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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RICHARD EDELMAN,

Plaintiff,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Defendant.

Case No.: 15-CV-2750-BEN-BGS

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: March 13, 2017
Time: 10:30 a.m.
Ctrm: 5A
Judge: Hon. Roger T. Benitez

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I. Introduction

Plaintiff Richard Edelman ("Edelman") sues the Securities and Exchange Commission ("SEC") under the Freedom of Information Act ("FOIA") to obtain the SEC's records of its investigations of Empire State Building Trust ("ESRT"), the public company that owns the iconic Empire State Building. Until October 7, 2013, Empire State Building Associates ("ESBA") owned the iconic building. After, ESRT became the owner of the Empire State Building and 17 office and retail buildings in New York City.

Malkin Holdings Inc. ("Malkin Holdings") orchestrated the consolidation of the multiple private and public entities that became ESRT, including the initial public offering ("IPO") that created it as a public company. Edelman Dec. ¶ 4.[1] The Empire State Building became ESRT's flagship asset and its main marketing symbol. In a pending civil action for securities fraud, investors allege Malkin Holdings reaped a windfall through the IPO measured in the hundreds of millions of dollars. Aguirre Declaration filed herewith, ¶ 4, Ex. 2.

Edelman has two interests in obtaining these records. First, he operates a website: www.empirestatebuildinginvestors.com/. Its purpose is to inform investors and the public about legal proceedings relating to ESRT. The website focuses now on releasing records obtained through this case and will continue to do so. It has around 1,000 visitors a month, including investors, universities, government agencies, and media. Edelman Dec. ¶ 19.

Edelman's second interest is a personal one. His grandfather acquired a small interest in ESBA in 1961. Edelman's father inherited a fraction of that interest and placed it in the Edelman Family Trust ("Family Trust"), so it would pass down to his family members. *Id*. ¶ 3. As Malkin Holdings did with other investors who opposed the IPO and the consolidation, it forced Edelman's father to convert the Family Trust's interest in ESBA, its interest in the Empire State Building, into an interest in ESRT, a public company that owns properties scattered around New York City. *Id*. ¶¶ 4, 6, and Ex. 24.

[1] "Edelman Dec." refers to the Declaration of Richard Edelman filed herewith.

As discussed below, the SEC failed to satisfy its *statutory burden* under 5 U.S.C. 552(a)(4)(B) to prove that it complied with Edelman's FOIA request for records of SEC investigations of ESRT. Of the 46,000 pages of records the SEC collected through its MUI on ESRT's IPO, and aside from the records Edelman gave the SEC, the SEC has released only 129 pages of nonpublic records, many with significant redactions.[2] The SEC's motion asserts its exemptions in a factual vacuum, which allows it to argue its exemptions as abstract theory untethered to fact. Edelman addresses those facts next.

II. Background Facts

According to its website, ESRT is a "real estate investment trust" that owns office and retail properties in the New York metropolitan area, "including the Empire State Building, the world's most famous building."[3] Edelman's FOIA has requested the records relating to *any* SEC investigation of ESRT, including a specifically identified IPO and related proxy that stripped investors of their ownership interests in the iconic Empire State Building and forced them to accept interests in the ESRT IPO as a substitute.

Malkin Holdings initiated the ESRT IPO by filing SEC Forms S-4 and S-11 under the Securities Act of 1933 with the SEC on February 13, 2012. Aguirre Dec. ¶ 3, Ex. 1. To finalize the consolidation, Malkin Holdings needed the consent of 80% of the investors of ESBA and the consent of varying percentages of the investors in the entities owning the other properties. *Id*., ¶ 5, Ex. 3.

One month after filing the ESRT IPO, investors filed five class actions against Malkin Holdings for breach of fiduciary duty relating to the IPO and consolidation. *Id*., ¶ 6, Ex. 4. One complaint alleged the consolidation would deprive investors of "hundreds of million [*sic*] of dollars in value" that were being diverted to Malkin Holdings. *Id*., ¶ 4, Ex. 2. Malkin Holdings settled the class action for $55 million approximately ten months after it was filed. *Id*., ¶ 7, Ex. 5 at 30. It stipulated the class action counsel added nonmonetary benefit to investors in the form of $100 millions in tax relief, a factor that

[2] Declaration of Maria Pomares, filed herewith, ¶¶ 4-8, and Ex. 31.
[3] *See*: http://www.empirestaterealtytrust.com/properties. Last visited Feb. 6, 2017.

supported the class action counsels' fee application. *Id*., ¶ 8, Ex. 6 at 34. Although the state court found the class counsel provided "limited detail of the work performed," it awarded them a fee of $11.6 million or "an hourly rate of $2,475." *Id*., at 36.

One month after the class action settlement was presented to the state court, the SEC informed Malkin Holdings it had opened a matter under inquiry ("MUI"), a type of preliminary investigation, into the ESRT IPO. *Id*., ¶ 10, Ex. 7. In February 2013, the SEC requested Malkin Holdings to produce the following records:

1. The documents Malkin Holdings had provided the class action attorneys;
2. Emails to and from investors and logs relating to investor calls;
3. Documents used by Malkin Holdings to educate employees "how to handle inquiries from investors about the Proposed IPO."

