HyperLaw Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-------------------------------x

MATTHEW BENDER
& COMPANY, INC.,

Plaintiff,

and

HYPERLAW, INC.,

Intervenor-Plaintiff;

- v. -

WEST PUBLISHING COMPANY,

Defendant.

-------------------------------x

94 CIV 0589 (JSM)

AFFIDAVIT OF ALAN D. SUGARMAN IN SUPPORT OF HYPERLAW'S MOTION FOR SUMMARY JUDGMENT

THIS DOCUMENT CONTAINS INFORMATION THAT WEST PUBLISHING COMPANY HAS DESIGNATED AS EITHER CONFIDENTIAL OR ATTORNEY'S EYES ONLY AND IS BEING SUBMITTED UNDER SEAL PURSUANT TO A PROTECTIVE ORDER DATED APRIL 13, 1994.

HyperLaw Exhibit 1

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, Alan D. Sugarman, being duly sworn upon my oath do hereby state the following to be true and accurate:

1. This affidavit is submitted in support of HyperLaw's Motion for Summary Judgment. I am the President of HyperLaw, Inc. I am a graduate of the University of Chicago Law School and am a member of the bar of the State of New York. I have been personally involved in all aspects of HyperLaw's collection and publication of federal appellate opinions on CD-ROM. Accordingly, I am familiar with the practices followed by the U.S. Supreme Court and the various Courts of Appeals in the publication of their opinions. I have reviewed the deposition of West's Rule 30(b)(6) designee, Donna Bergsgaard, in which she describes the West editorial process; as well as other West documents describing its process. Furthermore, my qualifications and competence to make the statement below were presented to this court at the June 21, 1996 hearing.

2. Accompanying this Affidavit as separate exhibit binder (Binder 1of 3) is HyperLaw Exhibit 1-1 "Dead Copy Volume 1, Federal Reporter, Third Series, Pages 1-100", which contains the original slip opinions received by West from the United States Courts of Appeals, as edited by West copy editors for inclusion in the *Federal Reporter*. These documents were produced by West in discovery and were designated Confidential--Attorney's Eyes Only. West maintains a file or "jacket" for each opinion. So generally, included in each jacket is a form with bar codes labeled "Editorial Views", a computer input form labeled "Running Head and Contents Title", and a control form or checklist which is used by West for tracking the progress of the editing. The copy as it will appear in the *Federal Reporter* starts with a form labeled "TITLE, COURT, AND DATE". West

cuts up the caption in the original slip opinion and pastes it to this form. The edited slip opinion follows. West then typesets this edited copy for inclusion in the *Federal Reporter*. If West is the slip printer for the circuit, then the starting point may be a manuscript provided by the court.

3. Most of the changes shown in the dead copy in HyperLaw Exhibit 1-1 are format instructions to the typesetter using proofreader marks and additions of parallel citations. I have analyzed these changes, which are included in HyperLaw Exhibit 1-1. Except for routine typographical changes and citation changes, (changes such as adding parallel citations, updating citations changed since the slip opinion, deleting LEXIS and US Law Week citations and changing slip opinion cross-reference page numbers to Federal Reporter cross-reference page numbers) the following 15 trivial 'changes' in 100 pages are the only changes I could identify:
Change of citation form: a short citation form to full form.
Correct spelling in a quote: "prescribed" to "proscribed".
Correct citation: "18 U.S.C. § 1542(a)" to "18 U.S.C. § 1542".
Correct citation spelling: "Consul" to "Consaul".
Correct typographical error: periods at end of 2 sentences.
Correct citation: "445 A.2d" to "455 A.2d".
Correct citation: "575 F.2d 1079" to "575 F.2d 1097".
Correct citation: "U.S.S.G. § 4A2.1" to "U.S.S.G. § 4A1.2"
Change "Labor-Management" to "Labor Management" (delete hyphen)
Correct citation: "29 U.S.C. § 412" to "29 U.S.C. § 411"
Correct citation: "1993" to "1990"
Change of citation form: a short citation form to full form.
Correct citation spelling: "McGuiness" to "MacGuineas"
Correct citation spelling: "NMF Hosp." to "NME Hosp."
Correct citation from "15 U.S.C. 4034" to "15 U.S.C. 4304"

