UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN DEFENSE OF ANIMALS, Plaintiff, v. UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant, and LIFE SCIENCES RESEARCH, INC., Intervenor-Defendant.	Civ. No. 02-557 (RWR)

PLAINTIFF'S PRETRIAL BRIEF

Introduction

In this Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, case, defendant United States Department of Agriculture ("USDA") bears the burden of demonstrating that its failure to disclose information from over 1000 pages of records that it gathered during an investigation of intervenor's animal testing facility over ten years ago is lawful under Exemption 4 of the FOIA, which protects confidential commercial information. Specifically, USDA must show that release of any and all of the information at issue "would cause substantial competitive harm to HLS [Huntington Life Sciences]" as a result of "'competitors' use of the released information." Mem. Op. Nov. 21, 2008 at 4 (DE 92) (internal quotation omitted). However, especially in light of the age of the documents – all are now more than a decade old – and the fact that plaintiff In Defense of Animals ("IDA") long ago made clear that it does not seek certain information that might be of interest to competitors, including that which would identify the products or compounds being tested or the companies for which they were tested, defendant cannot satisfy its burden. Rather, as envisioned by Judge Oberdorfer after he conducted an in camera review of many of the withheld documents, "much, if not all, of the redacted and withheld documents will not likely survive the scrutiny of a trial, particularly under de novo FOIA review." Mem. Op. Aug. 14, 2007 at 8 (DE 60). Accordingly, plaintiff requests that the Court order the USDA to release all the information at issue to IDA, or, in the alternative, that the Court conduct its own review of a representative sample of the documents in camera and, informed by that review, craft a remedial order that provides the USDA detailed guidance on how to segregate the nonexempt information at issue, while withholding anything that would actually cause competitive injury.

I. BACKGROUND

IDA brought this FOIA case nearly seven years ago to obtain access to the closed investigatory records of the USDA concerning its 1996-1998 investigation of Huntingdon Life Sciences ("Huntingdon") for violations of the Animal Welfare Act ("AWA"), 7 U.S.C. §§ 2131-2159. Although the USDA charged Huntingdon on March 30, 1998 with twenty-three separate violations of the AWA, including the failure to provide treatment to dogs and other animals suffering extreme pain, and the failure to use appropriate methods to prevent and treat injuries in animals, less than ten days later the USDA entered into a settlement that required Huntingdon to pay a nominal fine. IDA submitted its request in an effort to shed light on whether the agency diligently carried out its duties under the AWA and implementing regulations.[1]

Although the USDA's investigation of Huntingdon was completed over ten years ago, defendants nevertheless insist that hundreds of the agency's investigatory records may be withheld in full under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), because disclosure of every single word of those documents is likely to cause "substantial competitive injury" to Huntingdon and its clients. Hundreds of additional documents have been heavily redacted.

However, IDA made absolutely clear six years ago that it does not seek access to any information that would reveal the identities of Huntingdon's clients or the identities of any drugs, compounds, or other products that Huntingdon was testing, or that would reveal test protocols.

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[1] Investigations by USDA's own Inspector General have found that USDA "is not aggressively pursuing enforcement actions against violators of the AWA," and has generally imposed "minimal" fines that do not effectively deter repeat violations. USDA Office of Inspector General, Report No. 33002-3-SF, Audit Report, APHIS Animal Care Program Inspection and Enforcement Activities, Exec. Summ. (Sept. 2005) available at http://www.usda.gov/oig/webdocs/33002-03-SF.pdf (Pl.'s Ex. 23).

See Stipulated Facts ¶ 25 (DE 87). Rather, plaintiff seeks access only to the evidence that the USDA relied on to find that Huntingdon was in violation of numerous standards of animal care and treatment under the AWA, including, for example, information that reflects animals being deprived of basic veterinary care and that Huntingdon's treatment and care procedures violated the AWA in myriad ways. In addition, plaintiff seeks access to fifty-six pages of records generated by Huntingdon's own "Institutional Animal Care and Use Committee" ("IACUC") – the entity within Huntingdon that is principally responsible for ensuring that the company complies with the Animal Welfare Act, see 7 U.S.C. § 2143(b) – as well as investigatory records generated by USDA but that have nonetheless been withheld under Exemption 4.