Id. The SEC received 46,000 pages of records and an index of the class action documents.

The SEC closed its investigation in less than three months.[4] It claims to have generated only 16 records during the MUI, almost all hand written notes. Pomares Dec., ¶ 8. It only released six of these records, five with significant redactions. The released SEC records point to only one significant event: a meeting between SEC staff and seven attorneys representing Malkin Holdings, including five of the most credentialed and influential attorneys in three of Wall Street's powerhouse law firms: Gibson Dunn, Clifford Chance, and Proskauer. Aguirre Dec., ¶ 11, Ex. 8.

This motion seeks an order directing the SEC:

1. To conduct a search and release the records of any MUI or investigation of ESRT;
2. To release the requested records it withheld, but did not list on its Vaughn Index;
3. To release the two *indexes* of the 44,000 pages of requested records;
4. To release all records it has withheld under Exemption 4;
5. To release its case closing reports on any MUIs or investigations; and
6. To pay Edelman's attorneys fees.

[4] The investigation appears to have been opened around Feb. 20, 2013, and closed on May 3, 2013. Doc. No. 52, Dkt. No. 22-2 at 21, is the case closing recommendation.

Edelman labored to avoid litigation and then labored to settle this matter. The SEC frustrated those efforts by changing its position on (i) whether it would release records, (ii) the number of records it was withholding, (iii) the grounds it was asserting in withholding records, and (iv) the exemptions it was asserting in withholding records. The SEC's shifting grounds suggest the agency decided to withhold the requested records and has been searching ever since to find justification for that decision. Dkt. No. 17 at 2-3.

III. FOIA's Critical Role In Bringing Transparency to the SEC

Section 200.53 of Title 17 of the United States Code of Federal Regulations broadly defines the SEC's mission. It confirms that Congress entrusted the SEC "with powers and duties of great social and economic significance to the American people." In particular, SEC Commissioners "regulate varied aspects of the American economy, within the limits prescribed by Congress, to insure that our private enterprise system serves the welfare of all citizens." The SEC's "success in this endeavor is a bulwark against possible abuses and injustice which, if left unchecked, might jeopardize the strength of our economic institutions." The failure of the SEC to carry out its mission exposes the nation's economic institutions and its investors to "abuses and injustices" in the financial markets it regulates. In this regard, the Financial Crisis Inquiry Report placed much of the responsibility for the 2008 financial crisis with the SEC.[5]

FOIA is the vehicle that allows the public to bring sunshine to the inner workings of executive federal agencies, such as the SEC, so the public, the media, and Congress can assess whether the SEC is carrying out its mission. In *Kowack v. United States Forest Serv.*, 766 F.3d 1130 (9th Cir. 2014), the Ninth Circuit explained FOIA's role:

> Democracy functions ill in shadow, yet government bureaucracies are notoriously reluctant to reveal their internal processes. Recognizing this tension, Congress passed [FOIA] in 1966. FOIA fosters transparency by adopting a baseline presumption that information in the hands of the government belongs to the people and must be disclosed on request. But some secrecy is necessary, so FOIA includes several narrow exemptions.

[5] *See*: https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf at xviii, 15-16, 126, 155, 187, 279, 291, and 446. Last visited Feb. 6, 2017.

The SEC is no exception to the Ninth Circuit's observation that "government bureaucracies are notoriously reluctant to reveal their internal processes." The SEC's antagonism towards FOIA is well documented. In 2009, after a thorough investigation, the SEC Inspector General ("IG") informed the SEC Chairman that the SEC FOIA Office and its review process by the Office of the General Counsel employed a "presumption of withholding" rather than "a presumption in favor of disclosure."[6] The statistics do not lie: The SEC had produced records in response to 13.4% of FOIA requests, while the other federal agencies produce records in response to 60.5% of the requests.[7] In this case, after a year of administrative proceedings and another year of litigation, it has released three tenths of one percent of the records it possesses, but that does not include the records of other investigations it did not search for. For the SEC, FOIA is for other agencies.

The SEC had short success in 2010 in nearly blocking all access to all SEC investigations and examinations when it snuck a special exemption to FOIA in Section 929I of the Dodd-Frank Act. The SEC's bill gave the SEC, and only the SEC, a unique exemption to FOIA.[8] The exemption did not amend FOIA; it added the SEC exemption by amending the securities acts. It had no Congressional scrutiny until the SEC used it. A bill to repeal the SEC's solo exemption (Section 929I) sailed through Congress without opposition and was signed by the President three months after Dodd-Frank became law.[9] In co-sponsoring the bill to repeal the SEC's unique FOIA exemption, current Senate Judiciary Committee Chair Charles Grassley explained why the repeal was necessary:

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[6] SEC OIG, *Review of the SEC's Compliance with the Freedom of Information Act*, Report No. 465, Sep. 25, 2009, at 50, available at http://nsarchive.gwu.edu/news/20150205/docs/2009-Sep-25-Inspector-General-Report-Review-of-the-SEC's-Compliance-with-the-Freedom-of-Information-Act.pdf. Last visited Feb. 6, 2017.