4. I also examined the West check list or control form. First, it obvious that each Circuit has a slightly different control form, because, in some Circuits, such as the Fifth and Eleventh Circuits, West is the slip opinion printer, necessitating extra steps. In

addition, West undertakes additional steps to make sure that a slip opinion not yet released by the court is not inadvertently released by West. These forms generally list from 22 to 25 steps. <u>Not one of the steps in West's control form refers to the pagination of the opinions.</u>

5. Moreover, there is no reference on the control sheet to the West so-called "precede and follow" process. In that regard, West has stated that it does not release an opinion for publication until the period for rehearing has ended, although it does release the opinion for inclusion on Westlaw. Precede and follow is nothing more than following the opinion with any orders that would materially affect the opinion, such as an order for hearing en banc. In addition, if an opinion has not made it to page layout, and an amendment appears, West merely places the amendment with the opinion; West refers to this as a "combine". This is nothing more than common sense. Moreover, West, as does HyperLaw, uses the docket number in its tracking of the opinions, and, related opinions and orders literally pop out of the computer. Although West claims some creativity in its arrangement of the cases, the arrangement is merely dictated by circumstances, not by creativity. As an example, a case is held for publication because a court has ordered a rehearing, not because West is creative. However, there is no evidence of the application of precede and follow in Volume 1 of the *Federal Reporter Third Series*. HyperLaw Exhibit 1-24 described below is a list of all full text opinions in Volume 1 produced by HyperLaw's control database system. All of the cases are organized by circuit, and then by date. I included the docket number and prepared another list organized by docket number. This shows no application of precede and follow in this volume.

6. Attached hereto (in Binder 2 of 3) is HyperLaw Exhibit 1-2 "Dead Copy for Mendell v. Gollust". This material was obtained from West in discovery. The dead copy for this opinion consists of the slip opinion printed by the court, with West's changes hand

marked by a copy editor. As part of West's effort to conceal the minimal editing, West designated this exhibit as Confidential--Attorneys Eyes Only, and I was unable to review the exhibit until recently. West's changes to the caption consist primarily of deletion of the information about the case below and the issues presented, as prepared by the Second Circuit. Virtually every other change and mark in the entire opinion consists either of addition of a parallel citation or mere typographical marks for the West typesetter. From my review, I could only discern two citation corrections: one, on slip page 5725, to a Public Law cite, and one, on page 5725, to a page reference in a case citation. It is impossible to determine from the exhibit whether the Court or one of the counsel had already noticed the errors and had advised West of the error. Thus, when I wrote James Schatz in 1991 and asked him what changes had been made by West, the truthful response would have been "nothing of any originality." For HyperLaw to determine the answer to this question, it needed to file a federal law suit, engage in extensive discovery, be subjected to abusive confidentiality designations, and fight dilatory practice.

7. Attached hereto is HyperLaw Exhibit 1-3, "Dead Copy for Eleventh Circuit Opinion" for Yordan v. Dugger, dated August 21, 1990". This Eleventh Circuit dead copy file is different from Second Circuit dead copy because the slip opinion printed for this Circuit are printed by West. The communications at the end of the file shows that the manuscript was mailed to West on August 6, 1990, before release of the opinion by the court. West includes its copyrighted headnotes and syllabi in the Eleventh Circuit slip opinions. I selected this opinion for inclusion because of the way counsel names are handled. The Eleventh Circuit does not include counsel names in its West printed slip opinions, unlike most other circuits. When one downloads an opinion from the Eleventh Circuit, counsel names are not included. However, this dead copy shows that even prior to release of the opinion by the court, the court sends to West the docket sheet for the case,

and West completely edits and formats the attorney names in its internal master copy. See page WO16961. Then, when West prepares the slip opinion version of the opinion for the court, it merely excludes counsel names. But as soon as the opinion is released to the public, West immediately post the finished headnoted opinion with counsel names on Westlaw, and also proceeds to immediately print the opinions. If a reader inspects a volume of Federal Reporter, opinions from the Fifth and Eleventh Circuits are printed months more quickly than opinions from other courts. This is not a reflection of creativity or originality -- it merely reflects the fact that West gets the opinions first, before the public does.