Defendant has already been afforded multiple opportunities to satisfy its burden with regard to the documents at issue, and yet has failed to do so. Hence, when USDA first moved for summary judgment – supported by declarations from a USDA FOIA officer and Michael Caulfield, the General Manager of Huntingdon, asserting that the disclosure of all of the documents would cause substantial competitive harm – the Court held that these materials could not satisfy USDA's Exemption 4 burden because defendants' assertions were conclusory and failed to adequately address whether there were segregable non-exempt portions of the documents. See Mem. Op. Sept. 24, 2004 at 21-22, 29-32 (DE 31); id. at 31 ("the conclusory statement that 'no reasonably segregable nonexempt information' exists does not provide for de novo review" and the agency "does not adequately correlate the harm to specific portions of the materials"). Accordingly, as requested by plaintiff, the Court ordered defendants to produce a "comprehensive Vaughn index describing the documents withheld (and to the extent necessary, portions thereof), the reasons for nondisclosure, and the reasons for no-segregability." Id. at 34.

However, in support of its renewed motion for summary judgment, the government produced a Vaughn index that, as subsequently found by the Court, "fails to even mention segregability," as well as another declaration that was "identical – almost to the word – to an earlier declaration that this court previously had found deficient, at least insofar as concerns segregability." Mem. Op. Aug. 14, 2007 at 9 (DE 60). Accordingly, Judge Oberdorfer, to whom the renewed summary judgment motions were referred, conducted an in camera review of a large sampling of the documents, and concluded that this review "has done little to instill confidence in the government's claim of exemption for most of the contested information." Id.

Although expressing skepticism as to the validity of USDA's exemption claim, especially with respect to the segregability issue, Judge Oberdorfer concluded that the parties had a genuine dispute over one material fact: "whether disclosure of the categories of information in the context of the documents sought by IDA would permit Huntingdon's competitors to derive or reverse engineer Huntingdon's proprietary information, thereby causing it substantial competitive harm." Id. Judge Oberdorfer accordingly denied the parties' motions for summary judgment, but cautioned:

> Although the law precludes summary judgment in this case, that does not mean that the court is, or should be, blind to the voluminous material submitted and reviewed. . . . While defendants' view of the facts does not rise to the level of 'blatantly' contradicting the record, it comes mighty close. Review in camera of a sampling of the disputed documents convinces that much, if not all, of the redacted and withheld documents will not likely survive the scrutiny of a trial, particularly under de novo FOIA review.

Id. at 12-13 (emphasis added). Judge Oberdorfer further stressed that "seventy-two pages that the government has recently decided to re-release to plaintiff with fewer redactions than it previously claimed under Exemption 4 is amply suggestive of the extraordinarily broad and far-

reaching view the government takes of the exemption." Id. at 13 (emphasis in original).

Faced with this judicial admonition for "com[ing] mighty close" to "'blatantly' contradicting the record," and adopting an "extraordinarily broad" view of Exemption 4, the response of USDA – the federal agency ultimately responsible for justifying its compliance with the FOIA, and particularly the statutory segregability obligation – has been to proffer no witnesses in an effort to sustain the government's burden of proof. For its part, defendant-intervenor is now relying on two witnesses – a toxicologist, who reviewed a small fraction of the records at issue for a few hours before preparing his expert report, and Mr. Caulfield, the same HLS employee whose declaration was previously deemed inadequate to sustain the government's burden of proof, and who the Court has now ruled cannot furnish any expert testimony regarding the likelihood of competitive injury. At best, given the age of the documents and plaintiff's longstanding limitation on what it seeks, the most that these witnesses can offer are conclusory and speculative assertions regarding the possibility of competitive harm – i.e., precisely the kinds of assertions that have previously been found wanting in this case, and that other federal courts have routinely rejected in Exemption 4 cases. Most important, these two witnesses cannot remotely satisfy the government's burden to establish that there is absolutely no segregable, non-exempt information pertaining to the care and treatment of animals in the **503** pages the USDA has continued to withhold in their entirety, or in the hundreds of additional documents that have been heavily redacted. Because defendants cannot satisfy their burden, plaintiff should at long last be granted access to the information that it requested over eight years ago, see, e.g., In Defense of Animals v. Nat'l Inst. of Health, 543 F. Supp. 2d 83, 107 (D.D.C. 2008) ("the Court has ordered that the requested information . . . must be released to plaintiff based on Defendant's

failure to sustain its burden in applying Exemptions 4 and 5 thereto"), and the Court should craft a narrow remedial Order that ensures that plaintiff receives the information that bears on animal care and treatment, as well as the USDA's enforcement of the AWA, while keeping confidential the protocols, compounds, client names, personal identities, and other information as to which IDA has long maintained it has no interest whatsoever.

