteran business owners had service-connected disabilities in 2002.

In 2008, the overall rate of self-employment (unincorporated and incorporated) was 9.8 percent, and the rate was 7.1 percent for women, 7.2 percent for Hispanic Americans, 4.7 percent for African Americans, 9.7 percent for Asian Americans and Native Americans, and 13.6 percent for veterans. Service-disabled veterans had lower self-employment rates than non-service-disabled veterans.

Source: U.S. Dept. of Commerce, Census Bureau, Survey of Business Owners; Advocacy-funded research by Open Blue Solutions, 2007 (archive.sba.gov/advo/research/rs291tot.pdf), and Office of Advocacy: *The Small Business Economy* (www.sba.gov/advocacy/849).

At what rates are the self-employed taxed?

Of the 15.5 million individuals whose primary occupation was self-employment (incorporated and unincorporated), the median personal marginal federal tax rate was 10 percent in 2008. Only 4.1 percent of the self-employed were in the marginal tax bracket of 33 percent or more.

Source: U.S. Dept. of Commerce, Census Bureau, Current Population Survey, March Supplement (special tabulation).

What research exists on the cost and availability of health insurance?

A Kaiser Family Foundation study confirmed the connection between firm size and offering health insurance. The survey shows that almost 60 percent of businesses with 3–9 workers offer health benefits to their employees. The ratio grows to more than three-fourths for firms with 10–24 employees, to 92 percent for firms with 25–49 employees, and to 99 percent for firms with 200 employees or more. Almost two-thirds of workers take health insurance coverage when offered. Overall in 2009, small firm employees were almost twice as likely as large firm employees to be uninsured (27.2 percent vs. 14.7 percent, respectively).

Source: Kaiser Family Foundation and the Health Research and Educational Trust, *Employer Health Benefits 2010 Annual Survey;* Employee Benefit Research Institute, *Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2010 Current Population Survey*.

How can I get more information?

For more information, visit Advocacy's website: www.sba.gov/advocacy. Specific points of interest include:

- Economic research: www.sba.gov/advocacy/847.
- Firm size data: www.sba.gov/advo/849.
- Lending: www.sba.gov/advocacy/852.
- Small business profiles by state and territory: www.sba.gov/advocacy/848.
- *The Small Business Advocate* newsletter: www.sba.gov/advocacy/810.

For email delivery of Advocacy's newsletter, press, regulatory news, and research, visit http://web.sba.gov/list. For RSS feeds, visit www.sba.gov/advocacy/feed. Direct questions to (202) 205-6533 or advocacy@sba.gov.

The SBA's Office of Advocacy was created by Congress in 1976 to protect, strengthen, and effectively represent the nation's small businesses within the federal government. As part of this mandate, the office conducts policy studies and economic research on issues of concern to small business and publishes data on small business characteristics and contributions. For small business resources, statistics, and research, visit the Office of Advocacy's home page at www.sba.gov/advocacy.

EXHIBIT E

"What Does It Cost to Provide Electronic Public Access to Court Records?"
by Steve Schultze, Associate Director of the Center for Information Technology Policy at Princeton University

Managing Miracles: Policy for the Network Society

Saturday, May 29, 2010

What Does It Cost to Provide Electronic Public Access to Court Records?

US Courts have long faced a dilemma. Public access to proceedings is essential to a well-functioning democracy. On the other hand, providing public access requires expenditure of funds. Charging for access works against public access. Traditionally, these costs have been considered to be part of the general operating cost of courts, and there have been no additional fees for public access. The cost of the courthouse, the public gallery, and the bailiff are included. The administrative cost that the clerks incur in providing free public inspection of records is also covered, although the clerk may collect fees for filing actions or making physical copies.

I have been trying to understand how these practices have been translated into the networked digital era by exploring PACER, the US Courts' system for "Public Access to Court Electronic Records." Digital technologies have a way of pushing the cost of information dissemination toward zero, but as I observed in a recent working paper, this does not appear to be the trajectory of public access fees. Congress has provided a statutory limitation that states that the "Judicial Conference may, only to the extent necessary, prescribe reasonable fees... to reimburse expenses incurred in providing these services." In short, **you can only charge for public access services if those fees are used to, at most, cover the operating expenses for those same services.** What's more, in an accompanying conference report, Congress noted that it "...intends to encourage the Judicial Conference to move... to a fee structure in which this information is freely available to the greatest extent possible."

As described below, the Judiciary's financial reports appear to tell a different story: In the past several years, the Judicial Conference has consistently expanded the scope of its expenditures of public access fees such that the vast majority is now spent on other services.

