

DOCKET NO.: 10-10229-B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

THEODORE KARANTSALIS,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE and
UNITED STATES MARSHALS SERVICE,

Defendants-Appellees.

On Appeal from the United States District Court, Southern District of Florida
Case No.: 1:09-cv-22910-PCH

BRIEF OF PLAINTIFF-APPELLANT
THEODORE KARANTSALIS

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

In accordance with Eleventh Cir. R. 26.1-1, Theodore Karantsalis respectfully submits this Certificate of Interested Persons and Corporate Disclosure Statement, listing in alphabetical order the trial judge, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held company that owns 10% or more of the parties' stock, and other identifiable legal entities related to the parties.

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9. United States Marshals Service

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff Theodore Karantsalis respectfully submits that oral argument will assist the Court in this matter. Although the legal issue presented by the appeal has been litigated to resolution in the Sixth Circuit, see Detroit Free Press, Inc. v. Dep't of Justice, 73 F.3d 93 (6th Cir. 1996), this is a matter of first impression in this Circuit, and oral argument will aid the Court in reaching its determination.

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STATEMENT OF JURISDICTION

This is an appeal from a final order of the United States District Court for the Southern District of Florida in an action brought by free-lance journalist Theodore Karantsalis (“Karantsalis”) pursuant to the Freedom of Information Act (“FOIA”) challenging a decision by the United States Department of Justice (“DOJ”) and United States Marshals Service (“USMS”) denying his request for a criminal defendant’s mug shot. The district court had subject matter jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B).

Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1294(1) because this is an appeal from a final judgment disposing of all parties’ claims. This district court granted summary judgment for Defendants and entered final judgment on December 14, 2009. Karantsalis timely filed his notice of appeal on January 13, 2010.

I. STATEMENT OF THE ISSUES

Whether the district court erred in concluding that mug shots of convicted, but not yet sentenced, federal prisoners may properly be withheld from the public on personal privacy grounds pursuant to FOIA Exemption 7(C).

II. STATEMENT OF THE CASE

A. Proceedings and Disposition in the Court Below.

This is an appeal based upon the DOJ and USMS's refusal to provide information requested under FOIA.

On July 11, 2009, free-lance journalist Karantsalis requested copies of mug shot photographs of Luis Giro, a former Miami Springs-based investment manager who had pled guilty to securities fraud, but had yet to be sentenced. See Tab 1 (Doc 1 – Pg 2.) His request was denied by the USMS Office of General Counsel in Washington, D.C. See Tab 1 (Doc 1 – Pg 7.)

After exhausting his administrative remedies, Karantsalis, proceeding *pro se*, filed an appeal to the district court on September 28, 2009. See Tab 1 (Doc 1.) On October 30, 2009, Defendants filed a motion for summary judgment claiming that the requested mug shots were exempt under FOIA Exemptions 6 and 7(C). (Doc 4.) The district court granted Defendants' motion finding that the mug shots were subject to Exemption 7(C), and entered final judgment on December 14, 2009. See

Tab 14 (Doc 14); Tab 15 (Doc 15.) Karantsalis filed his notice of appeal on January 13, 2010.

B. Statement of the Facts.

1. The Parties.

Plaintiff Theodore Karantsalis is a free-lance journalist who writes for several newspapers of general circulation in Florida, including *The Miami Herald*, *The River Cities Gazette* and *The Falcon Times*. See Tab 1 (Doc 1 – Pg 1.)

Defendant USMS, which acts under the authority of Defendant DOJ, is the United States law enforcement agency charged with, among other things, investigating and apprehending federal fugitives, housing federal detainees and “processing ... prisoners held in the custody of a marshal....” 28 C.F.R. § 0.111(i). As part of these duties, the USMS handles the booking process of federal prisoners, including the taking of mug shots and fingerprints. (See Doc 4 – Pg 6.)

2. The USMS’s Release of Mug Shots.

The USMS itself publicly disseminates via its website and otherwise photographs, including mug shots, of federal prisoners. The USMS does so for what it considers law enforcement purposes, including to aid in the capture of fugitives. (Doc 4-1 – Pg 16.) Mug shots often continue to be displayed on the

USMS website after a fugitive's capture. See, e.g., Fugitive Investigations, found at www.usmarshals.gov/investigations/index.html.

