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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA; SAN FRANCISCO BAY GUARDIAN, Plaintiffs, v. FEDERAL BUREAU OF INVESTIGATION, Defendant.	Case No. 12-cv-3728-SI **DEFENDANT'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Date: December 20, 2013 Time: 9:00 a.m. Place: Courtroom 10, 19th Floor Judge: Hon. Susan Illston

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PLEASE TAKE NOTICE that on December 20, 2013, at 9:00 a.m. in the United States Courthouse at San Francisco, California, defendant Federal Bureau of Investigation, by and through undersigned counsel, will renew its motion for summary judgment on all of plaintiffs' claims in their Complaint.

SECOND MOTION FOR SUMMARY JUDGMENT

Defendant Federal Bureau of Investigation hereby renews its motion for summary judgment on all of the claims in plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 56 and the Freedom of Information Act, 5 U.S.C. § 552, for the reasons more fully set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

In their Second Motion for Summary Judgment ("Second MSJ"),[1] plaintiffs the American Civil Liberties Union of Northern California and the San Francisco Bay Guardian make clear that they would rather have this Court decide this case on decades-old allegations of FBI misconduct than the undisputed facts set forth in the record. From the beginning of this lawsuit, plaintiffs have advanced a theory that the FBI was improperly spying upon the Occupy movement. Underpinning that theory was an assumption on plaintiffs' part that there must be a vast treasure-trove of records demonstrating that the FBI was engaging in some sort of improper surveillance of the Occupy movement. There is none. Plaintiffs nonetheless trudged forward, arguing that the FBI's search for records in response to plaintiffs' Freedom of Information Act ("FOIA") request must have been inadequate. Plaintiffs made this argument even though the FBI searched not only its Central Records System ("CRS") General Index, which is the method by which the FBI typically searches for records in response to FOIA requests, but also used a series of search terms to try to locate responsive records.

Plaintiffs no longer dispute the adequacy of the FBI's search. Instead, and in an effort to bulk-up their allegations of FBI misconduct, plaintiffs provide a lengthy dissertation on what they describe as the FBI's "checkered history involving surveillance of First Amendment activity." Second MSJ at 5. That theme underpins the entirety of plaintiffs' brief including, in particular, plaintiffs' argument that FOIA Exemption 7 is inapplicable to the law-enforcement documents that the FBI is withholding. However, the fact that the FBI has not located a large volume of records responsive to plaintiffs' FOIA request undercuts plaintiffs' argument that the FBI has engaged in some sort of improper "overcollection of information" regarding the Occupy movement. *See generally* Second MSJ at 8-11 (characterizing FBI's use of Suspicious Activity

[1] Plaintiffs' Notice of Motion and Motion for Summary Judgment; Memorandum in Support, ECF No. 43, 10/25/2013.

Reports as overcollection of information). As noted in Mr. Hardy's original declaration, responsive records were found only in cross-reference files, which generally contain only a "mere mention or reference to an individual, organization, or other subject matter, contained in a document located in another 'main' file on a different subject matter." Declaration of David M. Hardy (Dkt. No. 22-1, 12/21/2012) ("Hardy Decl.") ¶¶ 15, 21. Thus, the undisputed evidence demonstrates that – far from conducting some sort of vast surveillance operation focused on the Occupy movement – the FBI has very few responsive documents, and those that it does have were created in the context of investigating specific reports of threats. To that end, and as noted in Mr. Hardy's third declaration, the responsive records involved investigations of "potential *criminal activity by protestors* involved with the 'Occupy' movement." Third Declaration of David M. Hardy (Dkt. No. 34-1, 07/31/2013) ("Third Hardy Declaration") ¶ 12 (emphasis added).

Stripped of these allegations, plaintiffs' arguments that the FBI improperly withheld records fall by the wayside. As set forth in the Third Hardy Declaration, the documents at issue were created for legitimate law enforcement purposes, thus supporting the application of FOIA Exemption 7 generally. As for the specific exemptions themselves, the FBI has provided additional detail in support of each of them. Moreover, the United States District Court for the District of Columbia has recently granted summary judgment to the FBI in a substantially similar FOIA lawsuit regarding a request for records relating to the Occupy movement. *See Light v. Dep't of Justice*, ___ F. Supp. 2d ___, 2013 WL 3742496 (D.D.C. July 17, 2013). In addition to finding that the FBI's search for responsive records was adequate, the court upheld the FBI's assertions of Exemptions 6, 7(C), 7(D), and 7(E). *See id.* at *8-*11. And if there is any remaining doubt, this Court should exercise the option of reviewing the withheld records *in camera* for two reasons. First, the FBI cannot provide any additional information regarding its withholdings – save for a short supplemental declaration attached hereto regarding express assurances of confidentiality – without revealing the very nature of the information it seeks to protect. And second, the volume of records at issue is very small.

ARGUMENT

I. The FBI Has Established a Legitimate Law Enforcement Nexus.

As a threshold issue when analyzing Exemption 7, the Court must make a determination as to whether the documents have a law enforcement purpose which, in turn, requires examination of whether the agency serves a "law enforcement function." *Church of Scientology Int'l v. I.R.S.*, 995 F.2d 916, 919 (9th Cir. 1993) (internal quotation marks and citation omitted). The FBI serves a "law enforcement function," as it "has a requisite law enforcement mandate." *Id.* (internal quotation marks and citation omitted); *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 808 (9th Cir. 1995). Moreover, and in this Circuit, "law enforcement agencies such as the FBI should be accorded special deference in an Exemption 7 determination." *Binion v. U.S. Dep't of Justice*, 695 F.2d 1189, 1193 (9th Cir. 1983). Finally, and in order to satisfy Exemption 7's threshold requirement, a government agency with a clear law enforcement mandate—such as the FBI—"'need only establish a rational nexus between enforcement of a federal law and the document for which [a law enforcement] exemption is claimed.'" *Rosenfeld*, 57 F.3d at 808 (citation omitted).

