IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORGANIZATION FOR COMPETITIVE MARKETS,

Plaintiff,

vs.

OFFICE OF INSPECTOR GENERAL, UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant,

and

NATIONAL CATTLEMEN'S BEEF ASSOCIATION,

Defendant-Intervenor

Civil Action No. 1:14-cv-1902-EGS

DEFENDANT-INTERVENOR'S COMBINED OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT (ECF NO. 90) AND REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT-INTERVENOR'S MOTION FOR SUMMARY JUDGMENT (ECF NO. 91)

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Through its Freedom of Information Act ("FOIA") lawsuit brought against the United States Department of Agriculture's ("USDA") Office of Inspector General ("USDA OIG" or "OIG"), Plaintiff Organization for Competitive Markets ("Plaintiff" or "OCM") asserts greater rights of access to government records than are recognized under FOIA. Thus, in its purported Cross-Motion for Summary Judgment (ECF No. 90) and Opposition to USDA's and Defendant-Intervenor's Motions for Summary Judgment (ECF No. 91),[1] OCM argues that OIG's audit of the Beef Checkoff program was inadequate and mischaracterizes the federal Beef Checkoff program—as "the *federally funded* beef checkoff program" (ECF No. 90 at 9),[2] and as "relating to the use of *federal funds*" (ECF No. 91 at 40) (emphasis added in each quote)—in an effort to convince this Court that what is at issue here are "taxpayer dollars" for which OCM and the public have a supposed enhanced special interest in obtaining the records of a private entity, Defendant-Intervenor National Cattlemen's Beef Association ("NCBA"), through this FOIA action.

OCM's efforts to misdirect the Court are both irrelevant and based on a false premise. FOIA provides the protections it provides, and NCBA has no less protection under Exemption 4 regardless of whether taxpayer dollars are involved. Beyond that, contrary to OCM's efforts to mislead the Court, no federal taxpayer dollars are at issue here. All of the funds at issue here result from assessments paid by individual beef producers and importers, not taxes paid by individual taxpayers at large. Even the costs USDA incurs to administer and oversee the Beef Checkoff program are reimbursed from these same assessments.

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[1] OCM's Cross-Motion for Summary Judgment (ECF No. 90) and Opposition to Defendant's and Defendant-Intervenor's Motions for Summary Judgment (ECF No. 91) are identical documents, except for the first page of the Cross-Motion for Summary Judgment.

[2] Unless otherwise noted, all page citations for ECF docket entries are to the pagination contained in the ECF filing headers.

OCM completely ignores its intense competition with NCBA, failing to even address this point in its Opposition to NCBA's and USDA's Motions for Summary Judgment. *See generally* OCM Opposition to Defendant's and Defendant-Intervenor's Motions for Summary Judgment ("Opposition"), ECF No. 91. Instead, OCM incorrectly claims that NCBA raises this issue only in an effort to "disparage" OCM's legitimacy as a FOIA requester. *See* Opposition at 36 n.15. To the contrary, NCBA does not seek to "disparage" OCM or limit its right to make a FOIA request for government records, nor does NCBA detail OCM's efforts to "destroy" NCBA and to "take the checkoff contract away" from NCBA for the purpose of implying that OCM is not a qualified FOIA requestor. Rather, NCBA has described to the Court OCM's regular, intense, and specific proclamations of its actual competition with NCBA as further evidence of the existence of the competition NCBA faces generally, but which OCM denies even exists. It is because of such intense competition with OCM and other Competitor Entities[3] that NCBA would likely suffer substantial competitive harm if the NCBA Exempted Records[4] were released,

As NCBA has shown in its Motion for Summary Judgment, OCM has made clear in its public statements (though oddly absent from its filings with this Court) that it seeks to cause the very competitive harm against NCBA that OCM's Opposition claims would not occur by making public NCBA's "raw financial information" (OCM's words). Even if OCM never competed for annual contracts of the Beef Promotion Operating Committee ("BPOC"), OCM has made clear

[3] Where not otherwise defined, capitalized terms used are as defined by NCBA's Memorandum in Support of its Motion for Summary Judgment. *See* ECF No. 87. The "Competitor Entities" are defined to include American Farm Bureau Foundation for Agriculture, American National CattleWomen, Meat Importers Council of America, National Livestock Producers Association, North American Meat Institute, North American Meat Institute Foundation for Meat and Poultry Research and Education, Cattlemen's Beef Board, and the U.S. Meat Export Federation, as well as OCM. *Id.* at 24 n.4; Third Supplemental Evans Decl. ¶ 11.

[4] "NCBA Exempted Records" is defined in NCBA's Memorandum in Support of its Motion for Summary Judgment. ECF No. 87 at 13, 30-33.

that its "first order of business" is to take the "beef checkoff contract away from NCBA," to "take [NCBA's] money away," and to convince NCBA members to join OCM. OCM Press Releases, Newsletters, and Website, ECF No. 87-7 at A15, A24, A35-A36, A69. To OCM, exploiting the NCBA Exempted Records is "absolutely essential" to eliminating and destroying NCBA. *Id.* at A69. Thus, everywhere but in its filings with the Court, OCM recognizes that the NCBA Exempted Records could be used by the Competitor Entities (including OCM) to compete with, and cause substantial competitive harm to NCBA in connection with the annual BPOC contracting process.

The annual BPOC contract bidding and award process is not, as OCM contends, controlled by NCBA through a supposed "structural monopoly." In the past twelve fiscal years, NCBA's total amount and percentage share of BPOC contracts has decreased, the number of Competitor Entities has increased, and Federation-elected BPOC members do not always vote with the unanimity that OCM claims constitutes a "structural monopoly." *See* February 25, 2019 Third Supplemental Evans Declaration ("Third Supplemental Evans Decl."), attached hereto ¶ 26. Contrary to OCM's charge, the Federation-elected BPOC members do not (and cannot) act in concert to prevent BPOC contract awards to other Competitor Entities. *Id.* ¶¶ 24, 31.

The detailed record and myriad undisputed facts plainly establish that NCBA faces actual competition and the release of its sensitive and confidential business information would cause NCBA substantial competitive harm. Contrary to OCM's contention that claims of competitive harm are not specific, USDA, NCBA, and three of the Competitor Entities submitted over four hundred pages of detailed declarations and *Vaughn* Indexes with their Motions for Summary

Judgment that pertain to Exemption 4.[5]

OCM has no right to NCBA's confidential and sensitive business information that is protected from disclosure by Exemption 4. It is neither the purpose for nor the role of FOIA to "satisfy[ ] curiosity about the internal decisions of private companies . . . ." *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 928 (D.C. Cir. 2011). Nor is OCM's attempt to obtain NCBA's confidential business information germane to furthering the legitimate, but limited, purpose of FOIA of determining "*what the government is up to*." *McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1193 (D.C. Cir. 2004) (emphasis added) (citation omitted).

For the reasons that follow, and based upon the specific, detailed, and extensive declarations and *Vaughn* Indexes previously submitted in this case, OCM's Cross-Motion for Summary Judgment should be denied, and NCBA's Motion for Summary Judgment (ECF No. 87) should be granted.

I. OCM's Purported Cross-Motion Summary Judgment (ECF No. 90) Must Be Denied Because it Fails to Comply with the Federal Rules of Civil Procedure, this Court's Standing Order, and Case Law.

The Federal Rules of Civil Procedure provide, in relevant part, that "[t]he court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact . . . ." Fed. R. Civ. P. 56(a). The Rule goes on to set out the procedure for asserting there is no undisputed material fact:

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the

[5] In all, including OIG's *Vaughn* Indexes and declarations, USDA and NCBA filed nearly 750 pages of *Vaughn* Indexes and supporting declarations with their Motions for Summary Judgment.

> materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1).

