

Case No. 2017-2411

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GUST, INC.,

Plaintiff-Appellee,

v.

ALPHACAP VENTURES, LLC,

Defendant,

RICHARD JUAREZ,

Defendant,

GUTRIDE SAFIER LLP,

Movant-Appellant.

Appeal from the United States District Court
for the Southern District of New York,
Case Nos. 1:15-cv-06192-DLC and 1:16-cv-01784-DLC
Senior Judge Denise Cote

**BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION
IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE**

Daniel K. Nazer
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Tel: (415) 436-9333
Fax: (415) 436-9993
daniel@eff.org

December 20, 2017

Attorney for *Amicus Curiae*

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 29(a) and 47.4, counsel for *Amicus Curiae* certifies that:

1. The full name of the *amicus* represented by me is:

Electronic Frontier Foundation

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the *amicus curiae* represented by me are:

None.

4. The name of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or are expected to appear in this Court is:

Daniel K. Nazer, Electronic Frontier Foundation, San Francisco, California.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal are: None.

December 20, 2017

/s/ Daniel K. Nazer

Daniel K. Nazer

Attorney for *Amicus Curiae*

Electronic Frontier Foundation

TABLE OF CONTENTS

CERTIFICATE OF INTEREST ii

TABLE OF AUTHORITIES iv

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

 I. Unreasonable Arguments Regarding Patent Eligibility Can Be
 Relevant to An Award of Attorneys’ Fees 4

 II. If Accepted, Appellant’s Position Would Prevent District Courts From
 Awarding Fees In Appropriate Cases. 7

CONCLUSION 13

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS
PURSUANT TO FED. R. APP. P. 32(a)(7)(C) 14

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Cases

<i>Alice Corp. Pty. Ltd. v. CLS Bank International</i> , 134 S. Ct. 2347 (2014).....	<i>passim</i>
<i>Bayer Cropscience AG v. Dow Agrosciences LLC</i> , No. CV 12-256 (RMB/JS), 2015 WL 1197436 (D. Del. Mar. 13, 2015)	7
<i>Eclipse IP LLC v. McKinley Equip. Corp.</i> , No. SACV 14-154-GW AJWX, 2014 WL 4407592 (C.D. Cal. Sept. 4, 2014).....	11, 12
<i>eDekka LLC v. 3balls.com, Inc.</i> , No. 2:15-CV-541 JRG, 2015 WL 9225038 (E.D. Tex. Dec. 17, 2015)	8, 9
<i>Electronic Frontier Foundation v. Global Equity Management (SA) Pty Ltd</i> , No. 17-CV-02053-JST, 2017 WL 5525835 (N.D. Cal. Nov. 17, 2017).....	8
<i>GoDaddy.com LLC v. RPost Commc'ns Ltd.</i> , No. CV-14-00126-PHX-JAT, 2016 WL 4569122 (D. Ariz. Sept. 1, 2016).....	9
<i>Gust, Inc. v. AlphaCap Ventures, LLC</i> , 226 F. Supp. 3d 232 (S.D.N.Y. 2016)	6
<i>Inventor Holdings, LLC v. Bed Bath & Beyond, Inc.</i> , – F.3d –, 2017 WL 6062460 (Fed. Cir. Dec. 8, 2017).....	5
<i>Microsoft Corp. v. i4i Ltd. P’ship</i> , 564 U.S. 91 (2011).....	6
<i>My Health, Inc. v. ALR Technologies, Inc.</i> , Case No. 16-cv-00535 (E.D. Tex. Dec. 19, 2017).....	11
<i>NXIVM Corp. v. Foley</i> , No. 1:14-cv-1375 (LEK), 2015 WL 7776923 (N.D.N.Y. Dec. 2, 2015).....	5
<i>Secs. Indus. Ass’n v. Clarke</i> , 898 F.2d 318 (2d Cir. 1990)	4
<i>Shipping & Transit, LLC v. 1A Auto, Inc.</i> , 2017 WL 4993383 (S.D. Fla. Oct. 20, 2017).....	10

