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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Center for Biological Diversity,
10 Plaintiff,

No. CV-16-00527-TUC-BGM

ORDER

11 v.

12 United States Fish and Wildlife Service,
13 Defendant.

14 Currently pending before the Court is Defendant United States Fish and Wildlife
15 Service’s (“Defendant” or “USFWS”) Motion for Summary Judgment (Doc. 38) and
16 Plaintiff Center for Biological Diversity’s (“Plaintiff” or “CBD”) [Cross-]Motion for
17 Summary Judgment (Doc. 49). Defendant has filed a Statement of Facts Supporting
18 Motion for Summary Judgment (“SOF”) (Doc. 39), and Plaintiff has also filed a
19 Response to Defendant’s Statement of Facts in Support of their Motion for Summary
20 Judgment (“SSOF”), as well as a Statement of Facts in Support of their Motion for
21 Summary Judgment (“XSOF”). Each Party has responded to the opposing summary
22 judgment motion, and subsequently replied. As such, the motion is fully briefed and ripe
23 for adjudication.

24 In its discretion, the Court finds this case suitable for decision without oral
25 argument. *See* LRCiv. 7.2(f). The Parties have adequately presented the facts and legal
26 arguments in their briefs and supporting documents, and the decisional process would not
27 be significantly aided by oral argument.

28 . . .

1 **I. FACTUAL BACKGROUND**

2 **A. *The Law Enforcement Management Information System Database***

3 USFWS is responsible for determining whether or not the imports or exports are in
4 compliance with the laws and regulations enforced by USFWS. Def.'s SOF (Doc. 39) ,
5 Hyde-Michaels Decl. (Exh. "1") at ¶ 4. This oversight and enforcement includes, but is
6 not limited to compliance with the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.*
7 *Id.* USFWS determines whether imports or exports should be allowed to enter into or
8 depart from the United States. *Id.*

9 The Law Enforcement Management Information System ("LEMIS") database is
10 used by USFWS's Office of Law Enforcement to, among other operational needs: record,
11 process and store investigations, intelligence, import and export data, and other
12 programmatic data.¹ *Id.*, Exh. "1" at ¶ 2. The LEMIS information is used *inter alia* to
13 track species being imported or exported; monitor quotas of a particular species;
14 intervene in illegal trade and the unlawful commercial exploitation of fish, wildlife, and
15 plants; facilitation of the legal trade of fish and wildlife, and their parts and products; and
16 to prevent the importation of invasive, injurious, or otherwise harmful species. Def.'s
17 SOF (Doc. 39), Exh. "1" at ¶ 2.

18 The LEMIS data are derived from USFWS Form 3-177, the "Declaration for
19 Importation or Exportation of Fish and Wildlife." *Id.*, Exh. "1" at ¶ 3. USFWS must
20 clear all wildlife that are imported into or exported from the United States, irrespective of
21 form—whether wildlife are alive, whole, in parts, or as processed products. *Id.*, Exh. "1"
22 at ¶¶ 3–4; 50 C.F.R. § 14.52. In order to obtain clearance of such wildlife, an importer or
23 exporter is statutorily required to file a Form 3-177. *Id.*, Exh. "1" at ¶ 5; Pl.'s SSOF
24 (Doc. 46), Cummings Decl. (Exh. "2") at ¶ 13. Form 3-177 is similar to, but more
25 detailed than, the United States Customs and Border Protection ("CBP") declaration
26 forms. Def.'s SOF (Doc. 39), Exh. "1" at ¶ 3. Greater detail is demanded due to the

27 _____
28 ¹ CBD agrees that the LEMIS database is used to track import and export data; however,
asserts that the remainder of the information is either immaterial or require discovery. The Court
includes the additional information for background purposes only.

1 unique information USFWS is required to collect in order to make authoritative and
2 sound judgment on whether the species of fish or wildlife is correctly identified, requires
3 additional permits, or is in violation of any domestic or foreign law or regulation in order
4 for the USFWS to clear the shipment for import and export. *Id.* USFWS inputs the
5 information provided by Form 3-177 submitters into its LEMIS database. *Id.*, Exh. “1” at
6 ¶ 6.