In its previous order on the parties' cross-motions for summary judgment, this Court found that the FBI had not established a law-enforcement objective sufficient to allow for the invocation of Exemption 7. *See* Order Denying Defendant's Motion for Summary Judgment; Granting in Part and Denying in Part Plaintiffs' Motion for Summary Judgment (ECF No. 32, 07/01/2013) ("Order"), at 9-11. Specifically, the Court found that the FBI has failed to cite the exact laws it was enforcing. *See id.* at 10. In response, the Third Hardy Declaration has identified domestic terrorism (18 U.S.C. § 2331) and advocating the overthrow of government (18 U.S.C. § 2385) as the federal laws it was enforcing. *See* Third Hardy Decl. ¶¶ 12, 16.

Plaintiffs nonetheless contend that the identification of these specific statutes still does not satisfy the rational nexus requirement. In so doing, plaintiffs mischaracterize the FBI's position and its description of the documents at issue. Plaintiffs argue that the Third Hardy Declaration "contains echoes" of concerns in a three-year-old Inspector General report. Second MSJ at 14. That report, however, is irrelevant to the question of whether the FBI's declaration is

adequate to establish an Exemption 7 nexus for purposes of summary judgment in this FOIA case. It is also inapposite, as the "echoes" of which plaintiffs complain are a figment of their imagination. According to plaintiffs, "[t]he FBI suggests that *the Occupy movement was being investigated* for domestic terrorism" and "*[d]esignating Occupy as a terrorist group* would be consistent with the FBI's 'practice' of routinely classifying investigations of domestic advocacy groups as 'domestic terrorism cases.'" Second MSJ at 14 (quotation omitted) (emphasis added). But the FBI has not asserted that "the Occupy *movement* was being investigated"; it certainly has not designated it as a terrorist group. To the contrary, the FBI has repeatedly made clear that it has no main investigatory files on "the Occupy movement," Hardy Decl. ¶¶ 15, 21, and the handful of responsive records that the FBI has identified involve the collection of information relating to potential criminal activity by protesters. Third Hardy Decl. ¶ 12.

Moreover, the Third Hardy Declaration sets forth in detail the statutory basis for the collection of law-enforcement records in the eGuardian system. The records at issue do not involve "generalized law enforcement sharing." Third Hardy Decl. ¶ 16. Instead, they "contain [the] dual law enforcement purposes" of having been "compiled while actively assisting state and local law enforcement agencies and assessing potential terrorist threats." *Id.* Specifically, the records at issue were "complied [sic] as part of the FBI's core counter terrorism function via the national eGuardian terrorist threat reporting and assessment system." *Id.* Specifically, and pursuant to 28 C.F.R. § 0.85(l), "the FBI is the lead investigative agency for crimes 'which involve terrorist activities or acts in preparation of terrorist activities within the statutory jurisdiction of the United States." *Id.* (quoting 28 C.F.R. § 0.85(l)). As noted in Mr. Hardy's declaration, "'[t]errorism' includes 'the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.'" Third Hardy Decl. ¶ 13 (quoting 28 C.F.R. § 0.85(l)). The regulation authorizes the FBI to collect, coordinate, analyze, manage, and disseminate intelligence and criminal information "as appropriate." 28 C.F.R. § 0.85(l). To that end, the FBI has developed the eGuardian system "to meet the challenges of collecting and sharing terrorism-related activities amongst law enforcement agencies across various

jurisdictions." Third Hardy Decl. ¶ 14. The information submitted to the system, which is accessible to thousands of state, local, and tribal law enforcement personnel, "facilitate[s] situational awareness with respect to potential terrorist threats," can "serve as a trigger for violations of criminal laws," and "alert[s] the FBI to potential violations of federal criminal laws relative to its counter terrorism mission." *Id.* ¶¶ 14, 16. Finally, the FBI's general investigative authority in 28 U.S.C. § 533 and its general authority to collect records in 28 U.S.C. § 535 provides the statutory basis for the use of the eGuardian system. *See* Third Hardy Decl. ¶ 15.[2]

The Third Hardy Declaration thus makes several points clear. First, the FBI is not, as plaintiffs assert, relying on its general investigative authority alone in order to argue that there is a nexus between the records at issue and the enforcement of a criminal law. *See* Second MSJ at 13-15. In light of the FBI's clarification that it is not relying upon "general monitoring or the mere gathering of information," Third Hardy Decl. ¶ 11, it is unclear why plaintiffs continue to assert otherwise. Instead, it is the authority set forth in Sections 533 and 535 that provide the basis for the collection of terrorism-related records in the eGuardian system. *See* Third Hardy Decl. ¶ 15.[3]

Second, plaintiffs fault the FBI for failing to cite the statutes alleged to have been violated. *See* Second MSJ at 13. That ignores the fact that records in the eGuardian system – such as the records here – were "complied [sic] as part of the FBI's core counter terrorism function," Third Hardy Decl. ¶ 13, including collecting information relating to domestic terrorism and the advocating of the overthrow of the government, Supp. Hardy Decl. ¶¶ 12, 16. Plaintiffs assert that, "[i]f the FBI actually had a legitimate law enforcement purpose . . . . there should have been contemporaneous documentation of the basis for its conduct." Second MSJ at 14-15. Plaintiffs are beating a dead horse. This Court has accepted the FBI's assertion that,

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[2] As noted in the Third Hardy Declaration, Annex II to National Security Presidential Directive 46, the Intelligence Reform and Terrorism Prevention Act, and the President's National Strategy for Information Sharing provide additional support for the FBI's eGuardian initiative. *See* Third Hardy Decl. ¶ 15.

[3] In this regard, plaintiffs' invocation of the law of the case doctrine is inapplicable. *See* Second MSJ at 13.

because investigations focused on subject matters other than the Occupy movement (again, there were no "main" files found regarding Occupy), there were no DIOG forms for an investigation. Order at 7. Moreover, and as this Court noted, one of the withheld documents was a form FD-71. *Id.* And the Third Hardy Declaration addressed the one outstanding documentation issue that plaintiffs had raised. *See* Third Hardy Decl. ¶ 6. Accordingly, there is no dispute about the adequacy of the FBI's documentation.

