IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VERN McKINLEY,	)	
	)	
Plaintiff,	)	Civil Action No. 09-1263 ESH
	)	
v.	)	
	)	
FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT BOARD OF GOVERNORS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Plaintiff Vern McKinley, by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, respectfully submits this memorandum of law in opposition to the motion for summary judgment of Defendant Board of Governors of the Federal Reserve System ("the Board") and in support of his cross-motion for summary judgment against the Board. As grounds thereof, Plaintiff states as follows:

MEMORANDUM OF LAW

I. Introduction.

This case, like Plaintiff's companion case against Defendant Federal Deposit Insurance Corporation, implicates the quintessential purpose behind FOIA – piercing the veil of government secrecy and opening agency action to the light of public scrutiny. *See Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

On March 14, 2008, the Board voted to authorize the Federal Reserve Bank of New York ("FRBNY") to provide temporary emergency financing to The Bear Stearns Companies Inc. ("Bear Stearns"), an investment company and securities trading and brokerage firm facing bankruptcy, through an arrangement with JPMorgan Chase Bank, N.A. ("JPMorgan"). Minutes of the Board of Governors of the Federal Reserve System, March 14, 2008 ("Minutes"), attached as Exhibit 1 to the Declaration of Vern McKinley ("McKinley Decl.") (Exhibit A), at 2. Specifically, the Board authorized the FRBNY to extend a nonrecourse loan to JPMorgan, which in turn agreed to provide financing to Bear Stearns. *Id.*

In order for the transaction to proceed, however, the Board was required by section 13(3) of the Federal Reserve Act to determine that (1) unusual and exigent circumstances existed, and (2) Bear Stearns was unable to secure adequate accommodations elsewhere. *See* 12 U.S.C. § 343. Not since the Great Depression had the Board exercised its authority under section 13(3) to

authorize an emergency loan to a non-banking entity. Gary Shorter, "Bear Stearns: Crisis and 'Rescue' for a Major Provider of Mortgage-Related Products," *CRS Report for Congress,* March 26, 2008 at 4 (Order Code RL 34420) ("*CRS Report*"); *see also* Vern McKinley and Gary Gegenheimer, "Bright Lines and Bailouts: To Bail or Not to Bail, That is the Question," *Policy Analysis,* April 21, 2009 at 10.

Given the extraordinary nature of the transaction, Plaintiff sent a Freedom of Information Act ("FOIA") request to the Board on December 17, 2008 seeking information about the Board's decision. Plaintiff specifically requested the following:

> I am requesting further detail on information contained in the . . . minutes of the Board of Governors of the Federal Reserve dated March 14, 2008 . . . In particular I am requesting any supporting memos or other information that detail the "expected contagion that would result from the immediate failure of Bear Stearns" and the related conclusion that "this action was necessary to prevent, correct, or mitigate serious harm to the economy or financial stability" as described in the meeting minutes.

December 17, 2008 FOIA Request from Vern McKinley to the Board, attached to McKinley Decl. as Exhibit 2. When the Board failed to produce any of the requested information after more than six months, Plaintiff commenced this litigation. *Id.* at ¶ 4. Thereafter, the Board produced approximately 128 pages of publicly available materials that consisted mostly of congressional testimony and congressional correspondence and 53 pages that consisted largely of heavily redacted emails and email attachments. *Id.* at ¶¶ 5-6.

II. Factual Background.

A. The Federal Reserve System.

The Federal Reserve System includes several components that combine public and private elements. Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment in *Bloomberg v. Board of Governors of the Federal Reserve System*, Civ.

No. 08 CV 9595 (LAP) (S.D.N.Y.) ("Bloomberg Mem."), attached as Exhibit 6 to the McKinley Decl., at 37. The Board, to which Plaintiff directed his FOIA request, is a government agency in Washington, D.C. composed of seven members appointed by the president and confirmed by the Senate. *Id.* The Board supervises and regulates the operation of the Federal Reserve System, promulgates and administers regulations, and plays a major role in the supervision and regulation of the U.S. banking system. *Id.*

In contrast, the twelve regional reserve banks of the Federal Reserve System, which includes the FRBNY, serve as the operational arm of the nation's central banking system. *Id.* at 38. They carry out a variety of functions, including operating a nationwide payments system, distributing currency and coin, supervising and regulating member banks and bank holding companies, and serving as banker for the U.S. Treasury. *Id.* In addition, each regional reserve bank acts as a depository for banks within its district, a lender to eligible institutions through its "discount window," and a clearing agent for checks, and fulfills other responsibilities for banks within the district. *Id.*

Importantly, the regional reserve banks operate under independent grants of authority from Congress. *Id.* at 39. Each regional reserve bank is a separate corporation that issues stock held by depository institutions within its district. *Id.* Each regional reserve bank has its own 9-member board of directors, six of whom are elected by member banks within the district, and three of whom are appointed by the Board. *Id.* Regional reserve bank employees are not civil servants; they are at-will employees of each bank. *Id.* at 40. Regional reserve banks receive no appropriated funds from Congress, but rather are capitalized by required contributions from member banks. *Id.* They are private corporations separate and distinct from the Board. *Id.*

In the *Bloomberg* litigation, the Board acknowledged that "[t]he FRBNY is not an 'authority of the Government of the United States.'" Defendant Board of Governors of the Federal Reserve System's Supplemental Brief in *Bloomberg v. Board of Governors of the Federal Reserve System*, Civ. No. 08 CV 9595 (LAP) (S.D.N.Y.) ("Bloomberg Supp. Mem."), attached as Exhibit 7 to the McKinley Decl., at 2. It also acknowledged that "the FRBNY is not an 'establishment in the executive branch of government,'" that "the FRBNY is not a 'government corporation,'" and that "the FRBNY is not a 'government controlled corporation.'" *Id.* at 2-3. Moreover, the Board asserted in the *Bloomberg* litigation that "the extension of credit is a fundamental part of the business of banking, and a commercial activity in which the Reserve Banks are authorized to engage, but the Board is not." Bloomberg Mem. at 41. It argued to the court in *Bloomberg* that, "[b]ecause the Reserve Banks are statutorily authorized to extend credit to depository institutions, and to individuals, partnerships or corporations in unusual and exigent circumstances, upon prior Board authorization, and are not operating under delegated authority, Reserve Bank records obtained or created in the course of these activities are not Board records." *Id.* The Board also argued that "the fact that the FRBNY consulted with, and obtained prior authorization from, the Board prior to extending the Bear Stearns Loan under Section 13(3), and that the Board authorized the FRBNY to extend credit … do not transform these commercial lending transactions into agency functions." *Id.* at 46. The authorization of the FRBNY to extend credit to Bear Stearns through JPMorgan was solely the Board's action. The decision to actually extend the loan was exclusively that of the FRBNY.

B. The March 14, 2008 Emergency Loan.[1]

On March 14, 2008 at 9:15 a.m., the Board officially convened to "authorize[ ] the Federal Reserve Bank of New York . . . to extend credit to JPMorgan Chase Bank . . . on a nonrecourse basis to provide financing to Bear Stearns." Minutes, McKinley Decl. Exhibit 1, at 2. In authorizing the loan, the Board took what then-FRBNY President Timothy Geithner described as the "extraordinary step" of invoking its powers under section 13(3) of the Federal Reserve Act, 12 U.S.C. § 343. Statement of Timothy F. Geithner, President and Chief Executive Officer, Federal Reserve Bank of New York before the U.S. Senate Committee on Banking, Housing and Urban Affairs Regarding Actions by the Federal Reserve Bank of New York in Response to Liquidity Pressures in Financial Markets, United States Senate, April 3, 2008, ("Geithner Stmt."), attached as Exhibit 3 to the McKinley Decl., at 13.

Starting on Monday, March 10, 2008, FRBNY staff had begun monitoring rumors of liquidity problems at Bear Stearns. Bates No. 000001 ("There are considerable rumors on the Street") and Bates No. 000004 ("Apparently there was some misinformation in the press regarding Bear Stearns that . . . fueled rumors about potential liquidity problems").[2] Due to persistent rumors and corresponding market activity, Bear Stearns had been experiencing difficulty obtaining financing for its regular business activities. Bates No. 000007. By Wednesday, March 12, 2008, "an increased volume of [Bear Stearns'] customers expressed a

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[1] The following factual time line is presented for context only and to provide the Court with a depiction of the likely flow of the records and information during the Board's "fast moving, real-time effort" to avoid a Bear Stearns bankruptcy. Memorandum in Support of Summary Judgment Motion of Defendant Board of the Federal Reserve System ("Def's Mem.") at 24.

[2] Unless otherwise indicated, all citations to Bates Numbers refer to the Board's September 30, 2009 document production, which is attached to the McKinley declaration as Exhibit 4.

desire to withdraw funds from, and certain counterparties expressed increased concern regarding maintaining their ordinary course exposure to, Bear Stearns." The Bear Stearns Companies, Inc. Proxy Statement Pursuant to Section 14a of the Securities Exchange Act of 1934 ("Bear Stearns Proxy Stmt."), dated April 28, 2008, attached to the Declaration of Michael Bekesha ("Bekesha Decl.") (Exhibit B) as Exhibit 1, at 27. On Thursday, March 13, 2008, "an unusual number of customers withdrew funds from Bear Stearns and a significant number of counterparties and lenders were unwilling to make secured funding available to Bear Stearns on customary terms." *Id.* In short, Bear Stearns, although not a traditional commercial bank, was suffering the equivalent of a "bank run."

By late afternoon, Bear Stearns reported "a sharp deterioration in [its] liquidity position." *Id.* at 28. At 2:33 p.m., Deborah P. Bailey, deputy director of the Board's Division of Banking Supervision and Regulation, notified members of the Board that "[FRBNY] and Board staffs are monitoring the situation. [FRBNY] staff is in ongoing contact with SEC staff and has asked them to keep the Federal Reserve [informed] as to the firms' liquidity profile including unencumbered cash positions, available secured and unsecured financing sources, and available Fed-eligible and non-eligible collateral." Bates Nos. 000010-11.

Since Bear Stearns was an investment company and securities trading and brokerage firm, not a depository bank or a bank holding company, it reported to and was regulated by the Securities and Exchange Commission ("SEC"), not the Federal Deposit Insurance Corporation ("FDIC"), the Federal Reserve System, or the Office of the Comptroller. Def's Mem. at 3; Declaration of Margaret Celia Winter ("Winter Decl.") at ¶ 10-11. Therefore, when Bear Stearns determined that it would not be able to open for business on Friday, March 14, 2008, it first contacted the SEC. Bates No. 000031. At approximately 7:50 p.m., on Thursday, March 13,

2008, FRBNY staff learned of the possibility that Bear Stearns would file for bankruptcy the following day. *Id.* An email exchanged between FRBNY officials, including FRBNY President Geithner, noted: "SEC just received a call from [Bear Stearns Chief Risk Officer] Mike Alix indicating [that Bear Stearns is] uncertain about [its] ability to operate tomorrow. Likely to call us." Bates No. 000031. Attached to a subsequent email were notes of a telephone conference apparently between FRBNY staff and SEC officials regarding Bear Stearns. Bates No. 000030. A FRBNY official forwarded this same email to the Board's General Counsel, Scott Alvarez, at 8:15 p.m. *Id*. At approximately 8:30 p.m., Deputy Director Bailey informed the members of the Board and other Board officials that Bear Stearns' "Chief Risk officer indicated that [Bear Stearns] will likely have 'trouble' opening tomorrow and will be under pressure. A great deal of uncertainty about ability to operate." Bates No. 000033.

