UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL DAY LABORER ORGANIZING NETWORK; CENTER FOR CONSTITUTIONAL RIGHTS; and IMMIGRATION JUSTICE CLINIC OF THE BENJAMIN N. CARDOZO SCHOOL OF LAW, Plaintiffs, v. UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; FEDERAL BUREAU OF INVESTIGATION; and OFFICE OF LEGAL COUNSEL, Defendants.	:	No. 10 Civ. 3488 (SAS) ECF Case

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT ON EXEMPTIONS APPLIED TO OPT-OUT RECORDS AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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In this Freedom of Information Act ("FOIA") case, Defendants United States Immigration and Customs Enforcement ("ICE"), United States Department of Homeland Security ("DHS"), Federal Bureau of Investigation ("FBI"), and Executive Office for Immigration Review ("EOIR") (collectively, "Defendants") have withheld certain information responsive to Plaintiffs' FOIA request for opt-out records pursuant to FOIA exemptions (b)(2), (b)(5), (b)(6), (b)(7)(C) and (b)(7)(E). Defendants have submitted *Vaughn* declarations and indices in which they demonstrate that the withheld information fits squarely within the claimed exemptions. Indeed, the information withheld is precisely the type of information that courts routinely find is appropriately withheld under the claimed exemptions. It includes: (1) internal telephone numbers, internal fax numbers and secured intranet addresses (exemptions (b)(2) and (b)(7)(E)); (2) intra- and inter-agency correspondence reflecting non-final decisions and/or undisclosed legal advice (exemption (b)(5)); and (3) the names and other identifying information of government employees (exemptions (b)(6) and (b)(7)(C)).

For their part, Plaintiffs concede, as they must, that Defendants' withholdings under exemptions (b)(2) and (b)(7)(E) are appropriate. (*See* Pls. Mem. at 2 n.3.)[1] Plaintiffs, however, assert that Defendants' *Vaughn* declarations and indices are insufficient to justify certain of their withholdings under exemptions (b)(5), (b)(6) and (b)(7)(C). Plaintiffs identify the specific withholdings that they are challenging in Plaintiffs' Exhibits A-D and F-G (collectively, the "challenged withholdings").[2] Plaintiffs further argue that this Court should conduct an *in camera*

[1] Citations in the form "(Pls. Mem. __)" refer to Plaintiffs' "Memorandum of Law in Opposition to Defendants' Motion for Partial Summary Judgment and in Support of Plaintiffs' Cross-Motion for Partial Summary Judgment," dated February 11, 2011. Citations in the form "(Pls. Ex. __)" and references to "Plaintiffs' Exhibit __" refer to exhibits attached to the "Declaration of James Horton," dated February 11, 2011.

[2] At one point, Plaintiffs state that they are challenging only the withholdings reflected in Plaintiffs' Exhibits A-D and F. (*See* Pls. Mem. at 3.) However, at another point, they state they

review of a sample of the challenged withholdings, or alternatively, order the immediate release of the challenged withholdings.[3] As shown below, none of Plaintiffs' arguments have merit. Through their *Vaughn* submissions, Defendants have established the propriety of each of their challenged withholdings. Moreover, even if Defendants' *Vaughn* submissions were in some way deficient (and they are not), the proper remedy would be to give Defendants an opportunity to submit additional support for their withholdings.

ARGUMENT

A. Defendants Submitted Adequate *Vaughn* Declarations and Indices

To justify its withholdings, a FOIA defendant must submit a "reasonably detailed" *Vaughn* declaration/index. *Halpern v. FBI*, 181 F.3d 279, 295 (2d Cir. 1999). Defendants here have done precisely that. For each withheld/redacted document, Defendants have included in their *Vaughn* submissions: (1) the exemption(s) claimed; (2) a description of the document; (3) a reasonably detailed summary of the withheld information; and (4) in most instances (and where applicable), the document's date, source and recipient. In addition, Defendants have identified the portion(s) of each document to which each claimed exemption applies. Courts routinely approve *Vaughn* submissions that include this information. *See, e.g.*, *Skull Valley Band of Goshute Indians v. Kempthorne*, No. 04-339, 2007 WL 915211, at *11 (D.D.C. Mar. 26, 2007).

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are challenging the withholdings identified in Plaintiffs' Exhibits A-D and F-G. (*See id.* at 12 n.18.) Defendants assume that Plaintiffs are challenging the withholdings identified in Plaintiffs' Exhibit G.