The Judiciary Financial Plans

The first source for my analysis is the Judiciary's annual set of Financial Plans, submitted to Congress after their funds for that year have been appropriated. These are not made publicly available, but I have obtained the relevant excerpts from 2007, 2009, (appended to my working paper) and 2010 (here). I haven't yet obtained the 2008 Plans, so for two data points from that year I have to estimate based on averages for the prior and following years. You can download my Excel spreadsheet that combines the top-level data and drives the chart below (note the comments in the spreadsheet for details on how the numbers were derived).

EPA (Electronic Public Access) funds are collected solely via PACER fees, and are expended on a variety of programs. One of these expenditures is the PACER program itself, but many other expenditures are not. This includes things like "courtroom technology", "telecommunications", and "CM/ECF" (the electronic filing system). I described some of these in my working paper, but after I published that I had the opportunity to ask a panel made up of staff members from the Administrative Office of the US Courts and federal judges how these fees were used. At the 7th Conference on Privacy and Public Access to Court Records, the Hon. William E. Smith from the United States District Court for the District of Rhode Island explained that PACER fees:

> "...also go to funding courtroom technology improvements, and I think the amount of investment in courtroom technology in '09 was around 25 million dollars. [...] Every juror has their own flatscreen monitors. We just went through a big upgrade in my courthouse, my courtroom, and one of the things we've done is large flatscreen monitors which will now -- and this is a very historic courtroom so it has to be done in accommodating the historic nature of the courthouse and the courtroom -- we have flatscreen monitors now which will enable the people sitting in the gallery to see these animations that are displayed so they're not leaning over trying to watch it on the counsel table monitor. As well as audio enhancements. In these big courtrooms with 30, 40 foot ceilings where audio gets lost we spent a lot of money on audio so the people could hear what's going on. We just put in new audio so that people -- I'd never heard of this before -- but it actually embeds the speakers inside of the benches in the back of the courtroom and inside counsel tables so that the wood benches actually perform as amplifiers. So now the back of the courtroom can really hear what's going on. This all ties together and it's funded through these fees."

Clearly, the costs of expensive multimedia systems for courtrooms are not part of the expenses

About

I'm Steve Schultze, Associate Director of the Center for Information Technology Policy at Princeton. I'm interested in how public policy changes in the context of the internet. I tend to focus on telecommunications and government transparency. Please comment, and feel free to email me at sjs-at-princeton_dot_edu. I tweet at @sjschultze.

What I've Written About...

FCC Transparency PACER Network Neutrality Spectrum Copyright Broadband CFAA CRS Lieberman privacy security Android GPO Malamud craigslist innovation law open source

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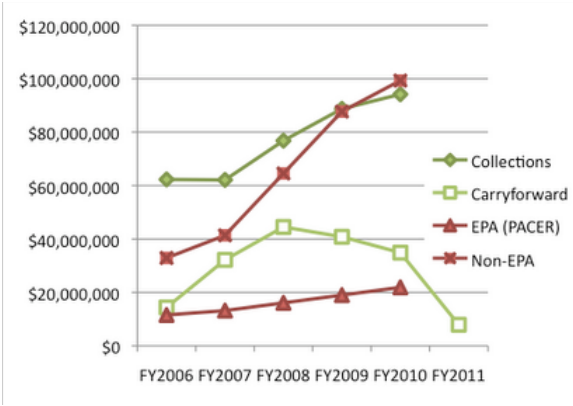
Google Spain and the "Right to Be Forgotten"

Will Greenwald's New Book Reveal How to Conduct Warrantless Bulk

incurred in providing PACER. The 2007 Judiciary Financial Plans delineate between EPA (PACER) and non-EPA programs, illustrating the substantial discrepancy in funds generated by the PACER program and the funds spent on PACER. As described in my working paper, the Courts can point to no statutory justification for spending PACER fees on these non-EPA programs. As of 2009, the Financial Plans no longer separate EPA and non-EPA expenses, but it is easy to reconstruct these totals based on the individual breakouts included in the plans. By doing this, I generated the following graph:



Income is in green, which consists of either direct collections or carryover from the previous year. Expenditures are in red. As you can see, according to the courts, the cost of running PACER has grown only slowly over time, whereas other services have grown dramatically. The carryforward peaked in 2008 at $44.5m, around the time that the courts decided to start spending more aggressively on non-PACER programs. Specifically, in March 2007, the Information Technology Committee of the Judicial Conference observed that, "In recent years, significant unobligated balances have accumulated," and proposed to, "expand use of Electronic Public Access funds for IT efforts, such as applicable network, courtroom technology and jury management requirements. The IT Committee did not support any reduction to the fee at this time." In 2010, expenditures on non-EPA services will actually exceed EPA revenues. As of 2011, the courts plan to have spent out most of the carryforward they had accumulated.