In addition to contacting the SEC, Alan Schwartz, CEO of Bear Stearns, called JPMorgan Chief Executive Officer James Dimon to ask JPMorgan to lend Bear Stearns as much as thirty billion dollars or buy the company outright. Bryan Burrough, "Bringing Down Bear Stearns," *Vanity Fair*, August 2008, available at http://www.vanityfair.com/politics/features/2008/08/bear_stearns200808. Mr. Dimon informed Mr. Schwartz that a loan or outright purchase was impossible, but that JPMorgan was willing to assist Bear Stearns in finding a solution to its liquidity problem. *Id.* Starting around 7:30 p.m. on Thursday, March 13, 2008, "[r]epresentatives of JPMorgan Chase and officials from the U.S. Treasury Department, [FRBNY] and [the Board] engaged in discussions regarding how to resolve the liquidity deterioration at Bear Stearns." Bear Stearns Proxy Stmt., Bekesha Decl. Exhibit 1, at 28. At 9:16 p.m., Board Vice Chairman Donald Kohn sent an email to the other Board members and Board officials stating:

> [Bear Stearns is] talking to [JPMorgan] but not clear what might happen. Right now it looks like without help holding company likely to file Chapt. 11 tomorrow – broker and other liquid entities should continue to operate, though obviously they wuillbe (sic) subject to runs. SEC has people in the firm and FRBNY likely to send someone over to look at positions."

Bates No. 000034. By 11:00 p.m., JPMorgan also had a team of specialists at Bear Stearns' headquarters reviewing its financial records to determine what action, if any, JPMorgan could and would be willing to take. Burrough, "Bringing Down Bear Stearns," *supra*.

At 12:38 a.m. on the morning of March 14, 2008, Bear Stearns' Chief Risk Officer emailed a FRBNY staffer a spreadsheet of banks and brokers having the largest exposure to Bear Stearns. Bates No. 000038. By 1:03 a.m., this same Bear Stearns spreadsheet had been circulated to other FRBNY staffers and to officials at the Board. Bates Nos. 000037-38. By 2:00 a.m., investigators from the FRBNY joined JPMorgan and SEC staffers already at Bear Stearns' headquarters. Burrough, "Bringing Down Bear Stearns," *supra*. The data uncovered by the investigators suggested that a bankruptcy filing would have repercussions beyond Bear Stearns. *Id.*

In the early morning hours of Friday, March 14, 2008, FRBNY President Geithner, Board Chairman Ben Bernanke and Vice Chairman Donald Kohn, Treasury Secretary Hank Paulson, Treasury Undersecretary Robert Steel, and officials of the SEC, and their respective staffs, were "working hard to see if liquidity could be found for Bear Stearns." William D. Cohen, *House of Cards: A Tale of Hubris and Wretched Excess on Wall Street*, at 71-72 (Doubleday 2009). At approximately 4:00 a.m., FRBNY President Geithner called Chairman Bernanke, who reportedly "agreed that the Fed should intervene." John Cassidy, "Anatomy of a Meltdown," *The New Yorker*, December 1, 2008, available at http://www.newyorker.com/reporting/2008/12/01/081201fa_fact_cassidy.

At approximately 5:00 a.m. on Friday, March 14, 2008, FRBNY President Geithner arranged for a conference call with Chairman Bernanke, Secretary Paulson and others.[3] Geithner Stmt. at 10. At 5:48 a.m. and 5:50 a.m., respectively, almost an hour after the conference call commenced, the members of the Board and Board officials received, via emails from the FRBNY, spreadsheets entitled "Bear Stearns exposure Mar 14 v1.xls" and "Bear Stearns Counterparty Credit Exposures March 14 Morning Call.xls." Bates Nos. 000040 and 000042. Approximately one hour later, around 7:00 a.m., "Geithner laid down the gauntlet. 'We've got to make a call here, because [repo] markets open at seven-thirty,' he said. 'What's it going to be?' The consensus was there. 'Let's do it," Bernanke said."[4] Kate Kelly, *Street Fighters: The Last 72 Hours of Bear Stearns, the Toughest Firm on Wall Street*, at 69 (Penguin Group 2009). The "it" was to have the FRBNY offer a short-term nonrecourse loan to JPMorgan, which in turn would extend credit to Bear Stearns.

Shortly thereafter, Secretary Paulson called President Bush and informed him of the decision even though the Board had not yet met to authorize the transaction. *Id.* at 70-71. Over the next two hours, JPMorgan and Bear Stearns drafted press releases to announce the loan to the markets and the public.

In the interim, at 7:39 a.m., Coryann Stefansson, Associate Director of the Board's Division of Banking Supervision and Regulation, obtained and sent to Governor Randall Kroszner a document setting forth data from the third quarter of 2007 regarding the value of credit default swaps held by the top twenty five commercial banks. Bates No. 000044

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[3] Plaintiff has not been able to determine the identities of all of the participants in the conference call.

[4] *See* Declaration of Jean Helwege ("Helwege Decl.") (Exhibit C) at ¶ 6 for a description of repurchase or "repo" markets.

At 9:13 a.m., just as the meeting of the Board was about to convene, JPMorgan issued a press release announcing that "in conjunction with [the FRBNY], it has agreed to provide secured funding to Bear Stearns … Through its Discount Window, [the FRBNY] will provide non-recourse, back-to-back financing to JPMorgan." Press Release, "JPMorgan Chase and Federal Reserve Bank of New York to Provide Financing to Bear Stearns," March 14, 2008, available at http://investor.shareholder.com/jpmorganchase/releasedetail.cfm?releaseid=299381. At 9:16 a.m., Federal Reserve Governor Kevin Warsh sent an email to the heads of the twelve Federal Reserve Banks informing them of the following:

> Bear Stearns is proving unable to find (sic) itself. This morning, the Board ***will*** vote under 13(3) to authorize the FRB-NY to lend to JPMorgan Chase to on-lend to Bear Stearns. We will announce that action later this morning, following announcements by JPMC and BS. In addition, we will announce the following: 'The Federal Reserve is monitoring market developments closely and will provide liquidity as necessary to promote the orderly functioning of the financial system.'

McKinley Declaration at Exhibit 5, Bates No. 000046 (emphasis added).

Around 9:21 a.m., approximately six minutes after the Board convened, Bear Stearns issued its own press release stating that it had "reached an agreement with JPMorgan … to provide a secured loan facility." Press Release, "Bear Stearns Agrees to Secured Loan Facility with JPMorgan Chase," March 14, 2008, available at http://www.businesswire.com/portal/site /home/permalink/?ndmViewId=news_view&newsId=20080314005441&newsLang=en. When the stock market opened at 9:30 a.m., the decision to "bail out" Bear Stearns was at least two hours old and the public had been notified about the FRBNY's emergency financing of Bear Stearns.

At 9:39 a.m., apparently after the Board had formally authorized the transaction, a FRBNY official emailed FRBNY staff, Board staff, and staff of other Federal Reserve Banks a spreadsheet of "counterparty credit risk exposure to Bear [Stearns]." Bates No. 000050.

At 11:52 a.m. on Friday, March 14, 2008, FRBNY staffer Jamie McAndrews emailed FRBNY President Geithner and other FRBNY employees a three-page memorandum outlining "a set of arguments in favor of today's action for your review." Bates No. 000054. FRBNY President Geithner forwarded the memorandum to Board Chairman Bernanke, Vice Chairman Kohn, and Governor Kevin Warsh, by email, along with a notation stating, "This is very good." *Id.* Later that afternoon, at 1:54 p.m., Vice Chairman Kohn emailed a response to McAndrews and FRBNY President Geithner, stating, "Jamie, Nice job; you've made the case about as strongly as it could be made, and it's very helpful to have this spelled out." Bates No. 000053. The email was "cc-ed" to Chairman Bernanke and Governor Warsh. *Id.* Four minutes later, McAndrews responded to Vice Chairman Kohn, stating, "Thanks very much Don, I'll work to incorporate your comments, and others I receive in the next day or two from people here." *Id.* McAndrews "cc-ed" Chairman Bernanke, Governor Warsh, and FRBNY President Geithner. It does not appear that any subsequent version of the document has ever been produced or identified.[5]

On March 16, 2008, JPMorgan acquired Bear Stearns. Def's Mem. at 4 n.1; Declaration of Alison M. Thro ("Thro Decl.") at ¶ 3. Thereafter, Bear Stearns ceased to exist as a separate entity. Burrough, "Bringing Down Bear Stearns," *supra*.

[5] The Board has not identified whether Item No. 34 (Bates Nos. 000166-68) is a final version of this same memorandum.

On March 26, 2008, FRBNY attorneys sent attorneys at the Board a four-page memorandum "recount[ing] the legal advice that was provided by FRBNY legal staff to Board legal staff." *Vaughn* Index, attached to Thro Decl. as Exhibit F, at Item No. 36 (Bates Nos. 000185-88). On April 2, 2008, Board attorneys prepared a sixteen-page memorandum that "recounts the legal advice that was provided to the Board on and around March 14, 2008 in support of staff's recommendation that the Board authorize under section 13(3) . . . FRBNY to extend credit to [Bear Stearns] indirectly through [JPMorgan]." *Id.* at Item No. 35 (Bates Nos. 000169-84).

On June 27, 2008, the Board released the minutes of its March 14, 2008 meeting. Four months after the Board had acted, the minutes only disclose, as set forth above, that "given the fragile condition of the financial markets at the time, the prominent position of Bear Stearns in those markets, and the expected contagion that would result from the immediate failure of Bear Stearns, the best alternative available was to provide temporary emergency funding to Bear Stearns through an arrangement with JPMorgan Chase . . . Such a loan would facilitate efforts to effect a resolution of the Bear Stearns situation that would be consistent with preserving financial stability." Minutes, McKinley Decl. Exhibit 1, at 2. Among other necessary findings, the minutes summarily state only that the Board had concluded that "unusual and exigent circumstances existed" and "Bear Stearns, and possibly other primary securities dealers, were unable to secure adequate credit accommodations elsewhere." *Id.* at 3. Nowhere did the Board identify the specific evidence it considered or how it analyzed this evidence. *See*, *e.g.*, Helwege Decl. at ¶ 4 ("Unfortunately, [the] records [released by the Board] do not include even a basic summary of the reasoning behind the authorization to extend a loan to Bear Stearns via

JPMorgan"). This is the precise information that Plaintiff sought when he submitted the FOIA request to the Board on December 17, 2008.

