UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CHARLES SEIFE, Plaintiff, *v.* FOOD AND DRUG ADMINISTRATION and DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants, and SAREPTA THERAPEUTICS, Intervenor-Defendant.	Case No. 1:17-cv-3960 (JMF) May 29, 2018

COMBINED MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This case arises out of the highly irregular approval of a new drug by the leadership of defendant Food and Drug Administration (FDA) over the opposition of the agency's internal and external scientific reviewers, and amidst allegations of scientific misconduct, ethical conflicts, and the violation of the FDA's statutory standards. In 2016, defendant-intervenor Sarepta Therapeutics (Sarepta) obtained FDA approval for eteplirsen (Exondys 51) to treat a rare form of muscular dystrophy despite the vocal objections of experts that Sarepta had provided no evidence of any clear clinical benefit from the drug, while its intravenous method of administration would pose certain—perhaps fatal—health risks to patients. Sarepta now sells the drug at a list price that can exceed $1,000,000 a year, putting patients and their families under enormous financial strain and causing insurance companies to question coverage for a drug that, in the words of one high-ranking FDA official, may be no more than an "elegant placebo." Kenney Decl., Ex. F, 22.

Through this Freedom of Information Act (FOIA) lawsuit, science reporter Charles Seife (Seife) seeks to compel disclosure of information about the effectiveness and safety of Exondys 51: Specifically, he seeks narrative summaries describing the clinical trials conducted by Sarepta and the underlying safety and efficacy results they produced. This information will substantially advance the public's understanding of alleged misconduct and irregularities in the approval of Exondys 51 and will help patients and their doctors make informed decisions about using the drug. The information is contained in standardized Clinical Study Reports (CSRs) that Sarepta submitted to win approval for Exondys 51, but defendants have largely withheld it under FOIA Exemption 4 based upon the allegation that disclosure would cause competitive harm to Sarepta.

This Court should grant Seife's motion to compel disclosure for two reasons. First, in seeking an exemption from FOIA's disclosure mandate, defendants fall woefully short of satisfying their evidentiary burden. To withhold confidential commercial information under Exemption 4, either

Sarepta or the FDA was required to make a specific factual showing that disclosure was likely to cause imminent and substantial competitive injury. Neither has.

The single non-expert declaration submitted to establish competitive injury is from a witness who lacks personal knowledge and offers only the type of conclusory claims courts have previously found insufficient under Exemption 4. Nor do those claims of harm from disclosure withstand scrutiny considering all that is already known about Sarepta's clinical trials, and they are squarely rebutted by Seife's qualified experts. The former FDA Associate Commissioner for Public Health Strategy and Analysis, Dr. Peter Lurie, for example, shows that the requested data cannot be affirmatively used by competitors "in any meaningful way," but would shed light on the safety and efficacy of Sarepta's drug. Lurie Decl. ¶¶ 24; *see also id.* at 21-25. Nothing presented by Sarepta or the FDA demonstrates a likelihood of substantial and imminent competitive harm.

Second, the overwhelming public interest in the disclosure of CSR safety and efficacy information should compel disclosure, even if some likely competitive injury had been established. Disclosure is essential given both the allegations of wrongdoing in the FDA approval process and the significant health risks to patients taking Exondys 51—risks they might choose to forego if the drug is not actually effective, as many experts have stated. The information at issue will shed significant light on both the FDA's compliance with its statutory mandate and the drug's public health consequences. At a minimum, given the substantial public interest at stake, Seife respectfully requests the Court to conduct an *in camera* review of a sample of the redactions to determine if the withheld information is indeed properly exempt.

STATEMENT OF FACTS

A. The CSR Safety and Efficacy Information at Issue

The instant cross-motions concern defendants' authority to withhold key efficacy and safety information from CSRs submitted by Sarepta that describe two clinical trials of Exondys 51 in human

subjects. The FDA requires every applicant for new drug approval to submit CSRs, which are standardized reports presenting the trial results needed to evaluate a drug's safety and efficacy. *See* FDA's Mem. SJ at 2, n.2; *id.* at 7, n.6 (citing 21 U.S.C. § 355(b)(1)). The CSR is the primary basis for FDA approval. Lurie Decl. ¶ 13.

A CSR contains both a narrative summary of the clinical trial and underlying data relating to the tested drug's effectiveness and safety. This information is needed by the public to validate claims made by drug companies about their products and to understand how the FDA analyzes those claims and conducts its approval process. A wide consensus exists within the research community that disclosure of safety and efficacy data contained in CSRs is vital to public health and to ensure that "patients and the researchers have access to all trial results that are relevant to clinical care, and not just the positive or favorable outcomes." Kenney Decl., Ex. BB, 36. The FDA itself recognizes the importance of public access to CSR safety and efficacy data, recently instituting a pilot program that will proactively release this key CSR information on a voluntary basis. *See* Seife Decl. ¶¶ 97-101; Kenney Decl., Ex. Z, 5-14. The European Union, too, is proactively releasing CSRs after regulatory decisions have been made, whether or not the drugs it reviews are approved, to promote greater accountability in medicine. Seife Decl. ¶ 102; Kenney Decl., Ex. AA.

While there is a clear public interest in disclosure of CSRs generally, the public interest in disclosure of the efficacy and safety data for the Sarepta studies at issue is particularly compelling. The approval of Exondys 51 resulted from such an unprecedented departure from regular approval procedures that some FDA employees were accused of impropriety and ethical misconduct, while other FDA scientists quit in protest and one questioned whether a Sarepta researcher may have engaged in "scientific misconduct." Seife Decl. ¶¶ 16-21, 29-40. The withheld efficacy and safety information relates directly to issues at the heart of the public controversies surrounding the approval of Exondys 51. *Id.* ¶ 108-121. The withheld data also hold the key to public health questions about

the effectiveness of the drug and potentially fatal side effects from using it, *id.* at 102-149, so disclosure will valuably inform doctor-patient decision-making about a drug whose list price can exceed $1,000,000 per patient per year. Zuckerman Decl. ¶ 28; Kenney Decl., Ex. GG, 18.

B. The Controversy Surrounding the Approval of Exondys 51

Exondys 51 was developed to treat Duchenne Muscular Dystrophy (Duchenne), a fatal neuromuscular disorder that primarily affects young boys and adolescents and is caused by a lack of the protein dystrophin. Seife Decl. ¶ 9. Sarepta sought accelerated approval for the drug based primarily on two clinical trials that involved just twelve patients, Study 201 and 202.[1] *Id.* ¶¶ 10, 13.

A researcher responsible for these clinical trials, Dr. Jerry Mendell, published initial results with his colleagues in 2013 in the *Annals of Neurology*. Kenney Decl., Ex. N. That article claimed inaccurately that the drug had increased patients' percentage of dystrophin-expressing muscle fibers to 47% of normal after 48 weeks of treatment. *Id.*; Seife Decl. ¶ 11. Since patients with Duchenne typically have dystrophin levels that are less than 1% of normal, such a result would have truly signaled a breakthrough. Seife Decl. ¶ 11; Kenney Decl., Exs. E, 3-4 & D, 20. Sarepta trumpeted this initial finding in a press release of its own that received great attention and generated widespread hope that Exondys 51 would provide a miracle cure. Seife Decl. ¶ 11; Kenney Decl., Exs. O, 3 & F, 16.

As a result of the publicity around Study 201 and 202, the FDA was inundated with calls to approve Exondys 51. One FDA official reported personally receiving thousands of emails supporting approval. Seife Decl. ¶ 12; Kenney Decl., Ex. F, 24. When an Advisory Committee was convened to

[1] Study 201 was a single-center, double-blinded, randomized-controlled trial involving twelve patients with Duchenne, four of whom received a placebo. Seife Decl. ¶ 10. This study used the change in the percentage of dystrophin-positive fibers over time as a surrogate marker, or proxy, for neuromuscular health by analyzing the levels of dystrophin in patients. *Id.* Researchers also measured the distance patients walked in a 6-minute walk test (6MWT). *Id.* After twenty-four weeks, the four patients initially given placebos were then given a regimen of Exondys 51. *Id.* After forty-eight weeks, the study was extended to an "open-label phase," meaning that all test-givers and all patients were aware that all patients were receiving the study drug. *Id.* This extended phase was Study 202. *Id.*

review Sarepta's information and advise the FDA on the drug, fifty-two people spoke during the public hearing portion of an eleven-hour long meeting, with fifty-one pleading for approval. Seife Decl. ¶ 13; Kenney Decl., Ex. GG, 21. Notwithstanding the immense public pressure, the Advisory Committee concluded that the results presented in the CSRs failed to demonstrate that Exondys 51 was effective. Seife Decl. ¶ 13; Kenney Decl., Ex. GG, 21. When the Committee's vote was announced, the audience broke into angry shouts. Seife Decl. ¶ 13; Kenney Decl., Ex. GG, 21.

The internal FDA team tasked with reviewing the CSR data also questioned the interpretation of the study results by Sarepta. Dr. Ronald Farkas, one of the lead reviewers on the review team, expressed "strong doubts" about the accuracy of Sarepta's findings and concerns about possible "scientific misconduct" and results that appeared to "have been heavily manipulated photographically." Seife Decl. ¶ 39; Kenney Decl., Exs. L & GG, 9. Dr. John Jenkins, Director of the FDA's Office of New Drugs, found "no rational basis" to approve Exondys 51, and urged that doing so would "def[y] any sense of scientific reason." Seife Decl. ¶ 32; Kenney Decl., Ex. I, 3.

The FDA required Sarepta to submit interim results from a third ongoing trial of the drug, Study 301, which the company did on June 27, 2016. Seife Decl. ¶ 14; Kenney Decl., Ex. G, 14. After receiving the additional Study 301 data, reviewers in the FDA's Division of Neurology Products, Office of Biometrics, Office of Clinical Pharmacology, Office of Drug Evaluation-I, and Office of New Drugs *uniformly* recommended against approval. Seife Decl. ¶ 14; Kenney Decl., Ex. D, 4.

At this point, something extraordinary happened. Dr. Janet Woodcock, head of the Center for Drug Evaluation and Research (CDER), intervened and unilaterally gave a green light to the drug. Seife Decl. ¶ 15; Kenney Decl., Ex. E. This may have been the first time in FDA history that a CDER Director had overruled a review team and an Advisory Committee on the question of a drug's efficacy. Seife Decl. ¶ 15; Kenney Decl., Ex. G, 15. In taking this step, Dr. Woodcock expressed concern to FDA staff that Sarepta's "stock went down after the [Advisory Committee] meeting" and worried that

Sarepta "needed to be capitalized"—extra-statutory factors not properly considered in evaluating a drug's safety and efficacy. Seife Decl. ¶ 16; Kenney Decl., Ex. G, 17. Although Dr. Woodcock later denied to then-Commissioner Robert Califf that these financial concerns had influenced her decision to approve the drug, Seife Decl. ¶ 16; Kenney Decl., Ex. H, 10, n.23, rumors persisted that Dr. Woodcock had succumbed to external influence and had not approved the drug based on efficacy but rather due to lobbying and pressure by the patient community, Seife Decl. ¶ 16; Zuckerman Decl. ¶ 24-25.

Dr. Ellis Unger, Director of the Office of Drug Evaluation-I, disagreed with Dr. Woodcock's decision so vehemently that he appealed it to an FDA scientific review body. Seife Decl. ¶ 17; Kenney Decl., Ex. F. Dr. Unger called attention to procedural flaws in the approval process, including that Dr. Woodcock made clear to the review team that she intended to approve Exondys 51 before she had read the review memoranda. Seife Decl. ¶ 17; Kenney Decl., Ex. F, 27. Dr. Unger also challenged Dr. Woodcock's analysis of the Sarepta studies, specifically pointing to problems in tests known as "Western blots" that Sarepta used in Study 201 and 202 to measure patients' dystrophin levels. Seife Decl. ¶ 18; Kenney Decl., Ex. F, 5-7. He also conducted statistical analyses showing that the measured level of dystrophin increase apparently caused by Exondys 51 did not correlate with the measures of patient muscle health, so that there was no evidence the drug produced any meaningful clinical result. Seife Decl. ¶ 18; Kenney Decl., Ex. F, 17-20. In contrast to the lack of evidence of efficacy, Dr. Unger underscored the "certain" risk of side effects from the drug, including possible death from infection caused by the drug's method of administration. In his view, the drug was merely an "elegant placebo," and one that would give vulnerable patients "false hope in exchange for hardship and risk." Seife Decl. ¶ 19; Kenney Decl., Ex. F, 22.