In their defense, the courts argue that all of the programs on which they spent PACER funds are somehow generally related to electronic public access. The current PACER site notes that PACER fees are "used to finance other expenses related to electronic public access to the courts in areas such as courtroom technology and the Bankruptcy Noticing Center." Nevertheless, the fact remains that many of those do not represent "expenses incurred in providing [the charged for] services." Programs like CM/ECF or Telecommunications represent, at best, ancillary programs. However, most if not all of their expenses would exist regardless of the PACER program. What's more, parties have always had to pay filing fees for certain actions, and although CM/ECF has saved them time and money compared to the days of couriers, public access fees are instead paying for the entirety of the system's development. Likewise, the Telecommunications program extends far beyond anything required to support PACER, and would be necessary regardless of any EPA-related use. Bankruptcy Noticing ($9.7m planned for 2010) is a free service that creditors use to monitor incoming bankruptcy claims.

Long Range IT Plan for the Judiciary

My second source for a big-picture perspective on IT spending by the courts is the annual "Long Range Plan for Information Technology in the Federal Judiciary." The 2010 version is available from the US Courts website, but the link to the 2009 version was broken in the recent upgrade of the site (which was, ironically, intended to make information more easily accessible). Fortunately, I have it.

The Long Range Plan covers IT financing of the entire Judiciary, and as such it describes far more than just EPA (PACER) fees. That being said, there is a fascinating shift from the 2009 Plan to the 2010 Plan. Each year, the Judiciary forecasts costs for many different IT-related program areas. We can therefore compare the projections for FY 2010 that are found in the 2009 Plan with the FY 2010 projections found in the 2010 Plan. Four of these program areas immediately pop out in such a comparison: Electronic Public Access Program, Court Allotments, Court Administration and Case Management, and Telecommunications. You can see the changes from one year to the next reflected in the chart below:

Program Costs	FY 2010 in 2009 LRP	FY 2010 in 2010 LRP	% Change	Change

Surveillance on Americans from Abroad?
The importance of anonymous cryptocurrencies
Christopher Yoo on Comcast and Competition: When Antitrust Lawyers Do the Math

Others
Free Government Information
Freedom to Tinker
Public Knowledge
Technology Liberation Front
Legal Research Plus
Susan Crawford
Google Public Policy
Tales of the Sausage Factory

Feeds
Atom
RSS

Electronic Public Access Program (PACER)	$26.5m	$105.6m	+298.49%	+$79.1m
Court Allotments	$143.9m	$102.7m	-28.63%	-$41.2m
Court Administration and Case Management	$22.1m	$2.6m	-88.24%	-$19.5m
Telecommunications	$88.8m	$76.8m	-13.51%	-$12m

Somehow, the projected costs of the Electronic Public Access program in 2010 grew by about 300% between 2009 and 2010. The cost of Court Allotments, Court Administration and Case Management, and Telecommunications shrank by an equivalent amount. It is hard to imagine that the actual plans of the Judiciary changed so dramatically from one year to the next. Rather, it seems far more likely that they simply decided to change their accounting practices to portray a cost for the EPA system commensurate with the amount they are collecting.

What *Should* PACER Cost To Run?

The FY2010 Financial Plan represents the lowest estimate from the Judiciary that I can find for current PACER costs, listing "Public Access Services and Applications" at $21.9m. But is that a reasonable number for what PACER should cost to run? Even if the Judicial Conference believes so, there are several reasons why it could be run far more efficiently:

PACER is run on a highly inefficient decentralized infrastructure
Every court runs its own instance of PACER software, requiring its own hardware, network connection, and support staff. This means that, between district, bankruptcy, and circuit courts, these resources are duplicated approximately 200 times. I have heard various theories for why this is the case, including the notion that control of records has been traditionally delegated to local jurisdictions. It may also be true that at the time PACER was first deployed this was the only technical and operational way to implement it. However, a modern system administrator would never choose to implement a system that exhibited these inefficiencies. Fortunately, the Administrative Office of the Courts already controls the whole network and a first step of physical (if not logical) centralization should be fairly straightforward.

PACER costs include maintaining a staff in San Antonio, TX to answer phones
Although the average PACER user may not be aware of it, there is a full-time staff at the PACER Service Center just waiting to answer their various PACER-related questions (In 2009 this included 135,000 help desk calls, and almost 30,000 support emails). This service helps to overcome some of the more confusing usability barriers of the current PACER system, because these people will walk users through the process. This service is funded out of basic PACER access fees, which are based on per-page access rather than phone calls to the support staff.