8. Attached hereto is HyperLaw Exhibit 1-4 "Special Instructions for Judge Breyer", taken from the Dead Copy for a First Circuit Opinion." Here, West can be seen merely following the instructions of Judge Breyer regarding "using single quotes to set of certain words and phrases." West was not the slip printer for the First Circuit in July, 1990 when this was written. This is but one example of federal judges instructing West on how opinions are to be published, and West complying with these instructions. *See generally* Bergsgaard Deposition, Exhibit 2 to the instant motion.

9. Attached hereto is HyperLaw Exhibit 1-5, "Court Errata Sheet from Dead Copy I" showing changes communicated by the Second Circuit to West for an 1993 opinion, *U.S. v. Radonjich*. The corrections are communicated on a court form. The distribution is shown as "Panel Members", "West Publishing Co.", and "Clerk". These errata sheets are not made available on the Second Circuit's electronic bulletin board. West was not and is not the slip opinion printer for the Second Circuit, and this evidences that West automatically received certain changes, while other publishers did not. Although presumably other publishers could obtain these errata sheets, another publisher would not know if there was an errata sheet unless it checked with the court.

10. Attached hereto is HyperLaw Exhibit 1-6, "Court Errata Sheet from Dead Copy III" which is another errata sheet received from the Second Circuit for a 1992 opinion. Also included is a Case Control System print-out prepared by West showing a "cc:" to Judge Pollack who was sitting on the panel.

11. Attached hereto is HyperLaw Exhibit 1-7, "Supplemental Affidavit of Donna Bergsgaard" dated February 22, 1996, as filed in *Oasis v. West*, 3-95-93, United States District Court, District of Minnesota, Third Division. Attached to the Affidavit are assorted correspondence from judges to West correcting court opinions. Many of the corrections are contained in pre-printed West correction forms which West provides to the courts for corrections to advance sheets. Bergsgaard states in Paragraph 6 and 7:

> Since at least the 1890's West has provided courts with a correction form which the courts may use to identify any corrections in the advance sheets. Some judges send their own letters to West, rather than use the correction cards, such as the two letters from William H. Taft, then Chief Judge of the Sixth Circuit, attached as Exhibit 1 to this Affidavit. Depending upon the magnitude of the correction, West may then choose to correct this material for the bound volume. The corrections are part of the plate correction files, examples of which are attached to the Affidavit of Susan Lilyquist in support of Oasis' motion for summary judgment.
>
> Correction cards are used for all courts within the National Reporter System and there is nothing different or special about the correction cards provided to Florida courts. Attached as Exhibit 2 are examples of correction cards for states other than Florida.

Moreover, no such records--plate correction files of correction cards--were provided in response to HyperLaw's discovery requests for changes to 1 F.3d. These cards show examples back to 1891. In addition, West did not mark these documents as confidential, although, in discovery with HyperLaw, West marked similar corrections from judges and courts as "Confidential" or "Attorneys Eyes Only."

12. Attached hereto is HyperLaw Exhibit 1-8, "West Publishing Company's

Memorandum of Law In Opposition To Plaintiff Oasis Publishing Company's Motion For Summary Judgment, February 23, 1996, Pages 1, 5-7, 25." Appearing therein is a section titled "West's Practice of Soliciting Corrections From Courts is Irrelevant to the Pending Motions" in which West states on page 6:

"As Donna Bergsgaard describes in both her original and supplemental affidavits, communication with courts regarding topics such as corrections ... is West's standard practice for <u>all</u> NRS publications and is not at all unique to Florida.

* * *

Similarly, West has communicated with judges regarding corrections to opinions throughout its history."

13. Attached hereto is HyperLaw Exhibit 1-9, "An Inside Look at Information Management and Case Reporting at West Publishing Company" and Donna M. Bergsgaard is the author. The report includes statements. This report was distributed by West to various law librarians in 1994 or 1995. This was obtained by HyperLaw after the close of discovery. Despite discovery requests that would cover this document, never produced.