The appeals committee confirmed Dr. Unger's claim that Dr. Woodcock had indeed "orally communicated her intention to grant accelerated approval" before she had the review team's draft

memorandum, and before data from the ongoing Study 301 had even been requested. Kenney Decl., Ex G, 23. It concluded that a further independent scientific review of the drug was necessary. *Id.* The head of the Committee (and Acting Chief Scientist of the FDA) wrote separately to express support for Dr. Unger's view of the problems with Sarepta's science, and also faulted Sarepta for "misleading communications" that "led to unrealistic expectations and hope for [Duchenne] patients and their families." *Id.* at 26-28.

In yet another extraordinary turn of events, then-FDA Commissioner Robert Califf upheld Dr. Woodcock's approval decision despite this dissent, while simultaneously conceding that flaws in Sarepta's clinical trials "made it impossible to use much of the resulting data as reliable evidence in regulatory decision-making." *Id.*, Ex. H, 5. Commissioner Califf called for the correction or the retraction of the Mendell article but approved the drug nonetheless. *Id.* at 12, n.28; Kenney Decl., Ex. M.

C. Background to This Lawsuit and Procedural History

The approval of Exondys 51 provoked an outcry in the scientific community and generated intense media coverage. It was reported by *The Washington Post*, *The New York Times*, *NPR*, *Forbes*, *STAT News* (a news site run by the Boston Globe) and criticized in at least one major medical journal. Seife Decl. ¶ 22; Kenney Decl., Ex. GG, 23-24. One expert, Dr. Diana M. Zuckerman, President of the National Center for Health Research, describes the FDA approval of Exondys 51 as "based on the skimpiest evidence [she had] ever seen in the approval of a drug." Zuckerman Decl. ¶ 15.

As a science reporter, Seife closely followed the Exondys 51 approval process and began his own journalistic investigation into its highly unusual approval. Seife Decl. ¶¶ 22-24. He identified several categories of information held by the FDA that would be relevant to understanding whether the approval met the FDA's statutory criteria for safety and efficacy, or whether its approval might fairly be attributed to extra-statutory factors, such as improper influence allegedly exerted by Dr.

Woodcock and her Deputy Director, Dr. Richard Moscicki. *Id.* Seife also identified specific undisclosed information that he needed to assess the validity of the competing claims about the trial results reported in the CSRs for Study 201 and Study 202. *Id.*

As he had done often in the past, Seife then drafted a FOIA request for the information he needed and submitted it to the FDA in December 2016. *Id.* ¶¶ 6-7, 25. The FDA denied his request for expedited processing and then failed to produce any documents over nearly six months. Seife then filed this lawsuit on May 25, 2017. Complaint, ECF No. 1.

Seife promptly moved for summary judgment on his right to expedited processing. Mot. for Partial Summary Judgment, ECF No. 16. In response to that motion, on July 11, 2017, the Court: (1) ordered disclosure by July 24, 2017 of one internal document (the "Jenkins memo") that Seife's motion had specifically sought; and (2) referred the parties to Magistrate Judge Ellis for settlement talks. *See* ECF No. 29. After those settlement talks, the FDA agreed to an aggressive schedule for providing the requested information to Seife, which the Court approved on July 27, 2017. Stipulation and Order, ECF No. 39. Thereafter, on September 15, 2017, Sarepta filed an unopposed motion to intervene, ECF Nos. 34 & 44, which the Court granted, ECF No. 47.

D. Information Already Learned Through Defendants' FOIA Response

Seife's FOIA request resulted in the disclosure of thousands of pages of previously non-public information about the approval process. These documents raise significant concerns about whether the FDA followed statutory standards in approving Exondys 51 and whether Sarepta engaged in scientific misconduct to win approval—concerns that cannot be resolved without access to the withheld information.

1. Concerns about the FDA approval process.

The memorandum from Dr. John Jenkins, Director of the Office of New Drugs within CDER, that the Court ordered disclosed at the outset questioned how Sarepta's studies could possibly

be deemed to have satisfied the statutory standard required for accelerated approval of a new drug.[2] Seife Decl. ¶ 30-33; Kenney Decl., Ex. I. According to Dr. Jenkins, Dr. Woodcock provided "no rational basis" for her finding that the statutory standard of efficacy had been met, and "'any' level of [dystrophin] protein seem[ed] to be enough for [her] to support approval." Seife Decl. ¶ 32; Kenney Decl., Ex. I, 3. Dr. Jenkins found Dr. Woodcock's "regression analyses" to be "scientifically invalid," showing a "correlation" between "higher level of dystrophin, without regard to drug effect" or improvement in clinical endpoint. Kenney Decl., Ex. I, 3. Dr. Jenkins was so concerned about Dr. Woodcock's approval that he delayed his own retirement to prevent Dr. Woodcock from "acting in [his] place as head of OND [Office of New Drugs]." Seife Decl. ¶ 33; Kenney Decl., Ex. I, 5.

Dr. Jenkins further objected that Commissioner Califf had upheld Dr. Woodcock's unilateral decision under a "totality of the evidence" standard, when the law requires "substantial evidence." Seife Decl. ¶ 32; Kenney Decl., Ex. I, 3. In his view, the approval of Exondys 51 undermined the FDA's ability to "reach science-based conclusions on future applications" by eroding the "substantial evidence" standard. Seife Decl. ¶ 31; Kenney Decl., Ex. I, 4.

The Jenkins memo also challenged behavior by Dr. Woodcock during the Exondys 51 approval that circumvented the normal review process. Seife Decl. ¶ 31; Kenney Decl., Ex. I, 2-3. He pointed to "frequent private conversations" Dr. Woodcock had with Sarepta employees and Duchenne patients without, to his knowledge, "document[ing] the substance of those conversations to the record, as is required by FDA regulations." Seife Decl. ¶ 31; Kenney Decl., Ex. I, 4.

[2] To qualify for the accelerated pathway, a drug must treat a "serious or life threatening disease[]" and must provide "meaningful" benefit over existing therapies. 21 C.F.R. 5314.500; *see* 21 U.S.C. § 356(c). In addition, the drug must directly exhibit a demonstrated "clinical benefit," or indirectly demonstrate a clinical endpoint by evidencing a "surrogate endpoint," which is a marker that "is reasonably likely . . . to predict clinical benefit." § 356(c)(1)(A). Sarepta's studies attempted to measure dystrophin protein levels as a "surrogate measure" to indirectly demonstrate a clinical benefit of Exondys 51. Seife Decl. ¶¶ 20, 76. At the time of the approval, the benefit had to have been proven by "substantial evidence" as shown by "adequate and well-controlled investigations." 21 U.S.C. § 355(d) (2016).

Other internal documents revealed that Dr. Richard Moscicki, the Deputy Director of CDER under Dr. Woodcock, remained involved in the Exondys 51 approval process even though he was recused due to his prior work with the CEO and former Chief Medical Officer of Sarepta. Seife Decl. ¶ 36-38; Kenney Decl., Ex. J. One email by Dr. Moscicki shows Dr. Woodcock asked that he "join her for a discussion with [REDACTED] patient advocate," and another indicates Dr. Moscicki received communications from Sarepta about Exondys 51 while the approval was pending. Seife Decl. ¶ 37; Kenney Decl., Ex. J, 3, 18, 21-22. Dr. Unger expressed concern at the time with Dr. Moscicki's ongoing involvement despite his recusal, and Dr. Jenkins agreed that Dr. Moscicki's involvement was "awkward" and needed to be addressed. Seife Decl. ¶ 38; Kenney Decl., Ex. J, 2.

The appointment of Benjamin Dupree to be a patient representative on the Advisory Committee considering Exondys 51 raised further concern. Seife Decl. ¶ 34-35; Kenney Decl., Ex. K. The voting members of the Advisory Committee typically consist of independent experts and consumer representatives who review a drug's safety and efficacy procedures. Seife Decl. ¶ 34. In Dr. Unger's view, Dupree had a "blatant conflict of interest" because his parents owned Sarepta stock. *Id.*; Kenney Decl., Ex. K, 4. Dr. Unger claimed he was "blocked by CDER management" when he asked that a different patient representative be appointed to the Committee. Seife Decl. ¶ 35; Kenney Decl., Ex. K, 6. Dr. Woodcock is the head of CDER. Seife Decl. ¶ 15.

2. Evidence of the possible manipulation of study results.

Emails produced by the FDA separately question whether Sarepta researchers may have committed "scientific misconduct" during the trials. Seife Decl. ¶ 39; Kenney Decl., Ex. L. In one, Dr. Ronald Farkas worried about "misrepresentation of the data" in the "Western blot" images that measure the amount of dystrophin protein in trial subjects. Seife Decl. ¶ 39; Kenney Decl., Ex. L, 2. Dr. Farkas warned that at least one of the Western blot images seemed "heavily manipulated photographically" and that "edges of the band [] were darker than the central part," and appeared to

have been deleted to present a more favorable conclusion. Seife Decl. ¶ 39; Kenney Decl., Ex. L, 8. He also noted that the images in the CSRs did not match those that had been presented earlier to the FDA and questioned whether the published Mendell paper "represents scientific misconduct through the omission and misrepresentation of results such that findings are not accurately portrayed." Seife Decl. ¶ 39; Kenney Decl., Ex. L, 10.

E. The Pending Cross-Motions

Disclosing the redacted CSRs will inform the public about all of these issues and will, in particular, illuminate four concerns: (1) the controversy over the Western blots submitted by Sarepta; (2) the conflicting FDA analyses of whether dystrophin levels are correlated with any clinical benefit for Duchenne patients; (3) the potential that Sarepta engaged in "endpoint switching" to manipulate evidence of its drug's efficacy; and (4) whether the drug's safety risks outweigh the questionable evidence of efficacy Sarepta provided. Seife Decl. ¶ 109. Addressing these concerns will inform the public debate about whether Dr. Woodcock improperly based her approval decision on extra-statutory factors or succumbed to lobbying by conflicted staffers or the company if it implicates the credibility of her scientific interpretations. *Id.*

ISSUE PRESENTED AND STANDARD OF REVIEW

These cross-motions for summary judgment present the issue of whether defendants are permitted to withhold information about the safety and efficacy of an approved drug that is contained in standardized Clinical Study Reports that must be submitted to the FDA for approval. Specifically, Seife objects to the redaction from the CSR of efficacy and safety information in the form of descriptions and results of the specific tests conducted, including both the underlying patient-level results and their analyses, along with Adverse Events (AEs) experienced by study participants and the names of scientific documents and tables in the Sarepta CSRs.

Defendants argue that this information may or must[3] be withheld under FOIA Exemption 4, which permits the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Neither Sarepta nor the FDA claim that the redactions in this case involve trade secrets; rather, the redactions allegedly involve "confidential commercial information." Under the governing *National Parks* test, confidential commercial information (CCI) may be withheld under Exemption 4 only upon a showing that its disclosure will either "cause substantial harm to the competitive position of the person from whom the information was obtained" or "impair the Government's ability to obtain necessary information in the future." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *Cont'l Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d Cir.1977) (adopting *National Parks* standard).

