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

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| COMPETITIVE ENTERPRISE INSTITUTE,<br><br>Plaintiff,<br><br>v.<br><br>NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,<br><br>Defendant. | Civil Action No. 10 CV 0883 (RWR) |

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
**(ORAL ARGUMENT REQUESTED)**

**TABLE OF CONTENTS**

**Table of Contents**
**(Continued)**

Page

**Table of Contents**
**(Continued)**

Page

## TABLE OF AUTHORITIES

**Cases** Page(s)

**Table of Authorities**
**(Continued)**

Page(s)

**Table of Authorities**
**(Continued)**

Page(s)



**Statutes**



**Regulations**



**Other Authorities**

## INTRODUCTION

This lawsuit seeks to compel NASA to respond to three Freedom of Information Act ("FOIA") requests—filed in August 2007 and January 2008—seeking information relating to NASA's global temperature record and activities undertaken by NASA scientists, at taxpayer expense, on the website RealClimate.org. For more than three years, NASA has failed to comply with these requests. The requested information pertains directly to issues of national significance, including the integrity of "warming" claims NASA makes about U.S. and global temperatures and the extent to which NASA scientists have utilized a third-party advocacy "blog" to respond to and attack critics of the agency. NASA's delay in responding to these requests has been the subject of an Inspector General investigation and Congressional attention.

NASA's Goddard Institute for Space Studies ("GISS") maintains one of the world's authoritative temperature data set. GISS and climate researchers from around the world have used its data set to derive conclusions about global warming. In August 2007, statistician Steve McIntyre ("McIntyre") informed NASA that he had discovered a significant error in NASA's temperature data set. Subsequently, GISS scientists were forced to revise millions of entries in the NASA temperature record. Those revisions had the notable effect of replacing 1998 with 1934 as the "hottest" year on record in the United States. This directly contradicted previous NASA statements that 1998 was the "hottest" year on record. It also undermined a key pillar of the global warming narrative, which is premised on "unusual warming" and an escalating warming trend. NASA has been a leading public proponent of this narrative, issuing press releases over the years bearing titles such as *2005 Warmest Year in a Century* and *2006 Was Earth's Fifth Warmest Year. See* Declaration of Samuel Dewey (Executed Nov. 3, 2010) ("Dewey Decl.") Ex. J.

NASA never provided a public explanation for these changes despite an ensuing public relations storm. Instead, on taxpayer time and at taxpayer expense, NASA scientists carefully researched and edited a statement trying to minimize the significance of the temperature record changes, which they posted on the Columbia University website of Dr. James Hansen ("Dr. Hansen"), the Director of GISS.[1] Dr. Gavin Schmidt ("Dr. Schmidt") then re-published virtually the same explanation and analysis on a third-party advocacy blog called RealClimate.org. The emails among the NASA scientists working on this project reflect a conscious choice to keep the final explanation off NASA's servers. *See* Dewey Decl. Ex. F-47 (email from GISS scientist Dr. Makiko Sato to Dr. Hanson) ("Jim, Please check if everything is fine. Robert, *please move to the C[olumbia] U[niversity] site and hide this after Jim checks it*. Darnell, Please send it out to Jim's email list.") (first emphasis added) ("Internal Appeal"). By doing so, GISS scientists evaded the Data Quality Act and other rules that would have required more vetting by NASA (including potential peer review) and made a "rapid response" to McIntrye impossible.

Rather than deal forthrightly with a FOIA requester on these issues, NASA has engaged in obstruction and delay. NASA did not apprise Dr. Schmidt that his emails were the subject of a FOIA request until *almost two years after* the request was made. Senior counsel at NASA's Goddard Space Flight Center ("GSFC") received documents responsive to CEI's 2007 FOIA requests on March 17, 2008—but NASA did not produce any documents until 18 months later, on the evening of December 31, 2009, and only after CEI threatened litigation.

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[1] In addition to being the Director of GISS, Dr. Hanson is a self-described environmental activist who recently was arrested in front of the White House while protesting strip mining. Dewey Decl. Ex. K. Dr. Hanson has compared "climate change" to "Nazism faced by Churchill in the 20th century and slavery faced by Lincoln in the 19th century." *Id.* Ex. L.

The pattern of obfuscation continues in this Court. NASA's motion for summary judgment acknowledges the agency has withheld records that are responsive to the two 2007 requests—including records in a computer directory called "Steve" and a subdirectory called "alternate_cleaning." But NASA contends the materials are properly withheld because charts based on them are purportedly in the public domain, and because the 2007 FOIA requests purportedly did not seek "computerized" material. But contrary to NASA's suggestion, the 2007 requests *do* seek computerized material (NASA's brief omits words without an ellipsis when describing the scope of the 2007 FOIA requests to this Court), and under binding Supreme Court precedent, NASA must produce all responsive material and data, even if some compilations of that data have been made public.

NASA also makes inaccurate statements to justify the withholding of records responsive to the 2008 RealClimate request. These include the statement that *all* of Dr. Schmidt's work on the RealClimate.org blog is performed in his "personal" rather than his "official Agency[] capacity." Mem. Of P. & A. In Supp. Of Def's. Mot. For Summ. J. ("Mot.") at 22. In the administrative process, CEI exhaustively documented (in some 26 pages with 66 exhibits) that the agency used RealClimate to explain why NASA revised millions of values in its temperature data set in response to McIntyre's criticism—one of the most significant and far-reaching criticisms that had ever been mounted against the work at GISS. Yet NASA's brief and the Travis Declaration do not mention, let alone address, any of that record evidence. Nor does NASA's brief or the Travis Declaration mention that, after CEI filed its 2008 FOIA about Dr. Schmidt's involvement with RealClimate, someone deleted all of the timestamps from the RealClimate postings and archives. The agency cannot obtain summary judgment on the

definition of "agency records" by ignoring harmful and embarrassing facts in the administrative record. But that is what it seeks to do.

NASA has failed to comply with FOIA and NASA's summary judgment motion should be denied.

## PROCEDURAL HISTORY

### A. The 2007 Temperature Records Requests.

On August 24 and 27, 2007, CEI filed two FOIA requests with NASA. Dewey Decl. Exs. A, B. The first Request, No. 2007-175, sought records "related to the August 2007 correction by NASA/GISS of online temperature data for over 1200 US HCN stations and . . . their U.S. temperature history." *Id.* Ex. A. The second Request, No. 2007-172, asked for records relating to emails sent from McIntyre "calling [GISS's] attention to an error(s) in NASA/GISS online temperature data." *Id.* Ex. B. The request also sought "all internal communications citing or addressing" CEI's August 24 FOIA request.

NASA's responses were due on September 24 and September 27, 2007. *See* 5 U.S.C. § 552(a)(6). On January 29, 2008, CEI notified NASA that the requests were four months overdue yet received no response. Complaint ¶ 17; admitted at Answer ¶ 17. By March 17, 2008, the GSFC legal office had received approximately 205 responsive emails from GISS. *See* Declaration of Larry Travis ¶ 29 (Executed Sept. 17, 2010) ("Travis Decl."). Although CEI had requested a rolling production, these documents sat in the GSFC legal office for approximately 20 months. *Id.* NASA has never provided an explanation for that delay.

### B. The 2008 RealClimate Request.

On January 28, 2008, CEI filed a third FOIA request. Dewey Decl. Ex. D. The Request, No. 08-040, sought records related to "posts or entries by [Dr. Schmidt] on the weblog or 'blog' http://www.realclimate.org/, alternatively styled in correspondence as 'RealClimate', 'Real

Climate', 'RC', or 'the blog'." *Id.* The request was targeted to "electronic mail or other correspondence sent or received by . . . Gavin A. Schmidt." *Id.* It covered the period January 1, 2007 through the date NASA complied with the request. *Id.*

NASA's response was due February 27, 2008. *See* 5 U.S.C. § 552(a)(6). NASA did not notify Dr. Schmidt of the request until "on or around" November 24, 2009—nearly 22 months after CEI had filed it. Travis Decl. ¶ 29.

While the requests were pending, CEI contacted NASA on several occasions to ask that documents be produced. On June 23, 2009, CEI informed NASA that its responses were overdue by a year. A NASA FOIA Liaison Officer responded: "We apologize for the delay in responding to your email. Your requested information has been forwarded to the Office of Chief Counsel for review. I will contact you as soon as the information has been returned to me for final processing. Thank you again for your patience regarding your request." Complaint at ¶ 18; admitted at Answer ¶ 18. Seven months later, on January 21, 2009, CEI again asked about the production. NASA did not respond to CEI for 10 months. Complaint at ¶ 21; admitted at Answer ¶ 21. On November 24, 2009, CEI informed NASA that it would sue unless documents were produced by December 22, 2009. On December 21, 2009, NASA requested and CEI consented to a short extension. *Id.* ¶¶ 22–23.

On December 31, 2009, approximately 28 months (861 days) after NASA received CEI's first 2007 request, NASA issued Initial Determinations with respect to all three requests. Dewey Decl. Exs. C, E. NASA produced additional records on February 23, 2010. Travis Decl. Ex. 5. With respect to the 2008 Request, NASA produced only emails between Dr. Schmidt's NASA account and another NASA account. *See* Dewey Decl. Ex. E.