<i>Shipping & Transit, LLC v. 1A Auto, Inc.</i> , No. 16-CV-81039, 2017 WL 5001445 (S.D. Fla. Sept. 26, 2017)	10
<i>Shipping & Transit, LLC v. Hall Enterprises, Inc.</i> , No. CV 16-06535-AG-AFM, 2017 WL 3485782 (C.D. Cal. July 5, 2017)	10
<i>Summit Data Sys., LLC v. EMC Corp.</i> , No. CV 10-749-GMS, 2014 WL 4955689 (D. Del. Sept. 25, 2014)	7
<i>Ultramercial, Inc. v. Hulu, LLC</i> , 772 F.3d 709 (Fed. Cir. 2014)	6
<i>Vehicle Interface Techs., LLC v. Jaguar Land Rover N.A., LLC</i> , No. 12-1285-RGA, 2015 WL 9462063 (D. Del. Dec. 28, 2015)	4, 6

Rules

Fed. R. Civ. P. 11	2, 13
--------------------------	-------

Statutes

28 U.S.C. § 1927	2, 6, 7, 13
35 U.S.C. § 101	<i>passim</i>
35 U.S.C. § 285	<i>passim</i>

Other Authorities

Colleen Chien & Edward Reines, <i>Why Technology Customers Are Being Sued En Masse for Patent Infringement and What Can Be Done</i> , 49 Wake Forest L. Rev. (2014)	8
Jeff Roberts, Gigaom, <i>Patent trolls rampage ahead of key reform, Etsy and NFL among 184 targets of 1-day blitz</i> , April 28, 2014	9
Randall R. Rader, Colleen V. Chien, David Hricik, <i>Make Patent Trolls Pay in Court</i> , The New York Times (June 7, 2013)	8

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

*Amicus curiae*¹ Electronic Frontier Foundation (“EFF”) is a non-profit civil liberties organization that has worked for more than 25 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 40,000 active members have a strong interest in helping the courts and policy-makers ensure intellectual property law serves the public interest. As part of its mission, EFF has often served as *amicus* in key patent cases, including *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347 (2014), *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014), *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014), *Bilski v. Kappos*, 561 U.S. 593 (2010), *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), and *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

This brief is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29(a). Counsel for both Appellant Gutride Safier LLP and Appellee Gust, Inc. informed EFF that their clients consent to its filing.

¹ Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Furthermore, no person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

District courts have a variety of tools to sanction and deter abusive litigation practices. In patent cases, these tools include fee awards under Section 285 of the Patent Act, fee awards under 28 U.S.C. § 1927, as well as Rule 11 sanctions. Although this appeal involves a fee award under Section 1927, it raises legal issues potentially relevant of all of these rules and statutes. Specifically, Appellant argues that the law regarding patent eligibility under Section 101 of the Patent Act is so uncertain that attorneys should not be sanctioned for raising unsuccessful eligibility arguments. If accepted, Appellant's argument could drastically restrict the ability of district court judges to appropriately manage their dockets and protect litigants from abuse.

Appellant's sweeping argument on Section 101 must be rejected for three reasons. *First*, the fact that a legal issue is sometimes difficult or a close call in some cases does not mean that it is difficult in every case. Patent owners must accept that *Alice Corp. Pty. Ltd. v. CLS Bank International*, 134 S. Ct. 2347 (2014) ("*Alice*") is the law and cannot present arguments that are plainly inconsistent with its holding. For example, it would be objectively unreasonable to cite computer implementation, standing alone, as establishing patent eligibility. Similarly, a patent owner should not be permitted to dispute that a claimed method is implemented using a conventional computer where the specification expressly

states otherwise. Patent eligibility, like every other question in patent law, can be subject to both reasonable *and* unreasonable arguments.