Third, plaintiffs argue that the FBI's standards for compiling suspicious activity reports are too broad because, in plaintiffs' view, they allegedly define taking photographs and buying water as having a potential terrorism nexus. *See* Second MSJ at 16. This FOIA case, however, is not a proper forum to adjudicate plaintiffs' view that governing standards are either inadequately or improperly defined. Plaintiffs ask the Court to reject the application of Exemption 7 whenever the FBI "casts a net so wide that it traps entirely innocent, and in some cases constitutionally protected, activity." Second MSJ at 16. And that is how they attempt to characterize the information they believe is contained in the documents at issue. *Id.* Their assumptions about "innocent activity," however, are contradicted by the facts set forth in Mr. Hardy's declarations. *See* Third Hardy Decl. ¶ 13 (relying upon terrorism standard as using "force and violence"); *id.* ¶ 22 (describing sources as "members of organized violent groups" who "come into contact with criminal elements"). It is also contradicted by the substance of the documents the FBI has already released. *See* Hardy Decl. Ex. G (ACLU-NC-1: describing coordinated shut-down of ports and "possible violence"; ACLU-NC-8: describing shut-down of port when "the large number of protesters posed a danger to the several hundred workers still inside the port"; ACLU-NC-12: describing "BLACK-MASKED ANARCHISTS WHOSE ACTIONS INCLUDED: VANDALISM OF SMALL BUSINESSES, SETTING FIRES IN DOWNTOWN OAKLAND, AND PHYSICAL CLASHES WITH THE OAKLAND POLICE"). For the same reason, plaintiffs' semantics that Exemption 7 does not apply because the Third Hardy Declaration used the words "would" and "such as" fails. *See* Second MSJ at 14 (focusing on how the FBI's assistance "would" relate to investigation of crimes "such as" domestic terrorism). As the declarations and released documents make clear, the FBI had a legitimate,

real, and concrete law enforcement justification for collecting and sharing the information at issue.

Fourth, plaintiffs cite *Rosenfeld v. U.S. Department of Justice*, 57 F.3d 803 (9th Cir. 1995), to argue that the FBI cannot engage in "generalized monitoring and information-gathering." Second MSJ at 15 (quoting *Rosenfeld*, 57 F.3d at 809). While that proposition may be true in a general sense, it is not applicable here. In *Rosenfeld*, plaintiff introduced evidence into the record relating to the subject of the FOIA request that supported a conclusion that the withheld documents "were compiled with no rational nexus to a plausible law enforcement purpose—that any asserted purpose for compiling these documents was pretextual." *Rosenfeld*, 57 F.3d at 809.[4] There is no such evidence here that relates directly to these documents, or the subject matter of plaintiffs' FOIA request. At most, plaintiffs offer a criticism of the standards underpinning the eGuardian system. *See* Second MSJ at 16. Plaintiffs' generalized criticism of the FBI's standards for conducting terrorism-related investigations, however, does not shed any light on the records at issue in this litigation; they certainly do not demonstrate that the FBI was engaging in generalized monitoring and information-gathering in these documents. They are certainly inconsistent with the notion that the FBI, as a law-enforcement agency, is entitled to special deference. *Binion*, 695 F.2d at 1193.

Fifth, plaintiffs continue to ignore the necessity of information-sharing between federal, state, and local law enforcement officials. As one court has put it,

> The FBI has long aided state and local law enforcement agencies in their attempts to reduce crime. This practice antedates the FOIA. Undoubtedly, much of the information provided to the FBI by state and local agencies contains sensitive information obtained from confidential sources which the agencies and parties to the investigations would not want disclosed to the general public or the subjects of the investigations. These files were considered confidential prior to the FOIA. Nothing in the language of the FOIA or its legislative history suggests that Congress sought to change this long-standing practice or to discourage

[4] The other case plaintiffs cite, *Powell v. U.S. Department of Justice*, is even less helpful. In that case, the court found that much of the information at issue related to "legal defense committees which were organized to support the defense and publicize the constitutional questions which were raised" by the government's prosecution of two individuals who were "victims of McCarthyism and the anti-communist zealotry then prevalent in Washington." *Powell v. U.S. Dep't of Justice*, 584 F. Supp. 1508, 1511, 1522 (N.D. Cal. 1984). Moreover, the Department of Justice did not attempt to offer a rational nexus explanation in that case. *Id.* at 1522.

> cooperation between the FBI and other law enforcement agencies. If FOIA Exemption 7 were to be read as applying only to federal law enforcement actions, the practical effect of such a ruling would be to discourage and perhaps curtail entirely the long-standing cooperation and information sharing of the nation's many law enforcement entities. Since such a negative result is not dictated by the plain meaning of the statute, this Court will not strain to interpret the FOIA in such a counter-productive manner.

Wojtczak v. U.S. Dep't of Justice, 548 F. Supp. 143, 148 (E.D. Pa. 1982). *See Rojem v. U.S. Dep't of Justice*, 775 F. Supp. 6, 10 (D.D.C. 1991) (citing 28 U.S.C. § 534 and 28 C.F.R. § 0.85(g) to uphold application of Exemption 7 because "[f]ederal law specifically authorizes the FBI to assist local law enforcement agencies"). The Ninth Circuit has also highlighted the importance of confidential information-sharing between federal, state, and local law enforcement officials when it held that the confidential source exception embodied in Exemption 7(D) applies to state and local agencies. According to the court, a contrary result would be "an impairment to federal law enforcement groups" because "state and local enforcement agencies are under no obligation to provide information to federal agencies." *Church of Scientology v. U.S. Dep't of Justice*, 612 F.2d 417, 426 (9th Cir. 1979).