The page titled "Text Corrections to Court Documents" is an admission by West that all error corrections are the work of the courts or approved by the courts. It states:

- Advance Sheets
- Editors and clerks note potential errors.
- Court confirms errors.
- Corrections made to text.

- Bound Volumes
- Court reviews advance sheet case for errors
- Corrections sent to West
- Corrections made to text
- (25% of advance sheet pages have changes or corrections made)

HyperLaw Exhibit 1-9 also includes a West flow chart entitled "How a Slip Opinion Becomes a Reporter Case". The flow chart shows under production of bound volumes "corrections from court made." The flow chart shows under production of bound

volumes "corrections from court made." Nowhere on the flow chart is there any reference whatsoever to the insertion of page breaks or the arrangement of opinions.

HyperLaw Exhibit 1-9 includes a number of misleading and unsubstantiated statistics such as:
80,000 case cites corrected.
10,000 statute cites corrected.
25% of Advance Sheets have changes or corrections made.
The Comparing Department makes nearly 30,000 corrections every workday.

Of course, there is no way to know what West means by a correction. During deposition, West witnesses did not disclose that such statistics existed and no such statistics were provided, notwithstanding request of documents and interrogatories clearly covering these subjects.

14. Attached hereto is HyperLaw Exhibit 1-10 "If You Had Time ... West Advertisement, National Law Journal in April, 1995." This advertisement was a glossy multi-page insert that appeared in other publications, as well, and obviously was intended to influence the various citations proposals which West was opposing. This insert appeared just before the scheduled Wisconsin Supreme Court hearing and the AALL Convention where the AALL Task Force on Citations report was to be considered. This Advertisement claims 26 steps in the West Editorial Process and appears to be based upon "An Inside Look at Information Management and Case Reporting at West Publishing Company" and Donna M. Bergsgaard. There is absolutely no reference to the pagination process. West admits again that it only makes changes approved by the courts.

Step 11 The West Attorney/Editor contacts the court for clarification of possible errors in the text. In reading Castenada, the Attorney/Editor discovers several possible typographical and substantive errors. When the court confirms that these are indeed errors, West corrects the text of the opinion.

Nowhere in this document does West admit to this audience that it receives spontaneous

corrections from the court and that substantive suggestions to court opinion by West Attorney/Editors is rare. In addition, the last page contains the statistics that 80,000 citations are corrected and 10,000 corrections are made in the text of opinions.

15. Attached hereto is HyperLaw Exhibit 1-11 "West Copyright Registrations: Item 6b, Material Added" filed with the United States Copyright Office. They are of two types, Form SE are for the advance sheets which are considered serials, and Form TX which are for the West bound volumes, including the temporary West's Supreme Court Reporter volumes. These registrations demonstrate the constantly conflicting and ambiguous copyright claims. I reviewed paragraph 6b in each of these forms: "Material Added to This Work"

FORM SE, May 25. 1990, Supreme Court Reporter, Volume 110, Number 13
Compilation of Supreme Court opinions and editorial annotations, references and tables.
FORM SE, June 12. 1990, Supreme Court Reporter, Volume 110, Number 14
Original text including digest paragraphs, synopses and headnotes, and compilation of such text and judicial opinions.
FORM TX, May 13, 1992, Supreme Court Reporter, Volume 108, Volume 108A and Volume 109B.
Original text including editorial revisions and additions, and compilation of such text, previously published judicial decision and previously published text including digest paragraphs, synopses and headnotes.
FORM SE, May 30, 1990, Federal Reporter, Volume 895/896, Number 3/1
Compilation of U.S. Court of Appeals and Temporary Emergency Court of Appeals opinion, with editorial annotations, references and tables
FORM SE, July 12, 1990, Federal Reporter, Volume 899, Number 2,
Original text including digest paragraphs, synopses and headnotes, and compilation of such text and judicial decisions.

