

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

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

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**PLAINTIFF’S REPLY IN SUPPORT OF  
PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT**

Summary judgment should be entered for Plaintiff Rebecca Tushnet because Defendant United States Immigration and Customs Enforcement (ICE) has failed to show that it conducted an adequate search for records responsive to Plaintiff’s Freedom of Information Act (FOIA) request, and ICE has failed to show that the information it redacted on more than 300 pages of guides submitted by private industry are exempt from disclosure under FOIA Exemption 7(E).

**FACTUAL DEVELOPMENTS SINCE PLAINTIFF FILED HER MOTION**

On June 29, 2016, ICE produced an additional 133 pages of material in response to Plaintiff’s FOIA Request, consisting of 115 photographs responsive to Request No. 1, Bates Nos. 4540-4654; and an 18-page industry guide related to identification of counterfeit sports-related apparel responsive to Request No. 2(a), Bates Nos. 4655-4672.<sup>1</sup> ICE has made redactions on ten of the pages of the industry guide, Bates Nos. 4656-4657, 4659, and 4664-4670, based on a claim

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<sup>1</sup> The documents produced by ICE on June 29, 2016, are available at: <http://instituteforpublicrepresentation.org/wp-content/uploads/2016/04/Combined-June-2016-Release-and-Rerelease.pdf>.

that the material is protected from disclosure under Exemption 7(E). Also on June 29, 2016, ICE rereleased eight pages of material that ICE had previously withheld in their entirety pursuant to Exemption 4, Bates Nos. 572, 573, 575, 588, 589, 594, 595, and 597. ICE concedes that the material should not have been withheld under Exemption 4, but ICE has made partial withholdings under Exemption 7(E) on each of the eight rereleased pages. Pineiro Decl. of June 30, 2016, Doc. 30-1, ¶ 15.

ICE has now made six rolling productions of material totaling 4,672 pages, consisting of 1,475 pages of text documents and 3,197 photographs of seized items. Plaintiff challenges only the adequacy of ICE's search for responsive records, and ICE's Exemption 7(E) redactions to the industry guides.<sup>2</sup>

## ARGUMENT

### **I. ICE's Conclusory Statement That It Performed A Reasonable Search Is Insufficient To Carry Its Burden.**

ICE devotes the first eight pages of its Reply and Opposition to the unremarkable proposition that although an agency's search must be reasonably calculated to find all responsive records, it need not be perfect. *See* Def. Reply, Doc. 30, at 1-8. Plaintiff does not argue that ICE must show that it has located every responsive record to demonstrate an adequate search. Rather, ICE bears the burden of showing "beyond material doubt that it has conducted a search reasonably

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<sup>2</sup> With the addition of the industry guide produced on June 29, 2016, Bates Nos. 4655-4672, ICE has now produced 25 industry guides totaling 521 pages, more than 300 pages of which bear 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 in paragraph 17 of the Pineiro Declaration of June 30, 2016, Doc. 30-1. The industry guides bear Bates Nos. 524-627, 630-716, 1089-1106, 1135-1152, 1184-1312, 1530-1535, 2615-2677, 2681-2758, and 4655-4672.

calculated to uncover all relevant documents.” *DeBrew v. Atwood*, 792 F.3d 118, 122 (D.C. Cir. 2015) (internal citations omitted); *see* Pl. Mem., Doc. 27, at 9, 15, 19 (citing *DeBrew*).

ICE argues that agency declarations are accorded a presumption of good faith, Def. Reply at 2-3, and ICE relies heavily on the conclusory statement in the most recent Pineiro declaration that “all locations that have a reasonable likelihood of containing responsive records have been searched.” Pineiro Decl. of June 30, 2016, Doc. 30-1, ¶ 14 (cited in Def. Reply at 5, 8, 11). Thus, the argument goes, because ICE has a declaration saying the search was reasonable, and the declaration is entitled to a presumption of good faith, the search was necessarily adequate. The Court should reject ICE’s syllogism for the following reasons.

