

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
REBECCA TUSHNET,)	
)	
Plaintiff,)	
)	No. 1:15-cv-15-00907 (CRC)
v.)	
)	
UNITED STATES IMMIGRATION)	
AND CUSTOMS ENFORCEMENT,)	
)	
Defendant.)	
_____)	

PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff Rebecca Tushnet moves for summary judgment in this case brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, on the ground that there is no genuine issue of disputed material fact and that Plaintiff is entitled to judgment as a matter of law. Defendant United States Immigration and Customs Enforcement (ICE) has not demonstrated that it has conducted a search reasonably calculated to uncover the requested records. ICE has also failed to show that records it withheld are exempt from disclosure under 5 U.S.C. §§ 552(b)(4) or (b)(7)(E), or that there is any other basis for withholding them under FOIA. Accordingly, judgment should be entered for Plaintiff.

In support of this Motion, and in opposition to Defendant’s Motion for Summary Judgment (Doc. 25), Plaintiff submits the accompanying Memorandum in Opposition to Defendant’s Motion for Summary Judgment and In Support of Plaintiff’s Cross-Motion for Summary Judgment; Plaintiff’s Statement of Undisputed Material Facts, with 24 attached Exhibits; Plaintiff’s Response to Defendant’s Statement of Undisputed Material Facts; and a proposed Order.

Respectfully submitted,

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Dated: May 20, 2016

Attorney for Plaintiff

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**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Rebecca Tushnet brought this action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, et seq., to compel Defendant United States Immigration and Customs Enforcement (ICE) to produce records responsive to her six-part FOIA request of March 6, 2015. Plaintiff's request seeks records related to ICE's seizure of clothing on the basis that it is counterfeit or infringing. Plaintiff challenges the adequacy of ICE's search for responsive records, ICE's redactions under FOIA Exemption 7(E) of information found on about 300 pages of 24 industry guides totaling 503 pages, and ICE's withholding of eight pages of material under FOIA Exemption 4.

Plaintiff's Motion for Summary Judgment should be granted and ICE's denied. First, ICE has failed to conduct a search reasonably calculated to uncover the requested records. The inadequacy of ICE's search is apparent from the paltry results, and common sense compels the conclusion that ICE has further responsive records. Indeed, ICE does not even claim to have searched a critical record system that houses responsive documents. Further, ICE delegated its search responsibility to individual offices without providing any guidance on how to search or what to look for, resulting in searches that were unreasonably limited, haphazard, and arbitrary, if they were conducted at all. Further, ICE searched only 17 of the 39 offices known to have participated in an operation aimed at the seizure of counterfeit sports apparel, even though each of the 39 offices is likely to have responsive records.

Second, the information ICE redacted from the industry guides is not protected from disclosure by FOIA Exemption 7(E). ICE's declaration and Vaughn Index do not adequately describe the information redacted, but instead use a categorical description to

cover all of the various types of information withheld, and ICE applies a near-verbatim recitation of the statutory standard as its reason for claiming the exemption. Further, to the extent ICE has redacted information from the industry guides that encourages ICE to seize items that are not counterfeit or infringing, but rather are parodies or other uses of trademarks protected under the doctrine of fair use, the material is not protected by Exemption 7(E) because it serves no legitimate law-enforcement purpose. Similarly, to the extent ICE has redacted information that is publicly available and well-known, release of the information does not risk circumvention of the law and it is not entitled to Exemption 7(E) protection. Finally, the industry guides are not protected by Exemption 7(E) because they are not internal agency materials and do not constitute official policy. Rather, the guides reflect the opinions of trademark rights holders and do not establish law enforcement procedures.

Third, ICE has abandoned its claim that eight pages of material may be withheld in full under Exemption 4. Because ICE has failed to even attempt to meet its burden to justify its Exemption 4 withholdings, ICE has waived the claim and the Court should order ICE to produce the documents.

BACKGROUND

I. The Impetus for Professor Tushnet's FOIA Request

On January 29, 2014, Defendant United States Immigration and Customs Enforcement (ICE) held a news conference focused on seizures of counterfeit sports-

related apparel in the days leading up to Super Bowl XLIX. *See* Exh. 1.¹ A resulting article in the Boston Globe contained this passage:

The profane debasing of a mascot – and really anything that denigrates a team – is guaranteed to be contraband, said Daniel Modricker, a spokesman for US Immigration and Customs Enforcement. That “Yankees Suck” T-shirt you put on for special occasions? If it uses anything that looks like a team or league logo, it probably constitutes trademark infringement.

Exh. 2 at 2. The article caught the attention of intellectual property scholars, including Plaintiff Rebecca Tushnet, a professor at Georgetown University Law Center, because the remark attributed to Mr. Modricker is a gross misstatement of the law. *See, e.g., SaleHoo Group, Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210, 1217 (W.D. Wash. 2010) (adding “sucks” to a trademark prevents confusion about whether the use is authorized and therefore avoids infringement); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1165 n.2 (C.D. Cal. 1998) (same); *see also Radiance Foundation, Inc. v. N.A.A.C.P.*, 786 F.3d 316, 319 (4th Cir. 2015) (Lanham Act, to avoid constitutional questions, targets only confusing uses); *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc.*, 886 F.2d 490, 495 (2d Cir. 1989) (“the expressive element of parodies requires more protection than the labeling of ordinary commercial products”). Further, “counterfeiting” is a narrower category than “infringement.” Because parodies do not infringe, by definition they cannot be counterfeit. *See Sakar Int’l, Inc. v. U.S.*, 516 F.3d 1340, 1346 n.5 (Fed. Cir. 2008) (elaborating on the distinction). Professor Tushnet contacted Mr. Modricker and requested “the statutory or decisional authority ICE uses to seize items that ‘denigrate’ a registered trademark,” and information on the number of items seized on that basis. Exh. 3. Professor

¹ Unless otherwise noted, all citations to “Exh.” Refer to the Exhibits attached to Plaintiff’s Statement of Undisputed Material Facts.

Tushnet explained that she was “puzzled how ‘Yankees Suck’ or the like, even using the Yankees colors and font, could constitute counterfeiting.” *Id.* Mr. Modricker replied that “if one logo where [sic.] disparaging another logo than [sic.] it would be infringement.” *Id.*

The article in the Boston Globe also caught the attention of blogger and UCLA law professor Eugene Volokh, who attempted to contact Mr. Modricker to confirm ICE’s position. Exh. 4. Mr. Modricker was unavailable but another ICE Public Affairs Officer confirmed that:

During our anticounterfeiting effort for the Super Bowl, there are some things that are a dead giveaway. For example, one of the things we have seen is . . . the Dallas star, the Dallas logo, and basically the shirt says ‘Dallas suck.’ When you see a shirt that is placing one team above another, using the official NFL trademark logos, and placing one team above another or putting down one team versus another, you can tell right away that that’s not a legit item. Anything that is a joke at one team’s expense, anything that could be in a negative context within the league, is a dead giveaway.

Id.

Professor Tushnet continued to seek information from ICE concerning “the statutory or decisional basis for seizing items on the grounds that disparagement constitutes either trademark or copyright infringement,” and information on the number of items seized on such grounds. Exh. 5. Following further exchanges with Mr. Modricker, *see* Exh. 6, Professor Tushnet was directed to Joseph M. Liberta, Chief of the Criminal Law Section of ICE’s Homeland Security Investigations (HSI) Law Division in the Office of the Principal Legal Advisor. Mr. Liberta stated that:

ICE HSI Special Agents focus their enforcement efforts on interdicting the cross-border movement of infringing works and counterfeit merchandise in violation of 17 U.S.C. § 506, 18 U.S.C. § 2319, and 18 U.S.C. § 2320, as well as associated violations of U.S. criminal and customs laws. As part of their investigatory process ICE HIS Special Agents will consider the scope of the protected intellectual property as registered with USPTO or the Copyright Office, information from right holders regarding what constitutes

an unauthorized use of their intellectual property, and information gathered as part of an investigation. No single factor is dispositive and will be considered on a case-by-case basis. ICE HSI Special Agents consult with ICE's Office of the Principal Legal Advisor and U.S. Department of Justice attorneys to determine whether probable cause exists in support of a seizure and whether there are defenses under the Copyright Act and Lanham Act, such as potential fair use provisions and federal circuit-specific case law, which influence whether an enforcement effort is pursued by the government.

Exh. 7. Finally, with regard to Professor Tushnet's request for information regarding the number of seizures made on the grounds that the seized items contained disparaging uses of marks, Mr. Liberta stated that Professor Tushnet could pursue the information through a FOIA request. *Id.*

II. Professor Tushnet's FOIA Request

On March 6, 2015, Plaintiff submitted a six-part FOIA request that, in large part, tracked Mr. Liberta's explanation of how ICE agents determine whether to seize items thought to be infringing or counterfeit. Specifically, Professor Tushnet's FOIA request sought:

- 1) All images and descriptions of clothing seized or impounded by ICE as counterfeit from 2012 to the date of the request.
- 2) All records, guidelines, policies, procedures, or training documents that describe how ICE:
 - a. determines how similar one mark must be to another to deem an item bearing a mark counterfeit;
 - b. distinguishes between items that are merely infringing items and items that are counterfeit;
 - c. uses or considers circuit-specific case law in determining whether an item is counterfeit or infringing;
 - d. considers the legal doctrine of fair use in determining whether an item is counterfeit or infringing;

- e. considers trademark-infringement defenses other than fair use in determining whether an item is counterfeit or infringing.
- 3) All records that use the words “disparagement,” “parody,” “distortion,” or “tarnishment,” or grammatical variants thereof, in connection with trademark rights holders’ requests or consultations with trademark rights holders.
- 4) All records indicating that an item was seized by ICE, in whole or in part, because the item disparaged, parodied, distorted, or tarnished a trademark.
- 5) All documents, presentations, handouts, and photographs used by ICE in connection with the ICE news conference on counterfeit clothing held the week of January 25, 2015-January 31, 2015, which is described in the article “US agents tackle fake Super Bowl items,” written by Nestor Ramos and published in the Boston Globe on January 31, 2015. See <http://www.bostonglobe.com/metro/2015/01/31/searching-for-tom-bardy-feds-hunt-counterfeiters-before-big-game/SusU4CTQW5nfEC0wvLvkiM/story.html>
- 6) All records referencing Daniel Modricker’s paraphrased statement at the news conference described in request number 5 that “[t]he profane debasing of a mascot – and really anything that denigrates a team – is guaranteed to be contraband,” including any records reflecting his exact words.

Exh. 8.

III. ICE’s Response to the FOIA Request

In response to Professor Tushnet’s FOIA request, ICE made five rolling productions of material totaling 4,539 pages, consisting of 1,457 pages of text documents and 3,082 photographs of seized items.

On September 30, 2015, ICE produced 523 pages of material, consisting of a 511-page summary table responsive to Request No. 1, Bates Nos. 1-511; ten pages responsive to Request No. 5, Bates Nos. 512-514 and 517-523; and two pages responsive to Request No. 6, Bates Nos. 515-516.²

² The documents produced by ICE on September 30, 2015, are available at: <http://instituteforpublicrepresentation.org/wp-content/uploads/2015/12/2015-ICLI-00027-Docs-produced-by-ICE-9.30.15.pdf>.

On December 3, 2015, ICE produced 106 pages of material, consisting of 104 pages of industry guides related to identification of counterfeit sports-related apparel responsive to Request No. 2(a), Bates Nos. 524-627; and two pages responsive to Request No. 6, Bates Nos. 628-629.³

On February 1, 2016, ICE produced 576 pages of material, consisting of 250 photographs responsive to Request No. 1, Bates Nos. 839-1088; 265 pages of text documents responsive to Request No. 2(a), Bates Nos. 630-716, 777-838, and 1089-1205; and 61 pages of text documents responsive to Request No. 6, Bates Nos. 717-776.⁴

On March 1, 2016, ICE produced 585 pages of material, consisting of 250 photographs responsive to Request No. 1, Bates Nos. 1541-1790; and 335 pages of text documents responsive to Request No. 2(a), Bates Nos. 1206-1540.⁵

On April 1, 2016, ICE produced 2,749 pages of material,⁶ consisting of 2,574 photographs responsive to Request No. 1, Bates Nos. 1791-2614 and 2790-4539; and 175 pages of text documents responsive to Request No. 2(a), Bates Nos. 2615-2789.⁷

³ The documents produced by ICE on December 3, 2015, are available at: <http://instituteforpublicrepresentation.org/wp-content/uploads/2015/12/2015-ICLI-00027-Docs-produced-by-ICE-12.3.2015.pdf>.

⁴ The documents produced by ICE on February 1, 2016, are available at: <http://instituteforpublicrepresentation.org/wp-content/uploads/2016/04/2015-ICLI-00027-Color-Release.pdf>.

⁵ The documents produced by ICE on March 1, 2016, are available at: <http://instituteforpublicrepresentation.org/wp-content/uploads/2016/04/Combined-March-2016-release.pdf>.

⁶ ICE's cover letter accompanying the production of April 1, 2016, erroneously stated that the release totaled 2,784 pages. *See* Exhibit 11 to Pineiro Decl. of April 29, 2016, Doc. 26-1 at 48.

⁷ The documents produced by ICE on April 1, 2016, are available at: <http://instituteforpublicrepresentation.org/wp-content/uploads/2016/04/Combined-April-2016-Release-1-of-2.pdf> and <http://instituteforpublicrepresentation.org/wp-content/uploads/2016/04/Combined-April-2016-Release-2-of-2.pdf>.

ICE has produced no records responsive to Request Nos. 2(b)-(e), 3, or 4.

STANDARD OF REVIEW

Summary judgment is appropriate when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, the Court draws all reasonable inferences in the non-movant’s favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). FOIA cases are typically resolved on summary judgment. *Shapiro v. Dep’t of Justice*, 969 F. Supp. 2d 18, 26 (D.D.C. 2013). FOIA’s “strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.” *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991). An agency may satisfy its burden by affidavit, *DiBacco v. U.S. Army*, 795 F.3d 178, 195 (D.C. Cir. 2015), but “the government must demonstrate the absence of a genuine dispute regarding the adequacy of its search for or production of responsive records.” *Judicial Watch, Inc. v. Dep’t of the Navy*, 971 F. Supp. 2d 1, 3 (D.D.C. 2013). “The agency bears the burden of establishing that any limitations on the search it undertakes in a particular case comport with its obligation to conduct a reasonably thorough investigation.” *McGehee v. CIA*, 697 F.2d 1095, 1101 (D.C. Cir. 1983). The agency also bears the burden of showing that withheld information comes within one of FOIA’s nine statutory exemptions, which are to be narrowly construed. *Summers v. Dep’t of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998); 5 U.S.C. § 552(a)(4)(B). If the government cannot “carry its burden of convincing the court that one of the statutory exemptions appl[ies],” the requested records must be released. *Goldberg v. Dep’t of State*, 818 F.2d 71, 76 (D.C. Cir. 1987).

ARGUMENT

I. ICE Failed to Conduct an Adequate Search for Relevant Records.

Under FOIA, the agency bears the burden of showing “beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents.” *DeBrew v. Atwood*, 792 F.3d 118, 122 (D.C. Cir. 2015) (internal citations omitted). Here, ICE attempts to justify its search by reference to a single boilerplate declaration riddled with errors. *See* Pineiro Decl. of April 29, 2016, Doc. 26. ICE’s flawed declaration is insufficient to support its claim that it conducted an adequate search because common sense suggests that ICE must have further responsive records, ICE failed to search record systems and offices where it knows responsive records are likely to be found, and it delegated the selection of search methods and terms to individual offices resulting in widely disparate efforts to locate responsive documents.

A. The Inadequacy of ICE’s Search is Apparent from the Result, and ICE’s Claim that It Cannot Locate Further Responsive Records is Implausible.

The result of ICE’s efforts to produce responsive records demonstrates that ICE failed to fulfill its obligation to conduct a search “reasonably calculated to uncover all relevant documents.” *DeBrew*, 792 F.3d at 122. A search’s failure to uncover material known to be in the possession of the agency “raises a legitimate question as to thoroughness of the search.” *See Bagwell v. U.S. Dep’t of Justice*, No. 15-cv-00531, 2015 WL 9272836, at *2 (D.D.C. 2015) (finding doubt as to the adequacy of a search where it failed to uncover a record of communication alluded to in public). The records ICE located and produced cannot possibly constitute the universe of responsive records. As explained below, to credit ICE with conducting an adequate search, one would have to believe that 1) ICE agents seldom photograph items they seize as counterfeit; 2) ICE has delegated to private industry

nearly all responsibility for training and guiding ICE agents in performing their duties related to enforcing intellectual property rights; and 3) no records exist to back up multiple detailed statements by ICE officials regarding ICE's investigatory activities. Because such assertions defy common sense, it is likely that ICE has failed to conduct an adequate search for records responsive to Plaintiff's Request Nos. 1 through 4.

1. ICE's search identified photographs of only a small fraction of the items of clothing seized by ICE as counterfeit during the relevant period, even though seized merchandise is routinely photographed.

Plaintiff's Request No. 1 seeks "[a]ll images and descriptions of clothing seized or impounded by ICE as counterfeit from 2012 to the date of the request." Exh. 8 at 1. The parties have already submitted briefs addressing the adequacy of ICE's search for records containing *text* responsive to Request No. 1. *See* Briefs filed as Doc. Nos. 18-21. As explained in those briefs, to locate text records responsive to Request No. 1, ICE searched a single database and produced a 511-page summary table with 40-character-or-less descriptions of the clothing seized as counterfeit, even though ICE admits that it has responsive records with more detailed descriptions which it refuses to produce based on a claim of undue burden. ICE argues that agencies need not comply with FOIA if it would be burdensome to do so. Plaintiff argues that burden alone cannot excuse an agency's noncompliance with FOIA, and ICE has failed to produce evidence sufficient to show undue burden. The parties' dispute regarding whether FOIA requires ICE to produce additional records containing written text responsive to Request No. 1 remains pending.

With regard to *images* responsive to Request No. 1, ICE has *not* asserted that it would be unduly burdensome to comply with the request. Rather, ICE would have this

Court and Plaintiff believe that it conducted an adequate search but turned up only 3,082 photographs of seized items. ICE's contention is laughable.

ICE has admitted that, during the time period relevant to the FOIA request, ICE seized allegedly counterfeit clothing items in 5,564 different seizure incidents, resulting in 1,085 corresponding investigative case files. Pineiro Decl. of Feb. 5, 2016, Doc. 20-1, ¶¶ 9-13. ICE further admits that “[a] single seizure incident could have multiple seized items associated to it.” *Id.* ¶ 9. Thus, there are likely far more than 5,564 different clothing items seized as counterfeit by ICE agents during the relevant time period, but ICE has produced only 3,082 photographs. Further, because the photographs ICE has produced reflect multiple shots of the same items from various angles and distances, and multiple shots of the tags attached to each item, the 3,082 photographs relate to only a few hundred different items.⁸ It is implausible that ICE would not photograph most items it seizes as unlawful counterfeits, while photographing a small portion of seized items multiple times from multiple angles. Indeed, documents among the records produced indicate that ICE agents routinely send photographs of suspected illegal counterfeit items to industry representatives for consultation, *see, e.g.*, Exh. 9, and it is beyond serious doubt that the 1,085 investigative case files identified by ICE as containing material responsive to the FOIA request contain photographs of the items at issue in the investigation.

⁸ For example, the 15 photographs bearing Bates Nos. 839-853 are of the same jersey, the 74 photographs bearing Bates Nos. 880-953 are of the same jersey; and the 4 photographs bearing Bates Nos. 1617-1620 are of the same hologram tag.

2. ICE's search for documents responsive to Request No. 2(a) produced little more than guides submitted by private industry, and it is implausible that ICE has delegated to private industry responsibility for setting policy and training ICE agents to perform their duties related to protecting intellectual property rights.

Plaintiff's Request No. 2(a) seeks "[a]ll records, guidelines, policies, procedures, or training documents that describe how ICE determines how similar one mark must be to another to deem an item bearing a mark counterfeit." Ex. 8 at 1. In response, ICE has produced 24 industry guides⁹ totaling 503 pages.¹⁰ The guides are provided by trademark rights holders to assist ICE agents in distinguishing between authentic and counterfeit merchandise. In contrast to the volume of guidance materials provided by private industry, ICE produced less than 100 pages of its own training materials,¹¹ none of which bear on the issue of "how similar one mark must be to another to deem an item bearing a mark counterfeit." Ex. 8 at 1. Either ICE has delegated to private industry responsibility for training ICE agents in determining whether an item is counterfeit, or ICE has failed to conduct an adequate search. The latter is more probable.¹²

⁹ The industry guides bear Bates Nos. 524-627, 630-716, 1089-1106, 1135-1152, 1184-1312, 1530-1535, 2615-2677, and 2681-2758, and are listed on Defendant's Vaughn Index, Doc. 26-1, Exhibit 12, as Entry Nos. 4-8, 10-12, 19, 21-22, 25-28, 33, 35-37, and 39-43.

¹⁰ Neither in the cover letters accompanying its five productions, nor in its declarations, has ICE set forth which documents produced correspond with which requests. However, ICE's counsel has made clear that the industry guides are responsive to Request No. 2(a). In a letter dated October 15, 2015, ICE's counsel stated that the agency had located industry guides responsive to Request No. 2, but had located no documents responsive to Request Nos. 2(b), 2(c), 2(d) or 2(e). Exh. 11 at 2. In a letter dated November 13, 2015, ICE's counsel indicated that the agency had located additional sports apparel industry guides responsive to Request No. 2(a), and had "determined that it should conduct searches for responsive records at additional offices for items responsive to Item 2a through 2e." Exh. 13 at 3.

¹¹ The ICE training materials bear Bates Nos. 777-838 and 1153-1183.

¹² Even if it is the former, it is important for scholars and the public to know that the government has abdicated its decision-making role, but without confidence in the adequacy of ICE's search, one can only speculate that the government has done so.

3. ICE's search found no documents responsive to Request Nos. 2(b)-(e), 3, or 4, even though the requests were patterned on statements by ICE officials.

According to ICE attorney Joseph M. Liberta, ICE agents “focus their enforcement efforts on interdicting the cross-border movement of [both] infringing works and counterfeit merchandise.” Exh. 7. Thus, Plaintiff’s Request No. 2(b) sought “[a]ll records, guidelines, policies, procedures, or training documents that describe how ICE distinguishes between items that are merely infringing items and items that are counterfeit,” Ex. 8 at 1, but ICE’s search turned up no responsive documents. Given Mr. Liberta’s statement that ICE agents focus on both infringement and counterfeiting, which are legally distinct categories, it is improbable that ICE has no guidelines, policies, procedures, or training documents to help its agents distinguish between the two.

Mr. Liberta also stated that ICE considers “federal circuit-specific case law” as part of the investigatory process, Exh. 7; thus, Plaintiff’s Request No. 2(c) sought “[a]ll records, guidelines, policies, procedures, or training documents that describe how ICE uses or considers circuit-specific case law in determining whether an item is counterfeit or infringing,” Exh. 8 at 1, but ICE’s search turned up no responsive documents. Given Mr. Liberta’s statement that ICE considers circuit-specific case law, it is improbable that ICE has no records on the topic.

Mr. Liberta further stated that ICE considers “potential fair use provisions” as part of its investigatory process, Exh. 7; thus, Plaintiff’s Request No. 2(d) sought “[a]ll records, guidelines, policies, procedures, or training documents that describe how ICE considers the legal doctrine of fair use in determining whether an item is counterfeit or infringing,”

Exh. 8 at 2, but ICE's search turned up no responsive documents. Given Mr. Liberta's statement that ICE considers fair use, it is improbable that ICE has no records on the topic.

Mr. Liberta asserted that ICE considers "whether there are defenses under the Copyright Act and Lanham Act" as part of its investigatory process, Exh. 7; thus, Plaintiff's Request No. 2(e) sought "[a]ll records, guidelines, policies, procedures, or training documents that describe how ICE considers trademark-infringement defenses other than fair use in determining whether an item is counterfeit or infringing," Exh. 8 at 2, but ICE's search turned up no responsive documents. Given Mr. Liberta's statement that ICE considers defenses under the Copyright Act and Lanham Act, it is improbable that ICE has no records on the subject.

Two different ICE Public Affairs Officers have stated that where an item uses a team logo in a disparaging manner, or places one team logo above another, the item is infringing or counterfeit. *See* Exhs. 3 and 4. Thus, Plaintiff's Request No. 3 sought "[a]ll records that use the words 'disparagement,' 'parody,' 'distortion,' or 'tarnishment,' or grammatical variants thereof, in connection with trademark rights holders' requests or consultations with trademark rights holders," Exh. 8 at 2; and Plaintiff's Request No. 4 sought "[a]ll records indicating that an item was seized by ICE, in whole or in part, because the item disparaged, parodied, distorted, or tarnished a trademark." *Id.* ICE's search turned up no documents responsive to Plaintiff's Request Nos. 3 and 4, but the search did reveal photographs of shirts seized by ICE that disparage a trademark. *See, e.g.,* Exhs. 15, 18, and 19. Given that two different ICE Public Affairs Officers stated that disparagement is indicia of infringement or counterfeiting, and the photographs of seized items indicate that ICE

has seized such material, it is improbable that ICE has conducted an adequate search but found no records responsive to Request Nos. 3 or 4.

