

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

THE JUSTICE NETWORK, INC.)	
)	
Plaintiff,)	
)	
v.)	
)	No. 17-cv-00169
CRAIGHEAD COUNTY, et al.)	
)	
)	District Judge D.P. Marshall Jr.
Defendants.)	Magistrate Judge Joe J. Volpe
)	
_____)	

[PROPOSED] BRIEF OF *AMICUS CURIAE*
THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") submits this brief as *amicus curiae* in order to highlight the perversity of Plaintiff The Justice Network, Inc.'s complaint and the relief requested therein. Contrary to Plaintiff's assertions, the decisions of Judges Bowling and Fowler to waive certain costs, fees, and fines and to end local courts' relationship with The Justice Network was not done to "punish" Plaintiff, but fully justified as a matter of law and policy. Under the prior status quo, The Justice Network collected upwards of a half million dollars a year off the backs of thousands of largely poor and disproportionately minority Arkansans in Craighead County alone, and for those who simply could not afford to pay, it worked with the court system to impose *additional* fines and to ensure their imprisonment. As Judges Bowling and Fowler recognized, there were at least two serious problems with this Justice Network-led regime. First, it caused widespread harm and systematically perpetuated fundamentally unfair and unequal treatment in violation of the Fourteenth Amendment by jailing

people without any regard for their ability to pay court-imposed debt. Second, it undermined faith in the criminal justice system and deprived probationers of due process by preying on poor and disproportionately minority populations.

I. STATEMENT OF INTEREST

The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity. As a part of that work, the Lawyers' Committee is dedicated to preventing the criminalization of poverty, ending mass incarceration, and securing criminal justice reform through impact litigation and other means. The Lawyers' Committee is actively challenging the kinds of constitutional violations described in the brief in another matter in this Court. *See Dade v. Sherwood*, Case No. 16-cv-00602 (E.D. Ark. Aug. 23, 2016). The Lawyers' Committee has a significant interest in the outcome of this case, as it pertains to the ability judges to ensure equal justice and due process in their courtrooms, and, consequently, protect the civil rights of minorities and indigent defendants in Craighead County.

II. FACTUAL & PROCEDURAL BACKGROUND

Plaintiff in the above-captioned case is a Tennessee corporation that was employed as the sole provider of misdemeanor probation supervision in Craighead County, Arkansas for approximately twenty years, from 1997 until February 2017. Doc. 1 ¶¶16, 45. Defendants are District Judges of the Craighead County District Court, David Boling and Tommy Fowler (the "Judges"); the County of Craighead; and nine cities within the County, namely, the cities of Bay, Bono, Brookland, Caraway, Cash, Egypt, Jonesboro, Lake and Monette. *Id.* ¶¶22-23, 26-29.

In a complaint filed June 30, 2017, The Justice Network, Inc. alleges that an "Amnesty Program" instituted by the Judges, "which forgives fees owed by the probation clients" to Plaintiff,

illegally infringed upon Plaintiff's constitutional rights under the Contracts and Takings clauses of the U.S. Constitution and Article 2, Section 22 of the Arkansas Constitution (prohibiting takings). *Id.* ¶¶5, 7. Plaintiff further alleges that the Judges tortiously interfered with the contracts between Plaintiff and their probationer-clients and that the defendant municipalities have been unjustly enriched. *Id.* ¶¶135-153. Plaintiff seeks "actual or compensatory and presumed damages," as well as punitive damages, for its injuries. *Id.* at pp. 24-25. It requests a declaratory judgment that the Judges illegally "effectuated a custom and policy to forgive fees owed to Plaintiff by probation clients (under the "Amnesty Program")" *Id.* at 25. And it asks the Court to enjoin the Judges from waiving any other fees allegedly owed by probationers to The Justice Network. *Id.*

As alleged, prior to the Judges' election, all persons convicted of misdemeanors in the Craighead County District Court, or in "City Courts" within the County, whose sentence included probation "were placed under the supervision of The Justice Network." *Id.* ¶45. Probation orders routinely included a provision requiring probationers to pay monthly supervision fees to Plaintiff. *Id.* ¶47; *id.* at 29 (blank order). Plaintiff also separately required probationers to sign a "Probation Fee Agreement," which Plaintiff alleges constituted a contract between Plaintiff and their probationer-clients. *Id.* ¶46; *id.* at p. 27, 28 (fee agreements). Per the "contract," probationers agreed to pay, *inter alia*, \$35 per month, and, if ordered to complete community service, an additional \$15 per month. *Id.* at 27, 28.¹ All fees were due "in advance." *Id.*