7 ***B. Prior LEMIS Data Releases by USFWS***

8 FOIA requests for LEMIS data by members of the public have occurred since at
9 least 2001. Pl.’s SSOF (Doc. 46), Peyman Decl. (Exh. “4”) at ¶ 7. From 2001 until
10 approximately mid-2014 or 2015, USFWS released LEMIS data without exemption. *Id.*,
11 Adkins Decl. (Exh. “3”) at ¶¶ 11–12 & Exh. “4” at ¶ 7 & Goyenechea Decl. (Exh. “9”) at
12 ¶ 7. During the 2014 to 2015 time period, USFWS began withholding more than one (1)
13 or two (2) fields of data from the LEMIS database. Pl.’s SSOF (Doc. 46), Cummings
14 Decl. (Exh. “2”) at ¶ 39 & Exh. “4” at ¶ 9. The withholdings varied from request to
15 request. *See id.*, Exh. “2” at ¶ 30 (USFWS withheld quantity; customs document
16 number; name of carrier; air waybill and bill of lading number; foreign CITES permit and
17 U.S. permit numbers; declared value of wildlife; and foreign importer/exporter data
18 pursuant to Exemption 4) & Exh. “3” at ¶ 12 (releasing quantity and foreign
19 importer/exporter data) & Schubert Decl. (Exh. “5”) at ¶ 4 (2015 FOIA request, response
20 withheld U.S. importers/exporters, foreign importers/exporters, air waybill, and declared
21 value data) & Exh. “9” at ¶ 7 (releasing quantity and foreign importer/exporter data).
22 USFWS had previously released both quantity and foreign importer/exporter data to CBD
23 in response to a FOIA request. *Id.*, Exh. “3” at ¶12.

24 ***C. CBD’s Current FOIA Request***

25 **1. Original Request and Response**

26 On February 24, 2016, Plaintiff filed a Freedom of Information Act (“FOIA”)
27 request with USFWS seeking LEMIS data for: date of import/export; port of clearance;
28 purpose code; customs document number; name of carrier; air waybill of bill of lading

1 number; transportation code; number of cartons of wildlife; United States
2 importer/exporter; foreign importer/exporter; scientific and common name of species;
3 foreign Convention on International Trade in Endangered Species of Wild Fauna and
4 Flora (“CITES”) permit and United States permit numbers; description code; source
5 code; country of origin; quantity/unit, and declared value. Pl.’s Opp. to Mot. to Intervene
6 (Doc. 28), Uhlmann Decl., CBD FOIA Request 2/24/2016 (Exh. “A”) at 1–2; Def.’s SOF
7 (Doc. 39), Hyde-Michaels Decl. (Exh. “1”) at ¶ 2. In response to this request, USFWS
8 provided the following LEMIS data fields: species; wildlife description; number of
9 cartons; country of origin; country of import/export; purpose of import/export; source;
10 dates; ports of clearance; transportation code; and name of United States
11 importer/exporter. *See* Pl.’s Opp. to Mot. to Intervene (Doc. 28), Uhlmann Decl.,
12 USFWS Response to CBD’s FOIA Request 3/4/2016 (Exh. “B”) at 2. Pursuant to FOIA
13 Exemption 4, which exempts confidential commercial information, USFWS withheld
14 LEMIS data fields containing: declared value; quantity; foreign importer/exporter; name
15 of carrier; bill of lading number; customs document number; and permit number. *Id.*,
16 Uhlmann Decl., Exh. “B” at 2. On April 8, 2016, CBD appealed USFWS’s decision to
17 withhold the following LEMIS data fields: declared value; quantity; foreign
18 importer/exporter; bill of lading number; customs document number; and permit
19 numbers. *Id.*, Uhlmann Decl., CBD FOIA Appeal 4/8/2016 (Exh. “C”) at 2. USFWS did
20 not respond to CBD’s FOIA appeal within twenty (20) days. Answer (Doc. 35) at ¶ 9.

21 **2. The Instant Litigation**

22 On August 9, 2016, CBD filed the instant litigation to challenge the Exemption 4
23 withholdings. *See* Compl. (Doc. 1). On November 25, 2016, USFWS noticed the
24 submitters of LEMIS data through a notice (the “Notice”) in the Federal Register on
25 November 25, 2016 (81 Fed. Reg. 85255) and pursuant to 43 C.F.R. 2.27(b). Def.’s SOF
26 (Doc. 39), Hyde-Michaels Decl. (Exh. “1”) at ¶ 11. The Notice solicited views from
27 submitters of Form 3-177 regarding the Exemption 4 data and contained instructions for
28 submitters, as well as apprised them of the legal standards applicable in this case. *Id.*

1 Ultimately, approximately thirty-two (32) submitter companies were deemed by USFWS
2 to have provided sufficient information, and warranted exemption. *Id.*, Exh. “1” at ¶ 14.
3 During this litigation USFWS and CBD negotiated a rolling release of all data that
4 USFWS had deemed not subject to exemption. *Id.*, Exh. “1” at ¶ 21. USFWS has
5 provided CBD with all relevant information, except for the Exemption 4 information that
6 is currently the subject of this litigation. *Id.* Through this litigation CBD seeks the
7 release of the following data fields: 1) foreign importer/exporter; 2) United States permit
8 number; 3) quantity; and 4) name of carrier. Pl.’s SSOF (Doc. 46), Cummings Decl.
9 (Exh. “3”) at ¶ 31.