OCM has not provided a Statement of Material Facts Not in Dispute to accompany its Cross-Motion for Summary Judgment, as required by the Federal Rules and this Court's Standing Order. *See* Fed. R. Civ. P. 56; Standing Order, ECF No. 60 at 8-10 ("[T]he moving party shall include a separate document entitled Statement of Material Facts Not in Dispute."). Therefore, the Court has no basis upon which to grant OCM summary judgment as a matter of law.

Instead, OCM simply denies, without any support, many of the Statements of Material Facts Not in Dispute offered by NCBA and USDA. Even this, however, is inadequate and contrary to the requirements of this Court's Standing Order. The Standing Order requires that in a counter-statement of disputed facts, if claimed facts are denied, there must be "appropriate citations to the record." ECF No. 60 at 8-10. In violation of this requirement, OCM's responses do not contain any citations to the record; instead, they repeatedly and generally assert: "Denied. *See* OCM's Memo in Support of Cross-Motion for Summary Judgment." *See, e.g.*, ECF No. 90-4 ¶¶ 4, 24, 26, 27, 28, 32, 33, 35, 36. This is not a "citation to the record," much less an "appropriate" one. Nor is there even a specific page citation to OCM's "Memo in Support of Cross-Motion for Summary Judgment." Since they are not meaningfully contested, NCBA's and USDA's Statements of Material Facts Not in Dispute should be accepted. As this Court's Standing Order provides, "failure to comply with [these requirements] may result in . . . the Court concluding that facts are not properly controverted and thus undisputed." ECF No. 60 at 8-10.

OCM does offer six Counter-Statements of Fact, all of which pertain to specific, non-material matters pertaining to the operations of NCBA and the BPOC. *See* ECF No. 90-4 at 9. None of these counter-statements address the fundamental issues underlying this or any other FOIA action, such that the Court could grant summary judgment on their bases, even all were undisputed. *See* NCBA Reply to OCM's Counter-Statement of Disputed Facts, attached hereto.

OCM's Cross-Motion for Summary Judgment should be denied. A motion for summary judgment is insufficient if it "makes few factual allegations and cites to no particular parts of materials in the record in support thereof as Fed. R. Civ. P. 56(c)(1)(A) requires." *Collington v. District of Columbia*, 828 F. Supp. 2d 210, 212 n.5 (D.D.C. 2011) (denying motion for summary judgment for failure to comply with Fed. R. Civ. P. 56(c)(1)(A)); *c.f. Angelex, Ltd. v. United States*, 907 F.3d 612, 620 (D.C. Cir. 2018) (citing to Fed. R. Civ. P. 56(c) for the requirement that facts offered without support by "affidavits or declarations" are insufficient for purposes of prevailing at summary judgment under Fed. R. Civ. P. 56).

The denial of OCM's Cross-Motion for Summary Judgment on these grounds should be with prejudice.[6] As OCM notes, this case is entering its fifth year. The parties have all expended a significant amount of time and resources in order for USDA to finally produce to OCM a full record of responsive records and *Vaughn* Indexes. Nonetheless, the process of moving for summary judgment, by all parties, has been underway for well over two years, with admitted starts and stops. If OCM had factual assertions it wished to make, it has had plenty of time and opportunity to develop and prepare them. OCM could have prepared substantive

[6] Should the Court not deny OCM's Cross-Motion for Summary Judgment because of OCM's failure to comply with the Federal Rules and this Court's Standing Order, NCBA incorporates by reference the remainder of this filing as opposition to OCM's Cross-Motion for Summary Judgment, given that OCM's Cross-Motion for Summary Judgment and Opposition are identical in substance.

declarations and collected evidence to support its inevitable Cross-Motion for Summary Judgment. OCM failed to do so. OCM should not get another bite at this particular apple, with all of the inevitable delays and prejudice that would now result, and this Court should deny OCM's Cross-Motion for Summary Judgment and proceed with concluding this case once and for all.[7]

II. NCBA is Entitled to Summary Judgment Because OCM Has Failed to Demonstrate That Exemption 4 Does Not Apply to the NCBA Exempted Records.

A. OCM Does Not Dispute that the NCBA Records are "From a Person" and are "Privileged or Confidential."

Exemption 4 of FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). OCM does not dispute that the NCBA Exempted Records are "from a person." Nor does OCM dispute that the NCBA Exempted Records are "commercial or financial information." Furthermore, as explained throughout, OCM readily admits that the NCBA Exempted Records contain NCBA's "raw financial information." *See* ECF No. 87-7 at A15,

[7] Such a result is consistent with federal district courts viewing with disfavor attempts by movants to file second or successive motions for summary judgment. *See, e.g.*, *Wannall v. Honeywell Int'l, Inc.*, 292 F.R.D. 26, 30-31 (D.D.C. 2013) (noting that where "litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again," particularly for a "successive summary judgment motion that presents no new material facts or legal arguments") (citation omitted), *aff'd*, 775 F.3d 425 (D.C. Cir. 2014); *Middlegate Dev., LLP v. Beede*, No. 10-0565, 2011 WL 3475474, at *11 n.26 (S.D. Ala. Aug. 9, 2011) (noting it inappropriate "to allow litigants to treat their initial summary judgment motions as a 'dry run' which they would have an opportunity to redo or supplement . . . later on to correct any deficiencies identified by opposing counsel"); *United States v. Fisherman's Fleet, Inc.*, No. 06–11696, 2008 WL 687028, at *1 (D. Mass. Mar. 12, 2008) (denying leave to file second motion for summary judgment where movants "had a full opportunity on their first motion to advance any and all" bases for summary judgment); *Doherty v. Portland Cmty. Coll.*, No. CV–99–1375, 2000 WL 33200560, at *3 (D. Or. Nov. 15, 2000) ("[M]uch of the value of summary judgment would be lost if parties were to successively raise new theories" in subsequent summary judgment motions.). While multiple summary judgment may be appropriate by a defendant agency movant in a FOIA case when, for example, the agency is ordered to reprocess records incident to a court's summary judgment decision, *see Wisdom v. United States Trustee Program*, 266 F. Supp. 3d 93 (D.D.C. 2017), that is not the case here.

A24, A57, A99, A133.

In its Opposition, OCM conjures up straw man arguments that bear no relationship to the criteria upon which Exemption 4 is based. OCM claims that its FOIA Request "has not sought proprietary business models or secret methods for revolutionizing food promotion." Opposition at 29. NCBA, however, have never sought Exemption 4 protection over "secret methods for revolutionizing food promotion." Moreover, there is nothing in Exemption 4 that limits its protections only to "proprietary business models or secret methods for revolutionizing food promotion." NCBA claims Exemption 4 protection over the NCBA Exempted Records because they contain NCBA's confidential and sensitive business information, which, even OCM describes as NCBA's "raw financial information." ECF No. 87-7 at A15, A24, A57, A99, A133.

Instead, OCM asserts a novel theory, claiming that "FOIA case law makes clear that financial records that are necessarily required by government agencies in order to satisfy their regulatory obligations, such as audits by Inspector General's offices are generally not exempt from disclosure." Opposition at 9. Not surprisingly, OCM's Opposition fails to cite to a single case or any other authority in support of this supposed sweeping carve-out to Exemption 4.

To the contrary, "as a matter basic to our free enterprise system," Exemption 4 is designed to protect confidential and financial information of private business entities. *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 52 (D.C. Cir. 1981) (citations omitted). The NCBA Exempted Records include such commercial and financial information.[8] *See, e.g.*,

[8] As explained in NCBA's Memorandum in Support of its Motion for Summary Judgment. ECF No. 87 at 13, 30-33, *id.* at 32-33, the NCBA Exempted Records include:

- Detailed accounting ledgers from NCBA's accounting software and journal entries that include NCBA payroll, employee benefits, operating expenses, rent, contract payment data, building and facilities maintenance, legal and accounting fees, and other confidential business information. *See e.g.*, First Evans Decl. ¶ 60; Supplemental Evans Decl. ¶¶ 27, 28; Second Supplemental Evans. Decl. ¶¶ 60,

November 12, 2018 Second Supplemental Declaration of Douglas L. Evans ("Second Supplemental Evans Decl."), ECF No. 87-4 ¶¶ 198, 199, 201, 207; March 21, 2017 Declaration of Douglas L. Evans ("First Evans Decl."), ECF No. 87-5 ¶¶ 20, 22; *see generally* November 13, 2018 Declaration of Mark R. Brook, USDA AMS FOIA Officer ("Brook Decl."), ECF No. 88-7 ¶ 87-102.