The USMS also releases photographs, including mug shots, of federal prisoners in response to certain FOIA requests. All FOIA requests of any kind directed to the USMS are handled by the USMS Office of General Counsel ("OCG") in Washington, D.C. (Doc 4-1 – Pg 1.) When mug shots are requested, the OCG first considers where the request originated from. If the request is made from a state sitting in the Sixth Circuit – i.e, Michigan, Ohio, Kentucky or Tennessee – the request may be granted depending on the status of the prisoner. (See Doc 4-1 – Pg 3.) Specifically, if the prisoner has been publicly named, indicted, has made a court appearance and is party to an ongoing trial or appeal, the photograph will be released. (See id.)

If the request is made from somewhere outside of the Sixth Circuit, the request will be granted if the photograph has already been released to an individual or entity in the Sixth Circuit. (Doc 9-1 – Pgs 1-2.) For example, a FOIA request for a mug shot of recently convicted federal inmate Bernie Madoff was granted because it came from Michigan. (Doc 9-1 – Pg 1.) Thereafter, four additional requests for Madoff's mug shot were granted "without regard to the location of the request" since Madoff's mug shot had already been once provided. (Doc 9-1 – Pg 2.) Similarly, the USMS released a copy of the mug shot of Joseph Nacchio, the

former Chairman and Chief Executive Officer of Quest Communications International, pursuant to a request from the *Detroit News*. (See id.) The USMS had previously denied a request for Nacchio's mug shot because it came from the *Denver Post* in Denver, Colorado. (See id.)

3. Karantsalis' Request for Luis Giro's Mug Shot.

Luis Giro was the owner, President and Chief Investment Officer of Giro Investment Group, Inc., and was federally indicted on securities fraud charges in 2003. See Tabs 1, 3 (Doc 1 – Pg 11; Doc 3 – Pg 2.) Giro then fled and was a fugitive from 2003 until his capture by the Venezuelan government in May 2009. See Tab 3 (Doc 3 – Pg 3.) While a fugitive, the FBI circulated copies of Giro's driver's license as part of their INTERPOL red notice. (Doc 4-1 - Pg 5.) After the Venezuelan authorities turned Giro over to the FBI, he was processed by the USMS, which including the taking of his booking photographs, or mug shots, on May 29, 2009. (Doc 3 – Pg 3; Doc 4 – Pg 2.) On June 22, 2009, Giro appeared in open court and pled guilty to criminal charges. He was awaiting sentencing when Karantsalis initially requested copies of his mug shots under FOIA. (Doc 4 – Pg 2.)

On July 9, 2009, Karantsalis wrote an article about Giro's plea which was published in *The River Cities Gazette*. (Doc 1 – Pg 11.) The article covered Giro's

business dealings, the details of his arrest and capture, and included photographs made public by the Venezuelan government. (Id.)

Thereafter on July 11, 2009, Karantsalis, pursuant to FOIA, requested a copy of Giro's mug shots. See Tab 1 (Doc 1 – Pg 6.) His request was denied on July 13, 2009 on the purported basis that “Exemption 7(C) allows an agency to withhold records or information compiled for law enforcement purposes to the extent that their production could reasonably be expected to constitute an unwarranted invasion of personal privacy.” See Tab 1 (Doc 1 – Pg 7.) Karantsalis appealed the denial that same day, which was also denied by letter dated September 8, 2009. See Tab (Doc 1 – Pgs 8-10.) Giro's proceedings were ongoing at this time, and he was later sentenced on October 23, 2009. See Tab 3 (Doc 3 – Pg 2.)

C. Standard of Review.

The grant of summary judgment in a FOIA case is subject to *de novo* review, with “all facts and reasonable inferences in the light most favorable to the non-moving party.” Miccosukee Tribe of Indians of Florida v. United States, 516 F.3d 1235, 1243 (11th Cir. 2008).