III. Argument.

A. Summary Judgment Standard.

FOIA generally requires complete disclosure of requested agency information unless the information falls into one of FOIA's nine clearly delineated exemptions. 5 U.S.C. § 552(b); *see also Rose*, 425 U.S. at 360-61 (1976) (discussing the history and purpose of FOIA and the structure of FOIA exemptions). In light of FOIA's goal of promoting a general philosophy of full agency disclosure, the exemptions are to be construed narrowly. *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989). "[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *United States Dep't of State v. Ray*, 502 U.S. 164, 173 (1991).

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). In FOIA cases, agency decisions to "withhold or disclose information under FOIA are reviewed *de novo*." *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp.2d 252, 256 (D.D.C. 2004). In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the requester. *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

For an agency to prevail on a claim of exemption, it must "prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *Goland v. Central Intelligence Agency*, 607 F.2d 339,

352 (D.C. Cir. 1978). "Reliance on 'agency affidavits is warranted if the affidavits describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Sciba v. Board of Governors*, 2005 U.S. Dist. LEXIS 45686, *4 (D.D.C. Nov. 5, 2005) (*quoting Military Audit Project v. Casey,* 656 F.2d 724, 738 (D.C. Cir. 1981)). The court may require an *in camera* inspection of the withheld documents to "insure that agencies do not misuse the FOIA exemptions to conceal non-exempt information." *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 393 (D.C. Cir. 1987) (*quoting Allen v. Central Intelligence Agency*, 636 F.2d 1287, 1298 (D.C. Cir. 1980)).

Finally, an agency must demonstrate that, even where particular exemptions properly apply, all non-exempt information has been segregated and disclosed. *Sussman v. U.S. Marshals Service*, 494 F.3d 1106, 1116 (D.C. Cir. 2007); *Shurberg Broadcasting of Hartford v. Federal Communications Commission*, 617 F. Supp. 825, 828 (D.D.C. 1985). A segregability determination is absolutely essential to any FOIA decision. *See Summers v. Dep't of Justice*, 140 F.3d 1077, 1081 (D.C. Cir. 1998).

B. The *Vaughn* Index and Declarations Are Inadequate and Contradictory and Therefore Fail to Satisfy the Board's Burden.

"The typical FOIA case 'distorts the traditional adversary nature of our legal system's form of dispute resolution.'" *Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (citations omitted). "When a party submits a FOIA request, it faces an 'asymmetrical distribution of knowledge' where the agency alone possesses, reviews, discloses, and withholds the subject matter of the request." *Id.* Because of this lopsided relationship, the

burden is on the agency to establish its right to withhold information from the public. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980).

1. The Board's *Vaughn* Index Is Inadequate.

An agency's *Vaughn* index must supply "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). In *Dellums v. Powell*, 642 F.2d 1352, 1361 (D.C. Cir. 1980), the Court held that the agency was required to "demonstrat[e] the applicability of the exemptions invoked *as to each document or segment withheld*." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987) (*citing Dellums*, 642 F.2d at 1361) (emphasis in original). Additionally, a *Vaughn* index should "consist of 'one document that adequately describes each withheld record or deletion and sets forth the exemption claimed and why that exemption is relevant.'" *King*, 830 F.2d at 224 (*quoting Paisley v. Central Intelligence Agency*, 712 F.2d 686, 690 (D.C. Cir. 1983)).

The Board's *Vaughn* Index fails to satisfy these most basic requirements. On August 11, 2009 and September 30, 2009, the Board provided responsive documents to Plaintiff. It also produced a draft *Vaughn* Index with its September 30, 2009 production. The September 30, 2009 document production had been paginated with Bates numbers and contained references to various FOIA exemptions where information had been withheld. After reviewing the documents and draft *Vaughn* Index produced on September 30, 2009, Plaintiff realized there were substantial inconsistencies between the exemptions referenced on the documents and the exemptions referenced in the draft *Vaughn* Index.

Rather that produce a second set of documents that correctly referenced the exemptions being invoked, the Board has simply proclaimed that the final version of the *Vaughn* Index submitted with the Board's summary judgment motion "reflects our final claim[s] of exemption." Thro Decl. at ¶ 15. Consequently, the claims of exemption referenced on the documents are not accurate, and Plaintiff and the Court are forced to refer back-and-forth between the *Vaughn* Index and the documents to determine what claims of exemption the Board is attempting to invoke for any particular document.

In addition, the Board's memorandum, *Vaughn* Index, and supporting declarations generally refer to the documents by item number rather than by Bates number, but the documents themselves make no reference to the item numbers. Adding to this already confused state of affairs is the fact that the Board appears to have grouped an entire set of documents into one item. Specifically, Item 11 consists of 8 documents, which bear Bates Nos. 000004, 000021, 000022, 000023, 000030, 000031, 000038, and 000039. Item 12 consists of part of Bates No. 000022, which also is part of Item 11. Moreover, although the *Vaughn* Index is paginated, the page numbers of the *Vaughn* Index differ from the item numbers.

By way of example, Item 8 appears on page 9 of the *Vaughn* Index, but refers to the document bearing Bates No. 000013. Although Bates No. 000013 references Exemption 4, according to the *Vaughn* Index, the Board is only invoking Exemption 5 with respect to this particular document. Similarly, Item 9 appears on page 10 of the *Vaughn* Index, but refers to the document bearing Bates No. 000017. Although Bates No. 000017 references Exemptions 4 and 8, according to the *Vaughn* Index, the Board is invoking Exemptions 4, 5, and 8 with respect to this particular document. Finally, to add to the confusion, there does not appear to be any entry

in the *Vaughn* Index for Bates No. 000051, which does not appear to have been assigned an item number either.

In sum, the system of reference used by the Board in its *Vaughn* Index is needlessly complex, if not hopelessly confused. The Board has failed to satisfy its most basic burden of creating a proper *Vaughn* Index. *Mead Data Central, Inc.*, 566 F.2d at 251.

2. The Board's Declarations Are Inconsistent With Its *Vaughn* Index.

Similarly, the Board's declarations also are legally deficient. While it is true that in FOIA cases, courts place a high degree of confidence in agencies' declarations, the existence of contrary evidence rebuts this confidence. *See Military Audit Project*, 656 F.2d at 738; *see also Boyd v. Crim. Div., U.S. Dep't of Justice*, 2005 U.S. Dist. LEXIS 3981, *9-10 (D.D.C. March 9, 2005). In addition, a court may require an *in camera* inspection of the withheld documents to "insure that agencies do not misuse the FOIA exemptions to conceal non-exempt information." *Carter*, 830 F.2d at 393 (*quoting Allen*, 636 F.2d at 1298).

At least two of the three declarations submitted by the Board contain discrepancies with the *Vaughn* index submitted by the Board. These discrepancies cast doubt on the overall accuracy of the Board's production, specifically the information withheld and redacted.[6]

The Thro declaration purports to identify the records or information withheld pursuant to FOIA's various exemptions and describe what are claimed to be the bases for these withholdings. With respect to several records, however, Ms. Thro's descriptions differ from the descriptions set forth in the *Vaughn* Index. In other instances, a description is completely

[6] These discrepancies are in addition to the discrepancies, noted above, between the exemptions cited on the documents and the claims invoked in the *Vaughn* Index.

lacking or the exemption invoked in the declaration differs from the exemption invoked in the *Vaughn* Index. For example, Ms. Thro describes the various records and information withheld pursuant to Exemption 5, including Items 7 and 8, as "market developments and analyses related to a potential bankruptcy by Bear Stearns; methods of obtaining information regarding financial institutions' exposure to Bear Stearns; proposed regulatory responses to the situation; and arguments and considerations regarding the need for the Temporary Loan." Thro Decl. at ¶19. By contrast, the *Vaughn* Index entry for Item 7 describes the withheld information as the "identities and exposure of several large mutual funds with exposure to [Bear Stearns]. It describes the withheld information on Item 8 as the "identities of two financial firms and one regulated financial institution." Similarly, the *Vaughn* Index entry for Item 12 cryptically describes the redacted information as "seek[ing] clarification regarding the nature and scope of [Bear Stearns'] repo exposure to counterparties." The Thro declaration does not make reference to any such information. Thro Decl. at ¶ 19.

Paragraph 20 of the Thro declaration describes information and records withheld pursuant to Exemption 4, including Items 12, 14, and 15, as "confidential commercial information obtained from market participants on a voluntary and strictly confidential basis." Not only does this differ from the *Vaughn* Index entry's perplexing reference to "seek[ing] clarification regarding the nature and scope of [Bear Stearns'] repo exposure to counterparties," but the *Vaughn* Index entry for Item 12 neither invokes Exemption 4 nor asserts that provision of the information was "voluntary." *Vaughn* Index at Item No. 12. The *Vaughn* Index entries for Items 14 and 15 identify the information at issue as being obtained from Bear Stearns, not from "market participants," and neither entry identifies whether the information was compelled or obtained voluntarily. *Id.* at Item Nos. 14 and 15. The Thro declaration asserts that the withheld

information in Item 20 was produced voluntarily, but the *Vaughn* Index for this same item makes no such claim. *Compare* Thro Decl. at ¶ 20 *with Vaughn* Index at Item No. 20.

The declaration of Coryann Stefansson contains similar deficiencies or inconsistencies.[7] Ms. Stefansson describes certain withheld records or information, including Items 2, 3, 16, and 19, as identifying "the exposures of individual Federal Reserve-regulated financial institutions to Bear Stearns; the collection of information from those firms; the exposure of other firms not regulated by the Federal Reserve to Bear Stearns; Bear Stearns' liquidity position; and the potential impact on institutions of a Bear Stearns bankruptcy." Stefansson Decl. at ¶ 13. The *Vaughn* Index entry for Item 16 describes the withheld information as pertaining to "the projected regulatory response to [Bear Stearns'] funding position," yet the Stefansson declaration references no such information. *Compare* Stefansson Decl. at ¶ 13 *with Vaughn* Index at Item No. 16. Likewise, the *Vaughn* Index entries for Items 2 and 3 describe the withheld information as "Chairman Bernanke's personal email address," and the *Vaughn* Index entry for Item 19 describes the withheld information as a "Board staff member's cellular telephone number." While Plaintiff has elected not to challenge these particular withholdings, the obvious inconsistencies between the Stefansson declaration and the *Vaughn* Index entries for these three items are startling and call into question the Board's descriptions of the records and information being withheld from Plaintiff.

The function of a *Vaughn* Index and accompanying agency declarations is three-fold: (1) to force "the government to analyze carefully any material withheld;" (2) to enable "the trial court to fulfill its duty of ruling on the applicability of the exemption;" and (3) to enable "the adversary system to operate by giving the requester as much information as possible, on the basis

[7] Ms. Stefansson did not sign her declaration; it apparently was signed for her.

of which he can present his case to the trial court." *United American Financial, Inc. v. Potter*, 2009 U.S. Dist. LEXIS 102365, *13 (D.D.C. Nov. 3, 2009) (*citing Judicial Watch v. Food and Drug Admin.*, 449 F.3d 141, 146 (D.C. Cir. 2006)). The overall confusion created by the Board's document identification scheme and the inconsistencies and discrepancies between the documents themselves, the *Vaughn* Index, and the Board's declarations thwart both the Court's ability to rule on the exemptions being invoked and Plaintiff's ability to challenge those exemptions. At a minimum, the Court should require *in camera* inspection of the withheld records and information.