Pursuant to the FOIA Improvements Act of 2016, to withhold CCI under Exemption 4 defendant agencies or intervenor Sarepta must establish *both* that the withheld information falls within Exemption 4 *and* that a particular harm to Sarepta's competitive position is reasonably foreseeable, a heightened burden that their motions fail to note or establish. *See* 5 U.S.C. § 552(a)(8)(A)(i)(I). Whether a defendant agency has met its burden in a FOIA case is typically resolved on summary judgment. *New York Times Co. v. DOD*, 499 F. Supp. 2d 501, 509 (S.D.N.Y. 2007). In ruling on the summary judgment motion, the FOIA exemption is construed narrowly and "[a]ll doubts" are resolved "in favor of disclosure." *Associated Press v. DOD*, 554 F.3d 274, 283 (2d Cir. 2009).

[3] Citing only D.C. and Ninth Circuit authority, a footnote in Sarepta's brief suggests that the Trade Secrets Act (TSA), 18 U.S.C. § 1905, should be construed to be "at least as broad as" Exemption 4, so that the TSA "divests" the FDA of any discretion to disclose information falling within Exemption 4. Sarepta Corrected Mem. SJ at 10, n. 6, ECF No. 78. The suggestion is entirely off-base. The Second Circuit has never adopted this view of the interplay between the TSA and FOIA, s*ee Nadler v. FDIC*, 92 F.3d 93, 97 (2d Cir. 1996) (declining to reach the issue); it has rejected other D.C Circuit theories of expanded authority to withhold information under Exemption 4, *see Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 149-51 (2d Cir. 2010) (rejecting a proposed "program effectiveness" justification under Exemption 4); and, it has in fact read Exemption 4 as allowing permissive, not mandatory, withholding, *id.* at 147 (Exemption 4 "*allows* a federal agency . . . to refuse disclosure") (emphasis added).

Importantly, review of an agency's decision to withhold information under FOIA is *de novo* and no deference is afforded the agency's decision to withhold. § 552(a)(4)(B). While agency declarations are accorded a presumption of good faith, a failure to submit "reasonably detailed explanations of why material was withheld" negates that presumption because "[a]bsent a sufficiently specific explanation . . . the adversary process envisioned in FOIA litigation cannot function." *Halpern v. FBI*, 181 F.3d 279, 295 (2d Cir. 1999).

ARGUMENT

I. DEFENDANTS FAIL TO DEMONSTRATE ANY PROPER BASIS FOR WITHHOLDING SAREPTA'S CSR INFORMATION UNDER EXEMPTION 4

A. Defendants Bear A Heavy Burden to Withhold CSR Information That Inherently Informs About Both FDA Activity and Drug Safety and Effectiveness

Because FOIA's objective is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny," there is a "strong presumption in favor of disclosure." *U.S. Dep't of State v. Ray,* 502 U.S. 164, 173 (1991) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)). To demonstrate that CSR information may be withheld under the "substantial competitive harm" prong of *National Parks* requires the agency or intervenor-defendant to demonstrate both the existence of "actual competition" and a "likelihood of 'substantial' competitive injury if the information were released.'" *Inner City Press v. Bd. of Governors*, 380 F. Supp. 2d 211, 219 (S.D.N.Y. 2005), *aff'd*, 463 F.3d 239 (2d Cir. 2006). Competitive injury in this context does not include injury to a company's "competitive position" caused by embarrassment or reputational loss; rather the competitive injury must result from the "use of proprietary information" by competitors. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291, n.30 (D.C. Cir 1983) (addressing clinical trial data). Moreover, any such competitive injury must be "imminent" to justify withholding information under Exemption 4. *Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 279 (S.D.N.Y. 2009), *aff'd*, 601 F.3d 143 (2d Cir. 2010).

To make these showings, defendants must present "adequate documentation of the specific, credible, and likely reasons why disclosure of the document would actually cause substantial competitive injury." *NRDC. v. U.S. Dep't of Interior*, 36 F. Supp. 3d 384, 401 (S.D.N.Y. 2014). "Conclusory and generalized allegations of substantial competitive harm" are insufficient to satisfy this burden and "cannot support an agency's decision to withhold requested documents." *Public Citizen Health Research Group*, 704 F.2d at 1291.

It is particularly important to maintain the required burden on defendants because CSRs inherently contain information that will substantially inform the public about the actions of the government—the core goal of the FOIA disclosure mandate. *DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 772 (1989) (citing *Rose*, 425 U.S. at 372). Disclosure of CSR safety and efficacy data also sheds light on issues of great public concern regarding the quality of approved medicines. Few issues are of more moment to the public than the likelihood that a medicine—especially an extremely expensive one needed by children—will benefit their health or impose harmful side effects. Both benefits of disclosure are properly weighed in deciding whether CSR information may properly be redacted under Exemption 4.

The Second Circuit has not considered the issue of public interest balancing under FOIA's Exemption 4,[4] but the better view is that adopted by the Ninth Circuit and advocated by Judge Garland of the D.C. Circuit. Where the public interest supports disclosure of information withheld under Exemption 4, the Ninth Circuit requires trial judges to "balance the strong public interest in favor of disclosure against the right of private businesses to protect sensitive information." *GC Micro Corp. v.*

[4] In *Bloomberg,* 601 F.3d at 149-151, the Second Circuit rejected a test designed to consider the public interest in *withholding* information, noting that "a test that permits an agency to deny disclosure because the agency thinks it best to do so (or convinces a court to think so, by logic or deference) would undermine 'the basic policy that disclosure, not secrecy, is the dominant objective of [FOIA].'" *Id.* at 151 (citing *Rose,* 425 U.S. at 361).

Def. Logistics Agency, 33 F.3d 1109, 1115 (9th Cir. 1994), *overruled on other grounds by Animal Legal Def. Fund v. FDA*, 836 F.3d 987 (9th Cir. 2016) (citing *National Parks*, 498 F.2d at 768-69).

In *GC Micro*, a subcontractor requested access to records submitted by federal defense contractors concerning their use of Small Disadvantaged Businesses ("SDBs"). *Id.* at 1110-11. To determine whether the records could properly be withheld, the court explicitly considered both the likelihood of competitive injury *and* the public interest in disclosure. *Id.* at 1112-16. It ordered disclosure because access to the records would allow the public to assess the "wisdom and efficiency of federal programs and expenditures" and the government's compliance with laws intended to encourage subcontracting with SDBs. *Id.* at 1113. The court also noted that disclosure would encourage federal contractors to set higher SDB subcontracting goals, a result it considered to be neither collateral nor consequential, but rather a public interest properly weighed in applying Exemption 4. *Id.* at 1113.

Judge Garland advocated for a similar approach in the D.C. Circuit. In *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 903-04 (D.C. Cir. 1999), the court considered whether the public health interest in not subjecting clinical trial participants to drugs that had caused adverse side effects in earlier abandoned trials could properly be balanced against the competitive injury that would be caused by disclosing information about the abandoned trials. The panel majority accepted that "'[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose' and may be weighed in the balance," but rejected collateral public health interests as irrelevant to withholding under Exemption 4. *Id.* at 909 (Garland, J., concurring in the judgment) (quoting the majority).

Judge Garland disagreed. He concurred in the judgment because Public Citizen had not adduced adequate facts to support its theory of a public health risk and the issue had not been fully briefed, but he rejected the majority's conclusion that courts cannot balance "the public interest in

safeguarding human health" against competitive harm in applying Exemption 4. *Id.* at 907-09 (internal quotation marks omitted). Judge Garland found unreasonable the panel majority's view that "even if disclosure were the only way to prevent the loss of human life, that would count for nothing as against a showing by the company that disclosure would cause substantial harm to its competitive position." *Id.* at 907-10.

Moreover, because protecting public health is key to the FDA's mission, revealing the public health information it possesses is never collateral under FOIA. Clinical trials cannot proceed without FDA authorization, so disclosure of information about abandoned trials could reveal whether the FDA was complying with its "statutory dut[y]" to adequately analyze test results, ensure safety for human test participants, and promptly discontinue or prevent duplicative studies where safety concerns exist. *Id.* at 909-10. Indeed, in an earlier case involving disclosure of clinical trial data under Exemption 4, a D.C. district court had found that the disclosure of test results showing that a product presents a safety risk "is unquestionably in the public interest," and the public interest in disclosure "far outstrips the negligible competitive harm." *Teich v. FDA*, 751 F. Supp. 243, 253 (D.D.C. 1990). The court stressed the public health benefit of ensuring that competitors are not permitted to "blindly put out potentially damaging products." *Id.* at 253.[5]

So too here, disclosure of CSR information both advances FOIA's goal of informing the public about the actions of government and serves a significant public health interest. Where the potential for substantial competitive harm from disclosure is established, *both* interests are properly weighed in deciding whether information may be withheld under Exemption 4.[6] As Judge Garland

[5] *Teich* acknowledged that data showing a product was safe could be useful to competitors. *Id.* But it found that disclosure of study protocols and results could not alone facilitate a competitor's premarket approval application since competitors are required to submit raw data that demonstrates safety and effectiveness for their specific products. *Id.*

[6] Courts in other contexts have recognized that a public interest in health and safety can outweigh a private interest in confidentiality. As early as 1919, the Supreme Court declared: "The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise

recognized, considering the impact on public health of an FDA refusal to disclose information is directly relevant to understanding the FDA's "performance of its statutory duties" and thus furthers the core purpose of FOIA. *Id.* at 909. While defendants fail to show competitive harm, the Court should adopt a public interest balancing test as an additional and alternative ground for disclosure.

B. Defendants Fail To Establish That Disclosing The CSR Information Would Cause Substantial Competitive Harm

To invoke Exemption 4 successfully, the prime burden for the FDA and Sarepta is to demonstrate substantial and imminent competitive injury from disclosure of the CSR information. Their effort falls short in multiple respects.

1. Defendants' conclusory contentions are insufficient to establish substantial and imminent competitive harm.

To meet the substantial harm requirement under *National Parks*, it is defendants' burden to present "adequate documentation of the specific, credible, and likely reasons why disclosure of the document would actually cause substantial competitive injury." *NRDC*, 36 F. Supp. 3d at 401. *See also Lee v. F.D.I.C.*, 923 F. Supp. 451, 455 (S.D.N.Y. 1996) (rejecting "assertions of substantial competitive injury, . . . [that] appear . . . to be unduly speculative and conclusory"); *Public Citizen*, 704 F.2d at 1291 ("Conclusory and generalized allegations of substantial competitive harm" are insufficient to satisfy this burden and "cannot support an agency's decision to withhold requested documents."). Defendants attempt to do so through arguments from counsel untethered to any factual record and

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of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth." *Corn Prod. Ref. Co. v. Eddy*, 249 U.S. 427, 431-32 (1919). More recent courts have reached the same conclusion. For example, in multidistrict litigation against pharmaceutical manufacturers and distributors arising out of the opioids epidemic, the court ruled that the public interest in "solving the opioid crisis . . . outweigh[ed] any slight risk of anticompetitive harm" in disclosure of "proprietary or confidential information" and ordered "information sharing" among the parties to enable a settlement. *Nat'l Prescription Opiate Liti.*, 1:17-MD-02804, Order (N.D. Ohio Mar. 27, 2018), ECF No. 199 (collecting cases in support). *See also Kentucky v. Merck*, No. 09-CI-1671, Opinion & Order 10-14 (Ky. Cir. Ct. Mar. 23, 2018) (removing "confidential" designation from documents discussing Vioxx because the information could "shed important light on such pressing issues of public concern," and placing a "great" burden on any party seeking to shield such information from public scrutiny) (citing Second Circuit caselaw concerning First Amendment right-of-access).

via a single declaration by a marketing professional, Ian Estepan.[7] *See* Estepan Decl. ¶ 1-2. The conclusory claims advanced are entirely insufficient, and defendants' showing falls short for a number of reasons. *See* Objections and Mot. to Strike.