At bottom, the FBI has shown that its investigative activities are "realistically based on a legitimate concern that federal laws have been or may be violated or that national security may be breached." *Powell v. U.S. Dep't of Justice*, 584 F. Supp. 1508, 1522 (N.D. Cal. 1984) (quoting *Pratt v. Webster*, 673 F.2d 408, 420-21 (D.C. Cir. 1982)). Accordingly, the FBI has met the threshold Exemption 7 requirement.

II. The FBI Properly Withheld Records Pursuant to Exemptions 6 and 7.

A. Exemption 7(A).

Exemption 7(A) permits the withholding of: (1) "records or information"; (2) "compiled for law enforcement purposes"; (3) the disclosure of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7). Congress enacted Exemption 7(A) because it "'recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their cases'" in court. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 156 (1989) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214,

224 (1978)). To satisfy its burden justifying the applicability of this Exemption, the FBI need only demonstrate that (1) a law enforcement proceeding is pending or prospective, and (2) release of the information could reasonably be expected to cause some articulable harm to the proceeding. *Robbins Tire & Rubber Co.*, 437 U.S. at 224.

As set forth in the Third Hardy Declaration, the FBI originally asserted Exemption 7(A) to withhold in their entirety five records of a criminal and investigative nature. Third Hardy Decl. ¶ 17. "Given the temporary nature of Exemption 7A, the FBI has now determined that release [of four of the records] would not interfere with a pending investigation; however, a further review of these records determined that the information [in those four records] remains exempt from disclosure pursuant to other applicable FOIA Exemptions." *Id.* Exemption 7(A), however, continues to apply to the fifth record (Bates 38-40). *Id.*

Plaintiffs do not dispute the application of Exemption 7A to this remaining record. *See* Second MSJ at 17-18. Instead, they quarrel over segregability. *See id.* The FBI, however, has described the "underlying reporting and analysis" in the document as being "condensed in order to provide the audience with an essential understanding of the threat and proposed actions" outlined in the document. Third Hardy Decl. ¶ 17. The FBI has therefore provided a description of this very short, two page record that explains why, after "further review," the FBI concluded "that no information could be segregated without negatively impacting the on-going proceedings." Third Hardy Decl. ¶ 19. To that end, the FBI's declaration makes clear that "the information that was provided to the FBI in these records is also withheld pursuant to FOIA Exemption (b)(7)(D)." Third Hardy Decl. ¶ 18. Thus, even if segregability were possible on this two-page intelligence report, it would be an academic exercise because the information in the document is exempt pursuant to another FOIA provision.

B. Exemptions 6 and 7(C).

Exemption 6 provides that an agency may withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Its more expansive law-enforcement counterpart, Exemption 7(C), permits withholding of "records or information compiled for law enforcement purposes" to

the extent that "production of such law enforcement records . . . *could reasonably be expected* to constitute an *unwarranted* invasion of personal privacy." *Id.* § 552(b)(7)(C) (emphasis added); *see Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 693 n.7 (9th Cir. 2012) (describing Exemption 7(C)'s broader protections). Both exceptions are often considered together. *See Yonemoto*, 686 F.3d at 693 n.7.[5]

Plaintiffs correctly note that there are three categories of documents at issue that the FBI is withholding pursuant to these exemptions. *See* Second MSJ at 18. Those categories are (1) third parties who provided information to the FBI; (2) third parties merely mentioned in the documents; and (3) local law enforcement officers.

1. Third Parties Who Provided Information to the FBI.

As noted in the Third Hardy Declaration, "[t]he FBI balanced the privacy interest of the third parties who provided information to the FBI" against the public interest in disclosure. Third Hardy Decl. ¶ 20(a). The FBI determined that "these individuals have a substantial interest in the nondisclosure of their identities and their connection with these particular incidents described in the records at issue, because of the potential for future retaliation, embarrassment, harassment, or unnecessary judgment." *Id.* Against those privacy interests, the FBI evaluated the substance of the documents and concluded that "[t]here is no basis on the face of the records at issue to determine that these names and/or identifying information bear in any way upon the FBI's performance of its statutory duties, or contribute significantly to the public understanding of its operations or activities." *Id.*

Plaintiffs still claim that the FBI's declaration is too conclusory by latching-on to the fact that the FBI merely cited "the potential" for harassment or retaliation. Second MSJ at 18. The FBI's declarant, however, is not clairvoyant; he cannot predict the future with certainty. What the FBI has done, however, is evaluate the privacy interests of the individuals who provided information to the FBI in light of "their connection with these particular incidents described in the records" and, on that basis, concluded that a real and concrete potential exists for future

[5] Exemption 6 would apply even if this Court found that the FBI has failed to make an Exemption 7 threshold showing of a law-enforcement nexus.

harassment or retaliation. Third Hardy Decl. ¶ 20(a). Thus, the FBI has identified a real and concrete privacy interest that these individuals have in maintaining their confidentiality.

Against that privacy interest, Exemption 7(C) shields this information unless "the public interests in disclosing the *particular* information requested outweighs those privacy interests." *Yonemoto*, 686 F.3d at 694. For the public interest, plaintiffs once again dredge-up allegations that the FBI "investigat[ed]" the Occupy movement, *see* Second MSJ at 18, even though the FBI has repeatedly made clear that it has identified no "main" investigatory files regarding the Occupy movement. For that reason, plaintiffs' citation to *Rosenfeld* is once again inapposite. Plaintiffs describe *Rosenfeld* as standing for a generalized proposition that FOIA's public purpose is fulfilled by disclosing records that document FBI abuses, such as "whether and to what extent the FBI investigated individuals for participating in political protests, not federal criminal activity." Second MSJ at 18, quoting *Rosenfeld*, 57 F.3d at 812. The full quote from *Rosenfeld*, however, makes clear that the case is both unique and distinguishable on its facts:

> The public interest in this case is knowing whether and to what extent the FBI investigated individuals for participating in political protests, not federal criminal activity. Disclosing the names of the investigation subjects *would make it possible to compare the FBI's investigations to a roster of the [Free Speech Movement's] leadership.* Therefore, disclosing the names of investigation subjects promotes the public interest *of this FOIA request*.