Although not willing to admit it to this Court, OCM elsewhere describes the commercial and financial nature of the NCBA Exempted Records by stating in its many media barrages that the NCBA Exempted Records contain NCBA's "raw financial data," "raw financial information," and "financial records." ECF No. 87-7 at A15, A24, A57, A99, A133. OCM's efforts and bases to both narrow the range of records subject to Exemption 4 and to create a giant exception to Exemption 4 for materials reviewed by the OIG lack any support in the record and OCM offers none. OCM's claims should be rejected out-of-hand.

61, 62, 67, 68, 69, 70, 192, 193; Brook Decl. ¶ 97.

- Documents on NCBA's internal business operations, confidential tax advice and state tax filings, budgets, internal programs, compliance, and strategic goals. *See, e.g.*, First Evans Decl. ¶¶ 34, 36, 41, 45-50, 52, 55-58; Supplemental Evans Decl. ¶ 28; Second Supplemental Evans Decl. ¶¶ 77, 78, 80, 207; Brook Decl. ¶ 97.

- Documents pertaining to NCBA's contractors, contractual agreements, business contracts and contacts with third-parties containing proprietary information, identity, pricing, and performance obligations. *See, e.g.*, First Evans Decl. ¶¶ 35, 37, 44, 54; Supplemental Evans Decl. ¶¶ 25, 26; Second Supplemental Evans Decl. ¶¶ 121, 163, 172, 178; Brook Decl. ¶ 97.

- Administrative documents pertaining to operating expenses (phone, internet, shipping and delivery services), employee payroll, employee benefits, employee expense requests, employee insurance, and other sensitive employee information. *See, e.g.*, First Evans Decl. ¶¶ 40, 42, 43, 45, 59; Supplemental Evans Decl. ¶¶ 25, 26; Second Supplemental Evans Decl. ¶¶ 71, 72, 99, 103, 104, 109, 111, 113; Brook Decl. ¶ 97.

B. The NCBA Records Were Provided to OIG by NCBA Voluntarily.

Under *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) and *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), if records subject to a FOIA request have been provided to the government voluntarily, Exemption 4 applies if the records contain confidential business information not normally disclosed to the public. *Critical Mass*, 975 F.2d at 873 (citations omitted). Despite the sworn statements of NCBA and USDA officials that all records provided by NCBA were provided voluntarily, OCM argues that "[c]heckoff records provided to OIG for program audit are lawfully compelled," because of the "Beef Act's requirement that complete accounting for all checkoff funds be kept and made available to the Secretary." Opposition at 30, 32.

In making such an argument, OCM confuses the authority of USDA's Agricultural Marketing Service ("USDA AMS" or "AMS") and the actions of USDA OIG in this matter. It is correct that under the Beef Act and the Beef Order, NCBA is required as a BPOC contractor to maintain certain records and to make them available to AMS upon request. *See* 7 C.F.R. § 1260.202; Third Supplemental Evans Decl. ¶ 10. AMS, however, did not request the NCBA Records from NCBA under the Beef Act or the Beef Order. The NCBA Records were requested by OIG, and NCBA voluntarily provided OIG the NCBA Records. Brook Decl. ¶ 93. In fact, "AMS determined that all Beef Checkoff Contractor information redacted pursuant to Exemption 4 was voluntarily submitted to OIG by the Beef Checkoff Contractor in direct response to OIG's request for the information." *Id.*; *see also* Second Supplemental Evans Decl. ¶ 13 (noting that there are a very small number of records that did not originate with NCBA and that were not submitted by NCBA to OIG).

AMS received the NCBA Records only for the purposes of responding to the underlying OCM FOIA Request, as OIG referred these records to AMS for evaluation (and AMS,

subsequently, provided them to NCBA for its recommendation as to whether Exemption 4 applies). Brook Decl. ¶¶ 5-12. The NCBA Records did not come into OIG's possession as a result of the requirements of the Beef Act and Beef Order. *See* Second Supplemental Evans Decl. ¶¶ 9-14; Brook Decl. ¶¶ 5-12. Therefore, the entire premise of OCM's argument that the records were not provided voluntarily to OIG because the records were required to be made available, if requested, to AMS under the Beef Act and Beef Order is without merit.

The NCBA Exempted Records do not lose the status of being voluntarily provided just because OIG *could* have sought copies of them, but did not. OCM cites to *Frank LLP v. Consumer Fin. Protec. Bureau*, 288 F. Supp. 3d 46, 61 (D.D.C. 2017), arguing that "the relevant question is whether the [government] has actual legal authority to obtain the information that was produced." Opposition at 31-32. However, OCM fails to explain that in *Frank*, unlike here, the agency exercised its compulsory authority by issuing civil investigative demands to third parties. *Frank*, 288 F. Supp. 3d at 60. Indeed, as NCBA previously cited (but which OCM did not address in its Opposition), an agency "must also exercise [that actual legal authority] in order for a submission to be deemed mandatory." *Parker v. Bureau of Land Mgmt.*, 141 F. Supp. 2d 71, 78 n.6 (D.D.C. 2001).

Here, the record is clear that USDA OIG did not exercise any such "actual legal authority" in connection with the NCBA Records at issue. *Parker*, 141 F. Supp. 2d at 78 n.6; Brook Decl. ¶¶ 60, 93; Supplemental Evans Decl. ¶¶ 4-8; First Evans Decl. ¶¶ 11-14; Second Supplemental Evans Decl. ¶¶ 9-14. OCM fails to point to any record evidence disputing the statements by USDA, as well as NCBA, that all NCBA information "was voluntarily submitted to OIG by [NCBA] in direct response to OIG's request for the information." Brook Decl. ¶¶ 60, 93; Second Supplemental Evans Decl. ¶¶ 9-14. Here, unlike in *Frank*, OIG did not take any

steps to compel NCBA to provide the NCBA Records for the OIG audit. Brook Decl. ¶¶ 60, 93; Supplemental Evans Decl. ¶¶ 4-8; First Evans Decl. ¶¶ 11-14; Second Supplemental Evans Decl. ¶¶ 9-14.

Accordingly, the NCBA Exempted Records are protected from disclosure under Exemption 4 under the criteria applied by this Circuit. *See Critical Mass*, 975 F.2d at 878-79. First, as explained above and as detailed in the declarations from NCBA and USDA, NCBA voluntarily provided to OIG staff certain of its information to assist OIG in its two audits of the Cattlemen's Beef Board ("Beef Board"). Brook Decl. ¶ 60; Second Supplemental Evans Decl. ¶¶ 13, 58. NCBA, however, was not the subject of the OIG audits and OIG neither compelled, nor sought to compel, NCBA to provide these records. Second Supplemental Evans Decl. ¶ 12. Second, the NCBA Exempted Records contain sensitive and confidential NCBA business records that are not customarily made available by NCBA to the general public, nor are they the kinds of records customarily made public by any private business entity. Second Supplemental Evans Decl. ¶¶ 15-16; Supplemental Evans Decl. ¶ 8. NCBA has never publicly disclosed such confidential business information, ledger books, accounting records, or employee personnel information. First Evans Decl. ¶¶ 23-26.

OCM does not meaningfully dispute NCBA's argument or its relevant Statement of Undisputed Facts. Instead, in OCM's "Counter-Statement[s] of Disputed Facts" (ECF No. 90-3 at 26, ECF No. 90-4 at 5), OCM simply summarily "denie[s] that records were submitted voluntarily (as the term is construed for Exemption 4)" without providing any appropriate citation to the record, as required by this Court's Standing Order.[9] *See* ECF No. 60 at 8-10.

