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20 Attorneys for the Defendant

21
22 **UNITED STATES DISTRICT COURT**
23 **SOUTHERN DISTRICT OF CALIFORNIA**
24

25 RICHARD EDELMAN,

26 Plaintiff,

27 v.

28 UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Defendant.

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

JOINT STATUS REPORT

Date: November 3, 2016
Time: 9:30 a.m.
Ctrm: 1B
Judge: Hon. Bernard G. Skomal

1 The parties jointly make this submission pursuant to the Court's October 11, 2016,
2 Order. (ECF No. 16.) There are no new developments in the case. The SEC has not
3 produced the index nor has reached a final decision on its production. Accordingly, the
4 parties restate their positions below. Since the parties are unable to agree on a single
5 statement, they submit separate statements below. In short, Plaintiff's request this matter
6 be set for summary judgment and the SEC opposes the setting of that motion.

7 **I. Plaintiff's Statement**

8 Plaintiff has exhausted all efforts to narrow or settle this matter with the SEC. It is
9 Plaintiff's position the SEC is unnecessarily delaying these proceedings while its Office
10 of the General Counsel ("OGC") pretends to decide an issue--whether to produce an
11 index for 44,000 documents--despite it already decided in favor of releasing the records.
12 The SEC's vacillating positions and contentions throughout this case underscore the need
13 for the matter to be set for summary judgment. Further, the implicit premise that the
14 SEC's FOIA Office and the OGC operate separately is a myth, particularly when the
15 SEC's OGC takes a position such as it has in this case.

16 ***A. The SEC's First Position***

17 On March 19, 2015, the SEC's FOIA Office informed Plaintiff it had three boxes
18 of responsive records and it would produce those records upon Plaintiff's agreement to
19 pay for them. Plaintiff agreed to do so.

20 ***B. The SEC's Second Position***

21 On September 28, 2015, the SEC stated there were only 1,442 pages, roughly one
22 sixth of the volume it had represented in its March 19, 2015, letter. It asserted a number
23 of FOIA exemptions in withholding a large volume of the records. Consequently,
24 Plaintiff filed his action on December 8, 2015.

25 ***C. The SEC's Third Position***

26 On March 4, 2016, the SEC's counsel informed Plaintiff's counsel that the SEC had
27 located 44,000 responsive pages, during the period of administrative appeal completed on
28 December 2, 2015. The SEC had not previously informed either Plaintiff or his counsel

1 of this discovery. On March 7, 2016, the SEC's counsel informed Plaintiff's counsel that
2 the SEC would be releasing the 44,000 pages of records in March or April.

3 ***D. The SEC's Fourth Position***

4 On approximately May 5, 2016, the SEC's counsel informed Plaintiff's counsel that
5 the 44,000 pages of documents would be treated pursuant to the SEC's First-In-First-Out
6 ("FIFO") procedure if the scope of the documents was not narrowed. On May 16, 2016,
7 Plaintiff's counsel requested the SEC to verify whether they still use the Concordance
8 document storage system, since the SEC had represented previously they had ceased
9 using the system. The SEC did not respond. In its May 25, 2016, status report filed with
10 this Court, the SEC argued, "The District Court would not have jurisdiction under FOIA
11 to order that the SEC create a list of the document titles from the Concordance database;
12 *FOIA does not obligate an agency to create records that do not already exist* (emphasis
13 added)." May 25, 2016, Defendant's Status Report at 3, 22-25.

14 By letter of May 31, 2016, attached as Exhibit A, Plaintiff's counsel responded to
15 the SEC's contention that it no longer used Concordance. The letter included the current
16 link at the SEC's website referencing Concordance as the data system used by the SEC to
17 collect and maintain records submitted to the SEC in response to a subpoena or letter
18 request. The SEC website also indicates that the party submitting records to the SEC
19 must provide a subject line for each record submitted which therefore creates an index.

20 ***E. The SEC's Fifth Position***

21 The SEC's next position was that the FOIA Office was agreeable to release an
22 index to the 44,000 pages of documents, which was provided by the person who
23 submitted the records to the SEC. However, the SEC would have to give the submitter a
24 period of time to object to the release. On June 21, 2016, the SEC's counsel informed
25 Plaintiff's counsel that a letter was sent by the SEC to the submitter requiring
26 substantiation of his request for confidential treatment. On July 18, 2016, the SEC's
27 counsel informed Plaintiff's counsel that the SEC had given the submitter until July 25,
28 2016, to submit supplemental arguments. Attached as Exhibit B is a copy of the email.