Plaintiff's response to any failure to "abide by the order of probation," including a failure to pay Plaintiff's fees, was to seek the defaulting probationer's arrest and a new order of "restitution" from the court for fees owed. "In the event [a] probation client failed to abide by the

¹ Plaintiff's "Probation Fee Agreement" also contemplates a \$35 per month "Probation Extension Fee." Doc. 1 at 27. Plaintiff's "Public Service Fee Agreement" contemplates a \$25 "Public Service Processing Fee;" a \$15 per month "Public Service Extension Fee;" and a \$15 per month "Post Contempt of Court Fee." *Id.* at 28. Both agreements impose an additional \$5 per month late charge for any payments received after the 5th of the month. *Id.* at 27-28.

order of probation ..., The Justice Network would file an affidavit with the court indicating what condition or conditions were not completed.” *Id.* ¶50. “The affidavit was then countersigned by the Craighead County prosecutor and the [former] Judge.” *Id.* ¶51. “The judge of the District Court would order that restitution be paid to [Plaintiff] for all outstanding fees” *Id.* ¶52.

In March 2016, the citizens of Craighead County elected the defendant Judges, who largely ran on a platform of ending the local courts’ relationship with Plaintiff. *Id.* ¶¶72, 73, 65, 68. Defendant Boling explained his decision to the local paper, in part, as follows: “[I]n order for [Plaintiff] to continue to feed, they have to have people in the system.” *Id.* ¶66. Defendant Fowler, similarly, indicated that he does “not support the privatization of probation services” because “the privatization of [probation] in any aspect leads to the questionability of credibility and just a distrust.” *Id.* ¶68. He added: “[I]t’s not a money-making arm of the government. If it’s privatized, that’s what’s left. It’s to make sure enough people are coming through to meet the bottom line.” *Id.* ¶69. Per the local paper’s summary, “Boling and Fowler ... don’t see how a private, for-profit business with a vested financial interest in keeping folks on its rosters, is a good service for the community.” *Id.* ¶85 (alteration in original).

Upon taking office, the Judges “followed through on promises made on their respective campaign trails.” *Id.* ¶139. The Judges ended the relationship with Plaintiff and implemented an “Amnesty Day” program, in which the Judges “met with probation offenders who had outstanding fines ... to discuss payment options[,]” and in some instances waived select debt. *Id.* ¶¶1, 86-90. Due to cancellation of “payments owed by *hundreds* of probation clients,” Plaintiff alleges a loss of “*hundreds of thousands* of dollars in now uncollectable fees.” *Id.* ¶¶ 78, 170 (emphasis added).

Plaintiff alleges the Judges did all this to “punish” Plaintiff and/or to further the Judges’ own “political aspirations.” *Id.* ¶¶105, 139.

All defendants have moved to dismiss the Complaint. *See* Docs. 10, 13, 15, 29.

III. ARGUMENT

A. The Prior Status Quo Resulted in Widespread Harm and Constitutional Violations

The Justice Network’s assertion that the Judges stopped using Plaintiff’s “services” and began to individually consider the propriety of debts imposed in connection with those “services” *in order to punish* The Justice Network is belied by facts well known to Plaintiff and implied by its Complaint. *See* Doc. 1 ¶105 (alleging the Judges acted in order to “punish” Plaintiff). Even a quick perusal of the local paper reveals a years’ long history of harm in Craighead County under the prior status quo, indifferently imposed in pursuit of company profit. *See* Exhibits 1-6. The Justice Network’s practice of seeking warrants for the arrest of their “clients” solely and immediately for failure to pay and/or attend a class or assignment scheduled by the company (not a judge) pushed thousands of people into cycles of debt, fear, poverty, and incarceration.