Rosenfeld, 57 F.3d at 812 (emphasis added). First, plaintiffs' invocation of *Rosenfeld* is inappropriate because the language they cite involved the subjects of investigations; the withheld information here consists of the identities of people who provided information to the FBI. Second – and critical to the court's analysis – was the fact that the disclosure of the names was relevant because the names could be compared to an independent roster. Here, plaintiffs are just fishing for names. Third, the records at issue in *Rosenfeld* involved documents that were many years, if not decades, old. That fact also played an important role in the court's balancing of privacy interests. *See Rosenfeld*, 57 F.3d at 812-13.

Finally, and as noted in the Third Hardy Declaration, "the names and/or identifying information of these third parties who provided information to law enforcement in these records

is also withheld pursuant to FOIA Exemption (b)(7)(D)." Third Hardy Decl. ¶ 20(a).[6]

2. Third Persons Merely Mentioned.

There is a well-recognized strong interest in withholding the names of third parties merely mentioned in governmental records. *See, e.g., Gabel v. IRS*, 134 F.3d 377, 377 (9th Cir. 1998) (protecting third-party names in Department of Motor Vehicles computer printout included in plaintiff's IRS file); *Neely v. FBI*, 208 F.3d 461, 464 (4th Cir. 2000) (withholding names of third parties mentioned or interviewed in course of investigation). These privacy interests are "well-recognized and substantial" because being connected "with particular investigations" may lead to "future harassment, annoyance, or embarrassment." *Neeley*, 208 F.3d at 464-65; *see also Branch v. FBI*, 658 F. Supp. 204, 209 (D.D.C. 1987) ("It is generally recognized that the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.").

As described by the FBI, the third parties merely mentioned appear in these documents "by mere happenstance." Third Hardy Decl. ¶ 20(b). "In balancing the privacy interest of these third parties merely mentioned in the records at issue, the FBI considered the minimum and indirect participation of these individuals." *Id.* The FBI balanced these individuals' substantial privacy interest against the public interest, which the FBI concluded was "minimal to nonexistent, since release of the identities of these individuals *will have no impact whatsoever in the public understanding of neither the FBI operations, nor shed any light into the FBI's performance of its statutory duties*." *Id.* (emphasis added).

Plaintiffs make the same argument regarding third parties merely mentioned as they do to informants. They do not cite any public interest in knowing the identities of these individuals,

[6] Plaintiffs have abandoned the argument that, because this information is also being withheld pursuant to Exemption 7(D), Exemptions 6 and 7(C) are inapplicable. That is for good reason – courts routinely uphold the application of Exemption 7(C) to informant-related information. *See, e.g., Schiffer v. FBI*, 78 F.3d 1405, 1410 (9th Cir. 1996) (protecting pursuant to Exemption 7(C) names of persons who provided information to FBI). To that end, the Ninth Circuit has explicitly noted that courts need not "reach the issue whether the witnesses who provided information to the FBI are 'confidential informants'" under Exemption 7(D) if Exemption 7(C) applies. *See Schiffer*, 78 F.3d at 1408.

other than the assertion that "there is a strong public interest in learning *whether* the FBI systematically sought to acquire information about Occupy leaders and activists." Second MSJ at 19 (emphasis added). Plaintiffs, however, have not identified or defined who these "leaders and activists" are, thus making their point moot. *See Rosenfeld*, 57 F.3d at 812 (discussing interest in disclosure of names where there was a roster of names to compare against). Moreover – and not withstanding plaintiffs' repeated assertions to the contrary – there is no evidence to support plaintiffs' implication that the FBI was systematically attempting to acquire information about Occupy. To the contrary, plaintiffs' use of the term "whether" indicates that this is nothing more than a fishing expedition. *See* Second MSJ at 19. Plaintiffs' "[m]ere speculation about hypothetical public benefits . . . cannot outweigh a demonstrably significant invasion of privacy." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 179 (1991) (Exemption 6); *see also NARA v. Favish*, 541 U.S. 157, 173-75 (2004) (holding that requester who asserts a government misconduct "public interest" must produce evidence that would be deemed believable by a "reasonable person" for there to exist a "counterweight on the FOIA scale for the court to balance against the cognizable privacy interests in the requested records"); *Schiffer*, 78 F.3d at 1410 (finding "little to no" public interest in disclosure of names when requester made unsubstantiated claim that FBI's decision to investigate him had been affected by "undue influence"); *Quiñon v. FBI*, 86 F.3d 1222, 1231 (D.C. Cir. 1996) (absent evidence FBI engaged in wrongdoing, public interest is "insubstantial").

3. Local Law Enforcement.

The third category of information withheld are the names of local law enforcement officials identified in the records. As the FBI has put it in the Third Hardy Declaration, "[t]he FBI balanced the privacy interest of the local law enforcement individuals in the records at issue and determined that they have a serious well recognized privacy interest in nondisclosure or [sic] their identities which is not outweighed by any public interest in disclosure." Third Hardy Decl. ¶ 20(c). The FBI balanced that interest against the "negligible" public interest in the identity of these officers:

> Releasing the names of these officers sheds no light on the FBI's performance of its statutory duties. The critical fact in the public interest balance is FBI coordination with state and local departments. The names of those departments have been released. Correspondingly, plaintiffs have not articulated any countervailing public interest, nor have there been any allegations of agency corruption or illegality that would outweigh the privacy interest at issue. Finally, allegations of publicity of some of these incidents in the news media does not necessarily render nonexistent the privacy interests of the individuals mentioned in these records in the actual context of investigatory records.

Third Hardy Decl. ¶ 20(c).

Plaintiffs do not offer any public interest justification in releasing the names of local law enforcement officials. *See* Second MSJ at 19. That, alone, should resolve the matter. *See Nix v. United States*, 572 F.2d 998, 1006 (4th Cir. 1978) ("One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives."); *Halpern v. FBI*, 181 F.3d 279, 296-97 (2d Cir. 1999) (protecting identities of nonfederal law enforcement officers); *Jones v. FBI*, 41 F.3d 238, 246 (6th Cir. 1994) (protecting names of federal, state, and local law enforcement personnel).