II. LEGAL STANDARD

A. The Freedom of Information Act

Plaintiff requested the information at issue pursuant to the FOIA, which "Congress enacted [] for the purpose of introducing transparency to government activities." Nat'l Inst. of Health, 543 F. Supp. 2d at 93 (citing Stern v. FBI, 737 F.2d 84, 88 (D.C. Cir.1984)); see also U.S. Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487, 491 (1994) (noting "FOIA's central purpose of opening agency action to public scrutiny"). The Supreme "Court repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA. Without question, the Act is broadly conceived. . . . The Act's basic purpose reflected a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." John Doe Agency v. John Doe Corp., 493 U.S. 146, 151-52 (1989) (citations and quotation marks omitted); see also Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174 (2004) (noting "FOIA's prodisclosure purpose").

Although the FOIA contains"'limited exemptions," they "'do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.' Accordingly, these exemptions 'must be narrowly construed.'" John Doe Agency v. John Doe Corp., 493 U.S. 146, 151-52 (1989) (citations omitted).

1. Exemption 4

"Like all FOIA exemptions, exemption 4 is to be read narrowly in light of the dominant disclosure motif expressed in the statute." Washington Post Co. v. U.S. Dep't of Health & Hum. Servs., 865 F.2d 320, 324 (D.C. Cir. 1989), quoted in Critical Mass Energy Proj. v. Nuclear Regulatory Comm'n, 975 F.2d 871, 884 (D.C. Cir. 1992). This exemption provides that "trade secrets and commercial or financial information" that are "obtained from a person and privileged or confidential" need not be disclosed. 5 U.S.C. § 552(b)(4). In this case, "[t]he parties agree that plaintiff does not seek access to any trade secrets and that the information at issue is 'commercial' and 'obtained from a person' for purposes of the exemption." Mem. Op. Aug. 14, 2007 at 8 (DE 60). Thus, the only disputed issue is "whether the information is 'privileged and confidential.'" Id.

In this Circuit, involuntarily submitted information is "confidential" for the purposes of Exemption 4 "if disclosure would (1) impair the agency's ability to get information in the future or (2) cause substantial competitive harm to the entity that submitted the information." Judicial Watch, Inc. v. FDA, 449 F.3d 141, 148 (D.C. Cir. 2006) (citation omitted). Here, "[t]he government does not argue that disclosure of Huntingdon's documents would result in impairing its ability to retain the cooperation of other entities in future investigations." Mem. Op. Aug. 14, 2007 at 9 (DE 60). Accordingly, as this court has recognized, this case boils down to one narrow question: "whether disclosure of the categories of information in the context of the documents sought by IDA would permit Huntingdon's competitors to derive or reverse engineer Huntingdon's proprietary information, thereby causing it substantial competitive harm." Id.; see also CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987) (a showing of a

"likelihood of substantial competitive injury" is required (citations omitted)).[2]

As the Court recently explained in detail, "[t]he type of competitive injury covered under Exemption 4 is limited to 'that which may flow from competitors' use of the released information, not from any use made by the public at large or customers.'" Mem. Op. Nov. 21, 2008 at 4 (DE 92) (citing Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treas., 981 F. Supp. 20, 23 (D.D.C. 1997); Worthington Compressors, Inc. v. Costle, 662 F.2d 45, 51-52 (D.C. Cir. 1981)). Thus,

> "[t]he important point for competitive harm in the FOIA context . . . is that it be limited to harm flowing from the affirmative use of proprietary information by competitors. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials or violations of civil rights, environmental or safety laws."