When the Defendant Judges took office, they found an estimated 50,000 outstanding warrants from the misdemeanor court, for more than 8,000 different individuals. *See* Exhibit 1, *Amnesty Deadline Draws Full House*, THE SUN, Feb. 11, 2017. That is almost one warrant for every two residents of Craighead County. *See* U.S. Census Bureau, QuickFacts, *Craighead County, Arkansas* (July 2016), available at <https://tinyurl.com/yc6wg57y> [last accessed Aug. 17, 2017] (showing County population of 105,835). That is an average of more than five warrants for each affected individual. Defendant Boling recalled one day in August 2016 when thirty-four people appeared before him in court; only six were accused of crimes; the remainder (twenty-eight individuals) were jailed solely on warrants issued for failure to pay. Exhibit 2, *Keith Inman, Judges Plan Changes for District Court*, THE SUN, Dec. 7, 2016. Some of them involved shocking sums owed as a result of misdemeanor convictions. Defendant Fowler’s clerks, for example,

identified fifty-one people “in the court’s Jonesboro division alone who owed more than \$10,000 in fines and other fees.” Exhibit 3, Keith Inman, *District Judges Explain Changes*, THE SUN, Jan. 26, 2017. It should be noted this amount is *twenty* times the amount authorized under Arkansas law in punitive fines for Class C misdemeanors, and *four* times the maximum amount authorized for even *the highest* misdemeanor fine. See Ark. Code Ann. § 5-4-201 (fine capped at \$2,500, and \$500 for Class A and C misdemeanors respectively).

Local residents described widespread hopelessness on the part of Plaintiff’s “clients.” Vicki Crego, Executive Director of the Women’s Crisis Center of Northeast Arkansas, spoke to the local paper about “a woman in the crisis center who had gotten a job and was working diligently to get back on her feet.” Exhibit 4, Keith Inman, *Ministers Question Local Justice System*, THE SUN, Nov. 8, 2012. “Because she had a job, she was unable to complete court-ordered public service work by the deadline, she said.” *Id.* “A contempt of court warrant was issued, and she was arrested.” *Id.* The arrest then cost the woman her job, and her children, who were placed in foster care. *Id.* Pastor Adrian Rodgers related the catch-22 nature of Plaintiff’s “agreement” for probationers he had counseled who could not afford the monthly fees: the agreements require probationers to “pay a fee to get started with public service and monthly fees for as long as it takes to complete the work,” but “Rodgers said some probationers don’t go to ... monthly appointments because they don’t have money to pay the fee.” *Id.* And “[i]f they don’t pay the fee, they’re not allowed to perform the work, Rodgers said.” *Id.* Then “[i]f they don’t perform the work, they’re arrested and receive more fines and fees and are ordered to perform more work”

On account of Plaintiff’s summary procedures, even “clients” who were in compliance could end up in jail. Kevin Richardson, a local employer, told the paper “of one employee who

was arrested on warrants on her way to work. She had proof she performed her public service but still had to go to jail” *Id.* ““More often than not, they lose hope,’ Richardson said.” *Id.*

The editors of the local paper, *The Sun*, repeatedly published impassioned calls for change. On July 11, 2012, under the headline “Justice Network an Oxymoron,” Editor Chris Wessel wrote:

Last year, The Justice Network collected \$556,548 in fees from clients referred to the firm from the district court. For the first six months this year, the company has already collected \$355,001. Last month, one man paid \$695 in fees.

What *The Sun* has found is that clients often face an unreasonable and inflexible schedule to complete public service and classes to meet their probation requirements. As soon as a class or public service schedule is missed, The Justice Network issues a warrant for the client’s arrest, and the revolving door spins some more — more fines, more fees, more classes, more arrests. On top of that, mistakes have been made, and probationers have been rearrested for not meeting their probation requirements when they’ve actually met them.

[...]

Those caught up in the system have a terrible time getting out. They have a hard time keeping a job to pay off the fines and fees because The Justice Network assigns the public service and class schedule to the probationer. They don’t have a choice.

[...]

We want to know why the failure rate of probation is so high here. We suspect it’s because The Justice Network is more interested in making money than helping those on probation complete their public service and classes and become productive members of the community once again.

Exhibit 5, Editorial, *Justice Network an Oxymoron*, *THE SUN*, July 11, 2012; *see also* Exhibit 6, Editorial, *Ministers Input Needed to Change Probation System*, *THE SUN*, Nov. 9, 2012 (“Like a maze with no exit, the ... probation system is more often a dead end than a remedy for lawbreakers to turn their lives around and become productive members of society. Much of that is because the private company that operates ... [it] has found it far more lucrative if lawbreakers fail ...”).

The spiraling debt and hopelessness of thousands of County residents under the prior status quo more than justifies the Judges’ decisions to end their courts’ relationship with The Justice Network. The harms perpetrated additionally fell disproportionately on minority Arkansans,

adding another level of inequality to a system that threatened jail for poor persons but not for rich.² And, as if that weren't reason enough, the prior status quo resulted in widespread violations of the Fourteenth Amendment.