B. ICE Failed to Search Critical Records Systems Where It Knows Responsive Records Could Likely Be Found.

ICE failed to fulfill its obligation to conduct a search “reasonably calculated to uncover all relevant documents,” *DeBrew*, 792 F.3d at 122, because ICE failed to search the 1,085 investigative case files underlying the 5,564 seizure incidents identified in the summary table ICE produced bearing Bates Nos. 1-511. The underlying investigatory case files likely include photographs of seized clothing responsive to Plaintiff’s Request No. 1, and the case files may also include records responsive to Request Nos. 2, 3, and 4.

ICE is well aware of the record system that likely contains the responsive records. In a declaration filed with the Court on February 5, 2016, ICE explained that the TECS system contains ICE’s case management database that stores investigative case files, and that the 5,564 seizure incidents listed on the summary table correspond to 1,085 TECS cases. Pineiro Decl. of Feb. 5, 2016, Doc. 20-1 ¶¶ 11-12. Although ICE knows that TECS contains responsive records, ICE has refused to search the TECS system. Indeed, ICE’s declaration filed in support of its Motion for Summary Judgment fails to even mention the existence of TECS, other than to note that ICE redacted TECS codes from the documents produced, Pineiro Decl. of April 29, 2016, Doc. 26 ¶ 70, and the declaration does not indicate that *any* investigatory case files were searched for responsive documents. ICE’s refusal to search the investigative case files in the TECS system is particularly egregious because Plaintiff identified for ICE the 25 entries from the summary table that were of greatest interest and offered to drastically reduce the scope of the request to minimize any burden. Exh. 12 at 2. Despite Plaintiff’s offer to drastically reduce the scope of her request,

ICE refused to search the investigative case files, even with respect to the 25 items of greatest interest. Exh. 13.

To satisfy FOIA, ICE must conduct a search “reasonably calculated” to uncover all relevant documents and ICE must provide “reasonable detail” regarding the search and the methods used. *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). At minimum, ICE must expressly state that it searched all files “likely” to house documents responsive to Plaintiff’s request. *Am. Immigration Council v. U.S. Dep’t of Homeland Sec.*, 950 F. Supp. 2d 221, 230 (D.D.C. 2013). In *Perez-Rodriguez v. U.S. Dep’t of Justice*, 888 F. Supp. 2d 175, 182-84 (D.D.C. 2012), this Court found an ICE search for responsive records to be inadequate based on a failure to comprehensively search the TECS system. Because the TECS system houses records responsive to the FOIA request at issue in this case but was not searched, ICE has failed to fulfill its search obligation under FOIA.

C. ICE Did Not Search All Offices Thought to Have Responsive Records, and The Search Terms and Methods Used Varied Widely and Without Any Rational Basis.

ICE’s search for responsive records was inadequate because the ICE FOIA office delegated responsibility for the search to a variety of record custodians without providing instruction on where or how to search. Indeed, ICE admits that it allows “employees [to] exercise discretion, based on their operational knowledge and subject matter expertise, in choosing the specific search terms utilized to ascertain whether or not potentially responsive documentation exists.” Pineiro Decl. of April 29, 2016, Doc. 26 ¶ 42. ICE’s delegation of search responsibility without any guidance or oversight resulted in searches that were unreasonably limited, haphazard, and arbitrary, and which failed to fulfill ICE’s obligations under FOIA. The searches misconstrued Plaintiff’s request and “contravene[d]

the government's duty to construct a FOIA request liberally." *Sack v. Dep't of Justice*, 65 F. Supp. 3d 29, 36 (D.D.C. 2014) (internal quotations and citations omitted) (finding an agency's narrow use of search terms was insufficient to prove it conducted an adequate search).

For example, the ICE FOIA Office sent Plaintiff's request to the ICE Office of Training and Development (OTD) and "instructed OTD to conduct a comprehensive search," but provided no further guidance. Pineiro Decl. of April 29, 2016, Doc. 26 ¶ 30. It is reasonable to believe that OTD would have records responsive to Request No. 2, which seeks, in relevant part, training materials that describe how ICE determines how similar one mark must be to another to deem an item bearing a mark counterfeit; distinguishes between items that are merely infringing items and items that are counterfeit; uses or considers circuit-specific case law in determining whether an item is counterfeit or infringing; considers the legal doctrine of fair use in determining whether an item is counterfeit or infringing; and considers trademark-infringement defenses other than fair use in determining whether an item is counterfeit or infringing. Exh. 8 at 1-2. However, OTD never conducted a search reasonably calculated to find records responsive to Request No. 2. Had it done so, OTD would have used search terms such as "trademark," "counterfeit," "infringing," "case law," "fair use," and "trademark-infringement defenses." Instead, OTD used the "search terms 'disparagement,' 'distortion,' 'tarnishment,' 'parody,' 'dist,' 'dip,' 'tarn,' and 'Modricker.'" Pineiro Decl. of April 29, 2016, Doc. 26 ¶ 30. Although such terms might locate documents responsive to Request Nos. 3-6, such terms are not calculated to reveal records responsive to Request No. 2, which specifically seeks training documents likely held by OTD.

Similarly, the ICE FOIA Office tasked the Intellectual Property Rights (IPR) Center within the Office of Homeland Security Investigations (HSI) to respond to Plaintiff's FOIA Request, but provided no guidance on how to carry out the task. Subsequently, the Unit Chief searched her computer "using the terms 'Tushnet,' 'Modricker,' and 'counterfeit guides.'" Pineiro Decl. of April 29, 2016, Doc. 26 ¶ 44. A search using these three terms is not reasonably calculated to uncover documents relevant to Plaintiff's six-part FOIA request.

Further, according to ICE's search declaration, HSI "tasked all 26 HSI Special Agent in Charge field offices to search for photographs responsive to item 1 and all potentially responsive records to items 2 through 6 of the request." *Id.* ¶ 45. ICE does not explain why it tasked only the 26 HSI field offices when documents produced by ICE show that 39 HSI offices participated in a nationwide operation aimed at seizing counterfeit sports merchandise. *See* Exh. 1 at 9 (listing 39 HSI offices with Operation Team Player investigations). The 39 HSI offices involved in that operation are likely to have documents responsive to Plaintiff's request, but only 17 of the offices identified in ICE's declaration as having been searched are among the 39 offices most likely to have responsive records. *Compare* HSI offices listed in Pineiro Decl. of April 29, 2106, Doc. 26 ¶ 46, *with* HSI offices listed in Exh. 1 at 9. Thus, 22 HSI offices likely to have responsive documents were not searched at all. Moreover, with respect to the 26 field offices asked to conduct a search, ICE's FOIA office provided no instructions on how to conduct the search; rather, the systems searched and the search terms used were "based on the judgment of the employee and their operational knowledge of the particular matter," Pineiro Decl. of April 29, 2106, Doc. 26 ¶ 46, which led to wildly divergent searches among the various offices. For

example, the Houston office used 24 search terms, the Denver office used 16, and the St. Paul office used 15, while Boston, Detroit, Honolulu, Miami, New Orleans, New York, Philadelphia, San Francisco, San Juan, and Seattle, used two terms or less. *Id.* Two offices did not bother to respond at all. Only two offices—Houston and Los Angeles—used search terms designed to locate photographs or documents related to the 25 seizure incidents identified by Plaintiff as being of greatest interest. *Id.* Had all 26 offices conducted a robust search, the number of responsive documents located would have been much higher. And had ICE searched all 39 offices likely to have responsive material, instead of searching only 17 of the 39 offices, the number of responsive documents located would have been much higher. Thus, the searches ICE conducted are inadequate to fulfill FOIA’s requirement that an agency conduct a search “reasonably calculated to uncover all relevant documents.” *DeBrew*, 792 F.3d at 122.

II. ICE Has Not Shown that Exemption 7(E) Justifies Withholding Product Guides Provided by Industry Groups.

Exemption 7(E) allows an agency to withhold “records or information compiled for law enforcement purposes, but only to the extent that the production . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). ICE has failed to demonstrate that the information it redacted from guides provided to ICE by private industry groups may be withheld under Exemption 7(E).

ICE has produced 24 industry guides totaling 503 pages, of which about 300 pages have significant redactions under Exemption 7(E). The industry guides are listed on Defendant’s Vaughn Index, Doc. 26-1, Exhibit 12, as Entry Nos. 4-8, 10-12, 19, 21-22, 25-

28, 33, 35-37, and 39-43, and were provided to ICE by sports industry organizations such as the NFL, the NBA, the NHL, and MLB; by brands such as Nike, Adidas, and New Era; and by CAPS – the Coalition to Advance the Protection of Sports Logos. The industry guides purport to advise ICE agents on how to distinguish between authentic and counterfeit merchandise. *See* Pineiro Decl. of April 29, 2016, Doc. 26 at ¶ 71 (describing the guides as related to the “identification of clothing as counterfeit”). ICE has invoked Exemption 7(E) as its basis for redacting many different categories of information, including images of authentic and allegedly counterfeit jerseys and t-shirts, various details such as stitching, tags, and holograms, and descriptions of what to look for in distinguishing authentic from counterfeit merchandise. ICE’s Vaughn Index does not distinguish between the various types of information redacted under Exemption 7(E); rather, it uses general and boilerplate language to cover hundreds of different redactions. The Exemption 7(E) redactions to the industry guides are addressed in a single conclusory paragraph of ICE’s declaration, *id.* ¶ 71, which is cut and pasted into ICE’s Memorandum of Law in Support of Defendant’s Motion for Summary Judgment with no additional analysis. Def.’s Mem., Doc. 25 at 17-18.

The industry guides often contain disclaimers stating that they do *not* contain official policy or procedures for determining whether merchandise is counterfeit or authentic. One common disclaimer indicates that the guides express “opinions . . . of the right owner” and that “decisions as to whether or not merchandise should be detained or seized for infringing protected intellectual property rights are to be made in accordance with established procedures by [agency] personnel at the appropriate management level of the concerned field office.” Exh. 14 at 1. Another disclaimer states that “[T]he information

provided above is for reference purposes only.” *Id.* at 2. Others state that “[t]he opinions expressed herein are those of the right owner and do not necessarily reflect the position of [the agency].” *See, e.g., id.* at 3.

The Court should reject ICE’s claim that the information it redacted from the industry guides may be withheld under Exemption 7(E). First, ICE has failed to provide a Vaughn Index or declaration with sufficient detail to justify ICE’s invocation of the exemption. Second, to the extent the industry guides encourage the seizure of items protected by the doctrine of fair use, they do not serve any legitimate law enforcement purpose. Third, ICE has failed to show how disclosure of the redacted information could risk circumvention of the law, because much of the redacted information is already in the public domain. Finally, ICE cannot support its contention that the guides are entitled to protection as law enforcement techniques, guidelines, or procedures, because the guides are not internal agency materials; rather, they were provided to express the opinions of private industry groups and the guides explicitly state that they do not constitute official law enforcement procedures.

A. ICE’s Vaughn Index and Declaration Lack the Detail Required to Support Redactions Under Exemption 7(E).

Although ICE provided a Vaughn Index that purports to describe the information redacted under Exemption 7(E), and the reasons for the redactions, ICE has failed to provide “reasonably specific detail” sufficient to show “the information withheld logically falls within the claimed exemption.” *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Justice*, 746 F.3d 1082, 1088 (D.C. Cir. 2014). Instead, ICE uses a single, categorical description of the information withheld, and a generic recitation of the statutory standard as the reason for the redactions. ICE addresses its Exemption 7(E)

redactions to the industry guides in a single conclusory paragraph of its declaration, Pineiro Decl. of April 29, 2016, Doc. 26 ¶ 71, which is repeated almost verbatim in the only paragraph of ICE's Memorandum that addresses the issue. Def.'s Mem., Doc. 25 at 17-18.

With regard to identifying the material redacted, ICE's Vaughn Index lists the industry guides in 24 different entries, but uses the same description for every redaction within each guide, even though the redacted information falls into many different categories. Further, the Vaughn Index uses essentially the same language for every guide, stating that the redacted portions include "comparisons through photos, diagrams, and description of authentic and counterfeit branded merchandise," which "assist law enforcement in identifying counterfeit or authentic merchandise." *See, e.g.* Def.'s Vaughn Index, Doc. 26-1, Exhibit 12, Entry No. 10 (describing the redacted sections of a CAPS Product Identification Guide). Categorical descriptions are appropriate only when the categories are specifically defined and all of the circumstances they encompass support the agency's claim that the statutory exemption applies. *Citizens for Responsibility & Ethics in Washington*, 746 F.3d at 1088. Here, ICE's categorical description covers *all* the redactions, which include everything from examples of authentic merchandise, tags, and holograms, to examples of supposedly counterfeit or infringing items. The categorical approach used by ICE makes it impossible for Plaintiff or the Court to determine whether any of the redacted material is arguably subject to Exemption 7(E).

With regard to the reasons for the redactions, ICE's Vaughn Index and declaration provide no explanation of the law enforcement techniques or procedures supposedly implicated, how they would be disclosed by release of the redacted information, or how

release would risk circumvention of the law. For example, as its reasons for redacting information in an NFL Product Guide, ICE states:

The information withheld serves as a guideline to law enforcement to compare authentic merchandise to counterfeit merchandise. The disclosure of the above information contains sensitive law enforcement techniques and procedures could reveal techniques and/or procedures [sic.] for law enforcement investigations or prosecutions, or disclose guidelines for law enforcement investigations or prosecutions which could reasonably be expected to risk circumvention of the law. Moreover, disclosure of these techniques and practices could permit people seeking to violate or circumvent the law by taking proactive steps to counter operational and investigative actions taken by ICE during enforcement operations. The disclosure of this information serves no public benefit and would not assist the public in understanding how the agency is carrying out its statutory responsibilities. Specifically, if the information above, which includes techniques and procedures and guidelines, were exposed, the harm that would be caused is that individuals could circumvent the law by knowing how the investigation was conducted, and therefore counter operational and investigative actions taken by ICE during enforcement operations.

Def.'s Vaughn Index, Doc. 26-1, Exhibit 12, Entry No. 6. "This near-verbatim recitation of the statutory standard is inadequate." *Citizens for Responsibility & Ethics in Washington*, 746 F.3d at 1102. By failing to provide the detail and explanation necessary to justify its redactions under Exemption 7(E), ICE has failed to carry its burden and the Court should order ICE to release the redacted material.

B. To The Extent The Industry Guides Instruct ICE to Seize as Counterfeit Materials Protected by The Doctrine of Fair Use, The Guides Cannot Be Withheld Under Exemption 7(E).

Industry guides that encourage ICE to seize material that is not actually counterfeit or illegal serve no valid law-enforcement purpose. Because such guides are not "related to the enforcement of federal laws" and there is no "rational nexus" between the redacted material and the agency's legitimate law enforcement duties, the information is not exempt from disclosure under Exemption 7(E). *See Jefferson v. Dep't of Justice*, 284 F.3d 172, 177

(D.C. Cir. 2002) (providing the test for the threshold determination under Exemption 7 of whether documents are compiled for law enforcement purposes). Although some of the redacted material within the industry guides may contain information for determining authenticity, there is substantial evidence that the guides also instruct ICE to seize items that are not counterfeit, but rather are items which include parodies or other uses of trademarks protected under the doctrine of fair use. Indeed, not all uses of a trademark without authorization are infringing; non-confusing uses, including parodies, are both legitimate and important to free expression and robust discourse about important elements of modern culture. As the leading treatise on trademark explains, “No one likes to be the butt of a joke, not even a trademark. But the requirement of trademark law is that a likely confusion of source, sponsorship or affiliation must be proven, which is not the same thing as a ‘right’ not to be made fun of.” 2 J. McCarthy, *Trademarks and Unfair Competition* § 31:38 at 670 (2d ed. 1984); *see also Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1486-87 (10th Cir. 1987) (“Lardashe” jeans were protected parody of Jordache jeans). The court in *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410 (S.D.N.Y. 2002), noted the First Amendment rationale supporting this sensible rule:

[T]he parodist is not trading on the good will of the trademark owner to market its own goods; rather, the parodist’s sole purpose for using the mark is the parody itself, and precisely for that reason, the risk of consumer confusion is at its lowest. ... [C]ourts have explained that:

Trademark parodies ... do convey a message. The message may be simply that business and product images need not always be taken too seriously; a trademark parody reminds us that we are free to laugh at the images and associations linked with the mark. The message also may be a simple form of entertainment conveyed by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark’s owner.

... Even if not technically a parody, [Timmy Holedigger pet perfume] is at least a pun or comical expression—ideas also held to be entitled to First Amendment protection.

Id. at 414-15 (citations omitted).

Among the documents ICE produced is an NHL product guide identifying as counterfeit a shirt depicting the Philadelphia Flyers logo with the crossed hammers of the Chicago Blackhawks imposed over it, forming the message “No Flyers Zone.” Exh. 15. This use of the Flyers’ logo is protected because it cannot be confusing about the Flyers’ sponsorship; thus, the shirt depicted as “counterfeit” in the industry guide is not an unlawful use of the mark. Guidelines provided by industry that promote a policy of seizing items protected by fair use are not related to the enforcement of federal law, have no rational nexus to ICE’s law enforcement duties, and are not protected under Exemption 7(E). *Keys v. U.S. Dep’t of Justice*, 830 F.2d 337, 340 (D.C. Cir. 1987) (finding that a claim under Exemption 7 is refutable by “persuasive evidence that in fact another, nonqualifying reason” exists for compiling the documents) (internal citations omitted).

Although the “No Flyers Zone” shirt described above was not redacted, there is reason to believe that material redacted from the industry guides includes similar examples of overreaching by trademark holders that is not protected under Exemption 7(E). For example, among the photographs ICE produced of items seized as counterfeit are several examples of items that should not have been seized, including a t-shirt containing a parody of the Chicago Bulls logo, Exh. 16; a t-shirt depicting Marilyn Monroe wearing a 49ers jersey, Exh. 17; a t-shirt bearing the message “49ers SFuck,” Exh. 18; and a t-shirt with the San Francisco Forty-Niners logo crossed out, Exh. 19. These nonconfusing uses go beyond the statute’s authorization for seizures of counterfeit or infringing merchandise. The fact

that ICE has seized such merchandise suggests that the industry guides encouraged ICE to do so, and the industry guides likely contain redacted images of such material. Further, as noted above, two different ICE Public Affairs Officers have stated—incorrectly—that where an item uses a team logo in a disparaging manner, or places one team logo above another, the item is infringing or counterfeit. *See* Exhs. 3 and 4. These ICE officials may have been influenced by material in the industry guides that has been redacted. Such material is unrelated to any legitimate law enforcement purpose and is not protected by Exemption 7(E).

C. Disclosure of The Techniques and Procedures Described in the Industry Guides Do Not Risk Circumvention of the Law Because They Are Already Known to the Public.

“Exemption 7(E)’s protection is generally limited to techniques or procedures that are not well-known to the public.” *See Justice Watch, Inc. v. U.S. Dep’t of Commerce*, 337 F. Supp. 2d 146, 181 (D.D.C. 2004). In contrast, the material ICE has redacted from the industry guides is publicly available. The public has access to *authentic* merchandise and its attached tags and holograms because such items are marketed to the public through authorized dealers, both online and in brick-and-mortar stores. Similarly, techniques for identifying *counterfeit* merchandise are well-publicized, both by industry and ICE. Indeed, the FOIA request at issue had its genesis in a press conference held by ICE and the NFL to educate consumers about the differences between authentic and counterfeit goods. *See* Exh. 1. Given that ICE and industry both publicize images of authentic and counterfeit merchandise, it is clear that any techniques or procedures that could be derived from such images are already available to the public. *See Davis v. U.S. Dep’t of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (“[T]he government cannot rely on an otherwise valid

exemption claim to justify withholding information that has been ‘officially acknowledged’ or is in the ‘public domain’”).

ICE has failed to explain how the material it redacted from the industry guides that shows authentic merchandise differs from what is available publically on industry websites, if at all. For example, the CAPS website provides detailed information regarding sports team marks, events, logos, and official hangtags, stickers, and holograms, as well as providing detailed instructions for how to identify licensed merchandise. *See, e.g.*, CAPSInfo.Com, www.capsinfo.com (last visited May 20, 2016). On the NBA page, for example, in addition to pictures, CAPS provides detailed descriptions of holograms used for NBA licensed merchandise. Exh. 20.

Some of the information available on the CAPS website appears to be identical to information that ICE redacted from the industry guides. For example, the CAPS website displays for the public current and past authentic NHL tags and holograms, serial numbers, and concealed images, along with detailed instructions for how to identify authentic licensed merchandise. Exh. 21. ICE has produced an NHL product guide showing the same tags and holograms shown on the CAPS website, but has redacted under Exemption 7(E) certain text, serial numbers and concealed images. Exh. 22.

Even if there are secret procedures or techniques outlined in the industry guides for identifying *authentic* merchandise, which are unknown to the general public, ICE has given no reasonable explanation for how the images or descriptions of *counterfeit* merchandise in the industry guides might “increase the risk that ‘a law will be violated or that past violators will escape legal consequences.’” *See Pub. Emps. for Env'tl. Responsibility v. U.S. Section, Int'l Boundary and Water Comm'n, United States-Mexico*, 740 F.3d 195 (D.C.

Cir. 2014). Indeed, ICE publically instructs consumers on how to identify counterfeit materials. For example, in a story run by a CBS station in Denver prior to the Super Bowl, an ICE agent shows a reporter authentic and counterfeit sportswear and demonstrates how to identify counterfeit merchandise, including by looking at the stitching and looking for holograms. *See* Jeff Todd, *Counterfeit Merchandise Targeted At Super Bowl 50*, CBS Denver, February 3, 2016 11:55 PM, <http://denver.cbslocal.com/2016/02/03/counterfeit-merchandise-targeted-at-super-bowl-50/> (embedded video). ICE has not shown how the specific techniques and procedures supposedly outlined in the redacted portions of the industry guides differ from those that are generally available to the public, such that they might fall within Exemption 7(E).

Finally, to the extent the redacted material in the industry guides contains more than photos or images but also contains text describing secret techniques or procedures for determining whether an item is authentic, ICE has not explained why the descriptions of secret techniques are not “reasonably segregable” from the rest of the image, such that the image may be released. 5 U.S.C. § 552(b) (“any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection”). Indeed, ICE has redacted entire images and pages of material, contrary to its claim that “only 2 pages were withheld in full.” *See* Defendant’s Statement of Undisputed Material Facts, Doc. 25, ¶ 21; *c.f.*, Exh. 23 (showing examples of 7 pages redacted in full and 9 pages redacting everything but a header). Indeed, ICE relies on a conclusory statement that all information not exempted from disclosure “was correctly segregated,” Pineiro Decl. of April 29, 2016, Doc. 26, ¶ 74, which is insufficient to support ICE’s contention that all information withheld is non-segregable. *Stolt-Nielson Transp.*

Grp. Ltd. v. United States, 534 F.3d 728, 734 (D.C. Cir. 2008) (finding the agency’s conclusory statement that only exempted material was withheld insufficient “for a court to conclude that the self-serving conclusion is the correct one”).

ICE has failed to meet its burden of showing that the material withheld from the industry guides might risk circumvention of the law, particularly in light of the significant quantity of detailed information already available to the public detailing how to identify authentic and counterfeit materials. The Court should order ICE to release the redacted material.

D. The Industry Guides Do Not Constitute Law Enforcement Techniques, Procedures, or Guidelines, Because They Are Not Internal Agency Materials.

Exemption 7(E) protection extends to law enforcement records that are “predominantly internal.” *Milner v. Dep’t of Navy*, 562 U.S. 562, 575 (2011). ICE makes no attempt to explain how guidance from private industry groups constitutes law enforcement “techniques or procedures” or even law enforcement “guidelines” such that they fall within Exemption 7. Instead, ICE simply states in a conclusory fashion that these external guides constitute such guidelines and contain such techniques and procedures. *See Pineiro Decl. of April 29, 2016, Doc. 26 at ¶ 71* (stating that the release of information contained in the guides would result in the disclosure of “guidelines and techniques that law enforcement employ in investigating the illegal sale of counterfeit merchandise”). “[A]n agency may seek to block the disclosure of *internal* agency materials relating to guidelines, techniques, sources, and procedures for law enforcement investigations and prosecutions.” *Tax Analysts v. IRS*, 294 F.3d 71, 79 (D.C. Cir. 2002) (emphasis added). The industry guides are not internal agency materials and do not constitute official policy,

as shown through the use of explicit disclaimers stating that the industry guides “do not necessarily reflect the position” of the agency and that “decisions as to whether or not merchandise should be detained or seized for infringing protected intellectual property rights are to be made in accordance with established procedures” of the agency. Exh. 14. Thus, ICE has failed to show that the material redacted from the industry guides is entitled to protection under Exemption 7(E).