[3] It is unclear whether Plaintiffs are advocating for the immediate release of all of the challenged withholdings or only a subset of those withholdings. (*Compare* Pls. Mem. at 3 (advocating for the immediate release of the withholdings identified in Plaintiffs' Exhibits A-D), *with id.* at 12 & n.18 (advocating for the immediate release of the withholdings identified in Plaintiffs' Exhibits A-D and F-G).)

Plaintiffs assert that Defendants' *Vaughn* submissions fail "to provide adequate descriptions of the documents and the nexus between the non-disclosed documents and the claimed exemptions." (Pls. Mem. at 10.) That assertion is baseless. Similarly, Plaintiffs' claim that Defendants have provided "this Court with no meaningful way to evaluate claimed exemptions without reviewing the documents themselves" (*id.* at 11) is without merit. A review of Defendants' *Vaughn* submissions establishes as much. Take, for example, the FBI's *Vaughn* submissions supporting its redactions to the documents bates stamped 1413-1415 (these redactions are among the challenged withholdings). For these records, the FBI's *Vaughn* index provides:

- a reasonably detailed description of the records (*i.e.*, "Emails among DHS, FBI and state employees concerning NY Commissioner letter to Northern Manhattan Coalition for Immigrant Rights");
- the dates of the records (*i.e.*, "8/26/10-8/27/10");
- the claimed exemptions (*i.e.*, (b)(2), (b)(5), (b)(6) and (b)(7)(C)); and
- a reasonably detailed description of the withheld information sufficient to enable Plaintiffs and this Court to evaluate the withholdings (*i.e.*, "Federal employee names, phone numbers and email addresses; email from CJIS counsel to CJIS staff concerning response to letter from NYS government official").

(*See* Docket No. 34-1 at 5.) In its *Vaughn* declaration, the FBI provides additional detail to justify these withholdings, explaining, for example, that the material redacted pursuant to exemption (b)(5) "consists of a portion of an e-mail dated August 27, 2010, from CJIS counsel to a CJIS employee. In this e-mail, counsel provides advice concerning an employee's concern over FBI employee names having been released by a New York state official in a letter to the Northern Manhattan Coalition for Immigrant Rights." (Docket No. 34 at ¶ 13.)

The FBI's *Vaughn* submissions for these emails are plainly adequate. Moreover, the *Vaughn* submissions for these emails are illustrative of Defendants' *Vaughn* submissions for the other challenged withholdings. Defendants have provided Plaintiffs and this Court with more than enough information to evaluate Defendants' withholdings.

B. Defendants Properly Invoked FOIA Exemption (b)(5)

Defendants' withholdings under exemption (b)(5) are appropriate because the withheld information falls within the scope of the deliberative process privilege and/or the attorney-client privilege. (*See* Defs. Mem. at 10-16.)[4] These two privileges apply because the withheld information: (1) was exchanged only "inter-agency or intra-agency"; and (2) reflects deliberative, pre-decisional communications and/or confidential communications between agency counsel and their agency clients for the purpose of securing legal advice. (*See id.*) Defendants' *Vaughn* submissions establish that the withheld information satisfies these requirements. Plaintiffs, however, raise three arguments as to why Defendants have improperly invoked exemption (b)(5) to withhold the information identified in Plaintiffs' Exhibits A-D. Each of those arguments lacks merit.

First, Plaintiffs argue that ICE incorrectly invoked the deliberative process and attorney-client privileges to withhold "at least twenty draft legal memoranda and communications." (Pls. Mem. at 14 & n.21.) Yet, Plaintiffs support their argument with mere conjecture. They speculate that these records contain "a secret body of law [that ICE is concealing] from public view," and that at least some of these records reflect final agency decisions and other publicly-disclosed information because they were created within several days and in some instances

[4] Citations in the form "(Defs. Mem. __)" refer to "Defendants' Memorandum of Law in Support of Defendants' Motion for Partial Summary Judgment on Exemptions Applied to Opt-Out Records," dated January 28, 2011.

weeks of final announcements of agency policy. (*See id.* at 13-15.) Plaintiffs' mere speculation, however, is insufficient to counter the clear and detailed statements in ICE's *Vaughn* submissions showing that the documents at issue in fact contain deliberative and/or attorney-client information. *See Vento v. IRS*, 714 F. Supp. 2d 137, 154 (D.D.C. 2010) (rejecting plaintiffs' challenge to the agency's exemption (b)(5) withholdings on the ground that plaintiffs' "rest their objection . . . on mere speculation that some of the documents might include working law").