C. The Board Improperly Withheld Information Under FOIA Exemption 4.

FOIA Exemption 4 permits the withholding of "trade secrets and commercial or financial information obtained from a person that is privileged or confidential." 5 U.S.C. § 552(b)(4). In order to determine whether information was privileged or confidential, courts look to whether its production was compulsory or whether it was provided to the government voluntarily. If the provision of the information was compulsory, "it will not be considered confidential unless the submitter can show that disclosure will (1) 'impair the government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.'" *Defenders of Wildlife v. U.S. Dep't of the Interior*, 314 F. Supp.2d 1, 7-8 (D.D.C. 2004) (*citing Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) ("*National Parks*")). If the information was provided to the government voluntarily, it is considered confidential "if it is 'of a kind that would customarily not be released to the public by the person from whom it was obtained.'" *Defenders of Wildlife*, 314 F. Supp.2d at 7-8 (*quoting Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*)).

It is not at all clear which information the Board is claiming was provided voluntarily and which allegedly was provided involuntarily. In its memorandum, the Board asserts that it "compelled financial entities it regulated to produce data regarding their financial exposure to Bear Stearns" and cites the declarations of Ms. Thro and Ms. Stefansson in support of this contention. Def's Mem. at 20-21 (*citing* Thro Decl. at ¶ 17 and Stefansson Decl. at ¶¶ 13-15). Neither declaration supports this claim. The Thro declaration references certain information that allegedly was "obtained from market participants on a voluntary and strictly confidential basis." Thro Decl. at ¶ 20 (*citing* Item Nos. 7, 12, 14, 15, 20, 30, 31, 37, and 38). However, the *Vaughn* Index for several of these items asserts that disclosure of the information would "impair the government's ability to obtain necessary information in the future," which is part of the legal test for involuntarily provided information. *Vaughn* Index at Item Nos. 7, 14, 15, 20, 30, 31, 37, and 38. The *Vaughn* Index for these same items further asserts that disclosure would likely cause substantial competitive harm, which also is part of the legal test for involuntarily provided information. *Id.*

Moreover, in many instances, the Board appears to have redacted nothing more than the names of financial institutions from various emails. *See* Item No. 4 (Bates No. 000007), Item No. 5 (Bates No. 000008), Item No. 7 (Bates No. 000011-12), Item No. 9 (Bates No. 000017), Item No. 17 (Bates No. 000034), Item No. 18 (Bates No. 000035), and Item No. 24 (Bates No. 000052). However, the Board fails to establish that the mere identity of a financial institution is "privileged or confidential" "commercial or financial information." It plainly is not. *Bloomberg v. Board of Governors*, 649 F. Supp.2d 262, 278 (S.D.N.Y. 2009) (Names of financial institutions borrowing at FRBNY's discount window are not confidential under Exemption 4). Even when viewed in context of the individual email in which a name appears, most, if not all of

the remainder of the information in the email is generic. *Id.* That a particular financial institution "has adamantly stressed that it is continuing to provide liquidity to Bear Stearns" or "noted that Bear Stearns may face difficulty involving portfolio disagreements" hardly appears to constitute "privileged or confidential" "commercial or financial information." Item No. 4 (Bates No. 000007). The Board certainly has not demonstrated that it is. The same is true for whether an institution reported that "Bear appears to be reducing [short term] funding and staggering long term debt" (Item No. 5 (Bates No. 000008)); that Bear Stearns had an overdraft with a second institution "that will use up a good part of [Bear Stearns' committed lines of credit]" (Item No. 17 (Bates No. 000034)); that the customers of a third institution were "probing about novations" or that a fourth institution was "reaching out to Tim Geitner (sic) about forming a working group to ensure safe settlement processes." Item No. 24 (Bates No. 000052).

Even without taking these substantial shortcomings into account, the Board fails to satisfy its burden of proof under Exemption 4. Its assertion that disclosure of the withheld information would "impair the government's ability to obtain necessary information in the future" is nothing more than boilerplate, conclusory language that mimics the language of the case law. *Vaughn* Index at Item Nos. 4-6, 7, 9-10, 14-15, 17-18, 20-22, 24, 30-33, and 37-38.[8] The Board makes no attempt to demonstrate how disclosing the name of a particular financial institution or any other particular piece of information about a particular institution would lead to this result. It merely asserts that this is so.

[8] The Board apparently claims that Item No. 13 was provided involuntarily, but the *Vaughn* Index entry for this item does not include the Board's boilerplate "impairment" language. Rather, it claims only that disclosure "could chill the free flow of information between regulated financial institutions and their supervisor." *Vaughn* Index at Item No. 13. It is unclear whether this omission was deliberate or unintentional. Either way, the Board has failed to satisfy its burden of proof with respect to Item No. 13.

In addition, the Board claims that its ability to obtain necessary information in the future would be impaired because "supervisors rely on the willingness of the supervised institutions to provide full information in order to assure a robust supervisory environment, and supervised institutions are willing to provide this information because they know that the supervisors will maintain its confidentiality." Stefansson Decl. at ¶ 15. This particular assertion is contradicted by the claim that the regulated institutions were required to provide the information at issue. If, as the Board asserts, regulated institutions are required to provide information, then their "willingness" to provide the information is irrelevant.

The Board also makes the general assertion that the unidentified institutions that provided the withheld information would likely suffer substantial competitive harm if the information were disclosed. *Vaughn* Index at Item Nos. 4-6, 7, 9-10, 13, 14-15, 17-18, 20-22, 24, 30-31, 33, and 37-38; Stefansson Decl. at ¶ 15; Thro Decl. at ¶ 17. Like the Board's "impairment" claim, its "competitive harm" claim suffers from a complete lack of specificity.

To prevail on such a claim, the Board must "provide specific evidence substantiating an assertion that release of a record would cause substantial competitive harm to the person from whom the information was obtained." *Bloomberg*, 649 F. Supp.2d at 279 (*citing Public Citizen Health Research Group v. Food and Drug Admin*, 704 F.2d 1280, 1291 (D.C. Cir. 1983)); *see also Gulf & Western Industries v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979). "Conclusory and generalized allegations of substantial competitive harm, of course, are unacceptable and cannot support an agency's decision to withhold requested documents." *Id.* The agency must provide evidence that if the requested information is disclosed, competitive harm would be "imminent." *Bloomberg*, 649 F. Supp.2d at 279 (*citing Iglesias v. Central Intelligence Agency*, 525 F. Supp. 547, 559 (D.D.C. 1981)). The specific evidence must show

that the competitive harm will result from the affirmative use of the information by competitors of the person from whom the information was obtained, not merely injuries to that person's competitive position in the marketplace or "embarrassing publicity attendant upon public revelations." *Id.* (*citing Public Citizen Health Research Group*, 704 F.2d at 1291 n.30).

The Board's submissions fail to satisfy this exacting standard. Its *Vaughn* Index repeats the same boilerplate phrase – fifteen times – that "disclosure would likely cause substantial competitive harm." *Vaughn* Index at Item Nos. 4-7, 9-10, 13-15, 17-18, 20-22, and 24. Another five times it uses the word "injury" instead of the word "harm." *Id.* at Item Nos. 30-31, 33, and 37-38. Similarly, Ms. Stefansson's description of the alleged harm never progresses beyond mere conjecture.[9] Stefansson Decl. at ¶ 15. She fails to demonstrate that the alleged harm or injury *will* happen, much less that it will happen *imminently*. *Bloomberg*, 649 F. Supp.2d at 279. As in *Bloomberg*, the Board's evidence is insufficient to satisfy its burden of proof. *Id.*

By contrast, Dr. Helwege's declaration cogently demonstrates that large complex banking organizations ("LCBOs") are not likely to suffer competitive harm if information about their exposure to Bear Stearns was made public. Helwege Decl. at ¶¶ 12-16. The Board's claim that the release of information about LCBO's exposures to Bear Stearns might cause an LCBO to suffer competitive harm in the form of impaired access to liquidity "is not substantiated by any empirical evidence." *Id.* at ¶ 13. Dr. Helwege explains that LCBOs have access to funding sources that are not available to nonfinancial firms or even many financial firms. *Id.* at ¶ 14. "If a competitor tries to convince a bank's customers, creditors, or analysts that exposure to Bear Stearns is causing a lack of liquidity, the bank could simply obtain funding through insured

[9] Ms. Stefansson uses the word "could" at least six times. Stefansson Decl. at ¶ 15.

deposits or the discount window, avoiding any potential funding shortages in the repo market." *Id.* In addition, Dr. Helwege notes that the Board's argument fails to make a clear distinction between loan exposure and repo market exposure. *Id.* at ¶ 16. "[I]f the LCBO had repo exposure to Bear Stearns, a default would result in the LCBO keeping the collateral. If that collateral were not as strong as Treasury collateral, the LCBO could use the Board of Governors' [Term Securities Lending Facility] to swap it out and avoid any funding problems." *Id.* Not only are the Board's assertions of harm too conclusory to satisfy its burden of proof, but, as Dr. Helwege shows, they also are incorrect.

Second, it is difficult to understand, and indeed, the Board fails to explain, how disclosure of information about an institution's exposure to Bear Stearns in March 2008 – two years ago – could cause competitive injury to the institution today. It would not. *See generally* Helwege Decl. at ¶¶ 13-16. From a market perspective, the information at issue "extremely dated." *Id.* at ¶ 15. Not only is it two years old, but Bear Stearns acquired by JPMorgan and has not exists as a separate entity for two years. *See, e.g.*, Def's Mem. at 4 n.1; Thro Decl. at ¶ 3. The fact that Bear Stearns has since been acquired by JPMorgan and no longer exists further undermines any claim that disclosing information about an institution's exposure to Bear Stearns two years ago will cause the institution to suffer imminent, substantial harm at the hands of one of its competitors. Although no longer relevant to the market, the information remains of substantial interest to researchers and academics such as Plaintiff and Dr. Helwege.

Again, it is unclear whether the Board is claiming that any particular information was provided voluntarily or involuntarily. While the Thro declaration makes reference to certain items that allegedly were provided "voluntarily" (Thro Decl. at ¶ 20 (*citing* Item Nos. 7, 12, 14, 15, 20, 30, 31, 37, and 38)), the *Vaughn* Index identifies a different set of items that allegedly

were provided "voluntarily." *Vaughn* Index at Item Nos. 7, 30-33, and 37-38. With respect to all of these *Vaughn* Index entries except the entry for Item 12, the *Vaughn* Index also uses language suggesting that the items were produced "involuntarily."[10] This is because the entries claim that disclosure would cause competitive harm to the submitter(s) and impair the government's ability to obtain necessary information in the future, which are factors that are only relevant to involuntarily provided information. Regardless, the Board does not claim that any of these items are "of a kind that would customarily not be released to the public by the person from whom it was obtained."[11] *Defenders of Wildlife*, 314 F. Supp.2d at 7-8 (internal quotation omitted). The Board has thus failed to meet its burden of proof with respect to the allegedly "voluntarily" provided records or information.