11 II. STANDARD OF REVIEW

12 “The Freedom of Information Act was enacted to facilitate public access to
13 Government documents.” *United States Dep’t of State v. Ray*, 502 U.S. 164, 173, 112
14 S.Ct. 541, 547, 116 L.Ed.2d 526 (1991) (citations omitted). “The statutory scheme
15 provides public access to government information ‘shielded unnecessarily’ from the
16 public and establishes a ‘judicially enforceable public right to secure such information
17 from possibly unwilling official hands.’” *Watkins v. United States Bureau of Customs
18 and Border Protection*, 643 F.3d 1189 (9th Cir. 2011) (quoting *Department of Air Force
19 v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976)). “The basic purpose of
20 FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society,
21 needed to check against corruption and to hold the governors accountable to the
22 governed.” *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 96 S.Ct. 2311,
23 2327, 57 L.Ed.2d 159 (1978) (citations omitted).

24 “At the same time, FOIA contemplates that some information may legitimately be
25 kept from the public.” *Lahr v. NTSB*, 569 F.3d 964, 973 (9th Cir. 2009). Accordingly,
26 FOIA contains nine exemptions pursuant to which information can be withheld. *See* 5
27 U.S.C. § 552(b)(1)–(9). “FOIA’s ‘strong presumption in favor of disclosure’ means that
28 an agency that invokes one of the statutory exemptions to justify the withholding of any

1 requested documents or portions of documents bears the burden of demonstrating that the
2 exemption properly applies to the documents.” *Lahr*, 569 F.3d at 973 (quoting *Ray*, 502
3 U.S. at 173, 112 S.Ct. 541). Furthermore, “[b]ecause of its overarching goal of public
4 disclosure, FOIA ‘exemptions are to be interpreted narrowly.’” *Watkins*, 643 F.3d at
5 1194 (quoting *Lahr*, 569 F.3d at 973).

6 “Most FOIA cases are resolved by the district court on summary judgment, with
7 the district court entering judgment as a matter of law.” *Animal Legal Defense Fund v.*
8 *United States Food & Drug Admin.*, 836 F.3d 987, 989 (9th Cir. 2016) (citations
9 omitted). The Ninth Circuit Court of Appeals has “conclude[d] there is no principled
10 distinction to be drawn between [its] usual summary judgment standard and the standard
11 to be applied in FOIA cases.” *Id.* Accordingly, summary judgment is appropriate when,
12 viewing the facts in the light most favorable to the nonmoving party, *Anderson v. Liberty*
13 *Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986), “there is
14 no genuine dispute as to any material fact and the movant is entitled to judgment as a
15 matter of law.” Fed. R. Civ. P. 56(a). A fact is “material” if it “might affect the outcome
16 of the suit under the governing law,” and a dispute is “genuine” if “the evidence is such
17 that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477
18 U.S. at 248, 106 S.Ct. at 2510. Thus, factual disputes that have no bearing on the
19 outcome of a suit are irrelevant to the consideration of a motion for summary judgment.
20 *Id.*

21 22 **III. ANALYSIS**

23 **A. Exemption 4**

24 FOIA exempts “trade secrets and commercial or financial information obtained
25 from a person and privileged or confidential” from disclosure. 5 U.S.C. §552(b)(4). “In
26 order to invoke Exemption 4 in the Ninth Circuit, the government agency must
27 demonstrate that the information it sought to protect is ‘(1) commercial and financial
28 information, (2) obtained from a person or by the government, (3) that is privileged or

1 confidential.” *Watkins v. United States Bureau of Customs and Border Protection*, 643
2 F.3d 1189, 1194 (9th Cir. 2011) (quoting *GC Micro Corp. v. Defense Logistics Agency*,
3 33 F.3d 1109, 1112 (9th Cir. 1994)). “The terms ‘commercial or financial’ are given
4 their ordinary meaning. *Id.* (citing *Pub. Citizen Health Research Group v. FDA*, 704
5 F.2d 1280, 1290 (D.C. Cir. 1983)). “[C]ommercial or financial matter is ‘confidential’
6 for purposes of the exemption if disclosure of the information is likely to have either of
7 the following effects: (1) to impair the Government’s ability to obtain necessary
8 information in the future; or (2) to cause substantial harm to the competitive position of
9 the person from whom the information was obtained.” *Id.* (quoting *GC Micro Corp.*, 33
10 F.3d at 1112).