[9] For many entries where OCM has denied the statements in USDA's or NCBA's Statement of Material Facts as to Which There is No Genuine Dispute (ECF Nos. 87-1 [NCBA], 88-2 [USDA]), OCM's "Counter-Statement[s] of Disputed Facts" (ECF Nos. 90-3, 90-4) fail to

Such unsubstantiated denials are insufficient to rebut the detailed declarations and record in this case that the NCBA Records were voluntarily provided by NCBA to OIG and that the NCBA Exempted Records are not customarily made public. OCM's generic denials, without any citations to particular parts of the record, do not rebut the specific factual bases identified by USDA and NCBA. *See* Fed. R. Civ. P. 56(c); *see also infra* Section I.

C. NCBA Faces Actual Competition and Would Suffer Substantial Competitive Harm.

1. The Competitor Entities and NCBA Compete for Contracts in the BPOC Annual Contracting Process, Which USDA, NCBA, and other Competitor Entities Acknowledge is "Fiercely Competitive."

If the NCBA Exempted Records were compelled to be produced, as OCM claims (and NCBA disputes), they *still* would be subject to Exemption 4 protection if disclosing them would cause NCBA substantial competitive harm. *Critical Mass*, 975 F.2d at 880. Contrary to the statements contained in the declarations by USDA, NCBA, and several Competitor Entities (ECF Nos. 87-4, 87-5, 87-6, 88-7, 88-8, 88-9, 88-10), OCM argues that NCBA cannot suffer substantial competitive harm because, in effect, NCBA faces no competition. Opposition at 34-36. OCM's assertions are both factually and legally incorrect, and disclosure of the NCBA Exempted Records would cause NCBA substantial competitive harm. Therefore, the NCBA Exempted Records should be exempt from disclosure in response to OCM's underlying FOIA request.

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provide an appropriate cite to the record, and instead simply cite generally to "*See* Plaintiff's Memo in Support of Cross-Motion for Summary Judgment." Other "denied" entries contain no "appropriate citation[ ] to the record" as required by this Court's Standing Order. *See* ECF No. 90-4 ¶¶ 18, 21, 22.

a. The Federation of State Beef Councils and Its Involvement with the Beef Promotion Operating Committee.

The BPOC is responsible for awarding annual BPOC contracts and recommending the annual budgets to the Beef Board, subject to Beef Board and USDA approval. Second Supplemental Evans Decl. ¶ 8; Brook Decl. ¶ 45. The Beef Act requires that the Beef Checkoff program contract only with established national nonprofit industry-governed organizations to implement programs of promotion, research, consumer information, and industry information. Brook Decl. ¶¶ 44, 45. The Beef Order provides the eligibility requirements. 7 C.F.R. § 1260.163. In August 2012, the BPOC changed its requirements for an organization to be deemed an eligible BPOC contractor. Third Supplemental Evans Decl. ¶ 13. These changes have allowed more organizations to be deemed an eligible BPOC contractor, which has created a greater number of BPOC contract bids and, in turn, increased competition for BPOC contract awards. *Id.* Currently, NCBA is one of approximately forty potential approved industry-related organizations and associations eligible to compete for BPOC contracts and which have requested to receive information about the annual BPOC bidding process. *Id.* ¶ 10.

The BPOC is comprised of 20 members. 7 C.F.R. § 1260.161. The Beef Order requires that the BPOC "shall be composed of 10 Board members elected by the [Beef Board] and 10 producers elected by the Federation [of State Beef Councils]." *Id.* The Federation was formerly the Beef Industry Council of the National Live Stock and Meat Board. 7 C.F.R. § 1260.112. Currently, the "Federation" refers to the Federation of State Beef Councils, an unincorporated division of NCBA and a successor organization to the Beef Industry Council of the National Live Stock and Meat Board. Third Supplemental Evans Decl. ¶ 4. The Federation is comprised of the 44 qualified state beef councils ("QSBCs") that collect the $1-per-head beef checkoff assessment. *Id.* Cattle producers, selected by the QSBCs, make up the Federation Board. *Id.*

The 10 Federation-elected BPOC members "shall consist of the Federation chairperson, vice-chairperson, and eight duly elected producer representatives of the Federation Board of Directors who are members or ex officio members of the Board of Directors of a qualified State beef council." 7 C.F.R. § 1260.161; Brook Decl. ¶ 45. The "eight duly elected producer representatives" from the Federation "shall, to the extent practical, reflect the geographic distribution of cattle numbers." *Id.* These prospective Federation-elected BPOC members are required to "file with the Secretary [of Agriculture] a written agreement to serve on the Committee and to disclose any relationship with any beef promotion entity or with any organization that has or is being considered for a contractual relationship with the Board or the Committee." *Id.* In order to serve on the BPOC, the Secretary is required to certify such representatives as eligible. *Id.* These prospective Federation-elected BPOC members are also required to sign conflict of interest acknowledgement forms and are informed that their loyalties serving on the BPOC are to all beef producers. Third Supplemental Evans Decl. ¶ 9.

Any action of BPOC requires the "concurring votes of at least two-thirds of the members present." 7 C.F.R. § 1260.164(a). At least 15 members of the BPOC are required to constitute a quorum. *Id.*

b. Contrary to OCM's Claims, NCBA Does Not Have a "Voting Lock" or "Structural Monopoly" on the Annual BPOC Contract Award Process.

Without any support or basis in the record, OCM claims that NCBA "has a voting lock on the committee that decides checkoff contract awards" and that "NCBA holds enough checkoff contract award votes to prevent *any* competitive harm at all from a release of checkoff receipt and disbursement records, let alone substantial competitive harm." Opposition at 8, 35. OCM argues that "as a purely legal matter such a structure eliminates any legitimate claim of substantial competitive harm from the release of spending records." *Id.* at 35. This, OCM

postulates, creates a "structural monopoly," which OCM suggests is enough for NCBA to "control the voting outcome of any contract bid [and] for purposes of Exemption 4, that ends the inquiry." *Id.* at 36.

OCM fails to provide any record evidence or case citation to support such an argument, and its argument is just plain wrong. OCM's unsupported and generalized arguments fail in the face of the actual structure and operation of the BPOC and BPOC voting on such BPOC contracts by its members. First, OCM has improperly conflated "NCBA" with the Federation of State Beef Councils and the Federation members who are chosen (and approved by the Secretary) to serve on the BPOC. There is no basis for asserting that NCBA controls the votes of the Federation-elected BPOC members or that NCBA somehow "possess[es] a voting lock" on the BPOC through the Federation-elected BPOC members. The prospective Federation-elected BPOC members are producers and Federation members. Third Supplemental Evans Decl. ¶ 5. These prospective Federation-elected BPOC members must file a written agreement and conflict of interest acknowledgment and must be first approved by the Secretary of Agriculture. 7 C.F.R. § 1260.161. As detailed below, these Federation members vote independently and often *against* NCBA contract proposals while often voting *for* competing contract proposals.

Second, even if NCBA did control the votes of the Federation-elected BPOC members, it would not be enough to guarantee that NCBA could stifle any and all competition. There are only 10 Federation-elected BPOC members, but the Beef Order mandates a two-thirds vote requirement for *any* BPOC action, which effectively eliminates the ability of BPOC to be run by what OCM claims is an "NCBA" 10-member fiat. While the Federation-elected BPOC members arguably could block contracts being awarded to Competitor Entities, the inverse is equally true. The Beef Board-appointed BPOC members could also prevent any contract award to NCBA.

But both hypothetical scenarios are equally baseless because the BPOC awards contracts to NCBA and the Competitor Entities year-after-year. As further evidence of the fairness of this process, the Beef Board and USDA must approve all BPOC contracts, serving as a significant and powerful check on the activities of the BPOC and the contracts it awards.[10] 7 U.S.C. § 2904(6)(B); 7 C.F.R. § 1260.169.

c. BPOC Contract Funding Changes From FY08 to FY19 Evidences That the Annual BPOC Contract Bidding Process is "Fiercely Competitive" and NCBA Faces Actual Competition.

