

**IN THE SIXTH CIRCUIT COURT OF  
THE UNITED STATES**

CareToLive,

Appellant,

Case No. 09 CA 4084

vs.

FDA.

Appellee.

**PLAINTIFF'S MOTION FOR LEAVE TO SUPPLEMENT  
RECORD ON APPEAL**

Now comes Appellee through their undersigned Counsel and hereby moves to supplement the record on Appeal with documents 3, 20, and 29 from the Southern District of Ohio (Eastern Division) case titled CareToLive vs. von Eschenbach, case no. 07-729, as further set forth in the attached memorandum.

Respectfully submitted,

S/Kerry M. Donahue

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## MEMORANDUM

This case involves a request by Appellant under the Freedom of Information ACT (FOIA). That request was originally made as a part of Case No. 07-729 filed in the District Court on July 30, 2007, but that Court later ruled that said complaint could/should be filed by separate action which resulted in Plaintiff-Appellant filing the case that has resulted in this appeal.

Concerned about the possible destruction of documents by FDA employee Richard Pazdur upon his discovery of the fact that the documents were being sought, the Plaintiff's 3<sup>rd</sup> document filed in that case was a motion to preserve documents (document 3).

The Court denied that motion but verbally instructed FDA counsel to instruct its clients not to destroy any documents involved in pending litigation. That document (#3) specifically placed the Court on notice of the destruction that did in fact occur. All subsequent requests to pursue discovery on the matter were denied by the District Court. The lower Court even denied the request by Appellant to obtain the date of the computer deletion of the records by the FDA.

In this subsequent FOIA case Defendant-Appellee indicated by affidavit that the documents did exist and that Richard Pazdur of the FDA possessed said documents, both hard copies and electronically on his FDA computer. The affidavit from Richard Pazdur further indicates that the documents are now

unavailable because the electronic copies were deleted and the hard copies were shredded, by him.

Despite the lack of any reasonable search for the documents by Appellee and despite the lower Courts repeated refusal to allow discovery on the issue and without the lower Court even allowing Appellant the full opportunity to be heard, the District Court denied the Civil Rule 56(f) motion of Appellant and declined to allow even minimal discovery and a full response to Defendant-Appellants motion for Summary Judgment, which would have been appropriate based on the particular facts of this case.

Important to the brief and oral arguments to be presented to this Court are documents 3, 20 and 29 in the Case titled CareToLive vs. von Eschenbach which requested that the Court make an order that no documents be destroyed. Based on the fact that such a motion (#3) and order (#29) was made in a related case the Appellant should have been able to conduct some minimal discovery into the circumstances surrounding the destruction of the documents.

Regardless the motion, order denying the motion (but made with oral instruction with all counsel present) as well as document no. 20, which made the motion to enforce the same FOIA as is at issue herein, more specifically in that case, are all relevant to what later transpired in this case, which was the refusal to produce documents based on the Appellee allegation that they are

now unavailable due to destruction.

WHEREFORE, Appellant seeks leave to supplement the record with document number 3, 20 and 29 from Southern District of Ohio case no. 07-729 CareToLive vs. von Eschenbach.

Respectfully submitted,

S/Kerry M. Donahue

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**CERTIFICATE OF SERVICE**

It is understood that since this document was e-filed with the court that the clerk will transmit a copy by e-mail to all counsel of record in this matter this 26<sup>th</sup> day of October, 2009.

S/Kerry M. Donahue

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Kerry M. Donahue