First, the Estepan declaration should be rejected on its face because it is unsubstantiated, cites no documentary evidence for the vast majority of its claims, and includes no concrete examples of how Sarepta's competitors could use the information.[8] While some examples of potential harm are given in Sarepta's memorandum of law, ECF No. 78 at 17-25 (referencing Sarepta's Exhibit B), these arguments by lawyers are unsupported by declarations and have no evidentiary value. *Cf. Beyar v. New York City Fire Dep't*, 310 F. App'x 417, 419 (2d Cir. 2008) (agreeing with jury instruction that lawyer statements are not evidence). Further, Estepan never states that his conclusions are based on personal knowledge, never attests to reading the CSRs or the specific redactions at issue, and never explains how his focus on "executing corporate strategic initiatives" qualifies him to opine about how the redacted information would be useful to the scientists designing different trials for different drugs. *See* Objections and Mot. to Strike. Under Fed. R. Civ. P. 56(c)(4), courts cannot rely on testimony given at the summary judgment stage without "personal knowledge" of the facts. *See also Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 683 (D.C. Cir. 1976) (rejecting district court reliance on "conjecture" by Exemption 4 witness not based upon "personal knowledge").

Moreover, Sarepta did not establish Estepan as an expert in FDA procedures or drug study design, nor could it. Estepan lists no medical or legal degree or other relevant foundation for his

[7] Defendants' other declarations do not speak to the issue of competitive harm, but rather to the FOIA production process.

[8] Estepan speculates, without foundation, about what Sarepta's competitors are doing. Because Estepan has not been designated or established as an expert, he may not rely on hearsay. Fed. R. Evid. 703. Other than listing the names of purported competitors and claiming they are conducting studies on their own "DMD assets," Estepan provides no explanation or substantiation of the basis and admissibility of such assertions. *See* Estepan Decl. ¶ 59.

highly technical and scientific testimony. He describes his background only summarily as "overseeing Investor Relations, Corporate Communications, and Program Management" at Sarepta. Estepan Decl. ¶ 1. Yet the thrust of Estepan's argument is that "[a] scientist could make productive use of the data" sufficient to meet FDA guidelines for approval of different drugs, a conclusion that requires detailed personal knowledge of clinical trial design and a medical background that he fails to establish. *See id.* ¶¶ 30-31. By contrast, Seife's independent, uncompensated expert, a former Associate Commissioner of the FDA, testified such data cannot be used by competitors "in any meaningful way." Lurie Decl. ¶ 24.

In addition, Exemption 4 requires the defendants to support each redaction with specificity based on the particular facts at issue. Neither the FDA or Sarepta do so. This, "by itself," is fatal to defendant's position. *Gov't Accountability Project v. HHS*, 691 F. Supp. 2d 170, 180 (D.D.C. 2010) (*GAP*); *cf. Trans–Pac. Policing Agreement v. U.S. Customs Serv.,* 177 F.3d 1022, 1027-28 (D.C. Cir. 1999) (describing analytic process court must go through in Exemption 4 context to segregate non-exempt material). Defendants are required to explain how the identified competitive injury "turns upon the particular facts" involved. *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1193 (D.C. Cir. 2004); *see also Torres Consulting & Law Grp., LLC v. NASA*, 666 F. App'x 643, 644 (9th Cir. 2016) (collecting cases finding that the substantial competitive harm determination is a question of fact). Blanket reliance like Sarepta's on judicial decisions finding that certain types of information may be withheld under Exemption 4, *see* Sarepta Corrected Mem. SJ at 14-15, is not sufficient; analogies to prior cases do not substitute for the "specific showing" FOIA demands. *GAP*, 691 F. Supp. 2d at 180.

Ultimately, defendants fail to provide supporting detail demonstrating how the types of information they say can generically give rise to competitive injury is likely actually to do so in this case. This, too, is fatal to their position. For example, in *AIDS Healthcare Foundation v. FDA*, No. 11-

cv-07925 (C.D. Cal. Aug. 6, 2013) (slip. op.), the FDA's claimed right to withhold information under Exemption 4 was rejected, even though it was supported by three expert declarations asserting that releasing safety and efficacy data for an HIV drug could cause competitive injury. The court found these declarations insufficient because the main declarant lacked personal knowledge of the relevant drug market for a particular type of HIV medication and "none of the declarations demonstrate[d] that disclosure . . . would likely cause [the drug manufacturer] Gilead to suffer competitive harm in the [larger] market for HIV treatment medications"—the only market for which the FDA had established "actual competition." *Id.* at 12-19. The court concluded that the FDA had failed to demonstrate "a likelihood of substantial competitive injury" in the HIV market, which was "limited to harm flowing from the affirmative use of proprietary information by competitors." *Id.* at 19-20.

Other cases litigating the withholding of clinical trial information under Exemption 4 have similarly made clear that to establish competitive injury, expert declarations must be specific and detailed. *See, e.g.*, *Pub. Citizen*, 704 F.2d at 1291 (finding that Exemption 4 properly applied based on "a lengthy expert report and numerous depositions documenting the competitive injury that disclosure would cause"); *Physicians Comm. For Responsible Med. v. NIH*, 326 F. Supp. 2d 19, 26-27 (D.D.C. 2004) (finding insufficient defendants' evidence that competitors would "affirmative[ly] use [] proprietary information" at issue despite evidence that three other labs were working on similar projects); *Pub. Citizen Health Research Grp. v. FDA*, No. 99-cv-0177, 2000 WL 34262802, at *2-3 (D.D.C. Jan. 19, 2000) (rejecting as conclusory a pharmaceutical company's similar declaration regarding competitive injury from release of individual-level patient data); *Pub. Citizen Health Research Grp.*, *v. FDA*, 964 F. Supp. 413, 415-16 (D.D.C. 1997) (rejecting as unclear a claim that disclosure would allow competitors to "'piggyback'—to appropriate the study's design for their own uses"); *Teich*, 751 F. Supp. at 254 (rejecting claim that Exemption 4 applied for lack of "specific and direct evidence" after striking one expert declaration and finding insufficient the "unsupported allegations" of competitive injury

advanced); *GAP*, 691 F. Supp. 2d at 179-80 (rejecting claim that competitor could use redacted data "without having to incur the time and expense in developing the information itself" where no explanation was provided as to "how a competitor could use the information at issue to support their own drug applications").

In *Public Citizen Health Research Group v. FDA*, 185 F.3d at 905-06, the court permitted the FDA to withhold some abandoned Investigational New Drug (INDs) applications under Exemption 4, but not all of the INDs at issue. The abandoned applications involved clinical trial data submitted for drugs that were never introduced onto the market and never subjected to the final approval process and post-market disclosures (described below and relevant here). The court still rejected the FDA's withholding of one IND because, like here, the pharmaceutical company's declaration contained "only conclusory assertions that disclosure would cause substantial competitive harm." *Id.* at 906. The court found insufficient broad statements such as that "disease models. . . have been developed [by the company] at great expense" and "the clinical trial protocols also 'have applicability beyond the specific drug being tested,'" allegations that bear substantial similarity to the conclusory claims made by defendants here. *Compare Pub. Citizen*, 185 F.3d at 906 *with* Sarepta Corrected SJ Mem. at 16-17; Estepan Decl. ¶¶ 23-24, 26-28.

Defendants' authority is not to the contrary. Sarepta describes *Webb v. HHS*, 696 F.2d 101 (D.C. Cir. 1982), as finding that "competitive harm would result from the release of detailed data in [the] submitting company's [New Drug Application]," Sarepta Corrected SJ Mem. at 13, but *Webb* did not reach the merits of the Exemption 4 claim. It found the issue moot because there was no "live dispute over particular documents." 696 F.2d at 108. Defendants' also miscite *dicta* in that case discussing why the "premature" release of the New Drug Application (NDA), *prior to a drug's approval*, would have competitive disadvantages for a drug manufacturer. *Id.* at 103 (specifically noting post-approval more information could be released). The FDA routinely releases its analyses of the data

from NDAs after approval in the form of Action Packages.[9] *Webb* and defendants' other cases are inapposite for the further reason, explained below at Section I.B.3, that Seife is only seeking patient data redacted for demographic information, height, weight, and age that cannot be affirmatively used by competitors in their own applications for approval, the only potentially cognizable harm.[10]

2. So much information about approved drugs must be disclosed by law that any incremental competitive harm from disclosing the CSR information would not be substantial.

It is axiomatic that publicly available information may not be withheld under the competitive injury prong of *National Parks. Inner City Press/Cmty. on the Move v. Bd. of Governors of Fed. Reserve Sys.*, 463 F.3d 239, 244-45 (2d Cir. 2006). In Exemption 4 cases, this principle applies not only as a matter of law, but as a matter of fact, meaning that if plaintiffs can provide evidence of public information, even if it is not identical to the withheld information, defendants must prove the competitive injury

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[9] *See, e.g.*, U.S. Food & Drug Administration, *Drug Approval Package: Exondys 51 Injection (eteplirsen)*, https://www.accessdata.fda.gov/drugsatfda_docs/nda/2016/206488_TOC.cfm (Oct. 26, 2016). *Webb*'s concern that other drug manufacturers "could utilize [the clinical data] in [their] own NDA without incurring the time, labor, risk, and expense in developing them independently," 696 F.2d at 103, does not apply post-approval because once a drug is approved, companies are given a period of "data exclusivity" preventing others from relying on the same data for submission in their applications. The FDA has two provisions governing NDAs: §§ 355(b)(1) and (b)(2). Section 355(b)(1) requires applicants to submit "full reports of investigations which have been made to show whether or not such drug is safe for use and whether such drug is effective in use." 35 U.S.C. § 355(b)(1). Section 355(b)(2) allows applicants to rely on other applicants' investigations, even where the applicant does not have a right or reference, provided that the applicant certifies that no valid patents cover the drugs for which the investigations were conducted. § 355(b)(2). In this case, Exondys 51 is entitled to seven years of data exclusivity because it is an "orphan drug." 21 U.S.C. §§ 360bb, 360cc. Because there are patents on the drug, § 355(b)(2) is inapposite.

[10] Sarepta's other cases are similarly inapposite. *Citizens Commission on Human Rights v. Food & Drug Administration*, No. 92-cv-5313, 1993 WL 1610471, at *8 (C.D. Cal. May 10, 1993), *aff'd in relevant part*, 45 F.3d 1325 (9th Cir 1995), is an unpublished opinion from 1993 involving the Church of Scientology, which requested *all records* related to Prozac, and in support of the competitive harm the FDA introduced three declarations demonstrating that release of the raw data would cause substantial competitive injury, evidence that was apparently uncontroverted. Further, the appeal addressed only questions of whether the *Vaughn* Index and agency search for records were proper and whether there was a sufficient basis to grant discovery; the Ninth Circuit did not consider the merits of other arguments but did order the release of adverse reaction reports. 45 F.3d at 1329. *Campaign for Responsible Transplantation v. Food & Drug Administration*, No. 00-cv-2849 (D.D.C. Sept. 24, 2004) (slip op.), is an unpublished opinion, not available on Westlaw, about Investigational New Drug applications (INDs), which are *pre-approval* materials. Moreover, plaintiffs there did not submit evidence to make an affirmative case for disclosure, as Seife does here.

beyond what is publicly-known. For example, in *Continental Stock Transfer & Trust Co. v. Securities and Exchange Commission*, 566 F.2d 373, 375 (2d Cir. 1977), the Second Circuit applied this principle and found "one simple fact" dispositive: most of the requested information could be found in a stock guide or could be obtained from other manuals. *Id.* As a result, even though not all of the information was public, "the so-called new disclosures hardly [could] cause any substantial harm." *Id.*

In *Lee*, this Court similarly concluded that financial information could not be withheld under Exemption 4 because it was publicly available in a different format and "substantial competitive injury likely to result from this information being available in the new format [was] not apparent." 923 F. Supp. at 455. The D.C. Circuit, too, found that the defendants were not entitled to summary judgment in the Exemption 4 context if the information sought could be "reconstructed through one of several methods" even though the result "obviously differ[ed]" from the withheld information. *Greenberg v. FDA*, 803 F.2d 1213, 1218 (D.C. Cir. 1986). *Accord Schwartz v. DEA*, No. 13-cv-5004, 2016 WL 154089, at *14-15 (E.D.N.Y. Jan. 12, 2016) (Amon, C.J.) (holding that government did not overcome FOIA's presumption of disclosure in dispute over application of Exemption 7(E) where it had previously disclosed a transcript of video in dispute and was unable to "explain what techniques and procedures would be revealed" through disclosure of the video beyond what was "publicly known"), *aff'd*, 692 F. App'x 73 (2d Cir. 2017).[11]