Moreover, although Plaintiffs purport to challenge the withholding of "at least twenty" records on this basis (Pls. Mem. at 14), they focus on only one — a document that ICE describes in its *Vaughn* index as a memorandum, dated "10/2/10," from "the Deputy Principal Legal Advisor to Beth Gibson," reflecting "[d]eliberations and legal opinions regarding SC becoming mandatory in 2013." (Docket No. 35-1 at 45; *see* Pls.' Mem. at 14-15; Pls. Ex. B at Doc. 1.) Plaintiffs argue that this memorandum must reflect final agency decisions and other non-confidential matters (and thus falls outside the scope of exemption (b)(5)) because: (1) it is dated four days before an October 6, 2010 public statement by DHS Secretary Janet Napolitano concerning Secure Communities; (2) the author of the memorandum received an email complementing him for his work after the Secretary made the announcement; and (3) ICE has not produced "a version of the memorandum marked 'final.'" (Pls. Mem. at 15.) Of course, none of those observations is in any way inconsistent with ICE's assertion that the document reflects non-final agency deliberations and undisclosed legal advice.

Agency policy decisions often continue to evolve right up until the time they are announced. A position taken one day may well be modified or rejected the next. Thus, ICE's

assertion that the memorandum — which is dated four days before Secretary Napolitano's statement — is pre-decisional and contains undisclosed legal advice is entirely unremarkable. Similarly unremarkable is the fact that there is no "final" version of this particular document. Communicating through memoranda is slow and cumbersome. One would expect that there would come a point in the decision-making process where the parties to the process would opt to use other means to convey their ideas and advice. This does not mean that the memorandum did not serve a useful purpose, or that its author was not entitled to the praise that he ultimately received. What it does mean, however, is that the observations to which Plaintiffs point in an effort to undermine ICE's claim that the memorandum is pre-decisional do nothing of the sort.

Notably, the other documents that Plaintiffs cite to support their claim that Defendants have improperly withheld "at least twenty draft legal memoranda and communications" do not support it. (*See* Pls. Mem. at 14 n.21 (citing Pls. Ex. B at Docs. 1-15, 18-19).)[5] It is clear from ICE's *Vaughn* entries for these other documents that they reflect pre-decisional communications and/or legal advice. As with the October 2, 2010 memorandum discussed above, there is nothing to suggest that these other documents reflect final agency decisions or other non-confidential matters, much less that they constitute "a secret body of law."[6] (*See, e.g.*, Pls. Ex. B at Doc. 17 (challenging the withholding of a memorandum, dated "9/7/2010," that ICE has described as follows: "Draft internal memorandum containing deliberations and legal advice about the policies and procedures for SC, including options for states that wish to 'Opt-Out.' The deliberations and legal advice did not reflect any final agency policy or position.").)

[5] Plaintiffs actually cite to Plaintiffs' Exhibit E in footnote 21 of their brief, but it appears that they intended to cite to Plaintiffs' Exhibit B.

[6] Some of these other documents are prior versions of the October 2, 2010 memorandum. (*See, e.g.*, Pls. Exs. 4, 5, 6, 8.) Such documents are clearly pre-decisional and deliberative.

Second, Plaintiffs assert that Defendants have failed to make the required showing to withhold information identified in Plaintiffs' Exhibits B and C pursuant to the deliberative process privilege because Defendants' *Vaughn* submissions: (1) "recycle boilerplate language or merely restate the statutory standard"; and (2) do not provide sufficient information to enable Plaintiffs or this Court to conclude that the withheld information is pre-decisional and deliberative. (*See* Pls. Mem. at 16-19.) Plaintiffs are wrong on both counts.