[7] *Id*., at 9-10.

[8] Aguirre, Gary, *The Dodd-Frank Act: A FOIA Exemption for SEC Misconduct?* WALL STREET LAWYER. Sep. 2010. Vol. 14. No. 9.

[9] Beckett, Christine, *President Signs Bill Revoking Controversial SEC FOIA Exemption*, Reporters Comm. For Freedom of the Press. Oct. 6. 2010. available at http://www.rcfp.org/browse-media-law-resources/news/president-signs-bill-revoking-controversial-sec-foia-exemption. Last visited Feb. 6, 2017.

> The blanket FOIA exemption for the SEC that was contained in the Wall Street Reform bill was dramatically overbroad and was drafted in a way that evaded full and fair consideration by this Committee. It was particularly troubling given the SEC's terrible record on complying with FOIA and the clear intent of Congress on this issue.[10]

Another way to avoid compliance with FOIA is to destroy investigative files. The SEC did that too. It destroyed all records of MUIs until mid-2010 when the SEC attorney running the shredder told Congress, the agency that regulates federal records, and the SEC IG the SEC was destroying MUIs. The SEC IG reported on the practice:

> The OIG investigation found that it had been the policy of Enforcement, from the point of time in which MUIs were first created in approximately 1981 until July 20, 2010, to dispose of all documents relating to a MUI that were closed without becoming investigations. According to Enforcement, between October 1, 1992 and July 20, 2010, Enforcement opened 23,289 MUIs. Of those 23,289 MUIs, 10,468 MUIs were closed without becoming an investigation or another MUI.

Aguirre Decl., ¶ 12, Ex. 9. Edelman now seeks the records the SEC has doggedly fought to keep from the public by destroying them for decades, asserting phony exemptions (according to its IG), and then sucker punched Congress with Dodd-Frank Section 929I.

The MUI of ESRT shares one common factor with other investigations that the SEC closed and later became the subjects of Congressional investigations and criticism by its own IG.[11] As discussed above, the SEC closed down its MUI of ESRT shortly after a group of high-powered attorneys educated SEC Enforcement attorneys handling the case.

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[10] *See* Press Release, U.S. Senator Chuck Grassley, Senate Judiciary Committee Approves Bill To Repeal SEC FOIA Exemptions (Sep. 16, 2010) available at http://www.grassley.senate.gov/news/news-releases/senate-judiciary-committee-approves-bill-repeal-sec-foia-exemptions. Last visited Feb. 6, 2017.

[11] The SEC's decision to close down major investigations after influential attorneys contacted its staff is documented in (1) a U.S. Senate report (U.S. Senate Comm. on the Judiciary and U.S. Senate Finance Comm., *The Firing of an SEC Attorney and the Investigation of Pequot Capital Management*, S. Rpt. 110-28, Aug. 2007 at 5; *available at http://pogoarchives.org/m/er/senate-pequot-report-august2007.pdf*, last visited Feb. 6, 2017) and (2) in SEC IG's Case No. OIG-483, *Failure to Vigorously enforce Action against W. Holding and Bear Stearns at the Miami Regional Office*, Sep. 30, 2008. Aguirre Decl., ¶ 13, Ex. 10.

IV. Argument

A. Legal Standards and Burden of Proof

FOIA explicitly provides this Court shall determine "*de novo*" whether the agency improperly withheld any records from a complainant who files a civil action under FOIA. 5 U.S.C. 552(a)(4)(B). It expressly places the burden on the agency to "sustain its action." *Id*. The Ninth Circuit articulated an agency's statutory burden under FOIA in *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994) as follows: "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." Further, "Disclosure, not secrecy, is the dominant objective of FOIA." *Shannahan v. IRS*, 672 F.3d 1142, 1148 (9th Cir. 2012) (internal quotation marks and brackets omitted). It also noted in *Shannahan* that FOIA's nine exemptions should be "narrowly construed." *Id*.

B. Objections to SEC's Declarations

Edelman objects to the admissibility of the following declarations offered by the SEC in support of its motion for summary judgment:

1. The Declaration of Carin M. Cozza, Dkt. No. 22-2

a) Edelman objects to the entire declaration on the grounds that Carin M. Cozza ("Cozza") states in ¶ 2 she partially relied on written or oral hearsay statements, but she fails to state which statements are based on personal knowledge and which on hearsay.[12]

b) Edelman objects to the statements in ¶¶ 3, 4, 5, 7, 8, 10, 14, 16, 19, and 23 on the grounds they are inadmissible hearsay and conclusions based on hearsay.

2. The Declaration of Thomas N. Keltner, Jr. of August 26, 2016, Dkt. No. 22-3

Edelman objects to the entire declaration on the grounds that it violates the best evidence rule, lacks authentication, is hearsay, is irrelevant and states legal conclusions.

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[12] Cozza's declaration (Dkt. No. 22-1) reads at ¶ 2:

> In making this declaration, I have relied on my personal knowledge, or where my personal knowledge was lacking or incomplete, I have relied on my review of records routinely maintained in the ordinary course of business or information provided by Commission staff.