While Seife bears the burden of demonstrating that the type of information redacted from the CSRs is publicly available elsewhere, defendants "retain[] the burden of persuasion that information is not subject to disclosure." *Inner City Press*, 463 F.3d at 245. Defendants have barely described the

[11] That some portions of redacted material are not public does not make them automatically exempt. Analogous arguments for protecting trade secrets details where key information is disclosed in patents are regularly rejected. *See, e.g.*, *Big Vision Private Ltd. v. E.I. DuPont De Nemours & Co.*, 1 F. Supp. 3d 224, 269 (S.D.N.Y. 2014) (holding "patent application destroyed any secrecy that inhered in the alleged trade secret as of that date") (citing *BondPro Corp. v. Siemens Power Generation, Inc.*, 463 F.3d 702, 706-07 (7th Cir. 2006) (same)), *aff'd sub nom. Big Vision Private Ltd. v. E.I. du Pont de Nemours & Co.*, 610 F. App'x 69 (2d Cir. 2015).

information redacted from the CSRs, and the Seife declaration and attached exhibits show that a vast amount of information about Sarepta's clinical trials—including clinical endpoints, Adverse Events, narrative portions of the CSRs and test results—is publicly available, either by operation of law or through Sarepta's voluntary disclosures. *See* Seife Decl. ¶¶ 54-92 (describing public materials). (For the Court's convenience, Seife has attached a "reverse *Vaughn* Index" as Exhibit B to the Kenney Declaration that shows where disputed information described in Sarepta's Exhibit B is public with reference to exhibits submitted in support of Sarepta's motion. Seife has also prepared an Exhibit C, which compares pages of the CSRs to public documents.) Such a great deal of information relating to the effectiveness and safety of Exondys 51 is available that no proper basis exists for redacting similar information from the CSRs. The redacted information will show whether Sarepta's prior disclosures were accurate and aid understanding of its drug's effectiveness but will not be useful to applications by other drug manufacturers.

a) Much of the drug efficacy data contained in CSRs must be made public through ClinicalTrials.gov and FDA Advisory Committee materials and is routinely disclosed in scientific publications.

A great deal of information relating to the efficacy of approved drugs such as Exondys 51 is made publicly available by operation of law through a government-mandated website called ClinicalTrials.gov and through disclosure of Advisory Committee materials.

The Second Circuit has held that information required to be disclosed in SEC filings and public review documents may not be withheld under Exemption 4, and that "[a] requesting party can [prevail] by pointing to a regulation that requires the disclosure of the specific information sought." *Inner City Press*, 463 F.3d at 249. Thus, information Sarepta must publicly disclose by operation of law in the drug approval process may not be withheld from the CSRs under Exemption 4. One such mandatory disclosure is through ClinicalTrials.gov, a database where certain clinical trials and their results must be publicly posted pursuant to the Food and Drug Administration Amendments Act of

2007 (FDAAA). *See* 42 U.S.C. § 282(j)(2)(A), (C); § 282(j)(3). Mandatory public disclosures include information describing the trial, its primary purpose and how patients are recruited, along with such details as the study design, primary and secondary outcome measures, start and end dates, target number of subjects, and other information.[12] For drugs that are approved, basic results must be reported thirty days after approval. § 282(j)(3)(E)(iv).

Sarepta has posted the required information for Study 201, including details about the outcome measures redacted from the CSRs. Seife Decl. ¶¶ 58-60, 67; Kenney Decl., Ex. S. While the statutory deadline for posting the results of Study 202 has passed, [13] Sarepta has yet to make the required public posting of results for this study. Seife Decl. ¶ 58. Among the information from this study that Sarepta must disclose on the FDA website is the percent of dystrophin positive fibers because this is one of the study's primary endpoints. *Id.* ¶ 117; § 282(j)(3)(C). Because the statute requires posting the results, per *Inner City Press* they are considered public via operation of law.

Information Sarepta submitted to the FDA Advisory Committee also makes public much of the information now being withheld from its CSRs. For example:

- The FDA redacted a spaghetti plot depicting individual 6MWT results over the course of four years for study participants as compared to historical control patients. However, an apparently identical figure was made publicly available as part of Sarepta's briefing document in advance of the April 25, 2016 FDA Advisory Committee Meeting. *Id.* ¶ 68; Kenney Decl., Ex Q, 66.

- The spaghetti plot of individual 6MWT results that the FDA withheld is identical to a plot that is publicly available in Sarepta's May 3, 2018 Securities and Exchange Commission (SEC) Form 8-K filing, which contained the presentation slides from Sarepta's April 24, 2018 presentation to the European Medicines Agency. Seife Decl. ¶ 69; Kenney Decl., Ex. P, 38.

[12] *See* § 282(j)(2)(A)(ii). The FDAAA requires public disclosure of the "[b]asic [r]esults" for certain clinical trials, which includes primary and secondary study outcomes, as well as demographic and baseline characteristics of patient samples. § 282(j)(3)(C).

[13] Study 202 was completed in 2016 but has not posted results. Seife Decl. ¶ 58; Kenney Decl., Ex. S, 32, 44.

- The FDA redacted information on another clinical endpoint, the North Star Ambulatory Assessment (NSAA), which has been "validated" and is "widely used internationally, in clinical settings and as a secondary outcome measure[] in clinical trials." NSAA methods and results were also extensively discussed in Sarepta's briefing documents, and results were displayed graphically, yet narrative portions of the CSRs and patient level results of the NSAA were redacted. Seife Decl. ¶ 70.

Sarepta has made public much information like that redacted from the CSRs through its publications and those of its research collaborators. For example, the specific methodologies used to analyze dystrophin levels, conduct biopsies, prepare tissues, and assay exon-skipping have all been reported in the scientific literature in great detail. *Id.* ¶ 83. The same is true of information regarding Sarepta's dystrophin measures and results, lymphocyte counts, and exon-skipping. *Id.* Sarepta's dosing information has also been widely reported. *Id.* ¶ 157; Lurie Decl. ¶ 22. Although Sarepta contends in its papers that its method of quantifying dystrophin is confidential commercial information, when it encouraged the FDA to adopt the immunohistochemistry (IHC) technique that it used, Sarepta conceded that IHC is "a well-established method, having been used for over 20 years in the diagnosis of [Duchenne] and has been validated in [Duchenne] clinical trials." Seife Decl. ¶ 83; Kenney Decl., Ex. W, 18.

Defendants fail to demonstrate how the redacted information concerning the efficacy of Exondys 51 differs from the details they have made public, much less demonstrate how any actual difference could be the source of substantial competitive injury in light of all that is known.

b) Much of the adverse event and safety data contained in the CSRs must be made public through ClinicalTrials.gov and FDA Advisory Committee materials and is routinely disclosed in scientific publications.

Sarepta has also made extensive disclosures related to safety information and Adverse Events (AE) and safety concerns redacted in the Clinical Study Reports for Study 201 and Study 202 through ClinicalTrials.gov and the FDA Advisory Committee review process. Summary tables of adverse events experienced by patients in both Study 201 and the dose-ranging study are available on

ClinicalTrials.gov. Seife Decl. ¶ 91. In addition, Sarepta submitted detailed AE information in its mandatory Advisory Committee submissions, including "narrative descriptions of adverse events, a discussion of adverse event categories of particular interest, case reports by individual participant number for particular adverse events, a table of all adverse events in the 24 weeks of Study 201, and a table of all adverse events from all Exondys 51 trials, by dosing and number of patients exposed." *Id.* Defendants fail to demonstrate how the redacted information concerning adverse events and safety issues surrounding Exondys 51 differs from the publicly known details or how the disclosure of any unknown information could be the source of substantial competitive injury in light of all that is known.

3. The unsubstantiated claims of harm by Sarepta and the FDA do not withstand scrutiny.

Sarepta identifies four categories of redacted information that it claims could cause commercial harm if disclosed: Sarepta's study procedures, test results, "exploratory" endpoints, and Adverse Events. The FDA describes four slightly different but largely overlapping categories,[14] while both Sarepta and the FDA rely on the same Estepan Declaration to support their claims of competitive injury. All apart from defendants' lack of detail and failure to account for the substantial amount of CSR information that is made public elsewhere, their claims of harm from release of this information are insufficient on their own terms.

The only potential harm relevant under the *National Parks* test is competitive injury to Sarepta flowing from the actual use of still-confidential information by a competitor. *Public Citizen*, 704 F.2d at 1291, n. 30. Sarepta's argument that data from its studies could "be exploited by competitors in [sic] to claim in a marketing campaign that their [Duchenne] treatments are superior," *see* Sarepta's Corrected SJ Mem. at 20, is simply not cognizable. Because the competitive injury needed to invoke

[14] The FDA identifies "granular-level detail regarding clinical studies" and "patient-level data regarding study results and patient characteristics." FDA's Mem. SJ at 17.

Exemption 4 must come from the "*use* of proprietary information caused by competitors," potential embarrassment or reputational loss is beside the point. *Public Citizen*, 704 F.2d at 1291, n. 30 (emphasis added); *see also United Techs. Corp. v. DOD*, 601 F.3d 557, 563-64 (D.C. Cir. 2010) (same); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 341 (D.C. Cir. 1989) (same).[15]

a. Defendants have not established that the redacted CSR information would be of any material use to a Sarepta competitor.

Defendants argue in general terms that competitors could benefit from additional disclosure of Sarepta's trial protocols, test results, "exploratory" endpoints, and even the Adverse Events patients experienced. Sarepta's Corrected Mem. SJ at 18-24. They suggest that competitors could use the information to "bypass the years of expensive trial and error work that Sarepta undertook," Estepan Decl. ¶ 25, or to develop a "historical external control set," *id.* ¶ 33. Similar arguments in support of Exemption 4 withholdings were considered and rejected in *Teich v. FDA*, a case involving the potential dangers surrounding silicone breast implants. 751 F. Supp. at 243.

The manufacturer, Dow Corning, and the FDA argued in *Teich* that disclosure of its protocols and test results for animal studies that had yielded negative results would cause injury by "facilitating its competitors' safety testing" and providing a "road map" to competitors, thus "taking advantage of the research funds and time expended by Dow Corning." *Id.* at 253. The court rejected these arguments, finding it "inconceivable that disclosure of the protocols and results alone will facilitate a competitor's premarket approval application." *Id.* Because a competitor must submit "not only the protocols and test results, but the raw data supporting those results," a competitor would still need to run its own studies before any possible injury could be inflicted on the manufacturer. *Id.* Moreover,

[15] For the same reason, Sarepta's conclusory claims that release of its data would allow competitors to undermine Sarepta's patent positions or recruit away Sarepta's patients fail—because they do not rely on competitors actually using Sarepta's data. *See* Sarepta Corrected Mem. SJ at 20. Nor does Sarepta explain *how* the mechanics would work to inflict either injury. *Id.*

to the extent testing produces inconclusive results, the court was not persuaded disclosing its results would assist competitors "in avoiding the expenditure of time and money on 'blind alleys.'" *Id.*

Sarepta's competitors are similarly required to submit their own safety and efficacy data to the FDA to win approval for any new drug application, 21 U.S.C. § 355. Nor does anything asserted in the Estepan declaration support a finding that a Sarepta competitor could make affirmative use of the withheld details concerning its studies and their results.

i. Study procedures.