1 On August 17, 2016, counsel for both parties spoke by phone. Counsel agreed to
2 an extension so the SEC could complete the process of reviewing the request for
3 confidentiality. Plaintiff's counsel agreed to a continuance of the status conference set for
4 September 8, 2016, so the time periods specified under the applicable regulations would
5 expire. The joint status report filed by both parties on that date made the following
6 statement regarding the release of the records:

7
8 In light of the SEC's determination that it wishes to produce the index, and
9 the ongoing proceedings regarding Malkin Holdings' confidentiality request,
10 the parties request that a summary judgment deadline not yet be set. The SEC
11 may have more information during the September 8, 2016 telephonic
conference and will provide an update at that time.

12 Dkt. No. 13 at 3, ll. 4-9.

13 By email of September 15, 2016, Plaintiff's counsel informed the SEC's counsel
14 that the case should have reached the OGC by August 25, 2016, that more than 20 days
15 had passed since that date, and requested an update. The SEC's counsel replied that the
16 OGC was busy was working on a response.

17 There is no reason for the OGC to continue its delay of these proceedings. The
18 August 17, 2016, joint status report would not have been filed without the approval of the
19 SEC's OGC agreeing to the language: "In light of SEC's determination that it wishes to
20 produce the index." The same office and the same associate general counsel that
21 supervises this case, supervises the SEC's FOIA Office, and decides SEC appeals. In the
22 past, FOIA Office staff has approached Associate General Counsel Richard Humes, upon
23 receiving a FOIA request from Plaintiff's counsel. As an example, see attached as
24 Exhibit C. The role of the OGC in supervising the FOIA Office and deciding appeals
25 from the FOIA Office was recognized as established practice by the SEC Office of the
26 Inspector General: "We found that some personnel in OGC, who counsel staff during the
27 initial FOIA request process, may later evaluate the same appeal decision. This results in
28 a potential conflict of interest that raises concerns about OGC's ability to render unbiased

1 appeal opinions."¹ In short, there is no legitimate reason for the SEC to be stalling, since
 2 its OGC has been involved in every phase of this case and in creating each of its five
 3 positions in this case. All of those positions share a common element: the SEC is not
 4 producing the documents now, maybe later. Accordingly, Plaintiff requests this matter to
 5 be set for summary judgment without further delay.

6 **II. Defendant's Statement**

7 Defendant the Securities and Exchange Commission ("SEC") objects to the setting
 8 of a summary judgment deadline in this case, as doing so would be premature and not an
 9 efficient use of the parties' and the Court's resources. The SEC has not released the
 10 index at issue, because it is still in the process of considering third party Malkin
 11 Holdings' request for confidential treatment.

12 As set forth in the parties' previous joint statement, the SEC agrees that producing
 13 the index at issue would be appropriate to facilitate a narrowing of the issues and
 14 potential settlement of this matter. However, the SEC is obligated to balance Mr.
 15 Edelman's interest in release of the requested documents against Malkin's interest in
 16 confidential treatment. The FOIA includes a statutory exemption for trade secrets and
 17 other confidential information. *See* 5 U.S.C. § 552(b)(4) (exemption for "trade secrets
 18 and commercial or financial information obtained from a person and privileged or
 19 confidential"). The SEC's regulations set forth the agency's procedures for addressing a
 20 request for confidentiality. 17 C.F.R. § 200.83.

21 Here, Malkin Holdings has requested that the index be treated as confidential and
 22 not released. On August 16, 2016, the SEC's FOIA Branch Chief made the final
 23 decision that the index is not subject to confidential treatment. On August 26, 2016,
 24 the agency's Office of General Counsel received Malkin's administrative appeal. OGC

25 ¹ SEC Office of the Inspector General, Review of the SEC's Compliance with the
 26 Freedom of Information Act, Sep. 25, 2009, Report No. 465, at 19, available at:

27 <http://nsarchive.gwu.edu/news/20150205/docs/2009-Sep-25-Inspector-General-Report-Review-of-the-SEC's-Compliance-with-the-Freedom-of-Information-Act.pdf>. Last visited Sep. 29, 2016.