A year-to-year review of the annual BPOC contract funding demonstrates that NCBA faces actual competition. In fact, over the past twelve fiscal years (FY08 through FY19), the value of NCBA's total BPOC contract awards has decreased from $38,401,500 to $27,442,700, a total decrease of nearly $11,000,000, or 15%. Third Supplemental Evans Decl. ¶ 18. At the same time, the value of USMEF's BPOC contract awards increased from $5,250,000 to $8,300,000 in FY19, a total increase of $3,050,000, or nearly 60%.[11] *Id.* ¶ 19. Several other

[10] OCM claims that USDA approval is meaningless because "if [a BPOC contract] doesn't survive [the BPOC], it doesn't make it." Opposition at 35 (quotation omitted). However, OCM ignores a significant point: USDA approval is required for BPOC contracts. Were "NCBA" supposedly monopolizing control of the BPOC through the 10 Federation-elected BPOC members, USDA could step in and stop approving those BPOC contracts whenever there is a supposed improper "voting lock." OCM goes further, however, to question this reality by asserting that NCBA has "planted agents" within USDA. ECF No. 87-7 at A24. Again, there is nothing to support OCM's improbable claim.

[11] One of the Competitor Entities, USMEF, is a subcontractor to NCBA on certain BPOC contracts. Third Supplemental Evans Decl. ¶ 14. Even though viewed as a subcontractor of NCBA for certain BPOC contracts, USMEF does not act as a traditional subcontractor and there is no practical significance of USMEF being a "subcontractor." *Id.* ¶¶ 14, 15. USMEF is approved to enter into annual BPOC contracts and competes directly with NCBA and the other Competitor Entities for these contracts, including those annual BPOC contracts that are awarded to USMEF as a subcontractor. *Id.*; USMEF Decl. ¶¶ 5, 6, 7, 17. USMEF presents its own annual contract proposals to BPOC. USMEF Decl. ¶ 6; Third Supplemental Evans Decl. ¶ 15. NCBA does not collaborate with USMEF in preparing their annual contract proposals to BPOC nor does NCBA collaborate with USMEF on how much funding each organization will request in their annual contract proposals to BPOC. *Id.* Although these contracts have historically been

Competitor Entities were not awarded any BPOC contracts in FY08, but have been awarded BPOC contracts since that time—for example, NAMI and AFBFA. *Id.* ¶ 20.

Having not received any BPOC contract funding until FY13, NAMI was most recently awarded $1,902,200 in FY19 for promotion, industry information, and research programs. Third Supplemental Evans Decl. ¶ 20. Similarly, in FY19, AFBFA was awarded $700,000 in BPOC contract funding (having not received any BPOC contract awards from FY08 through FY13). *Id.* As this establishes, the specific Competitor Entities participating in each annual BPOC bidding process can, and in fact regularly do, change from year-to-year. *Id.* ¶ 12; *see also* February 26, 2019 Second Declaration of Mark R. Brook, USDA AMS FOIA Officer, ¶ 17.

This actual competition is further compounded because the Competitor Entities request more in BPOC contract bids than is available to be funded and budgeted by the Beef Board. Third Supplemental Evans Decl. ¶ 33. As a result, the Competitor Entities not only compete against one another for the BPOC contracts, but the competition for such BPOC contracts is multiplied given the total available funding for BPOC contracts. *Id.*

These incontrovertible facts belie OCM's unsupported claims that NCBA exercises a supposed "structural monopoly" that "controls the voting outcome of any contract bid." Opposition at 35, 36. Based on these numbers, if NCBA truly manipulated and controlled the BPOC, OCM would have to argue that NCBA *intentionally* allowed its share of BPOC contract awards to be reduced in share and volume, which seems like unlikely and illogical behavior for a supposed structural monopolist, particularly since now there are new Competitor Entities in the various program areas. Instead, this information demonstrates that the annual BPOC contract award process is, in fact, "fiercely" and "highly" competitive—as described by USDA, NCBA,

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awarded through NCBA, NCBA does not receive any benefit from contracts awarded to USMEF and all funds from BPOC contract awards are remitted directly and in full to USMEF. *Id.* ¶ 15.

and three Competitor Entities—among a growing number of Competitor Entities. Brook Decl. ¶ 99; Second Supplemental Evans Decl. ¶¶ 17-19; ANCW Decl. ¶¶ 7, 17; USMEF Decl. ¶¶ 7, 17; MICA Decl. ¶¶ 7, 21.

d. Recent BPOC Meeting Minutes and Vote Rolls Also Establish that There is Not a "Voting Lock" or "Structural Monopoly" in the Annual BPOC Contract Awards Process.

Finally, OCM's conclusory and unsupported assertions about the structure of the BPOC and its annual contracting awards process, are simply false. *See* Opposition at 34-37. To the contrary, evidence submitted in the form of declarations by NCBA Chief Financial Officer Douglas Evans establishes that NCBA faces actual competition (not the least of which during the annual BPOC contract process) and that NCBA would suffer substantial competitive harm from the release of its "raw financial information" and confidential business information.

Under OCM's "structural monopoly" theory, OCM claims that NCBA faces no competition (and therefore could not suffer competitive injury) because the 10 Federation-elected BPOC members collectively vote to advance all of NCBA's annual BPOC contract bids and collectively vote to reject any of the Competitor Entities' annual contract bids. OCM provides no factual basis supporting such an unsubstantiated argument and it is false. A review of the BPOC meeting minutes and voting rolls also easily rebuts OCM's fanciful (and conclusory) claim. During the FY17, FY18, FY19 annual BPOC contract awards, the average percentage of BPOC contract award votes where Federation-elected BPOC members all voted the same is 54%; the same as the average percentage of BPOC contract award votes where Beef Board-appointed BPOC members all voted the same. Third Supplemental Evans Decl. ¶ 31. This incontrovertible fact plainly refutes OCM's baseless claims of NCBA's "voting lock" and "structural monopoly."

Review of the BPOC meeting minutes and voting rolls further demonstrates that the Federation-elected BPOC members act independently, without regard for whether the contract bid is from NCBA or a Competitor Entity. Third Supplemental Evans Decl. ¶ 31. In FY17, FY18, and FY19, Federation-elected BPOC members voted in favor of every non-NCBA contract bid. *Id.* ¶¶ 28-30. In addition, during these same years, Federation-elected BPOC members also voted against NCBA contract proposals. *Id.*

For the limited present purposes of this FOIA action, the above confirms that the annual BPOC contract award process is competitive and is one in which NCBA (and the other Competitor Entities) face actual competition. The Federation-elected BPOC members act independently of each other and act independently of the Federation (and also NCBA). Furthermore, NCBA does not exploit these members "to control the voting outcome of any contract bid," as OCM baselessly argues. Opposition at 36. Additionally, it cannot be disputed that the Competitor Entities not only compete against one another for BPOC contracts, but also compete against one another to maximize their BPOC contract awards with the available funding. Third Supplemental Evans Decl. ¶ 33.

2. OCM Competes with NCBA and Could Compete in the BPOC Annual Contract Bidding Process.

As NCBA first explained to the Court in August 2017, OCM's extra-judicial statements make clear that it competes with NCBA and intends to compete with NCBA. *See* ECF No. 61 at 11-12, 13-15. OCM makes no clearer an admission that Exemption 4 should apply than its own proclamation that its "first order of business"—dating back to at least 2011, when OCM "pressured" OIG to perform the 2011 audit—is to use the FOIA Request to obtain NCBA's "raw financial records" in order to cause NCBA competitive harm by taking the "beef checkoff contract away from NCBA." ECF No. 87-7 at A24, A46. OCM states its intent is to use the

NCBA Exempted Records as part of OCM's ultimate goal to "tak[e] the . . . checkoff contract away from NCBA," "defund[ ]" and "discredit[ ]" NCBA, "blow[ ] up [NCBA's] ammo dump[,] take their money away," and convince NCBA members to join OCM. *Id.* at A15, A24, A35-A36, A46, A69. In OCM's own words, eliminating NCBA is "absolutely essential." *Id.* at A69.