**A. The Pineiro declarations are riddled with errors.**

The Pineiro declarations are unreliable because they contain multiple errors. For example, Mr. Pineiro has submitted five declarations in this case. Pineiro Decls. of Dec. 16, 2015, Doc. 15-1; Jan. 15, 2016, Doc. 18-1; Feb. 5, 2016, Doc. 20-1; Apr. 29, 2016, Doc. 26; June 30, 2016, Doc. 30-1. In his first, second, and fourth declarations, Mr. Pineiro stated that Plaintiff’s FOIA request contained a “request for expedited processing,” even though it did not. *See* Doc. 15-1, ¶5; Doc. 18-1, ¶ 6; Doc. 26, ¶ 6. Similarly, in his declaration of April 29, 2016, Mr. Pineiro purports to describe the column headings in ICE’s *Vaughn* index, but the headings he lists in his declaration are different from those on the *Vaughn* index. *Compare* Doc. 26, ¶ 51; *with* Doc. 26-1, Exh. 12.

The errors in Mr. Pineiro’s declarations extend beyond carelessness in cutting and pasting from declarations used in other cases. For example, Plaintiff disputed paragraphs 11, 15, and 18, of ICE’s Statement of Undisputed Material Facts, Doc. 25, all of which are based on the Pineiro declaration of April 29, 2016, Doc. 26, because the facts stated in the declaration of April 29, 2016,

directly contradict the facts stated in the Pineiro declaration of December 16, 2015, Doc. 15-1. *See* Pl. Resp., Doc. 27-2, ¶¶ 11, 15, and 18.

Other errors in the Pineiro declarations demonstrate a lack of attention to detail. For example, Mr. Pineiro stated in his declaration of April 29, 2016, Doc. 26, ¶ 49, that ICE produced 2,784 pages of responsive records on April 1, 2016; in fact, ICE produced only 2,749 pages of material on that date.<sup>3</sup> Mr. Pineiro declared on April 29, 2016, that ICE had provided Plaintiff with “all of the potentially responsive records from the 26 HSI field offices.” Doc. 26, ¶ 47. In his most recent declaration, Mr. Pineiro admits that two of the 26 field offices had not responded as of April 29, 2016, and that the 133 pages of responsive records found in those offices were not released until June 29, 2016. Doc. 30-1, ¶¶ 8-10. On December 16, 2015, Mr. Pineiro declared that ICE had identified “approximately 11,269 pages of photos and 1,891 pages of documents” to review for processing, Doc. 15-1, ¶ 38, but in fact ICE found only 3,197 photographs and 846 pages of text documents. ICE explained the discrepancy in an Interim Joint Status Report, Doc. 23 at 3, stating that it had not actually counted the photographs before preparing the declaration, but had estimated the number of photographs by dividing the total size of the data for all the photographs by an erroneous estimate of the average size of each image.

Given the multitude of errors and inconsistencies in the Pineiro declarations, the Court should reject ICE’s suggestion that the Court defer to Mr. Pineiro’s assertion that “all locations that have a reasonable likelihood of containing responsive records have been searched.” Pineiro Decl. of June 30, 2016, Doc. 30-1, ¶ 14.

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<sup>3</sup> 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>.

**B. Plaintiff relies on evidence of overlooked materials, rather than mere speculation, to show that ICE has failed to conduct an adequate search.**

ICE argues that a conclusory agency declaration is all that is needed to shift the burden to Plaintiff to prove the inadequacy of ICE's search. That is not the law. The agency at all times bears the burden of showing "beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." *DeBrew*, 792 F.3d at 122 (internal citations omitted). Although an agency may use declarations to attempt to meet its burden, "[i]t is not enough . . . for the affidavit to state in conclusory fashion that the agency 'conducted a review of [the files] which would contain information that [the plaintiff] requested' and did not find anything responsive to the request." *Pinson v. U.S. Dep't of Justice*, 69 F. Supp. 3d 125, 133 (D.D.C. 2014) (quoting *Weisberg v. DOJ*, 627 F.2d 365, 370 (D.C. Cir. 1980)). Further, if a review of the record reveals "positive indications of overlooked materials, summary judgment [for the agency] is inappropriate." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (internal citation and quotation marks omitted).

The burden of demonstrating an adequate search remains with the agency because advocacy in FOIA cases is inherently lopsided. Only the agency is likely to know the places it has not searched where responsive records reside. If the Court allowed boilerplate statements in agency declarations to establish the adequacy of an agency's search, no challenge by a FOIA requester would succeed because the agency will always declare that its search was sufficient. Giving deference to ICE's declaration would allow ICE to remove all semblance of advocacy from resolution of this FOIA dispute. Thus, the Court must look beyond ICE's conclusory assertions regarding the adequacy of its search, and examine closely Plaintiff's specific reasons for doubting that ICE's search complied with the requirements of FOIA. ICE attempts to respond to those

reasons beginning on page eight of its Reply. As described in the Section II below, ICE's attempts to avoid the logical conclusion of Plaintiff's observations are unavailing.