Far from recycling boilerplate language or simply restating the statutory standard, Defendants' *Vaughn* submissions provide reasonably detailed accounts of the withheld information sufficient to show that portions of it fall within the scope of the deliberative process privilege. Among the *Vaughn* entries that Plaintiffs characterize as boilerplate is ICE's entry for the redacted portion of a "Word document by SC PMO staff," dated "10/14/2010." (*See* Pls. Mem. at 18 & n.31 (citing Docket No. 35-1 at Doc. ICE FOIA 10-2674.0002308-10).) ICE describes the redacted material as "portions of a draft response to a reporter's questions about SC. The language is neither reflective of a final agency action or position nor responsive." (Docket No. 35-1 at Doc. ICE FOIA 10-2674.0002308-10.) That *Vaughn* entry is neither boilerplate nor conclusory. Rather, it contains sufficient detail to allow Plaintiffs and this Court to conclude that the withheld material is both deliberative and pre-decisional. The same is true for the other *Vaughn* entries that correspond to Plaintiffs' other challenged withholdings. (*See, e.g.*, Pls. Ex. C at Doc. 6 (challenging the redaction of the following information on a document identified by ICE as an "[e]mail between SC program staff elements," dated "10/15/2010": "SC staff coordination/discussion of issues and concerns and proposed draft answers to news reporter questions regarding program. The comments do not reflect any final agency policy or

decision."); Pls. Ex. C at Doc. 43 (challenging the redaction of the following information on a document identified by ICE as an "[e]mail from OPLA regarding inquiry from Chairwoman Lofgren," dated "8/3/2010": "Suggestions as to the content and legal sufficiency of the response to the Chairwoman. These discussions were deliberative of the content of the reply to the Chairwoman and did not reflect any final agency policy or position.").)

Moreover, Defendants have carried their burden of establishing that the withheld information is pre-decisional and deliberative. The *Vaughn* entries quoted in the paragraph above are more than sufficient to meet Defendants' burden as to those withholdings, as are the entries for the other withholdings identified in Plaintiffs' Exhibits B and C. (*See, e.g.*, Pls. Ex. C at Doc. 38 (challenging the redaction of the following information on a document described by ICE as a "Mandatory versus Voluntary Memo from SC Director to the Assistant Secretary," dated "9/24/10": "A request for concurrence on proposed policy within SC and the supporting statutory support for those policies. These discussions were deliberative of the posture of SC and did not reflect any final agency policy or position."); Pls. Ex. C at Doc. 42 (challenging the redaction of a similar "request for concurrence on proposed policy within SC" on an *earlier* draft of the "Mandatory versus Voluntary Memo from SC Director to the Assistant Secretary," dated "3/17/2010").)[7] Plaintiffs' position that ICE should identify the specific agency policies to which each of its redactions relate (*see* Pls. Mem. at 17-18) when ICE has already disclosed more than enough information to establish that the withheld information is pre-decisional and deliberative (*see, e.g.*, Pls. Ex. C at 38) is untenable. *See Rein v. U.S. Patent & Trademark*

[7] Plaintiffs' argument that the March 17, 2010 draft of the "Mandatory versus Voluntary Memo" is not pre-decisional is indicative of the extent to which Plaintiffs overreach with respect to their challenges to Defendants' withholdings. The March 17, 2010 draft is clearly pre-decisional and deliberative given that there is another version of the document that was created more than six months later.

Office, 553 F.3d 353, 373-74 (4th Cir. 2009) (holding that "the Agencies were not required to identify the specific policy judgment at issue in each document for which the deliberative process privilege is claimed").

Finally, Plaintiffs assert that ICE has failed to make the required showing to withhold information identified in Plaintiffs' Exhibit D pursuant to the attorney-client privilege because ICE's *Vaughn* submissions do not establish that: (1) the documents at issue "contain advice which is 'legal' in nature, rather than nonlegal, policy-related or public relations discussions"; or (2) the confidentiality of any such legal advice has been preserved. (*See* Pls. Mem. at 21.) Like Plaintiffs' other arguments, these arguments miss the mark.

ICE's descriptions of the documents identified in Plaintiffs' Exhibit D make clear that they contain advice that is legal in nature. For example, ICE describes the first 10 documents in Exhibit D as: "contain[ing] edits by an attorney which reflected client-supplied information"; "includ[ing] legal advice between attorney and client"; "[p]rovid[ing] legal points and authorities for client regarding SC program issues and concerns"; "containing legal advice, comments and edits to excerpts of a draft letter" from "OPLA attorneys"; "including OPLA legal advice, comments and edits"; "containing . . . legal advice about the policies and procedures for SC, including options for states that wish to 'Opt-Out'"; and "containing . . . legal advice about the policies and procedures for LEA's participation in SC." (Pls. Ex. D at Docs. 1-10.) In the few instances where ICE's *Vaughn* entries do not expressly describe the documents as containing legal advice, the descriptions make clear that they do. (*See, e.g.*, Pls. Ex. D at Doc. 18 (challenging a document that ICE describes as a "[d]raft memorandum from OPLA attorneys" that was "prepared to discuss issues related to the mandatory nature of SC in 2013").)