11 It is undisputed that the information collected in the LEMIS database is compelled
12 due to the mandatory nature of the Form 3-177. “[T]here is a presumption that the
13 Government’s interest is not threatened by disclosure because it secure[d] the information
14 by mandate; and as the harm to the private interest (commercial disadvantage) is the only
15 factor weighing against FOIA’s presumption of disclosure, that interest must be
16 significant.” *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d
17 871, 878 (D.C. Cir. 1992) (en banc); *cf. Frazee v. United States Forest Service*, 97 F.3d
18 367, 372 (9th Cir. 1996) (although the Ninth Circuit has not addressed the *Critical Mass*
19 distinction, recognizing that “[i]f the information is required by the government, then the
20 substantial competitive harm prong of the *National Parks* confidentiality test still
21 applies.”). “Competitive harm should not be taken to mean simply any injury to the
22 competitive position[.]” *Watkins*, 643 F.3d at 1195 (citations omitted). Moreover,
23 “[a]lthough the court need not conduct a sophisticated economic analysis of the likely
24 effects of disclosure[,] . . . [c]onclusory and generalized allegations of substantial
25 competitive harm . . . are unacceptable and cannot support an agency’s decision to
26 withhold requested documents.” *Id.* (quotations and citations omitted) (first alteration
27 added). “The government need not show that releasing the documents would cause
28 ‘actual competitive harm.’” *Id.* at 1194 (citing *GC Micro Corp.*, 33 F.3d at 1113).

1 “Rather, the government need only show that there is (1) actual competition in the
2 relevant market, and (2) a likelihood of substantial competitive injury if the information
3 were released.” *Id.*

4 ***B. Substantial Competitive Injury***

5 For purposes of this motion, the Court assumes without deciding that the data at
6 issue is commercial information protected by Exemption 4. Additionally, the court will
7 assume without deciding that each objector can demonstrate actual competition in the
8 relevant market.² A review of the 2014 and 2015 data originally released by USFWS to
9 CBD indicates that the LEMIS data regarding the objecting companies, and for which no
10 Exemption has been claimed, was disclosed. Pl.’s SSOF (Doc. 46), Cummings Decl.
11 (Exh. “3”) at ¶ 30 & Attach. “C.” As such, the Court limits its review of each objector’s
12 assertions regarding the likelihood of substantial competitive injury to the four (4) fields
13 sought by CBD.

14 **1. Charles River**

15 Charles River alleges that “[t]he information in the LEMIS ‘Quantity’ filed would
16 allow competitors to calculate the level of business being conducted by competing
17 importers and exporters[,] . . . [and] allow them (in conjunction with other information
18 they already possess) to calculate import and export volumes and prices being paid by
19 competing importers and exporters.” Def.’s SOF (Doc. 39), Name Redacted Decl. (Exh.
20 “3”) at ¶ 14(b). Regarding foreign importer/exporter data, Charles River alleges that
21 “[r]elease of this information allows competitors to identify our foreign suppliers as well
22 as our foreign customers and approach them seeking to offer or purchase animals at a
23 more attractive price.” *Id.*, Exh. “3” at ¶ 14(g). Charles River offers a general objection
24 regarding release of the United States permit number, and does not address the carrier
25 data. *Id.*, Exh. “3” at ¶ 14(h).

26 ² “Competitive harm analysis ‘is . . . limited to harm flowing from the affirmative use of
27 proprietary information by *competitors*. Competitive harm should not be taken to mean simply
28 any injury to competitive position” *Watkins v. United States Bureau of Customs and
Border Protection*, 643 F.3d 1189, 1195 (9th Cir. 2011) (quoting *Pub. Citizen Health Research
Group v. FDA*, 704 F.2d 1280, 1291–92 & n.30) (alterations in original).