Second, the blanket ruling sought by Appellant would effectively provide immunity for patent owners and their attorneys to make unreasonable arguments. Eligibility disputes under Section 101 can involve numerous sub-issues such as whether a claim implements an abstract idea, whether a patented method is implemented using conventional processes, and how claims should be construed. The rule sought by Appellant could insulate arguments on all of these sub-issues, no matter how unreasonable, as long as they pertained to eligibility. This Court should avoid any ruling that would provide immunity for all arguments relating to patent eligibility.

Third, many of the most abusive patent litigation campaigns involve patents of dubious eligibility under Section 101. In the opinion of *amicus curiae*, based on its familiarity with the dockets in many of these cases, some patent owners and their counsel make frivolous arguments regarding Section 101 as part of unmeritorious cases brought primarily to extract nuisance settlements. If district courts could not respond to such arguments with fee awards, then abusive litigation will prosper. In sum, this Court should exercise great caution before issuing a sweeping ruling that would prevent district courts from awarding fees in appropriate cases.

ARGUMENT

I. Unreasonable Arguments Regarding Patent Eligibility Can Be Relevant to An Award of Attorneys' Fees.

Patent litigation is replete with difficult legal and factual issues. But that does not mean that *every* legal or factual question is difficult. For example, while obviousness can be a difficult question in some cases, a patentee cannot ignore clearly invalidating prior art without risking a fee award. *See Vehicle Interface Techs., LLC v. Jaguar Land Rover N.A., LLC*, No. 12-1285-RGA, 2015 WL 9462063, at *3-5 (D. Del. Dec. 28, 2015) (awarding fees to defendants where patent infringement lawsuit became objectively baseless after patent owner was put on notice of invalidating prior art), *aff'd without op.*, 2017 WL 2558247 (Fed. Cir. June 13, 2017).

Appellant argues at length that it should not be sanctioned for its arguments regarding eligibility because the law surrounding the legal requirement of 35 U.S.C. § 101 was unsettled. Opening Br. at 23-28. But the existence of *some* unsettled issues regarding patent eligibility does not mean that all claims or arguments regarding eligibility are reasonable. The cases cited by Appellant stand for the unremarkable proposition that attorneys should not be sanctioned for failing to predict how the law will develop when “a *particular point* of law is unsettled.” *Secs. Indus. Ass’n v. Clarke*, 898 F.2d 318, 321-22 (2d Cir. 1990) (emphasis added); *NXIVM Corp. v. Foley*, No. 1:14-cv-1375 (LEK), 2015 WL 7776923, at *5

(N.D.N.Y. Dec. 2, 2015) (district courts had taken divergent approaches to specific question of whether statute of limitations was tolled). The cases do not stand for the proposition that major litigation issues—like obviousness or patent eligibility—become immune from sanctions because some questions within those areas are unsettled.

This Court very recently rejected a similar argument in *Inventor Holdings, LLC v. Bed Bath & Beyond, Inc.*, – F.3d –, 2017 WL 6062460 (Fed. Cir. Dec. 8, 2017). In *Inventor Holdings*, the district court found that the patent owner’s post-*Alice* arguments for patent eligibility were sufficiently weak to warrant an exceptional case finding under 35 U.S.C. § 285. *Id.* at *4. On appeal, the patent owner argued that Section 101 jurisprudence after *Alice* was too uncertain to impose sanctions for an unsuccessful argument regarding patent eligibility. *See id.* at *6. Indeed, the argument from the patent holder in *Inventor Holdings* is strikingly similar to that presented by Appellant in this case. *Compare* Opening Br. at 23-28 *with* *Inventor Holdings’* Opening Br., Case No. 2016-2442, 2016 WL 6135185, at *18-24 (Fed. Cir. Oct. 11, 2016). The *Inventor Holdings* Court unanimously rejected the patent owner’s “several arguments about general, unsettled issues in § 101 jurisprudence” because these general arguments failed to establish that its specific positions had been reasonable. 2017 WL 6062460, at *6 n.4. This Court should reach the same conclusion.

