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13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 SAN FRANCISCO DIVISION

16 AMERICAN SMALL BUSINESS  
17 LEAGUE,

18 Plaintiff,

19 v.

20 UNITED STATES DEPARTMENT OF  
21 DEFENSE,

22 Defendant.

Case No. CV 14-2166 WHA

**JOINT CASE MANAGEMENT  
STATEMENT AND [PROPOSED]  
ORDER**

Date: April 6, 2017  
Time: 11:00 a.m.  
Place: Courtroom 8, 19th Floor  
Judge: Hon. William Alsup

23 Pursuant to the Clerk’s Notice of March 15, 2017, Plaintiff, American Small Business League  
24 (“ASBL”), and Defendant, United States Department of Defense (“DOD”), respectfully submit this joint  
25 case management statement in advance of the Further Case Management Conference scheduled on April  
26 6, 2017. In this joint case management statement, the parties set forth below a brief description of the  
27 background to this litigation, their respective positions on future proceedings in this Court in light of the  
28

1 Ninth Circuit’s January 6, 2017 Opinion (“January 6 Opinion”) and the Mandate issued February 28,  
2 2017, as well as their proposed case schedule.<sup>1</sup>

### 3 **Background**

4 In August 2013, ASBL submitted a request to the DOD under the Freedom of Information Act  
5 for Sikorsky’s most recent Comprehensive Small Business Subcontracting Plan (the “Subcontracting  
6 Plan”). Order Denying Cross Motions for Summary Judgment dated November 23, 2014 [ECF No. 28]  
7 at 1. The agency responded that it would not be able to respond within the statutory time period, and  
8 ASBL commenced this action on May 12, 2014. *Id.* at 2. The parties filed motions for summary  
9 judgment, seeking a determination as to whether the Subcontracting Plan had to be disclosed or could be  
10 withheld in whole or part under FOIA Exemption 4, which addresses confidential business information.  
11 *Id.* DOD’s position is that the Subcontracting Plan “cannot be released because [it] contains confidential  
12 and financial information that would harm Sikorsky’s competitive position if that information were  
13 released.” *Id.* at 3-4. DOD subsequently also asserted that some of the information in the  
14 Subcontracting Plan was exempt under Exemption 6. *Id.* at 6. After in camera review of the documents,  
15 the Court ordered the Subcontracting Plan to be released. *Id.* at 7. DOD appealed to the Court of  
16 Appeals for the Ninth Circuit, which issued an opinion on January 6, 2017.

### 17 **Plaintiff ASBL’s Position**

18 In its decision reversing this Court’s order directing the Defendant to disclose the entirety of  
19 Sikorsky’s Subcontracting Plan, the Ninth Circuit found that the Declaration of Amy Johnson was  
20 sufficient to raise a triable issue of fact regarding the application of FOIA’s exemption of “commercial  
21 or financial information that is privileged or confidential,” and reversed the order. Pursuant to the recent  
22 *en banc* decision in *Animal Legal Defense Fund v United States Food and Drug Administration* 836  
23 F.3d 987 (2016) “if there are genuine issues of material fact in a FOIA case, the district court should  
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26 <sup>1</sup> Sikorsky Aircraft Corporation (“Sikorsky”) did not participate in the negotiation of the  
27 proposed next steps as it intervened in the case solely for purposes of the appeal to the Ninth Circuit.  
28 However, the Government notified counsel for Sikorsky of the parties’ positions in preparing for the  
Further Case Management Conference, and has shared a copy of this Case Management Statement and  
Proposed Order with him.

1 proceed to a bench trial or adversary hearing. Resolution of factual disputes should be through the usual  
2 crucible of bench trial or hearing, with evidence subject to scrutiny and witnesses subject to cross-  
3 examination.” *Id* at 990

4 ASBL contends that the factual allegations made by Sikorsky employee Amy Johnson in her  
5 declaration in support of the Defendant’s claim of exemption from FOIA are inaccurate. ASBL asserts  
6 that the information which is the subject of the FOIA request at issue in this case is not protected from  
7 disclosure as “commercial or financial information that is privileged or confidential” under Exemption 4  
8 of FOIA, 5 U.S.C. § 552(b)(4). The evidence will show that the Defendant cannot meet its burden of  
9 demonstrating the existence of both actual competition in the relevant market and a likelihood of  
10 substantial competitive injury. Sikorsky’s contract awards are “single source contracts” based on  
11 technological competition rather than any price advantage in obtaining component parts. Competition in  
12 the market Sikorsky operates in is non- existent. Moreover, the information withheld would not allow a  
13 competitor to derive line item prices, nor could a competitive advantage be obtained from knowledge of  
14 Sikorsky’s allegedly unique small business recruitment policies. Finally, the information claimed to be  
15 exempt is more than three years old and too out of date to be of any use to a competitor.