3. The Declaration of Thomas N. Keltner, Jr. of January 11, 2017, Dkt. No. 22-4

Edelman objects to the statements in ¶¶ 2,3, 4, 5, 6, 7, 8, 9 and 10 in his declaration to the effect that the disclosures of information described in those paragraphs would "likely cause substantial commercial harm to ESRT" on the grounds that the statements are inadmissible conclusions and hearsay by a non-expert unsupported by evidence establishing the facts upon which the conclusions are based.

C. The SEC Failed to Establish that It Conducted an Adequate Search

The SEC has the burden to prove it conducted a search reasonably calculated to uncover all relevant documents. *Zemansky v. U.S. Environmental Protection Agency*, 767 F.2d 569, 571 (9th Cir. 1985). A comparison of Edelman's records requests with the SEC's description of its search proves the SEC failed to conduct an adequate search. Edelman's February 2015 FOIA request sought the release of all records "concerning investigation in the matter of Empire State Realty Trust MNY08894. … *This FOIA also requests similar documents of any other SEC investigation concerning Empire State Realty Trust* (emphasis added)." Dkt. No. 1, Ex. 1, at 11.

The SEC searched for only half of the requested records: MUI No. MNY08894. It ignored the other half of the FOIA request: "This FOIA also requests similar documents of any other SEC investigation concerning" ESRT. *Id*. Cozza's declaration establishes the SEC conducted no search. It reads: "FOIA Lead Research Specialist Jason Luetkenhaus *verified* that the Commission had an investigation titled *In the Matter of Empire State Realty Trust*, MNY-08894 (emphasis added)." Dkt. No. 22-2 at 2, ¶ 3. Verifying the existence of a specific MUI is not a search when Edelman requested all records of SEC investigations of ESRT. Instead, under *Zemansky*, it had to conduct "a search reasonably calculated to uncover all relevant documents." 767 F.2d at 571. It did not do one. At a bare minimum, the SEC should have looked on HUB, the Division of Enforcement's electronic case management system, to locate any other MUI, TCR inquiry, or investigation. Hence, the Court should order a search compliant with case law.

D. The SEC Withholds Two Classes of Requested Records That Are Not Specified on Its Vaughn Index

The records released by the SEC indicate there are two classes of records which were not released and are not identified in the Vaughn index as withheld records. The first class is described as "Draft S-4 Prospectus and Private Wrappers Sent to Participants in the Private Entities" in a five-page table released by the SEC. Pomares Decl., ¶ 7, Ex. 31; Edelman Decl., ¶ 13(d). The SEC released all other records listed in the table or posted them to its Vaughn index.

The second class is described as "Information Concerning Richard and Steven Edelman" by an Enforcement staff attorney in his February 20, 2013, letter to Malkin Holdings's counsel in which he confirms the records Malkin Holdings agreed to produce. The SEC released no records that fit this description. *Id*., ¶ 13(e). Nor has the SEC listed them in its Vaughn index. The SEC obviously does not satisfy its burden to demonstrate it complied with FOIA when it identifies a record in its possession, does not release it, and asserts no exemption for withholding it. *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994).

E. The SEC Improperly Withheld Two Indexes of the 44,000 Pages of Records It Received from Malkin Holdings

The SEC withholds *two* indexes of the 44,000 pages of records it received from Malkin Holdings. Malkin Holdings's "outside counsel" created the first index, a 97-page spreadsheet, when they "exchanged" documents with counsel for a class action suing Malkin Holdings. Dkt. No. 22-3, ¶ 2. The SEC created a second index when it uploaded the 44,000 pages onto the SEC's Concordance document storage system in 2013.

The SEC asserts Exemption 4 in withholding the first index. This exemption allows an agency to withhold "trade secrets and commercial or financial information obtained from a person as privileged or confidential." 5 U.S.C. § 552(b)(4). The SEC concedes the district courts in the Ninth Circuit have followed the two-pronged test from *National Parks & Conservation Asso. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) for

determining whether records are "confidential" under Exemption 4. The SEC contends the second prong of *National Parks* applies to Edelman's request. The second prong allows an agency to withhold records if their disclosure would likely "cause substantial harm to the competitive position of the person from whom the information was obtained." Dkt. No. 22-1 at 8. *National Parks*, 498 F.2d at 770. Edelman agrees that *National Parks'* second prong is the applicable standard.

The Ninth Circuit has clarified the nature of the proof that must be offered to satisfy *National Parks'* second prong. "Conclusory and generalized allegations of competitive harm are insufficient to show that requested information is 'confidential' under the second prong of the National Parks…" *GC Micro*, 33 F.3d at 1113. Further, the SEC must "show that there is (1) actual competition in the relevant market, and (2) a likelihood of substantial competitive injury if the information were released." *Lion Raisins v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1079 (9th Cir. 2004).