Finally, the Board appears to be trying to argue that a new category of information should be protected from disclosure under Exemption 4. It argues that it obtained market data, via the FRBNY, from the proprietary databases of two financial institutions pursuant to contractual agreements between the FRBNY and the institutions. Thro Decl. at ¶ 21 (*citing* Item Nos. 32 and 37). The Board offers no legal authority for the proposition that Exemption 4 authorizes the withholding of such information. Because FOIA's exemptions are to be construed narrowly (*Tax Analysts*, 492 U.S. at 151), the Court should decline to extend Exemption 4 to new categories of information.

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[10] The *Vaughn* Index does not invoke Exemption 4 for Item 12, but the Thro declaration does. *Compare Vaughn* Index at Item No. 12 *with* Thro Decl. at ¶ 20.

[11] *See* Helwege Decl. at ¶ 20.

D. The Board Improperly Withheld Information Under FOIA Exemption 5.

Exemption 5 of FOIA allows an agency to withhold records or information that is "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other an agency in litigation with the agency." 5 U.S.C. § 552 (b)(5). Courts have recognized three types of Exemption 5 withholdings: the deliberative process privilege, the attorney-client privilege, and the attorney work product doctrine. *See Coastal States Gas Corp.,* 617 F.2d at 862. The Board purportedly invokes the deliberative process privilege and the attorney work product doctrine. Def's Mem. at 12.

1. The Board Improperly Seeks to Withhold Records and/or Information That Do Not Constitute Inter- or Intra-Agency Communications.

As an initial matter, the Board completely glosses over the fact that the Federal Reserve System is comprised of both government agencies – the Board and the Federal Open Markets Committee – and private corporations – the twelve regional reserve banks, which includes the FRBNY. The Board frequently refers to its own officials and FRBNY employees merely as "FRS staff." To do so is erroneous, if not disingenuous. As the Board itself noted in *Bloomberg*, officials of the Board are civil servants; staff members of the FRBNY are at-will employees.

Moreover, in *Bloomberg*, the Board correctly asserted that the FRBNY is not a government agency, but instead is a separate and distinct, private corporation. Obviously, because the Board itself has acknowledged that the FRBNY is not a government agency, then records and information exchanged by officials of the Board and employees of the FRBNY cannot constitute "inter-agency or intra-agency memorandums or letters." Exemption 5 does not apply to any such records or information. Nor, for this same reason, does Exemption 5 apply to records or information exchanged between the SEC and the FRBNY. Consequently, by

definition, Exemption 5 cannot apply to the following: Item Nos. 1, 4-6, 10-12, 14, 20-21, 26-27, 29-34, 36, 37, and 38.

2. The Board Improperly Applies the Deliberative Process Privilege.

In order to withhold information pursuant to the deliberative process privilege, an agency must demonstrate that the information would "reveal 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). Further, the information must be "predecisional and it must be deliberative" and "not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *Id*. (citations omitted). Lastly, the deliberative process privilege is a "qualified privilege and can be overcome by a sufficient showing of need." *Id.*

The Board makes the bold assertion that "*all* of the documents withheld in this case are protected by the deliberative process privilege." Def's Mem. at 12. Obviously, this is an overstatement because the Board's own *Vaughn* Index does not even assert that *all* of the withheld records and information are subject to an Exemption 5 claim. Several items are withheld under Exemption 6 only. *See Vaughn* Index at Item Nos. 2-3, 19, 25, and 28.

Nonetheless, in claiming deliberative process over all of the withheld records and information, the Board loses sight of the fact that much of this material is purely factual. It claims that, because this factual data was "considered by the Board members and Board and

Reserve Bank staff as part of the process of deliberation," it must be exempt. Thro Decl. at ¶¶ 17, and 19; *see also* Def's Mem. at 14-16, Stefansson Decl. at ¶ 12. This is simply not the law.

As a general matter, an agency has a duty to disclose any reasonably segregable, responsive, factual information. *Mead Data Central, Inc.*, 566 F.2d at 260. While courts have recognized the possibility that the disclosure of certain factual information can "expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions," courts have construed this exception narrowly. *Quarles v. Dep't of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990). At issue in *Quarles* were certain cost estimates that the Court found were not really facts at all, but instead information "derive[d] from a complex set of judgments – projecting needs, studying prior endeavors and assessing possible suppliers." *Id.* at 392-93. "They partake of just that elasticity that has persuaded courts to provide shelter for opinions generally." *Id.*; *see also Petroleum Information Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992) ("To fall within the deliberative process privilege, materials must bear on the formulation or exercise of agency policy-oriented *judgment*") (emphasis original).

The Board simply has not demonstrated that disclosure of the factual material at issue -- financial statistics, pricing and exposure data, and the identities of various financial institutions -- by itself will reveal any deliberations or judgment calls by Board officials in deciding to authorize an emergency loan to Bear Stearns. Nor could the Board make such an assertion. The Board itself has described the events as a "fast moving, real-time effort" to gather any and all information it could obtain to "monitor the possible impact of a Bear Stearns bankruptcy." Def's Mem. at 24.

The records produced by the Board confirm that this was the case. For example, Item 13 (Bates No. 000029), a 5:40 p.m. email from a Board analyst on March 13, 2008, states, "Here are exposures to [Bear Stearns] that I have now." Item No. 16 (Bates No. 000034), a 10:18 p.m. email from a Board official on March 13, 2008, states, "Gov. Kohn and I are still in the office . . . Based on [Bear Stearns] global operations, do you know if anyone has talked with the [Financial Services Authority] in London? . . . We have pulled together the exposure #s of the [Large Financial Institutions] to [Bear Stearns] but the information is from the last monthly reports" At 5:48 a.m. on the morning of March 14, 2008, this same Board official sent the following email to members of the Board and other Board officials: "I just got off a call with folks at [the FRBNY]. Below is a chart with exposures. I'm on my way into the office." Item Nos. 19 and 20 (Bates Nos. 000040 and 00041). If anything, the factual data the Board seeks to withhold from Plaintiff reflects a frantic scramble on the evening of March 13, 2008 and in the early morning of March 14, 2008 to gather as much raw data as possible, not any careful or considered culling of facts that would reveal the exercise of agency judgment.

Finally, completely absent from the Board's *Vaughn* Index and declarations is any demonstration that disclosure of the withheld records or information would cause harm to its decision-making process. The purpose of the deliberative process privilege is to protect the "quality of administrative decision-making [which] would be seriously undermined if agencies were forced to 'operate in a fishbowl' because the full and frank exchange of ideas on legal or policy matters would be impossible." *Mead Data Central, Inc.*, 556 F.2d at 256. Therefore, "a decision that certain information falls within exemption five should therefore rest fundamentally on the conclusion that, unless protected from public disclosure, information of that type would not flow freely within the agency." *Id.* "An agency cannot meet its statutory

burden of justification by conclusory allegations of possible harm. It must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA." *Id.* at 258 (emphasis added). In this instance, the Board has not made "conclusory allegations of possible harm;" it has not made *any* allegations of harm.

3. The Board Improperly Applies the Attorney Work Product Doctrine.

In order to exempt information pursuant to the attorney work product doctrine, an agency must demonstrate that the material was "prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." *Nat'l Labor Relations Board v. Sears*, 421 U.S. 132, 154 (1975). Importantly, "it is firmly established that there is no privilege at all unless the document was initially prepared in contemplation of litigation, or in the course of preparing for trial." *Coastal States*, 617 F.2d at 865. While there is no requirement that actual litigation be pending, it is absolutely necessary that "at the very least some articulable claim, likely to lead to litigation, must have arisen." *Id.*

The Board attempts to withhold Item 38, which it describes as a "draft affidavit … conveyed by a FRBNY attorney to Board attorneys." *Vaughn* Index at Item No. 38; *see also* Thro Decl. at ¶ 22. The Board asserts that the affidavit was "prepared by FRBNY attorneys in anticipation of litigation by Bear Stearns shareholders related to the Board's authorization to extend credit to [Bear Stearns] indirectly through [JP Morgan Chase]." *Id.* Nowhere does it assert that "some articulable claim, likely to lead to litigation, [had] arisen" or identify what such a claim might have been. *Coastal States*, 617 F.2d at 865. Nor does it seem likely that shareholders of Bear Stearns, whose investments would have been likely rendered completely worthless if the company had declared bankruptcy on the morning of March 14, 2008, would sue

the FRBNY, much less the Board, a government agency that enjoys sovereign immunity, for authorizing an emergency loan to Bear Stearns.

Moreover, the Board admits that the document was prepared by an FRBNY attorney. It is not the work product of a Board's attorney. To the extent the attorney work product doctrine might have applied, its protections were lost when the documents was sent outside the FRBNY to a third party – the Board. The Board's attorney work product doctrine claim must fail.

E. The Board Improperly Withheld Information Under FOIA Exemption 8.

Exemption 8 provides that an agency may withhold information that is "contained in or related to the examination, operating or condition reports prepared by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C. § 552(b)(8). While the Board is correct in asserting that Exemption 8 was crafted broadly, a broad application of the exemption does not eliminate an agency's obligation to provide "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *King*, 830 F.2d at 219 (*quoting Mead Data Central, Inc.*, 566 F.2d at 251). In other words, simply making an Exemption 8 assertion is not sufficient.

The Board invokes Exemption 8 for thirteen items, including two items that it referred to the SEC. *Vaughn* Index Item Nos. 4 (Bates No. 000007), 5 (Bates No. 000008), 6 (Bates Nos. 000008-9), 9 (Bates No. 000017), 10 (Bates No. 000020 and 000051), 11 (Bates Nos. 000004, 000021, 000022, 000023, 000030, 000031, 000038, and 000039), 12 (Bates No. 000022), 13 (Bates No. 000029), 17 (Bates No. 000034), 18 (Bates No. 000035), 21 (Bates No. 000043), 22 (Bates No. 000044), and 24 (Bates No. 000052). Of these thirteen items, however, the Board's *Vaughn* Index actually claims only twice that the information at issue relates to examination,

operating or condition reports.[12] *Vaughn* Index at Item Nos. 11 and 12 (claiming that "[t]he withheld records relate to examination, operating, or condition reports prepared by, or on behalf of or for the use of the SEC in connection with its supervision and regulation of [Bear Stearns]"). Both are items the Board referred to the SEC. *Id.* The *Vaughn* Index makes no mention of examination, operating, or condition reports with respect to the Board's own Exemption 8 claims. *Id.* at Item Nos. 4, 5, 6, 9, 10, 13, 17, 18, 21, 22, and 24.[13] While the Thro declaration baldly asserts that the withheld information "is related to examination, operating or condition reports," it fails to identify any particular report to which any particular piece of withheld information allegedly relates. Thro Decl. at ¶17. The Board's invocation of Exemption 8 should be rejected for this reason alone.