(In its description of the contents of the *Federal Reporter*, West does not even refer to the Judicial Conference opinions.) These statements of claim should be compared to the Copyright Notice in the West Federal Reporter in which West does not limit its claims in any manner.

16. Attached hereto is HyperLaw Exhibit 1-12 "Original Slip Opinions - United

States Courts of Appeals." These slip opinions show there is absolutely nothing unique about the caption arrangement that West uses in the Federal Reporter. Moreover, reference is made to the sample Fifth Circuit opinions. There, West is the slip opinion printer for the Court and the West synopsis, syllabi (digests) and key numbers are even included in the Fifth and Eleventh Circuit slip opinions. The following statement appears on each slip opinion:

Synopsis, Syllabi and Key Number Classification
Copyright ©1995 by West Publishing Co.
The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

Thus, West asserts, in these slip opinion contracts, absolutely no copyright claims as to the case name or the organization of the caption. Moreover, these slip opinions, to the casual observer, would look as if they were taken from the Federal Reporter. Interestingly, these two courts do not print attorney names in the slip opinions. All that West adds to these slip opinions when making its case reports are the attorney names.

17. In addition, the close working relationship between the federal courts and West is shown by the heading that appears at the beginning of District of Columbia Circuit slip opinions in HyperLaw Exhibit 1-1:

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections made be made before the bound volumes go to press.

In other words, the Clerk of the Court is acting as an agent on behalf of West to collect corrections and provide these corrections to West. West is the slip printer for the D.C. Circuit. This is one of many examples where there is no bright line between West's activities as a slip printer for a court, and West's activities as the quasi-official but private printer of the final court opinions. In my experience downloading opinions from the D.C.

Circuit, these corrections are not made available electronically to other publishers.

18. Attached hereto is HyperLaw Exhibit 1-13, "Copyright Misuse Excerpts From Transcript, West v. Mead, 4-95-931, April, 1988, Volume IV, pp. 32 37" which includes related exhibits including an internal West memorandum from Stephen Haynes dated June 25, 1985. After noting that it would take "18 operator-years" to star paginate existing WESTLAW files, the memorandum goes on to state "If we obtain a preliminary injunction, this will provide us the breathing room to bring up star paging ourselves."

19. Matthew Bender's Brief in support of its Motion for Summary at 9-10 and its supporting declarations carefully demonstrated that West has conceded that the first page citation is in the public domain--based upon statements made in public forums by West and its representatives. Bender pointed to statements made by West before the Wisconsin Supreme Court in March, 1995 and at a public American Association of Law Libraries convention in July, 1995, which occurred months apart. West, in its usual manner of using unsworn smoke and mirrors to suggest a dispute to facts that cannot be disputed, dismissively describes these statements as "certain unsworn statements allegedly made by West representative on occasions outside the litigation." The following series of exhibits documents that West cannot pass the smile test with this statement: neither Schatz nor Williamson will deny under oath that these statements were not made. The context of these statements is also presented to show that these statements were knowingly made with calculation--and were made in the presence of senior West officials. These statements were not made in a casual or educational context: they were made to affect and influence policy decisions of courts and associations, decisions which were then under debate at the forums where the statements were made. Moreover, hereinafter are additional examples of such statements, all captured in transcripts or West authored documents.

20. First, West claims that the statements attributed by its counsel Brady

Williamson were "allegedly" made. Attached hereto is HyperLaw Exhibit 1-14 "Letter From Brady Williamson to the Wisconsin Supreme Court dated April 3, 1995." The letter encloses for filing:

> "a transcript of the March 21, 1995 hearing on this matter. It has been prepared at the request of our client, West Publishing Company, by a court reporter for the convenience of the Court and the party."

Thus, it was Mr. Williamson who had the transcript prepared, and who submitted these statement to the court--specifically on behalf of West. We invite Mr. Williamson is urged to submit an affidavit denying the authenticity of the transcript he provided to the Wisconsin Supreme Court.