III. SUMMARY OF THE ARGUMENT

The district court erred in ruling that the mug shots of federal prisoners may properly be withheld from the public on personal privacy grounds pursuant to

FOIA Exemption 7(C). There is no arguable basis to conclude that Giro had a cognizable privacy interest in his mug shot. Moreover, even assuming a reasonable privacy interest existed, the public's interest in disclosure of the mug shots clearly outweighs any such interest.

IV. ARGUMENT AND CITATION OF AUTHORITY

The purpose of FOIA is to “pierce the veil of administrative secrecy and open agency action to the light of public scrutiny....” U.S. Dept. of Air Force v. Rose, 425 U.S. 352, 361 (1976). See also News-Press v. U.S. Dep’t of Homeland Security, 489, F.3d 1173, 1191 (11th Cir. 2007) (FOIA “attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.”) (citation omitted). FOIA presumes that there must always be full agency disclosure of records “unless information is exempted under clearly delineated statutory language.” Rose, 425 U.S. at 360-61. Therefore, courts must always bear in mind that records are “presumed to be subject to disclosure unless “the Government” affirmatively establishes that the requested records fall into one of FOIA’s exemptions.” Office of the Capital Collateral Counsel v. Dep’t. of Justice, 331 F.3d 799, 802 (11th Cir. 2003).

“Because FOIA’s purpose is to encourage disclosure, its exemptions are to be narrowly construed” Moye, O’Brien, O’Rourke, Hogan & Pickert v. Nat’l R.R. Passenger Corp., 376 F.3d 1270, 1277 (11th Cir. 2004) (citation omitted). See also

News-Press, 489 F.3d at 1191 (“[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objection of the Act.”) (quoting Rose, 425 U.S. at 352).

Exemption 7(C) excuses from mandatory disclosure certain “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C).¹ Here, no such expectation is reasonable.

A. The District Court Erred in Concluding that Giro Had A Cognizable Privacy Interest in His Mug Shot.

Exemption 7(C) permits nondisclosure only where there is a reasonable expectation of privacy in the information sought. See Fed. Labor Relations Auth. v. U.S. Dep’t of Veterans Affairs, 958 F.2d 503, 509 (2d Cir. 1992) (“Only where a privacy interest is implicated does the public interest for which the information will serve become relevant and require a balancing of the competing interests.”).

Such an expectation is reasonable only if disclosure would work an invasion of privacy that is significant and substantial. See, e.g. Rose, 425 U.S. at 381 n. 19 (FOIA’s exemptions “are directed at threats to privacy interests more palpable than

¹ Karantsalis does not dispute that Giro’s booking photograph was “compiled for law enforcement purposes.” See Tab 1 (Doc 1 – Pg 3.)

mere possibilities”); Detroit Free Press, Inc. v. Dep’t. of Justice, 73 F. 3d 93, 97 (6th Cir. 1996) (“[T]he personal privacy of an individual is not necessarily invaded simply because that person suffers ridicule or embarrassment from the disclosure of information in the possession of government agencies.”) (citation omitted).

Here, the district court erroneously ruled that there was a reasonable expectation of privacy in Giro’s mug shot based on what it characterized as the privacy interest in the “unique” and “embarrassing” nature of the mug shots and the fact that “photographs taken by the Marshals Service are generally not available for public dissemination.” See Tab 14 (Doc 14 – Pg 6.)

1. There is No General Privacy Interest in a Mug Shot.

In the seminal case of United States Dep’t of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749 (1989), the Supreme Court noted that when a court reviews an agency decision to withhold records under a FOIA privacy exemption, the preliminary question is whether the claimed interest in withholding records “is the sort of ‘personal privacy’ interest that Congress intended [the privacy exemptions] to protect.” 489 U.S. at 762. Although the privacy interests recognized under FOIA are not coextensive with the privacy interests protected under either the Constitution or the common law, the Court in Reporters Committee made clear that both these sources may aid in identifying what is and is not a substantial privacy interest under FOIA. Id. at 762-67 and nn. 13-15.

