IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOLD ANTI-TRUST ACTION COMMITTEE, INC.,	)	
Plaintiff,	)	
	)	Civil Action No. 09-2436 (ESH)
v.	)	
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Regulations

Cases

Miscellaneous

* Authorities upon which we chiefly rely are marked with asterisks.

INTRODUCTION

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. section 552, as amended. Plaintiff, Gold Anti-Trust Action Committee, Inc. ("GATA"), a nonprofit, tax-exempt organization, seeks injunctive relief against defendant, the Board of Governors of the Federal Reserve System (hereinafter "FRB"), for FRB's refusal to identify and disclose certain records concerning "gold swaps" from 1990 to 2009, requested by GATA under FOIA.

FRB claims that a number of records were exempt from disclosure under 5 U.S.C. sections 552(b)(4) and (b)(5), and has filed a motion for summary judgment, accompanied by a memorandum of points and authorities and three declarations, together with a statement of material facts as to which it contends there is no genuine issue.

GATA submits: (i) this memorandum; (ii) the declarations of Chris Powell, Adrian Douglas, and James Turk; (iii) Plaintiff's Statement of Material Facts as to Which a Genuine Issue Exists; and (iv) the Rule 56(f) F.R.Civ.P. declaration of its attorney of record, William J. Olson, in opposition to the FRB's pending motion for summary judgment.

PARTIES AND JURISDICTION

GATA is a nonprofit educational organization incorporated under the laws of Delaware, and is tax-exempt under section 501(c)(3) of the Internal Revenue Code of 1986 and is a public charity. GATA is engaged in a variety of research and public education activities relative to economic and monetary policy, with a particular focus on the role, price, and supply of gold. GATA's activities include, *inter alia,* attempting to monitor the policies and actions of the United States with respect to gold, and educating the public concerning governmental and non-governmental efforts to affect and/or manipulate supply and demand for gold and the price of gold. Complaint ¶ 3.

FRB is an independent board within the Executive Branch of the United States Government. 12 U.S.C. § 241. *See also* Complaint ¶ 4. An agency within the meaning of 5 U.S.C. section 552(f) — established by statute and charged with responsibility for, *inter alia*, conducting the nation's monetary policy by influencing the monetary and credit conditions in the economy, supervising and regulating banking institutions, and providing financial services to depository institutions, the U.S. government, and foreign institutions — FRB has possession of and control over the records, memoranda, reports, documents, publications, and similar papers and files sought by GATA in this action, and is responsible for fulfilling GATA's FOIA request at issue herein. Complaint ¶ 4.

This Court has both subject matter jurisdiction over this action and personal jurisdiction over defendant pursuant to 5 U.S.C. section 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. section 1331. *See* Complaint ¶ 2.

STATEMENT OF FACTS

1. GATA's Initial 2007 FOIA Request.

a. GATA's FOIA Request. By letter dated December 6, 2007, GATA submitted a FOIA request to FRB seeking copies of all records in FRB's possession or control relating to, explaining, denying, or otherwise mentioning "gold swaps" involving the United States of America or any agent thereof, during the time period January 1, 1990 to December 6, 2007, the date of the request.

b. FRB's Response. FRB responded by letter dated April 9, 2008, producing certain records and withholding others.[1] In addition to certain redactions from records that were produced, 137 pages of responsive records were said to be withheld in full. FRB claimed that the withheld records were exempt under 5 U.S.C. sections 552(b)(4), (5), and (6). There was no identification of those documents, however, either in the denial letter of April 9, 2008, or any other document transmitted to GATA, nor was there any reasonable explanation as to the factual basis for any claim of exemption on which such documents were withheld. Complaint ¶ 8.

c. GATA's Administrative Appeal. By letter dated May 5, 2008, GATA appealed the FRB's partial denial of that 2007 FOIA request, challenging the legality of the denial and also submitting that, even if any of the withheld documents arguably were covered by an exemption, the importance of the information being sought with respect to the confidence of the American people in the integrity of the nation's gold stock justified a discretionary release of such documents by the FRB "in the public interest," as authorized by the FRB regulations set forth at 12 C.F.R. section 261.14(c). Alternatively, GATA requested that the FRB provide an index — of the type specified in Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (hereinafter "Vaughn Index") — of any documents completely or partially withheld, identifying the nature and date of each document, the FOIA exemption claimed, and the basis for each such claim.