Id. at 5 (quoting Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983)); see also United Tech. Corp. v. Marshall, 464 F. Supp. 845, 854-55 (D. Conn. 1979) ("The mere fact that [a] company may be embarrassed by the public disclosure of" of information "is not sufficient to warrant withholding . . . . Indeed, it would seem that one purpose of the FOIA is to utilize public opinion as a lever in insuring compliance with the nation's statutory goals." (citations omitted)); Silverberg v. Dep't of Health & Hum. Servs., No.

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[2] Despite previously adopting the government's position that all of the documents at issue were involuntarily submitted, intervenor now, on the eve of trial, contends for the first time that some of the documents were actually voluntarily submitted to the USDA. While it is revealing that intervenor now seeks to lower the hurdle that must be overcome in order for this information to be withheld from IDA, Huntingdon's position must be rejected. As instructed by the Court, see Minute Order (Dec. 10, 2008), plaintiff will make a separate filing explaining why intervenor's about-face should be rejected under well-established doctrines of estoppel and law of the case, and why it must fail on the merits in any event.

89-2743, 1991 WL 633740, at *4 (D.D.C. June 14, 1991) ("The harm that a certified laboratory may suffer from distortions of released testing and inspection information is not likely to cause damage to the laboratory's competitive position. A laboratory may suffer embarrassment from potential distortions of this information, but the case law is clear that the government can not withhold confidential information under Exemption Four of FOIA on the grounds it may cause embarrassment." (citations omitted)).

2. The Segregability Requirement

Even where an agency is able to demonstrate that particular information is exempt from disclosure, the FOIA mandates that it disclose any segregable portions of the documents in which the protected information is contained. See 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."). This is because "[t]he focus of the FOIA is information, not documents . . . ." Mead Data Central v. U.S. Dep't of the Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977). Accordingly, "an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." Id. To justify withholding a document in full, an agency must provide a "detailed justification." Id. at 261. The justification must be as detailed as that required for a claim of exemption. See Vaughn v. Rosen, 484 F.2d 920 (D.C. Cir. 1973). "In addition to a statement of its reasons, an agency should also describe what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." Mead Data, 566 F.2d at 261; see also id. at 260 ("unless the segregability provision of the FOIA is to be nothing more than a precatory precept, agencies must be required to provide the reasons behind their conclusions in order that they may be

challenged by FOIA plaintiffs and reviewed by the courts").

"The segregability requirement is of such great import that this Court has an affirmative duty to engage in its own segregability analysis, regardless of Plaintiff's pleadings." Nat'l Inst. of Health, 543 F. Supp. 2d 83, 107 (D.D.C. 2008) (citing Billington v. Dep't of Justice, 233 F.3d 581, 586 (D.C. Cir. 2000)). "'[S]pecific findings of segregability regarding each of the . . . documents' withheld in response to a FOIA application" are required. Summers v. Dep't of Justice, 140 F.3d 1077, 1081 (D.C. Cir. 1998) (citation omitted).

B. Burden of Proof and Standards Governing Relief

1. Burden of Proof

In a FOIA action the agency withholding information bears the burden of demonstrating that its withholding is lawful. See 5 U.S.C. § 552(a)(4)(B) ("the burden is on the agency to sustain its action"); U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 142 n.3 (1989) ("The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought . . . have not been improperly withheld." (citations and additional quotation marks omitted)); see also U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991) ("That burden remains with the agency when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document." (citing 5 U.S.C. § 552(a)(4)(B))); Keys v. Dep't of Homeland Sec., 510 F. Supp. 2d 121, 130 (D.D.C. 2007) ("The burden is on the agency to adequately demonstrate that all reasonably segregable, nonexempt material was disclosed." (citation omitted)).

2. Standards Governing Relief

The FOIA grants this Court "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant," 5 U.S.C. § 552(a)(4)(B), and "the common remedy in a FOIA action is to require disclosure of material improperly withheld," Nw. Coal. for Alternatives to Pesticides v. EPA, 254 F. Supp. 2d 125, 133 (D.D.C. 2003).