Additionally, there can be no reasonable dispute that the information for which ICE has invoked the attorney-client privilege has been kept confidential. Plaintiffs are litigating this motion precisely because the information is non-public. Moreover, ICE's express reason for not releasing the information is that "[d]isclosure of such information would discourage [agency] clients from freely disclosing all pertinent information to their [agency] attorneys." (Docket No. 35 at ¶ 18; *see id.* at ¶ 17.) The obvious implication of ICE's rationale is that the communications have remained confidential.

In light of all of the above, this Court should uphold each of Defendants' withholdings under exemption (b)(5).

C. Defendants Properly Invoked FOIA Exemptions (b)(6) and (b)(7)(C)

The only information that Defendants have withheld pursuant to exemptions (b)(6) and (b)(7)(C) are the names and other identifying information of individuals referenced in the responsive documents.[8] (*See* Docket No. 34 at ¶ 17; Docket No. 35 at ¶ 21; Docket No. 36 at ¶ 15; Docket No. 37 at ¶ 8.) Courts routinely find that such information is appropriately withheld under exemptions (b)(6) and (b)(7)(C) because there is no public interest in disclosure that could possibly outweigh the privacy interest that individuals have in not having their names and other identifying information disclosed in government documents. *See, e.g.*, *Beck v. DOJ*, 997 F.2d 1489, 1494 (D.C. Cir. 1993) (observing that because the request implicates no public interest at all, the court "need not linger over the balancing; something . . . outweighs nothing every time" (internal quotation marks omitted)); *Yelder v. U.S. Dep't. of Defense*, 577 F. Supp.

[8] Notably, Defendants did not redact all of the names and identifying information from the challenged records. Defendants left unredacted the names and/or titles of senior government employees. (*See* Pls. Ex. B at Doc. 1.) Thus, Plaintiffs can determine whether specific communications emanated from senior officials for purposes of evaluating the applicability of the deliberative process privilege. Their suggestion to the contrary (*see* Pls. Mem. at 17, 23) is incorrect.

2d 342, 346 (D.D.C. 2008) (observing that, under exemption (b)(6), "information such as names, addresses, and other personal identifying information is properly withheld because it creates a palpable threat to privacy" (internal quotation marks omitted)).

Plaintiffs argue that the names and other identifying information should be released because it would assist them in litigating their case. (*See* Pls. Mem. at 23-24.) That argument is unavailing because a FOIA requester's private need for information in connection with litigation plays no part in determining whether disclosure is warranted. *See Garcia v. DOJ*, 181 F. Supp. 2d 356, 372 (S.D.N.Y. 2002).

Accordingly, for the reasons set forth above, this Court should uphold Defendants' withholdings under exemptions (b)(6) and (b)(7)(C).[9]

D. Defendants Met Their Obligations Regarding Segregability

Under FOIA, if a record contains information that is exempt from disclosure, any "reasonably segregable," non-exempt information must be disclosed after redaction of the exempt information. 5 U.S.C. § 552(b). However, non-exempt portions of records do not need to be disclosed if they are "inextricably intertwined with exempt portions." *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show "with 'reasonable specificity'" that the information it has withheld cannot be further segregated. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996).

[9] Plaintiffs complain that ICE did not include entries for its (b)(6) and (b)(7)(C) withholdings in its *Vaughn* index. (*See* Pls. Mem. at 10; Pls. Ex. G.) However, there was no need to include such entries, as ICE explained in its *Vaughn* declaration that it applied exemptions (b)(6) and (b)(7)(C) across the board to withhold the "names, phone numbers, and email addresses of federal and state employees and other third parties appearing in agency records." (Docket No. 35 at ¶ 21.)