III. ICE Has Not Justified Its Withholdings Under Exemption 4, So The Redacted Material Must Be Released.

ICE withheld eight pages of material in its entirety pursuant to Exemption 4, 5 U.S.C. § 552(b)(4). Exh. 24. Exemption 4 allows an agency to withhold documents that contain “trade secrets and commercial or financial information obtained from a person that is privileged or confidential.” 5 U.S.C. § 552(b)(4). When withholding documents, “the agency bears the burden of justifying any withholding.” *McKinley v. F.D.I.C.*, 756 F. Supp. 2d 105, 113 (D.D.C. 2010); *Bigwood v. U.S. Agency for Int’l Dev.*, 484 F. Supp. 2d 68, 74 (D.D.C. 2007). ICE has not even attempted to meet its burden. ICE does not mention the Exemption 4 withholdings in its Motion for Summary Judgment, Memorandum, Declaration, or Vaughn Index, let alone provide an explanation for the application of the exemption to the eight pages of withheld material. Because ICE has completely failed to justify any withholdings under Exemption 4, ICE has waived the claim and the Court should order the production of documents withheld pursuant to this exemption.

CONCLUSION

The Court should grant Plaintiff’s Motion for Summary Judgment and deny Defendant’s Motion for Summary Judgment with respect to the adequacy of ICE’s search for responsive records, and order ICE to conduct immediately a search reasonably

calculated to uncover the requested records. The new search should include a search of the investigatory case files in the TECS system, a search of all HSI offices involved in efforts to seize counterfeit sports merchandise, and the use of a uniform and comprehensive set of search terms reasonably calculated to find records responsive to all parts of Plaintiff's FOIA Request. The Court should grant Plaintiff's Motion for Summary Judgment and deny Defendant's Motion for Summary Judgment with respect to Defendant's Exemption 7(E) redactions of material from the industry guides, and order ICE to immediately produce the redacted material. The Court should grant Plaintiff's Motion for Summary Judgment with respect to the eight pages of material withheld in full under Exemption 4, and order ICE to immediately produce the withheld material.

Respectfully submitted,

/s/ Michael T. Kirkpatrick
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Dated: May 20, 2016

Attorney for Plaintiff

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
REBECCA TUSHNET,)	
)	
Plaintiff,)	
)	No. 1:15-cv-15-00907 (CRC)
v.)	
)	
UNITED STATES IMMIGRATION)	
AND CUSTOMS ENFORCEMENT,)	
)	
Defendant.)	
_____)	

PLAINTIFF’S STATEMENT OF UNDISPUTED MATERIAL FACTS

1. On January 29, 2014, Defendant United States Immigration and Customs Enforcement (ICE) held a news conference focused on seizures of counterfeit sports-related apparel in the days leading up to Super Bowl XLIX. Exh. 1.

2. Exhibit 2 is an article from the Boston Globe that contains this passage:

The profane debasing of a mascot – and really anything that denigrates a team – is guaranteed to be contraband, said Daniel Modricker, a spokesman for US Immigration and Customs Enforcement. That “Yankees Suck” T-shirt you put on for special occasions? If it uses anything that looks like a team or league logo, it probably constitutes trademark infringement.

3. Exhibit 3 is an email of January 31, 2015, from Professor Rebecca Tushnet to Daniel Modricker, and Mr. Modricker’s response of February 2, 2015.

4. Exhibit 4 is an email chain of February 2-3, 2015, between Professor Eugene Volokh and an ICE Public Affairs Officer.

5. Exhibit 5 is an email of February 4, 2015, from Professor Tushnet to Daniel Modricker.

6. Exhibit 6 is an email of February 5, 2015, from Daniel Modricker to Professor Tushnet, and Professor Tushnet’s response of February 9, 2015.

7. Exhibit 7 is an email of February 18, 2015, from Joseph M. Liberta to Professor Tushnet.

8. Exhibit 8 is Plaintiff's FOIA request of March 6, 2015.

9. In response to Professor Tushnet's FOIA request, ICE made five rolling productions of material totaling 4,539 pages, consisting of 1,457 pages of text documents and 3,082 photographs of seized items.

10. On September 30, 2015, ICE produced 523 pages of material, consisting of a 511-page summary table responsive to Request No. 1, Bates Nos. 1-511; ten pages responsive to Request No. 5, Bates Nos. 512-514 and 517-523; and two pages responsive to Request No. 6, Bates Nos. 515-516. The documents produced by ICE on September 30, 2015, are available at: <http://instituteforpublicrepresentation.org/wp-content/uploads/2015/12/2015-ICLI-00027-Docs-produced-by-ICE-9.30.15.pdf>.

11. On December 3, 2015, ICE produced 106 pages of material, consisting of 104 pages of industry guides related to identification of counterfeit sports-related apparel responsive to Request No. 2(a), Bates Nos. 524-627; and two pages responsive to Request No. 6, Bates Nos. 628-629. The documents produced by ICE on December 3, 2015, are available at: <http://instituteforpublicrepresentation.org/wp-content/uploads/2015/12/2015-ICLI-00027-Docs-produced-by-ICE-12.3.2015.pdf>.

12. On February 1, 2016, ICE produced 576 pages of material, consisting of 250 photographs responsive to Request No. 1, Bates Nos. 839-1088; 265 pages of text documents responsive to Request No. 2(a), Bates Nos. 630-716, 777-838, and 1089-1205; and 61 pages of text documents responsive to Request No. 6, Bates Nos. 717-776. The documents produced by ICE on February 1, 2016, are available at:

<http://instituteforpublicrepresentation.org/wp-content/uploads/2016/04/2015-ICLI-00027-Color-Release.pdf>.

13. On March 1, 2016, ICE produced 585 pages of material, consisting of 250 photographs responsive to Request No. 1, Bates Nos. 1541-1790; and 335 pages of text documents responsive to Request No. 2(a), Bates Nos. 1206-1540. The documents produced by ICE on March 1, 2016, are available at:

<http://instituteforpublicrepresentation.org/wp-content/uploads/2016/04/Combined-March-2016-release.pdf>.

14. On April 1, 2016, ICE produced 2,749 pages of material, consisting of 2,574 photographs responsive to Request No. 1, Bates Nos. 1791-2614 and 2790-4539; and 175 pages of text documents responsive to Request No. 2(a), Bates Nos. 2615-2789. The documents produced by ICE on April 1, 2016, are available at:

<http://instituteforpublicrepresentation.org/wp-content/uploads/2016/04/Combined-April-2016-Release-1-of-2.pdf> and

<http://instituteforpublicrepresentation.org/wp-content/uploads/2016/04/Combined-April-2016-Release-2-of-2.pdf>.

15. ICE has produced no records responsive to Request Nos. 2(b)-(e), 3, or 4.

16. During the time period relevant to Plaintiff's FOIA request, ICE seized allegedly counterfeit clothing items in 5,564 different seizure incidents, resulting in 1,085 corresponding investigative case files. Pineiro Decl. of Feb. 5, 2016, Doc. 20-1, ¶¶ 9-13. A single seizure incident could have multiple seized items associated to it. *Id.* ¶ 9. There are more than 5,564 different clothing items seized as counterfeit by ICE agents during the relevant time period.

17. In response to Plaintiff's FOIA request, ICE has produced 3,082 photographs of seized items. The photographs ICE has produced often include multiple shots of the same items from various angles and distances, and multiple shots of the tags attached to each item; thus, the 3,082 photographs relate to only a few hundred different items.

18. The 15 photographs bearing Bates Nos. 839-853 are of the same jersey, the 74 photographs bearing Bates Nos. 880-953 are of the same jersey, and the 4 photographs bearing Bates Nos. 1617-1620 are of the same hologram tag.

19. ICE agents routinely send photographs of suspected illegal counterfeit items to industry representatives for consultation. The documents attached as Exhibit 9 reflect this practice. Investigative case files often include photographs of the items at issue in the investigation.

20. In response to Plaintiff's Request No. 2(a), ICE produced 24 industry guides totaling 503 pages. The industry guides bear Bates Nos. 524-627, 630-716, 1089-1106, 1135-1152, 1184-1312, 1530-1535, 2615-2677, and 2681-2758, and are listed on Defendant's Vaughn Index, Doc. 26-1, Exhibit 12, as Entry Nos. 4-8, 10-12, 19, 21-22, 25-28, 33, 35-37, and 39-43.

21. Exhibit 10 is a letter of October 5, 2015, from counsel for Plaintiff to counsel for Defendant.

22. Exhibit 11 is a letter of October 15, 2015, from counsel for Defendant to counsel for Plaintiff.

23. Exhibit 12 is a letter of October 23, 2015, from counsel for Plaintiff to counsel for Defendant.

24. Exhibit 13 is a letter of November 13, 2015, from counsel for Defendant to counsel for Plaintiff.

25. ICE produced less than 100 pages of its own training materials. The ICE training materials bear Bates Nos. 777-838 and 1153-1183. None of the ICE training materials address the issue of how similar one mark must be to another to deem an item bearing a mark counterfeit.

26. The TECS record system contains ICE's case management database that stores investigative case files. The 5,564 seizure incidents identified in the summary table ICE produced bearing Bates Nos. 1-511 correspond to 1,085 TECS cases. Pineiro Decl. of Feb. 5, 2016, Doc. 20-1 ¶¶ 11-12. ICE has not searched the investigative files in the TECS system for records responsive to Plaintiff's FOIA request.

27. Thirty-nine HSI offices participated in a nationwide operation aimed at seizing counterfeit sports merchandise. Exh. 1 at 9 (listing 39 HSI offices with Operation Team Player investigations). Only 17 of the HSI field offices identified in ICE's declaration as having been searched are among the 39 offices with Operation Team Player investigations. *Compare* HSI offices listed in Pineiro Decl. of April 29, 2106, Doc. 26 ¶ 46, *with* HSI offices listed in Exh. 1 at 9.

28. Exhibit 14 includes examples of disclaimers in industry guides produced by ICE.

29. Exhibit 15 is a page from an industry guide identifying as counterfeit a shirt depicting the Philadelphia Flyers logo with the crossed hammers of the Chicago Blackhawks imposed over it, forming the message "No Flyers Zone."

30. Exhibit 16 is a photograph of a shirt seized by ICE that contains a parody of the Chicago Bulls logo.

31. Exhibit 17 is a photograph of a shirt seized by ICE that depicts Marilyn Monroe wearing a 49ers jersey.

32. Exhibit 18 is a photograph of a shirt seized by ICE that bears the message "49ers SFuck."

33. Exhibit 19 is a photograph of a shirt seized by ICE that has the San Francisco Forty-Niners logo crossed out.

34. Exhibit 20 is a series of screen shots from the NBA page on the CAPS website that provides detailed descriptions of holograms used for NBA licensed merchandise. The pages attached as Exhibit 20 can be found at <http://www.capsinfo.com/content.cfm?capsnav=nba&subnav=3>.

35. Exhibit 21 is a series of screen shots from the NHL page on the CAPS website that displays current and past authentic NHL tags and holograms, serial numbers, and concealed images, along with detailed instructions for how to identify authentic licensed merchandise. The pages attached as Exhibit 21 can be found at <http://www.capsinfo.com/content.cfm?capsnav=nhl>.

36. Exhibit 22 is a page from an industry guide produced by ICE that shows the same tags and holograms shown in Exhibit 21, but with redactions under Exemption 7(E) of certain text, serial numbers and concealed images.

37. Exhibit 23 includes examples of pages withheld in full by ICE under Exemption 7(E).

38. Exhibit 24 is eight pages of material withheld in full by ICE under Exemption 4.

Respectfully submitted,

/s/ Michael T. Kirkpatrick

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Dated: May 20, 2016

Attorney for Plaintiff

Exhibit 1

Office of Public Affairs
U.S. Department of Homeland Security



U.S. Immigration and Customs Enforcement

January 29, 2015

Contact:

ICE: Daniel Modricker, 617-935-5331

NFL: Angela Alfano, 646-430-3918

ICE teams with NFL and law enforcement partners to seize counterfeit goods

PHOENIX — U.S. Immigration and Customs Enforcement (ICE) Director Sarah Saldaña and National Football League's Counsel Dolores F. DiBella, on Thursday will announce the latest results of seizures of sports-related counterfeit merchandise as part of "Operation Team Player."

WHO: **Sarah Saldaña**, Director, U.S. Immigration and Customs Enforcement
Dolores F. DiBella, Counsel, NFL

- **William K. Brooks**, U.S. Customs and Border Protection (CBP), Director of Field Operations (DFO); Tucson Field Office
- **Chief Joseph Yahner**, Phoenix, (Acting) Chief of Police
- **Chief Debora Black**, Glendale, Chief of Police
- **Chief Alan Rodbell**, Scottsdale, Chief of Police
- **Bill Montgomery**, Maricopa County Attorney

WHAT: **News Conference** to announce the latest seizure results of a nationwide operation that is focused on seizing counterfeit sports-related merchandise leading up to Super Bowl XLIX.

WHEN: **Thursday, Jan. 29, 2014 at 10 a.m. (ET)**

WHERE: **Super Bowl XLVIII Media Center at the Phoenix Convention Center**
Second Floor, 200 level, Room A
100 North 3rd Street
Phoenix, AZ 85004

Important Note to Editors & Reporters: Access to this event is available to media with NFL-issued credentials. Media representatives who do not have these credentials should request a pass the day prior to the event by emailing Angela.Alfano@nfl.com.

Video availability: Video/photo b-roll of counterfeit merchandise seized during this operation will be available for download via DVIDS at dvidshub.net/units/ICE starting at 10:00 a.m. Thursday.

ICE

U.S. Immigration and Customs Enforcement (ICE) is the largest investigative arm of the Department of Homeland Security. ICE is a 21st century law enforcement agency with broad responsibilities for a number of key homeland security priorities. For more information, visit: www.ICE.gov. To report suspicious activity, call 1-866-347-2423.

Office of Public Affairs
U.S. Department of Homeland Security



U.S. Immigration
and Customs
Enforcement

Jan. 29, 2015

Contact: IPR Center Public Affairs
617-935-5331

Federal agencies seize more than \$19.5 million in fake NFL merchandise during ‘Operation Team Player’

Phoenix Federal officials teamed with the National Football League (NFL) Thursday to announce the results of a nationwide law enforcement effort aimed at combatting counterfeit sports merchandise.

Speaking at a NFL news conference, U.S. Immigration and Customs Enforcement (ICE) Director Sarah Saldaña, U.S. Customs and Border Protection (CBP) Director of Field Operations (DFO) William K. Brooks, and NFL Counsel Dolores F. DiBella discussed the results of the initiative dubbed “Operation Team Player.”

This year’s operation began immediately following the conclusion of Super Bowl XLVIII and targets international shipments of counterfeit merchandise as it entered the United States. Authorities identified warehouses, stores, flea markets, online vendors and street vendors selling counterfeit game-related sportswear and tickets throughout the country.

Fake jerseys, ball caps, t-shirts, jackets and other souvenirs are among the counterfeit merchandise and clothing confiscated by teams of special agents and officers from ICE’s Homeland Security Investigations (HSI), CBP, U.S. Postal Inspection Service (USPIS), and state and local police departments around the country – all in partnership with the NFL and other major sports leagues.

“Counterfeiting is not a game,” said ICE Director Sarah Saldaña. “It is most certainly not a victimless crime either. Whether it’s the child in Southeast Asia working in deplorable conditions, or local stores going out of business, intellectual property theft is a very real crime with very real victims. No good comes from counterfeiting American products regardless of whether they are all-star jerseys, airbags, or aspirin.”

Special agents from HSI and officers with CBP worked with sports leagues and law enforcement agencies throughout the nation to identify illegal shipments imported into the U.S., as well as stores and vendors selling counterfeit trademarked items. With three days left before Super Bowl XLIX, these teams have already seized more than 326,147 items of phony sports memorabilia along with other counterfeit items worth more than \$19.5 million. Law enforcement officers have made 52 arrests in relation to Operation Team Player so far, with Super Bowl XLIX efforts continuing through Feb 6th.

“The NFL is proud to once again partner with ICE and the IPR Center in combating the illegal sale of counterfeit merchandise and tickets,” said DiBella. “Together, we are working hard to protect fans and prevent them from being scammed by criminals seeking to profit from the public's passion for the NFL, their home teams and Super Bowl XLIX.”

“The sale of counterfeit products are connected to smuggling and other criminal activities and threatens the competitiveness of our businesses, the livelihoods of U.S. workers, and in some cases the health and safety of the consumer,” said CBP Commissioner R. Gil Kerlikowske. “CBP works closely with our federal government partners to protect the United States from these damaging and unsafe goods.”

Understanding the economic impact of intellectual property theft, the U.S. Chamber of Commerce is also spreading the word about the dangers that counterfeit products pose to the economy.

“Major events like the Super Bowl can highlight an economic problem we face throughout the year - counterfeit products put good, high-paying jobs at risk in places like Seattle, New England and Phoenix,” said David Hirschmann, president and CEO of the U.S. Chamber's Global Intellectual Property Center. “Innovative IP-intensive industries are responsible for over 1.4 million jobs in Massachusetts, 1.2 million in Washington, and 750,000 in Arizona. Sports fans need to be aware of criminals trying to take advantage of big events and holidays to sell counterfeit goods and compete with legitimate companies, like the ones that make the hats, jerseys, or other Super Bowl souvenirs from many of our most trusted brands.”

The IPR Center is one of the U.S. government's key weapons in the fight against criminal counterfeiting and piracy. Working in close coordination with the Department of Justice Task Force on Intellectual Property, the IPR Center uses the expertise of its 23 member agencies to share information, develop initiatives, coordinate enforcement actions and conduct investigations related to intellectual property theft. Through this strategic interagency partnership, the IPR Center protects the public's health and safety and the U.S. economy.

To report IP theft or to learn more about the IPR Center, visit www.IPRCenter.gov.

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U.S. Immigration and Customs Enforcement (ICE) is the largest investigative arm of the Department of Homeland Security. ICE is a 21st century law enforcement agency with broad responsibilities for a number of key homeland security priorities. For more information, visit: www.ICE.gov. To report suspicious activity, call 1-866-347-2423.



NFL NEWS CONFERENCE
 OPERATION TEAM PLAYER
 THURSDAY, JAN. 29, 2015

BACKGROUND:

The National Intellectual Property Rights Coordination Center (IPR Center) is coordinating Operation Team Player, an enforcement effort targeting counterfeit sports merchandise and apparel. As in years past, Homeland Security Investigations (HSI) will announce the results of the year's efforts during the week of the Super Bowl held in Phoenix, Arizona. Team Player operations have been conducted by HSI offices around the country in cooperation with state and local law enforcement, at every NFL city, and large and small markets around the country.

The NFL news conference on anti-counterfeiting efforts will be co-hosted by Dolores DiBella, NFL's Counsel. Also as in past years, invitations have been extended to a local CBP representative and a local public safety official to have minor speaking roles at the press conference. The primary topic will be the harm to the public, economy and U.S. businesses posed by counterfeit tickets, merchandise and apparel. The event will include only NFL-credentialed media.

LOCATION

- **Pre-brief** – 9:30am, Green Room 2338 (adjoined to the Press conference room).
- **News Conference** – Super Bowl Media Center (at Phoenix Convention Center), 100 North Third St. Phoenix, AZ, Conference Room A (Second Floor)

PROGRAM:

- Dolores DiBella, Counsel, NFL (speaking)
- Sarah Saldaña, Director, ICE (speaking)
- William K. Brooks, CBP, Director of the Tucson Field Office (speaking)
- Chief Joseph Yahner, (Acting) Chief of Police (speaking)
- Chief Debora, Black Glendale Chief of Police (speaking)
- Chief Alan Rodbell, Scottsdale Chief of Police (*not speaking*)
- Bill Montgomery, Maricopa County Attorney (speaking)
- Dolores DiBella, Counsel, NFL (speaking)

FLOW OF SHOW-

- 9:30 a.m.: YOU arrive at the Convention Center for presser pre-brief
- 9:40 a.m.: Meet with other principals taking part in the event
- B-roll will play continuously on a loop on a television screen next to the podium at the press conference. The b-roll will include video shot in Phoenix the week leading up to the press conference.
- 10:00 a.m.: NFL's Dolores DiBella opens press conference, gives remarks and turns the podium over to YOU
- 10:05 a.m.: YOU provide remarks (you gesture to the next speaker)



U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
Office of the Director
Briefing Book

- 10:10am: William K. Brooks, CBP, Director of the Tucson Field Office (speaking)
- 10:11 am: Chief Joseph Yahner, (Acting) Chief of Police (speaking)
- 10:11am: Chief Debora, Black Glendale Chief of Police (speaking)
- 10:12am: Bill Montgomery, Maricopa County Attorney (speaking)
- 10:13am: Dolores DiBella asks questions from the media
- 10:16 a.m.: At an appropriate time during the news conference (before or after questions from the media), YOU pick up a counterfeit jersey and/or counterfeit tickets and display them for a media photo op
- 10:30 a.m.: Press conference concludes
- 10:35 a.m.: YOU conduct one-on-one interviews with interested media in front of the ICE display and the staged seized IPR items which are positioned adjacent to the stage
- 11:00 a.m.: YOU depart

GOALS OF SPEECH/INTERVIEW:

- To showcase the work of the IPR Center and SAC/RAC offices around the country in bringing the full force of the U.S. government to bear on the problem of IP theft
- To show the IPR Center's work internationally to stop products before they cross our borders
- To highlight the continued increase in seizure numbers from year to year, noting that the problem has necessitated a corresponding increase in enforcement efforts to combat the growing problem of IP Theft
- To warn the consumers to be aware of the harm they do in buying counterfeits and knock offs
- To highlight the increased sophistication of the criminal networks that are engaging in IP crime
- To highlight the partnerships with other federal agencies, state and local law enforcement, PAYPAL, and various other partners of the IPR Center.

SOUND BITES (prepared remarks to be delivered SEPCOR):

- I'm happy to report our impressive results. So far, we've seized over 326,000 items with an estimated retail value of more than \$19.5 manufacturer's suggested retail price (MSRP). We have also made 52 arrests at the federal, state, and local level.
- As one of the most prolific sporting events of the year—especially with the Pro Bowl being held only a week earlier in the same city—counterfeit vendors take advantage of fan enthusiasm to violate trademarks and sell counterfeit and substandard goods to unwitting customers.
- Counterfeiting is a serious modern-day crime of global proportions. Selling fake football jerseys, hats and other team gear is just the **tip of the iceberg** of intellectual property rights crime. The international market is teeming with other bogus goods, including fake pharmaceuticals, electronics, airbags and parts for our military equipment. Nearly any item that will turn a profit is subject to being counterfeited.
- IP crimes negatively impact the nation. IP theft steals jobs and the earnings from legitimate U.S. companies and hard-working people – while punishing companies that spend time and money ensuring the security of their supply chain.



- The profits derived from counterfeiting can be quite lucrative. These illicit proceeds often fuel other criminal enterprises, such as drug and weapons trafficking. By their very nature counterfeit goods are substandard. Counterfeits also pose a public safety and health risk.
- Our message to consumers is simple “Buyer beware” Purchase from reputable dealers. Just as drugs and aliens are smuggled into the U.S., these items were brought into the area by criminals and the profits go to further their criminal activities.
- From the supermarket to the Super Bowl, ICE’s Homeland Security Investigations and our partners at the IPR Center are protecting the American public and U.S. business from threats from counterfeiters and trademark pirates.
- As we approach game day, and counterfeiters pick up their efforts, know this – we will continue to crack down on counterfeiters and send a clear message that abiding by intellectual property rights laws is not optional; it’s the law.

ADDITIONAL TALKING POINTS:

- Criminal organizations that counterfeit U.S. trademark goods and intellectual property exploit the American consumer’s trust and confidence every day in products ranging from toothpaste and pharmaceuticals to DVDs and athletic wear.
- At every major sporting event, these unscrupulous entrepreneurs take advantage of fan fever to sell a whole range of products bearing the trademark and names of the teams — though they are not licensed to produce these trademarked items.
- They use inferior materials and craftsmanship to produce look-alike products and the sale of those products steals American jobs and robs the economy of taxes that are used to pay for roads, teacher’s salaries, and other public services. This is intellectual property, designed and crafted by U.S. companies, that is being stolen for the personal benefit of criminals.
- That’s why ICE and the National Intellectual Property Rights Coordination Center have planned Operation Team Player, our response to those who would try to benefit by defrauding the fan with their substandard goods.
- ICE and its partners — such as the NFL, CBP and local law enforcement — have strengthened our response by combining our resources and leveraging our authorities.
- In the weeks leading to the Super Bowl, our IPR teams in HSI offices around the country have been sweeping hundreds of target vendors, stores, warehouses and flea markets to seize counterfeit sportswear.
- In the past few months, there has been over \$1 million of seized merchandise in the Phoenix valley alone.

ADDITIONAL INFORMATION FROM THE IPR CENTER:

- IPR Center initiated Operation Team Player in June 2013 to target the sale and trafficking of counterfeit sports merchandise, apparel and tickets, a multi-million dollar criminal industry.
- The trafficking of these items is extremely lucrative and becomes more profitable in markets involving successful and popular teams.
- Operation Team Player leverages HSI resources by targeting high profile sporting events for effective anti-counterfeiting operations and consumer outreach via heightened media coverage.



High interest sporting events include opening season, all-star games, championship finals, and high profile games.