PACER costs ironically include overhead from fee collection itself
Every quarter, PACER staff must prepare and physically mail bills to all PACER users that have incurred a billable level of fees. They must deal with all of the administrative overhead of managing these collections, including chasing down delinquent debtors and prosecuting them, if necessary. This portion of costs is a self-fulfilling prophecy.

PACER costs include expenses from upgrading the user interface, when third-parties could do a better job for free
The courts could publish all PACER data in bulk-downloadable format with relative ease and at a low cost. In this scenario, it is very likely that third parties would make the data more easily accessible in a variety of formats, at no cost to the courts. This general principle is laid out by my colleagues in a paper entitled "Government Data and the Invisible Hand."

If providing electronic public access can be grounded in free bulk access, the costs might well be manageable even within a no-fee system. The courts might also find it easier to avoid straying from their statutorily constrained requirement to, "only to the extent necessary, prescribe reasonable fees... to reimburse expenses incurred in providing these services."

[An advance copy of this post was sent to the Administrative Office of the Courts, which declined to provide comments, corrections, or additional documentation.]

Posted by Steve Schultze at 6:26 PM
Labels: PACER

7 comments:

Anonymous said...

How can the courts be encouraged to fix this problem?

Do you think that a class action suit by PACER users against the PACER administrators would be feasible?

June 16, 2010 at 7:51 PM

Steve Schultze said...

I think the courts are listening, even if they have not yet been fully motivated to fix the problem. The more they hear from different constituencies about why the system should change, the more likely they are to do so.

A suit against the courts is an interesting suggestion, but would be challenging. I also don't know if the right form would be a class action -- how would you define the class in a certifiable way, and how would you deal with the jurisdictional issues given that this issue spans every court? I imagine the hurdle of suing the Judiciary (especially for damages) goes above and beyond the existing hurdles of suing the government.

June 17, 2010 at 9:03 AM

Schlomo McGill said...

I've read the paper together with the article above and, while there's a lot of good information here, there's so much misunderstanding of the budget process, the constituent parts of CM/ECF (including PACER) and the Judiciary's culture and structure that it's a bit frustrating. You could really improve your understanding of the Judiciary and the EPA initiatives through a short stint as a fellow (for example) at the Administrative Office. Have you ever tried to get a more accurate perspective than the source documents (which have some good facts mixed in with both deficient and abstruse explanations) might allow? Honestly, reading this stuff it comes off like something one might get from Google rather than research.

June 22, 2010 at 9:58 PM

Steve Schultze said...

Hey Schlomo. Here, as with your comment over on the recapthelaw.org blog, you assert bad numbers or analysis but give no explanation for what you think is wrong. I assure you the research goes well beyond mere googling (including consultation with congressional appropriators and conversations with the AO itself). The data comes directly from the courts, so if it's wrong then they've got a bigger problem.

You seem to indicate that you have some inside view of the culture or budgeting practices of the Judiciary. Do you work for the courts?

June 22, 2010 at 10:15 PM

Schlomo McGill said...

Steve --

No comment on where I work -- I like working there. An easy example of poor research (or maybe just summarization) in this article carries forward (no pun intended) the misunderstanding of the relationship between the JITF fund and EPA funds that has plagued most internet commentary on PACER funds (perhaps getting the most notice with Lieberman's letter). The "significant unobligated balances" do not refer to PACER revenues at all -- EPA funds account for about 12-14% of JITF funds from year to year (you do cover this better in the report). That's clear from the referenced document and would be more easily understood with some additional familiarity with the US Courts. There's no mention of the segregation of EPA funds or how they are alloted in comparison to other JITF funds. I wrote a bit more on Greg's blog entry (3 geeks). This sort of factual, yet inaccurate, stuff flows through most of the research that has been published on PACER and IT funding in the Courts.

June 23, 2010 at 8:18 PM

Steve Schultze said...

The "significant obligated balances" most certainly did include EPA fees. This is self-evident from the fact that part of the solution they propose in that report is to begin spending EPA fees on non-PACER items. The carryover included other sources as well, but that does not change the fact that the carryover from EPA was significant, and it grew to $44.5m in FY 2008. Any ambiguity you perceive (which in any event my longer paper addresses) is made irrelevant by the fact that I provide clear and correct numbers. Nothing you're saying is new to me, nor does it demonstrate any "misunderstanding of the relationship between the JITF fund and EPA funds."

Given that you evidently work for the courts, I'd encourage you to point to or provide additional data if it would alter the conclusions. So far, I don't see anything.