Appellant argues that its litigation position was “bolstered” by the presumption of validity. Opening Br. at 36. But the presumption of validity cannot excuse an objectively unmeritorious eligibility argument. First, it is questionable whether the presumption of validity applies to patent eligibility under Section 101, as this is a pure question of law. *See Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 114 (2011) (Breyer, J., concurring) (standard of proof has no application when addressing legal questions); *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 720 (Fed. Cir. 2014) (Mayer, J., concurring) (presumption of validity does not apply). Even if the presumption did apply, it would not excuse objectively unreasonable arguments. *See, e.g., Vehicle Interface Techs., LLC*, 2015 WL 9462063, at *3-5 (presumption of validity did not preclude awarding fees from after time patent owner became aware of clearly invalidating prior art).

In EFF’s view, the patent eligibility arguments presented by Appellant below were sufficiently weak to support an award of fees under 28 U.S.C. § 1927. EFF agrees with Appellee and the District Court that the patent claims at issue here were clearly drawn to an abstract idea and implemented by conventional computer processes. *See* Response Br. at 21-28; *Gust, Inc. v. AlphaCap Ventures, LLC*, 226 F. Supp. 3d 232, 243 (S.D.N.Y. 2016) (“That the AlphaCap Patents employ an electronic database system to coordinate, monitor, and update information useful to

investment decisions is of no consequence, and does not make the asserted claims any less abstract.”).

The district court also properly considered settlement history as a factor suggesting the litigation was brought mostly for nuisance value. *See Bayer Cropscience AG v. Dow Agrosciences LLC*, No. CV 12-256 (RMB/JS), 2015 WL 1197436, at *4 (D. Del. Mar. 13, 2015) (fact that “plaintiff initiated litigation to extract settlements from defendants who want to avoid costly litigation” supports exceptional case finding); *Summit Data Sys., LLC v. EMC Corp.*, No. CV 10-749-GMS, 2014 WL 4955689, at *4 (D. Del. Sept. 25, 2014) (same).² These case-specific points are addressed in more detail by the parties’ briefs. EFF urges that any ruling should focus on case-specific details rather than be founded on some general immunity for eligibility arguments.

II. If Accepted, Appellant’s Position Would Prevent District Courts From Awarding Fees In Appropriate Cases.

Fee awards, whether under Section 285 or Section 1927, allow district courts to respond to and deter abusive litigation. In the patent context, many of the most abusive litigation campaigns involve a high volume of unmeritorious suits settled for nuisance amounts. *See, e.g.*, Colleen Chien & Edward Reines, *Why Technology*

² Appellant is correct that clients, not lawyers, control settlement decisions. *See* Opening Br. at 5. But that does not mean that the attorneys can simply ignore evidence showing a pattern of nuisance settlements and continue to litigate weak cases in the face of such evidence.

Customers Are Being Sued En Masse for Patent Infringement and What Can Be Done, 49 Wake Forest L. Rev. 235, 240 (2014) (noting that “[w]here the merits are weak, mass customer-suit litigation has become a common, but unsavory, tactic for collecting nuisance settlements from many sources that leverages the high cost of defense for each customer while reducing the risk of a sustained merits challenge”). In EFF’s view, some of the campaigns fitting this pattern have been founded on patents of very dubious eligibility under Section 101. Furthermore, some of the patent owners behind these campaigns have presented exceptionally weak arguments regarding patent eligibility. We discuss some of these cases below.³ It is very important that district courts retain the discretion to deter this kind of litigation conduct. *See* Randall R. Rader, Colleen V. Chien, David Hricik, *Make Patent Trolls Pay in Court*, The New York Times (June 7, 2013).⁴

In *eDekka LLC v. 3balls.com, Inc.*, No. 2:15-CV-541 JRG, 2015 WL 9225038 (E.D. Tex. Dec. 17, 2015), Judge Rodney Gilstrap of the Eastern District of Texas awarded fees pursuant to Section 285. The court found that the patent claims at issue were “clearly directed toward unpatentable subject matter, and no

³ *Amicus* EFF notes that its discussion in this section is an expression of its opinion based on the publicly available dockets. *See Electronic Frontier Foundation v. Global Equity Management (SA) Pty Ltd*, No. 17-CV-02053-JST, 2017 WL 5525835, at *15 (N.D. Cal. Nov. 17, 2017) (holding that online article criticizing litigation conduct of patent owner was protected opinion).