- HSI is working in coordination with CBP to target inbound shipments of counterfeit sports apparel and items at ports of entry including border crossings, international mail facilities, express courier consignment hubs and seaports across the United States.
- In addition, the IPR Center in coordination with the various HSI field offices, CBP, and state and local law enforcement agencies, has sought to identify and dismantle retail stores, flea markets and vendors suspected of selling counterfeit sports jerseys, hats, jackets, and other sports related items. Increased enforcement is being conducted in Phoenix, as well as Boston and Seattle, the home sites of the Patriots and Seahawks.
- The IPR Center has deployed additional agents to the Phoenix area to provide oversight as subject matter experts on enforcement operations and assist in the collecting and reporting of seizure statistics.

ANTICIPATED QUESTIONS:

What is the harm in buying a knockoff shirt or pair of shoes?

- Whether buying a counterfeit team shirt or a knock-off DVD, you are depriving U.S. companies and workers of income; and you're also feeding a criminal enterprise whose profits could be supporting more serious criminal endeavors.

Why is ICE going after counterfeiters?

- ICE is the lead U.S. law enforcement agency in attacking the global problem. The primary threat is that piracy funds organized crime. Many of these groups that illegally trade in pirated goods are also involved in everything from human smuggling and document fraud to contract killing and the drug trade, all crime areas under ICE's jurisdiction.
- We are attacking criminal organizations at all points in the international supply chain to address and strengthen the resilience at our border and working—when possible—with our international partners to identify foreign manufacturers and dismantle these international organizations.
- In addition to its agents at the IPR Center and around the country, ICE uses its 71 Attaché Offices located in 47 countries to combat counterfeiting and piracy. The IPR center partners involved in Team Player include the FBI, CBP and the U.S. Postal Inspection Service, which bring resources to the fight as well.

What kinds of products were seized in Operation Team Player?

- Seizures included the usual NFL jerseys, t-shirts, hats, cell phone covers, jewelry, watches other various other accessories, etc.

Have you made any arrests?

- We have made 52 arrests at the federal, state and local levels.

Why aren't there more arrests? What are the consequences of selling counterfeits?



- Make no mistake about it, the displays of counterfeit goods you see here at the media center are just a small fraction of what we have seized in recent weeks.
- The immediate consequence for these rogue retailers is the loss of their goods. Often that is punishment enough to put them out of business. In targeting hundreds of small counterfeit vendors, we are looking for the source of the goods, how they got into this area, whether they were smuggled, where they were held and kept. The investigation continues long after the game is over.
- As in any crime, the egregiousness of the crime determines at what level charges can be brought. Some of the seizures we have made did not meet the threshold for federal prosecution. But by sharing our findings with state and local law enforcement, they sometimes follow up and charge at a state or local level.

Who is the biggest violator?

- China continues to be the number-one source country for counterfeit and pirated goods seized. Last year China accounted for 85% of all counterfeit products illegally shipped into the United States. But the reason that we are here today is to raise the awareness of the American consumer about the dangers of buying counterfeit products.

How are consumers supposed to know which sites sell counterfeit goods and which ones are legitimately selling discounted products?

- Consumers should use the same care online that they exercise when shopping offline. Consumers should be wary of sites that advertise themselves through spam or that offer prices that are greatly discounted from what other retailers are offering. Consumers may also want to look at online review sites and opinion forums to learn about other customers' experiences with a site.

Why is ICE spending time, money and manpower on protecting these brands?

- These trusted brand names offer a guarantee to consumers that they are getting quality goods. When someone steals that brand to place on substandard goods, it's theft of intellectual property and fraud against the consumer. But not only that, it threatens the ingenuity and innovation that these products represent and can prove to be serious risks to the health and safety of consumers. They are sought after because they are original, represent a certain workmanship and make certain promises to the consumer. This wholesale theft of that brand and everything it stands for threatens, jobs and revenue, funds other criminal activities and often smuggling illicit goods that could bring other, more dangerous products into the United States.

What is ICE's biggest challenge with respect to IP rights enforcement right now?

- The biggest challenge we have with respect to IP rights enforcement right now is the globalization of IP crime. A counterfeit product manufactured in China, transshipped through Europe and sold within the United States involves organized criminal enterprises in several countries. International cooperation among law enforcement is required to stay ahead of the criminal syndicates.



How do we know there is a link to organized crime? What crimes are counterfeits funding?

- The profile of the IPR criminal has also changed. ICE has investigated several IPR cases that are linked to organized crime. We see the number of criminal organizations involved in IPR crimes growing because of the tremendous profits associated with the sale of counterfeit goods and because these organizations already have access to pre-existing smuggling infrastructures and routes. In many cases, these international organized crime groups take the enormous profits realized from the sale of counterfeit goods and use those profits to bankroll other criminal activities, such as the trafficking in illegal drugs, weapons and other contraband.

SAC Offices participating in Operation Team Player (Hard Goods):

Currently, there are thirty-eight (39) HSI offices with Operation Team Player investigations. The offices are: HSI Albuquerque, HSI Anchorage, HSI Atlanta, HSI Baltimore, HSI Baton Rouge, HSI Boston, HSI Buffalo, HSI Cherry Hill, HSI Cheyenne, HSI Cincinnati, HSI Cleveland, HSI Dallas, HSI Denver, HSI Detroit, HSI Ft. Pierce, HSI Galveston, HSI Gulfport, HSI Honolulu, HSI Houston, HSI Indianapolis, HSI Lafayette, HSI Las Vegas, HSI Los Angeles, HSI Memphis, HSI Miami, HSI Milwaukee, HSI Mobile, HSI Nashville, HSI Phoenix, HSI New York, HSI Newark, HSI Orange County, HSI Philadelphia, HSI Pittsburgh, HSI Providence, HSI San Diego, HSI San Francisco, HSI St. Paul and HSI Tucson.

Time Line for Statistical Reporting of Team Player

January 26: Cut off for reporting statistics for NFL press event on January 31.

January 27: Receive final CBP/HSI seizure statistics from CBP NTAG (COB PST)/pull final EIU enforcement stats.

January 28: Forward final numbers to PAO for press conference.

January 29: Press Conference.

February 6: Cut off for final follow up statistics.

February 8: CBP NTAG will provide final seizure numbers/EIU will provide final enforcement stats.

February 11: Forward final numbers to PAO for follow up statistical announcement.

Trademark Holders

Targeted trademark holders include: NFL, MLB, NBA, NHL, Nike, Reebok, and Adidas.



Seizure Stats (combined CBP and HSI seizures)

	Estimated MSRP	Items Seized
Team Player 2015	\$ \$19.5M	326,147

- In 2012, Operation Fake Sweep resulted in the seizure of 50,703 items of counterfeit merchandise with an estimated MSRP of \$5.12 million as well as 386 domain names seized.
- In 2011, Operation Interception resulted in the seizure of 40,375 NFL trademarked merchandise with an estimated MSRP of \$3.72 million as well as 10 domain names seized.

Counterfeit tickets

Representatives from the NFL will be available on-scene to make determinations as to the authenticity of any and all game tickets. Individuals identified with counterfeit tickets will be taken to a complaint center located at the facility and questioned concerning their source of the counterfeit tickets. HSI Phoenix will have personnel assigned to this complaint center and interview individuals in possession of counterfeit tickets in attempt to determine the source of the tickets. If individuals are identified as potential sellers of counterfeit tickets, HSI will dispense roving teams to appropriate locations in an attempt to identify individuals involved in the trafficking of counterfeit tickets.

OPERATIONAL RESULTS:

- 2014 MLB World Series: October 21-29, 2014, San Francisco, CA and Kansas City, MO: HSI Kansas City and HSI San Francisco conducted multiple enforcement actions resulting in 115 seizures with an MSRP value of \$165,092.
- NCAA 2015 College Football Bowls / Playoffs: HSI San Jose conducted an enforcement action at the PAC 12 championship game resulting in four local arrests and the seizure of 507 counterfeit items with an MSRP value of \$13,452.
- 2015 NHL Winter Classic: January 1, 2015, Washington, DC: HSI Washington DC conducted multiple enforcement operations resulting in the seizure of 680 counterfeit items with an MSRP value of \$25,130. Further investigative leads and enforcement actions are anticipated based upon these efforts.

Exhibit 2

US agents tackle fake Super Bowl items



DAVID J. PHILLIP/ASSOCIATED PRESS

By **Nestor Ramos** | GLOBE STAFF JANUARY 31, 2015

PHOENIX — Federal agents prowling the streets here this week aren't always searching for international terrorists. Sometimes, they're hunting for Tom Bardy.

Around the valley that encompasses and surrounds Phoenix, agents have spent recent days swarming malls and markets in search of Gronkowsky jerseys and Patriots caps. Authorized to seize counterfeit goods on sight, agents uncovered about \$100,000 worth of ersatz apparel here last weekend alone.

Gross misspellings of superstars' names are one of the things that give away the dubious duds. But more sophisticated fakes are indistinguishable from \$300 authentic jerseys hanging in the NFL shop set up in the Phoenix Convention Center. And it can be hard to persuade fans that saving several hundred dollars on a set of matching number 12 jerseys for the family is a bad idea.

Contraband team gear is almost as old as fanhood. Before Super Bowl XX, in 1986, fans flaunted trucker hats featuring the old New England Patriot doing something unspeakable to a [Chicago] bear.

The profane debasing of a mascot — and really anything that denigrates a team — is guaranteed to be contraband, said Daniel Modricker, a spokesman for US Immigration and Customs Enforcement. That “Yankees Suck” T-shirt you put on for special occasions? If it uses anything that looks like a team or league logo, it probably constitutes trademark infringement.

Although knockoffs are nothing new, the Internet has made selling fakes simpler in recent years. Official-looking websites sell gear of questionable quality to unsuspecting fans. And rather than trading in the cheap flea-market knockoffs that were once common, the products today offer only slight discounts over full retail price.

Wearing counterfeit clothes won't get you in trouble with the law — customs agents won't take the shirt off your back. But officials say counterfeiting is far from a victimless crime. Aside from violating trademarks, the fake items often skirt sales tax and keep money from legitimate retailers.



DAVID J. PHILLIP/ASSOCIATED PRESS

US agents said wearing fake clothes does not mean trouble with the law, but such items hurt legitimate retailers.

At a news conference this week, officials unveiled piles of knock-offs seized here in recent days: Earrings of unknown provenance; a dia de los muertos style skull with a Patriots logo on its side; several flasks bearing the logos of different teams.

Clothes are common, said Sarah Saldaña, head of Immigration and Customs Enforcement, but the other items can pose safety risks. Earrings and flasks made overseas on the cheap can include harmful metals. Such items are destroyed, while many of the seized clothes are shipped overseas to be given away in developing nations.

Those caught selling the goods usually face civil, not criminal charges. About 50 people were prosecuted criminally nationwide in a recent sweep.

Bogus tickets are more pernicious for those doing the purchasing.

Glendale police Chief Debora Black said some fans showed up at last week's Pro Bowl here with counterfeit tickets they had bought from a scammer. The NFL's version of an all-star game is widely derided and little-watched on television, but the event was sold out. Those with fakes were turned away. Though the value of watching the Pro Bowl is up for debate, the money spent on counterfeit tickets was very real.

Last Sunday's experience suggests fake tickets will turn up for Sunday's game, Black said. She and others urged those searching for last-minute seats to be wary. Real tickets have holograms on the back and a logo near the bottom that is cut all the way through each ticket. But some fakes are sophisticated, and some real tickets are stolen; those that have been reported stolen will not be accepted at the gate, either.



paid thousands of dollars to see the Super Bowl.

Comments

“It is not a victimless crime,” said Saldaña, citing counterfeit cases that include dangerous baby cribs and questionable military supplies.

Some wonder why the federal Immigration and Customs Enforcement agency spends so much time and money hunting down fake luxury items when the department is also tasked with reining in illegal immigration — a question Modricker said is the most common the agency receives.

About a week ago, an Arizona man who was free while awaiting deportation proceedings despite a burglary conviction and two harassment injunctions allegedly shot a convenience store clerk to death.

“We detain them very often, but very often we can’t,” said Jeh Johnson, secretary of the US Department of Homeland Security, who was asked about the case while visiting the Super Bowl site this week. Judges’ decisions, legal precedent, and the long delays before deportations all contribute to the decision to release an illegal immigrant, he said.

Special Agent in Charge Matt Allen, who is coordinating security for the Super Bowl, said keeping contraband out of the country is a central part of the agency’s mission.

shown during a press conference.

“

‘The majority of counterfeit goods are coming into the United States from elsewhere, primarily Asia.’

Jeh Johnson, secretary of the US Department of Homeland Security

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Allen said, which makes the knock-ons an issue for Immigration and Customs Enforcement and the Department of Homeland Security, which oversees it.

Jerseys and merchandise are the tip of the artificial iceberg, Modricker said. Pharmaceuticals, cosmetics, electronics — even car tires and airbags — are routinely recovered by agents.

In addition to the obvious dangers posed by fake car parts, “That’s money not being paid in taxes and not being reinvested into roads and schools,” Modricker said, and the Super Bowl is a good chance to highlight the larger problem.

Nestor Ramos can be reached at nestor.ramos@globe.com.

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Exhibit 3

rlt26@law.georgetown.edu

703 593 6759

Georgetown Law

From: Modricker, Daniel [(b)(6),(b)(7)(C)]
Sent: Monday, February 02, 2015 11:35 AM
To: Rebecca Tushnet
Subject: Re: Trademark seizures

Hello Rebecca, very much paraphrased. But if one logo where disparaging another logo than it would be infringement.

Happy to discuss when I return to Boston on Wednesday.

Best,
Dan

From: Rebecca Tushnet [<mailto:rlt26@law.georgetown.edu>]
Sent: Saturday, January 31, 2015 03:19 PM
To: Modricker, Daniel
Subject: Trademark seizures

Hello. My name is Rebecca Tushnet, and I teach at Georgetown Law. I was interested in your statement, as reported by Nestor Ramos, that "The profane debasing of a mascot — and really anything that denigrates a team — is guaranteed to be contraband." <http://www.bostonglobe.com/metro/2015/01/31/searching-for-tom-bardy-feds-hunt-counterfeiters-before-big-game/SusU4CTQW5nfEC0wvLvkiM/story.html> I understand that you may have been paraphrased, but I was wondering if you could provide me the statutory or decisional authority ICE uses to seize items that "denigrate" a registered trademark, and also any information on the number of percentage of items seized because they denigrate a trademark. I am interested because I am puzzled how "Yankees Suck" or the like, even using the Yankees colors and font, could constitute counterfeiting.

Thank you for your time,
Rebecca Tushnet

Rebecca Tushnet

rlt26@law.georgetown.edu

703 593 6759

Georgetown Law

Exhibit 4

(b)(6),(b)(7)(C)

From: (b)(6),(b)(7)(C)
Sent: Tuesday, February 03, 2015 11:16 AM
To: (b)(6),(b)(7)(C)
Subject: Re: Did I get these quotes right? In any event, please feel free to elaborate, clarify, or otherwise replace this

(b)(6),(b)(7)(C)

The first two are fine. The last one I'd say controversial not immoral -- I must have misspoke if I said that. I drink myself and wouldn't intentionally equate alcohol with morality.

(b)(6),(b)(7)(C)

Public Affairs Officer
Department of Homeland Security
U.S. Immigration and Customs Enforcement (ICE)
(504) 310 (b)(6), Office
(504) 329 (b)(7), Mobile
(C)

(b)(6),(b)(7)(C)

From: (b)(6),(b)(7)(C)
Sent: Monday, February 02, 2015 04:52 PM
To: (b)(6),(b)(7)(C)
Subject: Did I get these quotes right? In any event, please feel free to elaborate, clarify, or otherwise replace this

"During our anticounterfeiting effort for the Super Bowl, there are some things that are a dead giveaway. For example, one of the things we have seen is ... the Dallas star, the Dallas logo, and basically the shirt says 'Dallas suck.' When you see a shirt that is placing one team above another, using the official NFL trademark logos, and placing one team above another or putting down one team versus another, you can tell right away that that's not a legit item.

"Anything that is a joke at one team's expense, anything that could be in a negative context within the league, is a dead giveaway.

"Or something that could be potentially immoral – something like a beer keg."

From: (b)(6),(b)(7)(C)
Sent: Monday, February 02, 2015 4:14 PM
To: (b)(6),(b)(7)(C)
Subject: RE: Question from a blogger at the Washington Post, about the "US agents tackle fake Super Bowl items" story

Would you mind calling my colleague (b)(6),(b)(7)(C) at 504-329- (b)(6),(b)(7)(C) He's available to talk now (b)(6),(b)(7)(C)

(b)(6),(b)(7)(C)

Northeast Regional Communications Director/Spokesman
U.S. Immigration and Customs Enforcement (ICE)

313-226 (b)(6),
313-215 (b)(7)
(C) m)

From: (b)(6),(b)(7)(C)
Sent: Monday, February 02, 2015 4:46:41 PM
To: (b)(6),(b)(7)(C)
Subject: RE: Question from a blogger at the Washington Post, about the "US agents tackle fake Super Bowl items" story

Thanks – I got an out-of-the-office message from Mr. Modricker’s e-mail, though, and a suggestion that I ask you:

I will be out of the office until Feb 4, 2015. I will be traveling and have only limited access to email and voicemail during this time. If you need immediate assistance you can contact (b)(6),(b)(7)(C)

From: (b)(6),(b)(7)(C)
Sent: Monday, February 02, 2015 11:15 AM
To: (b)(6),(b)(7)(C)
Cc: Modricker, Daniel
Subject: FW: Question from a blogger at the Washington Post, about the "US agents tackle fake Super Bowl items" story

(b)(6) (b)(7)(C)
Copying our IPR Center spokesman.

From: (b)(6),(b)(7)(C)
Sent: Monday, February 02, 2015 2:12 PM
To: (b)(6),(b)(7)(C)
Cc: (b)(6),(b)(7)(C)
Subject: Question from a blogger at the Washington Post, about the "US agents tackle fake Super Bowl items" story

(b)(6) (b)(7)(C)
Dear Mr. (b)(6),(b)(7)(C) I read with interest the article "US agents tackle fake Super Bowl items" story, at <http://www.bostonglobe.com/metro/2015/01/31/searching-for-tom-bardy-feds-hunt-counterfeiters-before-big-game/SusU4CTQW5nfEC0wvLvkiM/story.html>, and especially this passage:

The profane debasing of a mascot — and really anything that denigrates a team — is guaranteed to be contraband, said Daniel Modricker, a spokesman for US Immigration and Customs Enforcement. That “Yankees Suck” T-shirt you put on for special occasions? If it uses anything that looks like a team or league logo, it probably constitutes trademark infringement.

I’d like to blog about this issue (in my blog, which is hosted at the Washington Post, though I am not a Post employee), but I noticed that this wasn’t attributed to Mr. Modricker as a quote. Could I have a statement from you folks on this question, just to make sure I’m quoting ICE directly, rather than a possibly flawed paraphrase of the ICE’s position. Many thanks,

(b)(6),(b)(7)(C)
Blogger, <http://washingtonpost.com/news/volokh-conspiracy>

Exhibit 5

Hi (b)(6),(b)(7)(C).

(b)(6),(b)(7)(C) is the OPLA attorney currently assisting us at the IPR Center. I included him in this email for introduction.

Hi (b)(6),(b)(7)(C).

(b)(6),(b)(7)(C) is our current PAO temporarily replacing (b)(6),(b)(7)(C) until we actually get a newly assigned and permanent PAO. (b)(6),(b)(7)(C) is physically located in Boston.

Please let me know if I can help with anything else!

(b)(6),(b)(7)(C)

Unit Chief ICE-Homeland Security Investigations
National IPR Coordination Center

(b)(6),(b)(7)(C)

Arlington, VA 22202

703-(b)(6),(b)(7)(C) (Office)

703-(b)(6),(b)(7)(C) (Mobile)

(b)(6),(b)(7)(C) @ice.dhs.gov

From: (b)(6),(b)(7)(C)

Sent: Wednesday, February 04, 2015 8:50 PM

To: (b)(6),(b)(7)(C)

Subject: Fw: Trademark seizures

(b)(5)

From: Rebecca Tushnet [<mailto:rt26@law.georgetown.edu>]

Sent: Wednesday, February 04, 2015 07:34 PM

To: (b)(6),(b)(7)(C)

Subject: RE: Trademark seizures

I hope you have safely returned to Boston. I am still very much interested in the statutory or decisional basis for seizing items on the grounds that disparagement constitutes either trademark or copyright infringement, as well as learning how many items have been seized on such grounds.

Thank you,
Rebecca Tushnet

Rebecca Tushnet

Exhibit 6

Homeland Security Investigations Law Division
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
500 12th Street, S.W. STOP 5900
Washington, DC 20536-5900
202-(b)(6),(b)(7)
202-(C) (iPhone)
(b)(6),(b)(7)(C) @ice.dhs.gov

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From: Rebecca Tushnet [mailto:rlt26@law.georgetown.edu]
Sent: Monday, February 09, 2015 12:11 PM
To: Modricker, Daniel
Cc: Liberta, Joseph M
Subject: RE: Super Bowl XLIX initiative

Thanks for your reply. I'm cc'ing Joe Liberta, as suggested. I'm still curious to know what kind of statements from ICE representatives led to very specific reporting that disparaging use of marks qualified as counterfeiting, as well as the statutory and decisional authority that leads ICE to use whether a treatment of a mark is disparaging as a factor in determining whether counterfeiting has occurred. (I also note that on Twitter, you told me that disparaging uses of marks constitute copyright infringement, so to the extent ICE considers disparaging alterations of logos to be copyright infringement I'd like to know the same for that. If on further reflection that is not ICE's position, please let me know.)

I note that the standard for counterfeiting is higher than that for infringement. Although rights owners may occasionally argue that parodies or disparaging uses are infringing, there is substantial legal precedent to the contrary and, even if there were not, that would not make parodies or disparaging uses counterfeits. (It is hard to imagine how a disparaging use of a mark would be confusingly similar to an authorized use.) Thus, I would also like to know how many seizures have occurred on the grounds--even in part--that the seized goods contained disparaging uses of marks, whether that claim came from consultation with rights owners or otherwise.

Thank you for your time,
Rebecca Tushnet

Rebecca Tushnet

rlt26@law.georgetown.edu

703 593 6759

Georgetown Law

From: Modricker, Daniel [(b)(6),(b)(7)(C)]@ice.dhs.gov]
Sent: Thursday, February 05, 2015 3:12 PM
To: Rebecca Tushnet
Cc: Liberta, Joseph M
Subject: Super Bowl XLIX initiative

Rebecca – Please note once again that the statement in the article was not a direct quote, but rather a paraphrasing of statements made by DHS and ICE Homeland Security Investigations when discussing the Super Bowl XLIX initiative.

ICE HSI considers a multitude of factors when determining whether merchandise is subject to seizure and forfeiture and whether an individual has engaged in conduct which constitutes federal copyright or trademark infringement. ICE HSI Special Agents rely upon their knowledge, training, and experience, evidence collected in the context of an investigation, as well as with consultation with right holders and whether, in the right holder’s opinion, the good or copy of the work infringes upon their intellectual property rights. No single factor is dispositive and each investigation depends on specific facts and evidence. As part of its enforcement priorities, ICE HSI focusses its efforts on violations of 18 U.S.C. §§ 2319 and 2320 and conduct which meets the elements of such violations.

If you have further questions regarding the legal basis for ICE HSI operations, please contact ICE’s Office of the Principal Legal Advisor. Joe Liberta, Chief of the Criminal Law Section, reachable at 202-732-5004, should be able to assist you.

Best,
Daniel

Daniel Modricker
National Intellectual Property Rights Coordination Center
Spokesman/Public Affairs Officer – New England
U.S. Immigration and Customs Enforcement (ICE)
617-[(b)(6),(b)(7)(C)]
617-[(b)(6),(b)(7)(C)] (m)

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Exhibit 7

From: Liberta, Joseph M
Sent: 18 Feb 2015 20:36:54 +0000
To: Rebecca Tushnet
Cc: Modricker, Daniel
Subject: RE: Super Bowl XLIX initiative

Rebecca – Please note that the positions Daniel expressed on his personal Twitter feed are personal opinions and should not be attributed to Homeland Security Investigations (HSI), U.S. Immigration and Customs Enforcement (ICE), or the U.S. Department of Homeland Security. Daniel made every effort to make that explicit on his Twitter page; any misstatement regarding copyright law is based on Daniel’s personal opinion, not agency position.

ICE HSI Special Agents focus their enforcement efforts on interdicting the cross-border movement of infringing works and counterfeit merchandise in violation of 17 U.S.C. § 506, 18 U.S.C. § 2319, and 18 U.S.C. § 2320, as well as associated violations of U.S. criminal and customs laws. As part of their investigatory process ICE HSI Special Agents will consider the scope of the protected intellectual property as registered with USPTO or the Copyright Office, information from right holders regarding what constitutes an unauthorized use of their intellectual property, and information gathered as part of an investigation. No single factor is dispositive and will be considered on a case-by-case basis. ICE HSI Special Agents consult with ICE’s Office of the Principal Legal Advisor and U.S. Department of Justice attorneys to determine whether probable cause exists in support of a seizure and whether there are defenses under the Copyright Act and Lanham Act, such as potential fair use provisions and federal circuit-specific case law, which influence whether an enforcement effort is pursued by the government.

Regarding the statement attributed to ICE in the Boston Globe article, this was paraphrased from a number of different statements made in response to questions (and not a prepared statement) and was taken out of context. The reference to “contraband” is simply to convey that items disparaging an NFL team would not be an officially licensed product of the League or a team. Whether such an item constituted infringement under the Copyright Act or Lanham Act would be determined on a case-by-case basis and according to legal precedent in the federal circuit where the enforcement effort is occurring. The reference to the “Yankees Suck” t-shirt was included in the same paragraph as the paraphrased quote by the author of the article, Nestor Ramos. Likely, this was just a Boston writer trying to give a local flavor to the story. It should not be attributed to Daniel or ICE.

We appreciate your continued interest in ICE’s intellectual property enforcement efforts and invite you to find more information at www.iprcenter.gov. Regarding your request to determine the number of seizures made by HSI, this is something that you, as a member of the public, are welcome to pursue via a Freedom of Information Act Request.

I hope this answers your questions and clears up any confusion caused by the article. Outreach is an important part of the IPR Center’s mission to ensure national security by protecting the public’s health and safety, the U.S. economy, and our war fighters, and to stop predatory and unfair trade practices that threaten the global economy.

Joseph M. Liberta
Chief
Criminal Law Section

Exhibit 8



GEORGETOWN LAW
INSTITUTE FOR PUBLIC REPRESENTATION

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Benton Senior Counselor
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Staff Attorneys
Meghan M. Boone
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Eric Null

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Washington, DC 20001-2075
Telephone: 202-662-9535
Fax: 202-662-9634

March 6, 2015

By first-class mail and e-mail

U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street SW, Stop 5009
Washington, DC 20536-5009
ICE-FOIA@dhs.gov

Re: Freedom of Information Request

Dear Freedom of Information Officer:

This letter is a request under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), on behalf of our client, Professor Rebecca Tushnet.

Records Requested

We request the following records that are in the possession or control of United States Immigration and Customs Enforcement (ICE).

- 1) All images and descriptions of clothing seized or impounded by ICE as counterfeit from 2012 to the date of this request.
- 2) All records, guidelines, policies, procedures, or training documents that describe how ICE:
 - a. determines how similar one mark must be to another to deem an item bearing a mark counterfeit;
 - b. distinguishes between items that are merely infringing items and items that are counterfeit;
 - c. uses or considers circuit-specific case law in determining whether an item is counterfeit or infringing;

- d. considers the legal doctrine of fair use in determining whether an item is counterfeit or infringing;
 - e. considers trademark-infringement defenses other than fair use in determining whether an item is counterfeit or infringing.
- 3) All records that use the words “disparagement,” “parody,” “distortion,” or “tarnishment,” or grammatical variants thereof, in connection with trademark rights holders’ requests or consultations with trademark rights holders.
- 4) All records indicating that an item was seized by ICE, in whole or in part, because the item disparaged, parodied, distorted, or tarnished a trademark.
- 5) All documents, presentations, handouts, and photographs used by ICE in connection with the ICE news conference on counterfeit clothing held the week of January 25, 2015-January 31, 2015, which is described in the article “US agents tackle fake Super Bowl items,” written by Nestor Ramos and published in the Boston Globe on January 31, 2015. *See* <http://www.bostonglobe.com/metro/2015/01/31/searching-for-tom-bardy-feds-hunt-counterfeiters-before-big-game/SusU4CTQW5nfEC0wvLvkiM/story.html>
- 6) All records referencing Daniel Modricker’s paraphrased statement at the news conference described in request number 5 that “[t]he profane debasing of a mascot – and really anything that denigrates a team – is guaranteed to be contraband,” including any records reflecting his exact words.

Format of Documents

To the extent that the requested records are available or readily reproducible in searchable, electronic format or other digital format, please provide the records in that format.

Request for Fee Waiver

These records are requested on behalf of Professor Rebecca Tushnet of Georgetown University Law Center, as part of an academic research project on trademark counterfeiting. We request a waiver of all fees, if any, associated with processing this request under 6 C.F.R. § 5.11(k) and 5 U.S.C. § 552(a)(4)(A)(iii). Release of the requested records is in the public interest because disclosure of the records is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in Professor Tushnet’s commercial interest.

As part of Professor Tushnet’s work at Georgetown, she is conducting research on the factors the government uses to identify counterfeits, in conjunction with Mark McKenna of the University of Notre Dame Law School. The results of their research may be published in a legal journal, a legal blog, or elsewhere, and they will not seek compensation for publication. Their research is likely to contribute significantly to public understanding of the treatment of counterfeits, and a complete waiver of fees is appropriate.

Tushnet FOIA Request
March 6, 2015
Page 3 of 3

Alternatively, we request a fee waiver under 6 C.F.R. § 5.11(d) and 5 U.S.C. § 552(a)(4)(A)(ii)(II) because Professor Tushnet is affiliated with Georgetown University Law Center, an educational institution with a scholarly purpose, and we do not seek the records for commercial use. The requested records would further Professor Tushnet's scholarly research.

If you determine that a full fee waiver is not warranted and the cost of responding exceeds \$25, please contact the undersigned at 202-661-6582 before fulfilling this request.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael T. Kirkpatrick".

Michael T. Kirkpatrick

Exhibit 9

On June 13, 2013, (b)(6),(b)(7)(C) with Homeland Security Investigations in El Paso, TX provided me with photographs of the following product samples to examine for authenticity. Based upon my training and expertise, I identified the following items as counterfeit, not licensed or authorized by Manchester United. Below please find a description of the items, the estimated retail values and the factors determining authenticity:

DESCRIPTION

1. One white and grey jersey short set bearing the trademark of Manchester United Ltd. The estimated retail value for an authentic set that is identical or substantially equivalent to this item is approximately \$105.00 USD.

(b)(7)(E)

2. One blue jersey short set bearing the trademark of Manchester United Ltd. The estimated retail value for an authentic jersey short set that is identical or substantially equivalent to this item is approximately \$105.00 USD.

(b)(7)(E)

Based upon the subsequent trademark registration the design of which is currently being used on products by the owner or its agent, I do hereby declare, under

DECLARATION OF (b)(6),(b)(7)(C)

I, (b)(6),(b)(7)(C) declare as follows:

1. The facts set forth below are personally known to me and are based upon my firsthand knowledge and on information provided to me in the regular course of business in my capacity as Senior Brand Protection Manager. If called as a witness, I could and would testify to these facts.

2. I am employed by adidas International, Inc. and act as intellectual property Senior Brand Protection Manager on behalf of Sports Licensed Division of the adidas Group, LLC (hereinafter referred to as "adidas").

3. In my capacity as Sr. Brand Protection Manager, for adidas, I coordinate intellectual property matters and oversee adidas's anti-counterfeiting efforts in North America.

4. adidas is the owner of numerous federal trademark registrations for the Mitchell & Ness word mark including, but not limited to, Registration Nos. 2,845,049; 2,860,283; 2,860,284 and, 4,073491 (collectively "adidas Trademarks"). Copies of the corresponding registrations are attached to this declaration as Appendix A.

5. The adidas Trademarks and the corresponding registrations are in full force and effect. The adidas Trademarks have never been abandoned, and adidas intends to preserve and maintain its rights with respect to the adidas Trademarks and the corresponding registrations.

6. On or about November 14th, 2012, I received for inspection from Special Agent (b)(6),(b)(7) (b)(6),(b)(7) of Homeland Security Investigations in Buffalo, New York, images of headwear bearing the adidas Marks ("Subject Merchandise). Copies of the corresponding images are attached to this declaration as Appendix B.

7. I have examined the images and identified the Subject Merchandise as not authorized or manufactured by adidas. I can confirm that Subject Merchandise as counterfeit. My determination is based on the following:

(b)(7)(E)

I declare under penalty of perjury under the laws of the State of Oregon that the foregoing declaration is true and correct to the best of my knowledge.

EXECUTED: November 19, 2012

(b)(6),(b)(7)(C)

(b)(6),(b)(7)(C)



FLY YOUR OWN FLAG

Affidavit of (b)(6),(b)(7)(C)

NEW ERA CAP CO., INC.

167 Delaware Ave.
Buffalo, New York
14202

TEL: 716-804-8000
FAX: 716-804-1499
TOLL-FREE: 888-520-6991
newera.com

WORLD HEADQUARTERS:

Buffalo, NY USA

INTERNATIONAL OFFICES:

London Tokyo
Paris Hong Kong
Singapore Taipei

1. I am employed by New Era Cap Co., Inc. ("New Era") a New York corporation located at 160 Delaware Avenue, Buffalo, New York 14202, in the capacity of Manager, Brand Protection US & Latin America. My duties include prevention of the infringement and counterfeiting of the trademarks and other intellectual property associated with New Era. I have held this position since March of 2010.
2. On November 5, 2012, I received a CD-ROM from Special Agent (b)(6),(b)(7)(C) that contained several images of a black NEW ERA NEW YORK YANKEES MAJOR LEAGUE BASEBALL hat that was purchased from <cheapestneweracap.com>. The cap prominently features our NEW ERA trademark, our NE & Design trademark and our NE & FLAG Design trademark. I have examined the images of the cap to determine the cap's authenticity.
3. My examination of the subject images reveals that the trademarks contained on said item have been applied without the knowledge and consent of New Era, and that said item is wholly counterfeit for the following reasons:

(b)(7)(E)

Signed this 7th day of November, 2012, in Milwaukee, Wisconsin.

(b)(6),(b)(7)(C)

Manager, Brand Protection US & Latin America
 New Era Cap Co., Inc.
 PO Box 11768
 Milwaukee WI 53211
 Ph: 414-446-(b)(6),(b)(7)(C)
 Fax: 414-446-4691



FLY YOUR OWN FLAG™

Affidavit of (b)(7)(C)

NEW ERA CAP CO., INC.

160 Delaware Ave.
Buffalo, New York
14202

TEL: 716 804 9000
FAX: 716 804 9199
TOLL-FREE: 888-526-6951
neweracap.com

WORLD HEADQUARTERS:

Buffalo, NY, USA

INTERNATIONAL OFFICES:

London Tokyo
Paris Hong Kong
Cologne Toronto

1. I am employed by New Era Cap Co., Inc. ("New Era") a New York corporation located at 160 Delaware Avenue, Buffalo, New York 14202, in the capacity of Manager, Brand Protection US & Latin America. My duties include prevention of the infringement and counterfeiting of the trademarks and other intellectual property associated with New Era. I have held this position since March of 2010.
2. On November 5, 2012, I received a CD-ROM from Special Agent (b)(6),(b)(7)(C) that contained several images of a black NEW ERA NEW YORK YANKEES MAJOR LEAGUE BASEBALL hat and a black and leopard print NEW ERA NEW YORK YANKEES MAJOR LEAGUE BASEBALL hat that were purchased from <mibenweracap.com>. The caps prominently feature our NEW ERA trademark, our NE & Design trademark and our NE & FLAG Design trademark. I have examined the images of the caps to determine the caps' authenticity.
3. My examination of the subject images reveals that the trademarks contained on said items have been applied without the knowledge and consent of New Era, and that said items are wholly counterfeit for the following reasons:

(b)(7)(E)



FLY YOUR OWN FLAG™

(b)(7)(E)

NEW ERA CAP CO., INC.

One Delaware Ave.
Buffalo, New York
14202

TEL: 716-849-0000

FAX: 716-644-0293

TOLL-FREE: 888-224-6911

newera.com

Signed this 7th day of November, 2012, in Milwaukee, Wisconsin

WORLD HEADQUARTERS:

Buffalo, NY - USA

(b)(6),(b)(7)(C)

INTERNATIONAL OFFICES:

London, United Kingdom
Hong Kong
Chicago, Illinois

Manager, Brand Protection US & Latin America
New Era Cap Co., Inc.
PO Box 11768
Milwaukee, WI 53211

Ph: 414-446-4691

Fax: 414-446-4691

E-mail: (b)(6),(b)(7)(C)



FLY YOUR OWN FLAG

Affidavit of (b)(6),(b)(7)(C)

NEW ERA CAP CO., INC.
201 Delaware Ave.
Buffalo, New York
14202

TEL: 716 664 9000
FAX: 716 664 9249
TOLL-FREE: 888 320 6900
www.neweracap.com

WORLD HEADQUARTERS:
Buffalo, NY, USA

INTERNATIONAL OFFICES:
London Tokyo
Paris Hong Kong
Guangzhou Seoul

1. I am employed by New Era Cap Co., Inc. ("New Era") a New York corporation located at 160 Delaware Avenue, Buffalo, New York 14202, in the capacity of Manager, Brand Protection US & Latin America. My duties include prevention of the infringement and counterfeiting of the trademarks and other intellectual property associated with New Era. I have held this position since March of 2010.
2. On November 5, 2012, I received a CD-ROM from Special Agent (b)(6),(b)(7)(C) that contained several images of a black and red NEW ERA NEW YORK YANKEES MAJOR LEAGUE BASEBALL cap, a black and blue NEW ERA TORONTO BLUE JAYS MAJOR LEAGUE BASEBALL cap, and a red, white and blue NEW ERA NEW YORK GIANTS NATIONAL FOOTBALL LEAGUE cap that were purchased from <newerahats2012.com>. The caps prominently feature our NEW ERA trademark, our NE & Design trademark and our NE & FLAG Design trademark. I have examined the images of the caps to determine the caps' authenticity.
3. My examination of the subject images reveals that the trademarks contained on said items have been applied without the knowledge and consent of New Era, and that said items are wholly counterfeit for the following reasons:

(b)(7)(E)



FLY YOUR OWN FLAG™

NEW ERA CAP CO., INC.

150 Delaware Ave
Buffalo, New York
14202

TEL: 716-604-9000

FAX: 716-604-9239

TOLL-FREE: 888-520-6957

newera.com

WORLD HEADQUARTERS:

Buffalo, NY, USA

INTERNATIONAL OFFICES:

London Tokyo
Paris Hong Kong
Singapore Toronto

(b)(7)(E)

Signed this 7th day of November, 2012, in Milwaukee, Wisconsin.

(b)(6),(b)(7)(C)

Manager, Brand Protection US & Latin America
New Era Cap Co., Inc.
PO Box 11768
Milwaukee, WI 53211
Ph: 414-446-(b)(6)
Fax: 414-446-4691
E-mail: (b)(6),(b)(7)(C)



FLY YOUR OWN FLAG™

Affidavit of (b)(6),(b)(7)(C)

NEW ERA CAP CO., INC.

160 Delaware Ave
Buffalo, New York
14202

TEL: 716-604-9000
FAX: 716-604-9299
TOLL-FREE: 888-529-6951
neweracap.com

WORLD HEADQUARTERS:

Buffalo, NY, USA

INTERNATIONAL OFFICES:

London Tokyo
Paris Hong Kong
Cologne Toronto

1. I am employed by New Era Cap Co., Inc. ("New Era") a New York corporation located at 160 Delaware Avenue, Buffalo, New York 14202, in the capacity of Manager, Brand Protection US & Latin America. My duties include prevention of the infringement and counterfeiting of the trademarks and other intellectual property associated with New Era. I have held this position since March of 2010.

2. On November 5, 2012, I received a CD-ROM from Special Agent (b)(6),(b)(7)(C) that contained several images of a NEW ERA NEW YORK GIANTS NATIONAL FOOTBALL LEAGUE cap that was purchased from <neweraonlineshop.com>. The cap prominently features our NEW ERA trademark, our NE & Design trademark and our NE & FLAG Design trademark. I have examined the images of the cap to determine the cap's authenticity.

3. My examination of the subject images reveals that the trademarks contained on said item has been applied without the knowledge and consent of New Era, and that said item is wholly counterfeit for the following reasons:

(b)(7)(E)

Signed this 7th day of November, 2012, in Milwaukee, Wisconsin.

(b)(6),(b)(7)(C) _____

Manager, Brand Protection US & Latin America
New Era Cap Co., Inc.
PO Box 11768
Milwaukee, WI 53211
Ph: 414-44-(b)(6),(b)(7)(C)
Fax: 414-446-4691
E-mail: (b)(6),(b)(7)(C)



FLY YOUR OWN FLAG™

Affidavit of (b)(6),(b)(7)(C)

NEW ERA CAP CO., INC.
110 Delaware Ave
Buffalo, New York
14202
TEL: 716-804-1600
FAX: 716-804-6799
TOLL-FREE: 888-820-1661
newera.com

WORLD HEADQUARTERS:
Buffalo, NY, USA

INTERNATIONAL OFFICES:
London, UK
Paris, France
Hong Kong
Singapore
Toronto

1. I am employed by New Era Cap Co., Inc. ("New Era") a New York corporation located at 160 Delaware Avenue, Buffalo, New York 14202, in the capacity of Manager, Brand Protection US & Latin America. My duties include prevention of the infringement and counterfeiting of the trademarks and other intellectual property associated with New Era. I have held this position since March of 2010.
2. On November 5, 2012, I received a CD-ROM from Special Agent (b)(6),(b)(7)(C) that contained several images of a NEW ERA BOSTON RED SOX MAJOR LEAGUE BASEBALL cap that was purchased from <wholesale-snapbackshats.com>. The cap prominently features our NEW ERA trademark, our NE & Design trademark and our NE & FLAG Design trademark. I have examined the images of the cap to determine the cap's authenticity.
3. My examination of the subject images reveals that the trademarks contained on said item has been applied without the knowledge and consent of New Era, and that said item is wholly counterfeit for the following reasons:

(b)(7)(E)

Signed this 7th day of November, 2012, in Milwaukee, Wisconsin

(b)(6),(b)(7)(C)

Manager, Brand Protection US & Latin America
New Era Cap Co., Inc.
PO Box 11768
Milwaukee, WI 53211
Ph: 414-446-4691
Fax: 414-446-4691
E-mail: (b)(6),(b)(7)(C)



FLY YOUR OWN FLAG

Affidavit of (b)(6),(b)(7)(C)

NEW ERA CAP CO., INC.

160 Delaware Ave.
Buffalo, New York
14202

TEL: 716-834-6000
FAX: 716-834-6099
TOLL-FREE: 888-800-6911
neweracap.com

WORLD HEADQUARTERS:

Buffalo, NY, USA

INTERNATIONAL OFFICES:

London, UK
Hong Kong
Toronto

1. I am employed by New Era Cap Co., Inc. ("New Era") a New York corporation located at 160 Delaware Avenue, Buffalo, New York 14202, in the capacity of Manager, Brand Protection US & Latin America. My duties include prevention of the infringement and counterfeiting of the trademarks and other intellectual property associated with New Era. I have held this position since March of 2010.
2. On November 5, 2012, I received a CD-ROM from Special Agent (b)(6),(b)(7)(C) that contained several images of a NEW ERA BUFFALO BILLS NATIONAL FOOTBALL LEAGUE cap that was purchased from <wholesaletodoor.com>. The cap prominently features our NEW ERA trademark, our NE & Design trademark and our NE & FLAG Design trademark. I have examined the images of the cap to determine the cap's authenticity.
3. My examination of the subject images reveals that the trademarks contained on said item has been applied without the knowledge and consent of New Era, and that said item is wholly counterfeit for the following reasons:

(b)(7)(E)

Signed this 7th day of November, 2012, in Milwaukee, Wisconsin

(b)(6),(b)(7)(C) _____

Manager, Brand Protection US & Latin America
New Era Cap Co., Inc.
PO Box 11768
Milwaukee, WI 53211
Ph: 414-446-4691
Fax: 414-446-4691
E-mail: (b)(6),(b)(7)(C)

AFFIDAVIT OF (b)(6),(b)(7)(C)

STATE OF IDAHO)

COUNTY OF KOOTENAI)

I, (b)(6),(b)(7)(C) am a paralegal for Trademark Management, which is the Administrator for CAPS, (Coalition to Advance the Protection of Sports logos). CAPS presently consists of the following five corporations: Collegiate Licensing Company, LLC; Major League Baseball Properties, Inc.; NBA Properties, Inc.; NFL Properties LLC; and NHL Enterprises, L.P.

My responsibilities include, but are not limited to, the following:

- Identifying counterfeit CAPS members' product;
- Coordinating and centralizing seizure activity with law enforcement, private investigators, in-house and outside counsels;
- Coordinating and centralizing civil enforcement efforts with private investigators and/or in-house counsels.

I am trained in, and have experience in, identifying and differentiating between licensed product bearing genuine trademarks and other proprietary rights, and infringements or unauthorized product. I first received training on the CAPS members' products in 2004. Since that time I have obtained extensive training from the CAPS members and have knowledge of the authorized licensees of all the CAPS members.

On December 16 and 17, 2014, Special Agent (b)(6),(b)(7)
(C) of Immigrations and Customs Enforcement provided me with photos of products to examine for authenticity. Based upon my training and expertise, I identified the items as counterfeit, not licensed or authorized by NFL Properties, LLC. Below please find descriptions of the items I reviewed, the estimated retail values and the factors determining authenticity:

DESCRIPTION

1. One red jersey bearing the trademarks of the San Francisco Forty Niners, LLC, and the National Football League. The estimated retail value for an authentic jersey that is identical or substantially equivalent to this item is approximately \$250.00 USD.



- Lack of authentic hologram
- Inferior quality and craftsmanship of the product
- Improper labeling

2. One red jersey bearing the trademark of the National Football League. The estimated retail value for an authentic jersey that is identical or substantially equivalent to this item is approximately \$250.00 USD.



- Lack of an authentic hologram
- Inferior quality and craftsmanship of the product
- Improper labeling

3. One blue sweatshirt bearing the trademark of the New England Patriots, L.P. The estimated retail value for an authentic sweatshirt that is identical or substantially equivalent to this item is approximately \$70.00 USD.



- Lack of an authentic hologram
- Inferior quality and craftsmanship of the product
- Improper labeling

Affidavit of (b)(6), (b)(7)(C)
 Page 4 of 4

The retail values set herein are based on licensed merchandise, sold through authorized dealers, as of December 19, 2014.

Based on the subsequent trademark registrations, the designs of which are currently being used on products by the owner or its agent, I do hereby declare, under penalty of perjury, that the foregoing statement is true and correct to the best of my knowledge.

Mark	Trademark Registration
<p>NFL Properties, LLC.</p> <ul style="list-style-type: none"> • San Francisco 49ers Word Mark • National Football League Design Mark (25 stars) • New England Patriots Design Mark • National Football League Design Mark (8 stars) 	<ul style="list-style-type: none"> • 3535892 • 2941347 • 2755546 • 3581281

12/23/14
 Date

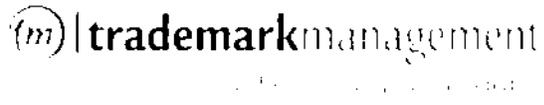
(b)(6), (b)(7)(C)

From: (b)(6),(b)(7)(C)
To: (b)(6),(b)(7)(C)
Cc: (b)(6),(b)(7)(C)
Subject: Affidavit
Date: Tuesday, December 23, 2014 12:43:56 PM
Attachments: [image003.png](#)
[Affidavit.pdf](#)
(b)(7)(E)

Hello (b)(6),(b)(7)(C)

Attached please find my affidavit regarding the NFL items you sent us for review. If you need anything further, please let me know.

Thanks,
(b)(6),(b)(7)(C)



(b)(6),(b)(7)(C) Paralegal
(b) (b)(7)(E)

From: (b)(6),(b)(7)(C)
To:
Subject: Current Jersey
Date: Tuesday, December 16, 2014 2:35:00 PM
Attachments: DSCF0309.jpg
DSCF0310.jpg
DSCF0311.jpg
DSCF0304.jpg
DSCF0307.jpg
DSCF0308.jpg

(b)(6),(b)(7)(C)

Please see the attached photos of a current jersey.

There are five current jerseys: (2) 49ers, (1) Saints, (1) Chiefs and (1) Patriots.

Please let me know if there are any other photos / angles that you would like.

Thank you.

(b)(6),(b)(7)(C)

From: (b)(6),(b)(7)(C)
To:
Subject: FW: NFL merchandise determination request part 6c & final
Date: Tuesday, December 16, 2014 12:25:00 PM
Attachments: (b)(7)(E)

From: (b)(6),(b)(7)(C)
Sent: Tuesday, December 16, 2014 11:20 AM
To: (b)(6),(b)(7)(C)
Subject: RE: NFL merchandise determination request part 6 & final

From: (b)(6),(b)(7)(C)
Sent: Tuesday, December 16, 2014 11:13 AM
To: (b)(6),(b)(7)(C)
Subject: NFL merchandise determination request part 1

(b)(6),(b)(7)(C)

I received your name / email from my co-worker, (b)(6),(b)(7)(C)

I've detained a shipment that originated in China and was declared to contain "antistatic clothing." Inside the shipment were six NFL player jerseys and nine NFL team / player sweatshirts. I respectfully request your assistance in determining the authenticity of the items and providing a value for them.

(b)(7)(E)

I have attached some photos, mostly of the jerseys. Please let me know if you'd like additional photos, etc...

Thank you very much.

Respectfully,

(b)(6),(b)(7)(C)
HSI SAC Honolulu

From: (b)(6),(b)(7)(C)
To:
Subject: FW: NFL merchandise determination request part 1a
Date: Tuesday, December 16, 2014 11:46:00 AM
Attachments: DSCF0292.JPG
DSCF0293.JPG

From: (b)(6),(b)(7)
Sent: Tuesday, December 16, 2014 11:13 AM
To: (b)(6),(b)(7)(C)
Subject: NFL merchandise determination request part 1

(b)(6),(b)

I received your name / email from my co-worker, (b)(6),(b)(7)(C)

I've detained a shipment that originated in China and was declared to contain "antistatic clothing." Inside the shipment were six NFL player jerseys and nine NFL team / player sweatshirts. I respectfully request your assistance in determining the authenticity of the items and providing a value for them.

(b)(7)(E)

I have attached some photos, mostly of the jerseys. Please let me know if you'd like additional photos, etc...

Thank you very much.

Respectfully,
SA (b)(6),(b)(7)(C)
HSI SAC Honolulu

From: (b)(6),(b)(7)(C)
To:
Subject: FW: NFL merchandise determination request part 1b
Date: Tuesday, December 16, 2014 11:46:00 AM
Attachments: (b)(7)(E)

(b)(6),(b)(7)(C)

From: [redacted]
Sent: Tuesday, December 16, 2014 11:13 AM
To: (b)(6),(b)(7)(C)
Subject: NFL merchandise determination request part 1

(b)(6),(b)(7)(C)

I received your name / email from my co-worker, (b)(6),(b)(7)(C)

I've detained a shipment that originated in China and was declared to contain "antistatic clothing." Inside the shipment were six NFL player jerseys and nine NFL team / player sweatshirts. I respectfully request your assistance in determining the authenticity of the items and providing a value for them.

(b)(7)(E)

I have attached some photos, mostly of the jerseys. Please let me know if you'd like additional photos, etc...

Thank you very much.

Respectfully,
SA (b)(6),(b)(7)(C)
HSI SAC Honolulu

From: [REDACTED]
To: [REDACTED]
Cc: [REDACTED]
Subject: FW: Throwback Jersey
Date: Wednesday, December 17, 2014 11:42:50 AM

(b)(6),(b)(7)(C) Hello [REDACTED]

This Throwback jersey is counterfeit.

The sweatshirt is very strange. Were there any hangtags or holograms on that item? Was it in the same shipment as the jerseys?

Thanks [REDACTED] (b)(6),(b)(7)(C)

-----Original Message-----

From: [REDACTED]
Sent: Tuesday, December 16, 2014 4:31 PM
To: [REDACTED]
Subject: Throwback Jersey

[REDACTED] (b)(6),(b)(7)(C)

Attached are photos from a "throwback" jersey.

Please let me know if there are any other photos you would like.

Thank you.

[REDACTED]

From: (b)(6),(b)(7)(C)
To:
Subject: NFLSweatshirt pics
Date: Tuesday, December 16, 2014 2:26:00 PM
Attachments: DSCF0295.jpg
DSCF0296.jpg
DSCF0297.jpg
DSCF0293.jpg

(b)(6),(b)(7)(C) [Redacted]

Due to the time difference, I decided to send just in case.

Nine sweatshirts total: (3) Patriots, (2) Chargers, (1) Dolphins, (1) Seahawks, (1) Green Bay and (1) Dallas.

Please let me know if there are any other pictures you'd like.

Thank you.

Respectfully,

(b)(6),(b)(7)(C) [Redacted]

From: (b)(6),(b)(7)(C)
To: (b)(6),(b)(7)(C)
Cc:
Subject: RE: Current Jersey Hangtags
Date: Friday, December 19, 2014 6:18:12 AM

Hello (b)(6),

Based on the photos you provided, I can confirm that the 49ers current jersey is also counterfeit.

Thanks.

(b)(6),(b)(7)

-----Original Message-----

From: (b)(6),(b)(7)(C)
Sent: Wednesday, December 17, 2014 2:58 PM
To: (b)(6),(b)(7)(C)
Subject: Current Jersey Hangtags

(b)(6),(b)(7)(C)

I was able to finish the photos before returning to court.

Please see the attached photos from the Reid jersey hangtag (DSCF0329-0333).

Two other jerseys - (b)(7)(E)

(b)(7)(E)

The Saints jersey (b)(7)(E)

(b)(7)(E)

Thank you,

(b)(6),(b)(7)(C)

From: [redacted] (b)(6),(b)(7)(C)
To:
Subject: RE: Current Jersey
Date: Wednesday, December 17, 2014 7:12:25 AM

Hello [redacted] (b)(6),(b)(7)(C)

[redacted] (b)(7)(E)

Thanks,
[redacted] (b)(6),(b)(7)(C)

-----Original Message-----
From: [redacted] (b)(7)(E)
Sent: Tuesday, December 16, 2014 4:36 PM
To: [redacted] (b)(6),(b)(7)(C)
Subject: Current Jersey

[redacted] (b)(6),(b)(7)(C)

Please see the attached photos of a current jersey.

There are five current jerseys: (2) 49ers, (1) Saints, (1) Chiefs and (1) Patriots.

Please let me know if there are any other photos / angles that you would like.

Thank you.
[redacted] (b)(6),(b)(7)(C)

From: (b)(6),(b)(7)(C)
To: (b)(6),(b)(7)(C)
Cc:
Subject: RE: NFL merchandise determination request part 6c & final
Date: Tuesday, December 16, 2014 12:45:40 PM

Hi (b)(6),(b)(7)(C)

It looks like 3 of the photos came through, but they are for different jerseys. Would you be able to send me a set of photos for 1 jersey and a set of photos for 1 sweatshirt? I would need to see pictures of the front, back, neck labels, any other sewn-in labels and all sides of all hangtags.

Thanks,

(b)(6),(b)(7)(C)

From: (b)(6),(b)(7)(C)
Sent: Tuesday, December 16, 2014 2:34 PM
To: (b)(6),(b)(7)(C)
Subject: FW: NFL merchandise determination request part 6c & final

From: (b)(6),(b)(7)(C)
Sent: Tuesday, December 16, 2014 11:20 AM
To: (b)(6),(b)(7)(C)
Subject: RE: NFL merchandise determination request part 6 & final

From: (b)(6),(b)(7)(C)
Sent: Tuesday, December 16, 2014 11:13 AM
To: (b)(6),(b)(7)(C)
Subject: NFL merchandise determination request part 1

(b)(6),(b)(7)(C)

I received your name / email from my co-worker (b)(6),(b)(7)(C)

I've detained a shipment that originated in China and was declared to contain "antistatic clothing." Inside the shipment were six NFL player jerseys and nine NFL team / player sweatshirts. I respectfully request your assistance in determining the authenticity of the items and providing a value for them.

The jerseys have NFL, Nike and team logos. The sweatshirts don't have NFL logos on them but have team logos, players names and numbers and a "NFL Players" similar to the NFL Players Assn logo.

I have attached some photos, mostly of the jerseys. Please let me know if you'd like additional photos, etc...

Thank you very much.

Respectfully,

SA (b)(6),(b)(7)(C)

HSI SAC Honolulu

(b)(6),(b)(7)(C)

From: [redacted]
To: [redacted]
Subject: RE: NFL merchandise determination request part 6c & final
Date: Tuesday, December 16, 2014 12:50:49 PM

Hi [redacted] (b)(6),(b)(7)(C)

If you are ok with waiting, I am happy to wait and see if they trickle through this afternoon. I am heading out in a few minutes for the day.

How soon do you need a determination?

Thanks,

[redacted] (b)(6),(b)(7)(C)

From: [redacted] (b)(6),(b)(7)(C)
Sent: Tuesday, December 16, 2014 2:49 PM
To: [redacted] (b)(6),(b)(7)(C)
Subject: RE: NFL merchandise determination request part 6c & final

[redacted] (b)(6),(b)(7)(C)

I sent about 20 emails – I’m sorry – and I tried to group them together. I took photos of four different jerseys as they had different labeling. Would you like me to resend or wait and see if any of the other pictures come through?

Thank you for your time & patience.

Respectfully,

[redacted] (b)(6),(b)(7)(C)

From: [redacted] (b)(6),(b)(7)(C)
Sent: Tuesday, December 16, 2014 12:46 PM
To: [redacted] (b)(6),(b)(7)(C)
Cc: [redacted]
Subject: RE: NFL merchandise determination request part 6c & final

Hi [redacted] (b)(6),(b)(7)(C)

It looks like 3 of the photos came through, but they are for different jerseys. Would you be able to send me a set of photos for 1 jersey and a set of photos for 1 sweatshirt? I would need to see pictures of the front, back, neck labels, any other sewn-in labels and all sides of all hangtags.

Thanks,

[redacted] (b)(6),(b)(7)(C)

From: (b)(6),(b)(7)(C)
Sent: Tuesday, December 16, 2014 2:34 PM
To: (b)(6),(b)(7)(C)
Subject: FW: NFL merchandise determination request part 6c & final

From: (b)(6),(b)(7)
Sent: Tuesday, December 16, 2014 11:20 AM
To: (b)(6),(b)(7)(C)
Subject: RE: NFL merchandise determination request part 6 & final

From: (b)(6),(b)(7)
Sent: Tuesday, December 16, 2014 11:13 AM
To: (b)(6),(b)(7)(C)
Subject: NFL merchandise determination request part 1

(b)(6),(b)(7)(C)

I received your name / email from my co-worker (b)(6),(b)(7)(C)

I've detained a shipment that originated in China and was declared to contain "antistatic clothing." Inside the shipment were six NFL player jerseys and nine NFL team / player sweatshirts. I respectfully request your assistance in determining the authenticity of the items and providing a value for them.

The jerseys have NFL, Nike and team logos. The sweatshirts don't have NFL logos on them but have team logos, players names and numbers and a "NFL Players" similar to the NFL Players Assn logo.

I have attached some photos, mostly of the jerseys. Please let me know if you'd like additional photos, etc...

Thank you very much.

Respectfully,

(b)(6),(b)(7)(C)

(b)(6),(b)(7)(C)

From: [redacted]
To: [redacted]
Subject: RE: NFL merchandise determination request part 1a
Date: Tuesday, December 16, 2014 11:44:00 AM

[redacted]

Okay then, all the other emails will be kicked back. I'll resend them <10mb.

Thank you.

[redacted]

From: [redacted]
Sent: Tuesday, December 16, 2014 11:43 AM
To: [redacted]
Subject: RE: NFL merchandise determination request part 1a

Hello [redacted]

I'm so glad you sent the below email, because I did not receive the first message with the photos attached. Can you please resend them? Please note that if the message is over 10MB, our server will kick it back.

Thank you,

[redacted]

From: [redacted]
Sent: Tuesday, December 16, 2014 1:41 PM
To: [redacted]
Subject: RE: NFL merchandise determination request part 1a

[redacted]

[redacted]

Thank you.

Respectfully,

SA [redacted]

HSI SAC Honolulu

From: [redacted]
Sent: Tuesday, December 16, 2014 11:13 AM
To: [redacted]
Subject: NFL merchandise determination request part 1

[redacted]

I received your name / email from my co-worker, (b)(6),(b)(7)(C)

I've detained a shipment that originated in China and was declared to contain "antistatic clothing." Inside the shipment were six NFL player jerseys and nine NFL team / player sweatshirts. I respectfully request your assistance in determining the authenticity of the items and providing a value for them.

The jerseys have NFL, Nike and team logos. The sweatshirts don't have NFL logos on them but have team logos, players names and numbers and a "NFL Players" similar to the NFL Players Assn logo.

I have attached some photos, mostly of the jerseys. Please let me know if you'd like additional photos, etc...

Thank you very much.

Respectfully,
SA (b)(6),(b)(7)(C)
HSI SAC Honolulu

From: (b)(6),(b)(7)(C)
To:
Cc:
Subject: RE: Regarding the sweatshirts
Date: Friday, December 19, 2014 9:07:37 AM

Hello (b)(6),(b)(7)(C)

I believe the sweatshirt is counterfeit, as well. We will be putting together an affidavit for the throwback 49ers jersey, the current 49ers jersey and the Patriots sweatshirt. Will these three items be sufficient for your purposes? The reason I ask is that I do not believe we have a full set of photos for the Chiefs or Saints items, which I would need to have before I could include them in an affidavit.

Thanks,

(b)(6),(b)(7)(C)

From: (b)(6),(b)(7)(C)
Sent: Thursday, December 18, 2014 4:24 PM
To: (b)(6),(b)(7)(C)
Subject: Regarding the sweatshirts

(b)(6),(b)(7)(C)

(b)(7)(E)

Thank you.

Respectfully,
SA (b)(6),(b)(7)(C)
HSI SAC Honolulu

From: (b)(6),(b)(7)(C)
To:
Cc:
Subject: RE: Throwback Jersey
Date: Wednesday, December 17, 2014 12:49:17 PM

Thanks, Amy. An authentic throwback jersey similar to this one has an MSRP of \$250.00. Once we have a determination on all the items, I'll get an affidavit for you. The affidavit will also state the MSRP.

-----Original Message-----

From: (b)(6),(b)(7)(C)
Sent: Wednesday, December 17, 2014 2:42 PM
To: (b)(6),(b)(7)(C)
Cc:
Subject: RE: Throwback Jersey

(b)(6),(b)(7)(C)

Thank you. Would you be able to provide a value for the throwback?

As for the sweatshirt, there were no hangtags or holograms. They were in the same shipment.

I've been in court all morning and will be heading back (hopefully only for the beginning) in the afternoon but will get the current jersey hangtag photos after that.

Thank you.

Respectfully,

(b)(6),(b)(7)(C)

-----Original Message-----

From: (b)(6),(b)(7)(C)
Sent: Wednesday, December 17, 2014 11:43 AM
To: (b)(6),(b)(7)(C)
Cc:
Subject: FW: Throwback Jersey

Hello (b)(6),(b)(7)(C)

This Throwback jersey is counterfeit.

The sweatshirt is very strange. (b)(7)(E) Was it in the same shipment as the jerseys?

Thanks,

(b)(6),(b)(7)(C)

-----Original Message-----

From: (b)(6),(b)(7)(C)
Sent: Tuesday, December 16, 2014 4:31 PM
To: (b)(6),(b)(7)(C)
Subject: Throwback Jersey

(b)(6),(b)(7)(C)

Attached are photos from a "throwback" jersey.

Please let me know if there are any other photos you would like.

Thank you.

(b)(6),(b)(7)(C)

From: (b)(6),(b)(7)(C)
To: (b)(6),(b)(7)(C)
Subject: (b)(7)(E)
Date: Tuesday, December 16, 2014 2:31:00 PM
Attachments: DSCF0301.jpg
DSCF0298.jpg
DSCF0299.jpg
DSCF0300.jpg

(b)(6),(b)(7)(C)

Attached are photos from a "throwback" jersey.

Please let me know if there are any other photos you would like.

(b)(6),(b)(7)
(C)

Exhibit 10



GEORGETOWN LAW
INSTITUTE FOR PUBLIC REPRESENTATION

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October 5, 2015

By email: peter.maier2@usdoj.gov

Peter R. Maier
Special Assistant United States Attorney
555 4th Street NW
Washington, DC 20530

Re: *Tushnet v. U.S. Immigration and Customs Enforcement*, No. 15-00907 (CRC)

Dear Peter:

As you know, the Initial Scheduling Conference in the referenced case has been rescheduled for October 14, 2015, and the parties have been directed to submit their Joint Report and proposed Scheduling Order on or before October 7, 2015. We are writing to you today to confirm the status of ICE's response to each part of our client's FOIA request, and to continue our discussion regarding the scope and adequacy of ICE's search for responsive records. We hope that this discussion will allow us to determine an appropriate schedule to propose to the court.

On September 30, 2015, ICE produced the first set of documents responsive to our client's FOIA request. The release consists of 523 pages. Pages 1-511 appear to be responsive to Request No. 1, pages 512-514 and 517-523 appear to be responsive to Request No. 5, and pages 515-516 appear to be responsive to Request No. 6. The letter that accompanied the first release did not state whether the produced pages are all of the documents that ICE has located that are responsive to Request Nos. 1, 5, and 6, or when we might expect to receive the next release. Although our client has not yet had time to review the documents in detail, we continue to have concerns about the adequacy of ICE's search for responsive records and whether the requests

* DC bar membership pending. Practice supervised by members of the DC bar.

** Admitted to bars of Washington State, the United States Court of Appeals for the District of Columbia Circuit, and the United States District Court of the District of Columbia.

have been properly interpreted, as set forth in detail below. As you know, an agency “must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files,” *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985), and an agency must use “methods which can be reasonably expected to produce the information requested,” *Oglesby v. U.S. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Request No. 1:

Request No. 1 seeks “All images and descriptions of clothing seized or impounded by ICE as counterfeit from 2012 to the date of this request.” The first 511 pages released on September 30, 2015, appear to be responsive to this request. The released document is a summary of ICE enforcement data showing the quantity of clothing items seized as counterfeit during the relevant time period, with a short description of the seized property. ICE has not indicated whether it has completed its search for records responsive to Request No. 1, or whether we should expect further releases of responsive documents.

To the extent ICE contends that the 511 pages produced is the entirety of its records responsive to Request No. 1, we are concerned that the search was inadequate because the summary produced contains minimal description and no images of the seized clothing. We suspect that the summary could not have been compiled without the use of other records further detailing the seizure of the items—records most likely created at the time of the seizure.

To illustrate this issue, on page 9 of the released documents, the summary indicates that in October of 2012, ICE seized 434 “COUNTERFEIT SHIRTS.” No further description of the shirts is listed. Similarly, on page 123, the summary indicates that ICE seized 126 “PATCHES,” but no further description is provided. Also on page 123, under the property description of a seized item, the summary states “NFL T-SHIRTS (SUSPECTED COUNTERFEIT).” We question how ICE could have seized these clothing items without making any other notes or creating any other records describing its rationale for determining that the items are counterfeit. Moreover, to make any prosecutions for crimes relating to these counterfeit items, we would expect the agents making the seizures to have created more meaningful documentation, such as incident reports, seizure notices, or photographs of the seized items.

As you know, one purpose of Request No. 1 is to determine whether ICE has seized as counterfeit items of clothing on the basis that they disparage, parody, distort, or tarnish a trademark. Such seizures would be consistent with the statement attributed to ICE spokesperson Daniel Modricker at the news conference described in parts five and six of the request. The information in the released summary is insufficient for this purpose, but the underlying documents within the scope of the request would likely reveal more information about the basis for ICE’s determination that an item is counterfeit. We understand that the files underlying the summary may be voluminous. If so, we are willing to work with ICE to refine the request to limit the volume of materials that must be produced.

Additionally, the first 511 pages of documents produced cite FOIA Exemption (b)(7)(E) as the basis for the redaction of material near the bottom of each page. We request that ICE

provide us with a Vaughn Index or similar description of the redacted information so that we can determine whether we will challenge the withholding of the redacted information.

Request No. 2:

Request No. 2 seeks “All records, guidelines, policies, procedures, or training documents that describe how ICE:

- a. determines how similar one mark must be to another to deem an item bearing a mark counterfeit;
- b. distinguishes between items that are merely infringing items and items that are counterfeit;
- c. uses or considers circuit-specific case law in determining whether an item is counterfeit or infringing;
- d. considers the legal doctrine of fair use in determining whether an item is counterfeit or infringing;
- e. considers trademark-infringement defenses other than fair use in determining whether an item is counterfeit or infringing.”

ICE has not yet produced any records responsive to Request No. 2. We were originally told that ICE had located one responsive manual that had not yet been processed but which likely contained material subject to withholding under FOIA Exemptions 3 and 7(e). We were later told that ICE had determined that it had no records responsive to Request No. 2. Most recently, we were told that ICE does possess industry guides provided by trademark rights holders, but that they might be subject to FOIA Exemption 4, and the agency might need to notify the submitters and give them an opportunity to provide input on whether Exemption 4 is applicable.

We continue to believe that ICE is likely to have records other than industry guides that are responsive to Request No. 2. Because ICE seizes items as counterfeit, it is reasonable to believe that ICE agents receive some type of training or guidance to help them determine whether an item should be seized as counterfeit and that such training goes beyond materials created by trademark rights holders. Any records, guidelines, policies, procedures, or training documents that instruct agents on means for determining whether an item is counterfeit would, at a minimum, at least implicitly have considered whether a particular mark is similar enough to another to deem the item counterfeit, even if that exact language is not used.

For example, ICE’s October 31, 2011 news release entitled “ICE announces results of ‘Operation Strike Out’” states “U.S. Immigration and Customs Enforcement’s (ICE) Homeland Security Investigations (HSI) and the National Intellectual Property Rights Coordination Center (IPR Center) have announced the results of ‘Operation Strike Out,’” in which “ICE HIS special agents operated . . . to identify stores and vendors selling counterfeit trademarked items . . . [and these agents] have seized 5,347 items of phony World Series-related memorabilia.” The agents must have used some method to identify the items sold by these vendors as counterfeit trademarked items. The records setting forth those methods would likely be responsive to Request No. 2.

Request No. 3:

Request No. 3 seeks all records that use the words “disparagement,” “parody,” “distortion,” or “tarnishment,” or grammatical variants thereof, in connection with trademark rights holders’ requests or consultations with trademark rights holders. We were initially told that the scope of this request may have been too broad and that we might need to narrow the request in order to reduce the volume of responsive documents to a manageable level. Subsequently, we were told that ICE had determined that it had no responsive records at all.

ICE has indicated that trademark rights holders provided ICE with manuals used to determine whether merchandise is counterfeit. It is reasonable to believe that some of those manuals or some of ICE’s consultations with trademark rights holders may have used the words listed in Request No. 3. Thus, unless ICE can provide us with a declaration explaining how it searched for records responsive to Request No. 3 and found none, we will likely need to challenge the adequacy of the search.

Request No. 4:

Request No. 4 seeks “All records indicating that an item was seized by ICE, in whole or in part, because the item disparaged, parodied, distorted, or tarnished a trademark.” We have been told that ICE has not found any records responsive to Request No. 4. As with Request No. 3, we question whether ICE has conducted an adequate search for responsive records. For example, our information indicates that ICE generates seizure notices to inform individuals with an interest in seized items of their ability to contest the forfeiture. We would expect that a search of such seizure notices, as well as internal records detailing the justification for such seizures, might identify records responsive to Request No. 4. Thus, unless ICE can provide us with a declaration explaining how it searched for records responsive to Request No. 4 and found none, we will likely need to challenge the adequacy of the search.

Request No. 5:

Request No. 5 seeks any materials used by ICE in connection with the ICE news conference on counterfeit clothing held in January 2015, which is described in a Boston Globe article. Of the documents ICE produced on September 30, 2015, ten pages of documents were responsive to Request No. 5. The documents contain an announcement regarding the January 29, 2015 news conference and the briefing book prepared by Daniel Modricker in preparation for that news conference. At this time, we have no specific concerns regarding ICE’s production of documents pertaining to Request No. 5.

Request No. 6:

Request No. 6 seeks “All records referencing Daniel Modricker’s paraphrased statement at the news conference described in request number 5 that ‘[t]he profane debasing of a mascot – and really anything that denigrates a team – is guaranteed to be contraband,’ including any records reflecting his exact words.” Of the documents ICE produced on September 30, 2015, two pages of documents were responsive to Request No. 6. These documents contain an email chain

between Eugene Volokh, Khaalid Walls, and a Public Affairs Officer whose name is redacted. The email chain indicates that Mr. Volokh contacted ICE in an effort to ascertain the exact wording of Mr. Modricker's statement, but no records have been produced that show the results of the inquiry, or whether anyone else inquired about Mr. Modricker's statement. The email indicates the Public Affairs Officer's willingness to speak with Mr. Volokh by phone, but no further records have been produced to indicate whether a telephone conversation ever took place. Given that Mr. Modricker's paraphrased statement in the Boston Globe article generated significant interest by legal scholars and others interested in intellectual property rights and free speech, including inquiries to ICE for clarification of Mr. Modricker's remarks, we would expect the agency to have records or notes beyond the Volokh email chain. Thus, unless ICE can provide us with a declaration explaining how it searched for records responsive to Request No. 6 and located only two pages of responsive records, we will likely need to challenge the adequacy of the search.

* * *

Thank you for your attention to this matter. We look forward to hearing from you with respect to ICE's position on each of the issues discussed above.

Sincerely,

s/ Michael T. Kirkpatrick

Michael T. Kirkpatrick

Exhibit 11

U.S. Department of Justice

Vincent H. Cohen, Jr.
Acting United States Attorney

District of Columbia

*Judiciary Center
555 Fourth St., N.W.
Washington, D.C. 20530*

October 15, 2015

Michael T. Kirkpatrick
Georgetown Law Institute for Public Representation
600 New Jersey Avenue N.W. Suite 312
Washington, D.C. 20001-2075

Re: Tushnet v. U.S. Immigration and Customs Enforcement
(D.D.C. No. 15-907CRC)

Dear Michael:

This letter memorializes our October 6, 2015 telephone discussions about this case. Where appropriate I have added supplementary information that is relevant to the matters presented in your October 5, 2015 letter.

Request #1

The September 30 production was only a partial, interim production. ICE expects to produce additional documents and/or a supplementary response on or about November 12, 2015. The search conducted by the agency sought seized items of counterfeit clothing. The database searched does not permit searches for photographs. Each line on the table that the agency produced reflects an individual item seized and the quantity. Multiple items could belong to a single case. For example, a seizure of thirty counterfeit items, e.g., hats, shirts, and jerseys, could be aggregated under one associated case number. Thus, the thousands of items seized reflected hundreds of underlying cases if not more. Additionally, not all seizures listed on the table have corresponding photographs. To the extent the FOIA request would necessitate an agency search of each underlying case for

responsive records, including a search for photographs in each case, the agency believes that the request is overly broad and would be unreasonably burdensome.

Request #2

The agency is currently reviewing records to locate guidelines for sports apparel submitted by private industry entities to assist agency determinations of whether items are counterfeit. We estimate that the number of responsive pages totals less than fifty pages. Because these submissions may be subject to Exemption 4, the agency is providing appropriate notice to the submitters. These records may also be subject to Exemption 7(E) because their release would reveal law enforcement techniques and procedures. Based on our discussions, we await a response from Plaintiff concerning whether she is willing to narrow this request to documents that pertain to sports apparel. That limitation would be subject to reconsideration after Plaintiff has reviewed the records pertaining to sports apparel in conjunction with agency claims under Exemptions 4 and 7(E). ICE expects to produce additional documents and/ or a supplementary response on or about November 11.

To date, the agency has not located guides, policies etc., that relate solely to trademark infringement responsive to item 2.b. The absence of such records reflects the lack of agency authority to enforce trademark infringement on behalf of trademark holders. Likewise, the agency has not located guides, policies, procedures, etc. responsive to items 2.c., 2.d., and 2.e. The agency has not searched within the contents of any underlying case for the existence of case specific internal correspondence discussing the terms in item 2. The agency considers a search of all seizure cases for records responsive to item 2 as overly broad and believes that a search of all seizure case files for these records would be unreasonably burdensome.

Request #3

Guides responsive to item 2 may also be responsive to item 3. Although there may have been consultations with trademark holders in connection with a given seizure, the agency lacks a means to identify such cases. Such an inquiry would be unreasonably burdensome because it would entail a review of associated narratives to determine whether consultations occurred and, if so, to identify the word or search terms that would reveal their existence. As discussed in response to item 1, there are thousands of items with associated cases, and the agency lacks any means to categorize these cases by consultation with trademark holder without

a review of each case file. The agency views such an inquiry as overly broad and believes that such a search would be unreasonably burdensome.

Request #4

The agency's database does not permit use of a code or other search term to indicate whether an item was seized because it disparaged, parodied, distorted, or tarnished a trademark. The agency has no authority to seize items based on these criteria. The agency also views such an inquiry into each seizure to be overly burdensome.

Request # 5

The agency produced responsive items in its September 30 production. Based on your October 6 letter, the agency believes that Plaintiff is satisfied with its response.

Request #6

The only responsive records located to date are 2 pages produced on September 30. This request seeks records related to a quotation from an article in the Boston Globe. The quotation appears to be a paraphrase, not a direct quotation. The excerpt may reflect a mistaken view of applicable law. Without a direct quotation, however, it is hard to ascertain the legal conclusion that the articles ascribes to Daniel Modricker. In addition to correspondence from agency counsel to Ms. Tushnet, the agency is also aware of other records, including emails from Ms. Tushnet to Mr. Modricker, which the agency forwarded to agency counsel. The agency has not deemed that correspondence responsive to this item. If it did, Exemption 5 would apply to items covered by the attorney client privilege.

If you have a different recollection of any of these matters, please let me know. I appreciate your cooperation on this matter to date.

Sincerely yours,

/s/

Peter R. Maier
Special Assistant United States Attorney

Exhibit 12



GEORGETOWN LAW
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October 23, 2015

By email: peter.maier2@usdoj.gov

Peter R. Maier
Special Assistant United States Attorney
555 4th Street NW
Washington, DC 20530

Re: *Tushnet v. U.S. Immigration and Customs Enforcement*, No. 15-00907 (CRC)

Dear Peter:

Further to our telephone discussions and your letter of October 15, 2015, we set forth below our position with respect to each of the Requests. As you will see, we are willing to significantly narrow the scope of some of our requests to minimize the burden on the agency.

Request No 1:

We understand that, to respond fully to Request No. 1, ICE would need to search the case files underlying the seizures identified in the summary table that ICE has produced (Pages 1-511) to locate any photographs or descriptions of the seized items, and that ICE views a search of all the underlying case files to be “unreasonably burdensome.”

Where an agency claims that a search would be unreasonable, the burden is on the agency to “provide sufficient explanation as to why such a search would be unreasonably burdensome.” *See Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 892 (D.C. Cir. 1995). Your statements that there are “hundreds of underlying cases” does not in itself demonstrate that a search of these cases would be unreasonably burdensome. *See Public Citizen, Inc. v. Dept. of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003) (finding a search not to be unreasonably burdensome even when the

agency submitted an affidavit stating that a manual search of 25,000 pages would be “costly and take many hours to complete” and would require the interstate transfer of files or staff).

Nevertheless, our client has agreed to significantly narrow the scope of her request to minimize the burden on the agency. Rather than requesting “[a]ll images and descriptions of clothing seized or impounded by ICE as counterfeit from 2012 to the date of th[e] request,” we are now willing to accept all images and descriptions of clothing seized or impounded by ICE as counterfeit **during the months of January and December of 2012-2014, and January 2015, and all images and descriptions that correspond to the following entries on the summary table produced on September 30, 2015:**

- HAND PAINTED T SHIRTS BEARING TRADEMARK (pg. 14)
- BEER PONG HAT (pg. 67)
- MARIJUANA HAT (pg. 72)
- STEALERS NFL JERSEYS (BULK) (pg. 245)
- STEALERS NFL JERSEYS (SAMPLE) (pg. 245)
- SHIRTS-UN MARKED (pg. 266)
- BOOGER KIDS HATS (pg. 269)
- GENERIC DRESSES (pg. 283)
- GENERIC HATS (pg. 283)
- HATS (NATIVE PRIDE) (pg. 309)
- TEE SHIRTS (HOMELAND SECURITY) (pg. 312)
- COUNTERFEIT UNKNOWN BRAND SKIRTS (pg. 317)
- COUNTERFEIT UNKNOWN NAME JERSEYS (pg. 317)
- COUNTERFEIT US MILITARY HATS (pg. 328)
- HOMELAND SECURITY HOODIES (pg. 353)
- NBA SMACK T-SHIRT (pg. 355)
- SWEATSHIRTS (BROWNIE ELF/BROWNS DOG) (pg. 359)
- SWEATSHIRTS BROWNS AND STEELERS (pg. 359)
- T-SHIRT “ELF HANGOVER” (pg. 359)
- T-SHIRT (COUNTERFEIT – USC V/S CLEMSON) (pg. 359)
- T-SHIRTS “BALTIMORE SUCKS” (pg. 359)
- T-SHIRTS FEAR THE ELF (pg. 360)
- NO NAME HATS (pg. 418)
- SHAMROCK HOODIES (pg. 501)
- SHAMROCK SS T-SHIRT (pg. 501)

This change reflects a narrowing of over 80% from the original request.

We wish to emphasize that although our discussions regarding Request No. 1 have focused on *images* of the seized items, our request also seeks all *descriptions* of the items. Thus, any records containing written descriptions of the seized items are responsive to this request, regardless of whether any photographs exist.

Request No. 2:

With regard to guidelines submitted by industry to assist agency determinations of whether items are counterfeit, our client is willing to narrow the scope of the request to **documents that pertain to sports apparel.**

In your letter of October 15, you state that the agency has not located any records responsive to items 2.b., 2.c., 2.d., or 2.e., the agency has not searched within the contents of any underlying seizure case for records responsive to Request No. 2, and the agency considers a search of all seizure case files for records responsive to Request No. 2 to be unreasonably burdensome.

We agree that a search of all seizure case files for records responsive to Request No. 2 is unnecessary. Request No. 2 seeks ICE guidelines, policies, procedures, and training documents reflecting general operating procedures for all ICE investigations, not merely those used in individual cases. However, the concerns raised in our letter of October 5, 2015, have not been addressed. As we stated before, “[b]ecause ICE seizes items as counterfeit, it is reasonable to believe that ICE agents receive some type of training or guidance to help them determine whether an item should be seized as counterfeit and that such training goes beyond materials created by trademark rights holders.” We find it hard to believe that ICE sends its agents into the field to seize items as counterfeit without providing those agents with any instructions, guidelines, or training to help them determine whether an item is counterfeit, especially given the legal complexities of making such determinations and the fact that the determination may vary depending on the circuit in which the seizure is made. We find it hard to believe that the United States government has delegated to private industry *all* responsibility for instructing ICE agents in the performance of this aspect of their official duties.

In your letter of October 15, you state that the agency has not located any records responsive to Request No. 2.b., and you state that the absence of such records “reflects the lack of agency authority to enforce trademark infringement on behalf of trademark holders.” We question whether the agency has conducted an adequate search for responsive records, because if the agency has no authority to seize items that are infringing, but does have authority to seize items that are counterfeit, it stands to reason that the agency would have materials to guide its agents in distinguishing between the two. We believe responsive records must exist if ICE agents in the field distinguish between items that are merely infringing and those that are counterfeit.

Indeed, in correspondence with Ms. Tushnet, ICE attorney Joseph Liberta stated:

ICE HSI considers a multitude of factors when determining whether merchandise is subject to seizure and forfeiture and whether an individual has engaged in conduct which constitutes federal copyright or trademark infringement. ICE HSI Special Agents rely upon their knowledge, training, and experience, evidence collected in the context of an investigation, as well as with consultation with right holders and whether, in the right holder’s opinion, the good or copy of the work infringes upon their intellectual property rights. No single factor is dispositive and each investigation depends on specific facts and evidence.

Mr. Liberta further stated:

As part of their investigatory process ICE HSI Special Agents will consider the scope of the protected intellectual property as registered with USPTO or the Copyright Office, information from right holders regarding what constitutes an unauthorized use of their intellectual property, and information gathered as part of an investigation. No single factor is dispositive and will be considered on a case-by-case basis. ICE HSI Special Agents consult with ICE's Office of the Principal Legal Advisor and U.S. Department of Justice attorneys to determine whether probable cause exists in support of a seizure and whether there are defenses under the Copyright Act and Lanham Act, such as potential fair use provisions and federal circuit-specific case law, which influence whether an enforcement effort is pursued by the government.

Given these statements from Mr. Liberta, we question whether ICE has conducted an adequate search for materials responsive to Request No. 2, if all it has found are industry guides.

Request No. 3:

In response to the agency's concern that a search of all seizure case files for records responsive to Request No. 3 would be unreasonably burdensome, our client has agreed to narrow the scope of this request **to exclude a search of any seizure case files that are not being reviewed in response to Request No. 1.** This change reflects a narrowing of over 80% from the original request.

We are concerned, however, by statements in your letter of October 15, 2015, indicating that the agency may have interpreted Request No. 3 as seeking records limited to consultations with trademark rights holders "in connection with a given seizure." Request No. 3 is not so limited. Rather, the agency should search for communications with trademark rights holders that include any of the specified terms, even if such communications were not made in connection with a given seizure.

Finally, we are confused by the statement in your letter that it "would be unreasonably burdensome . . . to identify the word or search terms that would reveal the[] existence" of responsive records. We have already identified the search terms in our original request and in our letter of March 27, 2015, so identifying search terms should impose no burden on the agency, and certainly not an "unreasonable" one.

Request No. 4:

In your letter of October 15, you state that "the agency's database does not permit use of a code or other search term to indicate whether an item was seized because it disparaged, parodied, distorted, or tarnished a trademark," but you do not identify what "database" the agency is unable to search with appropriate search terms. You also indicate that the agency views a search of each seizure case file for the terms "disparage", "parody", "distort", or "tarnish", as well as their grammatical equivalents, to be "overly burdensome." To the extent the agency

believes that any records responsive to Request No. 4 would most likely be in the underlying case files, we are willing to narrow the scope of this request **to exclude a search of any seizure case files that are not being reviewed in response to Request No. 1.** This change reflects a narrowing of over 80% from the original request.

Request No. 6:

In your letter of October 15, you stated that the agency is aware of “correspondence from agency counsel to Ms. Tushnet,” and “emails from Ms. Tushnet to Mr. Modricker, which the agency forwarded to agency counsel,” but “the agency has not deemed that correspondence responsive to this item.” We believe that such records are responsive to Request No. 6, because they either reference Mr. Modricker’s paraphrased statement or a part of a chain of communications that began with a reference to the paraphrased statement. Thus, we request that the agency search for and produce such records. If the agency withholds portions of related internal communications by invoking Exemption 5, we would still expect to receive the non-exempt portions, and ultimately a Vaughn index describing the redacted material. We are also aware of a Twitter exchange between Ms. Tushnet and Mr. Modricker on January 31, 2015, and February 1, 2015, which is responsive to Request No. 6, and we request that the agency search for and produce such records. We are also aware of communications between Ms. Tushnet and ICE attorney Joseph Liberta that are responsive to Request No. 6, and we request that the agency search for and produce such records.

Similarly, in our letter of October 5, we referenced the email chain between Eugene Volokh, Khaalid Walls, and a Public Affairs Officer whose name is redacted. The email chain is incomplete. We are aware that Mr. Volokh spoke to Bryan D. Cox (the Public Affairs Officer whose name is redacted) and that the conversation resulted in further email communication between Mr. Volokh and Mr. Cox. We consider those communications responsive to Request No. 6 because they are part of an email chain that began with a reference to the paraphrased statement of Mr. Modricker, and Mr. Cox followed up with Mr. Volokh because Mr. Modricker was traveling at the time of the inquiry. We request that the agency search for and produce the communications between Mr. Cox and Mr. Volokh, and any similar records that reference Mr. Modricker’s paraphrased statement.

* * *

Thank you for your attention to this matter. We look forward to hearing from you.

Sincerely,

s/ Michael T. Kirkpatrick

Michael T. Kirkpatrick

Exhibit 13

U.S. Department of Justice

Channing D. Phillips
United States Attorney

District of Columbia

*Judiciary Center
555 Fourth St., N.W.
Washington, D.C. 20530*

BY E-MAIL

November 13, 2015

Michael T. Kirkpatrick
Georgetown Law Institute for Public Representation
600 New Jersey Avenue N.W. Suite 312
Washington, D.C. 20001-2075

Re: Tushnet v. U.S. Immigration and Customs Enforcement (D.D.C. No. 15-907-CRC)

Dear Michael:

This letter provides a report concerning document production in this case. ICE could not produce the documents on November 12, 2015 in conformity with its earlier commitment. As discussed below, the records that cannot be produced as scheduled relate to Item 2 of the FOIA request. ICE expects to produce records responsive to Item 2a on or before December 3, 2015 and to produce additional records responsive to items 3, 4, and 6 thereafter.

At the outset, we sincerely appreciate your willingness to narrow the scope of the FOIA request. But, as discussed below, some of your suggestions for narrowing the request still present serious obstacles that cast doubt on their feasibility.

I now seek to clarify these potential problems and also describe ICE's additional efforts to locate responsive documents in accordance with your October 23, 2015 letter. These descriptions reflect my best effort to describe these searches. The following summarizes ICE's understanding of the issues related to the items in the FOIA request and it is addressing them.

Item 1

Notwithstanding your proposal to narrow the search to "all descriptions" of items seized in two months - December and January - in 2012-2015, ICE cannot conduct even a search as you have narrowed it without considerable difficulties. As we have previously explained, a search encompassing all underlying case files for descriptions of seized items would still be extremely burdensome. From your perspective, narrowing of the scope of ICE's search to seven months may seemingly reduce the task

substantially. But because the search would still require a review of each underlying case for all possible descriptions of each seized item, a seven-month search would remain extremely time consuming. The table previously provided to you contains at least an estimated 5,000 seizure incidents arising from more than 1,100 cases. Assuming the correctness of your premise that those seven months of records constitutes only one fifth of your original request, ICE would still have to make a manual review of the records concerning more than 1,000 seizures. For each seizure, ICE would have to make a manual review of all reports of investigation (ROIs). Moreover, an individual case often reflects several ROIs

Furthermore, for each case, there may also be local hard files containing additional records requiring manual review. A complicating factor is the absence of a central repository for these case files, which are located in twenty-six ICE Special Agent in Charge field offices and in at least 150 sub-offices throughout the United States and U.S. territories.

More important, reviewing these files is unlikely to result in much additional information for Plaintiff. ICE has already provided descriptions of all clothing items seized from 2012 to 2015. To the extent these items are described in multiple files, the descriptions of the seized items in a second or third file is probably duplicative of the records produced to Plaintiff already.

In the table of seized items we have previously provided to you, the information was derived from the Seized Assets and Case Tracking System, a database managed by U.S. Customs and Border Protection (CBP). Although CPB maintains this system, ICE's seizure cases form the sole source of the case data. The System of Records Notice ("SORN") for the Seized Assets and Case Tracking System does not include a complete description of the seized items. Nonetheless, this information may assist Plaintiff in understanding the data that formed these ICE records. For your information, the Seized Assets and Case Tracking System (SORN) appears at 73 Fed. Reg. 77,764 (December 19, 2008).

The portion of the FOIA request that seeks photographs poses particular challenges in producing responsive records. Unfortunately, neither the Seized Assets and Case Tracking System nor any other case system that ICE uses permits searches or queries based on whether photos exist. Therefore, ICE has directed program offices to search for photos responsive to the request using other available search parameters. To make the search manageable and to avoid interference with ongoing enforcement activities, ICE is excluding photos associated with open investigations from its search efforts. ICE is not yet able to estimate the quantity of responsive photographs in our files or how much time it will need to process photographs for a production. Should it determine that there is a sufficient volume of photographs to require a rolling production, we will advise you. Should circumstances warrant, we may also contact you to discuss whether narrowing the scope of this facet of the request is advisable.

Item 2

Two reasons explain the delay in production of these records. First, because the volume of industry guides was larger than anticipated, ICE could not meet its deadline for production of these records. In fact, but for Plaintiff's willingness to narrow the request to industry guides related to sports-related apparel the number of responsive records would have been even larger and the delay longer. Second, locating the contact information for submitters of these industry guides took longer than expected. ICE has now sent submitter notices to the appropriate contacts. ICE must give these submitters a reasonable time in which to respond to the notice. ICE is committed to making the second production on or before December 3, 2015. Currently, ICE anticipates producing roughly 104 pages of responsive records relating to industry guides for counterfeit goods.

ICE has additional sports apparel industry guides to process for production estimated totaling between 100 and 200 pages. ICE will begin processing these records for production after it completes the production scheduled for December 3, 2015.

In response to Plaintiff's October 23, 2015 letter, ICE has determined that it should conduct searches for responsive records at additional offices for items responsive to Item 2a through 2e. It has directed those offices, which include all 26 field offices, ICE headquarters legal offices, and program offices, to search for responsive records. Because the search for responsive records is underway, ICE cannot currently estimate the number of responsive records nor the time required to process them. Before December 3, 2015, it does, however, expect to determine how much time it needs to process records located before the December 3 production.

Item 3

As to item 3, given Plaintiff's October 23, 2015 letter, ICE has begun a search for additional responsive records.

Item 4

Given Plaintiff's October 23, 2015 letter, ICE has begun a search for additional records responsive to item 4 just as it has done with respect to Item 3. ICE has directed the appropriate offices to use assigned search parameters. ICE is currently unable to estimate how many responsive records it may locate or the amount of time required to process them. It anticipates that it will be able to provide that information by December 3, 2015.

Item 6

In response to your October 23, 2015 letter, ICE has located one additional email record, which it will process for release on or before December 3, 2015.

I appreciate your cooperation in this matter, especially the detailed level of communication that has enabled ICE to consider plaintiff's positions thoughtfully. I hope that this letter shows that ICE is making a legitimate effort to search for and produce records responsive to this FOIA request. Those efforts will involve personnel in more than 26 field offices, with additional sub-offices, and various headquarters offices.

Given these efforts and our expectation that ICE will be producing a significant number of additional records within a few weeks, I think the parties should defer filing and responding to dispositive motions under the current schedule, which would begin with a motion for summary judgment by ICE on December 11, 2015. Therefore, I suggest that the parties file a joint status report and motion for new schedule on or about December 8, 2015, after ICE's next production of records and after it informs

Plaintiff about of the volume of responsive records that have been located and the status of any additional searches still in progress.

Thank you for your cooperation. I look forward to hearing from you.

Sincerely yours,

/s/

Peter R. Maier
Special Assistant United States Attorney

Cc: Ron Seely, ICE

Exhibit 14

National Football League Counterfeit Merchandise Training

For Authorized Law Enforcement Only

CONFIDENTIAL

DISCLAIMER

The opinions expressed herein are those of the right owner and do not necessarily reflect the position of U.S. Customs and Border Protection (CBP). Decisions as to whether or not merchandise should be detained or seized for infringing protected intellectual property rights are to be made in accordance with established procedures by CBP personnel at the appropriate management level of the concerned field office. CBP personnel who have questions arising from this product identification training material or manual should call the IPR

Helpdesk at 562-980-3119, ext. 252, or the IPR and Restricted Merchandise Branch, Regulations and Rulings at (202) 325-0020.



NATIONAL FOOTBALL LEAGUE



COPYRIGHT and/or **LICENSEE NOTICES** on all screen-printed products showing
1) Licensee's Name; 2) "©" or "/"; 3) "MLB," "MLBP" or Silhouetted Batter Logo; and 4) year date:

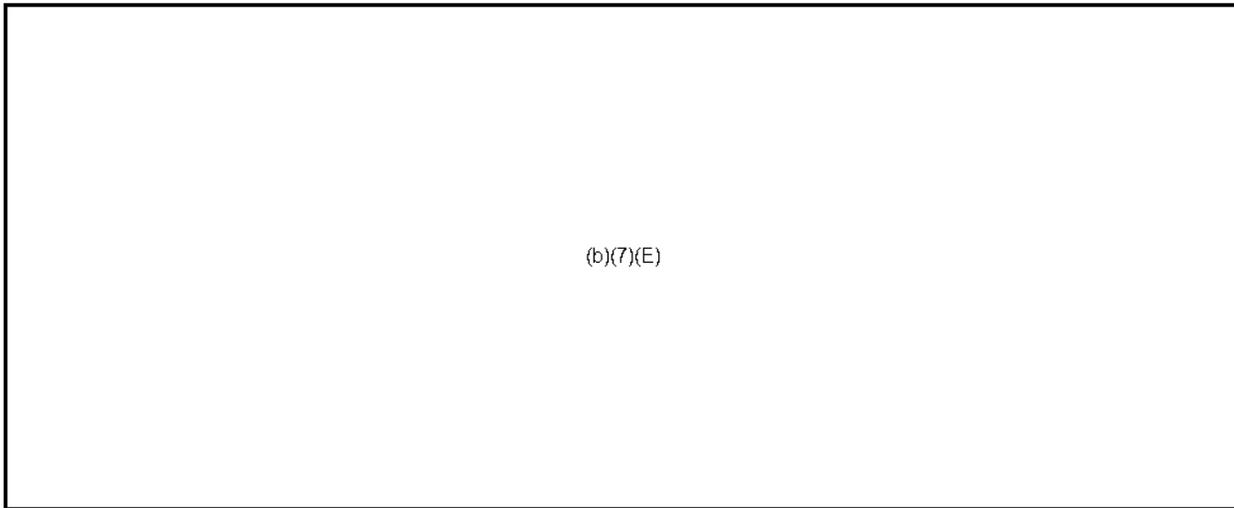
TMCO © MLBP 1998

PRO PLAYER/MLB 2000

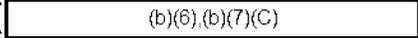
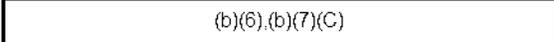
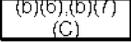
TMCO ©  1998

PRO PLAYER/  2000

IDENTIFYING THE COUNTERFEITS



(b)(7)(E)

The information provided above is for reference purposes only. Because Licensee's adherence to MLBP guidelines may vary, prior to seizing products believed to be counterfeit, please contact the MLBP Legal Department ()
 at (212-93 ) directly to obtain information regarding authenticity of products.



ANTI-COUNTERFEITING TRAINING MANUAL
2009-2010 NBA SEASON

CONFIDENTIAL – FOR LAW ENFORCEMENT USE ONLY

DISCLAIMER

The opinions expressed herein are those of the right owner and do not necessarily reflect the position of U.S. Customs and Border Protection (CBP). Decisions as to whether or not merchandise should be detained or seized for infringing protected intellectual property rights are to be made in accordance with established procedures by CBP personnel at the appropriate management level of the concerned field office. CBP personnel who have questions arising from this product identification training material or manual should call the IPR Helpdesk at 562-98 (b)(6),(b)(7)(C) or the IPR and Restricted Merchandise Branch, Regulations and Rulings at (202) 32 (b)(6),(C)

Exhibit 15

- Authentic** - \$330 - \$380
- Premier** - \$125 - \$185
- Replica (Youth)** - \$55 - \$100
- Name/Number T's** - \$22 - \$45
- Hats** - \$20 - \$35



BY CONTRAST

- Counterfeit Jerseys** - \$32 - \$99
- Counterfeit T's** - \$5 - \$15
- Hats** - \$5 - 15



A RANGE OF PRODUCTS



Exhibit 16



LOWWIN



Exhibit 17





Exhibit 18

49L S
SILK

Exhibit 19

ume



Exhibit 20



COALITION TO ADVANCE THE PROTECTION OF SPORTS LOGOS

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NBA PROPERTIES, INC.

DOMESTIC HANGTAGS AND STICKERS (2004-Present)

The following images show the hangtags and stickers that are part of the current NBA Hangtag and Sticker Program in the United States. Also included is a brief description of the products for which the current NBA Hangtags and Stickers are intended, as well as a breakdown of the overt features for each Hangtag and Sticker.

(IMAGES ARE NOT SHOWN IN ACTUAL SIZE)

NBA Holographic
Hangtag
(Front)



NBA Holographic
Hangtag
(Back)



Click here to view [list of domestic licensees](#).

Features: (1) "NBA" watermark on blue paper background; (2) Hologram is silver in color; (3)

NBA Logo in hologram is blue, white & red; (4) NBA team names appear in hologram; (5) NBA/Spalding basketball shows different images throughout hologram; (6) Nine digit serial number begins with the letters "NS"; and (7) American Express branding appears on back of hangtag.

NBA Holographic Stickers - Used on apparel and non-apparel products

1" Holographic Sticker
(Front)



Features: (1) NBA Logo is blue, white & red; (2) NBA team names appear in hologram; (3) Basketball rotates showing two different images; and (4) Nine digit serial number begins with the letters "NB".

1 cm Holographic
Sticker
(Front)



Features: (1) NBA Logo is blue, white & red; (2) NBA team names appear in hologram; and (3) NBA/Spalding basketball rotates showing two

Some headwear and t-shirt licensees will use the 1" Holographic Sticker instead of the NBA Holographic Hangtag in Hot Market situations (e.g., NBA Playoffs, Finals, All-Star Weekend) so they can bring their products to market faster.

NBAP also offers its Licensees a 1cm Holographic Sticker. This Sticker does not contain a serial number due to size constraints.

Hardwood Classics Program

Products featuring historical NBA, ABA, NBL & BAA players and teams

(IMAGES ARE NOT SHOWN IN ACTUAL SIZE)

HARDWOOD
CLASSICS
Holographic
Hangtag
(From: 2004 -
Present)
(Front)

HARDWOOD
CLASSICS
Holographic
Hangtag
(From: 2004 -
Present)
(Back)

HARDWOOD CLASSICS Holographic Hangtag -

Used on apparel products.

Click here to [view list of domestic licensees.](#)



Features: (1) "HWC" watermark on maroon paper background; (2) Hologram is gold in color; (3) NBA/HWC Logo rotates with VINTAGE Logo; (4) "NBA", "NBL", "BAA" & "ABA" initials appear in hologram; (5) Nine digit serial number begins with letters "HW"; and (6) American Express branding appears on back of hangtag.

HARDWOOD CLASSICS
1" Sticker
(From: 2004 - Present)
(Front)



HARDWOOD CLASSICS
1 cm Sticker
(From: 2004 - Present)
(Front)



Features: (1) Hologram is gold in color; (2) NBA/HWC Logo rotates with VINTAGE Logo; (3) "NBA", "NBL", "BAA" & "ABA" initials appear in hologram; and (4) Nine digit serial number begins with letters "HY."

Features: (1) Hologram is gold in color; (2) NBA/HWC Logo rotates with VINTAGE Logo; (3) "NBA", "NBL", "BAA" & "ABA" initials appear in hologram; and (4) This Sticker does not contain a serial number due to the size constraints.

NBA Authentics Program

Products identical to what NBA players wear on the court

NBA AUTHENTICS Holographic Hangtag - Used on apparel and non-apparel products.

NBA AUTHENTICS
Holographic Hangtag
(From: 2004 - Present)
(Front)



NBA AUTHENTICS
Holographic Hangtag
(From: 2004 - Present)
(Back)



Click here to view [list of domestic licensees](#).

Features: (1) "AUTHENTICS" watermark on grey paper background; (2) Hologram is silver in color; (3) NBA Logo in hologram is blue, white & red; (4) NBA team names appear in hologram; (5) NBA/Spalding basketball shows different images throughout hologram; (6) Nine digit serial number begins with the letters "NA"; and (7) American Express branding appears on back of hangtag.

NBA4HER Holographic Hangtag

Used on apparel and non-apparel products.

NBA4HER Holographic
Hangtag
(From: 2004 - Present)
(Front)



NBA4HER Holographic
Hangtag
(From: 2004 - Present)
(Back)



Click here to view [list of domestic licensees](#).

Features: (1) "4HER" watermark on light blue paper background; (2) Hologram is silver in color; (3) NBA Logo in hologram is blue, white & red; (4) NBA team names appear in hologram; (5) NBA/Spalding basketball shows different images throughout hologram; (6) Nine digit serial number begins with the letters "NH"; and (7) American Express branding appears on back of hangtag.

NBA BIGMAN Holographic Hangtag

Used on apparel and non-apparel products

NBA BIGMAN Holographic
Hangtag
(From: 2004 - Present)
(Front)

NBA BIGMAN Holographic
Hangtag
(From: 2004 - Present)
(Back)

Click here to view [list of domestic](#)

[licensees.](#)



Features: (1) "BIGMAN" watermark on orange paper background; (2) Hologram is silver in color; (3) NBA Logo in hologram is blue, white & red; (4) NBA team names appear in hologram; (5) NBA/Spalding basketball shows different images throughout hologram; (6) Nine digit serial number begins with the letters "NM"; and (7) American Express branding appears on back of hangtag.

NBA ELEVATION Holographic Hangtag

Used on apparel and non-apparel products.

NBA ELEVATION Holographic
Hangtag
(From: 2004 - Present)
(Front)

NBA ELEVATION Holographic
Hangtag
(From: 2004 - Present)
(Back)



Click here to view [list of domestic licensees.](#)

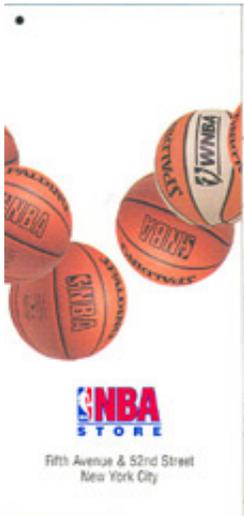
Features: (1) Hologram is silver in color; (2) NBA Logo in hologram is blue, white & red; (3) NBA team names appear in hologram; (4) NBA/Spalding basketball shows different images throughout hologram; (5) Nine digit serial number begins with the letters "ED"; and (6) American Express branding appears on back of hangtag.

This hangtag is only used on merchandise that is intended to be sold in Mass Market retail stores (e.g., Wal-Mart).

NBA Store

Features the world's largest assortment of NBA products

NBA Store Hangtag
(Front)



NBA Store Hangtag
(Back)



NBA Store Hangtag

Used on all products shipped to and sold at the NBA Store, located at Fifth Avenue & 52nd Street, New York City.

Exhibit 21

COALITION TO ADVANCE THE PROTECTION OF SPORTS LOGOS

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NHL ENTERPRISES, L.P.

The National Hockey League (the "NHL"), organized in 1917, is currently comprised of 30 member teams located throughout the United States and Canada. The NHL seeks to promote and commemorate the game of hockey, which is one of the most popular sports around the world. Fans of the NHL create a large demand for merchandise, particularly clothing, bearing the logos of the NHL and its member teams. Fans expect that these products will be of a certain standard of quality. To ensure that NHL licensed products meet or exceed these high quality standards, the NHL has developed certain quality control guidelines, some of which are listed below.

Licensed NHL Product

All NHL products require holographic stickers or hangtags that typically bear a unique serial number.

The NHL Official Licensed Product Logo, should, in most cases, be prominently displayed, shown in its entirety, and should include ® adjacent to the NHL Shield in all instances.



Most headwear and soft goods should have a sewn-in label which includes the NHL Officially Licensed Product Logo, NHL

copyright notice (© NHL) and a label indicating the name of the licensee. Licensee identification may not be included or screen printed on the same line as the NHL copyright notice.

Team screen printed products should bear the proper trademark designation (TM or ® at the bottom right of the team name and team logo.

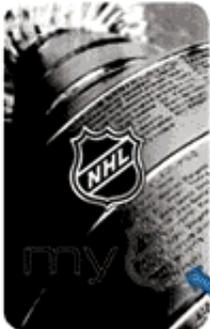


All Licensed Products typically include a copyright notice in the following form:

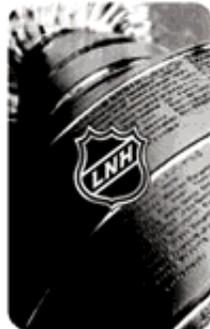
© NHL

NHL's Current and Former Holograms and Hologram Hangtags

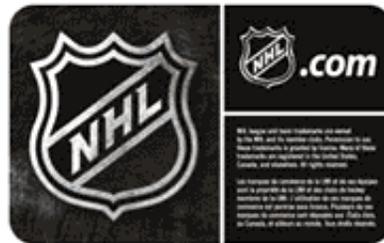
Current Front English



Current Front French



Current Back



Concealed Both the French and English versions contain the concealed image,



image

Current Hologram Sticker



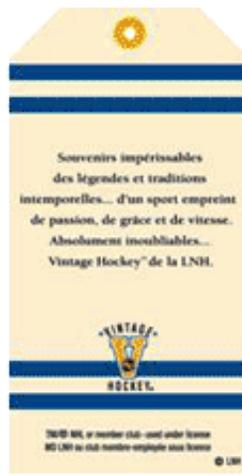
Concealed image is also present on the hologram sticker



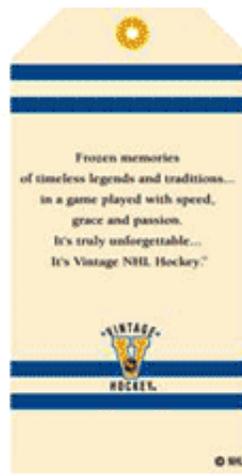
Current Front



Current Back French



Current Back English



Former Hologram Hangtag



Historical Hologram Hangtag



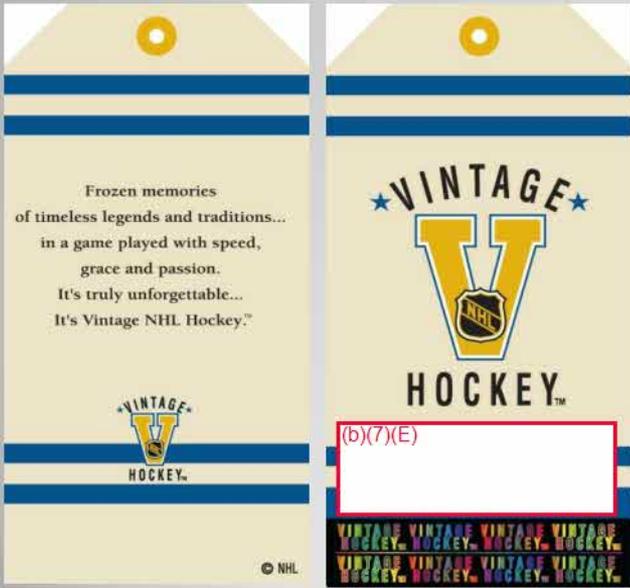
Former Hologram Sticker



Exhibit 22

(b)(7)(E)

(b)(7)(E)



(b)(7)(E)

(b)(7)(E)

(b)(7)(E)



HOW DO I TELL?

Exhibit 23

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

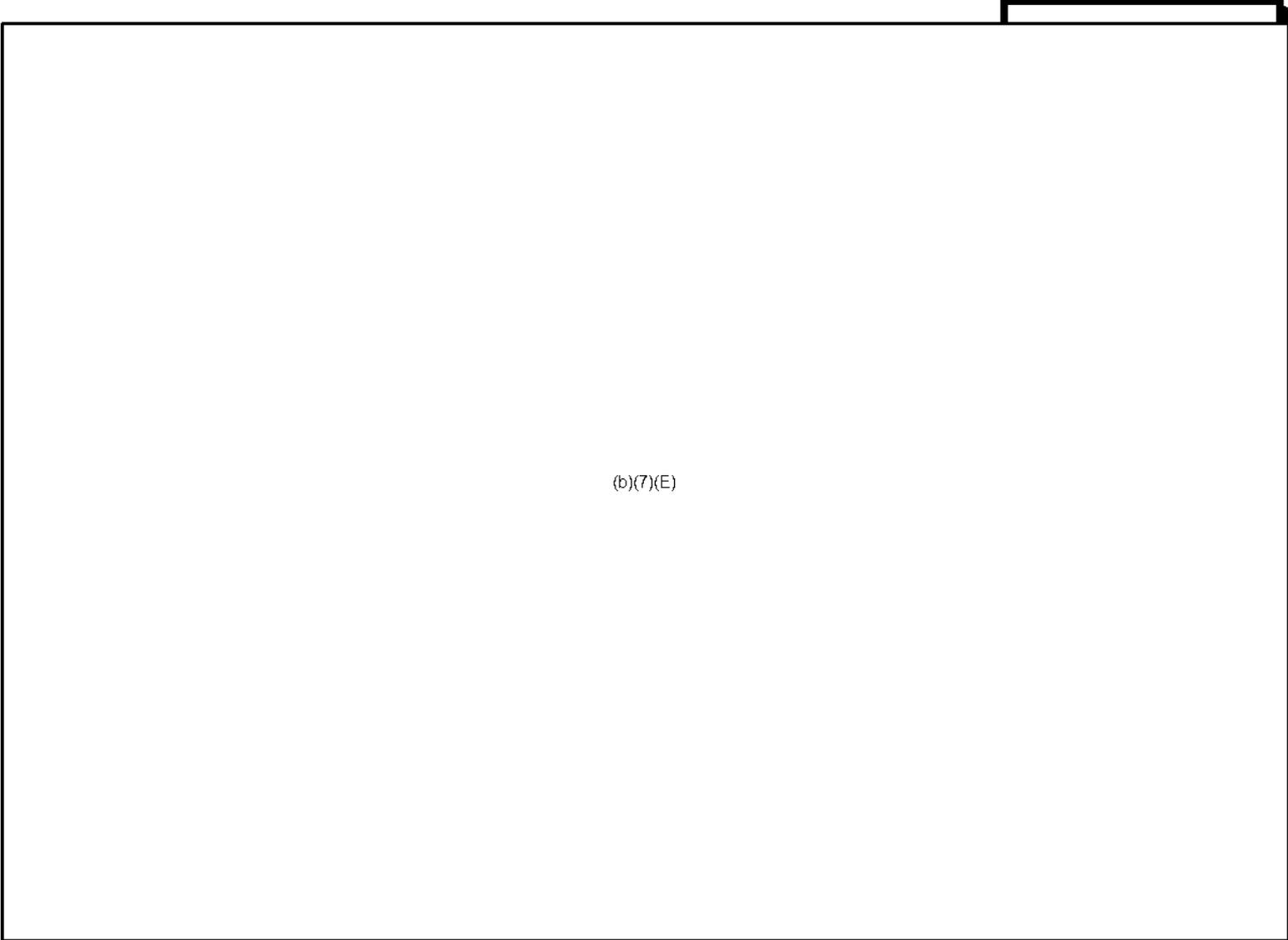
CURRENT HOLOGRAMS & HANGTAGS



(b)(7)(E)

INFERIOR QUALITY STITCHING & EMBROIDERY





(b)(7)(E)

LOGO INACCURACY



(b)(7)(E)

**INFERIOR QUALITY SCREEN PRINTING, LACK OF LICENSEE
NAME AND/OR IMPROPER LABELING**



(b)(7)(E)

IRREGULAR & CUT NECK LABELS



(b)(7)(E)

MISSPELLINGS



(b)(7)(E)

MISSPELLINGS



(b)(7)(E)

COUNTERFEIT HOLOGRAMS



(b)(7)(E)

SUMMARY



Exhibit 24

Page 572

Withheld pursuant to exemption

(b)(4)

of the Freedom of Information and Privacy Act

Page 573

Withheld pursuant to exemption

(b)(4)

of the Freedom of Information and Privacy Act

Page 575

Withheld pursuant to exemption

(b)(4)

of the Freedom of Information and Privacy Act

Page 588

Withheld pursuant to exemption

(b)(4)

of the Freedom of Information and Privacy Act

Page 589

Withheld pursuant to exemption

(b)(4)

of the Freedom of Information and Privacy Act

Page 594

Withheld pursuant to exemption

(b)(4)

of the Freedom of Information and Privacy Act

Page 595

Withheld pursuant to exemption

(b)(4)

of the Freedom of Information and Privacy Act

Page 597

Withheld pursuant to exemption

(b)(4)

of the Freedom of Information and Privacy Act

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
REBECCA TUSHNET,)	
)	
Plaintiff,)	
)	No. 1:15-cv-15-00907 (CRC)
v.)	
)	
UNITED STATES IMMIGRATION)	
AND CUSTOMS ENFORCEMENT,)	
)	
Defendant.)	
_____)	

**PLAINTIFF’S RESPONSE TO DEFENDANT’S
STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiff responds to Defendant’s Statement of Undisputed Material Facts (Doc. 25) as follows:

1. Undisputed.
2. Undisputed except to the extent that Defendant contends that each POC has “detailed knowledge about the operations of their particular program office.” Based on the inadequate search for records responsive to Plaintiff’s FOIA request, it is likely that some POCs lack such knowledge. *See* Pl. Mem. at 9-19.

3. Undisputed in part. Plaintiff disputes that, in this case, the ICE FOIA Office provided instruction or guidance on where or how to search. *See* Pineiro Decl. of April 29, 2016, Doc. 26 ¶ 42 (admitting that ICE allows “employees [to] exercise discretion, based on their operational knowledge and subject matter expertise, in choosing the specific search terms utilized to ascertain whether or not potentially responsive documentation exists”). Plaintiff further disputes that, in this case, those tasked with searching for responsive documents searched “both paper files and electronic files.” In particular, ICE failed to search the 1,085 investigative case files underlying

the 5,564 seizure incidents identified in the summary table ICE produced bearing Bates Nos. 1-511. The underlying investigatory case files likely include photographs of seized clothing responsive to Plaintiff's Request No. 1, and the case files may also include records responsive to Request Nos. 2, 3, and 4.

4. Undisputed except to the extent Defendant suggests that its search obligation under FOIA is dependent "on the manner in which the employee maintains his or her files." ICE is obligated to conduct a search reasonably calculated to uncover all relevant documents, regardless of how individual employees maintain their files.

5. Undisputed as to the agency's general process. Plaintiff disputes that, in this case, the Exemption 7(E) redactions to the industry guides were appropriate, that the withholdings under Exemption 4 were appropriate, and that reasonably segregated non-exempt material has been released. *See* Pl. Mem. at 19-30.

6. Plaintiff disputes that the ICE FOIA Office instructed other offices to conduct a comprehensive search or that comprehensive searches were conducted. For example, ICE failed to search the 1,085 investigative case files underlying the 5,564 seizure incidents identified in the summary table ICE produced bearing Bates Nos. 1-511. The underlying investigatory case files likely include photographs of seized clothing responsive to Plaintiff's Request No. 1, and the case files may also include records responsive to Request Nos. 2, 3, and 4. ICE's search for responsive records was not comprehensive because the ICE FOIA Office delegated responsibility for the search to a variety of record custodians without providing instruction on where or how to search. Rather, ICE allowed "employees [to] exercise discretion, based on their operational knowledge and subject matter expertise, in choosing the specific search terms utilized to ascertain whether or not potentially responsive documentation exists." Pineiro Decl. of April 29, 2016, Doc. 26 ¶ 42.

ICE's delegation of search responsibility without any guidance or oversight resulted in searches that were unreasonably limited, haphazard, and arbitrary. Plaintiff disputes that searches were conducted by "all 26 HSI Special Agent in Charge field offices," because the Pineiro Decl. of April 29, 2106, Doc. 26 ¶ 46, reports on the results of searches at only 24 such offices.

7. Undisputed.

8. Undisputed.

9. Undisputed.

10. Undisputed.

11. Disputed as to whether it was a POC within OTD that instructed the OPLA employees to conduct the search. *See* Pineiro Decl. of April 29, 2016, Doc. 26 ¶ 33 (stating that "a POC within OPLA . . . instructed two OPLA employees to conduct searches"). Disputed as to whether OPLA was tasked to search for records on December 11, 2015, and conducted the search and provided all responsive records the same day. It is unlikely that a comprehensive search could be conducted in a single day. Further, ICE has already submitted a declaration signed under penalty of perjury stating that OPLA was tasked to search for records on November 6, 2015, and responded with responsive records on December 8, 2015. Pineiro Decl. of Dec. 16, 2015, Doc. 15-1 ¶¶ 31 and 34.

12. Undisputed.

13. Undisputed.

14. Undisputed.

15. Disputed as to whether HSI was tasked to search for records on July 21, 2015. According to a previous declaration signed under penalty of perjury, HSI was tasked to search for records on March 31, 2015. Pineiro Decl. of Dec. 16, 2015, Doc. 15-1 ¶ 30.

16. Undisputed.

17. Undisputed.

18. Disputed that HSI tasked 26 field offices to search for additional responsive records “[a]fter a litigation review.” According to a previous declaration signed under penalty of perjury, the HSI field offices were tasked to search for additional responsive records after Plaintiff, “[b]y letters dated October 5, 2015, and October 23, 2015, . . . raised several questions concerning the adequacy of the searches conducted by ICE.” Pineiro Decl. of Dec. 16, 2015, Doc. 15-1 ¶ 38.

19. Plaintiff disputes that searches “were conducted by one or more employees within each Special Agent in Charge field office,” and that HSI RDU provided “all of the potentially responsive records from the 26 HSI field offices,” because the Pineiro Declaration of April 29, 2106, Doc. 26 ¶ 46, reports on the results of searches at only 24 such offices.

20. Undisputed.

21. Undisputed as to the first four sentences. Disputed that ICE produced 2,784 pages of responsive records on April 1, 2016. On April 1, 2016, ICE produced only 2,749 pages of material, bearing Bates Nos. 1791-4539.¹ Disputed that ICE has produced 4,574 pages of responsive records; ICE has produced material totaling only 4,539 pages. Disputed that only 2 pages were withheld in full. ICE withheld in full at least 17 pages. *See* Bates Nos. 572, 573, 575, 588, 589, 594, 595, 597, 756, 759, 1214, 1219, 1237, 2616, 2617, 2625, and 2626. Disputed that a “description of all of the redactions applied with the correlating FOIA Exemption being applied is set forth” in the Vaughn Index. ICE withheld eight pages of material in its entirety under FOIA

¹ The documents produced by ICE on April 1, 2016, are available at: <http://instituteforpublicrepresentation.org/wp-content/uploads/2016/04/Combined-April-2016-Release-1-of-2.pdf> and <http://instituteforpublicrepresentation.org/wp-content/uploads/2016/04/Combined-April-2016-Release-2-of-2.pdf>.

Exemption 4, but ICE's Vaughn Index does not mention the Exemption 4 withholdings or attempt to provide an explanation for the application of the exemption to the eight pages of withheld material.

22. Disputed. *See* Pl. Mem. at 19-30.

Respectfully submitted,

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick (DC Bar No. 486293)
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue NW, Suite 312
Washington, DC 20001
Phone: (202) 662-9546
Fax: (202) 662-9634
Email: michael.kirkpatrick@law.georgetown.edu

Dated: May 20, 2016

Attorney for Plaintiff

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
REBECCA TUSHNET,)	
)	
Plaintiff,)	
)	No. 1:15-cv-15-00907 (CRC)
v.)	
)	
UNITED STATES IMMIGRATION)	
AND CUSTOMS ENFORCEMENT,)	
)	
Defendant.)	
_____)	

[PROPOSED] ORDER

Having considered the motions for summary judgment and all related documents, and the entire record herein, it is hereby

ORDERED that Plaintiff’s Motion for Summary Judgment is **GRANTED**;

ORDERED that Defendant’s Motion for Summary Judgment is **DENIED**;

ORDERED that Defendant conduct immediately a search reasonably calculated to uncover the requested records, including a search of the investigatory case files in the TECS system, a search of all HSI offices involved in efforts to seize counterfeit sports merchandise, and the use of a uniform and comprehensive set of search terms reasonably calculated to find records responsive to all parts of Plaintiff’s FOIA request;

ORDERED that Defendant immediately produce the material redacted from the industry guides under Exemption 7(E); and

ORDERED that Defendant immediately produce the eight pages of material withheld in full under Exemption 4.

SO ORDERED this ____ day of _____, 2016.

The Honorable Christopher Cooper
United States District Judge