The Fourteenth Amendment prohibits the incarceration of any person for the sole reason that he or she is poor and cannot afford to pay some amount of money. *E.g.*, *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970) (holding statute that permitted imprisonment resulting “directly from an involuntary nonpayment of a fine or court costs” is “an impermissible discrimination that rests on ability to pay”); *Tate v. Short*, 401 U.S. 395, 398 (1971) (holding that subjecting petitioner to “imprisonment solely because of his indigency” works an invidious discrimination); *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (“[A] sentencing court must inquire into the reasons for the [probationer’s] failure to pay. . . . To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine.”); *Turner v. Rogers*, 564 U.S. 431, 447 (2011) (outlining due process requirements for civil contempt proceeding).

This prohibition derives from both due process and equal protection principles. *Bearden*, 461 U.S. at 665 ; *see also Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584, 2603 (2015) (“In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.”) (citing *Bearden*). Imprisonment for failure to pay is “fundamentally unfair,” and a violation of due process, in the absence of evidence that such failure to pay was the defendant’s fault. *Bearden*, 461 U.S. at 666, 666 n.7, 673. And such imprisonment offends equal protection

² Cf. Racial Disparities in the Arkansas Criminal Justice System, UALR William H. Bowen School of Law, *Report of Research Findings* (2015) (“People of color make up less than a quarter of the population of Arkansas but constitute almost half of the incarcerated population.”), available at <https://static1.squarespace.com/static/5492f99ce4b0a0509513144d/t/579a1adb5016e11db1e98669/1469717213747/RACIAL+DISPARITIES+IN+CRIMINAL+JUSTICE+SYSTEM+%28EXECUTIVE+SUMMARY%29.pdf> [last accessed Aug. 20, 2017].

because only those who cannot afford to pay will be imprisoned. *Williams*, 399 U.S. at 240-41; *Tate*, 401 U.S. at 398. Thus, as here, “[d]ue process and equal protection principles converge in the Court’s analysis of” cases involving “the treatment of indigents in our criminal justice system.” *Bearden*, 461 U.S. at 665, 664.

The practices of Plaintiff under the prior status quo undeniably resulted in the routine jailing of poor or low-income Arkansans without any finding that their alleged failure to pay was willful, and without notice that their ability to pay was at issue or an opportunity to be heard on their ability to pay before their arrest and detention. Public accounts show this to be true, but Plaintiff’s allegations also admit as much. In describing the prior status quo, Plaintiff alleges that “[i]n the event [a] ... client failed to abide by the order of probation[,]” Plaintiff “would file an affidavit with the court indicating what condition or conditions were not completed.” Doc. 1 ¶50. The County prosecutor and former Judge would “countersig[n]” the affidavit for arrest. *Id.* ¶51. Once Plaintiff’s client was arrested and arraigned, the “judge of the District Court would order that restitution be paid” to Plaintiff “for all outstanding fees owed” *Id.* ¶52. In other words, Plaintiff’s Complaint describes a conveyor-belt process for the efficient violation of Arkansans’ Fourteenth Amendment rights, wherein the District Court and the criminal justice system became a generation and enforcement mechanism for Plaintiff’s revenue.

B. For-Profit Probation Undermines Faith in the Criminal Justice System

Relatedly, although Plaintiff claims mal-intent, the express words of the Judges included in Plaintiff’s Complaint make clear their primary motivation for ending the relationship: the concept of a for-profit entity administering probation for-profit “probation” is perverse. *See supra*. For-profit probation administration puts profit before the interests of the probationers, their families, communities, and the public at large.

Ironically, there can be no better proof of the Judges' point than the instant lawsuit. The Justice Network complains that the Judges' expressed concerns about the well-being of individuals subject to their jurisdiction and the credibility of the justice system itself "ignore the contractual relationship existing between the probation clients and The Justice Network." *Id.* ¶71. Plaintiff asks this Court for an order declaring it *illegal* for the Judges to alter the terms of existing probation orders and even to affect *future* probation orders for the sole reason that a change in the status quo affects the company's bottom line. *Id.* at 24. To wit, Plaintiff asks the Court to enjoin the Judges from waiving any more fees, for whatever reason, because Plaintiff "has suffered significant economic loss, and will continue to sustain additional economic loss in the future, should the unlawful 'Amnesty Program' continue." *Id.* ¶4. This is an unambiguous assertion that The Justice Network's top priority is not the administration of justice for which it has been tasked, but rather maintaining its revenue stream. Generally speaking, revenue generation is a logical top priority for a for-profit company. But, as the voters of Craighead County and the Judges understand, there is no place for profit motive in a justice system.