21. Of course, Mr. Williamson may claim he did not know what was in the transcript, but this is refuted by the letter he received that was copied to the Wisconsin Supreme Court just prior to his submitting this transcript to the Wisconsin Supreme Court. Attached hereto is HyperLaw Exhibit 1-15 "Letter dated March 28, 1995 from Alan D. Sugarman to the Chief Justice of the Wisconsin Supreme Court". I sent this letter to bring to the Chief Justice's attention the inconsistency between Brady Williamson's testimony and certain inconsistent statements made by Vance Opperman in his deposition herein. I faxed a copy of this letter to Brady Williamson that day. Accordingly, when Brady Williamson filed the Supplemental Brief, dated April 3, 1995, with the transcript, a few days later (with the Supreme Court) confirming his statement that the first page citation was in the public domain [See Bender Exhibit 11], it was partially in response to my letter which Mr. Williams refers to page 8 of his Supplemental Brief . After I received Mr. Williamson's Supplemental Brief, I wrote another letter, HyperLaw Exhibit 1-16 " Letter dated April 7, 1996 to the Wisconsin Supreme Court" bringing further inconsistencies to the attention of the Court.

22. Moreover, the transcript shows that the Mr. Williamson's statements at the

hearing were made in the context of questions made a few minutes earlier. Attached hereto is HyperLaw Exhibit 1-17, "Excerpts from Transcript of hearing dated March 21, 1995 before the Wisconsin Supreme Court, pp. 45-56." The following testimony by Orrin R. Armstrong at pages 45-56 occurred a few minutes before the two statements by Brady Williamson that the West first page citation was in the "public domain". *See* Bender Exhibit 10, Wisconsin Transcript, pages 114 and 118.

SUPREME COURT JUSTICE: Well, let me just ask you a question about that. Is the volume and page, the first page number copyrighted?

MR. ARMSTRONG: I can't answer that question. There are people here who can.

SUPREME COURT JUSTICE: Okay, then whoever comes up, I'd just like an answer.

MR. ARMSTRONG: I'd like to believe that it's not.

SUPREME COURT JUSTICE: I'm not talking about the subsequent pages, just the first page.

MR. ARMSTRONG: I -- if I were -- if I knew the answer to that I would sleep better at night.

(inaudible comment).

MR. ARMSTRONG: I'm sorry?

SUPREME COURT JUSTICE: (Inaudible question).

MR. ARMSTRONG: I can't -- I can't says what -- I cannot state West's position for you. Let me continue.

23. West may also wish to claim that Mr. Williamson was an out-of-control maverick attorney, or that he was being directed or managed by some uninformed minor West functionaries. This possibility is refuted by HyperLaw Exhibit 1-18, "Affidavit of Orrin R. Armstrong " dated September 20, 1996, stating that the Chairman of West,

Dwight Opperman, was present at the Wisconsin Supreme Court March 25, 1995. Attached to his affidavit is a newspaper article confirming that fact.

24. West may also seek to suggest that Mr. Williamson as a minor league lawyer who simply goofed up. Attached hereto is HyperLaw Exhibit 1-19 “Affidavit of John Lederer” describing Mr. Williamson as being a leading lawyer in Wisconsin. Mr. Lederer, who also spoke at the March 21, 1995 hearing, also states that Dwight Opperman was present at the Wisconsin hearing.

25. West might also attempt to suggest that Mr. Williamson was not really its spokesman--but in December, 1995, West had Mr. Williamson speak further on the subject--this time before the American Bar Association (and submitting the same statements to the ABA) again under the close observation of the top West people--people who are also the principal spokespersons in the present litigation -- Ms. Bergsgaard and Attorney Schatz. Attached hereto is HyperLaw Exhibit 1-20, “Report of the ABA Special Committee on Citation Issues dated May 23, 1996.” West opposed the recommendation of the Committee. Page 4 shows that Brady Williamson spoke on behalf of West at a hearing dated December 8, 1995. Mr. Lederer was at the meeting as well, as his affidavit reflects. I also made a presentation at the December 8, 1996 ABA hearing, which was attended by Ms. Bergsgaard. (Mr. Schatz and five or six other West executives were there as well but did not speak.) I reviewed submissions made to the Committee members. Included in the submissions were the Wisconsin transcript and the briefs Mr. Williamson filed with the Wisconsin State Supreme Court. Thereafter, I received a list of documents submitted to the Committee. Included on the list which is still in my possession was the Wisconsin transcript and both of Mr. Williamson’s briefs. In essence, before the ABA, Mr. Williamson reiterated by his submissions the same statement about the first page citation being in the public domain to the blue ribbon ABA Committee. (The hearing itself was not

transcribed at the request of the Chairman.) Mr. Williamson acted with full authority of his client, West, and certainly after my letters, with a full understanding of the issues involved.