As the Board itself acknowledges, the information at issue consists of "e-mails or tables (or portions thereof) that contained information furnished to the Board by financial institutions regulated by the Board." Def's Mem. at 23. The Board summarily concludes that this information is "plainly 'related to examination, operating, or condition reports.'" *Id*. at 24. Such a conclusion is not so plain, and even a cursory review of the underlying records from which the information was redacted calls the Board's Exemption 8 claims into question. *See, e.g.*, Item Nos. 4 (Bates No. 000007), 5 (Bates No. 000008), 6 (Bates Nos. 000008-9), 9 (Bates No.

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[12] Moreover, the Board does not specify the examination, operating, or condition reports to which the information relates, or even the statute or regulation under which the Board or the SEC is authorized to prepare or receive such reports.

[13] Interestingly, the Board's purported justification for withholding information contained in Item 7 (Bates No. 000011-12) is almost identical to its purported justification for withholding information contained in Item No. 9 (Bates No. 00017), and yet, no Exemption 8 claim is made for Item No. 7. It defies logic to conclude that the identities and exposures of banks could be withheld under Exemption 8 in one instance, but not in the other.

000017), 13 (Bates No. 000029), 17 (Bates No. 000034), 18 (Bates No. 000035), 21 (Bates No. 000043), 22 (Bates No. 000044) and 24 (Bates No. 000052). Rather than relating to an actual report, it appears that the Board is claiming that any financial information it obtains in its supervisory capacity from or about any financial institution necessarily constitutes or relates to a "report" for purposes of Exemption 8. Such a construction of the term "report" is not consistent with the plain meaning of Exemption 8. *See Hammontree v. Nat'l Labor Relations Board,* 894 F.2d 438, 441 (D.C. Cir. 1990) (*citing Chevron U.S.A., Inc. v. Nat'l Resources Defense Council*, 467 U.S. 837, 842-43 (1984)). Congress cannot have intended the term "report" as used in Exemption 8 to have such an overarching meaning.[14]

Finally, in order for Exemption 8 to apply, the information contained in or related to the reports at issue, must have been "prepared by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C. § 552 (b)(8). The Thro declaration only regurgitates the language of Exemption 8 and fails to provide any basis in fact for concluding that any particular piece of withheld information relates to a particular report "prepared by or on behalf of, or for the use of" such an agency. The Board's Exemption 8 should be rejected for this additional reason.

[14] The Federal Financial Institutions Examination Council ("FFIEC") was statutorily created in 1979 and is a "formal interagency body empowered to prescribe uniform principles, standards, and *report forms for the federal examination of financial institutions*," including the Federal Reserve and the FDIC. *See* FFIEC homepage at http://www.ffiec.gov/about.htm (emphasis added). This suggests that the financial industry uses a formal system of examination, operating, or condition reports and does not, as the Board asserts, define examination, operating, and condition reports to mean any communicated financial information.

F. The Board Improperly Withheld Specific Records.

While Plaintiff challenges the Board's withholdings generally, he also asserts the following challenges to the withholding of specific items:

Item No. 11 (Bates No. 000004)

The Board asserts Exemptions 5 and 8 with respect to Item 11 (Bates No. 000004), which is an email that allegedly contains "detail on [Bear Stearns'] repo exposure to counterparties." *Vaughn* Index at Item No. 11. Because the information originated with the SEC, the Board referred the withheld material to that agency.

With respect to Exemption 5, the Board claims that the information was "communicated by SEC staff to FRS staff on a confidential inter-agency basis," then subsequently "communicated on an intra-agency basis among FRS staff as part of the pre-decisional, deliberative process." The Board does not claim that the SEC and the Board staffer who received the information were involved in any agency deliberations; its *Vaughn* Index asserts only that the SEC informed the Board staffer of factual information and that the staffer then conveyed the information to other Board officials. A review of the email itself confirms that this is the case. There is nothing deliberative about the purely factual "detail on [Bear Stearns'] repo exposure to counterparties" provided to the Board staffer by the SEC.

With respect to Exemption 8, the Board asserts that the material may be properly withheld because it "relate[s] to examination, operating or condition reports." However, neither the *Vaughn* Index nor any of the accompanying declarations identify any examination, operating, or condition reports to which the redacted material purportedly relates. Nor do they otherwise explain how the redacted material relates to any such reports. The bare assertion that "SEC staff

obtained the withheld information from [Bear Stearns] pursuant to its Consolidated Supervised Entity ("CSE") program" fails to remedy these material shortcomings.

Item No. 11 (Bates Nos. 000030-31)

The Board asserts Exemptions 5 and 8 with respect to Item 11 (Bates Nos. 000030-31), which is an email from one FRBNY employee to other FRBNY employees conveying the FRBNY employee's notes of a telephone conversation with an SEC official about Bear Stearns. One of the FRBNY employees who received the email then forwarded it to a Board official without any comment other than the notation "fyi." The Board's description of the information as "detail on [Bear Stearns'] repo exposure to counterparties obtained on a confidential inter-agency basis by FRS staff from SEC staff" thus is misleading. *Vaughn* Index at Item No. 11.

As the Board acknowledged in *Bloomberg*, the FRBNY is not a government agency; it is a separate and distinct private corporation. The record is not an "inter-agency" communication. Information was communicated from the SEC to a private entity, the FRBNY, then from that same private entity to the Board. Moreover, the Board does not demonstrate how this information reveals anything about the Board's deliberations. Exemption 5 does not apply.

With respect to Exemption 8, the Board asserts that the material may be properly withheld because it "relate[s] to examination, operating or condition reports." However, neither the *Vaughn* Index nor any of the accompanying declarations identify any examination, operating, or condition reports to which the redacted material purportedly relates. Nor do they otherwise explain how the redacted material relates to any such reports. The bare assertion that "SEC staff obtained the withheld information from [Bear Stearns] pursuant to its Consolidated Supervised Entity ("CSE") program" fails to remedy these material shortcomings.

Item No. 11 (Bates Number 000039)

The Board asserts exemptions 5 and 8 with respect to Item 11 (Bates No. 000039), which is a one page spreadsheet, entitled "Largest Bank_Broker Group Exposures to BS Group.xls." The spreadsheet was an attachment to the email chain that appears on Bates Nos. 000037-38. The Board's *Vaughn* index describes the spreadsheet as "detail on [Bear Stearns'] repo exposure to counterparties obtained on a confidential inter-agency basis by FRS staff from SEC staff." *Vaughn* Index at Item No. 11. This description is plainly incorrect. Also plainly incorrect is the Board's assertion that the document "was obtained by SEC staff from [Bear Stearns] and communicated by SEC staff to FRS staff on a confidential inter-agency basis." *Id.*

The initial email in the chain was sent from one Bear Stearns official, Chris Mushell, to another, Michael Alix. Bates No. 000038. Mr. Alix subsequently forwarded the email and accompanying spreadsheet to FRBNY employee William Brodows, who then forwarded the email and attachment to Brian Peters and four other FRBNY employees. Bates No. 000037. It was only then that Mr. Peters forwarded the email and accompanying spreadsheet to officials at the Board. In other words, Bear Stearns provided the spreadsheet to FRBNY, a private corporation, which then forwarded the spreadsheet to the Board. The email chain thus demonstrates that the SEC was not involved in the information exchange in any way.

As with its other claims of Exemption 5, the Board has completely failed to demonstrate how disclosure of the spreadsheet would reveal any agency deliberations. Nor can the Board properly claim that the spreadsheet can be withheld under Exemption 8 as an SEC examination, operating, or condition report, as the spreadsheet obviously originated with Bear Stearns and was sent to the FRBNY. The email chain belies any claim that the SEC was involved in any way.

Item No. 15 (Bates No. 000033)

The Board asserts Exemptions 4 and 5 with respect to Item 15 (Bates No. 000033), which is an email that is described as "confidential commercial information obtained by SEC staff from [Bear Stearns] and communicated on an inter-agency basis to FRS staff." *Vaughn* Index at Item No. 15. Again, a cursory review of the actual email demonstrates otherwise. Contrary to the Board's claim that the "information regarding [Bear Sterns'] liquidity situation was obtained by SEC staff," the email demonstrates that the information at issue was conveyed by Bear Stearns to an FRBNY employee during a conference call, and that the FRBNY employee subsequently conveyed this same information to the author of the email, an official of the Board:

> Quick update on [Bear Stearns] based on telephone conversation with Brian Peters, FRBNY. Apparently, there was a conference call with SEC as well as with the Chief Risk Officer at [Bear Stearns]. I understand the Vice Chairman participated in the call so his information probably will be more detailed than what I will provide. Sorry if my details are sketchy . . .
>
> [Bear Stearns] Chief Risk officer indicated that [Bear Stearns] will likely have 'trouble' opening tomorrow and will be under pressure. A great deal of uncertainty about ability to operate . . . [redacted].

Bates No. 000033. Again, the Board fails to demonstrate how the information conveyed by Bear Stearns to the FRBNY, which subsequently conveyed the information to the author, reveals anything about the Board's deliberation. It does not. Exemption 5 does not apply. With respect to Exemption 4, not only does the Board make only conclusory allegations of confidentiality about the admittedly "sketchy" details of the telephone conference, which apparently had multiple governmental and non-governmental participants, but it also makes only conclusory allegations of harm. Moreover, Bear Stearns certainly will not suffer imminent harm at the hands of a competitor if the information at issue is disclosed to Plaintiff, because Bear Stearns no longer exists.

Item No. 20 (Bates No. 000041)

The Board asserts Exemptions 4 and 5 with respect to Item 20 (Bates No. 000041), which is a spreadsheet entitled "Bear Stearns exposure Mar 14 v1.xls." As with several other withheld documents, the Board claims that "[t]he withheld confidential information was obtained by SEC staff from [Bear Stearns] and communicated by SEC staff to FRS staff on a confidential inter-agency basis. The confidential commercial information subsequently was communicated on an intra-agency basis among FRS staff." *Vaughn* Index at Item 20. Again, this claim is belied by the email to which the spreadsheet was attached.

This email demonstrates that the spreadsheet was sent by an employee of the FRBNY, William Brodows, to other FRBNY employees and officials of the Board. Bates No. 000040. One of the Board officials who received the email and accompanying spreadsheet from Mr. Brodows forwarded both documents to members of the Board and other Board officials along with a note: "I just got off a call with folks at NY Fed. Below is a chart with exposure info. I am on my way into the office." *Id.* There is no indication from the email chain that the SEC was involved at all.

In addition, although the Board asserts Exemption 5's deliberative process privilege over the spreadsheet, the Board fails to demonstrate how disclosure of the spreadsheet would reveal anything about the Board's decision-making process. Neither the email nor the accompanying spreadsheet reflect any agency deliberations at all.