Properly viewed, the interest of federal prisoners in avoiding the release of their mug shots is simply not sufficient to justify withholding them. Indeed, there is no historical privacy interest in mug shots, and courts have repeatedly refused to find a protectable interest in them.² See, e.g., Paul v. Davis, 424 U.S. 693, 713 (1976) (distribution of mug shots disclosing fact of arrest are not subject to constitutional privacy protection); Bailey v. City of Port Huron, 507 F.3d 364, 368 (6th Cir. 2007) (“As a matter of federal constitutional law, a criminal suspect does not have a right to keep her mug shot and the information contained in a police report outside of the public domain...”); Philbrook v. Perrigo, 637 F. Supp.2d 48, 55 (D. Mass. 2009) (police officers’ use of mug shot as computer “wallpaper” did not violate privacy interest); Sorrentino v. City of Philadelphia, 1997 WL 597990 (E.D. Pa. Sept. 16, 1997) (dismissing § 1983 action against police department who provided mug shots for display in neighborhood); Pemberton v. Bethlehem Steel

² In fact, in most jurisdictions, including those of this Circuit, mug shots are subject to public access under state records laws as a matter of course. See, e.g., Ala. Op. Atty. Gen. No. 2004-108 (April 1, 2004) (mug shots contained in computer database are subject to state’s open records act); Fl. AGO 94-90 (October 25, 1994) (“[A]n arrest report, including the booking photograph, prepared by a law enforcement agency is subject to disclosure.”); O.C.G.A. § 17-4-27 (contents of arrest records “shall be open for public inspection”). See also State v. Paluszcyk, 201 Wis.2d 523, (Wis. App. 1996) (mug shots available under state open records laws); Patterson v. Allegan County Sheriff, 199 Mich. App. 638 (1993) (same); Ky. Opp. Atty. Gen. 08-ORD-239 (November 6, 2008) (same); 92 Md. Op. Atty. Gen. 26 (June 14, 2007) (same); 1990 Va. Op. Atty. Gen. 9 (August 30, 1990) (same).

Corp., 66 Md. App. 133, 168 (Md. App. 1986) (circulation of mug shot did not constitute invasion of privacy).

It is against this backdrop that this Court should consider the district court's conclusions.

2. There is No Privacy Interest in Giro's Mug Shot.

Giro was a six-year fugitive who pled guilty, and was awaiting sentencing, at the time of Karantsalis' request. See Statement of Facts at B.3. He simply had no reasonable expectation of privacy in his mug shot.

The Sixth Circuit, the only circuit to address this issue under FOIA, has squarely held that the disclosure of a criminal mug shot could not be reasonably expected to constitute an invasion of personal privacy in circumstances such as these. Specifically, in Detroit Free Press, Inc. v. Dep't. of Justice, 73 F. 3d 93, 97 (6th Cir. 1996), the Sixth Circuit examined the privacy interest in the mug shots of individuals in "ongoing criminal proceedings[s], in which the names of the defendants have already been divulged and in which the defendants themselves have already appeared in open court."³ The Sixth Circuit noted that the defendants

³ In the district court, the Government claimed that Detroit Free Press was distinguishable because it "limited its holding to 'disclosure in an ongoing criminal proceeding.'" (Doc 4 – Pg 14.) Even assuming such a limitation, Giro was awaiting sentencing at the time of Karantsalis' FOIA request, and was clearly involved in an "ongoing" proceeding. (Doc 4 – Pg 2.) See also U.S. v. Soussoudis, 807 F.2d 383, 389 (4th Cir. 1986) ("Sentencing may also be viewed as

involved “had already been identified by name by the federal government and their visages had already be revealed during prior judicial appearances. No *new* information ... would therefore be publicized by release of the mug shots by the Marshals Service.” Id. (emphasis added).