1 is collecting information and working on the appeal, but has not yet acted on the
2 administrative appeal. Defendant will provide any additional information as it
3 becomes available, including during the November 3, 2016 status conference in this
4 matter. At this time, Defendant respectfully requests that a summary judgment
5 filing deadline not be set in this case.

6
7 Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies
8 and Procedures of the United States District Court for the Southern District of
9 California, I certify that the content of this document is acceptable to all signatory
10 counsel, and that I have obtained their authorizations to affix their electronic signatures to
11 this document.

12
13 DATED: October 28, 2016

Respectfully submitted,

14 LAURA E DUFFY
United States Attorney

15
16 s/ Katherine L. Parker
Katherine L. Parker
Assistant U.S. Attorney
Attorneys for Defendant

17
18
19 DATED: October 28, 2016

s/ Gary J. Aguirre
Gary J. Aguirre
Aguirre Law APC
Attorney for Plaintiff

Exhibit A

501 W BROADWAY, SUITE 800 · SAN DIEGO CA 92101 · PHONE: 619-400-4960 · GARY@AGUIRRELAWAPC.COM

By Electronic and First Class Mail

May 31, 2016

Katherine L. Parker
Assistant US Attorney
Office of the U.S. Attorney
880 Front Street, Room 6293
San Diego, CA 92101-8893

Carin Cozza
Office of the General Counsel
US Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Edelman v. SEC

Dear Ms. Parker and Ms. Cozza:

By this letter, I am requesting the Commission to reconsider positions it has taken in this matter to avoid needless and time consuming motions.

First, Mr. Cozza stated that the records production would be more complicated because the Commission no longer uses Concordance as a document storage system. I asked with my May 16 email that she verify that fact. She responded that she would look into it, but never responded. Accordingly, I have done some research which indicates the Enforcement Division continues to use Concordance. I refer you to Enforcement webpage (<https://www.sec.gov/enforce>) and the link to “Data Delivery Standards.” Please note those standards instruct those complying with Commission document productions to deliver the documents in “Concordance image productions.”

Second, in your status report last week, you argued, “The District Court would not have jurisdiction under FOIA to order that the SEC create a list of the document titles from the Concordance database; *FOIA does not obligate an agency to create records that do not already exist* (emphasis added).” See May 25, 2016, Defendant’s Status Report at 3, 22-25. In relation to that contention, I call your attention to Addendum A to the Data Delivery Standards, and in particular the Commission standards that those submitting records include a simple “subject” for the documents they are producing. In this regard, the Commission’s instructions read:

The metadata of electronic document collections should be extracted and provided in a .DAT file using the field definition and formatting described below:¹

¹ The table in this letter is an edited version of the table appearing on Enforcement’s website.

Field Name	Sample Data	Description
FIRSTBATES	EDC0000001	First Bates number of native file document/email
LASTBATES	EDC0000001	Last Bates number of native file document/email **The LASTBATES field should be populated for single page documents/emails.
CUSTODIAN	Smith, John	Email: mailbox where the email resided Native: Individual from whom the document originated
FROM	John Smith	Email: Sender Native: Author(s) of document **semi-colon should be used to separate multiple entries
TO	Coffman, Janice; LeeW [mailto:LeeW@MSN.com]	Recipient(s) **semi-colon should be used to separate multiple entries
<u>SUBJECT</u>	<u>Board Meeting Minutes</u>	<u>Email: Subject line of the email Native: Title of document (if available)</u> (emphasis added)
DATE_SENT	10/12/2010	Email: Date the email was sent Native: (empty)

The fact the metadata should be extracted and provided as described in Addendum A means the “subject” of the documents may be isolated and transferred to a CD or printed. There would likely be one line item for each document. I have one request in this regard: Would you kindly provide me with the total number of documents which have been uploaded onto Concordance? By way of comparison, your Vaughn index of the 14,040 pages of records identified only 28 separate documents. I believe this would help the Court in relation to any motions brought to obtain the concordance index.

Third, the Commission’s Vaughn index fails to comply with Ninth Circuit standards for multiple reasons. It is obviously insufficient to allow a Court to decide whether or not a specific record is subject to a valid FOIA exemption. See: *Muchnick v. Dep’t of Homeland Sec.*, 2016 U.S. Dist. LEXIS 22683 (N.D. Cal. Feb. 24, 2016)(The Vaughn Index here largely fails to “describe [each withheld document’s] contents to the extent possible” and also fails to provide a “particularized explanation of why each documents falls within the claimed exemption.”) Incidentally, the Vaughn index refers to the Bates numbers of the records and none are Bates-stamped.