Plaintiffs' one-sentence argument regarding local law enforcement officers simply asserts that, in *Lissner v. United States Customs Service*, 241 F.3d 1220 (9th Cir. 2001), "the Ninth Circuit rejected the applicability of this exemption to local law enforcement officers where, as here, the agency 'has made absolutely no showing' that disclosure would subject officers 'to danger, harassment, or embarrassment.'" Second MSJ at 19 (quoting *Lissner*, 241 F.3d at 1224). *That is an incorrect reading of the case.* In *Lissner*, the plaintiff sought records from the U.S. Customs Service regarding two local police officers who had been arrested, detained, and fined for smuggling steroids into the country. *Lissner*, 241 F.3d at 1221. Customs provided the names of the officers, but withheld general physical descriptions (such as height, weight, eye color, and ethnicity) of the officers. *Id.* at 1221-22. The court noted, as have the other courts cited above, "that individuals do not waive all privacy interests in information relating to them simply by taking an oath of public office." *Id.* at 1223. The court, however, conducted its own review of the documents, and found "nothing in the unredacted documents that is particularly personal."

Id. As for the language that plaintiffs cite, the court found that Customs "made absolutely no showing *that releasing a general physical description would subject either McColgan or Charles* to danger, harassment, or embarrassment." *Id.* at 1224 (emphasis added). In short, the identities of the people at issue in *Lissner* were not at issue; only their physical descriptions were. Moreover, and unlike here, the two law enforcement officials in *Lissner* were accused of wrongdoing.

Finally, plaintiffs make a few arguments that apply to all three categories of documents withheld pursuant to Exemption 7(C). First, they argue that there was extensive publicity regarding the Occupy movement. That is not enough; the Ninth Circuit has held that individuals do "not lose their statutory interest in privacy" pursuant to Exemption 7(C) "by reason of . . . earlier publicity." *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1047 (9th Cir. 1999). As the FBI has noted, it "has not publicized or released the names of any of the individuals whose identities have been withheld." Third Hardy Decl. ¶ 20. Moreover, "plaintiffs have provided no privacy waivers on behalf of any third party authorizing the FBI to disclose their identities." *Id.* To the extent these individuals are well-known to plaintiffs, they need only submit privacy waivers. Indeed, in the FOIA lawsuit involving a substantially similar FOIA request regarding the Occupy movement, plaintiffs provided such privacy waivers. *See Light v. Dep't of Justice*, ___ F. Supp. 2d ___, 2013 WL 3742496, at *10 (D.D.C. July 17, 2013) (noting that FBI agreed to re-process request after submission of nine privacy waivers). Tellingly, that court upheld the application of Exemptions 6 and 7(C) (as well as Exemption 7(D)), finding that the FBI "provided sufficient detailed information to support its application of" the exemptions. *Light*, 2013 WL 3742496, at *10.

C. Exemption 7(D).

The FBI has withheld material under Exemption 7(D), which permits the withholding or redacting of law enforcement records, the release of which "could reasonably be expected to disclose the identity of a confidential source . . . and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation . . . information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D). A

confidential source is one who "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993) (internal quotation and citation omitted). An implied assurance of confidentiality can be found "when circumstances such as the nature of the crime investigated and the witness' relation to it support an inference of confidentiality." *Landano*, 508 U.S. at 179, 181. In such circumstances, the government is entitled to a presumption of inferred confidentiality. *Id.* Unlike Exemption 7(C), Exemption 7(D) requires no balancing of public and private interests. *See Dow Jones & Co. v. U.S. Dep't of Justice*, 917 F.2d 571, 575-76 (D.C. Cir. 1990).

1. Express Assurance of Confidentiality.

The FBI has provided detailed facts in its declarations explaining why some sources were provided with express assurances of confidentiality. Plaintiffs, when confronted with those facts, chose to ignore them.

In the Supplemental Hardy Declaration, the FBI indicated that express assurances of confidentiality can be ascertained "from the face of the documents, which reflect that they contain information from a confidential human source." Supplemental Declaration of David M. Hardy (Dkt. No. 26-1, 02/15/13) ("Supp. Hardy Decl.") ¶ 17. This Court, however, asked for additional detail, noting that it was not clear to the Court why the face of the documents indicated express assurances of confidentiality were provided. *See* Order at 14. Mr. Hardy, when referring to "the face of the documents," was referring to the fact that the documents are Confidential Human Source Reporting Documents. Third Hardy Decl. ¶ 21. The FBI has now provided additional clarification in the Fourth Declaration of David M. Hardy, which is attached hereto. Specifically, there are four documents in which the FBI is asserting Exemption 7(D) for express assurances of confidentiality. Fourth Hardy Decl. ¶ 3. Three of those documents are entitled "CHS Reporting Document," in which a CHS stands for Confidential Human Source. *Id.* The fourth document is an Incident Summary and, while it is not entitled "CHS Reporting Document," it contains notations that say "CHS." *Id.* ¶ 4. Under the authority cited by plaintiffs, that is more than enough to justify an Exemption 7(D) withholding. *See* Second MSJ

at 20 (quoting *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 34 (D.C. Cir. 1998) (noting that "notations on the face of a withheld document" constitute probative evidence that source received express grant of confidentiality)).[7]

2. Implied Assurance of Confidentiality.

In order to demonstrate that an implied assurance of confidentiality was provided, the FBI must "describe[ ] circumstances that can provide a basis for inferring confidentiality." *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1063 (3d Cir. 1995). The FBI, in its Supplemental Declaration, noted that, "given the seriousness of the potential crime and the position of the sources," it is appropriate here to infer an implied assurance of confidentiality. Supp. Hardy Decl. ¶ 17; *see also* Hardy Decl. ¶ 67 (describing "[t]he sensitivity of the information, and the position of the sources, are such that it may be inferred that the information was provided with the expectation of confidentiality"); *id.* ("These sources provided valuable information that is detailed and singular in nature."). In further support of the exemption, the FBI has now noted that the sources it is seeking to protect "are *members of organized violent groups*" who "*come in contact with criminal elements* and share information that members of such elements believe is not intended for disclosure to law enforcement." Third Hardy Decl. ¶ 22 (emphasis added). Moreover, and as noted in the first declaration – but as emphasized in the Third Hardy Declaration – "[i]nformation provided by these sources is singular in nature due to their source closeness to criminal elements." Third Hardy Decl. ¶ 22. "With all certainty, these individuals will not share this information with any law enforcement agency if they are aware that their identities and the information they provided will be further disclosed." Third Hardy Decl. ¶ 22.