**C. The Administrative Appeal.**

On January 29, 2009, CEI appealed the Initial Determinations on all three FOIA requests. The appeal was 26 pages and contained 66 exhibits. The appeal argued at length that NASA's search pursuant to the 2007 requests was not adequate. Internal Appeal at 24–26. CEI also attacked NASA's finding that only some of Dr. Schmidt's RealClimate related emails were not agency records. *Id.* at 8–23. Plaintiff first challenged NASA's definition of "agency records" as flawed and overly restrictive, arguing that all of Dr. Schmidt's NASA-related emails are agency records, regardless of the sending or receiving email account. *Id*. CEI also challenged the adequacy of the 08-040 search and provided conclusive evidence that NASA had failed to produce emails known to exist from other sources. *Id.* at 23–24.

NASA issued a Final Determination on March 12, 2010 that "affirm[ed] . . . in part and reverse[d] in part" NASA's Initial Determinations on all three requests. Dewey Decl. Ex. G ("Final Determination"). NASA upheld the adequacy of the searches with respect to all three requests, but reversed as to its decision regarding which of Dr. Schmidt's emails constituted agency records. NASA ordered that a new search be run for "all email accounts Dr. Schmidt uses to conduct such activities," including accounts located on the domains "@nasa.gov," "@giss.nasa.gov," "@columbia.edu," and "@realclimate.org." *Id.* at 4.

NASA promised to release new responsive records by May 14, 2010. On May 28, 2010, having received no additional production, CEI filed suit. NASA produced a small number of additional documents on July 9, 2010, most of which were duplicative of prior productions.

**D. The Inspector General Investigation.**

NASA's delay in responding to CEI's FOIA requests has attracted the attention of Members of Congress and triggered an Inspector General investigation. On December 3, 2009, Senators Vitter and Inhofe asked NASA's Inspector General to investigate the cause of the long

delays in responding to CEI's three FOIA requests. The Inspector General responded by letter on February 3, 2010. He informed the Senators that he had conducted an investigation and determined that the delays were caused by "inadequate direction given to GISS personnel as to what documents were requested and a due date for a response"; "inadequate communication between GISS, Goddard's Office of Chief Counsel, and FOIA offices concerning the lack of a complete response"; and "inadequate staffing at the Goddard FOIA office" as "the sole FOIA specialist on staff was absent for 6 months during the relevant time period and there was no back-up specialist in place." According to the Inspector General, the GISS Director has now "made addressing FOIA requests a priority." Neither NASA's brief nor the Travis Declaration mention the Inspector General's findings, which are detailed in the complaint. *See* Compl. ¶¶ 54–56.

## STANDARD OF REVIEW

Through FOIA, Congress "sought to open agency action to the light of public scrutiny." *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (citation omitted). Therefore, in FOIA cases, the burden of proof is on the agency, and all doubts must be resolved in favor of disclosure. *See, e.g., Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). An agency seeking summary judgment on an adequacy-of-search claim "must demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents.'" *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (internal citations omitted). Similarly, when claiming that documents are not "agency records," the agency must support its position with affidavits that contain "reasonable specificity of detail" and that "are not called into question by contradictory evidence in the record or by evidence of agency bad faith." *Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2006).

## ARGUMENT

### I. NASA IS IMPROPERLY WITHHOLDING DOCUMENTS RESPONSIVE TO THE 2007 REQUESTS.

#### A. NASA Admits It Is Withholding Documents Responsive To The 2007 Requests.

It is axiomatic that a responsive document cannot be withheld without justification. 5 U.S.C. § 552(a)(3)(A). In Request 07-172, CEI sought copies of all records relating to McIntyre's criticism of the NASA temperature data set and GISS's revisions of millions of values in that temperature data set. Dewey Decl. at Ex. B. The complaint challenges the adequacy of the search for this material on the ground that documents that *were* produced reference a GISS directory labeled "/clima1/Steve/alternate_cleaning," and that, given the name of this directory and the topics referenced in the emails discussing the directory, it is highly likely that the directory contains documents that are responsive to the FOIA request. Compl. ¶¶ 90–98.

According to the Travis Declaration, after CEI filed its Complaint, GSFC's legal office conferred with GISS regarding this allegation and "sought to confirm" that the directory contained no responsive records. Travis Decl. ¶ 28. Both the "Steve" directory and the "alternate_cleaning" subdirectory, however, were found to contain responsive documents. NASA's search determined that the "Steve" directory "contains the data files and parameter lists that were used to create the graphs and charts that were posted on the GISS website on August 7, 2007 to correct temperature data that Steve McIntyre pointed out was erroneous. . . ." Travis Decl. ¶ 28(a). The Travis Declaration further states that the "primary" files are only "intelligible if read by a computer program or a commercial visualization tool that turns them into charts and graphs." *Id.* The "remaining files" are, allegedly, "*mostly* auxiliary files that determine aspects of the charts and graphs." *Id.* (emphasis added).

**1. The "Steve" Directory Contains Responsive Agency Records That Have Not Been Produced.**

NASA's only justifications for withholding records in the "Steve" directory are: (i) CEI already had access "to the charts and graphs that were created from those files" (Travis Decl. ¶ 28(b)), and therefore the files were "in the possession of Mr. Horner, at the time of the FOIA requests were received by NASA" (Mot. at 16); and (ii) "[p]laintiff's FOIA requests did not seek computer programs and data files; they sought only files of the following types: 'records, documents, [and] internal communications.'" Mot. at 16.

These justifications for withholding are contrary to both the record and settled law.

*First*. CEI does not possess the withheld data. Although some charts might be in the public domain, the program and data used to generate them are not. The law is clear that the output of a program, the program itself, and any underlying raw data, *regardless of form*, are separate records for FOIA purposes. *Forsham v. Harris*, 445 U.S. 169, 183 (1980) (the term "record" includes "machine readable materials . . . regardless of physical form or characteristics"); *see also* Dep't of Justice, *Freedom of Information Act Guide: Procedural Requirements* 33 (2009) (same); *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health & Human Servs.*, 844 F. Supp. 770, 782 (D.D.C. 1993) (ordering production of computer program as its "design and ability to manipulate the data" made it an agency record); *Delorme Publ'g Co. v. NOAA*, 907 F. Supp. 10, 12 (D. Me. 1995) ("[T]he paper charts—information that the human eye can decode—and the binary number strings—instructions a computer can decode to generate an image of a chart on a monitor—are both agency records."). Both the outputs from data and the underlying data itself are discoverable under FOIA. *See Long v. IRS*, 596 F.2d 362, 369 (9th Cir. 1979) (Kennedy, J.), rejected on non-FOIA grounds by *Church of Scientology v. IRS*, 484 U.S. 9 (1987) (requiring the production of data underlying IRS statistical tabulation);

*cf. DeLorme*, 907 F. Supp. at 12 ("No one would argue that an agency could refuse to disclose a pie chart or graph, for example, merely because the same 'content' is available in statistical tables.").[2]

Moreover, the evidence strongly suggests that NASA created charts that it did *not* release to the public. It appears from an email chain dated August 20, 2010 that Dr. Makiko Sato ("Dr. Sato")—a scientist at GISS—made "a set of maps and 3 linegraphs" with the data that was placed in the "Steve" and the "alternate_cleaning" directory. Dewey Decl. Ex. M. However, the director of GISS, James Hansen, appears to have determined to use the "two extreme cases," and only two maps and two line graphs were actually posted to the Internet. Dewey Decl. Exs. N–Q. Thus, the material in the directory has not been made publicly available, contrary to NASA's sworn representation.

*Second*. The raw computer files fall squarely within CEI's FOIA request. NASA claims the request sought only "records, documents, [and] internal communications." Mot. at 16. That appears to be a deliberate misstatement; Request 07-172 sought "all records, documents, internal communications, *and other relevant covered material*." Dewey Decl. Ex. B (emphasis added). NASA's brief omits "other relevant covered material" from its description of the request. Mot. at 16. CEI sought all records covered by FOIA in the broadest terms, and the electronic data underlying a graph is a "record" under FOIA.

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[2] That FOIA commands this result is not surprising; data can be interpreted in different ways, and it is impossible to evaluate statistical or graphical analysis without evaluating the underlying data and methods. *See, e.g., N.Y. Times v. NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc) (holding that audiotape of Challenger astronauts' final moments was a different record than a transcript as the "lexical and non-lexical aspects of a file may convey different information"); *Long*, 596 F.2d at 369 (holding the conclusion that only summary data need be produced is "valid only if we assume that the IRS statistics encompass every useful analytic conclusion that could be drawn from the information").

*Third*. The justifications do not account for all documents within the directory. The majority of documents are machine readable only, and "most[]" of the rest are auxiliary files. That leaves some files that are neither machine-readable only nor auxiliary files. At a minimum, NASA must either produce those files or describe their contents and justify their being withheld.