June 23, 2010 at 10:41 PM

thacker said...

Regarding litigation, couldn't the Judicial Conference and the Administrative Office be named as defendants? Wouldn't it place the litigation square in the lap of the Supreme Court? Such a concept makes this mind spin.

What I do know as a user of PACER and as a non-attorney is that PACER fees have precluded my ability to ferret out fraud wherein evidence is contained within thousands of federal court records. I argue that because of its pay wall, equal protection has been denied.

The Judicial Conference could very easily solve this issue within its budget requests to Congress, e.g. create separate budget items to fund IT, CM/ECF, etc.

The Conference's concerns over security via access, RECAP, etc. that I have personally heard from the courts and Administrative Office is dual-edged. The courts face much greater internal security issues, e.g. the courts' reliance upon IE6, then they do from that of a public repository.

Regardless, Shultze, thanks both to you and Princeton, along with countless others for helping the small guy such as myself.

And a final word to the federal courts ...for christ's sake, you are the federal courts and should set the standard and bar in all things and within things that the rest of us should always strive to achieve.

June 30, 2010 at 7:19 PM

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EXHIBIT F

May 22, 2014 E-Mail Concerning
Unsuccessful Case Filing to Clerk of Court
Richard W. Wieking, United States District
Court for the Northern District of California

From: **Aaron Greenspan** aarong@thinkcomputer.com
Subject: Willfully Negligent Clerk of Court Employees
Date: May 22, 2014 at 5:18 PM
To: Richard Wieking richard_wieking@cand.uscourts.gov
Cc: Snooki Puli snooki_puli@cand.uscourts.gov, David Grossman David.Grossman@mail.house.gov

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Clerk Wieking,

I just returned from the San Jose courthouse after attempting to file a lawsuit *pro se*. When I arrived at approximately 3:55 P.M. (due to traffic), clearly before the Clerk's office closed, the employee behind the desk informed me that it would be "impossible" to file my case because there was no way for her to obtain a case number. Perplexed, I inquired as to why, given that the office was still open, even if only for a few more minutes. I was told by her supervisor, Snooki Puli, that the individual I had been talking to was not a "cashier" and was therefore not "authorized" to take the money I was trying to pay the Court.

As I pointed out to Ms. Puli, the act of swiping a credit card through a terminal is not exceptionally difficult, nor is it time consuming. Ms. Puli insisted that no one present, apparently herself included despite her supervisory role, was capable of processing a payment or obtaining a case number. When I also pointed out that attorneys are permitted to file on-line at any time, both A) avoiding this entire situation and B) proving that filing at any time, obtaining a case number and processing a payment is possible, she simply said "OK." When I pointed out the discriminatory nature of the rule, she repeated, "OK." When it was finally 4:00 P.M., she informed me that the Clerk's office was closed and suggested that I leave and return tomorrow.

Ms. Puli did finally agree to "receive" my papers, and stamped them as received, except that the date stamp says "May 23" at 4:02 P.M., which is not the correct date; it is presently May 22. Ms. Puli then refused to keep the "received" papers and handed them back to me. Nor would Ms. Puli sign or stamp the summons documents I had brought, because she claimed a case number needed to be generated first. Other districts, such as the District of Massachusetts, allow summons documents to be generated digitally, even for *pro se* litigants.

To reiterate: complying with your District's discriminatory and unlawful Local Rules, I arrived while the Clerk's office was open and staff was available, and yet your staff still refused to process my case. I informed them of my strenuous objection to their refusal to do their jobs.

Additionally, to excuse the fact that no one in the Clerk's office was actually willing to do their job, I was told—completely incorrectly—that Local Rules of the Court forbade filing of new cases after 3:30 P.M. In fact, there is no such Local Rule, and your staff therefore had no valid legal basis for turning me away, relying unlawfully on their own personal preference. The Clerk staff was apparently referring to a sentence on the California Northern District Court web site (http://www.cand.uscourts.gov/filingprocsj) that seems to deal with "**Intellectual Property** cases," which my case is not. My case concerns the constitutionality of Local Rules that discriminate against *pro se* litigants, which your office seems only too happy to enforce.

The entire encounter with your staff was witnessed by another *pro se* litigant who happened to be in the office at the time, and who informed me privately that her experiences had been similarly "horrible."

Just because your staff feel as though they should be able to go home at 3:45 P.M. and serve only those they feel like doesn't mean that they are entitled to do so. There is no excuse for such laziness and utter incompetence. Now I am forced to needlessly return to the Court tomorrow, which will cost me time and money.

Aaron

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