There are three threshold factors that undermine the SEC's contention the first index should be treated as confidential. First, the SEC's counsel stated in May 2016 that Malkin Holdings had only requested confidentiality for "300-some" of the 44,000 pages. Aguirre Dec., ¶ 16, Ex. 11. If so, how could the index be 100% confidential if the confidentiality request applies to less than 1% of the records it indexes? Second, Malkin Holdings provided these records to several class action law firms that specialize in plaintiff securities litigation that were suing Malkin Holdings.[13] It is hard to imagine how Malkin Holdings could have made a clearer statement the records were not confidential than handing them over to class action law firms that were suing it.

Finally, the SEC provided Malkin Holdings with SEC Form 1662 before Malkin Holdings delivered a single document to the SEC. The SEC provides Form 1662 to every person from whom its Enforcement Division requests information. Aguirre Dec., ¶ 17,

[13] The New York Supreme Court website indicates the firms representing plaintiffs were (1) Wolf Haldenstein Adler, (2) Meister Seelig & Fein LLP, and (3) Pomerantz LLP. *See:* http://iapps.courts.state.ny.us/iscroll/Attorney.jsp?IndexNo=650607-2012. Last visited Feb. 6, 2017.

Ex. 12. Form 1662 informed Malkin Holdings that the SEC had 22 classes of "routine uses" which may be made of the information furnished. These "routine uses" include providing the information to bar associations, other professional associations, witnesses, private collection agencies, consumer reporting agencies, members of Congress, other government agencies (local, state, national and foreign), the press, "*and the public in response to inquiries relating to particular Registrants* (emphasis added)" such as Edelman's request. *Id*. This was a factor the court relied upon in *Aguirre v. SEC*, 551 F. Supp. 2d 33, 50 (D.D.C. 2008) in rejecting the SEC's assertion of Exemption 3, noting the SEC's "own Form 1662 … warns witnesses that their testimony could be released to many different types of organizations." In this case, Form 1662 likewise told Malkin Holdings that its records "could be released to many different types of organizations."

The SEC relies on factual *conclusions*—to which Edelman objects—in the two declarations of Thomas Keltner Jr. ("Keltner"), ESRT's general counsel, to support its contention the release of the index would likely cause substantial competitive injury to Malkin Holdings. First, Keltner contends the disclosure would reveal the names of the tenants which neither Malkin nor ESRT have made public. Dkt. Nos. 22-3, ¶ 4 and 22-4, ¶ 4. This statement cannot be squared with the statements in the ESRT filings with the SEC. ESRT lists its most impressive tenants in its SEC filings. Edelman Dec., ¶¶ 14-16, Exs. 29 and 30. ESRT's SEC filings also provide details regarding its tenants' leases, including their names, how many leases they signed, the number of properties, the time until the expiration of the lease, square footage leased, the percentage of leased square feet, and the base rent. *Id*., ¶ 16, Ex. 30. Further, a Google search of the address of the Empire State Building yields the identities of many if not most of its tenants. As is customary, a tenant roster is located in the lobby of the buildings. *Id*., ¶ 17. CNBC even reports who pays rent to ESRT.[14]

[14] According to the trust's S-11 filing, about 68 percent of the Empire State Building's existing 2.8 million square feet of office and retail space was rented out as of

But this is merely the threshold analysis. Going deeper, the SEC must demonstrate how the disclosure would likely cause substantial harm to Malkin Holdings's competitive position. The SEC nowhere defines the market in which Malkin Holdings competes. Nor does it identify who else competes in its market. Assuming it competes with other companies that acquire and manage commercial real estate in the New York City area, the SEC must establish the "likelihood of substantial competitive injury if the information were released." *Lion Raisins*, 354 F.3d at 1079. In this case, as in *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994): "It is questionable whether the declarations submitted by the three contractors show *any* potential for competitive harm, let alone substantial harm (emphasis added)."

The SEC's reliance on *Lion Raisins, Inc. v. USDA*, 354 F.3d 1072, 1081 (9th Cir. 2004) and *Watkins v. U.S. Bureau of Customs*, 643 F.3d 1189, 1196 (9th Cir. 2011) is more than misplaced. The *fact-rich* declarations submitted by the Department of Agriculture ("DOA") in *Lion Raisins* and the Bureau of Customs and Border Protection in *Wakins* sharply contrast with the *fact-void* declarations submitted by the SEC to support its claim. The DOA declarations explicitly defined the competitive industry: the California raisin packing industry; the SEC's do not. The DOA declarations identified the competitors: Lion Raisons, the FOIA requester, and its six California competitors: Sunmaid Raisins, National Raisin, Enoch Packing, Chooljian Bros. Del Rey Packing, and Victor Packing; the SEC's do not. The DOA declarations described the fierce competition existing within the industry at the time the case was filed. The Ninth Circuit summarized:

> The California raisin industry is highly competitive. At the time this action was commenced, raisin prices were at a 15-year low and the success or failure of contract bids hinged on price differentials of a fraction of a cent

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September 2011, with companies such as Walgreen, Bank of America and LinkedIn making up some of the biggest tenants.

Adam Molon, *Before Buying into Empire State, Know Who Rents It*, Oct. 2, 2013, available at: http://www.cnbc.com/2013/10/02/empire-state-building-goes-public-here-are-its-tenants.html.

> per pound. Lion is the largest independent handler of California raisins in the state.

354 F.3d at 1076 The SEC's declarations describe no competition in any industry.

The DOA's declarations explained how the disclosure to Lion Raisins, the largest California raisin packer, would cause competitive harm to its six competitors. The SEC's do not. Lion Raisins sought the DOA's check sheets for the prior ten years of its inspections of Lion Raisins' six competitors. The check sheets recorded the DOA inspectors' findings of "the quality of the raisins in various categories, including weight, color, size, sugar content, and moisture." *Id*. The SEC's declarations offer speculative conclusions. The Ninth Circuit noted the DOA's experts' background, concluding "Trykowski's experience lends considerable weight to his testimony." *Id*., at 1080. The SEC offers the opinion of ERST's counsel, who did not qualify as an expert. In *Lion Raisins*, the Ninth Circuit concluded: "Trykowski's conclusions are supported by detailed and specific descriptions of each category of information included on the Line Check Sheets and the ways in which each category of information could be turned to Lion's competitive advantage." *Id*. Again, the SEC has made no such showing. A comparison of the SEC declarations with the agency's in *Watkins*[15] yields the same sharp discrepancies.

The SEC's factual support for its assertion of competitive harm had even less granularity than the agency's flawed proof in *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109 (9th Cir. 1994). In *GC Micro*, the agency claimed the disclosure "would provide competitors with a roadmap of the corporations' subcontracting plans and strategies." *Id*. at 1114. *GC Micro* quoted *Gulf & Western Industries, Inc. v. U.S.*, 615 F.2d 527, 530 (D.C. Cir. 1979) for the principle the release of commercial information causes substantial competitive harm if it "would allow competitors to estimate, and undercut, [the firm's] bids." 33 F.3d at 1115. *GC Micro* successfully argued "the figures reported on the SF 294 contain too many fluctuating components to give the

[15] The declarations are more fully discussed in *Watkins v. U.S. Bureau of Customs & Border Prot*., 2009 U.S. Dist. LEXIS 102022 *20-28 (W.D. Wash. 2009).

defense contractors' competition any advantage." *Id*., at 1114. The Ninth Circuit agreed and reversed the summary judgment in favor of the agency and *directed judgment be entered in favor GC Micro*. In sum, the SEC makes no factual showing how the disclosure of the tenants' identities—available from multiple public sources—could cause a "likelihood of substantial harm" to Makin Holdings' competitive position.

Keltner's second argument is pure conclusion untethered to anything resembling a fact. He argues "the index lists numerous documents from third parties" and the release of the index listing those documents would cause ESRT to face "substantial reputational injury from the public disclosure of these otherwise private documents as a result of Malkin Holdings' submission of the materials to the SEC." Dkt. No. 22-4, ¶ 2. Note that Keltner does not claim anything in the index is confidential. Rather, he argues that Malkin Holdings's production of the records to the SEC would become public and that fact would cause it substantial competitive harm. This speculative assertion satisfies none of the standards articulated by the Ninth Circuit in the cases cited above.

Finally, Keltner contends the release of the index will disclose the *types* of records Malkin Holdings maintains on its various properties. Dkt. No. 22-3, ¶ 3. In essence, Malkin Holdings claims that it has a secret sauce: the way it keeps its records. Any company submitting records to the SEC could make the same claim. This exception would soon consume a large chunk of FOIA: public access to the third party records the SEC considered before closing an investigation. It also clearly violates the guidance in *National Parks*, 498 F.2d at 766-67, adopted by the Ninth Circuit in *GC Micro*, 33 F.3d at 1113: "The test for confidentiality is an objective one." Keltner's subjective conclusion does not pass the test. Nor does the SEC present any facts or law that lends support to this novel theory. This is just the SEC pulling a new trick out of its old bag.

As mentioned above, the SEC also possesses a second index of the same records available with the click of a mouse that it also refuses to release. The SEC's February 2013 letter directed Malkin Holdings to deliver "the documents in an electronic format consistent with the SEC Data Delivery Standards." Aguirre Dec. ¶ 10, Ex. 7. Those data

delivery standards are available on the SEC website. *Id*., ¶ 18, Ex. 13. The 44,000 pages of records are maintained in the SEC's Concordance document retrieval system. *Id*. Inputting the documents into the Concordance system automatically creates an index of the records: author, recipient, blind recipients, date, and subject. *Id.* The SEC Data Delivery Standards illustrate the level of detail that should be provided as the subject of a document: "Board Meeting Minutes." *Id*. The SEC also refuses to provide this index. *Id.*

F. The SEC Cites Neither Legal Authority Nor Factual Grounds in Withholding Specific Records under Exemption 4

The SEC relies on the second Keltner declaration in withholding four classes of records under Exemption 4 that it obtained from Malkin Holdings. Dkt. No. 22-4, ¶¶ 6-11. First, the SEC contends Malkin Holdings's communications with the IPO investors are confidential, because their disclosure "would reveal the techniques used to communicate with and solicit, as well as record-keeping for such communications." *Id*. ¶ 6. Once again, Malkin Holdings claims it has a secret sauce. The first secret sauce was the *type* of records it uses. This time, it is its "techniques" to communicate with the investors it solicits for an IPO. Again, the second secret sauce comes no closer than the first in meeting the Ninth Circuit cases discussed above. Again, the most stunning aspect of the secret sauce is the fact the SEC fully embraced the idea in withholding records.