**2. The "Alternate_Cleaning" Subdirectory Contains Responsive Agency Records That Have Not Been Produced.**

The Travis Declaration avers that the subdirectory "alternate_cleaning" "relates to the modification of data collected at 'two stations outside the contiguous United States,'" ¶ 28(c). These stations are apparently in Hawaii and Alaska. NASA argues that this data is not responsive because Request 07-172 only sought records "*citing, referencing, discussing or otherwise related to* the August 2007 correction by NASA/GISS of online temperature data for over 1200 US HCN stations and for their U.S. temperature history" as described herein. Mot. at 17 (emphasis added). Specifically, NASA notes that the HCN network covers only the 48 contiguous United States. It is apparent from context, however, that the "modifications" in the "alternate_cleaning" directory were made *as a direct result* of the August 2007 correction prompted by McIntyre's email. *See* Dewey Decl. Ex. M. Indeed, McIntyre's criticism becomes even *more* significant if—as NASA apparently has conceded—the temperature record also needed to be revised in Hawaii and Alaska to correct for the errors he identified.

Under the plain terms of the request, changes to the temperature records in Hawaii and Alaska "relate to" the correction of the U.S. temperature data. NASA's narrow and cramped construction of the FOIA request directly repudiates a Directive issued by the President on January 21, 2009, instructing executive agencies to comply with FOIA to the fullest extent of the law. The President has instructed that FOIA "be administered with a clear presumption: In the face of doubt, openness prevails" and that "a presumption of disclosure should be applied to all

decisions involving FOIA." *Presidential Mem. for Heads of Executive Dep't and Agencies*, 75 Fed. Reg. 4683, 4683 (Jan. 21, 2009). The Presidential Directive merely reflects what NASA has always professed its position on FOIA to be. By statute, the Administrator is directed to "provide for the widest practicable and appropriate dissemination of information concerning its activities and the results thereof." 42 U.S.C. § 2473; *see also* 14 C.F.R. § 1206.102 ("In compliance with the Freedom of Information Act . . . a positive and continuing obligation exists for NASA to make available to the fullest extent practicable upon request by members of the public all Agency records under its jurisdiction."). NASA's production—and its litigation positions—fall short of these pronouncements. The "alternate_cleaning" subdirectory contains materials that are responsive and must be produced.

**B. NASA's Search For Records Responsive To The 2007 Requests Was Not Adequate.**

Nor was NASA's search in response to the 2007 Requests adequate. Numerous examples of inadequacy exist—each of which would be a sufficient basis standing alone for this Court to find NASA's search unreasonable and deny summary judgment.

For a search to be adequate it must be reasonable. *See, e.g., Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994). In determining whether or not a search is "reasonable," courts must be mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. Dep't of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure"). The search must be "'adequate'" on the "'facts of this case.'" *Meeropol v. Meese*, 790 F.2d 942, 951 (D.C. Cir. 1986) (per Bork, Scalia and MacKinnon, JJ.) (internal citations omitted). In conducting the reasonableness

inquiry, the overarching presumption of FOIA—that all doubts are resolved in favor of the requester—applies in full force. *See Merrill*, 443 U.S. at 352; *Campbell*, 164 F.3d at 27.

**1. NASA Failed To Search Areas In Which Responsive Records Exist.**

In evaluating reasonableness, courts inquire into both the form of the search and whether the correct record repositories were searched. *See, e.g., Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) ("[T]he agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested."); *Founding Church of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979) (holding that an agency cannot create a filing system which makes it likely that discrete classes of data will be overlooked); *Greenberg v. Dep't of Treasury*, 10 F. Supp. 2d 3, 30 n.38 (D.D.C. 1998) (agency must search "those files which officials expec[t] [will] contain the information requested").

There is substantial evidence in the record that NASA failed to search areas in which responsive records exist. As NASA's production in the 2007 Requests makes clear, Dr. Schmidt often uses his @columbia.edu address for official correspondence. *See, e.g.*, Dewey Decl. Ex. R. Indeed, NASA has *admitted* that Dr. Schmidt often uses this Columbia email address for official business, and that some of these emails are agency records under applicable law: in response to CEI's Internal Appeal, Deputy Administrator Luedtke *directed* GISS to search the @columbia.edu domain. Final Determination at 4. Dr. Schmidt's @columbia.edu domain was in fact searched as part of the 08-040 remand, and some responsive documents were reviewed and ultimately produced. Travis Decl. ¶ 34. It is implausible to believe it was proper to search a @columbia.edu domain for Request 08-040, but not the 2007 Requests. Simply put, agency records were likely to be found at Dr. Schmidt's @columbia.edu domain, and the failure to search that domain renders the search unreasonable.

In addition, the Travis Declaration establishes that NASA searched only *emails* in response to the 2007 Requests. Travis Decl. ¶¶ 26–27. CEI did not limit its 2007 Requests to emails. Dewey Decl. Exs. A, B. There is evidence in the record that other documents, such as recordings of phone calls, voicemails, and notes of phone calls, are likely to exist. As CEI noted in its internal appeal:

> [O]n August 10, 2007 at 10:23 am, Dr. Hansen forwarded an e-mail sent to him at 9:40 am by Charles Lewis of the National Post to Dr. Ruedy and Dr. Sato noting, "I am being besieged by e-mails and calls about this, so we need to do something promptly, as there will be stories written today for publication tomorrow." (Ex.65).

Internal Appeal at 25. NASA's decision to search only emails was therefore unreasonable.

**2. NASA Ignored Evidence That Its Search Was Not Reasonable.**

Reasonableness is not judged at the initiation of the search, but is evaluated based upon the information before the agency when it makes its final determination. *Campbell*, 164 F.3d at 28. Accordingly, reasonableness of a search is judged "based on what the agency knew at its conclusion rather than what the agency speculated at its inception." *Id*. Consequently, if the agency is presented with evidence that it overlooked responsive documents, it must act upon it. *Id.* at 28–29. According to the D.C. Circuit, "a law-abiding agency" must "admit and correct error" in its searches "when error is revealed." *Meeropol*, 790 F.2d at 953.

"Positive indications of overlooked materials" from the "record" will defeat summary judgment. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999). This court has not hesitated to hold searches inadequate where documents in the record make reference to other responsive documents that have not been produced. *See Kean v. NASA*, 480 F. Supp. 2d 150, 158 (D.D.C. 2007) ("Given the fact that NASA recently amended one of these documents, . . . it appears likely that there are responsive documents regarding the satellite."); *Friends of Blackwater v. Dep't of the Interior*, 391 F. Supp. 2d 115, 120–21 (D.D.C. 2005)

(holding it was "inconceivable" that no drafts or related correspondence existed of documents produced from the Fish and Wildlife Services' Director's Office, and finding the search inadequate on those grounds); *Boyd v. U.S. Marshal Serv.*, No. 99-cv-2712, 2002 U.S. Dist. LEXIS 27734, at *4 (D.D.C. Mar. 15, 2002) (requiring agency to "explain its failure to locate [a] report" that was "clearly responsive and would appear to be the type of record that would likely be maintained among" the records that should have been searched).

The record in this case—composed primarily of documents that NASA has released—makes clear that numerous responsive documents exist that have not yet been produced:

**a) NASA Failed To Produce Documents Relating To Media Inquiries About The Temperature Correction.**

As CEI explained in its internal appeal, "[a] veritable public relations storm accompanied the news that GISS had modified its global temperature data set. Such important agency news usually generates large amounts of correspondence from the interested public." Internal Appeal at 25. Request 07-175 expressly noted that "responsive documents will also include communications with the relevant press officers." Dewey Decl. Ex. A. However, only a handful of emails from reporters or inquiring members of the public were produced. As CEI detailed for NASA in its internal appeal, documents in the record indicate the existence of numerous inquiries from the public and the press. For example, an email from Dr. Hansen to his GISS colleagues exclaims, "I am being besieged by emails and calls . . . so we need to do something promptly, as there will be stories written today for publication tomorrow." Internal Appeal Ex. 65. Later in NASA's response to the incident—entitled *A Light On Upstairs?* and published on Dr. Hansen's personal Columbia University website—he told his readers that he has "been besieged by rants." *Id.* Ex. 49. Yet again, the day after publication of *A Light On Upstairs?*, Dr.

Hansen told a reporter that he had missed his email about the temperature correction because his inbox was "overfull." *Id.* Ex. 66.

**b) NASA Failed To Produce Internal Deliberations.**

As CEI noted in its internal appeal, "NASA's production implies that there was not one instance of written, internal discussion regarding CEI's August 27, 2007 request seeking internal discussions over how and whether to respond to [CEI's] August 24, 2007 request for documents surrounding what had surely been NASA GISS's most heavily covered episode in years." Internal Appeal at 26. It is impossible for there to be no records or deliberations inside NASA about CEI's request. The Travis Declaration itself suggests that at least some correspondence must have been generated that was responsive to this request. *See, e.g.*, Travis Decl. ¶ 24 ("On September 12, 2007 HQ FOIA assigned CEI's request FOIA request number 07-172, and transferred the request to GSFC FOIA."). Surely some form of responsive record, be it an email, file label, a cover slip, a ledger, or some other form of transmittal record exists regarding this "transfer" of the request from HQ FOIA to GSFC FOIA. In such a situation, the search is inadequate and summary judgment must be denied—a position this court has taken with respect to NASA in the past. *Kean*, 480 F. Supp. 2d at 158 (search inadequate where records produced refer to records not produced that are reasonably likely to exist).