Where agency records have been improperly withheld, the Court retains broad discretion "to devise remedies to force an agency to comply with the FOIA's disclosure requirements." Tax Analysts, 492 U.S. at 142; see also Payne Ents., Inc. v. United States, 837 F.2d 486, 494 (D.C. Cir. 1988) ("The FOIA imposes no limits on courts' equitable powers in enforcing its terms." (citing Renegotiation Bd. v. Bannercraft Clothing Co., Inc., 415 U.S. 1, 19-20 (1974))); Renegotiation Bd., 415 U.S. at 20 (noting "the express vesting of equitable jurisdiction in the district court by s 552(a)"); see, e.g., Vaughn v. Rosen, 484 F.2d 820, 828 (D.C. Cir. 1973) (trial court has discretion to designate a special master to examine documents and evaluate agency's contentions).

Thus, for example, this Court might utilize its authority to "examine the contents of [] agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions," 5 U.S.C. § 552(a)(4)(B), to help it craft a remedy that – by offering a reticent agency guidance on segregating the information at issue and then ordering the release of segregated information while retaining jurisdiction – achieves the FOIA's "broad remedial purpose," August v. FBI, 328 F.3d 697, 700 (D.C. Cir. 2003). Cf. Nat'l Inst. of Health, 543 F. Supp. 2d at 108 (ordering agency to "provide redacted copies" of records "that meet

Defendants' duty to segregate" and specifying that the "the subject matter of the invoices and e-mails" should be disclosed).

III. DEFENDANTS' PROFFERED EVIDENCE IS INSUFFICIENT TO DEMONSTRATE THAT THE EXTENSIVE WITHHOLDINGS FROM THE TEN- TO TWELVE-YEAR OLD RECORDS AT ISSUE ARE LAWFUL.

The burden of demonstrating that the withholdings at issue in this case – including over 500 pages that have been withheld in full, and another 500 that have been withheld in part – rests squarely on the USDA as the "party with access to the information to be produced," Canadian Commercial Corp. v. Dep't of Air Force, 514 F.3d 37, 42 (D.C. Cir. 2008), and "the only party able to explain [its withholding]," Tax Analysts, 492 U.S. at 142 n.3 (quoting S.Rep. No. 813, 89th Cong., 2nd Sess., 8 (1965)). Because defendants proffer only highly speculative testimony about the possibility of substantial competitive harm should the particular information at issue be released, the agency simply cannot satisfy this burden.

As noted above, to justify the multitude of Exemption 4 withholdings at issue, the USDA would have to demonstrate that disclosure of any of the information at issue is likely to result in substantial competitive harm. See CNA Fin. Corp., 830 F.2d at 1152. Neither of intervenor's proffered witnesses can offer testimony demonstrating such a likelihood.

To begin with, neither of intervenor's witnesses can – or even purports to – offer the specific expert testimony that Judge Oberdorfer suggested would be of value in determining whether there will be competitive injury within the meaning of National Parks, i.e., whether disclosure of the precise information sought by IDA on the care and treatment of animals would "permit Huntingdon's competitors to derive or reverse engineer Huntingdon's proprietary information, thereby causing it substantial competitive harm." Mem. Op. Aug. 14, 2007 at 9 (DE

60). Rather, intervenor's sole remaining expert stated in his deposition that he is not testifying on that topic, see Szot Dep. 12:21-13:6, Mar. 14, 2008 ("Q. Did [Mr. Caulfield] ask you to testify about whether disclosing the records would allow HLS's competitors to reverse engineer HLS's proprietary information? A. No. Q. You're not offering testimony on that issue? A: It's – no, I don't think so."). And, Mr. Caulfield, once again, cannot testify as an expert on any topic, let alone the feasibility of reverse engineering.

Rather, it appears that the testimony of both of defendants' witnesses will be focused on a purported injury that was not mentioned in Judge Oberdorfer's analysis because it is not even cognizable under Exemption 4. Intervenor's sole expert, Dr. Robert J. Szot, was asked by intervenor's second witness, Michael Caulfield, intervenor's General Manager, "to testify as an expert witness on the role that confidentiality plays as part of the criteria used by study sponsors in selecting and maintaining relationships with a [contract research organization]." Szot Expert Report at 2 (Jan. 25, 2008); see also Szot Dep. 6:14-20, Mar. 14, 2008 ("The purpose [of my testimony] is to testify relative to the importance of confidentiality agreements between Contract Research Organizations, which I'll call CROs[,] and their clients. . . . . That is the only purpose I was asked to testify for."). Hence, the primary conclusion of his expert report is that "[r]elease of study raw data would cause competitive harm to Huntingdon Life Sciences" because it "would indicate to a study sponsor that HLS can not maintain a confidentiality agreement." Id. at 7. Mr. Caulfield similarly offers testimony about "the importance of the maintenance of client confidentiality and the confidentiality of research results as essential components of [Huntingdon's] future business viability." Pretrial Statement 10 (DE 95).