2. Bristol-Myers Squibb

1
2 Bristol-Meyers Squibb (“BMS”) urges that the name of carrier, foreign
3 importer/exporter with country code, and United States permit numbers “must be
4 withheld in order to prevent a substantial likelihood of competitive harm from disclosing
5 the identity of BMS’s vendors.” Def.’s SOF (Doc. 39), Graziano Decl. (Exh. “4”) at ¶ 9.
6 BMS argues that because competition for reliable vendors is acute, and “competitors vie
7 for the same limited resources,” those competitors could decide that BMS’s vendors
8 provide superior products or services and switch to BMS’s vendors. *Id.*, Exh. “4” at ¶ 10.
9 BMS extends this argument to the supply route and supply chain. *Id.* “BMS would then
10 be disadvantaged in that it would likely be forced to pay higher prices for specimens or
11 receive inferior service or quality than it now does because the quality of specimens it
12 currently sources from its preferred suppliers may become scarce.” *Id.* Finally, BMS
13 argues that the quantity of specimens in conjunction with the number of cartons and
14 monetary value “could lead to direct inferences about the amount of certain types of
15 research the company conducts, leading competitors to respond by increasing their
16 research or adjusting their research timelines in an effort to beat BMS to market.” *Id.*,
17 Exh. “4” at ¶ 15.

3. Covance Laboratories, Inc.

18
19 Covance Laboratories claims that “[t]he release of the information sought by CBD
20 will cause substantial financial harm to Covance’s business interests[,] . . . [and] will
21 provide competitors with a comprehensive picture of Covance’s business interests as a
22 whole. Def.’s SOF (Doc. 39), Harkness Decl. (Exh. “5”) at ¶ 6. Covance further alleges
23 that if its “competitors know which vendors an industry leader such as Covance
24 patronize, they could decide, as Covance has, that these vendors provide superior services
25 and/or research animals and therefore patronize these same vendors . . . [and Covance]
26 would likely be forced to pay higher prices for animals or receive inferior service or
27 quality because resources it currently sources from its preferred suppliers may become
28 scarce.” *Id.*, Exh. “5” at ¶¶ 8–9. Covance also express concern that “[t]he release of

1 airlines used, in conjunction with the names of the exporters, could considerably impact
2 Covance's business by allowing rival importers to reverse-engineer Covance's business
3 model and discover advantages that it provides." *Id.*, Exh. "5" at ¶ 11. Covance further
4 alleges that it would suffer substantial competitive harm if competitors knew the
5 quantities and unit numbers of imported animals, because the competitor could then learn
6 Covance's capacity to house a certain number of primates and undercut their prices. *Id.*,
7 Exh. "5" at ¶ 13.

8 **4. AbbVie, Inc.**

9 AbbVie alleges that it would be harmed if the LEMIS data were released, because
10 a competitor could look at the LEMIS fields for importer/exporter and quantity and
11 identify AbbVie's suppliers and ascertain its import volumes. Def.'s SOF, Name
12 Redacted Decl. (Exh. "6") at ¶ 18. AbbVie also alleges that its "competitors could use
13 LEMIS data to figure out and take advantage of our shipping arrangements, causing delay
14 and supply chain disruption." *Id.*, Exh. "6" at ¶ 19. AbbVie asserts that permit numbers
15 "can be used to determine country of origin, revealing clues to airline routes, potential
16 airline carriers, or other information that can be used to disrupt supply chain." Def.'s
17 Reply (Doc. 61), Name Redacted Decl. (Exh. "4") at ¶ 3. AbbVie further asserts that
18 release of quantity information "will enable competitors to effectively target major
19 importers and largest part of our supply line[.]" as well as reveal market share. *Id.*, Exh.
20 "4" at ¶¶ 4-5.

21 **5. Alnylam Pharmaceuticals**

22 Alnylam Pharmaceuticals asserts that release of the foreign importer/exporter,
23 name of carrier, and United States permit numbers could enable "competitors to identify
24 a company's vendors and/or suppliers of research specimens or other research services
25 relating to such specimens[.]" Def.'s Reply (Doc. 61), DeLena Decl. (Exh. "5") at ¶ 5.
26 Alnylam further alleges that "[q]uantity information could lead to direct inferences
27 regarding the phase and scope of product research and development in Alnylam's
28 pipeline." *Id.*, Exh. "5" at ¶ 6.

1 **6. Quality Marine**

2 Quality Marine asserts that quantity data would “provide trade volume by
3 species/subspecies and provide[] competitors trade information they can utilize to
4 undermine [its] relationships not only without suppliers, but also our customers.” Def.’s
5 SOF (Doc. 39), Buerner Decl. (Exh. “8”) at ¶ 16(b). Quality Marine further asserts that
6 release of foreign importer/exporter information would provide “competitors the ability
7 to determine who our foreign suppliers are as well as identify our foreign clients” and
8 approach either of them to the detriment of Quality Marine. *Id.*, Exh. “8” at ¶ 16(h).