Instead of explaining these direct quotations and admissions, OCM simply claims that NCBA "seeks to have this Court base its decision on disparaging claims about OCM." Opposition at 36. NCBA makes no such "disparaging" claims and NCBA does not suggest OCM is unqualified to make FOIA requests, as OCM suggests. Rather, NCBA merely quotes directly from OCM's own statements to inform the Court of OCM's desire to use the NCBA Exempted Records to cause NCBA substantial competitive harm.

Beyond that, OCM may be able to compete for annual BPOC contracts, even though it has not yet done so. Second Supplemental Evans Decl. ¶ 21. OCM does not cite to anything in the record or provide any specific support for its blanket denial of that statement. *See* Counter-Statement of Disputed Facts, ECF No. 90-4 at 4 ¶ 18. OCM states that it intends to "tak[e] the . . . checkoff contract away from NCBA." ECF No. 87-7 at A24, A46. This begs the question: if OCM is successful, where will NCBA's annual BPOC contracts (and the funds associated with them) go? It is certainly within the realm of possibility that OCM's feigned altruistic motives for this litigation are merely part of a concerted scheme to displace NCBA by competing for BPOC contracts once it has exploited NCBA's confidential business information and "raw financial information" to its commercial advantage.[12]

[12] As NCBA noted in its Motion for Summary Judgment filings, OCM's recent restraint as to making these public comments most likely does not exhibit a sudden change of heart in its longstanding and unrelenting competitive and disdainful view of NCBA. *See* Second Supplemental Evans Decl. ¶ 36. More likely, it simply reflects OCM's decision to judiciously limit its public and extrajudicial statements in light of the many previous admissions by OCM of

Again, without any support, OCM also suggests that NCBA seeks to use Exemption 4 to guard against mere embarrassment or reputational injury. Opposition at 37. To the contrary, NCBA is seeking to prevent the public release of its confidential business information and confidential internal records in order to prevent their release from causing NCBA substantial competitive harm—for example, OCM's proclaimed "defunding" of NCBA and taking the "beef checkoff contract away from NCBA." ECF No. 87-7 at A24, A46.

3. OCM's Conclusory Statements About The Lack of Competitive Harm are Incorrect; The Record Conclusively Establishes that Release of the NCBA Exempted Records Would Cause NCBA Substantial Competitive Harm.

There is sufficient basis in the record for concluding that disclosure of the NCBA Exempted Records would cause NCBA substantial competitive harm.

There can be no doubt that OCM will not only use any records it receives in this litigation to its own competitive advantage, but also that OCM will widely disseminate those records, allowing NCBA's many other competitors to use such records and information to their own competitive advantage against NCBA. Supplemental Evans Decl. ¶¶ 25-28. OCM has not come forward with any specific evidence to establish that NCBA (and the Competitor Entities) would not suffer substantial competitive harm from the release of their confidential business information. Instead, OCM attacks NCBA's, USDA's, and the Competitor Entities' statements by claiming they are general in nature. For example, OCM states that USDA and NCBA have "provided zero details to substantiate" the fact that the annual BPOC contracting process is competitive and that it is likely that substantial competitive harm would come from release of the NCBA Exempted Records. Opposition at 35. Even a cursory review of the declarations and *Vaughn* Indexes already in the record demonstrate the folly of this unsubstantiated argument.

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its direct competition with and antagonism toward NCBA, as NCBA has extensively demonstrated in its earlier summary judgment filings. *Id.*

Because future competitive harm is difficult to prove specifically, it is sufficient for USDA to predict reasonably that substantial competitive harm to NCBA is likely to occur from disclosure of the NCBA Exempted Records. Brook Decl. ¶¶ 46, 99. That is sufficient in the D.C. Circuit: "In reviewing an agency's determination as to substantial competitive harm, we recognize that predictive judgments are not capable of exact proof, and we generally defer to the agency's predictive judgments as to the repercussions of disclosure." *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 563 (D.C. Cir. 2010) (citations and quotations omitted); *see also Butler v. U.S. Dep't of Labor*, 316 F. Supp. 3d 330, 334-35 (D.D.C. 2018).

A court "need not conduct a sophisticated economic analysis of the likely effects of disclosure." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *Cornucopia Inst. v. U.S. Dep't of Agric.*, No. 16-148, 2018 WL 4637004, at *12 (D.D.C. Sept. 27, 2018). Instead, "an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011) (citation omitted). Parties objecting to disclosure need not show "actual competitive harm" but only need to provide evidence that "[a]ctual competition and the *likelihood* of substantial competitive injury" is likely to occur. *Gulf & W. Indus., Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979) (emphasis added). Competitive harm occurs when the information could be used to the detriment of the submitter's competitive position because, "as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors." *Worthington Compressors*, 662 F.2d at 52 (quoting *Nat'l Parks & Conserv. Ass'n*, 498 F.2d at 769). Competitive harm also occurs when a competitor could use the submitter's protected information and put the submitter in a "distinct disadvantage in bid solicitations if its [ ] information were made public." *Citizens for*

Responsibility & Ethics in Washington v. U.S. Dep't of Justice, 160 F. Supp. 3d 226, 239 (D.D.C. 2016).

The hundreds of pages of declarations from USDA, NCBA, and three other Competitor Entities provide specific justifications for why disclosure of the NCBA Exempted Records would cause substantial competitive harm, why they fall squarely within Exemption 4, and why they should not be subject to disclosure. *See* Brook Decl. ¶ 99; Second Supplemental Evans Decl. ¶¶ 197-207; ANCW Decl. ¶¶ 7, 17; USMEF Decl. ¶¶ 7, 17; MICA Decl. ¶¶ 7, 21.[13]

As NCBA has explained in extraordinary detail, Competitor Entities—with whom NCBA actually and actively competes—could, for example, plausibly and logically use the NCBA Exempted Records to "reverse-engineer" NCBA's business (by using NCBA's confidential and detailed business models, financial records, and strategies contained within the NCBA Exempted Records) and to undercut NCBA in the annual BPOC contracting process (by using NCBA's

[13] OCM claims that the declarations and *Vaughn* Indexes lack sufficient detail and are "boilerplate" and "generic." Opposition at 37-39. As explained in Section III.B, *infra*, that is not the case. The hundreds of pages of declarations and *Vaughn* Indexes provide this Court (and OCM) with extraordinary detail on the records at issue, the substantial competitive harm that would occur as a result of the release of each individual record, and further detail about such records.

Critically, "'[i]f an agency's affidavit describes the justifications for withholding the information with specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not contradicted by contrary evidence[,] then summary judgment is warranted on the basis of the affidavit alone.'" *Falkenstein v. U.S. Dep't of Housing & Urban Development*, 952 F. Supp. 2d 288, 293, 294 (D.D.C. 2013)(quoting *ACLU v. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011)) (granting agency defendant summary judgment where agency "properly relie[ed] on a detailed declaration" that "describ[ed] each document for which information was withheld, detail[ed] the information which was withheld, and explain[ed] the basis for withholding" regarding non-governmental entities "private funding and financial statements" and the substantial competitive harm that would come from the release of such information). As the record plainly demonstrates, such is also the case here. The declarations and *Vaughn* Indexes describe every record that was withheld (in whole or in part), detail the information which was withheld for each record, and explain the bases for withholding for each record.

confidential and detailed strategies, program results, employee payroll, and operational efficiencies to understand NCBA's business and contracting strategy). *See* Third Supplemental Evans Decl. ¶ 34; Second Supplemental Evans Decl. ¶¶ 197-207; Evans Decl. ¶¶ 27-32; Supplemental Evans Decl. ¶ 22-28.