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18 The evidence will further show that the signatures of those individuals which executed a  
19 document filed with a government agency to certify accuracy and compliance with federal law are not  
20 subject to a privacy exception under FOIA.

21  
22 Sikorsky is no longer a party to this litigation, having intervened solely for the purpose of appeal  
23 when this court found its supporting declaration did not meet the Defendant’s burden of proof. ASBL  
24 requests that should Sikorsky seek to intervene in this proceeding, Sikorsky bring a motion to do so  
25 within ten days of the Case Management Conference, or be foreclosed from intervening later in the  
26 proceeding. Allowing a second last-minute intervention by Sikorsky would prejudice ASBL’s discovery  
27 and preparation for trial, and lead to significant inefficiency in this procedure.

1 ASBL believes that written discovery may be necessary in this action, particularly if Sikorsky  
2 intervenes, but also in the absence of such intervention. It is possible that significant non-privileged  
3 correspondence exists containing evidence concerning facts underlying process of drafting the Johnson  
4 Declaration. Moreover, ASBL will immediately seek information regarding potential witnesses in order  
5 to plan the burdensome bi coastal deposition schedule to minimize travel and maximize efficiency.  
6

7 Notwithstanding the oft-cited maxim that “discovery is disfavored in FOIA cases, this matter  
8 falls well within the well-recognized exceptions to that suggestion. Discovery is allowed after  
9 dispositive motions, such as occurred here. *Lane v Dept of the Interior*, 523 F.3d 1128,1134 (9th Cir.  
10 2008). Entitlement to discovery occurs when there has emerged a genuine issue of material fact which  
11 can only be resolved by an evidentiary hearing. Moreover, a second exception justifying discovery is  
12 when the agency (or in this case the agency’s declarant) has acted in bad faith. The record in this matter  
13 speaks for itself. Discovery in FOIA cases “...should only be denied when the declarations are  
14 reasonably detailed, submitted in good faith, and the court is satisfied that no factual dispute remains.”  
15 *Hostettler LLP v. Dept of Commerce*, 473 F3d 312, 318 (D.C.C.2006). None of those factors are present  
16 in this case.  
17

18 ASBL believes that expert testimony and discovery are crucial to this case. The Defendant has  
19 relied on declaration testimony by a Sikorsky employee making bold assertions concerning the actual  
20 competition Sikorsky faces in the relevant marketplace as a means of meeting its threshold burden of  
21 showing “actual competition.” ASBL maintains that these allegations are inaccurate. The nature and  
22 extent of the competition for single source military hardware contracts can only be adduced by expert  
23 opinion, there is no other way of obtaining competent testimony to rebut the Defendant’s claims. The  
24 use of expert witness testimony to resolve disputed FOIA “competitive harm” claims is not unusual.  
25 See, e.g. *Pub. Citizen Health Research Group v. FDA*, 953 F. Supp. 400, 402-03 (D.D.C. 1996).  
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1           **Defendant DOD's Position**

2           DOD agrees that the language discussing the “genuine issue[s] of fact” in the January 6 Opinion  
3 implies that the Ninth Circuit intended that the next step in this litigation would involve a bench trial or  
4 adversary hearing. January 6 Opinion at 3,4; *see also Animal Legal Defense Fund*, 836 F.3d at 990  
5 (“Consistent with our usual procedure, if there are genuine issues of material fact in a FOIA case, the  
6 district court should proceed to a bench trial or adversary hearing.”). However, DOD notes that there  
7 are certain seeming inconsistencies in the Ninth Circuit’s opinion that could be read to imply that  
8 judgment should be entered in favor of the Government. First, the opinion notes that nothing more is  
9 required as to Exemption 4 than the declaration that was submitted. January 6 Opinion at 3. Second, as  
10 to Exemption 6, the court stated that it could “identify no countervailing public interest sufficient to  
11 justify disclosure in these circumstances, especially since the Department already disclosed the names of  
12 all employees mentioned in the Plan.” *Id.* at 4. Finally, the Ninth Circuit reversed, without indicating  
13 that it was also remanding the case to this Court. *Id.*

14           To the extent that the Court concludes that the appropriate next step is to conduct a bench trial or  
15 adversary hearing, the Government has agreed with Plaintiff as to the proposed steps outlined below.  
16 The Government has agreed to what it believes is a reasonable amount of discovery proportional to the  
17 needs of the case, in the interest of trying to reach a consensus with Plaintiff, but it has not agreed to  
18 additional written discovery beyond what is listed in the proposed steps below, and it has not agreed to  
19 expert discovery. The Government believes that the current proposal strikes an appropriate balance that  
20 will allow the Court to assess the credibility of the witnesses without imposing undue burdens on the  
21 parties or the Court.