9 **7. Animal Source Texas, Inc.**

10 Animal Source Texas, Inc. (“AST”) broadly asserts that disclosure of the LEMIS
11 data could result in competitors attempting to gain an advantage by utilizing AST’s
12 sources or suppliers. Def.’s SOF (Doc. 39), Stojadinov Decl. (Exh. “9”) at ¶¶ 17–18, 22–
13 23. AST further asserts that competitors could use information regarding a rare species
14 supplier to obtain new clients at AST’s expense. *Id.*, Exh. “9” at ¶ 24.

15 **8. Worldwide Primates, Inc.**

16 Worldwide Primates, Inc. (“WWP”) asserts that air carrier arrangements represent
17 “[o]ne of the most vital, sensitive, and protected components.” Def.’s SOF (Doc. 39),
18 Block Decl. (Exh. “10”) at ¶ 8. WWP alleges that release of carrier information and
19 foreign importer/exporter information will result in significant financial harm due to
20 competitors taking advantage of the information. *Id.*, Exh. “10” at ¶¶ 12, 15. WWP
21 admits that some of this information may be publicly available. *Id.*, Exh. “10” at ¶ 21.

22 **9. Boehringer Ingelheim Pharmaceuticals, Inc.**

23 Boehringer Ingelheim Pharmaceuticals, Inc. (“Boehringer Ingelheim”) asserts that
24 the name of the carrier, foreign importer/exporter, and United States permit numbers
25 “must be withheld in order to prevent a substantial likelihood of competitive harm from
26 disclosing the identity of Boehringer Ingelheim’s vendors.” Def.’s SOF (Doc. 39),
27 Baxter Decl. (Exh. “11”) at ¶ 9. Boehringer Ingelheim asserts that competitors could use
28 information that identifies vendors to determine the kind of tests Boehringer Ingelheim

1 may be pursuing or switch to Boehringer Ingelheim’s vendors to its detriment. *Id.*, Exh.
2 “11” at ¶ 10. Boehringer Ingelheim further expresses concerns that such information
3 would “give competitors insights into the company’s potential negotiating positions with
4 such vendors.” *Id.* Boehringer Ingelheim also alleges that the disclosure of the quantity
5 of specimens “could be used to provide information to competitors regarding the degree
6 of activity in Boehringer Ingelheim’s research [and] development pipeline.” *Id.*, Exh.
7 “11” at ¶ 14.

8 **10. Bogner of America, Inc.**

9 Bogner of America, Inc. (“Bogner of America”) objects to the release of LEMIS
10 data because it will cause “substantial financial harm to Bogner of America’s business
11 interests[,] [and] . . . will provide competitors with a comprehensive picture of Bogner of
12 America’s business interests as a whole.” Def.’s SOF (Doc. 39), Brandsetter Decl. (Exh.
13 “12”) at ¶ 9. Bogner of America expresses concern that “vendors may decide to increase
14 their prices if there is heightened demand for their services from more retailers—leading
15 to substantial competitive harm for Bogner of America’s business interests.” *Id.*, Exh.
16 “12” at ¶ 10.

17 **11. DM Exotics**

18 DM Exotics objections are based on issues surrounding the actual cost of what she
19 imports, information regarding which CBD does not seek. *See* Def.’s SOF (Doc. 39),
20 Mulleary Decl. (Exh. “13”).

21 **12. Exotic Reef Imports, Inc.**

22 Exotic Reef Imports, Inc. (“ERI”) asserts that the release of foreign
23 importer/exporter information will result in substantial financial harm, because
24 competitors could discern ERI’s suppliers and breeders. Def.’s SOF (Doc. 39), Miller
25 Decl. (Exh. “14”) at ¶ 17. ERI further asserts that disclosure of the United States permit
26 number “could be used to cross-reference to information related to species, country of
27 origin and quantities imported and allow [ERI’s] competitors to discern specific
28 information about the marine aquarium wholesale work . . . and could use such

1 information to improperly compete against and harm ERI.” *Id.*, Exh. “14” at ¶ 19. ERI
2 further admits that “some of this information might be publicly available from some other
3 source[.]” *Id.*, Exh. “14” at ¶ 24.