26. Mr. Williamson was not the only West representative stating that first page citations were in the public domain. James Schatz, who functions as West general counsel, and stated the same at the June 21, 1996, hearing herein. Is West actually claiming that the tape recorded public statements were "allegedly" made? Perhaps Mr. Schatz does not recollect. Apart from the hundreds of persons who heard it, there is a commercially available tape recording that could assist Mr. Schatz in his recollection. The Lederer Affidavit, Exhibit 1-19, also describes the forum in which Schatz made his statement: a well attended panel discussion at the American Association of Law Libraries convention in Pittsburgh in July, 1995, just a few months later. The statements of James Schatz are transcribed and reproduced in the Ken Halajian Declaration in Support of the Bender Motion. As Mr. Lederer's affidavit states, this was not a private closed meeting and the biggest topic of discussion at the Convention was the Association vote scheduled two days later to approve an AALL Task Force report on citations, which West opposed. I too attended the panel discussion "Who Owns the Law". The room was packed and I estimate that were several hundred people in the room including not only law librarians, but senior legal publishing executives. Moreover, all AALL panels are tape recorded, including the 1993 panel on which I appeared with Mr. Schatz. Attached hereto is HyperLaw Exhibit 1-21, "Mobiletape 1995 AALL Order Form", that was available in the convention hall at the table of the Mobiletape Company, Inc. It is my understanding these tapes may still be ordered from that company. Several hours after the conclusion of the session Who Owns the Law, I purchased several tapes in the convention hall because of Mr. Schatz's admissions. Attached hereto is HyperLaw Exhibit 1-22, "Tape Recording - "Who Owns

The Law" - AALL 1995." The statements of Mr. Schatz transcribed in the Ken Halajian declaration were in fact stated, and appear on the tape recording. Moreover, Mr. Schatz pointedly referred to me, as the transcript excerpt reflects--several times during this session. There is no doubt in my mind that Mr. Schatz was fully conversant with the Wisconsin proceeding, and his comments were delivered by him partly in the context of my letters to the Wisconsin Supreme Court.

27. In addition to the statements made by Dwight Opperman to the United States Congress in 1992 and quoted in the brief, there is another transcript in which these same representations were being made--this time to the federal courts. Attached hereto is HyperLaw Exhibit 1-23 "Excerpts from the Transcript of Proceeding of the Library Program Subcommittee of the Judicial Conference of the United States, held September 13, 1991". This hearing was held in the United States Court House, Washington, D.C. I received my copy of this transcript from Ralph Mecham, Director of the Administrative Office of United States Courts. The hearing concerned a Judicial Conference initiative to allow the use of parallel electronic citations to Federal court opinions. Dwight Opperman offered testimony on behalf of West. According to the transcript, also present was Donna M. Bergsgaard. The following appears at page 78 under questioning by the Honorable Robert F. Kelly, United States District Judge, Eastern District of Pennsylvania:

Judge Kelly: There would be a licensing fee for using that cite, for putting the volume and page number? If that were added to the electronically recorded opinion?

Mr. Opperman: No. People can use our Reporter citations at the beginning of the page. There is no license fee for that.