But Malkin Holdings's assertion of confidentiality is puzzling: what exactly did Malkin Holdings communicate to investors that it failed to disclose publicly in its SEC filings? Under SEC Rule 25 to the Securities Act of 1933, Malkin Holdings filed *162 (one-hundred and sixty-two)* Forms 425 with the SEC's public EDGAR database during the IPO—from February 2012 to June 2013. Aguirre Decl., ¶ 19, Ex. 14. Collectively, the Forms 425 describe every aspect of Malkin Holdings's communications with investors, e.g., letters, flyers, transcripts of conferences calls, scripts for calls to investors, scripts to answer questions from investors, etc. *Id*., Exs. 15-19. It is hard to imagine any type of communication, especially those that used secret techniques, between Malkin Holdings and investors that were not described in its 162 Form 425 filings. In any case,

other than bare conclusions, the SEC has made no showing Malkin Holdings has secret techniques for communicating with investors, how they stayed secret despite the 162 Form 425 filings, or how the disclosures would cause the "likelihood of substantial competitive injury" to Malkin Holdings. *Lion Raisins*, 354 F.3d at 1079.

But Malkin Holdings used one technique to communicate with investors that was not so secret: threats to sue them and worse. The declaration of an SEC branch chief handling the ESRT IPO describes how investors reported these threats: "A number of these investors expressed their fear that ESRT management would retaliate against them if ESRT discovered that they submitted complaints to the SEC regarding the transaction." Edelman Dec., ¶9, Ex. 26. One investor, Joyce Manheimer, testified in an arbitration proceeding last May why she was fearful of testifying:

> Q. Were you afraid to testify this morning?
> A. Yes, I was because I'm afraid that the Malkins could sue myself and my husband, and I feel I was threatened by them in the past.

Id., ¶ 8, Ex. 25 at 30-31. She also testified to a phone call she received from Peter Malkin during which he told her "[t]here could be legal ramifications" if she participated in conference calls with other investors. *Id*., at 39. She described a second type of threat:

> [I]f they reached the 80 percent [of investors who consented to the consolidation], then the investors had ten days to change their vote from a no to a yes, otherwise you would get a $100 on your investment.
> And I had no -- I felt I had a gun to my head. I had no choice but to change my vote from a no to a yes, even though I never intended on ever doing anything but keeping this building in my family.

Id., at 33-34. Edelman also stated that dozens of investors emailed or phoned SEC Enforcement to complain about these threats, but no records were released. *Id*., ¶ 13(b). The SEC may be using an unrecognizable description so these records fit an exemption.

Second, Keltner asserts that investors' names and contact information should be withheld under Exemptions 6 and 7(C). Dkt. No. 22-4, ¶¶ 7 and 8. Those contentions are

only partially asserted in the SEC's Vaughn Index,[16] but are not asserted in the SEC's points and authorities. Dkt. No. 22-1 at 9. Edelman has advised the SEC he does not seek investors' names and contact information, which may be withheld under Exemptions 6 and 7(C), but nothing more. The SEC's Vaughn Index appears to limit its assertion of Exemptions 6 and 7(C) (Dkt. No. 22 at 11) to the withholding of investors' names and contact information. Any redaction beyond the names and contact information exceeds the permissible scope of these exemptions. *Aguirre v. SEC*, 551 F. Supp. 2d 33, 53-60 (D.D.C. 2008). Edelman requests the Court to limit the scope of the information the SEC may withhold under Exemptions 6 and 7(C) to investors' names and contact information.

Third, again relying on Keltner's second declaration, Dkt. No. 22-4, ¶ 9, the SEC contends it may withhold a contract between Malkin Holdings and a third party that provided "independent valuation services in connection with the IPO." The third party is Duff & Phelps. It was referred to by name 95 times in the S-4 registration statement. Its opinion on the properties' valuations was the clue that held the IPO together. Other than the existence of the contract and its amendments, the SEC offers no facts why or how the disclosure of its terms would likely "cause substantial harm to the competitive position of the person from whom the information was obtained." Dkt. No. 22-1 at 8. *National Parks*, 498 F.2d at 770. Nor has it articulated how the disclosure "would allow competitors to estimate, and undercut" Malkin Holdings's bids. And bids on what? The SEC has failed to meet its burden under *National Parks, Lion Raisins and GC Micro.*

Finally, the SEC seeks to withhold three letters from attorneys for Malkin Holdings to the SEC that accompanied Malkin Holdings's February 2013 production of documents to the SEC. Since the SEC has failed to meet its burden to establish adequate grounds for its assertion of Exemption 4, it can hardly claim that the letters delivering those records may be withheld under Exemption 4. Further, the letters that accompany FOIA confidentiality requests do not usually describe contents of the records. Aguirre Dec., ¶

[16] The SEC asserts Exemption 6 and 7(C) in relation to Documents Nos. 10 and 15 of its Jan. 17, 2017, Vaughn index. Dkt. No. 22-2 at 11 and 13.