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[1] The records produced in 2007 were largely correspondence between the FRB and GATA or members of Congress about gold swaps, historic minutes of the Federal Open Market Committee, articles about gold culled from the Internet which are not government documents, and like documents. *See* Olson Decl. ¶ 9.

d. FRB'S Denial of GATA Appeal. By letter dated June 3, 2008, FRB denied GATA's appeal, including GATA's requests for a discretionary release of the documents and a Vaughn Index. Complaint ¶¶ 9-10.

2. GATA's Second (2009) FOIA Request.

a. GATA's FOIA Request. GATA's second FOIA request is set forth in its letter to FRB dated April 14, 2009, seeking the disclosure in a more focused and detailed manner of:

> copies of all records in the possession or control of the Federal Reserve Board relating to, explaining, denying or otherwise mentioning:
> • "**gold swap**,"
> • "**gold swaps**,"
> • "**gold swapped**,"
> • "**proposed gold swap**,"
> • "**proposed gold swaps**," or
> • "**proposed gold swapped**."
> during the time period **January 1, 1990, to the date of this request** either
> (a) **involving** the United States of America, or any department, agency or agent thereof, or
> (b) **not involving** the United States of America. [Complaint ¶ 11 (emphasis original).]

Without limiting its FOIA request, but in an effort to particularize certain categories of records covered by its request, GATA requested copies of 18 specific categories of records. *Id*. GATA's 2009 FOIA request was substantially identical to that submitted by GATA to the FRB in 2007, seeking records relative to "gold swaps" during the stated periods of time, although expanding the scope to include (i) "non-U.S." gold swaps, and (ii) records up to the April 14, 2009 date of the request.

The 2009 request sought all records previously requested (but not produced) in 2007 and expressed its belief that the FRB, in processing GATA's 2007 FOIA request, had not used considerations similar to the guidelines and "presumption of disclosure" principle set forth in

President Obama's January 2009 directive to the heads of the federal executive agencies,[2] GATA requested (i) that the FRB act in accordance with those guidelines in processing GATA's 2009 FOIA request, urging FRB to consider — even if a FOIA exemption technically (and/or arguably) might be assertable with respect to one or more responsive documents — discretionary release of any such documents in accordance with section 261.14(c) of the FRB regulations, since such release would be in the public interest, and (ii) if the records demanded by GATA's FOIA request were not disclosed in full, to provide a Vaughn Index of any documents completely or partially withheld. GATA also requested a fee waiver.

b. FRB's Response. By letter dated August 5, 2009 (Complaint, Exhibit B), FRB responded to GATA's FOIA request, identifying only two responsive records — in addition to the 137[3] pages that had also been withheld by FRB previously in responding to GATA's 2007 FOIA request. The FRB disclosed the two new records, comprised of 173 pages, some of which appeared to GATA to have been redacted — although FRB did not alert GATA that there had

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[2] In his January 21, 2009 Memorandum for the Heads of Executive Departments and Agencies, President Barack Obama issued the following directive:

> The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.... [i]n responding to requests under the FOIA, executive branch agencies ... should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public. All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA. [74 *Fed. Reg.* 4683-84 (Jan. 26, 2009); http://www.whitehouse.gov/the_press_office/ FreedomofInformationAct/.]

See Complaint ¶ 12. *See also* Attorney General Eric Holder's Memorandum for Heads of Executive Departments and Agencies (March 19, 2009), http://www.usdoj.gov/ag/foia-memo-march2009.pdf; Complaint ¶ 13.