Similarly here, there was no new information about Giro to protect from disclosure. Not only was Giro a known criminal who had appeared in open court, but he also had had his photographic likeness distributed far and wide by the United States and Venezuelan governments, and in turn by media outlets in the United States. See Statement of Facts at B.3. Indeed, even the United States Attorney’s Office issued a press release discussing Giro’s arrest and plea prior to Karantsalis’ request. See June 23, 2009 Press Release, found at <http://www.justice.gov/usao/fls/PressReleases/090623-03.html>. There is simply no basis to say Giro had a reasonable expectation of privacy in any information about his arrest and plea, including his mug shot.

The district court erroneously concluded that the distribution of Giro’s drivers’ license photograph was immaterial because mug shots are “unique” and “capture[] an embarrassing moment that is not normally exposed to the public

within the scope of the criminal trial itself.”). This was not a completed proceeding “fad[ing] from public view” as the Government suggested. (Doc 4 – Pg 15.)

eye” in a photograph “generally not available for public dissemination.” See Tab 14 (Doc 14 – Pg 6.) In fact, what is “embarrassing” is not the photograph but the already public fact of the arrest, about which, again, there can be no reasonable expectation of privacy. As previously discussed,, mug shots of arrests are, in fact, regularly disseminated. This is true in the state system. See, supra, n. 2. It is also true with respect to USMS. As previously noted, the USMS’s website displays photographs, including mug shots, of federal prisoners, even following their capture. See, e.g., Fugitive Investigations, found at www.usmarshals.gov/investigations/index.html.

Similarly, the USMS could have, and presumably would have, released Giro’s mug shot to someone requesting it from the Sixth Circuit. Id. at B.2. Had another person requested Giro’s mug shot from that circuit, or had Karantsalis been lucky enough to live in what the USMS deemed the right place, it would have been provided. Given these policies, Giro had absolutely no reasonable expectation of privacy.

The law is clear – “if the information is subject to disclosure, it belongs to all.” News-Press, 489 F.3d at 1187 (quoting Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004)). Here, the DOJ and USMS maintain policies that suggest that mug shots “belong to some.” That mug shots are subject to some

disclosure here completely negates any arguable privacy interest Giro may have had.

B. The District Court Erred in Concluding that Giro's Privacy Interest Outweighed Any Public Interest in His Mug Shot.

Assuming there is a sufficient privacy interest at stake that would justify withholding the requested mug shots, this Court must still balance the asserted privacy interest against the public's interest in disclosure. See, e.g., O'Kane v. United States Customs Service, 169 F.3d 1308, 1309 (11th Cir. 1999). In order to balance the interest in disclosure, courts weigh the privacy interest against the extent to which disclosure would "she[d] light on an agency' performance of its statutory duties," or otherwise let citizens know "what their government is up to." Reporters Committee, 489 U.S. at 773. See also Miccosukee Tribe, 516 F.3d at 1244 ("Congress enacted FOIA to 'enable the public to have access to government information that is unnecessarily shielded from public view.'") (citation omitted). By creating a presumptive right of access, FOIA allows "the public to decide for *itself* whether government action is proper." Washington Post Co. v. U.S. Dep't of Health and Human Servs., 690 F. 2d 252, 264 (D.D. Cir. 1982) (emphasis in original). See also News-Press, 489 F.3d at 1190 (FOIA allows the public to "check against corruption and to hold the governors accountable to the governed.") (citation omitted).

1. Mug Shots Directly Inform the Public of the USMS's Performance of its Duties.

Law enforcement records are “cloaked with the public interest if the information therein would shed light on agency action.” Quinon v. FBI, 86 F. 3d 1222, 1231 (D.C. Cir. 1996) (citation omitted). Here, the records at issue clearly shed light on the USMS's actions. Specifically, USMS is statutory charged with, among other things, the booking and processing of federal prisoners. See 28 C.F.R. § 0.111. The manner in which it handles prisoners and executes the statutory duty is clearly of reasonable interest to the public.

The district court based its conclusion that there was no “particular public interest” on what it deemed the “[c]ommon sense suggest[ion] that if a prisoner were receiving preferential treatment, he or she would not flagrantly display – and risk losing – such preferential treatment by smiling or smirking in a booking photograph.” See Tab 14 (Doc 14 - Pg 7.) The record belies this unsupported conclusion.

