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

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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