[3] FRB now asserts that the number of pages actually withheld was 144, not 137. *See* Thro Decl. ¶ 9, p. 5.

been any redaction — but FRB refused to disclose any of the 137 (now 144) pages that had been withheld previously in response to GATA's 2007 FOIA request. FRB now claimed that the withheld records were exempt under FOIA exemptions 4 and 5 — 5 U.S.C. sections 552(b)(4) and (b)(5), respectively — but there was no identification of those records, nor was there any reasonable explanation as to the factual basis for any claim of exemption on which such records were withheld. FRB also refused GATA's request for discretionary release of the withheld records, as well as GATA's request for a Vaughn Index. FRB did not respond to GATA's request for a fee waiver.[4] Complaint ¶ 17.

c. GATA's Administrative Appeal. By letter dated August 20, 2009 (Complaint, Exh. C), GATA timely appealed the partial denial of its FOIA request.

d. FRB's Denial of Appeal. GATA's appeal was denied by letter dated September 17, 2009 (Complaint, Exh. D), signed by Kevin M. Warsh, Vice Chairman of the Board of Governors of the Federal Reserve System.[5] That denial letter, *inter alia,* contains FRB's admission that among the documents requested by GATA relating to "gold swaps" being withheld from GATA were documents concerning "swap arrangements with foreign banks," and that these records were being withheld because such information is not of a type "customarily

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[4] By letters dated April 16 and May 12, 2009, FRB acknowledged receipt of GATA's FOIA request, did not respond to the substance of that request or to GATA's request for a fee waiver, and extended the time within which it would respond to that request to May 27, 2009, "in order to consult with another agency or with two or more components of the Board having a substantial interest in the determination of the Board." Complaint ¶ 16. FRB did not seek, or alert GATA to, any further extension of time, although the FRB response was not submitted on May 27, 2009, but rather on August 5, 2009.

[5] Portions of certain documents withheld by the FRB were released subsequent to the filing of this suit by GATA. *See* p. 8, *infra*.

disclosed to the public." Complaint ¶ 19 and Exh. C, p. 2. The FRB denial letter, confirming the FRB's withholding of documents under FOIA Exemptions 4 and 5, refused to address the apparent gaps in the "new" records that had been furnished by FRB, claiming that the records had been obtained from the Federal Open Market ("FOMC"), and that GATA would have to pursue the issue of "gaps" (*i.e.*, redactions) in furnished FOMC records with FOMC.[6] The denial letter also refused to reconsider FRB's position that documents in its possession, but originating with the Treasury Department, were not FRB's responsibility, and now claimed that there were no such documents.

3. Litigation in District Court.

a. GATA's Civil Action. Having exhausted the applicable administrative remedies, GATA filed this civil action in December 2009, requesting this Court to enter judgment in

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[6] GATA's follow-up letter to FRB dated September 30, 2009, seeking reconsideration of that decision, reminded FRB of the following:

> Our FOIA request to the FRB of April 14, 2009 included a request for all records in the possession or control of any FRB subsidiary organizational group or entity, such as a division, department, or committee. Indeed, our FOIA request expressly stated, at page 1 of the letter:
>
> > We are aware that the Federal Reserve System includes other entities such as the Board of Governors, the Federal Reserve Banks, and **the Federal Open Market Committee**. We understand it is possible that certain of the records herein requested could be maintained by one or more of those entities, and not by the Board of Governors of the Federal Reserve System**. We understand, however, that no separate FOIA request is required for those entities** because you will forward any such request to the appropriate entity for processing, and that we will be advised. **Please let us know if this is not correct**. [Emphasis added.]
>
> Despite this statement and request, at no time during the processing of our FOIA request were we advised that records of the **FOMC** were not producible by the FRB itself. Nor was the FRB's denial letter of August 5, 2009 premised in any way on such a position. [Comp., Exh. A, p. 1.]

FRB refused to reconsider its position as requested by GATA.

GATA's favor and order FRB to process the requested records expeditiously and, upon completion of such processing, to disclose the requested records in their entireties and make copies available to GATA as requested in its 2009 FOIA request.

b. FRB's Litigation-Related Release of Documents. Despite its earlier refusals to release the records sued for by GATA, FRB released portions of certain withheld records on June 11, 2010, after the initiation of this litigation, prior to the filing of defendant's motion for summary judgment. A few complete pages of documents were released, but most of the documents were heavily redacted, and that partial release did not satisfy GATA's request for responsive records.[7]

c. FRB's Motion for Summary Judgment. Defendant's only formal response to the Complaint in this Court — it has filed no Answer — is its **Motion for Summary Judgement**, filed on June 21, 2010. Defendant's Motion for Summary Judgment repeats FRB's position, in response to GATA's 2007[8] and 2009 FOIA requests, that the material retrieved by the FRB and withheld from disclosure is exempt from FOIA disclosure pursuant to 5 U.S.C. sections 552(b)(4) and (b)(5). In addition to a supporting **Memorandum of Points and Authorities**, defendant has offered in support of its motion a **Statement of Material Facts as to Which No Genuine Issue Exists**, as well as the **Declarations** of:

- **Alison M. Thro** ("Thro Decl."), an FRB attorney;
- **Timothy Fogarty** ("Fogarty Decl."), an employee of the Federal Reserve Bank of New York ; and

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[7] *See* attached Declaration of William J. Olson ¶ 9.

[8] FRB has apparently abandoned its claim that records were being withheld under **Exemption 6** ("personnel" records), as asserted in response to GATA's 2007 FOIA request.

- **Richard Dzina** ("Dzina Decl."), an employee of the Federal Reserve Bank of New York.

As indicated in its Statement of Material Facts as to Which a Genuine Issue Exists, GATA believes that certain material facts concerning the FRB search are in dispute, as are certain facts relative to the FRB's objections to disclosure, and that summary judgment in favor of defendant should not be granted.[9]

SUMMARY OF ARGUMENT

The FRB has not demonstrated that its search for records responsive to GATA's FOIA requests was adequate. GATA sought all records relative to "gold swaps" for a 20-year period — January 1990 through April 2009 — and the FRB has identified only a very few documents. The FRB has denied that it has more than a few documents even mentioning "gold swaps," which is the essential subject of GATA's FOIA request, for the period 1990 through 2009. And this is so despite the fact that evidence of government intervention in gold markets, including the use of gold swaps, is increasingly well known, as has been documented in the Declarations of Chris Powell, Adrian Douglas, and James Turk. There is serious concern about the adequacy of the FRB search for records responsive to the GATA's FOIA request, and defendant should be required **to conduct an adequate search**. Lastly, there are other FRB divisions and other federal reserve banks that were not asked for records. At a minimum, FRB should be required to explain in more detail how its search was conducted, why additional sources were not consulted, and why it is not in possession of additional records related to gold swaps.

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[9] Contemporaneously with the filing of this Memorandum, GATA filed a Motion for *In Camera* Review and Limited Discovery herein. *See* Olson Decl., ¶¶ 6-11.

Moreover, FRB has not demonstrated that the records admittedly withheld by FRB should not be disclosed, although GATA would relent with respect to certain draft documents if the final copies of those documents are produced. All of the documents withheld under **FOIA exemption 5** should be disclosed because defendant has failed to advance any convincing, non-conclusory reason to withhold them. Although they may appear as possible candidates for exemption as pre-decisional or deliberative, defendant has not made an adequate showing of their claimed pre-decisional or deliberative nature to qualify for exemption. Finally, the documents withheld under **FOIA exemption 4** should be disclosed because defendant has neither presented a convincing case that such documents are confidential nor advanced a convincing reason for withholding them under the other exemption standards.

ARGUMENT

I. NATURE AND STANDARD OF THIS COURT'S REVIEW

Summary judgment is appropriate in a contested FOIA case such as this, as in other litigation, only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Diamond v. Atwood, 43 F.3d 1538, 1540 (D.C. Cir. 1995). In determining whether a genuine issue of material fact exists, the Court must view all facts in the light most favorable to the non-moving party. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

Summary judgment on the basis of agency affidavits in a FOIA case is appropriate only if the affidavits are specific, reasonably detailed and descriptive of the withheld information in a factual and non-conclusory manner, and if there is no contradictory evidence on the record or evidence of agency bad faith. *See, e.g.*, Summers v. Department of Justice, 140 F.3d 1077, 1084 (D.C. Cir. 1998).

When deciding a motion for summary judgment in a FOIA matter, the court reviews the agency's decision *de novo*. Summers v. Department of Justice, 140 F.3d at 1079. *See also* 5 U.S.C. § 552(a)(4)(B). To prevail, an agency must show "beyond material doubt ... that it has conducted a search reasonably calculated to uncover all relevant documents." Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990); Weisberg v. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Where there is significant doubt as to the sufficiency of the FOIA search, or the Vaughn Index is inadequate, summary judgment for the agency is not proper. Ethyl Corp. v. Environmental Protection Agency, 25 F.3d 1241 (D.C. Cir. 1994); Truitt v. Dep't of State, 897 F.2d 540, 542 (D.C. Cir. 1990); King v. U.S. Department of Justice, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

II. FRB IGNORED THE PRESUMPTION IN FAVOR OF DISCLOSURE AND CERTAIN OTHER FOIA PRINCIPLES IN RESPONDING TO GATA'S FOIA REQUEST.

A. General FOIA Principles Favoring Disclosure. Under FOIA, every "agency" shall make "available to any person" for "public inspection and copying" all requested records that are not exempt from disclosure under one of FOIA's nine statutory exemptions. *See* 5 U.S.C. §§ 552(a)(3), (a)(4), (b)(1)-(9). FOIA was enacted "to establish a general philosophy of full agency disclosure." Environmental Protection Agency v. Mink, 410 U.S. 73, 80 n.6 (1973); Dep't of the

Air Force v. Rose, 425 U.S. 352, 361-62 (1976). Full disclosure is the official policy of the Executive Branch, as confirmed by President Obama's January 21, 2009 Memorandum for the Heads of Executive Departments and Agencies. *See* footnote 2, *supra*. Although FOIA exemptions exist, they are narrowly construed, *see* Vaughn v. Rosen, 484 F.2d at 823, and the agency has the burden of proving that its decision to withhold a record responsive to a FOIA request is justified. *See* 5 U.S.C. § 552(a)(4)(B). Even if a requested record contains exempt information, it must still release "any reasonably segregable portion" of that record. *See* 5 U.S.C. § 552(b). *See also* Oglesby v. U.S. Dept. of Army, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Finally, the agency's search for the requested records — although subject to no uniform, precise external standard — must be systematic and reasonable, and the agency's showing in this regard must be sufficient enough to allow the requester to challenge the procedures utilized. *See* Weisberg v. Dept. of Justice, 627 F.2d 365, 371 (D.C. Cir. 1980).

B. Documents Requested by GATA Involve Important Public Issues. The records requested by GATA concern "gold swaps," a term defined in the Declaration of Chris Powell, ¶ 2 and James Turk, ¶¶ 2-4. "Gold swap" is a term of art used in the financial community and the financial press, worldwide, as evidenced by recent stories. *See* Declaration of James Turk, ¶¶ 6-11. Public discussion of "gold swaps" is explained in the Declaration of Chris Powell. *See* Powell Decl., ¶¶ 6-7, 10-14, 18. Gold swaps involve important matters of federal intervention in gold markets about which the public has a right to know. GATA believes that FRB's files must contain information about such transactions — proposed or accomplished — in the financial community during the period in question. However, FRB has furnished very few records relative to "gold swaps" in response to GATA's FOIA requests. Olson Decl. ¶ 9. Indeed, FRB now

contends that most of the records currently at issue in this litigation do not involve "gold swaps" at all. *See* Thro Decl., Exh. 8 (Vaughn Index). Of course, if they do not involve "gold swaps," it is unclear why they were identified at all.

C. FRB's Response to GATA's FOIA Requests Was Inadequate. FRB has failed to act in accordance with the spirit of disclosure that is the foundation of the FOIA (EPA v. Mink, 410 U.S. at 80), and with the presumption of disclosure that was at the heart of President Obama's 2009 call to the heads of his executive agencies. *See* fn 2, *supra.* Examples of this "non-disclosure" spirit are: (i) FRB's consistent refusal to provide GATA with any information concerning the withheld documents — a Vaughn-type Index would have been ideal, but any document descriptions would have helped — during the administrative consideration of GATA's 2007 and 2009 FOIA requests and until well into this litigation; (ii) FRB's apparent refusal to consider seriously, prior to litigation, the discretionary release of many of the documents that FRB refused to disclose; and (iii) disclosing relatively meaningless portions of certain documents, and that only after suit was filed.

III. FRB FAILED TO CONDUCT AN ADEQUATE SEARCH FOR THE RECORDS REQUESTED BY GATA.

Defendant has set forth the steps by which the search was undertaken (*see* Thro Decl. ¶¶ 10-18), and GATA has no specific information with which to contest those statements concerning the number of records actually recovered. While not seeking to attack the good faith or credibility of any FRB employee or representative, GATA submits that the FRB search for records responsive to GATA's FOIA requests was inadequate, with respect to the procedures

employed, the sources from which the FRB claims to have sought records, and certain records that inexplicably have not been located. *See generally* Powell, Douglas, and Turk Declarations.

Obviously, GATA has not had the opportunity to view the records withheld by defendant, and only recently — within this litigation — has GATA been allowed, by virtue of the Vaughn Index furnished by FRB, even to see a description of the various records withheld. At this stage of the litigation, 20 items, consisting of 131 pages of documents, have been withheld, in whole or in part. *See* Thro Decl., Exh. 8.[10] In addition, certain documents that FRB furnished in redacted form — but that FRB considers not its responsibility because they originated with the FOMC — have been withheld.[11]

Most of the withheld records are now said by FRB not to involve gold swaps and thus non-responsive or irrelevant to GATA's FOIA request. *See* Thro Decl., Exh. 8. GATA submits that this raises the question why the records were identified at all in response to GATA's FOIA request, adding to the evidence that FRB's search and response to GATA's FOIA requests were misdirected and inadequate. Based upon the available evidence thus far, including the documents submitted with defendant's motion for summary judgment, the FRB search appears to have been defective or incomplete in the ways described below.

A. The FRB Search Did Not Include All Required Sources. FRB has indicated the various sources from which responsive documents were sought, and states that it searched

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[10] The number of withheld documents was greater at the time GATA filed its complaint because in June, 2010, just prior to the filing of defendant's motion for summary judgement, FRB released various portions of additional records. *See* p. 8, *supra*.

[11] *See* Complaint ¶ 17; Thro Decl. ¶ 8. As discussed at pp. 19-20, *infra*, FRB argues — incorrectly, it is submitted — that it is not responsible for redactions from documents it furnished which originated with FOMC.

"every record system within the Board that was **reasonably likely to produce** responsive documents" (Thro Decl. ¶ 18, p. 10 (emphasis added)). Nevertheless, FRB has proved no clear explanation of its system of records. Thus, for example, there is no FRB showing concerning the record systems that were **not checked** for records responsive to GATA's FOIA request. Also, defendant should be required to conduct a search of FRB records — including those of federal reserve district banks — that were not checked for responsive records.

The FRB responses to GATA's 2007 and 2009 FOIA requests withheld a number of responsive records, but FRB now asserts that most of those withheld had nothing to do with "gold swaps," which was the subject of GATA's request. *See* Vaughn Index (Thro Decl., Exh. 8). FRB has provided no reasonable explanation as to how its search could have identified irrelevant documents as responsive, or why these documents were again withheld as relevant but exempt on appeal, but only now that the case is in litigation are claimed to be irrelevant to GATA's request. It is difficult to evaluate the reasonableness of FRB's search under such circumstances, and FRB's lack of explanation raises questions concerning what instructions were given and/or what procedures were employed in carrying out FRB's search. For example, in contacting "those experts or components/staffs with the Board responsible for the subject matter involved" (Thro Decl. ¶ 11), what instructions were given by FRB's Legal Division? Was the GATA FOIA request itself forwarded to the actual searchers? What search terms were used?[12] FRB has thus far not revealed this information, but GATA submits that it must answer such

[12] *See, e.g.*, the process described (Thro Decl. ¶ 17, p. 10) for the computer search at the FOMC. Even assuming that such a search at FOMC was reasonably calculated to reveal all responsive documents, FRB offers no explanation as to why no similar search was conducted, for example, at FRBNY, *see* Thro Decl. ¶ 5.

questions if it hopes to convince this Court that its search was reasonable. *See, e.g.*, Russell v. CIA, 1996 U.S. Dist. LEXIS 6108 (D.D.C. May 3, 1996).

FRB has disclosed the sources from which it sought records — *see* Thro Decl. ¶¶ 10-18 — but there are other potential sources from which records presumably were not sought. For example, although the FRB apparently sought certain records from the Federal Reserve Bank of New York ("FRBNY") in response to GATA's FOIA request, *see* Thro Decl. ¶ 15, the details of that search by the FRBNY were not detailed,[13] and FRB apparently admits not having sought records from any of the eleven other regional federal reserve district banks. *See* 12 C.F.R. § 261.29(i)(1)(i). *See also* Fox News Network v. Board of Governors of the Federal Reserve ("Fox News v. FRB"), 601 F.3d 158, 162 (2d Cir. 2010), *aff'g* Fox News v. FRB, 649 F. Supp. 2d 262 (S.D.N.Y. 2009) (FRB records include certain records of the 12 FRB district banks).

An agency must demonstrate that it has conducted a "search reasonably calculated to uncover all relevant documents" and that the required search must be shown to be reasonable based upon the circumstances of the particular case. *See, e.g.*, Ethyl Corp. v. EPA, 26 F.3d at 1248; Weisberg v. U.S. Dept. of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). Although not every agency record need necessarily be searched, the agency must search those systems likely to contain information responsive to the FOIA request. *E.g.*, Oglesby v. U.S. Dept. of Army, 920 F.2d 57, 68 (D.C. Cir. 1990). Here, it is submitted that has not been done. To demonstrate the adequacy of a FOIA search, FRB may rely on detailed affidavits or declarations submitted in

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[13] Apparently, the FRBNY employees who have submitted declarations herein — Messrs. Dzina and Fogarty — were not involved in any search at the FRBNY; their declarations address factors related to the claimed FOIA Exemption 4, but not the details of any records search. Ms. Thro did not relate the particular details of any search by FRBNY staff except to indicate that a manual search of certain files was conducted. *See* Thro Decl. ¶ 16.

good faith, *see* McGehee v. CIA, 697 F.2d 1095, 1102 (D.C. Cir. 1983), but that submission must describe "what records were searched, by whom, and through what process," Steinberg v. United States Dep't of Justice, 23 F.3d 548, 552 (D.C. Cir. 1994), including information about the type of search performed and the search terms used, and they must aver that all files likely to contain information responsive to a FOIA request have been searched. *See* Oglesby, 920 F.2d at 68. Defendant's summary judgment submissions in this case do not comport with all of those requirements. GATA submits that the FRB search was therefore faulty, and that the search must be carried out in accordance with the requirements mentioned above. If there is any doubt of the reasonableness of the agency search, of course, summary judgment for the agency would not be appropriate. *See, e.g.*, Truitt v. Department of State, 897 F.2d 540, 542 (1990).

B. FRB Has Failed to Account for Records Originating with FOMC. GATA's 2009 FOIA request was virtually identical to its 2007 FOIA request with respect to the records requested, except for the end date (*i.e.*, April 14, 2009 instead of December 6, 2007), and the fact that it sought records related to non-USA gold swaps. The FRB response to GATA's 2009 FOIA request identified additional records, but the additional records were from the period 1990-1995, and should have been produced in response to the 2007 FOIA request. Furthermore, when asked about the unidentified — but apparent — redactions in the very records that it produced, FRB refused to address the substance of the matter, stating that GATA would be required to submit a FOIA request to the FOMC to find out about the gaps in the 1990-1995 records that had been disclosed to GATA by the FRB. *See* Complaint ¶ 17; Thro Decl. ¶ 8, pp. 4-5. However, GATA's FOIA request to the FRB of April 14, 2009 included a request for all records in the

possession or control of any FRB subsidiary organizational group or entity, such as a division, department, or committee, and expressly stated, at page 1:

> We are aware that the Federal Reserve System includes other entities such as the Board of Governors, the Federal Reserve Banks, and **the Federal Open Market Committee**. We understand it is possible that certain of the records herein requested could be maintained by one or more of those entities, and not by the Board of Governors of the Federal Reserve System**. We understand, however, that no separate FOIA request is required for those entities** because you will forward any such request to the appropriate entity for processing, and that we will be advised. **Please let us know if this is not correct**. [Compl., Exh. A, p. 1, emphasis added.]