Sarepta argues that release of clinical trial protocols would allow competitors to "use these procedures themselves." Sarepta's Corrected SJ Mem. at 16. This is a complete red herring. Seife is not seeking step-by-step clinical protocol details, but rather the narrative description of the tests conducted and their results presented in the CSRs.[16] And even were Seife seeking the protocols, Sarepta cannot point to a single court that has barred their disclosure, and for good reason: Courts that have considered the issue have concluded that protocols are not CCI and that a public interest in their release must be taken into account. *See, e.g., Pub. Citizen Health Research Group.*, 964 F. Supp. at 415-16.[17]

Sarepta is on no more solid ground in arguing that disclosing its discussion of dystrophin in the narrative portion of the CSR would allow competitors to know "how Sarepta obtained this measurement, down to the details of the slides on which the tissue biopsies were kept, what Sarepta

[16] When Seife submitted a markup of the *Vaughn* Index, he listed certain safety and efficacy data and names of documents as items he desired even though they fell into the protocols and statistical plan analysis for Study 202 based on the description of the items. *See* Seife Decl. ¶ 45-49. Seife is not seeking researcher names or the vast majority of the statistical plans. *Id.* at ¶ 52. *See* Sarepta Corrected Mem. SJ at 15, 18. And, as one of Seife's experts notes, it is "very difficult to believe that the statistical methods are not generally known, especially in light of the FDA's release of additional information about the drug when it was approved." Lurie Decl. ¶ 21.

[17] The court ordered the FDA to submit a copy of the protocol for *in camera* review. *Id.* at 416. Subsequent decisions in the case are not available, but according to the case docket, the court sought the input of two independent experts, both of whom agreed that release of the protocol would likely not cause competitive harm to BMS. No. 1:96-CV-01650, ECF No. 41. The court then ordered the FDA to release the protocol in its entirety. ECF No. 45.

did to those slides, and how Sarepta measured the contents of the slides." Sarepta's Corrected SJ Mem. at 18 (citing Bates page FDACDER_SAR00058). This claim is advanced without evidentiary basis and Sarepta fails even to explain what was unique or unknown to the industry about the techniques it used.[18] Sarepta's other example of useful information, concerning its dosing procedures (Bates FDACDER_SAR 00021640), is from a redaction that Seife has agreed to forgo requesting. Seife Decl. ¶ 49.

ii. Study results.

Sarepta and the FDA cannot credibly claim the study results should be kept secret because they may reveal information that shows the drug or the agency in a bad light. So, they make a different argument designed to conceal this very same information. The Estepan declaration asserts, specifically, that "a competitor could simply use the results of Sarepta's clinical study to conduct a head-to-head study," and that "de-identified patient-level study results . . . could be useful for the purposes of powering a clinical trial" or be used as a "historical control set." Estepan Decl. ¶¶ 29-33. These broad and unsubstantiated claims from a witness with no apparent qualification to make them fall apart upon inspection.

One of Seife's experts, Dr. Peter Lurie, a medical doctor and epidemiologist with thirty years of experience in public health and clinical trial design, including as the FDA's transparency lead and Associate Commissioner for Public Health Strategy and Analysis, rejects Estepan's unsubstantiated statements, noting that such de-identified data cannot be used as historical controls in "any meaningful way," citing and analyzing the relevant FDA provisions on point. Lurie Decl. ¶ 24. As Dr. Lurie

[18] If the statement is to be credited at all, the narrative portion of the CSR should be reviewed *in camera* to verify the level of detail that would be disclosed and to determine whether the withheld information could more narrowly be segregated.

explains, CSR data in the partially redacted form requested by Seife[19] is unusable by competitors. *Id.* ¶ 24-25. This is because, as Sarepta acknowledges, the FDA has imposed stringent guidelines for Duchenne trials, which include mandates on any use of "historical controls" for clinical trials—namely that they must be from similar patient demographics. *Id.* Thus, while the de-identified information is needed by Seife to assess the effectiveness of Exondys 51 revealed by Sarepta's testing, and to evaluate the role of the FDA in approving that drug, this information cannot be used by competitors because it will not contain the demographic information they would need. *Id.*

Sarepta is equally misdirected in arguing that disclosing its study results will undercut its advantage in the European Union. Once the European Medicines Agency (EMA) has made a decision on Sarepta's application for "marketing authorisation" for Exondys 51, regardless of whether the drug is approved or rejected, the CSRs will in fact be released under the EMA's policy to publish CSRs. Seife Decl. ¶ 102 (citing EMA policy documents). It is noteworthy that Europe generally refuses to treat clinical data as confidential commercial information. *Id.*; *id.* ¶¶ 44, 159; *see also* Regulation (EU) No 536/2014 of the European Parliament and of the Council of 16 April 2014.

Moreover, to the extent that Sarepta's clinical trials are, in the words a lead reviewer of the FDA team, based on "scientific misconduct," Kenney Decl., Ex. L, 10, these trials certainly would not be of affirmative use to competitors. Dr. Farkas warned about "misrepresentation of the data, even beyond that fact that it isn't clear what band [in the Western blot] represents dystrophin in the patient samples," and that the data Sarepta seeks to shield from public view appeared "far less impressive than portrayed in [Sarepta's] regulatory submissions and the Mendell paper." *Id.* He noted "we need to be concerned that the Mendell paper, at least, represents scientific misconduct through the omission and misrepresentation of results such that findings are not accurately portrayed." *Id.* Farkas elaborated

[19] Seife specifically stated that he did not seek age, weight, height, and demographic information from patient level data in the CSRs. *See* Kenney Decl. ¶ 7; Seife Decl. ¶ 53.

that an image of the Western blots "seems like it must also have been heavily manipulated photographically." *Id.* at 8. The only manner competitors could use this information would be to embarrass Sarepta or attempt to harm its reputation, harms that are not cognizable under Exemption 4. *See Public Citizen*, 704 F.2d at 1291, n. 30.

iii. Exploratory endpoints.

Contrary to Sarepta's claim, disclosure of the clinical endpoints described in the CSRs would not cause substantial competitive harm, given that many of the endpoints disclosed by Sarepta were developed by its competitors or are standard measures used in the community of muscular dystrophy researchers. Lurie Decl. ¶¶ 22-23; Seife Decl. ¶¶ 60-84 (citing academic articles and guidelines substantiating this claim). For example, Sarepta's "main clinical endpoint, the 6-minute walk test, is widely used in the field" and "its methods are generally understood" and thus "it is extremely improbable that the data for the 6-minute walk test would be of great commercial value, as the company is one of many in the field using this measure." Lurie Decl. ¶ 23. And, as explained *supra*, information about Sarepta's so-called exploratory endpoints are public, and they are also well-accepted in the field. *See* Section I.B.2.a.

iv. Adverse Events.

Sarepta next argues, remarkably, that the FDA may not reveal to the public or to researchers and journalists withheld adverse events associated with its drug. Here too, the company dare not claim that the Adverse Events themselves will undermine public trust in their drug or cast doubt on its approval, so they suggest that what they seek to protect is their "investment" in determining whether these events were related to the drug. But it is *precisely this information* that is of critical moment to understanding the safety and efficacy of the drug, because researchers, patients, and doctors cannot know whether Sarepta's public assessment was correct—or if Adverse Events that it declined to

disclose are indeed related to the drug—without understanding each Adverse Event, and the means taken to determine if it was related to the drug. *See* Lurie Decl. ¶¶ 12-18.

To be clear: insofar as Sarepta is arguing that revealing this safety and efficacy data would actually allow competitors to avoid "trial and error" in their own clinical studies, such as "unsuccessful . . . dosing approaches," Estepan Decl. ¶ 25, it seeks to withhold data so that its competitors conduct futile clinical trials that expose children to risks. As Dr. Lurie notes, "expos[ing] pediatric patients—children—to trials that are expected to be useless and that carry risk because they could be accompanied by AEs . . . is unethical and is a violation of the Declaration of Helsinki, an international accord that governs ethics in medical trials, which requires that '[m]edical research involving human subjects may only be conducted if the importance of the objective outweighs the risks and burdens to the research subjects.'" Lurie Decl. ¶ 26.

The FDA routinely releases Adverse Event datasets to the public and also has a publicly searchable adverse event website,[20] as it must if it is to regulate in a manner that protects the public interest. No company should be permitted to claim that such events implicate proprietary interests. Moreover, insofar as Sarepta claims it is entitled to a first mover advantage, it already has substantially enjoyed such position: As the company concedes, other companies' trials will not be complete until 2020 to 2027, Estepan Decl. ¶¶ 58-59, regardless of whether *Sarepta's* CSRs are released. As described below, Sarepta has not come close to showing imminent harm from any competitor—and instead seeks to shield from view possibly imminent harms to patients.

[20] *See* FDA Adverse Event Reporting System (FAERS): Latest Quarterly Data Files, https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Surveillance/AdverseDrugEffects/ucm082193.htm (last accessed May 29, 2018).

b. Defendants have not established that Sarepta faces an imminent competitive injury if the withheld CSR information is disclosed.

To withhold CSR information under Exemption 4, defendants must demonstrate that any competitive injury likely to be caused by disclosure is not only "substantial" but "imminent." *Bloomberg L.P.*, 649 F. Supp. 2d at 279; *see also Iglesias v. C.I.A.*, 525 F. Supp. 547, 559 (D.D.C. 1981) (affirming that documents must be released absent "evidence that competitive harm is imminent"); *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999) (certain injuries are categorically "too remote" to be cognizable under Exemption 4). Defendants fail to meet this burden as well. They identify certain existing manufacturers as "actual competition," but then acknowledge that approvals for their potential competing drugs are not likely to be granted for years—roughly from 2020 to 2027. *See* Estepan Decl. ¶¶ 58-59. By its own admission, any competitive injury Sarepta might conceivably suffer is years away.[21]

While no court has articulated a precise definition of "imminent" competitive injury, the FDA proposed its own definition in the context of standing. The FDA claimed, and a court agreed, that "[e]ven assuming that plaintiff is correct in asserting that the FDA has received an application for a finished drug product, that fact alone does not threaten plaintiff with *imminent economic harm* . . . The mere fact that the FDA receives an application for a finished drug product does not guarantee that it will be approved immediately, if at all." *Bristol-Myers Squibb Co. v. Shalala*, 892 F. Supp. 295, 297-98 (D.D.C. 1995) (emphasis added). The court added that if the "FDA is several steps away from taking action [that] might cause [a drug company] any competitive harm, . . . [the company would not] suffer 'imminent' harm." *Id.* If the filing of "an application for a finished drug product" is not imminent

[21] Sarepta also argues that its competitors will learn of its research strategies, Estepan Decl. ¶ 37, but never provides a timeframe for the approval of its competitors' drugs based on this. This would presumably be even farther in the future.

injury to a competitor, neither is the potential that disclosure here could somehow aid a competitor years down the road.

C. Sarepta Fails To Demonstrate That Disclosing The CSR Information Will Impair FDA's Ability To Regulate, Which The FDA Implicitly Concedes

Sarepta—but not the FDA—argues in the alternative that these CSR redactions are permitted under the "impairment prong" of the *National Parks* test. Sarepta Corrected SJ Mem. at 12-13. Under this standard, information may be withheld under Exemption 4 if disclosure would "impair the Government's ability to obtain necessary information in the future." *National Parks*, 498 F.2d at 770. This argument is entirely misdirected for multiple reasons.

First, the FDA itself makes clear why Sarepta's impairment theory is untenable. *See* FDA SJ Mem at 7, n.6. Sarepta's theory relies on the notion that drug sponsors would not submit clinical data if the Court ordered release of the safety and efficacy data in the CSRs. But drug sponsors are required by law to disclose CSRs to the FDA under 21 U.S.C. § 355(b)(1) and so cannot legally refrain from doing so if they wish to sell a drug in the U.S. market. *Id.* In addition, the contents of CSRs are regulated by the FDA, and therefore the level of detail cannot be reduced without risking rejection of the application for marketing approval. *Id.* at 3 (citing *Guideline for Industry: Structure and Content of Clinical Study Reports*).