As USDA and NCBA also explained, the Competitor Entities could use the NCBA Exempted Records, including the sensitive business information from NCBA, in order to gain an unfair competitive advantage in the annual BPOC contractual bidding process. Competitor Entities could copy NCBA's business model, business operations, and bidding strategies (all part of the NCBA Exempted Records)—processes that took decades to develop (at considerable cost and expense)—to competitively harm NCBA by impacting NCBA's BPOC contracts, business relationships, and business operations. Brook Decl. ¶¶ 87-102; Second Supplemental Evans Decl. ¶¶ 197-207. Each of these substantial competitive harms is individually sufficient to warrant the withholding of the NCBA Exempted Records from disclosure and the detailed justification for invoking Exemption 4 is logical and plausible. *See ACLU*, 628 F.3d at 619.

III. OCM has Not Alleged Any Other Genuine Issues of Material Fact Regarding the Application of Exemption 4 to the NCBA Exempted Records.

A. OCM's Manufactured Claim that the Beef Checkoff Program is Taxpayer Funded is Categorically False and, Even if True, Does Not Change How Exemption 4 is Applied to the NCBA Exempted Records.

OCM contends that because the Beef Checkoff program is supposedly "federally funded," is supported by "public funding," and involves "the use of federal funds," any records pertaining to such expenditures cannot be withheld from release under FOIA. Opposition at 8, 28, 40. Thus, OCM argues, Exemption 4 should not apply because OCM's members rely on FOIA "as a primary safeguard to bring transparency and accountability to this massively funded federal program." *Id.* at 29. Further, OCM disputes certain of NCBA's claims in NCBA's

proposed Statement of Undisputed Material Facts that such records are confidential and are not of the type normally made public by NCBA since they "are related to receipt, disbursement, or other use of federal checkoff contract dollars." *See, e.g.*, OCM Counter-Statement of Disputed Facts by OCM, ECF No. 90-4 at 6-7.

OCM's argument fails for two reasons. First, the Beef Checkoff program is not a "federally funded" program. 7 U.S.C. § 2904(8)(A); Brook Decl. ¶¶ 34-36. There are no federally appropriated funds allocated to the Beef Checkoff program. *Id.* Instead, the Beef Checkoff program is funded by assessments made against individual cattle producers and importers. 7 U.S.C. § 2901(b); Brook Decl. ¶ 41. Even the cost of managing and overseeing the program by USDA is paid for out of the Beef Checkoff funds from the producers and importers; USDA's appropriations from Congress are not involved in any way. 7 U.S.C. § 2904(8)(C); Brook Decl. ¶ 37.

Strangely, OCM argues that because the advertising supported by the Beef Board is subject to oversight and supervision by the Secretary of Agriculture, this somehow changes the manner in which FOIA should be applied to NCBA, a private entity and BPOC contractor. *See* Opposition at 28-29 (citing *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005)). To that end, OCM has claimed that as a result of *Johanns*, Beef Checkoff assessments "were declared government taxes" and no longer "producer fees."[14] *See* ECF No. 87-7 at A62, A85.

[14] It is unclear exactly the purpose or basis for OCM's reliance on *Johanns* in this FOIA case. In *Johanns*, the Supreme Court addressed the issue of "whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment." *Johanns*, 554 U.S. at 553. The Supreme Court held that generic advertising funded by targeted assessments on beef producers was "government speech" and not susceptible to a First Amendment challenge. *Id.* at 563-65. That holding does not, as OCM seems to imply, suggest that the assessments are "taxes." As explained herein, *Johanns* and OCM's curious interpretation thereof have no bearing or relevance to the issues currently before this Court.

OCM badly misstates *Johanns*. The *Johanns* majority opined that the "analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment." *Johanns*, 544 U.S. at 562. In describing the Beef Checkoff program, the majority decision in *Johanns* makes clear that the Beef Checkoff program is funded by "a $1-per-head *assessment* (or "checkoff") on all sales or importation of cattle and a comparable assessment on imported beef products." 544 U.S. at 554 (emphasis added).[15] These assessments are distinct from *taxes*; OCM's view of the nature of the Beef Checkoff program is, quite simply, without any support from *Johanns* and a complete non-sequitur to this FOIA action.

Second, even if OCM's view of the Beef Checkoff program was correct, that does not change how FOIA and particularly Exemption 4 are applied in this case (or any other FOIA case). The provisions of FOIA, including the application of Exemption 4, as interpreted by the Courts in this and other jurisdictions, apply regardless of whether the non-governmental entity whose records are requested receives taxpayers' dollars or not, and regardless of whether the entity contracts with the government. OCM relies largely on the decision of *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997), to suggest that FOIA should provide unlimited visibility into a private business' internal records, well beyond the normal protections of FOIA, "to assure federal checkoff funds are not being spent on Rolex watches or First Class air travel or state or federal lobbying." Opposition at 29.

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[15] Only the *Johanns* dissent suggests that the Beef Act imposes "taxes" on cattle sold in or imported into the United States. *See* 544 U.S. at 570. Neither of the two other cases cited by OCM recognize a commodity program assessment as a "tax." *See generally Humane Socy. of the U.S. v. Vilsack*, 797 F.3d 4 (D.C. Cir. 2015) (not calling assessment tax); *Humane Socy. of U.S. v. Perdue*, 290 F. Supp. 3d 5 (D.D.C. 2018), *amended in part sub nom. Humane Socy. of U.S. v. Vilsack*, 2018 WL 1964305 (D.D.C. Apr. 16, 2018) (same).

But OCM misconstrues the applicability of the *Martin Marietta* decision to this case. In that case, Martin Marietta sought to prevent release by the Department of the Navy's Naval Air Systems Command ("NAVAIR") of certain information contained in certain contracts between Martin Marietta and NAVAIR. *Martin Marietta*, 974 F. Supp. at 38. The company sought to protect its confidential business information from disclosure by suing under a "reverse-FOIA" theory, which placed on Martin Marietta the burden of demonstrating that NAVAIR's decision to disclose the information was "arbitrary or capricious, or an abuse of discretion." *Id.* at 41. Martin Marietta could not do that, in part because NAVAIR had concluded that release of such records would not cause substantial competitive harm. *Id.* In the instant case, however, USDA has already determined that the NCBA Exempted Records should be withheld subject to Exemption 4—a conclusion with which NCBA agrees—because their release would cause NCBA substantial competitive harm.

OCM's apparent argument from *Martin Marietta* that the records of any government contractor should be treated with less protection under Exemption 4 was squarely and subsequently refuted by the D.C. Circuit in another "reverse-FOIA" case, *McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin.*, 180 F.3d 303, 307 (D.C. Cir. 1999) (finding that if disclosure of detailed pricing information would be of an advantage to McDonald Douglas' competitors, "it follows that [McDonnell Douglas would] be competitively harmed by that disclosure"). There, the D.C. Circuit held that detailed pricing and related information was confidential commercial or financial information that would cause substantial competitive harm if released and, therefore, is protected by Exemption 4. *Id.* at 305-06. The "raw financial data" (and NCBA's other confidential business information) that OCM seeks is directly analogous to the "detailed pricing information" at issue in *McDonnell Douglas*, and, as in that case, its

disclosure would plainly advantage NCBA's competitors (including OCM) and cause NCBA substantial competitive harm.

OCM's strained claim that NCBA's confidential business records and "raw financial information" are not entitled to FOIA protection because it is supposedly funded by "federal funds" cannot prevail and must fail.

B. The NCBA Exempted Records Are Not Further Segregable.

OCM also claims that USDA has failed to demonstrate that no non-segregable information exists in the NCBA Exempted Records. Opposition at 39. But OCM offers no evidence to support this claim other than more vague generalizations about the *Vaughn* Indexes and declarations. Such bold-faced assertions not only lack credibility, but they also run directly contrary to the clear evidence already existing in the record.