**II. ICE Cannot Rebut Plaintiff's Evidence That ICE's Search Was Inadequate.**

**A. Given that ICE has seized clothing as counterfeit in at least 5,564 different incidents, many involving multiple items, it is implausible that ICE has conducted an adequate search and located only 3,197 photographs of seized clothing, many of which depict a single item.**

In response to Plaintiff's Statement of Undisputed Material Facts, Doc. 27-1, ¶¶ 16-19, ICE admits that it has identified 5,564 seizure incidents involving allegedly counterfeit clothing, and because "a single seizure incident could have multiple items associated to it," the 5,564 seizure incidents involve more than 5,564 different clothing items. Def. Resp., ¶ 16. Plaintiff's Request No. 1 sought all photographs of those more than 5,564 items, but ICE has produced only 3,197 photographs and it is undisputed that among the photographs produced are multiple photographs of the same items. *Id.*, ¶¶ 17-18. Thus, ICE has produced photographs of only a small fraction of the items seized.

In her opening brief, Plaintiff explained that it is likely that ICE has additional responsive photographs that have not been produced, because records produced by ICE reflect a practice of ICE agents providing such photographs to industry representatives. Pl. Mem. at 11. Plaintiff attached as Exhibit 9 to her Statement of Undisputed Material Facts, more than 30 pages of records demonstrating this practice. Thus, Plaintiff has produced evidence strongly suggesting that additional responsive photographs exist and would have been located had ICE conducted an adequate search.

In response, ICE asserts that because Plaintiff has not proven that ICE agents are "required to individually photograph each item," Def. Reply at 9, Plaintiff's evidence that ICE agents often do so amounts to nothing more than "pure conjecture about ICE's seizure practices." *Id.* ICE has

missed the point. Plaintiff has not argued that ICE agents are *required* to photograph each item; rather, she has demonstrated with ICE's own documents that ICE agents *often do*, which is a "positive indication[] of overlooked materials" that precludes a finding that ICE conducted an adequate search. *Valencia–Lucena*, 180 F.3d at 326. Significantly, ICE has not submitted any evidence to suggest that photographing seized items is uncommon, nor has ICE claimed to have produced all or even most of the photographs it has that are responsive to Plaintiff's Request No. 1.

**B. Given that ICE enforces intellectual property laws, it is implausible that ICE has no documents of its own that instruct its agents in determining how similar one mark must be to another to deem an item bearing a mark counterfeit.**

ICE has not produced a single record, guideline, policy, procedure, or training document of its own that describes "how ICE determines how similar one mark must be to another to deem an item bearing a mark counterfeit," even though its agents are called upon to do so every day. *See* Pl. Statement of Undisputed Material Facts, ¶ 25; Def. Resp., ¶ 25. Instead, in response to Plaintiff's Request No. 2(a), ICE produced 25 guides submitted by private industry that instruct ICE agents on the issue. In her opening brief, Plaintiff explained that it is implausible that ICE has no responsive records of its own, because if that is true, it would mean that ICE has delegated to private industry all responsibility for guiding ICE agents on the issue. Because it defies common sense to believe that ICE has done so, ICE's failure to find any records of its own responsive to Plaintiff's Request No. 2(a) indicates that its search was inadequate.

ICE has not denied that it has records of its own that are responsive to Plaintiff's Request No. 2(a), because of course it does. Instead, ICE simply refers to the Pineiro declarations as support for its assertion that it conducted an adequate search but could locate no responsive records other than guides submitted by private industry. Def. Reply at 9. Unless and until ICE submits a

declaration stating that it has no records of its own responsive to Plaintiff's Request No. 2(a), the Court should reject ICE's claim that it conducted an adequate search.

**C. Given that Plaintiff's Request Nos. 2(b)-(e), 3, and 4, track the language used by three ICE officials to describe ICE activities, it is implausible that ICE has no responsive records.**

Plaintiff's Request Nos. 2(b)-(e) seek records on how, as part of its investigatory process, ICE distinguishes items that are infringing from those that are counterfeit, and considers federal circuit-specific case law, the legal doctrine of fair use, and other trademark-infringement defenses. Each of these categories tracks the statement of Joseph M. Liberta, Chief of the Criminal Law Section of ICE's Homeland Security Investigations Law Division in the Office of the Principal Legal Advisor, who stated that ICE focuses on both "infringing works and counterfeit merchandise," and considers "whether there are defenses under the Copyright Act and Lanham Act, such as potential fair use provisions and federal circuit-specific case law." Pl. Statement of Undisputed Material Facts, Exh. 7. In her opening brief, Plaintiff explained that it is implausible that ICE has no records on the subjects of Mr. Liberta's statement, which indicates that ICE's search for such records was inadequate. In its Reply, ICE offers no explanation for its failure to locate responsive documents, and merely states that it "conducted a reasonable and thorough search . . . and provided Plaintiff with all responsive and disclosable records that were located." Def. Reply at 10. What ICE does not say is that "all" means "zero," because ICE concedes that it has produced no records responsive to Plaintiff's Request Nos. 2(b)-(e). Pl. Statement of Undisputed Material Facts, ¶ 15; Def. Resp., ¶ 15. ICE's conclusory statement that it conducted a thorough search is insufficient to overcome Plaintiff's evidence of overlooked materials, which precludes a finding that ICE's search was adequate. *See Valencia-Lucena*, 180 F.3d at 326.

Similarly, Plaintiff's Request Nos. 3 and 4 seek records of ICE consultations and seizures arising from disparagement, parody, distortion, or tarnishment of trademarks, because two different ICE spokespersons stated that such uses are unlawful. Pl. Statement of Undisputed Material Facts, ¶¶ 3 & 4, Exhs. 3 & 4; Def. Resp., ¶¶ 3 & 4. ICE admits that it has produced no records responsive to Plaintiff's Request Nos. 3 and 4. *Id.*, ¶ 15; Def. Resp., ¶ 15. Given the statements of the ICE officials, it is reasonable to believe that ICE has records responsive to Request Nos. 3 and 4, and the failure to locate any such records indicates that ICE's search was inadequate. In its Reply, ICE argues, without citation to law or evidence, that "it is entirely logical that ICE did not find records responsive to this portion of Plaintiff's request, as ICE has no legal authority to make seizures based on such factors." Def. Reply at 10. Plaintiff agrees with ICE's statement regarding its legal authority, but it does not necessarily follow that ICE has no responsive records. Indeed, FOIA has often been used to expose government misconduct, such as enforcement actions that exceed an agency's authority.

There are several reasons to believe that ICE has records responsive to Plaintiff's Request Nos. 3 and 4. First, ICE officials have previously (but erroneously) claimed that if an item uses a team logo in a disparaging manner, or places one team logo above another, the item is infringing or counterfeit. Pl. Statement of Undisputed Material Facts, Exhs. 3 & 4. Second, ICE has produced photographs of seized items suggesting that ICE has made seizures based on such factors. *See* Pl. Statement of Undisputed Material Facts, ¶¶ 30-33, Exhs. 16-19. Third, ICE has produced a summary table with short descriptions of items seized as counterfeit, and some of the entries indicate that ICE has made seizures based on such factors. *See, e.g.*, Bates No. 359 (describing the November 2014 seizure of eighteen "Baltimore Sucks" t-shirts). Given the confusion among ICE officials about ICE's authority and what constitutes fair use of a trademark, and given the examples

of parody items seized by ICE, it is reasonable to believe that ICE has records responsive to Request Nos. 3 and 4, which precludes a finding that ICE conducted an adequate search.

**D. ICE’s search was inadequate because ICE failed to search the TECS system.**

In her opening brief, Plaintiff explained that ICE has a records system called TECS that is likely to contain responsive documents, and ICE has not searched the TECS system. Pl. Mem. at 15. In response to Plaintiff’s Statement of Undisputed Material Facts, ¶¶ 16 & 26, ICE admits that the 5,564 seizure incidents identified in the table of seized clothing items ICE provided to Plaintiff correspond to 1,085 TECS cases; “TECS contains HSI’s case management database;” and ICE “has not searched individual TECS cases” for records responsive to Plaintiff’s FOIA request. Def. Resp., ¶¶ 16 & 26. In its Reply, ICE offers no explanation for its refusal to search TECS, but simply repeats its mantra that “all locations that have a reasonable likelihood of containing responsive records have been searched.” Def. Reply at 11. ICE’s conclusion is wrong, because ICE admits that TECS contains 1,085 cases that correspond to the 5,564 seizure incidents at issue and TECS has not been searched. “It is well-settled that if an agency has reason to know that certain places may contain responsive documents, it is obligated under FOIA to search barring an undue burden.” *Valencia-Lucena*, 180 F.3d at 327. Because ICE has failed to search the TECS system, ICE has failed to fulfill its search obligation under FOIA.

**E. Plaintiff offered to narrow the scope of her request before ICE tasked the HSI field offices to search for responsive records.**

Plaintiff observed in her opening brief that ICE’s refusal to search the TECS system is particularly egregious because Plaintiff offered to narrow the scope of her request to minimize any burden on the agency. Pl. Mem. at 15. In particular, Plaintiff identified twenty-five entries from the summary table of clothing seizures made by ICE, Bates Nos. 1-511, that are of greatest interest, such as the seizure of eighteen “Baltimore Sucks” t-shirts. Pl. Statement of Undisputed Material

Facts, ¶ 23, Exh. 12. In its Reply, ICE argues that the Court should not consider “communications between Plaintiff and ICE that occurred only after ICE had conducted the search.” Def. Reply at 11. But as ICE well knows, that is not what happened here. Plaintiff made her offer on October 23, 2015. Pl. Statement of Undisputed Material Facts, ¶ 23, Exh. 12. According to the Pineiro declarations, “Subsequent to Plaintiff’s letter [of October 23, 2015], HSI tasked all 26 HSI Special Agent in Charge field offices to search for additional responsive records.” Pineiro Decl. of Dec. 16, 2015, Doc. 15-1, ¶ 38. Thus, “on November 10, 2015, HSI RDU 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.” Pineiro Decl. of Apr. 29, 2016, Doc. 26, ¶ 45. ICE should not be heard to complain that it would have been burdensome to search the TECS system, because Plaintiff offered to drastically reduce the scope of her request *before* ICE started to conduct the major part of its search, and ICE never searched the TECS system at all.

**F. ICE’s insistence that records custodians have unfettered discretion to conduct as thorough or minimal a search as they see fit has resulted in searches that fail to satisfy the requirements of FOIA.**

In her opening brief, Plaintiff explained that ICE delegated to individual records custodians the responsibility of interpreting Plaintiff’s request and how to search for responsive records, resulting in widely divergent searches among the various offices, even though many of those offices operate in similar fashion. Def. Mem. at 16-19. For example, it is indisputable that some of the 26 HSI field offices conducted more robust searches than others. *See, e.g., id.* at 19 (noting that one HSI office used 24 search terms while others used two or less). ICE admits that the “manner in which each ICE office searched varied from office to office,” Def. Reply at 8, but argues that such divergence says nothing about the adequacy of the search, because the court in *Judicial Watch, Inc. v. U.S. Department of Housing and Urban Development*, 20 F. Supp. 3d 247,

254 (D.D.C. 2014), noted that FOIA does not require agencies “to search for responsive documents in a centralized fashion using consistent search terms and techniques across various departments,” so long as the searches are reasonably calculated to uncover all responsive records. Def. Reply at 12. ICE’s reliance on *Judicial Watch* is misplaced, because the HSI field offices are part of the same component and perform the same functions, and within each field office the search was “tasked to all individuals who supervise Intellectual Property Rights investigations.” Pineiro Decl. of Apr. 29, 2016, Doc. 26, ¶ 45. Because the offices and the individuals tasked with conducting the searches do the same type of work and purportedly searched for documents responsive to the same FOIA request, it stands to reason that they would use similar search terms and techniques. That their search terms varied widely suggests that the same type of record in two different HSI field offices would not have been located by each office, refuting ICE’s claim that all files likely to contain responsive documents were searched.

**III. ICE Has Failed To Show That The Information It Redacted From More Than 300 Pages Of Guides Submitted By Private Industry Is Exempt From Disclosure Under FOIA Exemption 7(E).**

ICE has produced 25 industry guides totaling 521 pages, more than 300 pages of which are substantially or completely redacted under FOIA Exemption 7(E).<sup>4</sup> The guides were created by trademark rights holders to assist ICE agents in distinguishing between authentic and counterfeit items. According to ICE, the redacted material describes “the features included in authentic authorized merchandise that indicate whether products are authentic, as well as the features that may indicate products are counterfeit.” Def. Reply at 14. ICE does not distinguish among the

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<sup>4</sup> 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 in paragraph 17 of the Pineiro Declaration of June 30, 2016, Doc. 30-1. The industry guides bear Bates Nos. 524-627, 630-716, 1089-1106, 1135-1152, 1184-1312, 1530-1535, 2615-2677, 2681-2758, and 4655-4672.

various “features” that it has redacted under Exemption 7(E), opting instead for a categorical approach whereby all such features on over 300 different pages are encompassed within the same boilerplate description, repeated two dozen times in ICE’s *Vaughn* Index.

In her opening brief, Plaintiff explained that categorical descriptions are appropriate only if 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 1082, 1088 (D.C. Cir. 2014). Here, ICE’s categorical description covers *all* the redactions, which include everything from examples of authentic stitching, labels, tags, holograms, and logos, to examples of such features that purportedly indicate that an item is counterfeit or infringing. ICE’s use of the categorical approach makes it impossible for Plaintiff or the Court to determine which redactions cover which type of material; thus, it is insufficient to meet ICE’s burden to show that each Exemption 7(E) redaction meets the statutory standard. *See Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991) (FOIA’s “strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents”). For this reason alone, the Court should grant Plaintiff’s motion for summary judgment and order the release of the material ICE redacted from the industry guides under Exemption 7(E). *Goldberg v. Dep’t of State*, 818 F.2d 71, 76 (D.C. Cir. 1987) (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).

**A. ICE has redacted information in the public domain, the release of which cannot risk circumvention of the law.**

Plaintiff explained in her opening brief that ICE’s redactions include information already in the public domain and such information is not subject to withholding under Exemption 7(E). Pl. Mem. at 26-28 (citing *Justice Watch, Inc. v. U.S. Dep’t of Commerce*, 337 F. Supp. 2d 146, 181

(D.D.C. 2004) (“Exemption 7(E)’s protection is generally limited to techniques or procedures that are not well-known to the public.”); *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’”). As Plaintiff explained, ICE redacted images of authentic merchandise even though the public has access to such material through authorized retailers. If the public can walk into a store or look online and see the features that ICE has redacted from the industry guides, it cannot be that the redactions are necessary to protect law enforcement techniques or to avoid the risk of circumvention of the law.

Similarly, techniques for identifying counterfeit merchandise are well-publicized by industry and ICE. Plaintiff’s opening brief provided examples of ICE press conferences held to educate consumers on how to distinguish between authentic and counterfeit goods, and industry websites that provide such information to the public. *Id.* at 27-28. If ICE and industry are already publicizing such information, there is no legitimate argument that the very same information in the industry guides is subject to withholding under Exemption 7(E).

ICE would appear to agree. In its Reply, ICE ignores these arguments completely, and does not dispute either the fact that much of the redacted information is already in the public domain, or the conclusion that publicly available information is not protected by Exemption 7(E).

**B. Material in the industry guides that does not serve a legitimate law enforcement purpose is not subject to withholding under Exemption 7(E).**

Exemption 7(E) does not apply to records that have no legitimate law enforcement purpose. *Jefferson v. Dep’t of Justice*, 284 F.3d 172, 177 (D.C. Cir. 2002). Thus, to the extent that any of the material redacted from the industry guides incorrectly describes as counterfeit items such as parodies or other uses of trademarks protected under the doctrine of fair use, such material should

not have been withheld under Exemption 7(E) because it is not related to the enforcement of federal law and has no rational nexus to ICE's law enforcement duties. ICE does not dispute these principles, but argues that Plaintiff has no evidence that material redacted from the industry guides describes as counterfeit material protected by fair use. Def. Reply at 16. In declaring that Plaintiff's argument "is unsupported by any facts and highly speculative," *id.*, ICE ignores the following evidence.

First, Plaintiff has identified a photograph of a shirt that an NHL product guide labeled "counterfeit" that depicts the Philadelphia Flyers logo with the crossed hammers of the Chicago Blackhawks imposed over it, forming the message "No Flyers Zone." Pl. Statement of Undisputed Material Facts, Exh. 15. As Plaintiff explained in her opening brief, the shirt's use of the Flyers' logo is lawful because there is no confusion as to whether the Flyers sponsored the shirt. Thus, the shirt is incorrectly labeled as "counterfeit" in the industry guide. Because ICE has redacted from the industry guides hundreds of images and descriptions of "the features that may indicate products are counterfeit," Def. Reply at 14, it is likely that some of the redacted material is incorrectly labeled as indicating that an item is counterfeit. Such material is not protected by Exemption 7(E) and should be released.

Second, ICE has produced photographs of items ICE seized as counterfeit that are lawful uses of the marks, including a t-shirt containing a parody of the Chicago Bulls logo, a t-shirt depicting Marilyn Monroe wearing a 49ers jersey, a t-shirt bearing the message "49ers SFuck," and a t-shirt with the San Francisco Forty-Niners logo crossed out. Pl. Statement of Undisputed Material Facts, Exhs. 16-19. Because ICE uses the industry guides to distinguish between authentic and counterfeit items, and has been unable to locate any such guidance of its own, it is reasonable

to believe that redacted portions of the industry guides label as counterfeit the types of t-shirts described above.

Third, ICE has produced a summary table listing clothing items seized as counterfeit by ICE during the relevant time period that contains a short description of the property seized. Bates Nos. 1-511. Several of the descriptions suggest that ICE has seized items that are not counterfeit, such as eighteen “Baltimore Sucks” t-shirts. Bates No. 359. Because adding “sucks” to a trademark prevents confusion about whether the use is authorized, *see, e.g., SaleHoo Group, Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210, 1217 (W.D. Wash. 2010), such items should not have been seized. To the extent the redacted portions of the industry guides encourage ICE to make such seizures, the redacted material is not protected by Exemption 7(E).

Fourth, 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. Pl. Statement of Undisputed Material Facts, Exhs. 3 & 4. Again, because the industry guides are the only records ICE has located that inform ICE personnel on how to distinguish between lawful and unlawful uses of marks, it is reasonable to believe that the misinformed ICE spokespersons were influenced by material in the industry guides that incorrectly describes as counterfeit items such as parodies or other uses of trademarks protected under the doctrine of fair use. Such material is not exempt from disclosure because it is not related to the enforcement of federal law and has no rational nexus to ICE’s law enforcement duties.

**C. The guides submitted by private industry are not protected by Exemption 7(E) because they are not internal agency materials.**

Exemption 7(E) may be invoked to withhold “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). The industry guides do not

constitute “internal agency materials” because they are submitted by private industry to express the opinions of rights owners and they explicitly state that they do not reflect government policy or the established procedures of any law enforcement agency. *See* Pl. Statement of Undisputed Material Facts, Exh. 14 (providing examples of the disclaimers used in the industry guides). ICE argues that Exemption 7(E) protection extends beyond internal agency guidelines and techniques, but ICE provides no citation to support its argument. Def. Reply at 16. Because the records at issue are industry guidelines and not ICE guidelines, they cannot properly be withheld under Exemption 7(E).

**D. ICE has failed to reasonably segregate the information it claims is exempt from disclosure.**

FOIA requires that an agency release “any reasonably segregable portion of a record” after redacting the specific material that the agency claims is exempt from disclosure. 5 U.S.C. § 552(b). Although ICE has submitted a conclusory declaration asserting that it has done so, the facts suggest otherwise. For example, the material redacted from the industry guides includes photographs of allegedly counterfeit clothing, including photographs of features such as stitching, labels, tags, holograms, and logos. Such photographs have been redacted in full from the industry guides, even though ICE has produced 3,197 photographs of items seized as counterfeit, including photographs of stitching, labels, tags, holograms, and logos, without a single redaction under Exemption 7(E). If ICE can release 3,197 photographs of allegedly counterfeit items without making a single redaction, it stands to reason that ICE could release similar photographs that are included in the industry guides. ICE’s failure to do so suggests that it has not carefully segregated images that can be released from the text and explanatory material that it claims is subject to withholding under Exemption 7(E).

### CONCLUSION

The Court should grant Plaintiff's Motion for Summary Judgment and deny Defendant's Motion for Summary Judgment, order ICE to conduct a search reasonably calculated to uncover the requested records, and order ICE to produce the material it redacted from the industry guides under Exemption 7(E).

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: July 14, 2016

*Attorney for Plaintiff*