⁴ Available at: <http://www.nytimes.com/2013/06/05/opinion/make-patent-trolls-pay-in-court.html>

reasonable litigant could have reasonably expected success on the merits when defending against the numerous § 101 motions filed in this case.” *Id.* at *2. Despite the fact that its patent was clearly vulnerable to a challenge under *Alice*, eDekka filed over 250 lawsuits, including 87 in a single week.⁵

Notably, courts that have distinguished Judge Gilstrap’s ruling in *eDekka* have done so on case-specific grounds rather than rejecting the view that an unreasonable Section 101 argument can support a fee award. *See, e.g., GoDaddy.com LLC v. RPost Commc'ns Ltd.*, No. CV-14-00126-PHX-JAT, 2016 WL 4569122, at *6–7 (D. Ariz. Sept. 1, 2016). This kind of case-specific approach, rather than an absolute rule, is more appropriate.

Recently, two district court judges awarded fees against a patent assertion entity called Shipping & Transit, LLC based, at least in part, on its unreasonable patent eligibility arguments. Shipping & Transit (and its predecessors in interest) have filed over 500 lawsuits asserting a family of patents on notification technology.⁶ In *Shipping & Transit, LLC v. Hall Enterprises, Inc.*, No. CV 16-

⁵ Litigation data from RPX (search for “eDekka LLC” performed on <https://insight.rpxcorp.com> on December 18, 2017); *see also* Jeff Roberts, Gigaom, *Patent trolls rampage ahead of key reform, Etsy and NFL among 184 targets of 1-day blitz*, April 28, 2014, at <https://gigaom.com/2014/04/28/patent-trolls-rampage-ahead-of-key-reform-etsy-and-nfl-among-184-targets-of-1-day-blitz/>

⁶ Litigation data from RPX (searches for “Shipping and Transit LLC” and “ArrivalStar SA” performed on <https://insight.rpxcorp.com> on December 18, 2017). *Amicus* EFF notes that it acted as counsel in for the plaintiff in

06535-AG-AFM, 2017 WL 3485782, at *1 (C.D. Cal. July 5, 2017), the court found that the asserted patent claims were directed to the abstract idea of “monitoring and reporting the location of a vehicle” and that they do not contain an inventive concept sufficient to transfer the abstract idea into a patent-eligible invention. The court concluded that Shipping & Transit’s legal arguments in defense of its patents were “objectively unreasonable in light of the Supreme Court’s *Alice* decision and the cases that applied that decision to invalidate comparable claims.” *Id.* at *7. The court also found that Shipping & Transit “repeatedly dismissed its own lawsuits to evade a ruling on the merits and yet persists in filing new lawsuits advancing the same claims.” *Id.*

Similar to the district court in this case, the court in *Shipping & Transit* found that the combination of the patent owner’s unreasonable legal arguments and its history of exploitative litigation justified an award of fees. *See id.* at *7-8. Since that order, a second district court reached a similar result regarding the same patent owner. *See Shipping & Transit, LLC v. 1A Auto, Inc.*, No. 16-CV-81039, 2017 WL 5001445, at *4 (S.D. Fla. Sept. 26, 2017), *report and recommendation adopted*, 2017 WL 4993383 (S.D. Fla. Oct. 20, 2017).

Triple7Vaping.Com, LLC v. Shipping & Transit LLC, Case No. 9:16-cv-80855 in the Southern District of Florida, but that the information discussed here is unrelated to that matter, and based on publicly available filings and court decisions.