With respect to Exemption 4, the Board again makes only conclusory allegations about confidentiality and the possibility of harm. The Board also ignores the fact that two years has passed since Bear Stearns suffered a liquidity crisis and was acquired by JPMorgan and the information at issue is "extremely dated." Helwege Decl. at ¶ 15. Under the circumstances, it

cannot be said that a company that had exposure to Bear Stearns in March 2008 will suffer imminent harm at the hands of a competitor if information about its exposure to Bear Stearns two years ago is disclosed to Plaintiff. *See generally* Helwege Decl. at ¶¶ 13-16.

Item No. 21 (Bates No. 000043)

The Board asserts Exemptions 4, 5, and 8 with respect to Item 21 (Bates No. 000043), which it describes as a table identifying "FRS-supervised [Large Financial Institutions] and other non-supervised, private companies with exposure to [Bear Stearns] and the size of the exposure for each institution in question." *Vaughn* Index at Item No. 21. The Board claims that a portion of the information on the table was obtained from "FRS-regulated financial institutions by FRS examiners in the course of the supervisory process" and that a portion was obtained "directly or indirectly from the SEC." *Id*.

Again, the document was attached to an email sent by the FRBNY's William Brodows to other FRBNY employees and to Board members and officials. Bates No. 000042. Given that the email originated with the FRBNY, a private corporation, the Board's bald and conclusory claim that the information in the attached table was obtained "by FRS examiners in the course of the supervisory process" is insufficient to satisfy the Board's burden of proving that Exemption 4 applies. Nor does there appear to be any basis at all for the assertion that the SEC was "directly or indirectly" involved in the production of the table. In addition, the Board again ignores the fact that the information at issue is now "extremely dated." Helwege Decl. at ¶ 15. The Board fails to explain how a company that had exposure to Bear Stearns in March 2008 will suffer imminent harm at the hands of a competitor if the information about its exposure to Bear Stearns two years ago is disclosed to Plaintiff. *See generally* Helwege Decl. at ¶¶ 13-16. Exemption 4 does not apply.

The Board also fails to demonstrate how disclosure of the spreadsheet would reveal anything about the Board's decision-making process. Neither the email nor the accompanying table reflect any agency deliberations at all. Exemption 5 does not apply.

Finally, the Board's Exemption 8 claim fails as well. The Board does not assert that the information in the table was "contained in or related to examination, operating or condition reports." Nor does the Board try to explain how the information in the table might relate to any examination, operating, or condition reports.

Item No. 22 (Bates No. 000044)

The Board asserts Exemptions 4, 5, and 8 with respect to Item 22 (Bates No. 000044), which it describes as an "email identify[ing] FRS-supervised [Large Financial Institutions] with exposure to [Bear Stearns] and institution-specific data regarding credit default swaps." *Vaughn* Index at Item No. 22. While the Board correctly describes the email as being from a Board official to a Board member, the email describes the substance of the withheld information as information from the third quarter of 2007 regarding the dollar value of credit default swaps held by the top twenty-five commercial banks. Bates No. 000044. This precise data is publicly available from the Office of the Comptroller of the Currency, which publishes reports to this effect, including a report from the third quarter of 2007, on its website. Comptroller of the Currency, "OCC's Quarterly Report on Bank Derivative Activities, Third Quarter 2007," attached to Bekesha Decl. as Exhibit 2, at Table 1. None of the claimed exemptions apply.

Item Nos. 26, 27, and 29 (Bates Nos. 000053-57)

The Board asserts Exemption 5 with respect to Item 26 (Bates No. 000053 (middle)), Item 27 (Bates No. 000053 (bottom)), and Item 29 (Bates Nos. 000055-57). For all three documents, the Board claims, "The withheld information was disseminated on an intra-agency

basis among Board members and Reserve Bank Staff and consists of a draft description of one aspect of the Board's pre-decisional, deliberative process regarding how to respond to the rapidly deteriorating financial situation at" Bear Stearns. This assertion fails to satisfy the Board's burden of proving Exemption 5 applies to these records for at least two reasons. First, the emails and attachment were sent back-and-forth between the Board and the FRBNY, which is not a government agency. Second, the content of the emails and of the attachment was not pre-decisional or deliberative in nature.

On March 14, 2008, at 11:52 a.m., more than two hours after the Board formally convened to authorize the FRBNY to extend a loan to Bear Stearns through JPMorgan, Jamie McAndrews, a FRBNY employee, emailed FRBNY President Geithner and other FRBNY employees an attachment outlining "a set of arguments in favor of today's [Board] action." Bates No. 000054. FRBNY President Geithner forwarded Mr. McAndrews' email and accompanying memorandum to the members of the Board. *Id.* Vice Chairman Donald Kohn responded, "Jamie, Nice job; you've made the case about as strongly as it could be made, and it's very helpful to have this spelled out. [Redacted]." Bates No. 000053. Mr. McAndrews subsequently replied to Vice Chairman Kohn, indicating that he would incorporate the Vice Chairman's comments and others he received from FRBNY employees. *Id.*

The redacted portions of the email exchange, as well as the attachment, do not fall within Exemption 5 because the records were not communicated on an intra-agency basis, as the Board claims. Again, the FRBNY is not a government agency. Nor was the attachment prepared by a government agency or an official of a government agency. Since the FRBNY is not a government agency, but is a private corporation separate and distinct from the Board, no intra-agency communication occurred.

In addition, the Board cannot properly assert the deliberative process privilege with respect to the memorandum. The Board asserts that the memorandum is a "description of arguments FRS staff presented to the Board in support of staff's recommendation that the Board authorize under Section 13(3) of the Federal Reserve Act [] FRBNY to extend credit." *Vaughn* Index at Item No. 29. According to the official minutes of the Board's March 14, 2008 meeting, Mr. McAndrews did not even attend the meeting. Minutes, McKinley Decl. Exhibit 1, at 1. While the Board claims that Mr. McAndrew later said he wrote the memorandum based on "his participation in two telephone calls which occurred on the evening of March 13 and the early morning of March 14, 2008," nowhere does it assert that the arguments Mr. McAndrews allegedly heard during these two unidentified telephone calls were the same arguments presented to and considered by at the Board's March 14, 2008 meeting. Thro Decl. at ¶ 19. Nor does it present any evidence to this effect.

Moreover, "a set of arguments in favor of [an] action" is not the same as arguments that were actually considered and accepted or rejected. It is nothing more than an after-the-fact justification or explanation of the action. *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Justice*, 658 F. Supp. 2d 217, 233 (D.D.C. 2009) ("*CREW*"). It is not a description of the deliberations themselves. *Id.* Exemption 5 does not apply to Mr. McAndrews' memorandum. For these same reasons, it does not apply to the email exchanges either.

Item No. 34 (Bates Nos. 000166-68)

The Board asserts Exemption 5 with respect to Item 34 (Bates Nos. 000166-68). The Board describes the entirely withheld, three-page document as "recount[ing] FRS staff's arguments made in support of staff's recommendation to the Board to authorize … FRBNY to extend credit to [Bear Stearns] indirectly through" JPMorgan. *Vaughn* Index at Item No. 34.

First, the Board does not provide an author or recipient of this document. This is particularly important in light of the Board's general failure to differentiate between FRBNY employees and officials of the Board. Second, the Board fails to state whether the document is a draft or a final version. Third, the subject of the document, described as "[s]ome arguments in favor of today's action by the Federal Reserve," does not suggest that the document is anything more than an after-the-fact explanation of the Board's decision. *CREW*, 658 F. Supp. 2d at 233. Based on the information provided and the assertions made, the Board has failed to provide a relatively detailed justification for its Exemption 5 claim.

Item No. 35 (Bates Nos. 169-84)

The Board asserts Exemption 5 with respect to Item 35 (Bates Nos. 000169-84). The document is described as an April 2, 2008 memorandum from the Board's General Counsel and Board attorney to the Board regarding the authority to provide an extension of credit to Bear Stearns. *Vaughn* Index at Item No. 35. It "recounts the legal advice that was provided to the Board on and around March 14, 2008." *Id*. Because the memorandum merely recounts advice given after the fact, it cannot be said to reflect the deliberative process of a government agency. Exemption 5 does not apply.

Item No. 36 (Bates Nos. 000185-88)

The Board asserts Exemption 5 with respect to Item 36 (Bates Nos. 000185-88). The document is described as a March 26, 2008 memorandum from an FRBNY attorney to attorneys at the Board regarding "Bear Stearns' Illiquidity as of March 14, 2008." *Vaughn* Index at Item No. 36. It "recounts the legal advice that was provided by FRBNY legal staff to Board legal staff" on or around March 14, 2008. *Id*. Again, the Board has acknowledged that the FRBNY is not a government agency and FRBNY employees are not government officials. Moreover,

because the memorandum merely recounts advice given after the fact – and especially because it recounts advice given by non-governmental third parties – it cannot be said to reflect the deliberative process of a government agency. Exemption 5 does not apply.

IV. Conclusion.

For the foregoing reasons, the Board's motion for summary judgment should be denied and summary judgment should be entered in Plaintiff's favor.

Dated: March 8, 2010

Respectfully submitted,

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VERN McKINLEY,	)	
	)	
Plaintiff,	)	Civil Action No. 09-1263 ESH
	)	
v.	)	
	)	
FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S RESPONSE TO DEFENDANT BOARD OF GOVERNORS' STATEMENT OF MATERIAL FACTS AND PLAINTIFF'S STATEMENTOF MATERIAL FACTS NOT IN DISPUTE

Plaintiff Vern McKinley, by counsel and pursuant to LcvR 56.1, respectfully submits the following response to the Statement of Material Facts Not in Dispute of Defendant Board of Governors of the Federal Reserve System ("Board"). Plaintiff also respectfully submits his own Statement of Material Facts Not in Dispute in support of his own cross-motion for summary judgment:

I. Plaintiff's Response to the Board's Statement of Material Facts Not in Dispute.

A. General Objection

As an initial matter, Plaintiff objects to the Board's statement for failing to comply with Local Civil Rule 7(h)(1). The failure to comply with the requirement to file a proper statement of material facts in "making or opposing a motion for summary judgment may be fatal to the delinquent party's position." *Gardels v. Central Intelligence Agency*, 637 F.2d 770, 773 (D.C. Cir. 1980); *see also Adagio Investment Holding Ltd. v. Federal Deposit Insurance Corp.*, 338 F. Supp.2d 71, 75 (D.D.C. 2004); *Smith Property Holdings, 4411 Connecticut L.L.C. v. U.S.*, 311

F. Supp. 2d 69, 78 (D.D.C. 2004); *Robertson v. American Airlines*, 239 F. Supp.2d 5, 8-9 (D.D.C. 2002).

The statement of material facts submitted by the Board contains an improper mix of fact and legal argument and "does nothing to assist the court in isolating the material facts, distinguishing disputed from undisputed facts, and identifying the pertinent parts of the record … nor does it provide the non-movant 'an opportunity fairly to contest the movant's case.'" *Robertson*, 239 F. Supp. 2d at 9 (citations omitted). It appears as though the Board simply cut and pasted entire paragraphs from its declarations into the statement rather than parsing out the factual material it asserts is not in dispute.