However, the impact that disclosure might have on a client's "confidence" in a company's "ability to maintain confidentiality," Szot Dep. 23:5-6, Mar. 14, 2008, regardless of whether it might impact that company's competitive position, is not the "[t]he type of competitive injury covered under Exemption 4" – i.e., it is not an injury that "'flow[s] from competitors' use of the released information." Mem. Op. Nov. 21, 2008 at 4 (DE 92) (citing Ctr. to Prevent Handgun Violence, 981 F. Supp. at 23; Worthington Compressors, 662 F.2d at 51-52); see also id. at 5 (DE 92) (competitive harm that "'flow[s] from customer . . . disgruntlement'" does not fall within Exemption 4's narrow scope (quoting Pub. Citizen, 704 F.2d at 1291 n.30)); People for the Ethical Treatment of Animals v. USDA, No. Civ. 03 C 195-SBC, 2005 WL 1241141, at *7 (D.D.C. May 24, 2005) (attestation that business would suffer from disclosure because customers would cease doing business with the business "if their financial records may be disclosed under FOIA" "does not demonstrate that release of the withheld information would put [the business] at a *competitive* disadvantage, *e.g.*, that a competitor would use the information to harm [the business]").[3]

Moreover, even if this purported interest in "confidentiality" were alone sufficient to prove competitive injury within the meaning of the National Parks test – which it is not –

[3] Indeed, even if it were the agency that had promised confidentiality, such a promise cannot override the FOIA. Ackerly v. Ley, 420 F.2d 1336, (D.C. Cir. 1969) ("It will obviously not be enough for the agency to assert simply that it received the file under a pledge of confidentiality to the one who supplied it. Undertakings of that nature can not, in and of themselves, override the Act."); Washington Post Co. v. U.S. Dep't of Health & Hum. Servs., 690 F.2d 252, (D.C. Cir. 1982) ("[T]o allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate."). Indeed, intervenor evidently recognizes that a generalized desire for "confidentiality" is insufficient to satisfy the stringent National Parks test, which is presumably why it has reversed course on the involuntary nature of the document submission.

Dr. Szot's and Mr. Caulfield's contentions are entirely too speculative to satisfy the burden of proof here in any event, especially because intervenor's own retained expert concedes that there are a host of factors that go into companies' selections of research organizations. See, e.g., Szot Dep. 99:7-9 (testifying that he does not know how many customers Huntingdon might lose under this scenario); People for the Ethical Treatment of Animals, 2005 WL 121141, at *7 (Declaration that bank's business would suffer from disclosure because customers would no longer participate in loan programs was "too conclusory and speculative to demonstrate substantial competitive injury" where declarant failed to "establish[] the number of loans [the b]ank would lose if the information was disclosed. Absent such a showing, [the b]ank cannot establish *substantial* competitive injury."); see also In Defense of Animals v. Dep't of Health & Hum. Servs., No. Civ. 99-3024, 2001 WL 34871354, at *10 (D.D.C. Sept. 28, 2001) (Statements "that '[a]n institution's ability to secure contracts could [] be hindered by release of this type of information' . . . . are inadequate for establishing a 'likelihood of *substantial* harm.' They are conclusory and provide little more than speculation about potential problems in securing future contracts." (quoting Pub. Citizen, 704 F.2d at 1291)).