4 **13. Safari Specialist Inc. d/b/a/ True-Life Taxidermy**

5 Safari Specialist Inc. d/b/a/ True-Life Taxidermy (“SSI”) asserts that “[t]he
6 disclosure of import/export quantity reveals SSI’s overseas taxidermy market share and
7 the primary locations where SSI conducts business, which would allow its competitors to
8 target clients and suppliers in those areas.” Def.’s Reply (Doc. 61), Vitro Decl. (Exh.
9 “11”) at ¶ 10.

10 **14. SNBL**

11 SNBL asserts that disclosure of foreign importer/exporter information “will result
12 in substantial financial harm to SNBL as such information would easily lead SNBL’s
13 competitors to discern the breeders [with whom] SNBL contracts[.]” Def.’s SOF (Doc.
14 39), Glaza Decl. (Exh. “16”) at ¶ 17. SNBL acknowledges “that some of this information
15 might be publicly available[.]” *Id.*, Exh. “16” at ¶ 24.

16 **15. Genentech, Inc.**

17 Genentech, Inc. (“Genentech”) asserts that release of foreign importer/exporter
18 and United States permit numbers could result in Genentech’s competitors identifying its
19 vendors, and using their services to Genentech’s commercial disadvantage. Def.’s SOF
20 (Doc. 39), Chan. Decl. (Exh. “17”) at ¶ 9. Genentech’s objections to the release of
21 quantity data only relate to its release with monetary value. *Id.*, Exh. “17” at ¶ 14.

22 **16. Novartis Pharmaceuticals Corporation**

23 Novartis Pharmaceuticals Corporation includes Novartis Institutes for BioMedical
24 Research, Inc. (“NIBRI”) and Novartis Institute for Functional Genomics, Inc., d/b/a the
25 Genomics Institute of the Novartis Research Foundation (“GNF”) (collectively,
26 “Novartis”). Def.’s SOF (Doc. 39), Bouchard Decl. (Exh. “18”) at ¶ 1 & Name Redacted
27 Decl. (Exh. “19”). Novartis asserts that release of foreign importer/exporter and United
28 States permit numbers could allow competitors to identify vendors, and use them to

1 Novartis’s disadvantage. *Id.*, Exh. “18” at ¶¶ 9–10 & Exh. “19” at ¶¶ 9–10. Novartis
2 further alleges that the LEMIS data would disclose what was in the pipeline, because
3 when Novartis “publicizes product pipeline information at all, it is usually only general
4 information regarding [its] research approaches, product discovery methodologies, and
5 certain projects in active clinical development.” Def.’s Reply (Doc. 61), Name Redacted
6 Decl. (Exh. “11”) at ¶ 8. Novartis also states that quantity data alone “could provide a
7 roadmap regarding [its] research efforts, enabling competitors to make direct inferences
8 about the amount of certain types of research NPC has conducted and continues to
9 perform.” *Id.*, Exh. “11” at ¶ 9.

10 **17. Burberry**

11 Burberry Limited and Burberry (Wholesale) Limited (collectively “Burberry”)
12 asserts that release of the LEMIS data “will provide competitors with a comprehensive
13 picture of Burberry’s business interests as a whole. Def.’s SOF (Doc. 39), Ahmetaj Decl.
14 (Exh. “20”) at ¶ 9. Burberry further alleges that such a release would reveal the identity
15 of its vendors and carriers, which would result in increased competition for scarce
16 resources. *Id.*, Exh. “20” at ¶ 9–10.

17 **18. Primate Products**

18 Primate Products (“PP”) asserts that release of carrier information will result in
19 PP’s competitors being able to take advantage of the relationships it has cultivated.
20 Def.’s SOF (Doc. 39), Rowell Decl. (Exh. “21”) at ¶13. Similarly, PP asserts that release
21 of foreign importer/exporter information will allow competitors to identify sources of PP
22 purchases, and gain an unfair competitive advantage. *Id.*, Exh. “21” at ¶ 16. PP
23 acknowledges that “some of this information may be publicly available[.]” *Id.*, Exh. “21”
24 at ¶ 21.

25 **19. Appropriateness of Exemption**

26 Each of the entities who have urged confidentiality have broadly stated the
27 possibility of competitive harm if the LEMIS data were released. In this case, however,
28 LEMIS data has been released in full for more than a decade prior to USFWS redacting

1 any information. Once USFWS began redacting fields, it did so without any sort of
2 consistency. Neither has USFWS presented a change of policy, circumstance, or statute
3 that might explain its uneven responses to FOIA requests.