B. Particular Responses

1. Plaintiff disputes that he sent the Freedom of Information Act ("FOIA") request at issue to Defendant Board of Governors on January 17, 2008, although Plaintiff submits that the date of his request is immaterial. The true date of the request was December 17, 2008. *See* Declaration of Alison M. Thro ("Thro Decl.") at Exhibit A; Declaration of Vern McKinley ("McKinley Decl.") at Exhibit 2. The remainder of the paragraph is undisputed.

2. Undisputed.

3. Plaintiff disputes that the Board has satisfied its burden of demonstrating that it conducted an adequate search. In *Bloomberg v, Board of Governors of the Federal Reserve System*, 649 F. Supp.2d 262, 273-74 (S.D.N.Y.), the Court found that the Board had not conducted an adequate search of records responsive to the FOIA request at issue in that litigation because the Board had not determined whether any responsive agency records were located "in

the Board's official files at a [Federal Reserve Bank.]" (emphasis original).[1] The Thro declaration notes that, "[w]hen appropriate, the Legal Division . . . contacts the relevant Federal Reserve Bank staff to determine if they have responsive Board records subject to FOIA." Thro Decl. at ¶ 2. The Thro declaration does not state whether any such inquiry made in response to Plaintiff's FOIA request. *Id.* at ¶¶ 3-5.

4. Undisputed.

5. Undisputed.

6. Undisputed.

7. Plaintiff objects to paragraph 7, which largely consists of a generalized narrative and legal conclusions rather than any particular factual assertion. Plaintiff also objects to paragraph 7 because the Board fails to identify with any degree of specificity which of the withheld information allegedly was provided by the Securities and Exchange Commission ("SEC") to the Board and/or the Federal Reserve Bank of New York ("FRBNY") on an inter-agency basis and which allegedly was obtained by the SEC in a supervisory capacity. Plaintiff disputes that any information the SEC provided to the FRBNY was provided on an "inter-agency basis" as the FRBNY is a private corporation and not a government agency. *See* McKinley Decl. at Exhibits 6 and 7. Plaintiff also disputes that the declarations submitted by the Board are sufficient to establish as a factual matter how any particular record or piece of information was obtained by the SEC. Plaintiff disputes in particular that the information contained in Bates Nos. 000038-39 was provided to the SEC by Bear Sterns, as the records on their face demonstrate that they were sent by an employee of Bear Stearns, Michael Alix, to William Brodows, an official of

[1] *Bloomberg* was decided on August 24, 2009, almost two weeks after the Board's initial response to Plaintiff's request. McKinley Decl. at ¶ 5.

the FRBNY, not to the SEC, and thus are not even SEC records. McKinley Decl. at Exhibit 4, Bates Nos. 000038-39.

8. Undisputed.

9. Plaintiff objects to paragraph 9, which largely consists of a generalized narrative and legal conclusions rather than any particular factual assertion. Plaintiff does not dispute the first sentence in paragraph 9. Plaintiff disputes the second and third sentences of paragraph 9, as Plaintiff disputes that the declarations cited in support of the broad-brush factual assertions contained therein identify with any degree of specificity the role played by each withheld record or piece of information in the authorization of the temporary loan to Bear Stearns through JPMorgan Chase & Co ("JPMorgan"). With respect to the fourth sentence of paragraph 9, Plaintiff does not dispute that Item 38 (Bates No. 000210-14) is a draft affidavit prepared by a FRBNY attorney. Plaintiff disputes that the Board has otherwise established a factual basis for asserting the attorney work product doctrine with respect to Item 38.

10. Plaintiff objects to paragraph 10, which largely consists of a generalized narrative and legal conclusions rather than any particular factual assertion. Plaintiff disputes the second and third sentences of paragraph 10, as Plaintiff disputes that the declarations cited in support of the broad-brush factual assertions contained therein identify with any degree of specificity how or why each particular record of piece of information was obtained or whether it is considered privileged or confidential financial or commercial information. Plaintiff also disputes the second and third sentences of paragraph 10 on the grounds that not all of the withheld information is bank examination or privileged or confidential commercial or financial information, as at least some of the withheld information consists merely of names of financial institutions. *See Vaughn* Index entries for Item Nos. 4, 5, 9, 10, 13, 17, 18, 21, 22, and 24. Plaintiff disputes the third,

fourth, fifth, and sixth sentences of paragraph 10, as disclosure of any particular record or piece of information is not likely to cause imminent, competitive harm. Declaration of Jean Helwege at ¶¶ 12-16. Nor do the declarations cited by the Board sufficiently support the claim that such harm would result. Plaintiff disputes the seventh sentence of paragraph 10, as Plaintiff disputes that the declarations cited in support of the broad-brush factual assertions contained therein identify with any degree of specificity how banks or supervised institutions would respond if any particular withheld record or piece of information were disclosed.

11. Plaintiff objects to paragraph 11, which largely consists of a generalized narrative and legal conclusions rather than any particular factual assertion. Plaintiff also objects to paragraph 11 because the Board of Governors fails to identify with any degree of specificity which of the withheld records or information allegedly was gathered on a voluntary basis from "market participants," rather than from a government entity or the now-defunct Bear Stearns. Plaintiff disputes the first, second, and third sentences of paragraph 11, as Plaintiff disputes that the Board has established that all of the withheld records or information was gathered by the Board, as opposed to by the FRBNY, that the record or information was gathered from "market participants" other than Bear Stearns, or that the records or information constitutes privileged or confidential commercial or financial information." By way of example, Item 7 indicates that the withheld information was provided by Bear Stearns. McKinley Decl. at Exhibit 4, Bates No. 000011. Items 12, 20, 30, 31, 37, and 38 were obtained and/or prepared by FRBNY employees, not any government agency or official. *Id.* at Bates No. 000022, 000040, 000058-59, 000061-70, 000189-209, and 000210-14; McKinley Decl. at Exhibits 6 and 7. Plaintiff also disputes the third sentence of paragraph 11 on the grounds that disclosure of any particular record or piece of information is not likely to cause imminent, competitive harm. Declaration of Jean Helwege at

¶¶ 12-16. Nor do the declarations cited by the Board sufficiently support the claim that such harm would result.

12. Plaintiff disputes that Items 32 and 37 were obtained and/or prepared by any government agency or employee, as the FRBNY is a private corporation. McKinley Decl. at Exhibits 6 and 7.

13. Plaintiff objects to paragraph 13 as it fails to identify which entity, the Board or the FRBNY, collected or obtained any particular piece of information, and, to the extent that any particular piece of information was collected or obtained by the FRBNY, Plaintiff disputes that the information was collected or obtained by a government agency or employee. McKinley Decl. at Exhibits 6 and 7.

II. Plaintiff's Statement of Material Facts Not in Dispute.

1. The Federal Reserve System includes several components that combine public and private elements. Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment in *Bloomberg v. Board of Governors of the Federal Reserve System*, Civ. No. 08 CV 9595 (LAP) (S.D.N.Y.) ("Bloomberg Mem."), attached as Exhibit 6 to the McKinley Decl., at 37.

2. The Board, to which Plaintiff directed his FOIA request, is a government agency in Washington, D.C. composed of seven members appointed by the president and confirmed by the Senate. *Id.*

3. The Board supervises and regulates the operation of the Federal Reserve System, promulgates and administers regulations, and plays a major role in the supervision and regulation of the U.S. banking system. *Id.*

4. In contrast, the twelve regional reserve banks of the Federal Reserve System, which includes the FRBNY, serve as the operational arm of the nation's central banking system. *Id.* at 38.

5. The regional banks of the Federal Reserve System carry out a variety of functions, including operating a nationwide payments system, distributing currency and coin, supervising and regulating member banks and bank holding companies, and serving as banker for the U.S. Treasury. *Id.*

6. In addition, each regional reserve bank acts as a depository for banks within its district, a lender to eligible institutions through its "discount window," and a clearing agent for checks, and fulfills other responsibilities for banks within the district. *Id*.

7. The regional reserve banks operate under independent grants of authority from Congress. *Id.* at 39.

8. Each regional reserve bank is a separate corporation that issues stock held by depository institutions within its district. *Id.*

9. Each regional reserve bank has its own 9-member board of directors, six of whom are elected by member banks within the district, and three of whom are appointed by the Board. *Id.*

10. Regional reserve bank employees are not civil servants; they are at-will employees of each bank. *Id.* at 40.

11. Regional reserve banks receive no appropriated funds from Congress, but rather are capitalized by required contributions from member banks. *Id.* They are private corporations separate and distinct from the Board. *Id.*

12. In the *Bloomberg* litigation, the Board acknowledged that "[t]he FRBNY is not an 'authority of the Government of the United States.'" Defendant Board of Governors of the Federal Reserve System's Supplemental Brief in *Bloomberg v. Board of Governors of the Federal Reserve System*, Civ. No. 08 CV 9595 (LAP) (S.D.N.Y.) ("Bloomberg Supp. Mem."), attached as Exhibit 7 to the McKinley Decl., at 2.

13. In the *Bloomberg* litigation, the Board also acknowledged that "the FRBNY is not an 'establishment in the executive branch of government,'" that "the FRBNY is not a 'government corporation,'" and that "the FRBNY is not a 'government controlled corporation.'" *Id.* at 2-3.

14. The Board asserted in the *Bloomberg* litigation that "the extension of credit is a fundamental part of the business of banking, and a commercial activity in which the Reserve Banks are authorized to engage, but the Board is not." Bloomberg Mem. at 41.

15. The Board argued to the Court in *Bloomberg* that, "[b]ecause the Reserve Banks are statutorily authorized to extend credit to depository institutions, and to individuals, partnerships or corporations in unusual and exigent circumstances, upon prior Board authorization, and are not operating under delegated authority, Reserve Bank records obtained or created in the course of these activities are not Board records." *Id.*

16. The Board also argued to the Court in *Bloomberg* that "the fact that the FRBNY consulted with, and obtained prior authorization from, the Board prior to extending the Bear Stearns Loan under Section 13(3), and that the Board authorized the FRBNY to extend credit … do not transform these commercial lending transactions into agency functions." *Id.* at 46.

17. The authorization of the FRBNY to extend credit to Bear Stearns through JPMorgan was solely the Board's action. Minutes of the Board of Governors of the Federal

Reserve System, March 14, 2008, attached as Exhibit 1 to McKinley Decl., at 2. The decision to actually extend the loan was exclusively that of the FRBNY. *Id.*

18. On or about December 28, 2007, the Office of the Comptroller of the Currency published a report, entitled "OCC's Quarterly Report on Bank Derivative Activities, Third Quarter 2007," setting forth information from the third quarter of 2007 regarding the dollar value of credit default swaps held by the top twenty-five commercial banks. Declaration of Michael Bekesha at Exhibit 2, Table 1. The report is publicly available on the website of the Office of the Comptroller of the Currency. *Id.* at ¶ 3.

Dated: March 8, 2010

Respectfully submitted,

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