Plaintiffs do not raise a segregability challenge as to the FBI, DHS or EOIR. (*See* Pls. Ex. F.) They do, however, assert such a challenge against ICE. Yet, the challenge against ICE is misguided, as ICE has established — with the requisite reasonable specificity — that it has satisfied its segregability obligation. Indeed, in its *Vaughn* declaration, ICE makes clear that it segregated where appropriate:

> With respect to the records that were released in part, all information not exempted from disclosure pursuant to the FOIA exemptions [that ICE invoked] was segregated and non-exempt portions released. Information withheld was individually determined to be exempt from release. To the extent records were withheld in their entirety, because the exempt information was so inextricably intertwined with the non-exempt information, if any, no portion of those records could be reasonably segregated and disclosed. To the extent a small number of non-exempt words or phrases were dispersed throughout the withheld information, those words and phrases, if disclosed, would be meaningless and would not serve the purpose of FOIA — to open agency action to the light of public scrutiny.

(Docket No. 35 at ¶ 26.) Moreover, a review of ICE's *Vaughn* index reveals that it released in full or in part many of the responsive documents that it located, thus showing that it took its disclosure and segregability obligations seriously. (*See generally* Docket No. 35-1 at 1 ("This index contains a description of the records withheld in full or in part by the ICE pursuant to FOIA Exemptions. Any portion of a document that is reasonably segregable from the information subject to an exemption has been released. *Unless otherwise indicated, documents listed have been withheld in part. Bates numbered pages not accounted for on this index have been released in full* . . . ." (emphasis added)).) Additionally, a review of the records ICE released shows that, where possible, it redacted only discrete portions of documents, thus evidencing its efforts to disclose as much of its records as possible. (*See* Docket No. 48-4 at ICE FOIA 10-2674.0010776-78.) Based upon ICE's statements regarding segregability in its *Vaughn*

declaration, as well as its actions as reflected in its *Vaughn* index and production, this Court should find that ICE satisfied its obligation to segregate.

E. This Court Should Not Conduct an *In Camera* Review or Order the Immediate Release of Any Information

In the event that this Court were to conclude that Defendants have failed to meet any of their obligations under FOIA, Defendants respectfully submit that the proper remedy would be to allow them to supplement their *Vaughn* submissions. The appropriate remedy would not be for this Court to conduct an *in camera* review of a sample of the challenged withholdings or to order the immediate release of the challenged withholdings, as Plaintiffs suggest. (*See* Pls. Mem. at 11-12.) The circumstances of this case do not justify *in camera* review. *See Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998) (observing that *in camera* review may be appropriate where (1) "the agency affidavits are insufficiently detailed to permit meaningful review of exemption claims" (2) "there is evidence of bad faith on the part of the agency"; (3) "the number of withheld documents is relatively small"; or (4) "the dispute turns on the contents of the withheld documents, and not the parties' interpretations of those documents"); *see also Halpern*, 181 F.3d at 295 (characterizing *in camera* review as "the exception, not the rule").

Moreover, there is no basis for ordering the immediate release of any of the challenged withholdings. Such a remedy should be reserved for situations where the agency has already had multiple opportunities to explain and justify its withholdings, or where there is evidence of bad faith. Neither of those circumstances is present here. This round of briefing represents Defendants' first opportunity to defend their withholdings and react to specific challenges to

their *Vaughn* submissions.[10] Moreover, Defendants have made a good faith effort to invoke exemptions only where appropriate, and to provide Plaintiffs and this Court with the information necessary to evaluate Defendants' withholdings. Indeed, Defendants' good faith is evidenced by, among other things, Plaintiffs' decision to forego challenging many of Defendants' withholdings, including all of their withholdings pursuant to exemptions (b)(2) and (b)(7)(E).

[10] Plaintiffs assert that Defendants already "have had ample opportunity to remedy the Vaughns' deficiencies and have not done so." (Pls. Mem. at 2; *see id.* at 10.) That assertion is unsupported. Defendants first produced their *Vaughn* indices to Plaintiffs on January 17, 2011, at the same time they produced the opt-out records. Shortly thereafter, Plaintiffs informed Defendants that they viewed the indices as deficient. In response, Defendants agreed to re-review the indices. Defendants did so in good faith, made a few revisions, but generally concluded that the indices were sufficient, and that Plaintiffs' generalized complaints were unfounded.

CONCLUSION

For the reasons set forth above, Defendants respectfully submit that their motion for partial summary judgment on exemptions applied to the opt-out records should be granted, and Plaintiffs' cross-motion for summary judgment should be denied.

Dated: New York, New York
February 18, 2011

Respectfully submitted,

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