Dr. Szot's and Mr. Caulfield's secondary assertion regarding competitive injury – that "[i]t is also possible that with knowledge of approximate study dates and raw data characteristics, competitors of [Huntingdon] study sponsors may gain information that could adversely affect fair competition between companies," Szot Expert Report at 7 (emphases added) – also fails to satisfy the Exemption 4 standard and is speculative on its face. See also id. at 5-6 ("[T]he release of study data could harm companies that sponsored studies at [Huntingdon] in 1997" because "[i]t is conceivable that the characteristics of the measured values and observed reactions to

dosing of the product seen in the study raw data generated for a company by [Huntingdon] could be linked by an astute scientist working for a competitor to similar data that was generated by them on a new product at another facility."); Caulfield Decl. ¶ 32(y) (Mar. 19, 2003) (DE 20-8) (if the information at issue is released, "competitors of Huntingdon's customers could gain unfair advantage in the development of their own, competing products" (emphasis added)). Assertions that disclosure "may" or "could" "conceivabl[y]" or "possibl[y]" result in some benefit to a competitor plainly does not satisfy the Exemption 4 requirement that substantial competitive injury be likely through release of the particular information at issue. See CNA Fin. Corp., 830 F.2d at 1152; see also, e.g., N.Y. Times Co. v. U.S. Dep't of Labor, 340 F. Supp. 2d 394, 401 (S.D.N.Y. 2004) (data was not "confidential" for the purposes of Exemption 4 where it could not be used to "'easily ascertain[]'" additional information); Ctr. for Pub. Integrity v. Dep't of Energy, 191 F. Supp. 2d 187, 194-95 (D.D.C. 2002) (Exemption 4 requires demonstration that "release of the information would be of substantial assistance to competitors" (emphasis added)).

Indeed, even if intervenor's witnesses were to change their testimony at trial and now assert that disclosure of the records at issue is likely to result in substantial competitive injury, conclusory assertions alone are insufficient to justify withholding. See Nat'l Inst. of Health, 543 F. Supp. 2d at 79 ("[T]he D.C. Circuit has cautioned that 'conclusory and generalized allegations of exemptions' are unacceptable . . . ." (quoting Found. Church of Scientology v. Nat'l Sec. Agency, 610 F.2d 824, 830 (D.C. Cir. 1979))); Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 680 (D.C. Cir. 1976) ("Conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA, since such allegations necessarily elude the beneficial scrutiny of adversary proceedings, prevent adequate appellate

review and generally frustrate the fair assertion of rights under the Act." (citation omitted)).

To sustain its burden under Exemption 4, a defendant must explain in specific detail who will be injured, how they will be injured, and the nature of the injury. See, e.g., Delta Ltd. v. U.S. Customs and Border Protection Bureau, 393 F. Supp. 2d 15, 18, 19 (D.D.C. 2005) (defendant must "outlin[e] how and why the release of [the information] would likely result in competitive harm" and "must show exactly who will be injured by the release of this information and explain the concrete injury" (citation omitted)); Teich v. FDA, 751 F. Supp. 243, 254 (D.D.C. 1990) (defendants must "sustain[] their claim of substantial competitive injury with specific and direct evidence"). Defendant must also "correlate" the alleged harm "to specific portions of the materials." Mem. Op. Sept. 28, 2004 at 31 (DE 31). Because the most that Dr. Szot and Mr. Caulfield can proffer are broad generalizations about the hundreds of pages at issue, defendants simply cannot satisfy their Exemption 4 burden.[4]

The failure of intervenor's witnesses to offer any concrete detail elaborating the bases for their conclusory assertions about competitive injury is further compounded by the fact that the information at issue is now more than a decade old, and the fact that plaintiff does not seek information such as test protocols, the substance being tested, clients' names, etc. Hence, defendants are required to prove the counterintuitive proposition that, despite the age of the documents and IDA's agreed upon redactions, release of the information at issue is nevertheless now likely to result in substantial competitive injury. See, e.g., Teich, 751 F. Supp. at 253-54

[4] In fact, Dr. Szot should be precluded from offering such testimony with regard to the vast majority of the records at issue because he had not so much as looked at them before formulating his expert opinion; according to his sworn testimony, prior to preparing his report, Dr. Szot only looked at "approximately 30" of the over 1000 records that are at issue in this case, i.e., less than three percent of the records at issue. See Szot Dep. 153:9-12, Mar. 14, 2008.