Karantsalis submitted to the district court mug shot photographs of Bernie Madoff and Joe Nacchio that revealed the very smirks and smiles indicative or special treatment. (Doc 7 - Pg 6-7.) Examination of Giro's mug shots would similarly shed light on Giro's treatment and would undeniably “contribute

significantly to the public understanding of the operations or activities of the government.” Reporters Comm., 489 U.S. at 775. As the Sixth Circuit explained:

Public disclosure of mug shots in limited circumstances, can, however, serve to subject the government to public oversight. For example, release of a photograph of a defendant can more clearly reveal the government’s glaring error in detaining the wrong person for an offense than can any reprint of only the name of an arrestee. Furthermore, mug shots can startlingly reveal the circumstances surrounding an arrest and initial incarceration of an individual in a way that written information cannot. Had the now-famous videotape of the Rodney King beating in Los Angeles never been made, a mug shot of Mr. King released to the media would have alerted the world that the arrestee had been subjected to much more than a routine traffic stop and that the actions and practices of the arresting officers should be scrutinized.

Detroit Free Press, Inc., 73 F. 3d at 98. Absent an examination of Giro’s mug shot, there is simply no way for the public to visually examine his treatment at the hands of the USMS and how his treatment may have compared to others. The public interest is without question.

2. Giro’s Privacy Concerns Do Not Outweigh the Public Interest.

Given the nature of the documents, the public has a weighty interest in disclosure of these mug shots. When this public interest is balanced against purported privacy interest discussed above, it is apparent that release of the photographs will not constitute a clearly unwarranted invasion of Giro’s privacy.

Here the only “privacy interest” arguably to be protected is the interest of a publicly identified federal defendant in his or her mug shot. As shown above,

whatever privacy interest Giro may have in limiting public access to his mug shot is severely limited and may not even be of sufficient weight to require balancing.

The public's interest in disclosure, on the other hand, dwarfs the privacy interest invoked by the DOJ and USMS, and the Government has not met its burden of overcoming the strong presumption favoring disclosure under FOIA. As a matter of law, the scale falls resoundingly on the side of the public's interest in "knowing what the Government is up to." Favish, 541 U.S. at 171 (quoting Reporters Committee, 489 U.S. at 773)). The undisputed evidence before the district court established the DOJ's actions were improper. The district court's decision should be reversed.⁴

V. CONCLUSION

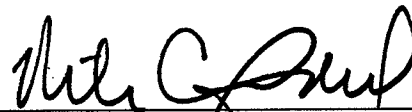
For the foregoing reasons, Plaintiff Theodore Karantsalis respectfully requests that this Court reverse the district court's judgment and direct the disclosure of Giro's mug shots.

⁴ In the district court, the DOJ and USMS alternatively alleged that the mug shots were exempt under FOIA Exemption 6, which excludes "personnel or medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 555(b)(6). While the district court did not address this argument, the law is clear that Exemption 6 requires even a higher showing of privacy than Exemption 7(C). See Favish, 541 U.S. at 165. As such, for the reasons stated herein, the mug shots are similarly not protected from disclosure under Exemption 6.

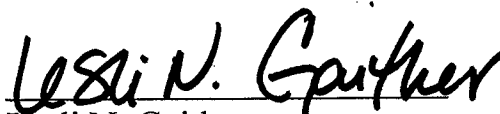
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DATED: March 1, 2010

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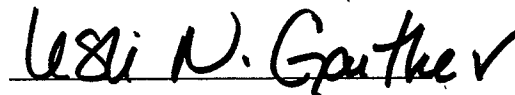


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KARANTSALIS

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7). This brief does not exceed 30 pages.



Lesli N. Gaither

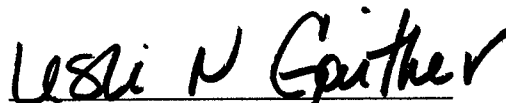
CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel of record in the foregoing matter with a copy of BRIEF OF PLAINTIFF-APPELLANT THEODORE KARANTSALIS via United States Mail and Electronic Mail addressed as follows:

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DATED this 1st day of March, 2010


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