**3. In Any Event, The Travis Declaration Is Legally Insufficient To Support Summary Judgment.**

As the D.C. Circuit has explained, to obtain summary judgment on the adequacy of a search, the government must proffer "a reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched." *Oglesby*, 920 F.2d at 68. If an affidavit fails this test, summary judgment is improper. *See, e.g., Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007); *Nation*

*Magazine*, 71 F.3d at 890; *Oglesby*, 920 F.2d at 68. Under applicable Circuit law, the Travis Declaration is inadequate for several reasons.

*First*. An agency's affidavit must set forth the search terms used for the search with reasonable specificity. *See, e.g., Morley*, 508 F.3d at 1122; *Oglesb*y, 920 F.2d at 68. The Travis Declaration fails this basic test. It does state seven search terms used by the agency in responding to the 2007 Requests, but then notes that searches were conducted with search terms "including" those seven. ¶ 27(b). Identifying *some* of the terms searched is not enough to establish the sufficiency of an affidavit. *See, e.g., Morley*, 508 F.3d at 1122 ("the terms searched" must be disclosed for an affidavit to be sufficient); *Kean*, 480 F. Supp. 2d at 157 (finding NASA's declarations insufficient as they did not identify "what . . . search terms were used").

*Second.* An affidavit must identify "how the search was conducted." *Morley*, 508 F.3d at 1122 (internal citations and quotations omitted). This requirement includes describing in some detail "what records were searched, by whom and through what process." *Steinberg*, 23 F.3d at 552. Even an affidavit that describes the search terms in detail is inadequate if this additional information is not provided. *See Schoenman v. FBI*, No. 04-cv-2202, 2009 WL 763065, at *15 (D.D.C. Mar. 19, 2009). Here, the Travis Declaration states only that the searches were performed "by GISS personnel involved." ¶ 27(b). It provides no explanation of how this determination of "involvement" was made and indeed provides no explanation of whose records were searched. For example, despite the media frenzy associated with the data correction, NASA's declaration leaves CEI in the dark as to whether NASA searched the relevant public relations offices for responsive records. Indeed, the Travis Declaration states that "[d]ifferent subsets of these search terms were used by the different GISS personnel performing the email

searches based on their role in communications about the requested matter." *Id.* These statements provide no explanation about who determined which NASA personnel were to use what set of search terms or who actually searched their records using those terms. Thus, the Travis Declaration is inadequate to prove the reasonableness of NASA's search. *See Aguirre v. SEC*, 551 F. Supp. 2d 33, 61 (D.D.C. 2008) ("It is true that the [agency's declaration] lists the specific offices queried for documents. However, it fails to describe in detail how each office conducted its search which is the SEC's burden under *Oglesby*.").

**4. NASA Has Acted In Bad Faith.**

Finally, NASA has plainly acted in bad faith—a fact that, standing alone, precludes entry of summary judgment. *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 772 (D.C. Cir. 1981). The circumstances justify a finding of bad faith:

**a) All Three FOIA Requests Were Subjected To Inexcusably Long Delays That Are Not Explained Or Are The Subject Of Contradictory Explanations.**

To be sure, "initial delays" alone are "rarely, if ever, grounds for discrediting later affidavits." *Iturralde*, 315 F.3d at 315. Courts, however, have not hesitated to find bad faith when a lengthy delay is combined with an utter failure to provide any reasoned explanation for that delay. *See Citizens For Responsibility and Ethics in Washington v. Dep't of Justice*, No. 05-cv-2078, 2006 WL 1518964, at *4 (D.D.C. June 1, 2006) ("*CREW*") ("The Court is troubled by the fact that a mere two hour search that started in August took several months to complete, and why the government waited [for several months] to advise plaintiff of the results of the search."). Similarly, courts have found bad faith where the explanation for delay is contradictory. *See, e.g.*, *Carney v. Dep't of Justice*, 19 F.3d 807, 812–13 (2d Cir. 1994) (listing conflicting affidavits as a situation in which courts have found bad faith); *Long v. Dep't of Justice*, 10 F. Supp. 2d 205, 210 (N.D.N.Y. 1998) (holding conflicting affidavits were evidence of bad faith); *Hawthorn Mgmt.*

*Serv. Inc. v. Dep't of Hous. & Urban Dev.*, No. 3:96-cv-2435, 1997 WL 821767, at *2 (D. Conn. Dec. 18, 1997) (finding bad faith where public news articles cast doubt on the affidavit's veracity).

*The 2007 Requests.* The 2007 FOIA Requests were subject to virtually unprecedented delay. In response to the delay in responding to the 2007 Requests (and the 08-040 Request), several Senators requested that the NASA Inspector General undertake an investigation. Dewey Decl. Ex. H. According to the GSFC Center Director, the delays in responding were caused by: (i) "inadequate direction given to GISS personnel as to what documents were requested and a due date for a response," (ii) "inadequate communication between GISS, Goddard's Office of Chief counsel, and FOIA offices concerning the lack of a complete response," and (iii) "inadequate staffing at the Goddard FOIA office; the sole FOIA specialist on staff was absent for 6 months during the relevant time period and there was no back-up specialist in place." Dewey Decl. Ex. I. The Travis Declaration contradicts these findings.

NASA headquarters did not even send the August 24 and August 27, 2007 requests to GSFC until September 20 and September 12, 2007, respectively. Travis Decl. ¶ 23–24. No explanation is provided for this delay, which clearly would not implicate any issues at GSFC (as opposed to NASA headquarters), as the NASA Inspector General found. Moreover, as of March 17, 2008, the GSFC legal office had received approximately 205 responsive emails from GISS. *Id.* These documents sat in the GSFC legal office until "late 2009" while the GSFC legal office "sought confirmation from GISS that the emails produced" were a "complete set of potentially responsive records." *Id.* ¶ 27. No explanation is provided as to why some 17–18 months were necessary to confirm that the set was responsive. CEI's Request stated that a rolling production of responsive records would be acceptable and these documents were later produced. Yet NASA

did not even make a partial response until after CEI threatened legal action. The Travis Declaration does not explain this delay. Notably, the Travis Declaration does not mention any of the reasons for delay cited in the Inspector General's report. There is no mention of "inadequate direction" or "inadequate communication." Similarly, there is no mention of difficulties in staffing. This combination of contradiction and implausible delay supports a finding of bad faith. *See CREW*, 2006 WL 1518964, at *4; *Hawthorn*, 1997 WL 821767, at *2.

*Request 08-040.* The same inexcusable and unexplained delay occurred with respect to the 2008 Request. According to the Travis Declaration, Dr. Schmidt was not even made aware of the 2008 Request—which sought only his records—until around November 24, 2009, *almost two years after it had been filed*. NASA's declaration provides no explanation for this delay—or any assurance that important responsive documents were not destroyed, deleted, or otherwise spoliated during the delay. GSFC simply waited nearly two years to notify the person whose records were sought by the request. This is not the case of a backlogged agency diligently working to clear requests; this is the case of an agency that simply ignored them. This sort of implausible delay is the essence of bad faith. *See CREW*, 2006 WL 1518964, at *4.

**b) The Travis Declaration Is Internally Contradictory.**

The Travis Declaration also contains internal contradictions indicative of bad faith.

*First*. In attempting to explain NASA's blatant failure to produce responsive documents in the "Steve" or "alternate_cleaning" directories, the Travis Declaration misstates the record. It states that Request 07-172 sought "records, documents, [and] internal communications; they did not encompass a request for computer programs and data files." ¶ 28(a). That is wrong. Request 07-172 sought "all records, documents, internal communications, *and other relevant covered material*." Dewey Decl. Ex. B (emphasis added). The Travis Declaration directly misstates the record to this Court.

*Second.* In explaining why documents referencing the "alternate_cleaning" subdirectory were produced, the Travis Declaration makes a statement that is squarely contradicted by NASA's production. The Travis Declaration states that NASA provided "emails that contained references to the 'alternate_cleaning' subdirectory, as they were among the emails that were captured by the search terms 'temperature' and 'gistemp.'" Travis Decl. ¶ 28(d). However, three of those documents do not contain these terms. *See* Dewey Decl. Ex. Q. Therefore, those documents were identified and produced according to some other search methodology that is *nowhere* identified or explained by the Travis Declaration.

**c) Compared To GSFC FOIA Averages, The Delay Here Was Extreme.**

Another factor which this court has looked to in analyzing bad faith is the length of delay as compared to the average delay for that agency or department. *CREW*, 2006 WL 1518964, at *5 (finding as evidence of bad faith that the "requests" have taken "much longer than the average period of time" it took to "process requests" in the "past five years").

Here, the delay was extraordinary. Request 07-175 took a total of 915 days to produce. Request 07-172 took 912 days to produce. Request 08-040 took 704 days. In 2008 and 2009, GSFC posted average processing times for "complex" FOIA requests of 82 and 89 days, respectively. Dewey Decl. Exs. S, T. According to NASA's own statistics, the longest recorded processing time in 2008 was 635 days, the longest in 2009 was 311 days. *Id.* Exs. S, T. In 2007 and 2006, median processing times were 28 and 19 days, respectively. *Id*. Exs. U, V. Data is not available for earlier dates. *Id.* Clearly, NASA's own statistics indicate that the processing of Plaintiff's FOIA Requests "ha[ve] been anything but ordinary and normal," and accordingly Plaintiff is entitled to a finding of bad faith. *CREW*, 2006 WL 1518964, at *5.

### C. CEI Exhausted Its Administrative Remedies With Respect To The Two 2007 Requests.

Finally, NASA contends half-heartedly that CEI has failed to exhaust its administrative remedies. That is another distortion of the record. On January 29, 2010, CEI filed an administrative appeal regarding both 2007 Requests. This appeal contended that NASA's search was inadequate because numerous responsive documents were missing. *See* Internal Appeal at 23–26. Indeed the appeal *expressly* attacked the adequacy of the search. Internal Appeal at 25 ("The totality of the facts and circumstances suggest that the agency did not undertake a credible or reasonable search."). When NASA ruled on CEI's administrative appeal, it did not find this portion of the appeal moot, or decline to decide it because NASA's search was ongoing, but rather it reached its merits, affirming the Initial Determination's finding "no evidence suggesting the records search was incomplete." Final Determination at 4. Notably, this "Final Determination" occurred on March 12, 2010, three weeks after the February 23, 2010 production that NASA now contends renders the 2007 Requests moot. Nothing in the February 23, 2010 production or cover letter suggested in any way that NASA had broadened its search parameters; NASA itself did not suggest this; and it is obvious that NASA did not search for or produce the "Steve" directory or the "alternate_cleaning" subdirectory or the media and press materials that CEI is seeking. Moreover, the Final Determination stated that it was a final agency action "subject to judicial review under the provisions of 5 U.S.C. § 552(a)(4)." *Id.* at 5. CEI now seeks that review to which it is entitled. Indeed, although NASA has taken a litigation position in its briefing that CEI's administrative appeal as to the 2007 Requests was "mooted" out by the February production, this position stands in direct contrast to that taken in the Travis Declaration. The Travis Declaration states that the Final Determination "stated that NASA HQ was *denying*

CEI's appeal with respect to Request Nos. 07-172 and 07-175." Travis Decl. ¶ 31 (emphasis added).

In any case, further appeals cannot be expected to alter NASA's decision. Exhaustion will be excused where there is a "certainty of an adverse decision." *Tesoro Ref. & Mktg. Co. v. FERC*, 552 F.3d 868, 874 (D.C. Cir. 2009) (quoting *Commc'ns Workers of Am. v. AT&T*, 40 F.3d 426, 433 (D.C. Cir. 1994)). CEI already appealed the adequacy of the 2007 searches. NASA already rejected specific claims of inadequacy. NASA's rejection of any further appeal would be a foregone conclusion.

## II. NASA IS IMPROPERLY WITHHOLDING DOCUMENTS RESPONSIVE TO THE 2008 REQUEST.

NASA's request for summary judgment on the 2008 Request for Dr. Schmidt's emails and other correspondence involving RealClimate is equally unpersuasive. NASA contends that *all* of Dr. Schmidt's emails concerning RealClimate are beyond the reach of FOIA because they are not "agency records." This new position has been concocted for this lawsuit. It directly contradicts NASA's position in the administrative proceeding—where NASA stated it would release the "R[eal]C[limate] email correspondence between Dr. Schmidt and other NASA officials because *said documents constitute agency records*," Dewey Decl. Ex. E at 2 (emphasis added)—and it has no basis in law or the record.

FOIA mandates the production of "agency records" but "did not provide any definition of the term." *Forsham*, 445 U.S. at 178. The D.C. Circuit has cautioned that "the term 'agency' records . . . not be manipulated to avoid the basic structure of FOIA: records are presumptively disclosable unless the government can show that one of the enumerated exemptions applies." *Consumer Fed'n of Am.*, 455 F.3d at 287. The D.C. Circuit has "adopted a 'totality of the circumstances' test to distinguish 'agency records' from 'personal records.'" *Id.* That "test

focuses on a variety of factors surrounding the creation, possession, control, and use of the document by an agency." *Id.* Documents "generated within the agenc[y]," and "prepared on government time, at government expense and with government materials" are generally agency records. *Id.* at 289. At bottom, "the question is whether the employee's creation of the documents can be attributed to the agency for the purposes of FOIA." *Id*.; *see also Burka v. Dep't of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996).[3]

**A. NASA Created The Requested RealClimate Materials.**

NASA contends that RealClimate related documents were sent or received by Dr. Schmidt in his *personal* capacity and therefore are not agency records. Each of NASA's arguments in support of that contention lacks merit.

**1. Dr. Schmidt Created Responsive Records Within The Scope Of His Employment And NASA Used Those Records.**

NASA asserts that "none of Dr. Schmidt's emails are agency records" because they were not created or received in the conduct of the activities within the scope of his employment and because "agency personnel do not read or rely upon the records for agency activities." Mot. at 21, 23, 28 (capitalization altered). Those claims are incorrect. The record is abundantly clear

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[3] *See also Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989) (holding that, for documents to qualify as "agency records," an agency "must either create or obtain the requested materials," and "must be in control of the requested materials" in the sense that they "have come into the agency's possession in the legitimate conduct of its official duties" (internal quotation marks omitted)); *Burka*, 87 F.3d at 515 (identifying "four factors relevant to a determination of whether an agency exercises sufficient control," to wit: "'(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files.'" (quoting *Dep't of Justice v. Tax Analysts*, 845 F.2d 1060, 1069 (D.C. Cir. 1988), *aff'd on other grounds*, *Tax Analysts*, 492 U.S. 136 (1989)).

that Dr. Schmidt creates responsive records on agency time, in his official capacity, and that he and other NASA employees use those records to conduct agency business.

*First.* In responding to McIntyre's revelations, Dr. Schmidt and his NASA colleagues unquestionably used RealClimate as a conduit for agency business. NASA employees—including Dr. Schmidt—spent days of agency time and substantial agency resources to craft a response. *See* Internal Appeal at 15–18. After GISS scientists corrected millions of values in the temperature data set, NASA did not issue an official press release. Instead, the GISS scientists agreed to "set matters straight in a place like RealClimate." Internal Appeal Ex. 41. At the conclusion of days of around-the-clock work, GISS employees published that response, entitled *A Light On Upstairs?*, on Dr. Hansen's *personal website* at Columbia University. An announcement appeared in bold on the GISS home page hosting the temperature data:

*****What's New*****
**Please see "A Light On Upstairs?" for discussions regarding the changes made on August 7, 2007 for 2000-2006 annual mean, U.S. mean temperatures.**

Dewey Decl. Ex. W (copy of GISS Surface Temperature Analysis Webpage). NASA's *official* website therefore directed the public and the scientific community to Dr. Hanson's *personal* website. At nearly the same time, Dr. Schmidt published a very similar analysis on RealClimate entitled *1934 And All That*, which used virtually identical charts and graphs as *A Light On Upstairs?* to explain the errors. By hosting *A Light On Upstairs* and *1934 And All That* on non-NASA sites, GISS scientists were able to evade the Data Quality Act and other requirements that would have required any official NASA response to McIntrye to be vetted internally (and possibly subject to peer review). Internal Appeal at 20 n.7.

After the publication of *A Light On Upstairs?* and *1934 And All That*, NASA continued to receive press inquiries regarding GISS's temperature corrections. Dr. Hansen and Dr.

Schmidt told NASA public relations officers to direct the reporters to RealClimate and Dr. Hanson's personal website. *See* Internal Appeal Ex. 52 ("send them 'A Light on Upstairs?'"); *see also id.* Ex. 53 (Dr. Hansen referring a reporter to the "Upstairs" piece); *id.* Dewey Decl. Ex. X (Dr. Schmidt instructing a NASA information officer to "point him to the RC piece and to Jim's Light's out piece").

In posting *1934 And All That*, Dr. Schmidt and his NASA colleagues used RealClimate as a conduit to transact official business; the evidence conclusively establishes that no scientist involved in that posting was acting in their personal capacity or on their own time. Dr. Schmidt's and the GISS team's emails associated with that posting were created by NASA because they were sent and received on the agency's behalf. *See Burka*, 87 F.3d at 515; *Consumer Fed'n of Am.*, 455 F.3d at 288–89; *In Defense of Animals v. Nat'l Insts. of Health*, 543 F. Supp. 2d 70 (D.D.C. 2008). Although NASA has yet to produce any such emails, according to its own evidence they obviously exist. *See* Travis Decl. ¶ 21(b) (noting that "the preparation of a post for publication on [RealClimate] involves a drafting and review process that usually takes a few days, is conducted on a non-public portion of the blog, and includes vetting by the permanent editors of the RealClimate blog"). This episode was a principal focus of CEI's administrative appeal (Internal Appeal at 15–20) and complaint (Compl. ¶¶ 30–36); NASA's summary judgment filings completely ignore it.[4]

*Second*. Emails NASA has already produced clearly show Dr. Schmidt discussing RealClimate on agency time or otherwise in his official capacity for agency purposes. Indeed,

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[4] Indeed, the emails suggest that at least one scientist, Dr. Sato, held reservations about this effort. Dr. Hanson directed Darnell Cain ("Cain") to send *A Light On Upstairs?* to his "mailing list" in the event that Dr. Sato did not "want to" do it. Dr. Sato informed Cain that she did not "know how" to email the piece and as a result Cain did so. Internal Appeal Ex. 50.

the very first page of NASA's December 31, 2009 production is an email sent from Dr. Schmidt to a fellow NASA colleague during business hours discussing climate modeling issues as well as RealClimate. Dewey Decl. Ex. Y. The record is replete with similar emails that belie NASA's contention that Dr. Schmidt created each and every responsive record on his own time or in his personal capacity. *See, e.g.*, Dewey Decl. Ex. Z; *see also* Internal Appeal at 20 n.8; *id.* Ex. 56 (work-hours emails depicting NASA employees discussing using RealClimate for NASA public relations purposes or as an article clearinghouse). These produced emails are agency records, as are the RealClimate emails NASA is still withholding.

*Third.* The substantial overlap between Dr. Schmidt's official duties and RealClimate activities supports a strong inference that Dr. Schmidt and his colleagues use RealClimate to carry out official functions. According to the Travis Declaration, Dr. Schmidt's official duties relate to "publishing formal scientific papers," "coordinating the input of a wide range of scientists," and developing a climate change model. Travis Decl. ¶¶ 17, 21. Contrary to the Travis Declaration, those activities are not "very different" from the work Dr. Schmidt produces for RealClimate, which includes writing on "climate change" and addressing "climate change papers or data authored by other scientists or journalists." *Id.* ¶ 21. Indeed, NASA's memorandum in support of summary judgment concedes this overlap. Mot. at 22 n.7 ("[T]here arguably might be some substantive overlap between Dr. Schmidt's work on the RealClimate blog and his official agency duties."); *see also id.* (Dr. Schmidt's work on the Real Climate blog "is somewhat substantively related to his agency work"). There is no substantive difference between Dr. Schmidt's collaborative work on scientific topics and papers undertaken through his NASA email accounts and that same work when undertaken through his RealClimate email accounts. Travis Decl. ¶ 19(b) (RealClimate posts are carefully vetted by all of the scientific

contributors). Dr. Schmidt himself effectively admitted as much when he directed a citizen to read his articles on both NASA and RealClimate to learn more about a topic he has "worked on for a while." Dewey Decl. Ex. Z.

In fact, NASA's own evidence supports the inference that Dr. Schmidt's RealClimate activities—including his emails discussing RealClimate—do in fact address agency business. For example, the Travis Declaration states that Dr. Schmidt's RealClimate writings "*rarely* discuss any NASA activities or personnel"; that the topics on the blog are not "*usually* related to Dr. Schmidt's official duties"; and that "[n]one of Dr. Schmidt's correspondence related to the blog has any *direct* bearing on Agency initiatives or projects; this correspondence is *mostly* unrelated to Agency business and does not *usually* discuss Agency operations or activities." Travis Decl. ¶¶ 21, 22 (emphases added). NASA's apparent need to resort to hedging words like "rarely," "usually," "direct[ly]," and "mostly," is strong evidence that on (allegedly) some occasions, Dr. Schmidt's RealClimate emails at least indirectly or partially discuss or analyze agency operations and activities. NASA's claim that it has not created, obtained, or used *any* of Dr. Schmidt's responsive emails because they were "not created or received in the conduct of . . . activities within the scope of his employment at NASA" (Mot. at 23) is therefore implausible and false.

**2. NASA's Claim That Dr. Schmidt Spent Only Limited Agency Time On RealClimate Activities Is Legally Irrelevant And Factually Inaccurate.**

NASA also asserts that Dr. Schmidt's responsive records are not agency records because Dr. Schmidt conducts only a limited amount of work on RealClimate during official work hours. Mot. at 24. The amount of time Dr. Schmidt spends is irrelevant: Whether it took 10 hours or 10 days to generate *1934 And All That* does not change the fact that emails about that posting

relate to Dr. Schmidt's official duties and served agency goals and are accordingly agency records.

In any event, NASA's claim that Dr. Schmidt's use of agency time to conduct RealClimate activities was "limited" is flatly contradicted by the evidence. At the time of its internal appeal, using timestamps on RealClimate posts, CEI identified 52 separate occasions on which Dr. Schmidt worked on the blog during work hours. *See* Internal Appeal Ex. 16. Many of the postings CEI identified are extensive. *Id.* Exs. 24–27. Dr. Schmidt is also likely to have taken part in a number of work-time posts published under the username "group," the RealClimate administrators' group, of which he is a member. *Id.* Exs. 17–23.

Notably, sometime after CEI filed its FOIA requests, RealClimate administrators retroactively deleted timestamps from the RealClimate archives and ceased placing timestamps on its posts. CEI has preserved originals of the timestamped copies as evidence. *Compare id.* Exs. 24–27 with *id.* Exs. 28.

In addition, NASA's own limited search uncovered 3,500 RealClimate emails in Dr. Schmidt's *desktop* computer, which is *located within the agency*. Travis Decl. ¶ 22. Without any evidence of remote access to email, Dr. Schmidt necessarily drafted and edited, or read, each and every one of those emails while *at work*. And although RealClimate posts are no longer timestamped, comments to posts are. Comments published as recently as June 2010 reveal Dr. Schmidt engaging in a heated dialogue with another scientist during work hours. *See* Dewey Decl. Ex. AA. In that exchange, Dr. Schmidt informs an adversary that if he "want[s] specific responses *after* work hours, [he] might need to be patient" because he (Dr. Schmidt) "actually [has] a life." *Id.* (emphasis added).

### 3. Dr. Schmidt's Purported "Permission" To Work On RealClimate In His Personal Capacity Is Irrelevant.

NASA also claims that Dr. Schmidt's responsive records are not agency records because he created and received them in his personal capacity. In support of its argument, NASA claims that Dr. Schmidt is authorized to engage in outside ventures under its outside work regulation, 5 C.F.R. § 6901. Mot. at 22. NASA is wrong.

*First*. CEI does not concede that Dr. Schmidt actually had the agency's blessing to work on the RealClimate blog on his own time. NASA regulations require that both his application for permission to work on the blog and the agency's approval of that application be *in writing*. *See* 5 C.F.R. § 6691.103(f), (g)(5). Significantly, NASA has *not* produced Dr. Schmidt's written request to engage in RealClimate activity. Nor has it produced NASA's official response. Those documents are directly responsive to CEI's FOIA request. *See* Dewey Decl. Ex. D. (seeking "electronic mail or other correspondence sent or received by . . . Gavin Schmidt," relating to "the content, importance, or propriety of posts," by Dr. Schmidt on RealClimate.) NASA cannot defeat summary judgment by baldly asserting that Dr. Schmidt had "approval" to work on Real Climate without producing any of the *legally required* documents that would actually prove this to be true.

*Second.* The record contains numerous responsive emails that were indisputably created in Dr. Schmidt's official capacity. The record also contains emails demonstrating how Dr. Schmidt and his fellow colleagues used RealClimate to advance agency endeavors. See Internal Appeal Exs. 30–47, 52–54, 56. Regardless of whether Dr. Schmidt had permission to work on RealClimate on his own time, the claim that he created and received every responsive document in his personal capacity is demonstrably false.

*Third.* Even if Dr. Schmidt had permission to work on RealClimate on his own time, that permission could not have authorized him to use agency time on his *personal* endeavors. *See* NASA Policy Directive 2540.1G (authorizing limited use of agency resources on an employee's own time); 5 C.F.R. § 6901.103.103(f)(1)(v) (outside employment must either be conducted "*entirely outside* of . . . regular duty hours," or while on a leave of "absence from work") (emphasis added). Accordingly, such permission, if it exists, cannot rebut the strong inference that Dr. Schmidt engages in RealClimate work in furtherance of agency objectives.

*Fourth.* NASA's position would permit it to funnel agency work through RealClimate—as it did in response to McIntyre—and then hide behind Dr. Schmidt's alleged "approval" for RealClimate work to evade FOIA requests. *Consumer Fed'n of Am.*, 455 F.3d at 287 ("[T]he term 'agency' records . . . not be manipulated to avoid the basic structure of FOIA."). Whether Dr. Schmidt had "approval" to work on RealClimate does not immunize those materials from FOIA when they are "agency records."

**4. It Is Irrelevant Whether Dr. Schmidt's RealClimate Emails Were Part Of His Performance Reviews.**

Finally, NASA's argument that Dr. Schmidt's RealClimate emails are not agency records because RealClimate activities were not part of his performance reviews or official assignments is legally irrelevant. *See* Mot. at 28.

If NASA's position were correct, an agency could shield activities from FOIA's disclosure requirements by simply excluding those activities from its employees' official reviews. The substance of the emails produced plainly shows Dr. Schmidt engaged in RealClimate activity on agency time using agency resources for agency purposes. Moreover, Dr. Schmidt's responsibilities include communicating with the public and dialoguing with other scientists about climate-related issues—activities that are inextricably intertwined with his

RealClimate activities. NASA may be indifferent as to whether he carries out those responsibilities through RealClimate, but the documents Dr. Schmidt creates in carrying out these responsibilities are nevertheless agency records.

**B. NASA Has "Control" Over Dr. Schmidt's Emails.**

NASA also contends that it does not "control" Dr. Schmidt's RealClimate emails because Dr. Schmidt allegedly never intended to relinquish his emails (Mot. at 26–27), the agency supposedly cannot dispose of his emails as it sees fit (*id.* at 27–28), and his records are apparently not integrated into a centralized filing system (*id.* at 28–29). These arguments fail.

Dr. Schmidt's intent is clearly not relevant to the agency records inquiry. *See Tax Analysts*, 492 U.S. at 147 (holding that the "*mens rea* requirement" embodied in the intent factor "is nowhere to be found in the Act"); *see also Consumer Fed'n of Am.*, 455 F.3d at 290 n.11. The law does not give government employees a "veto" power over FOIA requests by enabling them to construct *post hoc* rationalizations about what they "intended" when they created particular documents.

NASA's claim that it does not control Dr. Schmidt's emails because he sends work emails from a non-NASA computer is also baseless. Under NASA's logic, *none* of the emails Dr. Schmidt sends and receives every day he is at work would be agency records because NASA does not "control" the emails on Dr. Schmidt's "personal" computer at GISS. The same holds true for the "integration" of Dr. Schmidt's emails into the NASA servers. Accepting NASA's arguments would mean that government employees could readily circumvent FOIA by performing their work on personal computers, or by using Gmail or Yahoo email accounts to perform work activities. The D.C. Circuit adopted the use-focused totality of the circumstances approach in *Consumer Federation of America* precisely to avoid this type of manipulation of FOIA's definition of agency records. *See* 455 F.3d at 287.

Dr. Schmidt's RealClimate emails are not "private reflections" on his work that he "does not rely upon to perform his . . . duties," *Bureau of Nat'l Affairs, Inc. v. Dep't of Justice*, 742 F.2d 1484, 1493 (D.C. Cir. 1984); they have not been "retained solely for the convenience of" Dr. Schmidt in organizing his "personal and business" affairs," *id.* at 1496 (internal quotations marks omitted); and they are not even "unofficial scholarship of an employee who wished only to facilitate [his] own performance of [his] duties." *Am. Fed'n of Gov't Employees v. Dep't of Commerce*, 632 F. Supp. 1272, 1277 (D.D.C. 1986) (personal records holding questioned in *Bureau of Nat'l Affairs*, 742 F.2d at 1494). They are, instead, agency records that in this case directly address the integrity of NASA's official temperature record. CEI "does not seek information about [NASA] officials' lunches with friends or trips to the dentist; it simply wants to know 'what the[] government is up to,' a goal that is in accord with the basic policy of FOIA." *Consumer Fed'n of Am.*, 455 F.3d at 293 (internal citations omitted).

**C. NASA's Search For Records Was Inadequate.**

As with the 2007 Requests, NASA's processing of the 2008 Request was insufficient. NASA has: (i) provided a declaration which is so ephemeral in its definitions that it is impossible to make heads or tails of NASA's search methods and protocols; (ii) allowed Dr. Schmidt to conduct unsupervised self searches of emails despite his obvious incentive to withhold damaging or embarrassing emails; and (iii) failed to conduct searches for entire categories of likely responsive records. NASA's search was patently unreasonable.

**1. NASA Has Not Addressed The Almost Certain Spoliation of Relevant Emails.**

Between NASA's failure to notify Dr. Schmidt of the existence of the 2008 Request for nearly 22 months and the lack of any email backup system at GISS, there is a substantial

probability that responsive emails were deleted *after* CEI filed its FOIA Request. Accordingly, CEI is entitled to discovery on the issue of potential spoliation.

CEI filed the 2008 Request on January 28, 2008. Dewey Decl. Ex. D. On November 24, 2009, after prompting NASA several times for a response, Plaintiff sent NASA a "Notice of Intent To Sue." Internal Appeal Ex. 12. According to the Travis Declaration, NASA did not notify Dr. Schmidt of the 2008 Request—which sought solely his emails—until "on or around" November 24, 2009. Travis Decl. ¶ 29. NASA waited for *two* years and until threatened by litigation to inform Dr. Schmidt his materials were the subject of a FOIA request.

Moreover, GISS servers do not back up its employees' email accounts. Indeed "the act of accessing a specific email" deletes it irrevocably from GISS servers. Travis Decl. ¶ 12(b). The "*only* way to reach such email" would be to retrieve it from an individual's computer hard drive. *Id*. (emphasis added). GISS thus relies entirely upon each "individual user" to back up agency records. *Id.* Although the Travis Declaration describes how this process is "typically accomplished," it is silent as to how Dr. Schmidt actually backs up his emails. It also fails to provide any guarantees that Dr. Schmidt actually backs up his emails, and it contains no discussion of what records Dr. Schmidt has preserved or how frequently he deletes emails.

In sum, between the 22 month delay in informing Dr. Schmidt of the FOIA Request and in light of GISS's email retention policies, there is a strong likelihood that responsive records were not preserved. NASA's search therefore was not reasonable.[5]

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[5] Had NASA conducted itself in discovery proceedings in a civil action in a manner similar to the way it processed CEI's 2008 Request, it would almost certainly be subject to, at a minimum, a finding of spoliation. *See generally Pension Comm. of the University of Montreal Pension Plan v. Bank of Am. Secs.*, 685 F. Supp. 2d 456 (2010) (reviewing law of spoliation).

**2. The Travis Declaration Is Insufficient To Sustain NASA's Burden To Show That Its Search Was Reasonable.**

NASA has admittedly withheld thousands of responsive emails. Travis Decl. ¶ 32. NASA must justify those withholdings. *See, e.g., Morley*, 508 F.3d at 1122; *Campbell*, 164 F.3d at 32–33. NASA could have carried its burden by producing a *Vaughn* index describing the contents of the withheld documents. *See Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 480 (2d Cir. 1999). NASA, however, has not submitted any such index. Accordingly, to meet its burden at this stage, NASA must rely on the Travis Declaration, but that declaration demonstrates that NASA's search was unreasonable.

*First*. The Travis Declaration violates the personal knowledge requirement of Rule 56(e) of the Federal Rules of Civil Procedure. Regardless of whether the Travis Declaration is sufficient to attest to the adequacy of NASA's search methodology, we are aware of no case where a person without personal knowledge has been permitted to attest to *how an agency determines what is an agency record*. *See Grand Cent. P'ship*, 166 F.3d at 480 (rejecting a declaration by an affiant "lacking personal knowledge" of agency's use of records); *see also Gallant v. NLRB*, 26 F.3d 168, 171 (D.C. Cir. 1994); *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995); *Kalmin v. Dep't of the Navy*, 605 F. Supp. 1492, 1495 (D.D.C. 1985).

*Second*. The Travis Declaration is not consistent in describing the agency's criteria for withholding responsive emails from Dr. Schmidt's @giss.nasa.gov account to non-NASA individuals. It first asserts that all such emails "that had any reference whatsoever to Agency matters[] were released to CEI." Travis Decl. ¶ 32(a). In the very next paragraph, however, it states that the withheld emails "did not refer to NASA or raise or discuss any matters or projects *related to Dr. Schmidt's official duties*." *Id.* ¶ 32(b) (emphasis added). Without a *Vaughn* index, it is impossible to know if the agency withheld responsive documents that relate to agency

matters but do not relate to NASA's apparently more narrow view of Dr. Schmidt's "official duties."

*Third*. Because NASA has not defined either of the criteria it allegedly used to withhold responsive emails—an email's relationship to "agency matters" or to Dr. Schmidt's "official duties"—neither CEI nor the Court have any basis to assess the legitimacy of the agency's decisions about which documents to withhold. The Travis Declaration does not define "agency matters." Moreover, the Travis Declaration provides an incomplete definition of Dr. Schmidt's "official duties," stating only that they "focus upon" the development of the GISS climate model and coordinating the input of a wide range of scientists. Travis Decl. ¶ 17. Dr. Schmidt's duties, however, extend beyond those on which he *focuses*. Without more detail, it is impossible to assess the Travis Declaration's claim that withheld documents are unrelated to agency business. Even NASA's incomplete definitions, however, cast doubt on the legitimacy of its withholdings. According to the Travis Declaration, NASA withheld documents that discuss "climate change data" and "articles appearing in scientific journals." Travis Decl. ¶ 32. Emails on those topics appear to relate to Dr. Schmidt's official duties of coordinating the input of a wide range of scientists to develop a climate change model. *See* Travis Decl. ¶ 17.

**3. NASA Failed To Search Locations Likely To Contain Responsive Records.**

NASA's search was not adequate because it did not search for documents in locations reasonably likely to contain responsive documents. FOIA requires an agency to undertake search efforts "reasonably calculated to uncover all relevant documents," and an agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Oglesby*, 920 F.2d at 68; *see also Founding Church of Scientology*, 610 F.2d at 838; *Greenberg*, 10 F. Supp. 2d at 30 n.38.

*First*. Although this case has focused on Dr. Schmidt's emails, CEI's request sought emails and "other correspondence." *See* Dewey Decl. Ex. D. NASA did not search for paper records, whether printed emails or otherwise. Travis Decl. ¶ 32. That alone renders NASA's search unreasonable.