Further, the impairment argument is based on Sarepta's miscitation to a passing phrase of *dicta* in *Judicial Watch Inc. v. FDA*, 449 F.3d 141 (D.C. Cir. 2006), a case that actually denied an attempt by the FDA to withhold information related to a drug because the *Vaughn* Index was inadequate, *id.* at 150. *See* Sarepta Corrected SJ Mem. at 13. No court has adopted the *dicta* Sarepta presents as a holding, and the only two courts identified to have ruled on the impairment argument in the context of clinical trial data both rejected it, because the FDA *requires* submission to support drug approval and because the defendants failed to submit evidence that releasing data would damage its ability to obtain the information. *See Pub. Citizen Health Research Grp.*, 964 F. Supp. at 415; *see also Teich*, 751 F. Supp. at 251-

52 (considering this argument at length and rejecting it as "nothing less than *chutzpah* being elevated to new heights"). There is similarly no evidence of impairment here, and, to the contrary, the record shows that transparency of clinical trial data actually *improves* medicine and FDA decision-making. *See* Seife Decl. ¶¶ 94-107; Lurie Decl. ¶¶ 19-20.

D. An Overwhelming Public Interest Warrants Disclosure Of Sarepta's CSR Information

Even if defendants had met their burden to show substantial and imminent competitive harm (they did not and cannot), the public interest in disclosure here is overwhelming, providing an additional and alternative ground for granting plaintiff's motion and denying defendants' motions. The withheld information would shed light on core government functions, including whether the FDA wrongly approved a drug without supporting evidence and whether scientific misconduct, improper influence, conflicts of interest, or other problems infected this agency action. It will also assist reporters, researchers, doctors, and patients in weighing the risks and rewards of using Exondys 51. These public interests militate strongly in favor of disclosing the withheld information, particularly in the absence of any clear showing of substantial and imminent competitive injury.

1. CSR information will inform about the actions of the FDA.

The FDA itself has recognized that CSRs contain key safety and efficacy data, the release of which will better enable the public to understand and evaluate FDA approval processes, as well as the appropriate use of medicines. In this case, information withheld from Sarepta's CSRs goes to the heart of a public dispute about the actions of both the agency and the applicant seeking its approval.

a) The CSR information will shed light on whether the FDA is complying with statutory requirements.

As the FDA has made plain, CSRs are crucial documents in the drug approval process that shed light on FDA's performance of its statutory mandate to ensure that only drugs meeting certain clinical standards for safety and efficacy can be marketed. The Food Drug and Cosmetic Act requires

the FDA to protect public health both by "promptly and efficiently reviewing clinical research" and by maximizing "the availability and clarity of information about the process for review of applications and submissions . . . [and] the availability and clarity of information for consumers and patients concerning new products." 21 U.S.C. § 393. Inherent in this mandate is an overarching responsibility for transparency to consumers and the medical community. The FDA describes its "Transparency Initiative," launched in 2009, as "[a]n agency-wide effort to open the doors of the agency and promote innovation," and it includes initiatives to enhance public understanding "of FDA operations and decision-making." Seife Decl. ¶ 96; Kenney Decl., Ex. Z, 2.

The FDA most recently has recognized the importance of the disclosure of the copious safety and efficacy data included in CSRs. On January 16, 2018, the FDA announced a Disclosure Pilot Program that will proactively release "key portions" of up to nine CSRs on a voluntary basis. Seife Decl. ¶ 97; Kenney Decl., Ex. Z, 7. Commissioner Gottlieb used the occasion to underscore the importance of transparency to the FDA's mission of public health and stressed that routine disclosure of CSRs will provide an important "window" into the agency's actions. Seife Decl. ¶ 98; Kenney Decl., Ex. Z, 7. According to Commissioner Gottlieb and Dr. Woodcock herself, given the central role of a CSR in "addressing efficacy and safety," its publication will increase stakeholders' understanding of the basis for FDA's approval decisions, inform physicians and other healthcare providers about the detailed results upon which regulatory decisions were based, and enhance the accuracy of information used in scientific publications. Seife Decl. ¶¶ 98-101; Kenney Decl., Ex. Z. Importantly, Commissioner Gottlieb noted that Action Packages—materials developed and released by the FDA when a new drug is approved—do not currently provide the desired level of transparency. CSR disclosure is needed for "external audiences to extract all of the detailed clinical evidence that supported the FDA's approval decisions." Seife Decl. ¶ 100.

Academic scholarship further supports the conclusion that disclosure of CSRs is needed to ensure that the FDA is only approving drugs on the basis of sufficient clinical data as well as to prevent data manipulation and distortion on the part of the pharmaceutical industry. Researchers at Harvard and Stanford have highlighted the potential of undisclosed research data to "call into question manufacturers' claims or the FDA's decisions" and noted that "safety data from clinical trials will rarely fit" the Exemption 4 definition of CCI. Kenney Decl., Ex. BB, 82. According to these researchers, safety and efficacy data is never enough on its own to support product approval for a competitor, yet the "public health significance [of such data] is particularly high." *Id.*

CSR disclosure is important to assessing the FDA's actions because the limited clinical trial data otherwise available to the medical community are often plagued by errors and misrepresentations. Rising and colleagues found a 9% discordance between the conclusions that drug manufacturers report to the FDA and the conclusions published in scientific reports on the same studies. *Id.* at 69. Turner and colleagues conducted a study of published articles regarding approved antidepressant drug trials and found that, although FDA analyses reported that only 51% of the trials were positive, the scientific articles indicated that 94% of the trials conducted were positive. *Id.* at 85.

Without CSR disclosure, "selective publication of favorable results, gag orders on corporate-funded research, and misleading presentations of data" allow drug manufacturers to manipulate public understanding by presenting their drugs as more effective or less risky than they actually are. *Id.* at 52 The suicide risks created when the antidepressant Paxil was prescribed for adolescents[22] and the cardiovascular risks from taking Vioxx[23] are just two examples of public health risks created by

[22] GlaxoSmithKline for several years marketed its antidepressant paroxetine (Paxil) for pediatric use, distributing copies of a medical article about its clinical Study 329 stating that Paxil was "generally well tolerated and effective" for young patients. *See* Kenney Decl., Ex. BB, 114. It was not until the FDA conducted a study of original data it had from multiple studies of antidepressants in children, including Study 329, that the increased risk of suicidal thinking and behavior became apparent. *See id.* at 119-20.

[23] It was not until test data became available to researchers during litigation that a more thorough review made public the extent of cardiovascular risk apparent to the manufacturer during clinical trials of Vioxx

approved drugs that only became known when complete data from clinical trials were available to be studied.

b) The CSR information will shed light on whether the FDA approved an "elegant placebo" through a process infected by misconduct.

There is a strong public interest in disclosure of drug safety and efficacy information contained in the CSRs. Disclosure of the redacted and withheld portions of the CSRs for Studies 201 and 202 will shed light on allegations made by many high-ranking officials at the FDA, most prominently Drs. Unger and Jenkins, that the FDA violated its statutory mandate and lowered the bar for future drug approvals in approving Exondys 51 without "substantial evidence" of the drug's effectiveness established by "adequate and well-controlled investigations." 21 U.S.C. § 355(d) (2016); Seife Decl. ¶ 108-09. In particular, disclosing the redacted CSR information will inform the public about the internal FDA controversies over Sarepta's Western blots and whether Sarepta's data demonstrated any clinical benefit for Duchenne patients. Disclosure will also shed light on whether Sarepta manipulated evidence of its drug's efficacy by "endpoint switching" and whether safety concerns about Exondys 51 outweigh the questionable evidence of its efficacy provided by Sarepta.

Western blots images. Western blots redacted and withheld from Studies 201 and 202 will shed light on whether the FDA approved a drug based on misinterpreted or manipulated clinical trial data. Sarepta's initial Western blot analysis in the *Annals of Neurology* elicited public condemnation from two FDA officials and internal concern within the FDA. It is unclear which Western blots provided the basis for Dr. Woodcock's approval of Exondys 51, but members of the review team stated that Dr. Woodcock had already made up her mind well before the additional Western blot images from Study 301 became available. Seife Decl. ¶¶ 110-12; Kenney Decl., Ex. G, 11, 23.

(rofecoxib). *See id.* at 121-30. By the time that Vioxx was withdrawn from the U.S. market, it had caused an estimated 88,000 to 140,000 additional serious cardiac events, of which 44% were likely fatal. *See id.* at 131-37.

Although the FDA did release certain Western blot images attached to an email, the Western blot and immunohistochemistry images attached to the CSRs have been redacted. Seife Decl. ¶ 125. To the extent that the redacted information includes additional images or interpretations of Western blots, disclosure will enable independent evaluation of whether the data overall "clearly show, using adequate controls, that the drug increases dystrophin protein production in some of the patients," as Dr. Woodcock states. Seife Decl. ¶ 112; Kenney Decl., Ex. E, 4.

Conflicting FDA analyses. Disclosure of redacted narrative results surrounding dystrophin and corresponding tables will shed light on the conflicting scientific analyses employed by Drs. Woodcock and Unger. Seife Decl. ¶ 113. They presented contradictory analyses to evaluate the existence of any correlation between dystrophin production and a clinical benefit to Duchenne sufferers. These analyses bear directly on the question of whether, in the words of Dr. Unger, approval was "on the basis of a surrogate endpoint with a trivial treatment effect," *id.*; Kenney Decl., Ex. F, 28, and relied on a "scientifically invalid" analysis, Seife Decl. ¶ 113; Kenney Decl., Ex. I, 3-4. The competing analyses are based on data from two endpoints: the 6MWT and the NSAA, but the underlying patient-level data on both of these endpoints has been withheld. Seife Decl. ¶ 113. The FDA is thus refusing to disclose information at the heart of a key internal disagreement about the approval of Exondys 51. *Id.* Without disclosure of the redacted information data related to dystrophin level and the results from 6MWT and NSAA tests, scientists are unable to fully assess independently the merits of the conflicting views. *Id.*

Endpoints evaluation. Disclosure will reveal whether FDA approval was based on cherry-picked data relating to clinical endpoints. Clinical endpoints are measures determined by drug researchers to assess whether a product has clinically desirable outcomes. Lurie Decl. ¶¶ 8-9. Typically, the primary endpoints are specified before the study begins to ensure experimental validity. Seife Decl. ¶ 114; Lurie Decl. ¶ 8. Sarepta, however, repeatedly changed its primary endpoints during the

clinical investigation, suggesting that Sarepta may have chosen the most favorable endpoints rather than tracking the endpoints that most closely demonstrate the degree of clinical efficacy. Seife Decl. ¶ 115; Lurie Decl. ¶¶ 10-11. Sarepta eventually advanced two main endpoints—the change in dystrophin production and patients' performance on the six-minute walk test. Seife Decl. ¶ 117. But it reviewed eight others that it has now labeled "exploratory" to suggest that they are less clinically relevant. *Id.* The CSR data for these "exploratory" endpoints are heavily redacted, making it impossible to determine if dystrophin levels and the six-minute walk test are truly representative of the drug's efficacy. *Id.*; Lurie Decl. ¶¶ 10-11. Disclosing the withheld information will establish whether the results for the main endpoints identified by Sarepta, the 6MWT and dystrophin production, were the only favorable results among Sarepta's test data. Seife Decl. ¶ 118.

Other concerns about Sarepta's studies will also be addressed by disclosing the redacted information. Even though Study 201 included only twelve patients, Sarepta excluded data for the 6MWT from two patients who could no longer walk before the study ended, a very controversial decision that allowed Sarepta to provide a more favorable average measure for the study. Zuckerman Decl. ¶ 19.

FDA consideration of safety concerns. CSR disclosure will reveal whether the FDA approved a drug for which safety risks outweigh clinical benefit. The FDA is not authorized to approve a drug that has weak evidence of efficacy and strong evidence of safety concerns. *See* 21 C.F.R. § 312.84 (FDA must weigh risk-benefit profile of drug in drug approval). In this case, Dr. Woodcock asserted that "the therapy has been relatively safe in the clinic," though she acknowledged that "intravenous administration always carries risk." Kenney Decl., Ex. E, 13. In contrast, Dr. Unger classified the risk of infection as "certain," noting that "there would definitely be serious infections and possibly deaths if this drug is marketed, yet evidence of efficacy is lacking." *Id.*, Ex. F, 22.