Plaintiffs criticize the additional detail that the FBI has provided as being insufficient because the FBI has failed to provide detail on how the groups are "organized" or "violent." Second MSJ at 20-21. The two cases that plaintiffs cite, however, do not require this level of

[7] Mr. Hardy, in his Third Declaration, also noted that "[o]nly established sources of the FBI receive source symbol numbers" and that "[t]he fact that a source symbol number is assigned to the sources at issue in this case is a clear indication of the confidentiality agreement between these sources and the FBI." Third Hardy Decl. ¶ 21. Plaintiffs quibble with that justification, *see* Second MSJ at 20, but in light of the additional clarity that the FBI has now provided in the Fourth Hardy Declaration, plaintiffs' arguments are irrelevant.

detail. In *United States Department of Justice v. Landano*, the Supreme Court rejected the government's position that all FBI sources could be presumed confidential pursuant to Exemption 7(D), except in those circumstances where there was specific evidence that the source had no interest in confidentiality. 508 U.S. 165, 174-75 (1993). In rejecting that blanket presumption, the Court noted that "the Government often can point to more narrowly defined circumstances" such as "the nature of the crime and the source's relation to it." *Id.* at 179. Here, the FBI has described the sources as being members of "organized violent groups" who "come in contact with criminal elements." Third Hardy Decl. ¶ 22. As for *Quiñon v. FBI*, "the only case-specific factor apparently relied upon by the district court" was the FBI's statement that the interviewees "were acquainted and/or had contact on a business, professional, and/or social level with one or more of the subjects of th[e] investigation." 86 F.3d 1222, 1231 (D.C. Cir. 1996). The court rejected mere "social or business association" as a basis for inferring confidentiality. *Id.* That is not the case here.

Finally, and if there is any remaining question as to the adequacy of the FBI's declarations, the government notes that the district court in *Light* upheld the application of Exemption 7(D) to sources who provided information to the FBI under implied assurances of confidentiality, noting that "the FBI has provided sufficient detailed information to support is application of Exemptions 6, 7(C), and 7(D)." *Light*, 2013 WL 3742496, at *10.[8]

D. Exemption 7(E)

Exemption 7(E) protects from disclosure information compiled for law enforcement purposes where release of the information "would disclose techniques and procedures for law enforcement investigations or prosecutions," or where it would "disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Congress intended that Exemption 7(E) protect from disclosure techniques and procedures used to prevent and protect against

[8] Plaintiffs also assert that the FBI has failed to demonstrate that the confidential source information is not segregable. The Third Hardy Declaration, however, reiterates that "[t]he FBI released to plaintiffs all reasonably segregable, non-exempt information." Third Hardy Decl. ¶ 24.

crimes as well as techniques and procedures used to investigate crimes after they have been committed. *See, e.g.*, *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 250-51 (D.C. Cir. 1993) (holding that portions of FBI manual describing patterns of violations, investigative techniques, and sources of information available to investigators were protected by Exemption 7(E)).

In the Third Hardy Declaration, the FBI has provided a substantially expanded justification for the application of Exemption 7(E). Specifically, Exemption 7(E) has been used to protect information that is not well known about the FBI's Guardian Threat Tracking System ("Guardian"). Third Hardy Decl. ¶ 23(a). "To reveal the characteristics and data that are collected and tracked using this system could allow offenders to circumvent discovery because the FBI will use the same or similar techniques and/or assistance to bring future investigations to successful conclusions." *Id.* In addition, Exemption 7(E) has been used to protect "the manner in which the FBI applies and analyzes" the information it collects "for use in its investigations and for intelligence purposes." Third Hardy Decl. ¶ 23(b). This "is not publicly known." *Id.* While the FBI has fully explained its mandate of collecting and analyzing information in order to detect and prevent terrorist attacks and other harm to the national security, "it has not disclosed the precise methods used in the collection and analysis of information." *Id.* "Such disclosures would enable subjects of FBI investigations to circumvent similar, currently used techniques" as it would "facilitate the accumulation of information by investigative subjects regarding the circumstances under which the specific techniques can be used or requested and the usefulness of the information obtained." *Id.* In short, release of this type of information undoubtedly "would enable criminals, terrorists, and spies to educate themselves . . . [and] would improve the ability of such individuals to take countermeasures to circumvent the effectiveness of the techniques and to continue to violate the law and engage in intelligence, terrorist, and criminal activities." *Id.*

Plaintiffs respond to this point by arguing that "[t]he criteria used by the federal government for classifying activities as 'suspicious' and thus subject to tracking in federal databases are publicly available." Second MSJ at 22. Plaintiffs similarly argue that "[t]he process for collecting, vetting, and disseminating Suspicious Activity Reports is also public"

because the public knows that information is reported, passed along to "a fusion center" or "the FBI," and then is submitted to various databases. Second MSJ at 22. This is a red herring. The FBI is not seeking to protect the publicly available criteria for classifying suspicious activities, the fact that the government collects information, the existence of "fusion centers," the fact that the FBI analyzes data, or that information is submitted to various databases. As set forth in the Third Hardy Declaration, the information the FBI is withholding is not publicly known; revealing "the characteristics and data" – as opposed to the general existence of a system for collecting those data – would enable circumvention of the law.