It is well-established that the Due Process Clause of the U.S. Constitution demands justice-system decision-makers be free from pecuniary bias. Almost a century ago, in *Tumey v. Ohio*, 273 U.S. 510, 522 (1927), the Supreme Court invalidated an Ohio law that provided for trial before a village mayor who could levy fines that would be used in part to cover his "fees and costs, in addition to his regular salary." The Court held the Ohio scheme unconstitutional on two independent grounds, "both because of [the mayor's] direct pecuniary interest in the outcome, *and* because of his official motive to convict and to graduate the fine to help the financial needs of the village." *Id.* at 535 (emphasis added). The question of bias is to be considered from an objective

perspective, with the likely behavior of an average person in mind, and encompasses a concern for both actual impropriety and even the mere *appearance* of it. As the Court explained:

There are doubtless mayors who would not allow such a consideration as \$12 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Id. at 532. The Court has since repeatedly affirmed that Due Process requires justice-system decision-makers be free from pecuniary bias. *E.g. Ward v. Village of Monroeville* 409 U.S. 57 (1972); *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987).

Amicus does not assert that Plaintiff's role under the prior status quo was tantamount to a judge's, or in any way judicial. However, Plaintiff was entrusted to make decisions about the terms of their "clients'" payment and community service plans, and, to the extent the former judge considered Plaintiff's decisions part of his probation order, Plaintiff was empowered to deprive its "clients" of their fundamental right to physical liberty (and so much more) nearly at will, by simply submitting an affidavit. *See supra*. As the Judges and citizens of Craighead County recognized, the placement of so much power into the hands of a company driven primarily by its desire to ensure and increase its own revenue stream is facially intolerable.³

³ The U.S. Department of Justice briefly summarized the point, and the problem, with respect to for-profit probation companies generally in March of 2016 as follows:

[D]ue process concerns arise when ... designees [of the court] have a direct pecuniary interest in the management or outcome of a case—for example, when a jurisdiction employs private, for-profit companies to supervise probationers. In many such jurisdictions, probation companies are authorized not only to collect court fines, but also to impose an array of discretionary surcharges (such as supervision fees, late fees, drug testing fees, etc.) to be paid to the company itself rather than to the court. Thus, the probation company that decides what services or sanctions to impose stands to profit from those very decisions.

Again, The Justice Network’s filing of the instant case alone exemplifies the problem. The Justice Network’s suit makes abundantly clear that The Justice Network is more concerned about keeping its “clients” on probation and paying monthly fees than it is about any of the justice or fairness issues underlying the Judges’ actions. An individual probationer, the Judges, or the public at large cannot trust The Justice Network to make impartial decisions about whether to recommend extension of probation, revocation of probation, or an individual’s arrest for an alleged violation, when doing so would harm The Justice Network ... as alleged by The Justice Network in this suit.

IV. Conclusion

For the foregoing reasons, the Lawyers’ Committee for Civil Rights Under Law respectfully requests that the Court dismiss this action.

Respectfully submitted,

Jon M. Greenbaum (D.C. Bar No. 489887)
Lawyers’ Committee for Civil Rights Under Law
1401 New York Ave NW Suite 400
Washington, DC 20005
(202) 662-8315
jgreenbaum@lawyerscommittee.org

Joseph Dell’Armi (NY Bar No. 5184130)*
Venable LLP
1270 Avenue of the Americas
24th Floor
New York, NY 10020
(212) 808-5674
jdellarmi@venable.com
*Petition for Admission to Practice pending

Attorneys for Amicus

Exhibit 7, Vanita Gupta, Civil Rights Division, U.S. Dep’t of Justice, *Dear Colleague Letter Regarding Enforcement Fees and Fines* (Mar. 14, 2016), available at <https://www.justice.gov/crt/file/832461/download> [last accessed Aug. 17, 2017].

CERTIFICATE OF SERVICE

I hereby certify that, on the 22nd day of August 2017, I have sent the foregoing to the Clerk of Court by overnight mail, and the Clerk will send a notice of electronic filing to the parties.

Jon M. Greenbaum