20. The letters will, however, clarify the scope of the confidentiality request. Edelman has objected on multiple grounds to any statement in Cozza's and Keltner's declarations that Malkin Holdings requested confidential treatment of the records it submitted to the SEC. The only valid evidence of that request is the document itself. In the absence of admissible evidence that Malkin Holdings made a timely request for confidentiality, "it will be presumed that the submitter of the information has waived any interest in asserting an exemption." 17 CFR 200.83(h)(1).

And even if the Court should overrule Edelman's objection, there is considerable confusion in the record regarding the SEC's handling of Edelman's FOIA request. The SEC's trial counsel stated in May 2016 that Malkin Holdings only requested confidentiality of "300-some" records of the 44,000 described in the index (Aguirre Decl., ¶ 24), while Cozza states the confidentiality request included 350 documents. Dkt. No. 22-2, ¶ 10. It is unclear whether anyone made a *timely* request the 97-page index be treated as confidential. Cozza states: "My office located an 'index' which itemizes these 44,000 pages of additional records. Malkin Holdings had also requested confidential treatment for the index," (*Id*., ¶ 16) but does indicate when the request was made. Again, 17 CFR 200.83(h)(1) establishes a presumption of confidentiality is waived if not raised when the files are produced to the SEC.

Edelman is also moving the Court for an order under 17 CFR 200.83(g) to make "both request and substantiation may become part of the public court record." The Court is reviewing *de novo* SEC's administrative proceedings on Edelman's FOIA requests and thus the record of that administrative proceeding should be before the Court.

Finally, in *GC Micro*, 33 F.3d at 1115, the Ninth Circuit agreed "with the D.C. Circuit that, in making our determination, we must balance the strong public interest in favor of disclosure against the right of private businesses to protect sensitive information." The records sought will clarify what evidence the SEC considered in closing down its MUI—which generated 16 records—after three months.

G. The SEC Has Failed to Satisfy Its Burden Relating to Its Assertion of Exemption 5 in Withholding the Entire Case Closing Report

The SEC has refused to release any portion of the case closing report, which has two parts: (1) the closing report, typically a single paragraph signed by an SEC deputy or associate director closing the investigation and (2) a recommendation by the assistant director and branch chief stating the reasons for closing the investigation. The SEC has released the closing report in other cases without a fuss, but not the recommendation. Aguirre Dec., ¶¶ 21-22 and Exs. 20-22. Edelman submits the closing report on its face is not protected by the deliberative process or work product privileges. It is a final decision and its states no information subject to the work product privilege. It should be released. The recommendation that is attached to the report is treated by the SEC as the grounds for closing the MUI or investigation. Hence, it may not be withheld under Exemption 5. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (U.S. 1975).

> "[W]e hold that, if an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5.

Only one case, *Gavin v. U.S. SEC*, 2007 U.S. Dist. LEXIS 62252 *25-30 (D. Minn. Aug. 23, 2007), addressed the question whether the SEC could withhold the entire case closing report under Exemption 5. It decided the issue in favor of the SEC, but did not address the point quoted from *Sears* above. Edelman submits that no record generated by the SEC gives a clearer picture whether it carried out its mission in closing an investigation that the full case closing report. Aguirre Dec., ¶ 23.

H. The SEC Failed to Demonstrate that It Could Not Segregate the Allegedly Exempt Information

FOIA expressly states 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." 5 U.S.C. § 552(b). The Ninth Circuit has reaffirmed an

earlier holding that it is reversible error for the district court "'to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof, with respect to that document." *Hamdan v. U.S.DOJ*, 797 F.3d 759, 778-779 (9th Cir. 2015). Assuming *arguendo* what the SEC has yet to demonstrate, that any of the 44,000 pages of records qualify under Exemption 4, it is inconceivable that every description of every entry in a 97-page index qualifies under Exemption 4. The Court must address this issue and the SEC's motion cites no law and adduces no facts relevant to the issue. The same is true of its other Exemption 4 and Exemption 5 assertions.

I. The Court Should Set a Bench Trial on Any Disputed Issues of Material Fact

Edelman respectfully submits that the evidence before the Court warrants the entry of an order granting his motion for summary judgment on each of his contentions. In the event that the SEC should raise a material issue of fact, Edelman requests the Court set this matter for bench trial as the Ninth Circuit has directed in *Animal Legal Def. Fund v. U.S. FDA*, 836 F.3d 987, 990 (9th Cir. 2016), where it held: "Consistent with our usual procedure, if there are genuine issues of material fact in a FOIA case, the district court should proceed to a bench trial or adversary hearing."

J. Edelman Requests His Reasonable Attorney's Fees

Edelman requests leave of Court after the Court rules on the pending motions to submit an application for attorney's fees under pursuant to 5 U.S.C. § 552(a)(4)(E).

DATED: February 7, 2017 Aguirre Law, APC

By: /s/ Gary J. Aguirre
GARY J. AGUIRRE
Attorney for plaintiff