*Second*. NASA did not look for responsive records on the computers of GISS scientists other than Dr. Schmidt, even though it is reasonable to expect responsive records to be found on those computers. It was particularly unreasonable for NASA to search only Dr. Schmidt's computer. Mot. 18; Travis Decl. ¶¶ 29, 30, 32; *but see* Travis Decl. ¶ 33 (describing nominal attempt to search other scientists' computers for emails). Emails are both sent and received, and different people preserve and delete different emails. A reasonable search would have sought responsive emails located on at least those computers belonging to the colleagues with whom Dr. Schmid works the most.

*Third*. NASA's two efforts to locate emails traveling between Dr. Schmidt's @columbia.edu account and the accounts of his NASA colleagues were insufficient. In one attempt to locate these records, NASA sent an email to the GISS listserve, which contains approximately 135 members, asking employees to search their email accounts for any emails sent to them from Dr. Schmidt's @columbia.edu account. *See* Travis Decl. ¶¶ 6, 33. The request did not ask for any confirmation that employees had in fact searched their emails. *Id.* ¶ 33. Zero individuals responded with emails, and 20 people responded that they had no such records. Satisfied with an approximately 15% response rate, that was the end of NASA's search.

NASA's effort was facially inadequate. By the time it made its request to the listserve, NASA had positive proof that Dr. Schmidt routinely used his @columbia.edu address for official communications with other GISS employees. *See, e.g.*, Dewey Decl. Ex. R. A zero percent

positive response rate should have sent up red flags. In addition, because NASA failed to ask employees to confirm that they had searched, NASA can have no faith that employees actually did search. A 15% "negative" response rate is insufficient to inspire confidence. Moreover, the Travis Declaration does not specify which 20 GISS employees responded. Travis Decl. ¶ 33. Obviously, the reliability of GISS's search methodology would be called into question if the 20 people with whom Dr. Schmidt never interacted were the ones who responded. Finally, the request asked people to search only for emails "*from*" Dr. Schmidt's @columbia.edu account. *Id.* But records responsive to CEI's requests could have also been sent "*to*" Dr. Schmidt's @columbia.edu address.

NASA's other attempt to locate Dr. Schmidt's @columbia.edu emails was also deficient. During the course of the agency's response to CEI's FOIA request, Dr. Schmidt apparently undertook an unsupervised and unreviewed search of his @columbia.edu account. As a result of that search, NASA produced a handful of records to CEI. An unsupervised search does not satisfy FOIA's requirements. *See Kempker-Cloyd v. Dep't of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review). Even if it could, however, the Travis Declaration does not establish the search was adequate because it does not describe the methodology or the terms Dr. Schmidt used in his search. Travis Decl. ¶ 34; *Morley*, 508 F.3d at 1121–22; *see also Aguirre*, 551 F. Supp. at 61. Dr. Schmidt and NASA also made no effort to locate responsive documents from or to Dr. Schmidt's @realclimate.org address. *See* Travis Decl. ¶ 36.

*Fourth.* Because the Travis Declaration is silent regarding remote email access, CEI assumes that no such access exists. If GISS personnel can access their email remotely, by way

of a BlackBerry for example, NASA's search was inadequate because it apparently did not search for records on any devices used to gain such access.

**4. NASA Ignored Evidence That Its Search Was Not Reasonable.**

As with the 2007 Requests, CEI's Internal Appeal notified NASA that its search failed to produce a document known to exist. Nevertheless, NASA has never produced the missing document. That document came to CEI's attention as part of the event known as "ClimateGate," when thousands of private climate science related emails were released to the public. One such email released was an email from Dr. Schmidt to Dr. Hansen that has not appeared in any NASA production to date. *See* Internal Appeal Ex. 64 at 1–3.

NASA's failure to locate the document, or even state that it searched for the document, renders its search inadequate. This is not a case where CEI claims that a certain document "must" exist; it is a case where fortuitous outside events have allowed it to *prove* beyond any doubt that the record exists. *See Oglesby*, 920 F.2d at 67 n.13. Claims that a search was adequate become "untenable once [an agency] discover[s] information suggesting the existence of documents that it could not locate without expanding the scope of its search." *Campbell*, 164 F.3d at 28.

The agency has failed to explain why it could not locate a document known to exist in an easily searchable format. At the very least, CEI is entitled to a description of NASA's efforts to find the missing records. *See id.*; *Boyd.*, 2002 U.S. Dist. LEXIS 27734, at *4. Without such an explanation, NASA's search cannot be said to have been adequate.

**D. NASA's "Voluntary" Disclosures Did Not Moot The Request.**

Toward the end of its brief, NASA suggests that the entire controversy over CEI's RealClimate FOIA request is moot even if the Court were to conclude that the emails withheld are agency records because "as a result of the Agency's discretionary release Plaintiff has not

been injured by any improper withholding." Mot. at 30. This argument cannot be taken seriously.

Plaintiff's claim would have merit *only* if the Court were to adopt NASA's extreme position that *none* of Dr. Schmidt's documents are agency records. Of course, if the Court adopts this position, NASA wins on the merits rather than on mootness grounds.

Even if the Court concludes that none of the thousands of RealClimate related emails NASA has withheld are agency records—a conclusion that is unsupportable on the present record—there would still be a live controversy as to the adequacy of NASA's search.

## III. SUMMARY JUDGMENT IS INAPPROPRIATE AND DISCOVERY IS WARRANTED.

NASA is not entitled to summary judgment on the adequacy of the search undertaken in response to the 2007 Requests. Indeed, if any party is entitled to summary judgment on the 2007 Requests, it is the Plaintiff. The record conclusively establishes that NASA has withheld responsive documents from the "Steve" and "alternate_cleaning" directories. CEI is entitled to those documents as a matter of law. *See supra*, pp. 9–12. Moreover, the administrative record and NASA's own declaration establish that the searches undertaken in response to the 2007 Requests for documents located outside of those directories were inadequate as a matter of law. At the very least, NASA's bad faith in processing CEI's requests entitles CEI to further discovery to probe the veracity of NASA's claims. *See, e.g.*, *CREW*, 2006 WL 1518964; *Hawthorn Mgmt. Serv.*, 1997 WL 821767.

NASA's motion for summary judgment on CEI's 2008 Request must also be denied. CEI has established that there are several material issues of fact in serious dispute on this question. Especially viewed in light of NASA's bad faith in processing CEI's 2008 Request, CEI is entitled to discovery, including depositions as necessary, regarding: (i) GISS employees'

performance reviews and job responsibilities; (ii) Dr. Schmidt's authorization to work on RealClimate, which is responsive to CEI's FOIA request; (iii) the likely spoliation of responsive materials; (iv) NASA's use of RealClimate; and (v) NASA's process for distinguishing responsive emails relating to "agency business," which it has produced, from those not pertaining to "agency business," which have admittedly been withheld.

There is ample authority for permitting this type of discovery in light of the record evidence in this case. In similar circumstances, this Court has ordered discovery and depositions of high ranking officials. *See, e.g., Meeropol*, 790 F.2d at 947 (noting that the district court had ordered depositions of six FBI agents and one Department of Justice official); *Citizens for Responsibility and Ethics in Washington v. Office of Admin.*, No. 07-cv-964 (CKK) [Dkt. No. 36] (D.D.C. Feb. 22, 2009) (ordering deposition of head of the Office of Administration in the Executive Office of the President and other discovery) (Dewey Decl. Ex. BB); *CREW,* 2006 WL 1518964, at *1 (ordering deposition of the Associate Attorney General of the United States, the Director of the DOJ Office of Information and Privacy, and two other Department of Justice attorneys); *Elec. Privacy Info. Ctr. v. Office of Homeland Sec.*, No. 02-cv-620 (CKK) [Dkt. No. 11] (D.D.C. Dec. 26, 2002) (ordering discovery into whether Office of Homeland Security was a covered agency under FOIA) (Dewey Decl. Ex. CC).

Alternatively, CEI requests an order that NASA search for and produce all responsive documents subject to a protective order, which would permit counsel to review the materials to verify that they relate only to RealClimate issues. CEI and its counsel would review the documents pursuant to the terms of the protective order, and for those records determined to relate to agency business, make a showing that the Court should order their production. This process has worked in this district in other cases to effectively resolve production disputes. *See,*

*e.g.*, *In re Fannie Mae Sec. Litig.*, No. 04-cv-1639 (RJL) [Dkt. No. 746] (D.D.C. June 16, 2009) (Dewey Decl. Ex. DD); *United States v. Thompson*, No. 06-cr-288 (RJL) [Dkt. No. 33] (D.D.C. Aug. 18, 2009) (Dewey Decl. Ex. EE).

## CONCLUSION

For the foregoing reasons, NASA's motion for summary judgment should be denied.

Respectfully submitted,

Dated: November 3, 2010

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**CERTIFICATE OF SERVICE**

I, Andrew S. Tulumello, hereby certify, under penalty of perjury pursuant to 28 U.S.C. § 1746, that on this 3rd day of November, 2010, I served a true and correct copy of the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** and attached exhibits by CM/ECF upon the following counsel of record:

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