4 Based on the circumstances of this case, the corporate speculations are insufficient
5 to support exemption. “Competitive harm should not be taken to mean simply any injury
6 to the competitive position[.]” *Watkins*, 643 F.3d at 1195 (citations omitted). Moreover,
7 “[a]lthough the court need not conduct a sophisticated economic analysis of the likely
8 effects of disclosure[,] . . . [c]onclusory and generalized allegations of substantial
9 competitive harm . . . are unacceptable and cannot support an agency’s decision to
10 withhold requested documents.” *Id.* (quotations and citations omitted) (first alteration
11 added). If there were a true *likelihood* of *substantial* competitive injury, at least one
12 instance of harm would have been documented based on the years of unredacted LEMIS
13 data release. USFWS has not met “its burden of showing a potential of substantial
14 competitive harm.” *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1115
15 (9th Cir. 1994). As such, USFWS has not overcome FOIA’s strong presumption in favor
16 of disclosure. *Lahr v. NTSB*, 569 F.3d 964, 973 (9th Cir. 2009). CBD is entitled to a
17 dataset including the Exemption 4 information at issue. As such, summary judgment

18 **C. Administrative Procedures Act**

19 Defendant seeks dismissal of Plaintiff’s APA claim requesting an order directing
20 disclosure under the APA. Def.’s Mot. for Summ. J. (Doc. 38) at 14–15. “The Ninth
21 Circuit recognizes: ‘[I]f a plaintiff can bring suit against the responsible federal agencies
22 under [a citizen-suit provision], this action precludes an additional suit under the APA.’”
23 *Lion Raisins, Inc. v. United States Dept. of Agriculture*, 636 F.Supp.2d 1081, 1114–15
24 (9th Cir. 2009) (quoting *Berm-Air Disposal v. Cohen*, 156 F.3d 1002, 1005 (9th Cir.
25 1998)) (alterations in original). “The FOIA contains a citizen-suit provision[,] . . . and it
26 provides [Plaintiff] with another adequate remedy.” *Id.* at 1115. Because FOIA provides
27 an adequate remedy, Defendant’s motion to dismiss Plaintiff’s APA claim is granted.

28 . . .

1 ***D. Agency Appeal***

2 Defendant also seeks summary judgment on “Plaintiff’s claim for an order
3 compelling USFWS to respond to Plaintiff’s appeal.” Def.’s Mot. for Summ. J. (Doc. 38)
4 at 15. “The deciding official for FOIA appeals normally will not make a decision on an
5 appeal if the request becomes a matter of FOIA litigation.” 43 C.F.R. 2.60(d). CBD sued
6 in order to obtain relief pursuant to USFWS’s failure to respond to its FOIA appeal.
7 CBD has obtained the relief that it sought under FOIA, and the Court declines to issue a
8 declaratory ruling regarding USFWS’s appellate process. Accordingly, Defendant is
9 entitled to summary judgment on this claim.

10 ***E. Motion to Strike and 56(d) Relief***

11 Plaintiff sought to strike portions of Defendant’s factual statements, or in the
12 alternative sought relief pursuant to Rule 56(d), Federal Rules of Civil Procedure. In
13 light of the foregoing, Plaintiff’s motions are denied as moot.

14
15 **IV. CONCLUSION**

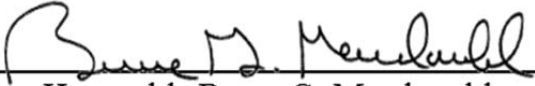
16 Based upon the foregoing, the Court finds that Defendant failed to meet “its
17 burden of showing a potential of substantial competitive harm.” *GC Micro Corp. v.*
18 *Defense Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994). Accordingly, IT IS
19 HEREBY ORDERED that:

- 20 1) Defendant’s Motion for Summary Judgment (Doc. 38) is DENIED in part and
21 GRANTED in part;
- 22 2) Plaintiff’s Cross-Motion for Summary Judgment (Doc. 49) is GRANTED in
23 part and DENIED in part;
- 24 3) Defendant shall provide documents responsive to Plaintiff’s FOIA request
25 consistent with this Order within fourteen (14) days of this Order;
- 26 4) Plaintiff’s claim pursuant to the APA is DISMISSED;
- 27 5) Plaintiff’s motion to strike and for 56(d) relief is DENIED AS MOOT; and
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6) The Clerk of the Court shall enter judgment in favor of the Plaintiff and close the case.

Dated this 30th day of March, 2018.



Honorable Bruce G. Macdonald
United States Magistrate Judge