Under these circumstances, you are forcing Mr. Edelman to spend funds to bring multiple motions to obtain the records to which he is entitled under FOIA. It is for that reason Congress provided that the successful requester may obtain his or her attorneys fees.

Very truly yours,


Gary J. Aguirre

Exhibit B

Gary Aguirre

From: Parker, Katherine (USACAS) [Katherine.Parker@usdoj.gov]
Sent: Monday, July 18, 2016 9:14 AM
To: Gary Aguirre
Subject: RE: Edelman v. SEC

Gary,
I apologize for the delay. The updates came while I was out last week and my email access was not ideal. Malkin responded with substantiation for its confidential treatment request. Last Thursday, the FOIA office responded and denied the confidentiality request, and provided until July 25 for Malkin to submit any supplemental arguments.
Best,
Katie

From: Gary Aguirre [mailto:gary@aguirrelawapc.com]
Sent: Monday, July 18, 2016 7:23 AM
To: Parker, Katherine (USACAS)
Subject: RE: Edelman v. SEC

Katie:

Per emails below, please advise re status of SEC letter to Malkin on index. Time should have run out for his response at least a week ago.

Best,

Gary J. Aguirre
Aguirre Law, APC
501 W. Broadway, Suite 800
San Diego, CA 92101
Tel: 619-400-4960
Fax: 619-501-7072

www.aguirrelawapc.com

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From: Parker, Katherine (USACAS) [mailto:Katherine.Parker@usdoj.gov]
Sent: Tuesday, July 05, 2016 10:15 AM
To: Gary Aguirre
Subject: RE: Edelman v. SEC

Gary,
Yes, I'll check and get back to you.
Katie

From: Gary Aguirre [mailto:gary@aguirrelawapc.com]
Sent: Tuesday, July 05, 2016 6:53 AM

EXHIBIT C

From: (b)(6)
To: (b)(6) Kotz, David
Subject: FW: Case #: 12-02728-FOIA Due date: January 24, 2012
Date: Wednesday, January 11, 2012 10:41:50 AM
Attachments: [Office of Information Technology - Referral Memo - Case #- 12-02728-FOIA.pdf](#)
[email amend aguirre request.pdf](#)
[Request Description.tif](#)

This search is being conducted to obtain responsive material for the FOIA request Gary Aguirre submitted on behalf of Kathleen Furey. (b)(6) previously received a copy of this request form the FOIA office and responded that with the exception of one request seeking report OIG-478, the OIG had no responsive records.

Do you have any objection to the search being performed? Should we request a copy of the results in light of the fact (b)(6) PI is still open?

Thanks,

(b)(6)

From: (b)(6)
Sent: Wednesday, January 11, 2012 10:22 AM
To: Humes, Richard M.; (b)(6)
Cc: eDiscovery Requests
Subject: FW: Case #: 12-02728-FOIA Due date: January 24, 2012

Richard, (b)(6)

Please see the FOIA request for emails received below. The details are contained in the attachments. Upon your approval we will process this request.

Thanks
Paul

(b)(6)
Office of Information Technology
US Securities and Exchange Commission
202.551 (b)(6)

Your Trusted Partner delivering technology solutions through Innovation | Integrity | Excellence.

From: (b)(6)
Sent: Tuesday, January 10, 2012 2:37 PM
To: (b)(6)
Cc: (b)(6)
Subject: Case #: 12-02728-FOIA Due date: January 24, 2012

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

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

RICHARD EDELMAN,
Plaintiff,

CERTIFICATE OF SERVICE

v.

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,
Defendant.

I, Katherine L. Parker, declare as follows:

I am a citizen of the United States over the age of eighteen years and a resident of San Diego County, California; my business address is 880 Front Street, Room 6293, San Diego, California; I am not a party to the above-entitled action. On October 28, 2016, I filed the following document in the Court's electronic filing system:

Joint Status Report

The above filing automatically notifies the following individuals via email:

Gary Aguirre, Counsel for Plaintiff

Executed on October 28, 2016

s/ Katherine L. Parker
Katherine L. Parker