28. Attached hereto is HyperLaw Exhibit 1-24, "Full-Text Opinions in 1 F.3d." These lists were produced from HyperLaw's opinion management database and is a list of all full text opinions. The first list organizes the case by West cite. There is absolutely no

evidence of the West "precede and follow" concoction. The opinions follow the mechanical arrangement of organization, first by circuit, and then by date. The listing shows the initial date of the opinion, and inspection of the Federal Reporter shows the few aberrations relate to amended opinion dates. There is also no evidence of a Circuit Judicial Council opinion, notwithstanding the claim in the Bergsgaard affidavit filed in support of West's motion for summary judgment. Bergsgaard Affidavit, August 5, 1996 at 14. Bergsgaard, at page 15, also concocts the claim that the reports are arranged with "fully headnoted opinions and jacketed memoranda first, followed by memorandum decisions." There is just no evidence of such arrangement in 1 F.3d -- the cases are arranged within circuit by date alone with exceptions that do not comport with this so-called rule. Interestingly, although she provides junk-statistics without substantiation claiming that in volumes 71-73, 13.6% have "file lines or combines", she provides no statistics for "precede and follow" or arrangement using the jacket/no jacket distinctions -- that is because there is little or none. I have prepared a similar print-out from HyperLaw's database of the case reports in volumes 71-73, which is attached as HyperLaw Exhibit 1-29 "Arrangement of Full-Text Opinions in 71 to 73 F.3d."

29. Also, HyperLaw Exhibit 1-24 is a list of the same cases ordered by circuit, and then date. Again, there is no evidence of the "precede and follow" concoction or of anything other than the publication of opinions of the United States Court of Appeals. There are 215 full text opinions in 1 F.3d. In the electronic environment, there is no difference in utility to a user how the opinions are ordered. Indeed, a sophisticated retrieval engine could be programmed so that the user could perceive the documents in any order the user desired, just as Borland could provide the user with a choice of interfaces, including the 1-2-3 interface, to perform spreadsheet tasks.

32. Attached hereto is HyperLaw Exhibit 1-25, "Fifth and Eleventh Circuit

Full-Text Opinions in 1 F.3d." Because these circuits do not include in their slip opinions, which are printed by West, the names of counsel, HyperLaw desires to copy the names of counsel from the West case reports. Even though these circuits do not include the names of counsel in their slip opinions, they provide West with this information at the time the slip opinions are printed/

33. Attached hereto is HyperLaw Exhibit 1-26, "Full-Text Opinions in 1 F.3d to be Copied by HyperLaw." These are opinions or orders not electronically disseminated by the respective courts. HyperLaw intends to copy he opinion text for those cases from West's Federal Reporter.

34. Attached hereto is HyperLaw Exhibit 1-27, "Letter and Affidavits of Eleanor Lewis". This letter describes the difficulty and expense if not impossibility of obtaining original court opinions from federal court archives. In many instance, the federal court archives were unable to locate the opinions Ms. Lewis desired.

35. Attached hereto is HyperLaw Exhibit 1-28, "Excerpt from 1988 West v. Mead Transcript -- Examination of Dwight Opperman." This excerpt shows the routine practice of West to print only corrections approved by the Court.

36. West's Swanson Exhibit D is a printout from Westlaw of *Lipton v. Nature Company*, 71 F.3d 464. West's Swanson Exhibit E is a copy of the same case from a printed West volume. The page breaks are different in the printed version as compared to the Westlaw version.

Book, 71 F.3d 471-2:	proof that the de-[]fendant copied protected
Westlaw, 71 F.3d 471-2:	proof that the defendant *471 copied protected
Book, 71 F.3d 472-3:	award of sum-[]ary judgment to Lipton
Westlaw, 71 F.3d 472-3:	award of sumary * 473 judgment to Lipton

The case was decided November 28, 1996. LEXIS and Matthew Bender versions of the case state: "[As Amended December 12, 1995]". West versions contain no mention of the amendment of the case. HyperLaw downloaded the file from the 2nd Circuit on November

29, 1995. The 2nd Circuit did not make available on its bulletin board either and amended version or the text of the amendment.

FURTHER Affiant sayeth not.

____

ALAN D. SUGARMAN

NOTARY PUBLIC

I, the undersigned Notary Public, do hereby attest that the Affiant did appear before me this ___ day of September, 1996, and upon his oath, did affix his signature hereto.

____ ***SEAL***

NOTARY PUBLIC
My Commission Expires: