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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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| LARRY BERMAN,<br><br>Plaintiff,<br><br>v.<br><br>CENTRAL INTELLIGENCE AGENCY,<br><br>Defendant. | No. S-04-2699 DFL-DAD<br><br>**PLAINTIFF LARRY BERMAN'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**<br><br>Date: June 1, 2005<br>Time: 10:00 a.m.<br>Courtroom: 7 (14th Floor) |

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## I. INTRODUCTION

The CIA's longstanding goal of maintaining the Agency's mystique is exemplified in this case by the two declarations of Information Review Officer Terry N. Buroker, which in eighty-six paragraphs and forty-two pages comes nowhere close to meeting the CIA's burden of establishing any one of the three claimed exemptions from the Freedom of Information Act's disclosure requirements to the two requested, nearly forty-year-old PDBs.

Most lacking in the CIA's Exemption 3 and 1 claims is any direct assertion that disclosure of the two PDBs at issue in this lawsuit, as opposed to disclosure of PDBs generally, or even the more than thirty that already have been released to the public, will actually reveal an actual intelligence source – past, present, living or dead. Telling on this score is the CIA's assertion, which it relies on in its responsive brief, that the requested PDBs "contain information specifically stating sensitive sources *or* methods of collection. . . ." See Buroker Decl., ¶ 34 (emphasis added). The CIA then goes on to define intelligence methods, implicated by the PDBs generally as opposed to the specific PDBs at issue. These include the PDB itself because it is part of a process by which the CIA advises the President and his most senior advisors and which is asserted to include presidential feedback concerning intelligence priorities. Id., ¶ 35, 37. So, at best, the CIA's claim establishes that disclosure of the requested PDBs *could* reveal a loosely defined "method," which already is officially acknowledged by the CIA and widely known by the public. The CIA has not, and cannot, establish that the PDB as a method of intelligence gathering is legally or factually entitled to special protection. The CIA's showing falls far short of that required in the Ninth Circuit Court of Appeals to establish an Exemption 3 or Exemption 1 claim, and illustrates the shortcomings of the CIA's evidence in this case.

Even if such generalized statements were sufficient, the CIA has not shown why the nation's national security interests in methods and sources, or foreign government information, cannot be protected through redaction of the two PDBs. Instead, the CIA hangs its hat on the mosaic theory, stretching this theory farther than ever before, by claiming that disclosure of any portion of the PDBs, whether or not implicating sources or methods, could provide the missing piece of the mosaic necessary for foreign governments to ascertain intelligence sources or



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methods. While the CIA's declarant has not shown himself competent to testify on such a complex intelligence matter, the CIA's expansive mosaic theory is not supported by the facts or law – and is undermined by the evidence of disclosures of CIBs and other intelligence documents that already have made the information in the PDBs public.

The CIA's Exemption 5 claims is similarly lacking in support, both factually and legally. The CIA provides no authority for its creative proposition that it has standing to invoke the presidential communications privilege. Without standing and without the President's personal invocation or direction that the privilege be invoked, the CIA's assertion of the presidential communications privilege falls flat. Its contention that the deliberative process privilege applies is equally hollow. The CIA concedes that the PDBs are not intra-agency or interagency documents, and further concedes that the PDBs are not draft or predecisional documents. By acknowledging that the PDBs do not meet two of the three requisite prongs for application of the deliberative process privilege, the CIA essentially admits what Plaintiff has known all along—that its Exemption 5 assertion is a throwaway argument.

In summary, the CIA has not established through detailed and specific affidavits the right to withhold the two, nearly forty-year-old PDBs sought by Plaintiff Larry Berman in this action and therefore summary judgment must be granted in his favor.

## II. REPLY ARGUMENTS

### A. The CIA's National Security Exemptions Are Not Supported By The Buroker Declarations

#### 1. The Buroker Declarations Are Not Entitled to Substantial Deference

Several reasons support a determination that the Buroker declarations are not entitled to substantial deference but instead should be subjected to heightened scrutiny. As a threshold matter, the CIA has not shown Buroker, an Information Review Officer of one year, to be competent to testify regarding the complex mosaic theory upon which the CIA's claimed exemptions appear to completely rely. Additionally, the declarations are unreasonable and lack credibility, given what we know of PDBs and other top level intelligence reports that already have been reviewed by the CIA and released to the public. Indeed, while a showing of bad faith is not

required in the Ninth Circuit for a court to set aside the substantial deference normally provided agency declarations on matters of national security, the Buroker declarations smack of bad faith in a number of significant ways. The CIA, nevertheless, has elected to ignore these deficiencies by invoking national security as an excuse for not explaining obvious gaps in its showing. Lastly, despite a pattern of replication between same day PDBs and CIB, the Buroker declarations fail to refute that verbatim or near verbatim information in the two PDBs is already available through the same day CIBs. This gaping hole in the CIA's evidence strongly suggests the existence of a direct waiver of the exemptions through the same day CIBs.

First, the CIA has not shown Buroker to be competent to testify on the attenuated and sweeping mosaic theory upon which its Exemption 3 and Exemption 1 claims are based.[4] To be clear, the Buroker declarations fail to directly state that disclosure of the two PDBs at issue will disclose an actual intelligence source or method of intelligence gathering; rather, the declarations at most state that "[t]he Requested PDBs contain *information* that could, by itself or with other information, expose the existence of specific intelligence sources and methods." See Buroker Decl., ¶ 34 (emphasis added). Yet, the CIA has not shown that Buroker is competent to testify regarding the intricacies of a mosaic theory that necessarily depends on an understanding of the information already available to foreign governments and how that information, in light of the bits and pieces of information sought, could be used by foreign governments to discover sources and methods, or harm national security. In stark contrast, the statements regarding the effect of disclosing bits and pieces of information in Central Intelligence Agency v. Sims, 471 U.S. 159, at 174, 179-80 (1985), and similar statements in Fitzgibbon v. Central Intelligence Agency, 911 F.2d 755 (D.C. Cir. 1990), upon which the CIA relies, were supported by affidavits submitted by the Director of Central Intelligence ("DCI"). As the Court in Sims and Fitzgibbon acknowledged, the DCI "must of course be familiar with 'the whole picture. . . ." and thus how disclosure could place

[4] Buroker himself seems to concede this by averring in both his declarations that the statements therein are based, in part, on "information made available to [him] in [his]official capacity." See Buroker Decl.,¶ 4; Suppl. Buroker Decl.,¶ 2. While this is not personal knowledge as required under Federal Rules of Civil Procedure 56(e), more problematic is that it leaves Professor Berman without recourse to test the competency of the individuals or information upon which Buroker is actually relying in providing information to this Court. Moreover, because Buroker does not specify which statements are based on personal knowledge and which are not, the declarations are fatally deficient and should be rejected on this independent basis.



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"the questioned item of information in its proper context." Sims, 471 U.S. at 178; see also Fitzgibbon, 911 F.2d at 762.

That a CIA Information Review Officer's affidavit in Assassination Archives and Research Center v. Central Intelligence Agency, 334 F.3d 55, 58 (D.C. Cir. 2003), was sufficient to support a determination that disclosure of a compendium of documents on Cuban personalities compiled by the CIA could itself reveal the entire "pool in 1962 of potential intelligence sources or targets of CIA intelligence collection" is inapposite. Such a conclusion does not require one "to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." Sims, 471 U.S. at 180. At most, Assassination Archives supports a determination that a CIA Information Review Officer's affidavit may support an exemption when the risks are clear from the face of the subject document itself. It does not support a determination that an Information Review Officer is competent to testify to a complex mosaic theory that depends on information already available and how that information could place in context the sought after information, whether seemingly innocuous or not. The CIA's mosaic theory, therefore, should be rejected on the grounds that the CIA's sole declarant is not competent to testify regarding the CIA's expansive mosaic theory. On this issue, the Buroker declaration should not be afforded any deference.

Second, even if the CIA had shown Buroker to be competent on this issue, his sweeping, absolutist assertions are not reasonable or credible in light of the already publicly available PDBs and other top-level intelligence reports. While it is not possible to know all that a foreign government may know about United States' intelligence, the CIA has made no effort to explain its mosaic theory in light of what information we absolutely do know is available and that the CIA has approved for release to the public, including PDBs the day after and the day before the PDBs at issue in this case, or the thousands of CIBs, which during the Johnson administration contained very similar, and often verbatim, intelligence as contained in the PDBs. See Fact Nos. 60-65 of Opposition to CIA Statement of Undisputed Facts and Statement of Additional Facts in Opposition. Instead of explaining how these disclosures, when combined with even innocuous portions of the two PDBs, could lead to the disclosure of sources or methods, or harm our nation's



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security, the CIA simply says it can say no more without harm to national security, and that the harm from disclosure is necessarily speculative in any event. See CIA's Reply at 5.

Why this response is not sufficient, and why Buroker's bloated claims that disclosure of any part of the PDBs will cause harm to the nation's security are not to be believed, is best illustrated by Buroker's recent decision to approve for release in redacted form two Johnson-era PDBs. If the harm from disclosure of any portion of the two PDBs at issue here is genuine, why did Buroker himself authorize the disclosure of these two other PDBs just last December? The answer is obvious: absent the CIA letterhead usually attendant the PDBs, Buroker reviewed the content of these cable-form PDBs and concluded that disclosure of the content in redacted form would not harm national security or lead to the disclosure of sources or methods, either standing alone or as part of a mosaic of otherwise available intelligence information. Because Buroker's claim of harm here is based on the PDB as an intelligence product generally, as opposed to any specific information in the two PDBs at issue, Buroker's own conduct contradicts the CIA' claims that release of any portion of the two PDBs at issue here will cause grave harm to national security.

Further eroding the credibility of the Buroker declaration, is the former CIA Director George Tenet's statement that it is not the *content* of the PDBs that make them sensitive, it is the fact that they are briefed to the President. See Exhibit 25 at 1 to Blanton Decl. This statement directly contradicts Buroker's claims that every word of the PDBs must be withheld because of national security concerns, and obviously comes from a more informed CIA official. Supporting Tenet's statement, and further discrediting Buroker's claims, is the CIA's own release of no less than thirty other PDBs and PICLs. Before being confronted with these releases, the CIA claimed that the "few" other releases of PDBs were a mistake. See Buroker Decl. at 14 n. 4. Now, it claims that they are of no import because only the DCI, not the Court, is in a position to determine when disclosure presents an acceptable risk. See CIA Reply at 6. Neither excuse is credible. Indeed, according to Buroker, the risk would never be acceptable because disclosure of any part of any PDB could lead to the disclosure of sources and methods. To be clear, nothing unique about the two PDBs at issue has been established by the CIA. Given the CIA's prior judgments that



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PDBs can be declassified in redacted form and released to the public, Buroker's claim that no portion of the two requested PDBs can be released lacks credibility and underscores why the CIA's declarations are not entitled to any deference in this case..

Lastly, in an apparent attempt to avoid a waiver of the intelligence contained in the PDBs due to the release of the same day CIBs, which Professor Berman established often contain verbatim or near verbatim intelligence as the same day PDBs, the CIA enters into a series of contradictions that further erode Buroker's credibility and that strongly suggest the CIA has waived any claims to protect the intelligence found in the requested PDBs. To begin with, the CIA contends in its reply brief that Buroker's supplemental declaration establishes that the requested PDBs contain different information from that in previously disclosed PDBs and CIBs. See CIA's Reply at 6. However, the declaration does not contain any such assertion regarding the CIBs, and with respect to the PDBs it only says that the requested PDBs contain "information not included in the few PDBs that have been released." See Supplemental Buroker Decl., ¶ 3. Though artfully phrased, neither the brief or the declaration refute that the same information contained in the requested PDBs has been released through same day CIBs or even through other PDBs.

In sharp contrast to the CIA's statement here is the one offered by the CIA in Assassination Archives, 334 F.3d at 59, upon which the CIA relies. There, when confronted with an argument that the CIA had waived the right to withhold a compendium of personality profiles on Cuban individuals due to prior disclosure of similar information under the John F. Kennedy Assassination Records Collection Act, the CIA countered with a declaration stating: "the Agency has never 'released any portion of the document in any form at any time, whether as part of the [JFK Act] or otherwise." Id. at 59. No such assertion has been or could be made here. Not only does the CIA fail to dispute that information in the same day CIBs replicates information in the requested PDBs, its brief suggests that this is the case. See CIA's Reply at 6 ("[E]ven if the actual information in the PDBs is disclosed elsewhere . . .").

Instead of denying the pattern of verbatim information in these two types of intelligence reports during the Johnson administration, the CIA goes to great lengths to distinguish the two

types of reports as a justification for releasing one and not the other. The CIA claims that the PDB often contains "raw intelligence," while the CIB does not contain raw intelligence. This statement is contradicted by Buroker's first declaration, which states that PDBs are "finished intelligence." See Buroker Decl., ¶ 38. It also contradicts the other evidence that PDBs are "finished intelligence." See Ex. 1 at 5 to Blanton Decl. Additionally, the CIA's contentions, set forth in Buroker's supplemental declaration, are stated in the present tense and do not indicate whether these assertions were true during the Johnson administration. A review of PDBs and CIBs available during the Johnson administration, and presented to this Court, shows that the two are very similar intelligence products both in their content and their presentation by various countries. That the CIBs may, in some instances, contain more information on more countries and have slightly wider distribution than the PDBs, does not sufficiently justify how the former can be released by the thousands while disclosure of any portion of the requested PDBs, according to the CIA, stands to cause the nation grave harm.

In summary, the Court should not afford any deference to the CIA's mosaic theory because the CIA's declarant is not competent on this issue, and, in any event, the CIA's contentions are not reasonable, are contradicted by the record and smack of bad faith.

**2. The CIA has Failed to Meet its Burden of Proof as to Exemption Three**

Not withstanding the deference this Court may afford the CIA's declarations, the "[a]gency still bears the burden of proving the withholding is justified." Wiener v. Federal Bureau of Investigation, 943 F.2d 972, 983 n. 19 (1991). Indeed, the Court must review the declarations *de novo* to ascertain whether the claims are reasonable. Id. (citing Central Intelligence Agency v. Sims, 471 U.S. 159, at 174, 179-80 (1985)). When agency declarations fail to state "the facts or reasoning" upon which the conclusions are based, substantial weight need not be afforded agency declarations. See id. at 983 (rejecting Exemption 3 claim that "disclosure of the withheld portions [of a CIA document] reasonably could be expected to lead to identification of the source of information" as failing to discuss the facts or reasoning upon which these conclusions were based); compare id. at 983 (upholding agency withholding under Exemption 3 of parts of three documents based on affidavit that discusses each document separately, discloses that the



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withholdings consist of codenames and the location of a CIA installation and further describing "how disclosure of this information [CIA installation] would compromise 'intelligence sources and methods,'. . . by leading to public pressure within the host nation to terminate its relationship with the CIA.")

Importantly, given the one-sided nature of FOIA litigation, effective advocacy requires that agencies provide "'as much information as possible without thwarting the exemption's purpose.'" Wiener, 943 F.2d at 979 (citing King v. Department of Justice, 830 F.2d 210, 224 (D.C. Cir. 1987). Effective advocacy is impossible where, as here, the agency states "*alternatively* several possible reasons for withholding documents, without identifying the specific reason or reasons for withholding each particular document." Wiener, 943 F.2d at 979 (rejecting as sufficient affidavit stating such alternative grounds as "[i]nformation of this category is *either* specific in nature *or* of a unique character, and thereby could lead to the identification of a source. . . It *may* be of such detail that it pinpoints a critical time frame *or* reflects a special vantage point from which the source was reporting."). "Effective advocacy is possible only if the requester knows the precise basis for the nondisclosure." King, 830 F.2d at 218-19. The agency may give alternative reasons for withholding a document only if each reason is applicable to the document at issue." Wiener, 943 F.2d at 979.

Reviewing the Buroker declarations in this context, it is clear that the CIA has failed to establish an Exemption 3 claim sufficient to withhold any part of the two PDBs at issue, let alone every word of them. A closer look at those portions of the Buroker declarations on which the CIA specifically relies in its reply brief is instructive.

Initially, it is important to note that no effort is made to discuss the claimed exemption in relation to any specific portion of the two PDBs at issue or the various items contained within the PDBs. Compare Wiener, 943 F.2d at 983; see also Mead Data Central v. Department of the Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977) ("when an agency seeks to withhold information, it must provide a relatively detailed justification, specifically identifying the reasons a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply."). Instead, the Buroker declaration broadly claims that the PDBs at issue

"contain *information* that *could*, by itself *or* with other information, expose the existence of specific intelligence sources and methods." See Buroker Decl, ¶ 34 (emphasis added). This statement does not say that the disclosure of the PDBs will actually reveal intelligence sources or methods of intelligence gathering; rather, the CIA appears to be relying entirely on a mosaic theory for its Exemption 3 claim. However, this blanket statement is patently insufficient as it provides no more information than – indeed less than – the affidavit rejected by the court in Wiener, which claimed that "disclosure of [the withheld] portions reasonably could be expected to lead to identification of the source of information." Wiener, 943 F.2d at 983.

In stark contrast to this showing, is that set forth by the CIA in Sims, involving a request for the institutional affiliations of the researchers who worked on CIA financed research projects established to counter Soviet and Chinese advances in brainwashing and interrogation techniques. There, relying on a mosaic theory, the United States Supreme Court held that the Director of Central Intelligence ("DCI") "reasonably concluded that an observer who is knowledgeable about a particular intelligence research project, like MKULTRA, could, upon learning that research was performed at a certain institution, often deduce the identities of the individual researchers who are protected 'intelligence sources.'" Sims, 471 U.S. at 179-80. It is not hard to understand the CIA's claim in Sims, explaining that disclosure of particular institutional affiliations could expose the identities of the researchers, given the focused nature of the particular research project and qualified researchers at each institution. This explanation, offered by the DCI, allows for effective advocacy and nothing more was needed to challenge the statement. In contrast, the statements in the Buroker declarations provide no similar basic information upon which to judge or challenge the CIA's blanket conclusions.

This is equally true of the CIA's vague contention that "the nature of the information contained in each of the Requested PDBs provides substantial information about its provenance to an educated reader." See Buroker Decl.,¶ 34. Unlike the DCI's declaration in Sims, no facts are set forth to place in context this conclusion. Even the showing in Minier v. Central Intelligence Agency, 88 F.3d 796 (9th Cir. 1996), upon which the CIA relies, illustrates the deficiencies of the CIA's showing here. In Minier, the CIA claimed that disclosure of documents revealing the

activities of a certain individual or whether the CIA ever employed this individual, who claimed to be a CIA agent involved in the assassination of President John F. Kennedy, would necessarily disclose sources and methods of intelligence gathering. Id. at 801. Like the showing in Sims, it is not difficult to understand how revealing the agency's relationship with a certain individual tied to a specific event would compromise CIA sources (including agents) or methods. No further showing is necessary for effective advocacy.[5] However, the CIA's claim here provides no factual basis upon which Professor Berman can contest the conclusion that disclosure of any part of the PDBs at issue here "could . . . expose the existence of specific intelligence sources and methods." See Buroker Decl., ¶ 34. Therefore, this conclusion is insufficient to support the exemption.

Likewise, the CIA's assertion that "[e]ach of the PDBs contains information specifically stating sensitive sources *or* methods of collection..." is insufficient to provide for effective advocacy because not only is this assertion stated in the alternative, its meaning is illusive given the CIA's broad definition of methods, as explained in the Introduction, and its failure to state whether such methods, as defined by the CIA, would be implicated by disclosure of the two PDBs at issue. See Buroker Decl., ¶ 34, 35 (emphasis added). The most that can be derived from this vague statement is that the PDBs as a whole are an intelligence method because it is part of a process by which the CIA "advises" the President and which includes presidential feedback regarding intelligence priorities. This expansive definition of methods, however, is not supported by the law and is directly contradicted by the facts presented by Professor Berman.[6]

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[5] Contrary to the CIA's contention, Minier does not stand for the proposition that an agency need never explain how disclosure would compromise a source or method. See CIA's Reply at 2 (citing Minier, 88 F.3d at 801). This unsupported proposition is especially suspect when the contention is not that disclosure would directly disclose a source or method, such as at issue in Minier, but that disclose of some information could reasonably lead to the disclosure of sources and methods, such as at issue in Sims, where the DCI's showing clearly showed how disclosure could compromise CIA sources. At a very minimum, however, the showing must set forth facts or reasoning supporting the conclusions, it must be specific enough to allow for effective advocacy, it must be reasonable and it must reveal as much information as possible without thwarting the exemptions purpose. See Wiener, 943 F.2d at 983, 979; King, 830 F.2d at 224; see also cases cited in Plaintiff's opening brief at 7.

[6] Importantly, the CIA is not saying that the PDBs in question reveal that certain information was being provided in response to specific inquiries by President Johnson or his senior advisors. Rather, it appears that the CIA is claiming that the release of PDBs generally would disclose the process (i.e. method) by which information is gathered at the request of the President. However, in this regard, the Buroker declaration itself publicly discloses this general process and, in any event, it is an officially acknowledged process generally known through publicly available information, including that on the CIA's own website.



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In short, the mere fact that information is conveyed to the President and the President provides feedback does not make the process, and all related documents, a method of intelligence collection within Exemption 3. Even if such a contention had merit, and it does not, Professor Berman's evidence shows that unlike other more recent Presidents and President Kennedy, President Johnson did not review the PDB in the presence of a CIA briefer and thus did not provide the CIA with the type of feedback claimed in the Buroker declaration. See Ex. 3 at 6 and 8 to Blanton Decl. Additionally, Professor Berman's evidence establishes that the CIA does not "advise" the President through the PDBs, as claimed by Buroker, but merely presents factual information that the President then may use in formulating foreign policy. See Ex. 2 at 1 to Blanton Decl.

Thus, as with its failure to set forth the *facts* or *reasons* supporting its conclusions, the CIA's failure to specify whether the two PDBs at issue could lead to the disclosure of sensitive sources or whether they could lead to the disclosure of methods, as expansively defined by the CIA, or a combination of both, renders the Buroker declaration fatally deficient.

Like those portions of the Buroker declaration discussed above, the CIA's reliance on other aspects of this declaration supposedly "specifically regarding intelligence sources" and "specifically regarding intelligence methods," provides no such specificity. See CIA's Reply at 3. For example, the statement that the requested PDBs contain "explicit references to information provided by foreign officials as well as other information that may incorporate information from foreign liaison relationships," (Buroker Decl., ¶ 49) says nothing more than that the PDBs contain information, which comes from various sources – a contention that Professor Berman does not doubt but which does not render the PDBs exempt as revealing sources or methods. Exemption 3 does not protect from disclosure all information merely because it was provided by various sources, unless disclosure would reveal the source, which is not established through the Buroker declarations, except perhaps through an attenuated and non-specific mosaic theory. See Buroker Decl., ¶ 34. To hold otherwise, would render all intelligence information off limits merely because it contains information provided by sources, as it necessarily must.

Nor does Exemption 3 protect from disclosure all information merely because it "constitutes information about the *application* of an intelligence method." See Buroker Decl., ¶ 37 (emphasis added). While the meaning of this statement is unclear, it is not an assertion that disclosure of the two PDBs at issue, or even PDBs in general, would reveal methods of intelligence gathering. Rather, a reasonable reading of this statement could be that the PDBs contain information obtained from the application of various intelligence gathering methods – a contention that Professor Berman does not dispute but which does not establish an Exemption 3 claim. Nevertheless, this assertion is even more attenuated because it is predicated on the legally unsupported notion that because the "PDB is itself an intelligence method, it follows that any PDB information . . . . constitutes information about the application of an intelligence method." Id.

In summary, the Buroker declaration is insufficient to establish that disclosure of the two PDBs at issue, in whole or in part, reveal intelligence sources or methods of intelligence gathering protected from disclosure under Exemption 3.[7]

**3. The CIA has Failed to Meet its Burden of Proof as to Exemption One**

An Exemption 1 claim that is based on the national security implications caused by disclosure of confidential intelligence sources must be supported by a showing that "the source was truly a confidential one and why disclosure of the withheld information would lead to exposure of the source." Wiener, 943 F.2d 972. Similarly, under Executive Order 12958 (as amended), "foreign government information" is defined as follows: "information provided to the United States Government by a foreign government or governments . . . *with the expectation that the information, the source of the information, or both, are to be held in confidence*." EO 12958 § 6.1(r) (emphasis added). Additionally, whether the concern is disclosure of sources or methods or foreign government information, the showing "must provide (to the extent permitted by national security needs) sufficient information to enable the requester to contest the withholding agency's conclusion that disclosure will result in damage to the nation's security." Id. at 980.

[7] As discussed further below, even if the CIA's showing was sufficient to establish an Exemption 3 claim, it has failed to adequately explain why segregation of exempt information from non-exempt information cannot be accomplished and it has failed to set forth an adequate record from which this Court can make specific factual findings on this issue, as it must.

Contrary to the CIA's assertion that its has set forth sufficient facts to support an Exemption 1 claim, the CIA has done nothing more than recite portions of the language contained in the applicable Executive Order and generalized harms that could flow from disclosure of sources and methods.

With respect to foreign government information, for example, the CIA claims that, "[i]nformation provided to the CIA by the intelligence services of foreign countries with which the CIA maintains a liaison relationship is provided only upon a guarantee of absolute secrecy." See Buroker Decl, ¶ 51. This assertion, stated in the present tense, without reference to PDBs, past or present, and apparently relating to foreign countries with which the CIA presently maintains a liaison relationship, does not say that foreign government information contained in the two PDBs at issue was provided with an expectation that the information would be held in confidence, let alone in abstencia. Thus, the CIA has not shown that any foreign government information contained in the PDBs was, and remains, properly classified under Executive Order 12958. Moreover, the CIA's showing regarding foreign government information lacks credibility. Even assuming this statement had been shown to apply to the two PDBs at issue, why would the CIA authorize the release of thirty PDBs and PICLS, which presumably contain information from foreign governments, if this information was provided "only upon a guarantee of absolute secrecy." Because the CIA has shown nothing unique about the foreign government information contained in the two PDBs as opposed to the thirty others that it has released, this contention also lacks credibility as applied to the PDBs at issue here or as applied to PDBs generally.

The CIA then goes on to recount the harms that could flow from exposure of liaison relationships, in general, without specifying specific harms that disclosure of any part of the two PDBs at issue here would cause. Id., ¶ 52.

The CIA's showing with respect to sources and methods is similarly deficient. As with the CIA's Exemption 3 claim, its Exemption 1 claim fails to state that an intelligence source (either an individual source or confidential liaison relationship source) is revealed in the two requested PDBs. Instead, the CIA states, "[t]he Requested PDBs each contain references to intelligence obtained from individual human sources and from confidential liaison relationships." Id., ¶ 54.

That the PDBs contain information from sources is not disputed. However, this is not sufficient to establish an Exemption 1 claim. And, while the CIA does state that disclosure of the two PDBs "would disclose specific intelligence methods," given its broad definition of methods, which includes the PDBs themselves as an intelligence product, this assertion has little meaning. Id., ¶ 59. More importantly, these blanket assertions followed by generalized harms fail to provide sufficient detail for Professor Berman "to argue for release of particular documents. . . ." Wiener, 943 F.2d at 981. They fail to answer critical questions such as, "[i]s it realistic to expect disclosure of a [thirty-five] year old investigation to reveal the existence of a current intelligence investigation?; Are the intelligence methods used in [1965] still used today, justifying continued secrecy?"; "whether the source [if there is one] is still useful as an informant, or even alive." Id. at 981 n. 14 and n. 15.

Given the complex mosaic theory upon with the CIA's entire Exemption 1 and 3 arguments appear to rely, it is even more imperative that the record provide as detailed a public disclosure as possible to provide Professor Berman a meaningful opportunity to oppose the CIA's sweeping claims. The Buroker declarations fail to provide this level of specificity and therefore the CIA has failed to meet its burden of establishing an Exemption 1 claim.

**B. The CIA Failed To Meet Its Burden Of Proof As To Exemption Five**

Under Exemption 5, the CIA continues to assert that its withholding of the two requested PDBs is justified under the presidential communications privilege and the deliberative process privilege. But there is nothing new in the CIA's Reply or the Supplemental Buroker Declaration that remedies the deficiencies in the CIA's legal arguments and factual evidence.

**1. The CIA has Failed to Establish That it has Standing to Invoke the Presidential Communications Privilege**

After filing a twenty-page motion and a twenty-seven page reply, the CIA has yet to cite a single case supporting its contention that it has standing to invoke the qualified presidential communications privilege. That is because there is no such authority.

In lieu of controlling law, the CIA relies upon speculative statements about Congress' intent. E.g., CIA's Reply at 18 ("Congress could not have intended that cabinet members—much



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less the President—be required to invoke the privilege in order for Exemption 5 to apply.") Mere speculation is insufficient to support the CIA's continued withholding of the PDBs on the basis of Exemption 5.

The key cases involving the invocation of the presidential communications privilege share a significant fact undeniably lacking in the instant case: the president personally invoked the privilege or the president directed an agency to invoke the privilege on his behalf. See United States v. Nixon ("Nixon I"), 418 U.S. 425 (1974) (President Nixon invoked the privilege); Nixon v. Administrator of General Services ("Nixon II"), 433 U.S. 425 (1977) (former President Nixon invoked the privilege); In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997) (President Clinton directed White House counsel to invoke the privilege). The CIA's suggestion that the Court ignore Nixon I and Nixon II because they are not FOIA cases is unsound. See CIA's Reply at 18 n. 13. Nixon I is the landmark case in which the Supreme Court first recognized the qualified privilege for presidential communications; Nixon II is the case in which the Supreme Court articulated the limitations of the presidential communications privilege and its "erosion over time after an administration leaves office." 433 U.S. 425, 451 (1977). To ignore these cases would be the equivalent of analyzing the contours of judicial review while ignoring Marbury v. Madison, 5 U.S. 137 (1803).

Cheney v. District Court, 124 S. Ct. 2576 (2004), cited for the first time in the CIA's reply brief, does nothing to justify the CIA's withholding of the PDBs under Exemption 5. In Cheney, Vice President Richard Cheney filed an interlocutory appeal of a discovery order that permitted discovery against himself and other senior officials in the Executive Branch. The United States Supreme Court held that the Vice President and other senior officials were not required to assert the executive privilege before separation of powers arguments raised in their petition could be heard.

If anything, the CIA's reliance upon Cheney amplifies that the CIA misses the first threshold step—standing—and jumps directly to the second step—invocation of the privilege. In Cheney, the Vice President was a party in the case, and regardless of whether he invoked the privilege or not, it was clear that his presence cleared the way of any standing issues to assert the



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executive privilege. Here, the President is not involved in the case, and the threshold issue of whether the CIA has standing to assert the presidential communications privilege is present.

The remaining cases cited by the CIA provide no support for the assertion that the CIA has standing. In Judicial Watch v. Department of Justice, 365 F.3d 1108 (D.C. Cir. 2004), the Court of Appeal did not address the issue of whether the presidential communications privilege had to be personally invoked because the plaintiff had failed to address the issue at the trial level and therefore waived the issue. In Lardner v. Department of Justice, 2005 WL 758267 (D.D.C. Mar. 31, 2005), an unpublished district court decision, the court held (in the only opinion that Professor Berman is aware of that does so) that the President need not personally invoke the presidential communications privilege. Neither case goes to the threshold issue of the CIA's standing—or lack thereof—to invoke the privilege.

It is undeniable that the CIA has not established that it has standing to invoke the presidential communications privilege. It is also undeniable that, unlike the landmark cases of Nixon I and Nixon II, and the more recent case of In re Sealed Case, the President has not invoked or directed the CIA to invoke the presidential communications privilege. Further, unlike Cheney, where the Vice President was a party, the President is not a party to this case, which would moot the issue of standing. In light of these undisputable facts and in light of the Supreme Court's explicit holding that the presidential communications privilege erodes over time and "carries much less weight than a claim asserted by the incumbent himself," then the presidential communications privilege asserted in this case—by an agency without standing and significantly not invoked by the current or any former presidents—should have no weight at all. Nixon II, 433 U.S. 425, 448 (1977).

**2. The CIA has not Satisfied any of the Three Prongs Necessary to Establish the Deliberative Process Privilege**

Just as it is unable to establish the application of the presidential communications privilege, so too the CIA fails to establish that the two requested PDBs may be withheld on the basis of the deliberative process privilege.

Because the CIA is unable to demonstrate that the PDBs are inter-agency or intra-agency documents that are predecisional and part of the agency's deliberative or decision-making process, the CIA encourages the Court to either ignore or misinterpret the three required prongs of Exemption 5. See 5 U.S.C. §552(b)(5).

As to the first prong, the CIA does not dispute the fact that the PDBs are not intra-agency (because they do not stay within the CIA) or inter-agency (because the President is not an agency). Instead, the CIA asserts without authority that Exemption 5 ought to apply because the PDBs are "intra-government." See CIA's Reply at 17 n.12. But FOIA uses the specific terms of "intra-agency" and "inter-agency" and its exemptions must be construed narrowly. Department of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001) ("consistent with the Act's goal of broad disclosure, these exemption have been consistently given a narrow compass"). If Exemption 5 were expanded to protect all "intra-government" documents from disclosure, then FOIA would be rendered meaningless, as all agencies could assert that some other non-agency governmental office or branch had received copies of the document.

The CIA cites Ryan v. DOJ, 617 F.2d 781 (D.C. Cir. 1980), to encourage this Court not to construe the terms "inter-agency" or "intra-agency" in a rigid manner. But the facts in Ryan involved records generated *outside* an agency but created through agency initiative, which is not the factual posture of this case. Moreover, Ryan predated the Supreme Court's unanimous decision in Klamath, in which the Supreme Court called into the question the viability of Ryan, describing it as a decision that "arguably extends beyond what we have characterized as the typical examples" of Exemption 5. Klamath, 532 U.S. at 12 n.4.[8]

The CIA's reliance upon EPA v. Mink, 410 U.S. 73 (1973), is equally misplaced. For, the CIA stretches EPA v. Mink beyond its moorings to transform dicta that has been put into doubt by several subsequent legal developments into a definitive holding. First, subsequent case law has determined that the National Security Council – the entity whose records were at issue in Mink –

[8] Not surprisingly, the CIA once again encourages this Court to simply ignore Supreme Court precedent that disfavors its position, this time, asserting that Klamath should not be relied upon because the Court found that the Klamath tribe was a non-government entity. See CIA's Reply at 17 n. 12. Of course, the Court's holding as to the specific tribe in no way minimizes the Court's analysis of the contours of Exemption 5.

is not an agency under the FOIA.[9] Armstrong v. Executive Office of the President, 90 F.3d 553, 567 (D.C. Circ. 1996). Thus, the Mink lawsuit itself likely could not be brought under the FOIA at all today. Second, in Mink, the Supreme Court described a range of classified and unclassified documents as "inter and intra agency" records. The Supreme Court first held that the classified documents among the records at issue were protected by Exemption 1 and not subject to in camera review.[10] The Court then went on to consider the applicability of Exemption 5 to the batch – but application of Exemption 5 to the classified records was irrelevant as they already had been determined to be withheld under Exemption 1. Looking at the three unclassified records that had not already been determined to be withheld under Exemption 1, two Council on Environmental Quality communications to Mr. Irwin and one EPA communication to Mr. Irwin (who was acting as staff for an entity then considered by the courts as an agency), these records on their face would appear to be inter-agency memoranda. There was no analysis whatsoever in Mink about whether the President was an agency under FOIA. That issue has been definitely decided elsewhere. See Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 156 (1980); Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992); In re Lindsey, 148 F.3d 1100, 1110 (D.C. Cir. 1998) (holding President not agency under FOIA).

The CIA's remaining argument regarding the "intra-agency" or "inter-agency" requirement is contrary to the law. On the one hand, the CIA concedes that the Office of the President is not an agency under FOIA. See CIA Reply at 17 (citing Armstrong v. Executive Office of the President, 1 F.3d 1274 (D.C. Cir. 1993)). On the other hand, the CIA asserts that Exemption 5 should nonetheless apply to the President, a non-agency, because the President would otherwise not be afforded sufficient protection. Id. If Congress purposely excluded the President from FOIA's definition of "agency," then it is not the role of the judiciary to subvert Congress' intent and to include as an agency that (the Office of the President) which is specifically excluded. Moreover, as discussed in Armstrong, the Presidential Records Act, not at issue in this case, was enacted to

[9] The records at issue were those of the Chairman to the "Under Secretaries Committee," which was a part of the National Security Council. Mink, 410 U.S. at 76.

[10] This holding led to a change in the statute by Congress to explicitly permit such review.

cover certain records that fall outside the scope of FOIA, and affords the Executive Office of the President significant protection.

Next, the CIA admits that it cannot establish the second prong of the deliberative process privilege because the "Requested PDBs are not draft versions of a subsequently finalized CIA documents." See CIA's Reply at 23. Despite the fact that the PDBs are not predecisional, the CIA still maintains they should be protected because "disclosure of the Requested PDBs would expose aspects of that [deliberative] process." (Id.) This ongoing process argument has been expressly rejected by courts. See Assembly of California v. U.S. Dep't of Justice, 968 F.2d 916, 921(9th Cir. 1992) ("Any memorandum always will be 'predecisional' if referenced to a decision that possibly will be made at some undisclosed time in the future."); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980) ("characterizing these documents as 'predecisional' simply because they play into an ongoing audit process would be a serious warping of the meaning of the word"). The CIA seeks to lead the Court down a dangerous slippery slope, an area in which every document could be deemed predecisional because it is part of a neverending process that will one day result in a decision. City of Virginia Beach v. U.S. Department of Commerce, 995 F.2d 1247, 1255 (4th Cir. 1993) ("while the government need not anchor the documents to a single, discrete decision amidst ongoing deliberative processes, ... an overly lax construction of the term 'predecisional' submerges the rule of disclosure under the exemption.") (internal citations omitted). To extend the deliberative process in the manner requested by the CIA would shield virtually all government records from disclosure.

Further, Plaintiff has provided evidence that President Johnson did not review the requested PDBs in the company of a CIA briefer, and that there was no ongoing dialogue with regard to these specific PDBs. See Blanton Decl., ¶4 & Ex. 3. The CIA has not opposed this specific and persuasive evidence, and continues to rely upon the boilerplate language in the Buroker Declaration that the PDBs *in general* reflect an "ongoing dialogue" between the President and his advisors. See Buroker Decl., ¶73 & CIA's Reply at 23 n. 20. Failing to provide any evidence of an ongoing dialogue with regard to the specific Johnson administration PDBs, and in



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the face of direct evidence from the Blanton Declaration that no dialogue occurred with regard to these PDBs, the CIA's generic argument about an ongoing dialogue fails.

Finally, the CIA comes no closer to establishing that the requested PDBs are part of its deliberative process or that they contain "advisory opinions, recommendations and deliberations." Carter v. Department of Commerce, 307 F.3d 1084, 1090-91 (9th Cir. 2002). Ironically, the CIA attempts to lean on the Berman Declaration's statement that PDBs illuminate "what the president knew" and "why foreign policy decisions were made during relevant times" as evidence that the PDBs are deliberative. See CIA's Reply at 22. That does not solve the deficiencies of the Buroker Declaration, now accompanied by the Supplemental Buroker Declaration, neither of which explain how the PDBs for August 6, 1965 and April 2, 1968 are part of the CIA's deliberative process. The CIA clings to its assertion that the PDBs are exempt—not because they are advisory or recommendatory in nature—but because the facts within the PDBs reveal the mental processes of the decisionmakers. But even the cases cited by the CIA explain that Exemption 5 should not be read as "permitting the withholding of factual material merely because it was placed in a memorandum with matters of law, policy, or opinion." EPA v. Mink, 410 U.S. 73, 91 (1973). In another case the CIA relies upon, Montrose Chemical Corp. v. Train, 491 F.2d 63, 68-71 (D.C. Cir. 1974), the document at issue was a summary of 9,200 page administrative record that the Administrator of the Environmental Protection Agency requested to help him determine whether the pesticide DDT was injurious to the environment. The salient point in the application of Exemption 5 is that there is a policy decision being made that relies on the document requested under FOIA. Mapother & Nevas v. Department of Justice, 3 F.3d 1533, 1539 (D.C. Cir. 1993) ("the key to Montrose Chemical was [the relationship] between the summaries and the decision announced by the EPA Administrator."). Similarly, while there are cases in which courts have held that the agency need not pinpoint a single decision in order to invoke Exemption 5, those are cases in which the content of the document at issue was a recommendation, proposal, suggestion, or draft that would have exposed subjective personal opinions of the writer rather than the final decision of the agency. See Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). The CIA makes no claim that release of the

two PDBs would expose the personal opinions of the writer, rather than the final decision of the agency, because of course, the PDBs are daily, final products of the agency.

The CIA concedes, as it must that "a report does not become part of the deliberative process simply because it contains only those facts which the person making the report thinks material." See CIA's Reply at 22 (citing National Wildlife Federation v. Forest Service, 861 F.2d 1114, 1119 (9th Cir. 1988), quoting Playboy Enterprises, Inc. v. Department of Justice, 677 F.2d 931 (D.C. Cir. 1982)). Even applying the "flexible, common-sense approach" espoused in Mink and the "functional" test in National Wildlife, it is clear that the CIA has not met its burden of establishing how the facts in the two requested PDBs are of a deliberative nature.

The CIA admits that the PDBs are not intra-agency or inter-agency documents. It also admits that the PDBs are not predecisional draft documents. Conceding that it cannot fulfill two of the three prongs necessary to invoke the deliberative process privilege, the CIA cannot invoke the privilege. Because the CIA is unable to bear its burden with respect to both the presidential communications privilege and the deliberative process privilege, its withholding of the PDBs is not justified by Exemption 5.

### C. The CIA's Declarations Fail To Show Why Information In The Two PDBs Is Not Reasonably Segregable

The CIA insists that the Buroker declaration sufficiently explains that no "reasonably segregable portions" of the documents exist. See CIA's Reply at 24. To the contrary, the very language used in the Buroker declaration undermines its credibility and illustrates why this Court must independently assess the CIA's segregation practices. See Wiener, 943 F.2d at 977 (rejecting 'categorical' approach of listing the 'types of harms' that generally result when a 'type' of information is disclosed); Rosenfeld v. U.S. Dept. of Justice, 57 F.3d 803, 807 (9th Cir. 1995) (government's general assertions that "disclosure of certain categories of facts may result in disclosure of the source and disclosure of the source may lead to a variety of consequences detrimental to national security" were insufficient) *quoting* Wiener, 943 F.2d at 980). The Buroker declaration offers only generalizations about the mosaic-nature of the PDBs *in general* and no analysis of specific information that might be segregated and released from the two PDBs

in question. Indeed, from the generic information offered by Buroker, there is no indication that sources or liaison relationships are even implicated in the two requested PDBs. Most importantly, as discussed above, the previous release of more than thirty *other* PDBs/PICLs – including the content of two PDBs released by the agency in December of 2004 – completely undercuts the underlying premise of the Buroker declaration that the disclosure of *any* PDB is a threat to national security interests. The CIA has failed to explain how segregation is not possible and independently warrants an in camera review by this Court.

### D. The CIA's Offer To Present Further Evidence Ex Parte and In Camera Should Be Rejected As Detrimental To The Adversarial Process

The CIA states that an in camera, ex parte "filing" is available to the Court to give more detail as to why Exemptions 3 and 1 apply to the requested PDBs. See CIA Reply at 4 n.2 and 16. This invitation should be rejected. As the Ninth Circuit recently has explained: "[r]equiring as detailed public disclosure as possible of the government's reasons for withholding documents under a FOIA exemption is necessary to restore, to the extent possible, a traditional adversarial proceeding by giving the party seeking the documents a meaningful opportunity to oppose the government's claim of exemption." Lion Raisins Inc. v. U.S. Dep't of Agriculture, 354 F.3d 1072, 1083 (9th Cir. 2004) (emphasis added) (citing Wiener, 943 F.2d at 979).

In camera and ex parte presentation of factual assertions as well as legal and expert opinion relating to secret documents is a far greater distortion of normal judicial process than in camera review of the documents alone, since it combines the element of secrecy with the element of one-sided, ex parte presentation. When in camera, ex parte declarations and legal briefs are submitted by the government, the district court is deprived of the benefit of informed advocacy to draw its attention to the weaknesses in the government's arguments. Without notice of the facts and arguments supporting the government's position, the FOIA requester has little or no opportunity to argue for release of particular documents. Wiener, 943 F.2d at 979. For these reasons, the use of in camera, ex parte declarations is extremely disfavored in FOIA cases.[11]

[11] See, e.g., Abourezk v. Reagan, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986) ("It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. ... Exceptions to

The acceptance of in camera, ex parte declarations and legal briefs is particularly dangerous when the materials already submitted by the government include errors, misstatements or mischaracterizations that demonstrate the need for adversarial challenge. Here, for example, the CIA made representations about the limited number of PDB excerpts or predecessor PICLs that already have been released and the special explanations for those releases. See Buroker Decl. at 14 n. 4. Yet, Professor Berman demonstrated that over thirty other PDBs or the predecessor PICLs have been released, including many that do not appear to be accounted for by the Buroker Declaration, including two in the same month that this lawsuit was filed (although those were not on PDB stationery). The special explanations offered by the CIA for the releases that it acknowledges do not seem to apply to most of these other approved releases. The CIA also now claims that the PDBs contain raw intelligence (that apparently cannot be segregated out for redaction), in a seeming effort to undermine Professor Berman's showing that declassified CIBs contain much of the same information (often verbatim) as is found in the classified PDBs. See Suppl. Buroker Decl., ¶ 4. Yet, this new assertion directly contradicts averments in Buroker's original declaration and other evidence that PDBs are finished intelligence. Nor does this new assertion square with a review of the PDBs that already have been released to the public.[12] As demonstrated in Professor Berman's Opposition to CIA Statement of Undisputed Facts and Statement of Additional Facts in Opposition, there are numerous matters that would not have been brought to the Court's attention without the benefit of adversarial presentations. Thus, this Court should reject the CIA's belated offer to present ex parte further evidence to support its claims.

## III. CONCLUSION

Because the CIA's affidavits fail to set forth detailed and specific facts justifying its withholding of the two Johnson-era PDBs at issue here, and because the facts presented in support

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the main rule are both few and tightly contained. ... Even in administering [the Freedom of Information Act], we have been vigilant to confine to a narrow path submissions not in accord with our general mode of open proceedings. See, e.g., Vaughn v. Rosen, 484 F.2d 820, 827-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) (requiring the government to create a public index listing privileged documents and providing explanations of the claim of privilege)").

[12] Should the Court consider the receipt of ex parte, in camera filings, it should first permit Professor Berman an opportunity to suggest procedures that would minimize the extreme prejudice associated with this departure from traditional U.S. judicial proceedings, such as the use of a special master, the opportunity to submit interrogatories, or selective disclosure to counsel.

of Plaintiff Berman's Cross-Motion for Summary Judgment are otherwise undisputed, summary judgment should be granted in favor of Plaintiff.

DATED this 18th day of May, 2005.

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