22           The Government notes that there was no discovery permitted in *Government Accountability*  
23 *Project v. Food and Drug Administration*, 12-cv-1954 (KBJ) (D.D.C.) (Order entered Oct. 24, 2016  
24 (ECF No. 59)) and *Public Citizen Health Research Group v. Food & Drug Administration*, 953 F. Supp.  
25 400, 406 (D.D.C. 1996), two cases from the United States District Court for the District of Columbia  
26 that also involved factual disputes centered on whether FOIA Exemption 4 applied to requests for  
27 certain industry data in an agency’s possession. This Court has observed that “due to the fact that venue  
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1 in FOIA cases is, by statute, established ‘in the District of Columbia,’ a significant proportion of FOIA  
2 cases arise in that District, which means that decisions of the District of District of Columbia with regard  
3 to FOIA are entitled to considerable deference.’ *See Hiken v. Dep’t of Def.*, 872 F. Supp. 2d 936, 943  
4 (N.D. Cal. 2012). In both of those cases from the United States District Court for the District of  
5 Columbia, the court denied the parties’ cross-motions for summary judgment after the parties submitted  
6 competing affidavits that took differing positions on whether disclosure of the requested material would  
7 cause substantial competitive harm, and proceeded directly to an evidentiary hearing without allowing  
8 for discovery. In light of this precedent, and in light of the scope of this FOIA case, the Government  
9 asserts that discovery should not be expanded beyond the steps proposed below.

#### 10 **The Parties’ Proposed Next Steps**

11 1. The deposition of the declarant from the litigation below (Amy M. Johnson) will be  
12 noticed as soon as reasonably possible. The parties shall exchange witness lists 30 days after this  
13 deposition, identifying the witnesses with relevant information that they may present at the evidentiary  
14 hearing or bench trial in this case.

15 2. Limited discovery in the form of depositions of individuals listed on the witness lists will  
16 be permitted only on the issue of whether protection from disclosure under the FOIA, individually  
17 and/or collectively, of the information currently redacted in Sikorsky’s Subcontracting Plan is proper  
18 under Exemption 4 of FOIA and whether protection from disclosure of Sikorsky employees’ business  
19 contact information and signatures is proper under Exemption 6. Each party may take the deposition of  
20 any witness who is expected to offer testimony on the issue of competitive harm at the evidentiary  
21 hearing in this matter.

22 3. Discovery shall be completed by no later than October 6, 2017.

23 4. The bench trial will take place on a date to be determined by the Court. The bench trial  
24 will be directed to resolving the parties’ factual dispute regarding whether protection from disclosure  
25 under the FOIA, individually and/or collectively, of the information currently redacted in Sikorsky’s  
26 Subcontracting Plan is proper under Exemption 4 of FOIA and whether protection from disclosure of  
27  
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1 Sikorsky employees' business contact information and signatures is proper under Exemption 6. At trial,  
2 all witnesses shall testify live, or through properly preserved deposition testimony.

3 5. Disclosures pursuant to Federal Rule of Civil Procedure 26(a)(3) will be made at least 30  
4 days before the bench trial, and any objections thereto will be made within 14 days thereafter.

5 6. A pretrial conference shall be held on a date to be determined by the Court in Courtroom  
6 8, 19th Floor. The parties will submit a proposed order setting forth any rulings made at the pretrial  
7 conference in accordance with item 4 of the Court's Guidelines for Trial and Final Pretrial Conference  
8 in Civil Bench Cases ("Civil Bench Cases Guidelines").

9 7. The parties are to serve and file a joint proposed final pretrial order at least seven  
10 calendar days in advance of the bench trial that includes each of items listed in item 2(a) of the Court's  
11 Civil Bench Cases Guidelines.

12 8. The parties shall file any motions in limine in accordance with item 2(b) of the Civil  
13 Bench Cases Guidelines.

14 9. To the extent not covered in this Proposed Order, the parties shall comply with all  
15 applicable guidelines set forth in the Civil Bench Cases Guidelines.

16 10. The parties expect a bench trial to last one to two days.

17 11. The parties shall submit proposed findings of fact and conclusions of law within 30 days  
18 of the conclusion of the hearing or bench trial.

19  
20 Dated: March 30, 2017

Respectfully submitted,

21 BRIAN J. STRETCH  
22 United States Attorney

23 /s/ Ellen London  
24 Ellen London  
Assistant United States Attorney  
Counsel for Defendant

25 Dated: March 30, 2017

26 /s/ Robert E. Belshaw  
27 Robert E. Belshaw (CABN 142028)  
28 Counsel for Plaintiff

1 *\* In accordance with Civil Local Rule 5(i)(3), I, Ellen London, attest that I have obtained concurrence*  
2 *in the filing of this document from the other signatory listed here.*

3  
4 **[PROPOSED] ORDER**

5 Pursuant to the parties' submission, the parties' joint proposed scheduling order is approved. IT  
6 IS SO ORDERED.

7 DATED:

8 \_\_\_\_\_  
9 Hon. William H. Alsup  
10 United States District Judge