Had OCM simply reviewed the hundreds of pages of *Vaughn* Indexes and supporting declarations, OCM could have confirmed that nearly all of the NCBA Exempted Records constitute what OCM itself has termed "raw financial data" or "raw financial information." *See generally* AMS *Vaughn* Indexes, ECF Nos. 88-33 at 1-152, 88-34 at 1-72; Brook Decl. ¶¶ 16-32; Second Supplemental Evans Decl. ¶ 15. As is made clear in the over one-hundred pages of previously-submitted declarations of NCBA (ECF Nos. 87-4, 87-5, 87-6), and in the hundreds of pages of previously-submitted declarations by USDA (ECF Nos. 88-3, 88-7), there is no meaningful information that can be segregated from these records. The *Vaughn* Indexes, totaling over 450 pages alone, contain further support and extraordinary detail outlining the lack of segregability of these NCBA Exempted Records.

Nor should this Court require USDA to spend the substantial time and resources that would be required to identify and make available to OCM disjointed words on the thousands of individual pages contained in the NCBA Exempted Records, when the result of that effort would

yield no meaningful information. *See Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977) ("[A] court may decline to order an agency to commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content."). Indeed, USDA should be "entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. United States Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). Such a presumption may be overcome if the plaintiff "produce[s] evidence that would warrant a belief by a reasonable person" that segregable material exists. *Id.* (quotation omitted). OCM has failed to, and cannot do so here.

Further as to the NCBA Records and NCBA Exempted Records, USDA has carefully identified in the *Vaughn* Indexes the many records and portions of records that can be released to OCM. *See, e.g.*, ECF No. 88-33 at 11, 12, 19, 20, 23, 27, 28, 120, 121, 122, 128; ECF No. 88-34 at 20, 32, 35, 36, 37, 39, 56 (listing NCBA Records released in full); ECF No. 88-33 at 19, 30, 38, 49, 56, 57, 114, 119, 120, 121, 127, 129, 130, 131, 133, 135, 136, 138, 140, 141, 143, 145, 146, 150; ECF No. 88-34 at 5, 6, 19, 21, 26, 39, 41, 51, 54, 65 (listing NCBA Exempted Records released in part with targeted redactions); *see also* Brook Decl. ¶¶ 135, 136.

The hundreds of pages of supporting declarations further establish that USDA has more than met its burden to establish the lack of segregability of those NCBA Records. *See Dutton v. U.S. Dep't of Justice*, 302 F. Supp. 3d 109, 122 (D.D.C. 2018); Brook Decl. ¶¶ 135, 136. Thus, it is apparent that USDA acted in good faith without "reflexively resisting every request for disclosure." *See Pub. Citizen Health Research Grp. v. Food & Drug Admin.* 997 F. Supp. 56, 64 n.4 (D.D.C. 1998) (noting with approval submitter's "recognition that some of the requested documents may be safely released" and considering it "evidence that their claims of exemption .

. . are grounded in good faith – that the company is not reflexively resisting every request for disclosure"), *aff'd in part & rev'd in part,* 185 F.3d 898 (D.C. Cir 1999).[16]

C. OCM Concedes USDA's Claim for Exemption 6 Withholding of Information Regarding NCBA Personnel.

In its Opposition, OCM objects only to the withholding of the names of "certain public employees." (ECF No. 91 at 40.) All of the discussion in that section of OCM's Opposition focuses on USDA employees. Accordingly, it is apparent that OCM has waived any objection to USDA's claim of Exemption 6 protection of names and other information as it pertains to NCBA employees, officials, venders, and business relationships.

D. OCM's Objection to USDA's Claims of Exemption 5 Protection Raises Potential Concerns for NCBA to the Extent the Subject Records May Contain Sensitive Business Information of NCBA or any Other Entity.

USDA has claimed Exemption 5 protection for certain records on the bases that they are protected as reflecting the deliberative process. *See* USDA Memorandum in Support of Motion for Summary Judgment at 20-27. OCM contests that claim on the apparent ground that there can be no deliberative process privilege between the auditing entity (e.g., USDA OIG) and the audited entity (e.g., USDA AMS). Opposition at 16-27.

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[16] OCM suggests no means by which this Court might resolve its supposed segregability concern, and no such vehicle exists short of an expensive, enormously time-consuming record-by-record review by this Court or a neutral decision maker. OCM's bare assertions that some NCBA Exempted Records could be released in a more revealing manner—not even supported by an analysis of the detailed *Vaughn* Indexes descriptions or the detailed declarations submitted therewith—cannot be enough to justify the enormously expensive and time-consuming process of such a record-by-record review. In fact, "'[w]hen the agency meets its burden by means of affidavits, *in camera* review is neither necessary nor appropriate.'" *ACLU v. U.S. Dep't of Def.*, 628 F.3d at 626 (quoting *Hayden v. Nat'l Sec. Agency*, 608 F.2d 1381, 1387 (D.C. Cir. 1979)); *see also Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) ("*In camera* inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that 'it can't hurt.'"). This is precisely the case here and it would be inappropriate for these proceedings to devolve into an unnecessary *in camera* review.

Such a challenge is far-fetched, as there are a number of decisions in the D.C. Circuit and other federal circuits holding that communications between an auditing entity and an audited entity of the same agency are protected under Exemption 5. For example, in *Hardy v. Bureau of Alcohol*, 243 F. Supp. 3d 155, 163-65 (D.D.C. 2017), the district court found that records and notes of interviews with the audited agency entity were properly withheld by the DOJ's Office of Inspector General as deliberative under Exemption 5 because they contained information that line-level inspectors believed relevant, extracted from a larger universe of facts, reflecting an exercise of judgment relevant to pre-decisional findings and recommendations. *See also ACLU v. DOD*, Case No: 15-CV-9317, 2017 WL 4326524, at *12 (S.D.N.Y. Sep. 27, 2017) (allowing Exemption 5 withholding of "a memorandum provided by the Office of Medical Services to the CIA Office of Inspector General containing comments on the OIG's Draft Special Review — Counterterrorism Detention and Interrogation Program," a record analogous to a draft audit report, because the record was "quintessentially deliberative"); *Hamilton Sec. Group, Inc. v. HUD, Office of the Inspector Gen.*, 106 F. Supp. 2d 23, 29-32 (D.D.C. 2000) (allowing Exemption 5 withholding of a draft OIG audit report finding that "[d]ocuments which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position"), *aff'd,* No. 00-5331, 2001 WL 238162 (D.C. Cir. Feb. 23, 2001).

NCBA was permitted to intervene in this case for the purpose of exerting its potential Exemption 4 protections, and has no direct interest in the Exemption 5 issue. But in the context of OCM's challenge to USDA's claim of Exemption 5 protection for certain of its records, NCBA has not been permitted to see or review the records in question. USDA maintains that

these records are covered by common law privilege, and disclosing them to NCBA for review could waive that privilege. NCBA understands and fully appreciates that argument.

However, according to the USDA OIG *Vaughn* Indexes (*see, e.g.*, ECF No. 88-6 at 208-394, 400-452), there are a number of records that USDA claims exempt from disclosure pursuant to Exemption 5 that *may* contain sensitive, confidential business information that NCBA would not normally disclose in its ordinary course of business, or the disclosure of which could cause NCBA substantial competitive harm. For example, there are references to information and records pertaining to NCBA, but USDA OIG has not provided these records to NCBA to review. *See id.* at 209, 225, 231, 234-35, 240-41, 245, 247, 254-55, 258, 266, 302, 306. In those instances, should OCM prevail in challenging USDA's claim of Exemption 5 protection, the result is that those records would be subject to release to OCM. Should that occur, NCBA insists on its right to review those records prior to release to OCM in order to claim, where appropriate, Exemption 4 protection for any confidential business information contained within such records.

IV. Conclusion

For the foregoing reasons and those stated in NCBA's Motion for Summary Judgment, NCBA respectfully requests that the Court grant its Motion for Summary Judgment and also USDA's Motion for Summary Judgment, deny OCM's Cross-Motion for Summary Judgment, and enter judgment in favor of NCBA and in favor of USDA and against OCM.

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Respectfully submitted,

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