Disclosing the redacted CSR information will allow independent evaluation of whether the FDA acted properly. Seife Decl. ¶ 108-125.

2. The withheld CSR information is needed to understand and evaluate the safety of Exondys 51.

Disclosing the withheld portions of the CSRs will also inform the public about several safety concerns associated with Exondys 51, most importantly the risks of infection and sepsis, cardiomyopathy, blood clots, and balance disorder, as well as other conditions laid out in the Seife declaration. *Id.* ¶¶ 126-149. Disclosing the CSR efficacy data would allow patients and their doctors to more meaningfully evaluate whether Exondys 51's possible benefits are worth its potentially deadly drawbacks. Zuckerman Decl. ¶ 29.

Infection and Sepsis. Patients who take Exondys 51 are incurring a risk of deadly infection. The drug is most commonly administered through an injection port surgically attached to a vein, Seife Decl. ¶¶ 127-32, but because Duchenne patients take corticosteroids that suppress their immune systems, they are particularly vulnerable to infection through these ports, which can introduce bacteria into the bloodstream. *Id.* ¶¶ 127-29. As Dr. Unger predicted, incidences of infection and sepsis associated with Exondys 51 were recorded after it was introduced to the market. The FDA's Adverse Event Reporting System (FAERS)[24] catalogues a patient using Exondys 51 who died from "septic shock," another case of "device related infection," and two cases of bacteremia (bacteria in the blood). *Id.* ¶ 129.

The redacted CSR information likely documents incidences of infection during the studies, but any statistical occurrences of infection and narrative sections detailing these adverse events are redacted. *Id.* ¶ 130. Redacted tables providing hematology information would also shed light on this

[24] FAERS is a public database to which medical providers and others report so-called Adverse Events, or negative experiences associated with a medical product, once a drug is on the market. Seife Decl. ¶ 128.

side-effect because the body produces white blood cells to counter infection. *Id.* ¶ 131. In addition, the FDA repeatedly redacted shift tables, *id.* ¶ 132, which show the number of patients who were initially rated low, normal, or high for a particular condition and how their condition shifted post-dose. *Id.* Because Sarepta's statistical takeaways from the studies could be misleading given the tiny number of participants in Studies 201 and 202, shifts would be more informative. *Id.* All of this information is relevant to understanding the safety risks of Exondys 51.

Cardiomyopathy. Cardiomyopathy, or disease of the heart muscle, is a common cause of death for patients with Duchenne and is possibly associated with Exondys 51. In another study involving Exondys 51, one patient with a pre-existing case of cardiomyopathy discontinued Exondys 51 treatment after his heart's ability to pump blood was impaired. *See id.* ¶ 133. This event was "judged by the investigator as possibly related to [Exondys 51]." *Id.* The FAERS database includes twelve reports of cardiac disorders, including four deaths and one cardiomyopathy diagnosis. *Id.* ¶ 134. Knowing to what extent Exondys 51 exacerbates this deadly condition is of vital interest to patients, and information related to cardiac side effects should be included in Sarepta's redacted adverse event data. *Id.* ¶ 135.

Blood clots. Blood clotting is another known safety issue for which additional information should be released. Following a redacted passage, the CSR for Study 202 reports three cases of blood clotting, including one report of blockage in the catheter device. *Id.* ¶ 140. Doctors with patients who are considering taking Exondys 51 along with other catheter-administered drugs would therefore benefit from further information on blood clot risks. *Id.* ¶ 141. Redacted shift tables regarding patients' blood physiology would inform how clotting arose in individual patients based on their initial health status. *Id.* ¶ 142.

Balance disorder. Balance disorder is one of the drug's most common adverse reactions and can easily lead to fractures. Although balance disorder is on the drug's label for side effects, the public

does not know much else about the disorder's possible severity. *Id.* ¶ 147. Redacted adverse events and narrative sections could provide information such as whether balance disorder emerges early on during treatment or more gradually and how severe the disorder may become. *Id.* Without access to the redacted CSR data, patients must decide whether or not to spend enormous sums on a drug that could easily do more harm than good. *Id.* ¶ 148.

3. The withheld CSR information is also relevant to insurance companies' coverage decisions and physicians' prescription practices.

There also exists a strong public interest in disclosure because further information on Exondys 51's safety and efficacy will inform decisions by insurance companies to cover the drug and by physicians to prescribe it. If disclosure indicates a lack of evidence that the drug provides any meaningful clinical benefit, patients and their insurers may avoid the drug's tremendous expense and infection risk. Sarepta estimates that the list price of Exondys 51 is about $300,000 a year per child, with varying rates depending on a child's weight, dosage requirements, and discounts to insurers. Zuckerman Decl. ¶ 27. Independent organizations estimate that the drug's list price is about $750,000 per year, and a *New York Times* article puts the list price as high as $1.5 million a year for some patients. *Id.* ¶ 28. Because the FDA approved the drug in a highly unusual process based on scant evidence, families are struggling to gain insurance approval. *Id.* ¶ 27. Disclosure could therefore assuage extreme financial burdens.

II. IN THE ALTERNATIVE, DEFENDANTS HAVE NOT REASONABLY SEGREGATED EXEMPT FROM NON-EXEMPT INFORMATION

If the Court declines to order disclosure of the requested material in whole, it should make specific findings of segregability, after conducting *in camera* review of the submitted portions of the information. It does not appear that defendants made reasonable efforts to segregate any purportedly exempt from non-exempt information in redacting the CSR information, blacking out sections so extensively that they contain virtually no useful clinical information. They have even gone so far as

to redact portions of the table of contents (including a portion they previously made public) along with the names of documents, the disclosure of which could hardly cause competitive injury. Seife Decl. ¶ 42.

Under FOIA, agencies have a duty to segregate exempt from non-exempt materials. This duty was heightened by the 2016 FOIA Improvements Act, which requires an agency to "(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and (II) take reasonable steps necessary to segregate and release nonexempt information." § 552(b)(9)(ii)(I-II). Agencies are not permitted to issue "sweeping, generalized claims of exemption for documents," but must provide "a detailed justification for an agency decision that non-exempt material is not segregable." *Mead Data Cent., Inc., v. U.S. Dep't of Air Force*, 566 F.2d 242, 260-62 (D.C. Cir. 1977). Specifically, they must describe "what proportion of the information in a [withheld] document is non-exempt and how that material is dispersed throughout the document." *Id.* at 261. District courts, too, must pay careful attention to questions of segregability and "must make specific findings of segregability." *Stolt-Nielsen Transp. Grp. Ltd. v. United States*, 534 F.3d 728, 734-35 (D.C. Cir. 2008).

The FDA failed to describe what portion of the material is non-exempt, and the nonexempt portion of the CSR material is not "relatively small and is so interspersed with exempt material that separation by the agency and policing of this by the courts would impose an inordinate burden." *Lead Indus. Ass'n, Inc. v. Occupational Safety & Health Admin.*, 610 F.2d 70, 86 (2d Cir. 1979). The documents have been redacted well beyond what is reasonable, blacking out materials that are easily accessible in other CSRs, for example one released in the FDA's pilot program. Seife Decl. ¶ 43.

III. AT A MINIMUM, *IN CAMERA* REVIEW IS WARRANTED GIVEN THE PUBLIC INTEREST IN DISCLOSURE OF DRUG SAFETY AND EFFICACY INFORMATION AND CONTROVERSY OVER THE FDA'S BEHAVIOR

FOIA grants judges broad discretion to "examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld." 5 U.S.C. § 552(a)(4)(B). Courts "often . . . examine the document *in camera*" "in an effort to compensate" for the informational imbalances in FOIA litigation. *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973). In cases with "a strong public interest in disclosure," there is "a greater call for *in camera* inspection." *Allen v. CIA*, 636 F.2d 1287, 1299 (D.C. Cir. 1980), *overruled on other grounds, Founding Church of Scientology of D.C. v. Smith*, 721 F.2d 828 (D.C. Cir. 1983); *see also Donovan v. FBI*, 806 F.2d 55, 59 (2d Cir. 1986) (adopting *Allen*), *abrogated on other grounds, DOJ v. Landano*, 508 U.S. 165 (1993).

Importantly, there need not be evidence of "bad faith" on the part of the agency for a district court to conduct *in camera* review, nor is it necessary for the court to making a finding of "contrary evidence." *Ferguson v. FBI*, 752 F. Supp. 634, 637-38 (S.D.N.Y. 1990). "A trial judge may order such an inspection 'on the basis of an uneasiness, a doubt [they] want[] satisfied.'" *Id.* (citing *Meeropol v. Meese,* 790 F.2d 942, 958 (D.C. Cir. 1986)). Indeed, when an agency has something to hide, arising from the subject matter of the FOIA request or the potential that the request will reveal agency misconduct, even in the absence of evidence of bad faith in the processing of the FOIA request, "it would be an abdication of the court's responsibility to treat the case in the standard way and grant summary judgment on the basis of *Vaughn* affidavits alone." *Jones v. FBI*, 41 F.3d 238, 242-43 (6th Cir. 1994). In *Jones*, the Sixth Circuit reversed the trial court's grant of summary judgment to the FBI made on the affidavits because the request involved "activities which, if disclosed, would publicly embarrass the agency." *Id. In camera* review was "necessary," the Court of Appeals ruled, because "no other party or institution" apart from the court was "available to ensure that the agency's assertions [were]

reliable." *Id.* Here, *in camera* review is also required because there is similar room for doubt given the assertions of possible misconduct that have been leveled.

If such a large amount of material exists that *in camera* review becomes too unduly cumbersome to review the entire record, courts are permitted to use document "sampling procedures" to enable them to "extrapolate . . . conclusions from the representative sample to the larger group of withheld materials." *Meeropol*, 790 F.2d at 958 (citations omitted); *see also Vaughn v. Rosen*, 383 F. Supp. 1049, 1052 (D.D.C. 1974) (reviewing a representative sample of nine of 2448 documents), *aff'd,* 523 F.2d 1136 (D.C. Cir. 1975). Indeed, courts have typically rejected sampling only where the plaintiff has not requested it and noted that district courts "should be particularly receptive" when the plaintiff makes such a request. *Halpern*, 181 F.3d at 298 (collecting cases).

Here, if the Court determines that the amount of redacted material is too "unwieldy" for it to review entirely, *id.*, Seife requests the Court to examine portions *in camera.* Specifically, Seife requests the Court to follow the sampling methodology used in *Jones*, where the Sixth Circuit asked the plaintiff to select a significant number of pages for review and then combined this "plaintiff's choice" with a "random sample" to be submitted under seal in unredacted form for *in camera* inspection. 41 F.3d at 243-44. The Sixth Circuit then used this "augmented sample"—which consisted of approximately 5 percent of the pages at issue—to determine whether the FBI had complied with the plaintiff's FOIA request. *Id.*

Here, Seife respectfully suggests that the portions of Sarepta's Exhibit B that Seife requests (because he does not request all pages in Exhibit B) can be used in lieu of a "random sample" and that defendants submit unredacted versions of these pages for the court to review under seal, along with unredacted pages corresponding to Seife's Exhibit C, which comprises a representative sample of the CSRs and corresponding documents for comparison purposes.

CONCLUSION

For the foregoing reasons, this Court should deny defendants' motions for summary judgment, grant Seife's cross-motion for summary judgment, and order the release of the requested information. If the Court declines to do so, it should make specific findings of segregability, after conducting *in camera* review of the submitted portions of the information.

Dated: May 29, 2018
New York, NY

Respectfully Submitted,

MEDIA FREEDOM &
INFORMATION ACCESS CLINIC[25]

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Certificate of Service

On May 29, 2018, a copy of the foregoing document was served on all counsel of record via the Court's Electronic Case Filing (ECF) system.

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