(intervening manufacturer of breast implants failed to demonstrate that substantial competitive harm was likely to result from disclosure of "protocols and final results" from animal studies of their product where "plaintiff [] limited his request to exclude information concerning . . . product specifications, marketing strategies, and the names of individuals and independent contractors who participated in the studies," and where the research data at issue and where "most of the studies at issue [] were prepared as much as 20 years ago"); see also Lykes Bros. Steamship Co., Inc. v. Pena, No. 92-2780-TFH, 1993 WL 786964, at *7 (D.D.C. Sept. 2, 1993) ("Given that the proposed disclosures would redact all price terms, financial terms, rates, and the like from the documents, the mechanisms by which such potential harm might come about are, on their face and without more development from plaintiffs, neither clearly evident nor particularly likely to occur."); Contratto v. Ethicon, Inc., 227 F.R.D. 304, 310-11 (N.D. Cal. 2005) (partial results of animal testing of actual or potential surgical gel ingredients that were "more than ten years old" did not warrant a protective order).

Finally, and perhaps most important, even if defendants could demonstrate that some of the information at issue does fall within the narrow scope of Exemption 4, they cannot possibly show that all of the information that has been withheld – including over 500 pages in their entirety – is exempt from disclosure, and contain not even a stitch of segregable non-exempt information on animals' treatment or condition. See Mead Data, 566 F.2d at 260. This Court has "order[ed] that the government provide *reasons* for its claim that most of the exempt information was not reasonably segregable from the documents," Mem. Op. Aug. 14, 2007 at 9 (DE 60) (underscoring added) (citing Mem. Op. Sept. 28, 2004 at 21-22 (DE 31)), yet defendant still offers no adequate explanation for this claim. As noted above, the government must provide

an explanation that is "detailed." Mead Data, 566 F.2d at 260. However, not only has the USDA still failed to detail the reasons underlying its generalized assertion that the records that have been withheld in full contain no segregable information – indeed, the government has evidently decided to sit on the sidelines during the trial – but this assertion simply "strains credulity" should it be advanced by intervenor's retained expert and long-time employee. Judicial Watch, Inc. v. FBI, No. 04-1643, 2006 WL 3334996, at *7 (D.D.C. Nov. 16, 2006) (Roberts, J.) ("On its face, the FBI's implied assertion that absolutely nothing in a lengthy document . . . can be reasonably segregated and disclosed strains credulity.").

Despite having three bites at the same apple, the USDA still cannot (and is no longer even trying to) demonstrate that all of the withholdings at issue here were justified under Exemption 4 and that there are no segregable non-exempt portions of the documents. Under such circumstances, the Court should craft an appropriate remedial order granting IDA appropriate access to the information it seeks, and rejecting the government's "extraordinarily broad and far-reaching view" of Exemption 4. Mem. Op. Aug. 14, 2007 at 13 (DE 60).

IV. REMEDY

Because defendant cannot satisfy its burden of justifying the extensive withholdings at issue in this case, IDA is entitled to the withheld information as a matter of law. See 5 U.S.C. § 552(a)(4)(B) (authorizing the Court "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant"); see also Nw. Coal. for Alternatives to Pesticides, 254 F. Supp. 2d at 133 ("the common remedy in a FOIA action is to require disclosure of material improperly withheld"). The Court need not afford the USDA yet another opportunity to further delay this case and deny plaintiff access to

the documents to which it is lawfully entitled. See Nat'l Inst. of Health, 543 F. Supp. 2d at 82 n.2 ("The Court is unwilling to give NIH a third bite at the same apple. NIH has the burden of showing that an Exemption to disclosure applies and it has failed repeatedly in that respect." (citing 5 U.S.C. § 552(a)(4)(B))).

Should the Court have concerns that some of the information withheld from IDA might fall within the scope of Exemption 4, plaintiff urges the Court to exercise its authority to craft an Order that will resolve this issue once and for all and ensure that nonexempt information is disclosed to plaintiff. Because the USDA has repeatedly demonstrated its unwillingness to segregate the information at issue, plaintiff respectfully requests that the Court offer the agency clear guidance on what is must release and what it can withhold, and that it consider reviewing a representative sample of the records in camera so as to provide defendant with concrete instructions on the process it should follow.

Respectfully submitted,

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