In addition, the Third Hardy Declaration described the application of Exemption 7(E) to withhold law enforcement techniques used to conduct national security and intelligence investigations as well as file numbers and the identity of FBI units. *See* Third Hardy Declaration ¶ 23(c); *id.* ¶ 23(d). As to techniques, "[r]elease of the details of specific law enforcement techniques utilized by the FBI to conduct national security and intelligence investigations could aid individuals in circumventing the law and promoting the invention of countermeasures which would divert the FBI's investigative methods from its intended target." Third Hardy Decl. ¶ 23(c). As to file numbers and FBI units, the Third Hardy Declaration describes the harm that will occur if this information is disclosed. *See* Third Hardy Decl. ¶¶ 23(d), (e).

Plaintiffs cite *Rosenfeld* to argue that the FBI cannot shield the specifics of these techniques pursuant to Exemption 7(E). *See* Second MSJ at 23. It is true that "Exemption 7(E) only exempts investigative techniques not generally known to the public." *Rosenfeld*, 57 F.3d at 815. However, the government may withhold detailed information regarding a publicly known technique where the public disclosure did not provide "technical analysis of the techniques and procedures used to conduct law enforcement investigations." *See Bowen v. U.S. Food & Drug Admin.*, 925 F.2d 1225, 1228–29 (9th Cir. 1991); *see also Asian Law Caucus v. U.S. Dep't of Homeland Sec.*, No. 08-00842, 2008 WL 5047839, at *4 (N.D. Cal. Nov. 24, 2008) ("The public does not already have routine and general knowledge about any investigative techniques relating to watchlists. The public merely knows about the existence of watchlists. Knowing about the general existence of government watchlists does not make further detailed information about the

watchlists routine and generally known."); *Barnard v. Dep't of Homeland Security*, 598 F. Supp. 2d 1, 23 (D.D.C. 2009) (recognizing that "[t]here is no principle . . . that requires an agency to release all details concerning those and similar techniques simply because some aspects of them are known to the public.").

Finally, this Court can look to the *Light* decision for guidance regarding the application of Exemption 7(E). In that Occupy-related case, the court concluded that the FBI "has adequately explained the nature of the records it withheld and its reasons for doing so." *Light*, 2013 WL 3742496, at *11. Specifically, the court noted that that "[t]he FBI withheld records that could disclose procedures and techniques it uses in national security investigations" as well as "file numbers . . . because such numbers might reveal investigative interests and priorities." *Id.* The *Light* court found that the FBI properly withheld "the location, identity, and expertise of the investigating FBI units, as this could allow an individual to avoid or circumvent those locations and those activities that are targets of investigation." *Id.* In sum, the court concluded that release of this and other information "would enable criminals to discover techniques and procedures and the effectiveness of law enforcement would suffer." *Id.*

III. The FBI Properly Withheld Information Pursuant to Exemption 1.

FOIA Exemption 1 protects records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552 (b)(1). The FBI has already provided two public declarations describing the application of Exemption 1 here. Those declarations indicated that the information being withheld relates to information about, and provided by, a "classified intelligence source." Third Hardy Decl. ¶ 9 (quoting Hardy Decl. ¶ 41). "The disclosure of information about this source, the symbol and file numbers associated with this source, or the content of the information provided, would compromise this classified source and trigger myriad national security harms." Third Hardy Decl. ¶ 9.

Mr. Hardy, in his capacity as an Original Classification Authority, has "determined that a more detailed discussion about this source on the public record to address the Court's concerns

would divulge the very information that is exempt and potentially compromise the source." Third Hardy Decl. ¶ 10. Accordingly, the FBI submitted a more detailed explanation in camera, ex parte. *See* Notice of Lodging of In-Camera, Ex-Parte Declaration of David M. Hardy, ECF No. 35 (07/31/2013). The FBI relies upon that declaration, as well as the previously submitted declarations, to justify its Exemption 1 withholding.

IV. If This Court Has Any Remaining Questions Regarding Withholdings or Segregability, It Should Review Records *In-Camera*.

At this stage in the litigation, the FBI has provided as detailed declarations as it can explaining the application of FOIA exemptions to these records, including why information being withheld cannot be further segregated. To the extent this Court has any remaining questions regarding the FOIA exemptions or segregability, it should order an in-camera review of the withheld documents.[9]

In-camera review is appropriate if "'the government has submitted as detailed public affidavits and testimony as possible.'" *Wiener v. FBI*, 943 F.2d 972, 979 (9th Cir. 1991) (citation omitted). Indeed, the D.C. Circuit has held that it is error not to review documents *in camera* where "the agency affidavits are insufficiently detailed to permit meaningful review of exemption claims," "the number of withheld documents is relatively small," and "the dispute turns on the contents of the withheld documents, and not the parties' interpretation of those documents." *Spirko v. United States Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998) (internal quotation marks, citation omitted). All of these factors weigh in favor of *in camera* review. The FBI has now submitted four declarations in support of the exemptions it is claiming (and does not believe that it can provide any additional detail in those declarations without revealing the substance of the withholdings), there are only forty (40) pages of documents that would need to

[9] In making this argument, the FBI does not concede that its declarations are inadequate, and refers this Court to *Light*, in which the D.C. District Court upheld not only the FBI's exemptions, but also its segregability analysis. *See Light*, 2013 WL 3742496, at *12 (finding FBI made showing that it had properly segregated information). To avoid a conflicting result with *Light*, and for the reasons set forth below, the government offers in-camera review only to the extent the Court harbors any remaining doubts about the applicability of FOIA exemptions to the records at issue, or to confirm that a proper segregability analysis has been conducted.

be reviewed, and the parties' dispute turns on the contents of the documents at issue.

CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' second motion for summary judgment and grant defendant's second motion for summary judgment. In the alternative, this Court should conduct an *in-camera* review of the records at issue.

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Respectfully submitted,

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