More recently, a district court awarded fees under Section 285 against My Health, Inc. because of “the weakness of My Health’s post-*Alice* patent-eligibility position.” *See* Memorandum Opinion and Order at 7, *My Health, Inc. v. ALR Technologies, Inc.*, Case No. 16-cv-00535 (E.D. Tex. Dec. 19, 2017).⁷ MyHealth’s patent was directed to a method of tracking a patient’s compliance with treatment guidelines. *See id.* at 5. While accepting that there are some “gray areas” in patent eligibility jurisprudence, the district court still found that “[t]he weakness in My Health’s § 101 position [was] by itself a sufficient basis for finding the cases exceptional.” *Id.* at 8.

In EFF’s view there are other patent owners whose litigation conduct fits this pattern although they have not, as yet, been subject to any fee awards. For example, a company called Electronic Communication Technologies, LLC (formerly known as Eclipse IP, LLC, referred to collectively here as “ECT”) has filed over 200 lawsuits asserting a family of patents on notification technology.⁸ In *Eclipse IP LLC v. McKinley Equip. Corp.*, No. SACV 14-154-GW AJWX, 2014 WL 4407592 (C.D. Cal. Sept. 4, 2014), Judge Wu of the Eastern District of California found 21 claims from three of ECT’s patents ineligible under *Alice*.

⁷ This order is not yet available on Westlaw. A copy is available at: <https://www.eff.org/document/myhealth-section-285-fees-order>

⁸ According to litigation data from RPX (search for "Electronic Communication Technologies LLC (f/k/a Eclipse IP, LLC)" performed on <https://insight.rpxcorp.com> on December 18, 2017).

Judge Wu noted that the analysis in *Alice* “fits the ’681 Patent’s claims *precisely*.” *Id.* at *7 (emphasis added). He reached similar results for the other challenged claims. *See id.* at *7-11. ECT appealed this order but it became final after ECT voluntarily dismissed its appeal. In EFF’s view, the reasoning of Judge Wu’s order, and *Alice*, applies straightforwardly to many of the patent claims ECT has continued to assert in other courts.⁹

Because abstract software patents implement abstract ideas using conventional computer technology, they tend to be vague and broad. This means they can sometimes be used to attack entire industries, much like AlphaCap’s patents were asserted against the crowdfunding industry. Just three of the patent assertion entities discussed above—eDekka, Shipping & Transit, and ECT—have accounted for over 1,000 patent lawsuits. If district courts do not have the tools they need to deter frivolous litigation from actors like these it could lead to hundreds, or even thousands, of additional abusive patent suits every year.

⁹ A motion to dismiss presenting such an argument is pending. *See* Motion to Dismiss Plaintiff’s Amended Complaint for Failure to State a Claim, *Electronic Communication Technologies, LLC v. Minted, LLC*, Case No. 9:16-cv-81669-KAM, Mot. To Dismiss, Dkt. No. 25, at 1 (S.D. Fla. filed Jan. 3, 2017) (arguing that the only asserted claim is “materially indistinguishable from ECT’s claims that were invalidated in *Eclipse IP, LLC v. McKinley Equip. Corp.*”).

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(A)(7)(C)**

I hereby certify as follows:

1. The foregoing Brief of *Amicus Curiae* Electronic Frontier Foundation complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. Cir. R. 32(a). The brief is printed in proportionally spaced 14-point type, and there are 2,925 words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(f), that is, the tables of contents and citations, and certificates of counsel, and by Fed. Cir. R. 32(b), that is, the certificate of interest, the statement of related cases, and the addendum in an initial brief of an appellant).

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and with the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft® Word for Mac 2011 in 14-point Times New Roman font.

December 20, 2017

/s/ Daniel K. Nazer
Daniel K. Nazer

Attorney for *Amicus Curiae*
Electronic Frontier Foundation

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2017, I caused the foregoing BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE to be served by electronic means via the Court's CM/ECF system on all counsel registered to receive electronic notices.

/s/ Daniel K. Nazer

Daniel K. Nazer

ELECTRONIC FRONTIER
FOUNDATION
815 Eddy Street
San Francisco, CA 94109-7701
Tel: (415) 436-9333
Fax: (415) 436-9993
daniel@eff.org