Despite this statement and request, at no time during the processing of its FOIA request was GATA advised that records of the FOMC were not producible by the FRB itself. Nor was the FRB's denial letter of August 5, 2009 premised in any way on such a position. *See* Complaint, Exh. B. Even if the FOMC were considered an entirely "separate agency" for FOIA purposes, the procedure followed by the FRB appears to have violated its own regulations, which provide (12 CFR, Chapter II):

> SECTION 261.13—Processing Requests
> * * * * *
> (g) Referral to another agency. To the extent a request covers documents that were created by, obtained from, or classified by another agency, the Board may refer the request to that agency for a response and inform the requester promptly of the referral.

At no time, to the best of GATA's knowledge, did FRB refer GATA's request to FOMC for a separate response. In fact, the opposite seems to have been the case. *See* Comp., Exh. B and D. It is submitted that FRB's refusal to correct the redactions on the FOMC documents was contrary to law, and that FRB was required to disclose the redacted documents in full unless they were

exempt under law. *See, e.g.*, McGehee v. CIA, 697 F.2d at 1109-1110; Truitt v. Dept. of State, 897 F.2d at 542-43.

Now, FRB also contends that the withheld FOMC documents are not responsive to GATA's FOIA request (s*ee* Thro Decl. ¶ 17, p. 10), but FRB does not explain how it knows what is in those records of a supposedly different agency. The FOMC documents are not part of the Vaughn Index submitted by defendant. *See* Thro Decl., Exh. 8.[14]

C. FRB Has Failed to Identify Records that Are Known and Should Have Been Disclosed. In response to GATA's 2007 and 2009 FOIA requests, the FRB has identified very few records — aside from miscellaneous items and correspondence, such as that involving GATA, U.S. congressmen, and other inquirers — mentioning gold swaps. *See* Olson Decl. ¶ 9. This is so despite the clear and continuing references on the FRB website — as well as the website of the Treasury Department — concerning gold swaps. For example, as GATA pointed out in its appeal letter dated August 20, 2009 (Complaint, Exh. E):

> A recent Google search of [the FRB's own website] www.federalreserve.gov for the words "Gold Swaps," for example, revealed the existence of the following document containing the words "gold swaps" that falls within the date range of the request (January 1, 1990 to April 14, 2009):
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> • Brahima Coulibaly, "Effects of Financial Autarky and Integration: The Case of the South Africa Embargo," Board of Governors of the Federal Reserve System, International Finance Discussion Papers, No. 839, Sept. 2005.[15]

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[14] Following FRB's refusal to disclose the FOMC documents, GATA submitted a FOIA request to FOMC, requesting, *inter alia*, the redacted documents withheld by FRB. In denying GATA's FOIA request with respect to the redacted documents, FOMC represented that the withheld documents did not mention gold swaps. However, the basis of the information Ms. Thro used for her assertions concerning the FOMC documents is uncertain.

[15] This FRB Discussion Paper clearly discusses gold swaps, as follows: "The [South African] government had, reportedly, facilitated foreign borrowing by reassuring foreign banks

> This document was neither provided in response to our request nor identified by the FRB as being withheld, and would appear to provide further evidence concerning the apparent inadequacy of the search performed by the FRB. Based upon the FRB's failure to identify that document, as well as the FRB's failure to identify the records (discussed in #3, above) in response to our 2007 FOIA request, we submit that there is substantial evidence concerning the inadequacy of the FRB's searches to date, and that the FRB should be required to provide adequate documentation of its FOIA search methodology, efforts and results with respect to GATA's 2007 and 2009 FOIA requests.

FRB, in its appeal denial of September 17, 2009, responded without any citation of authority that "the Board is not required to provide copies of documents that are already in the public domain, such as on a website, and are reasonably accessible to the requester." Complaint, Exh. D, p. 4. GATA submits that FRB had a duty to provide GATA the record in question, and cannot reasonably defend on the theory that GATA might have located the document itself by a search of the FRB website. Although it may not be absolutely determinative of the issue, FRB's failure in this regard should be considered meaningful evidence that FRB's search was not adequate.

In the letter denying GATA's appeal for "gold swap" records, FRB Vice Chairman Kenneth Warsh pronounced that among the documents being withheld from GATA were documents concerning "swap arrangements with foreign banks," on the basis that such information is not of a type "customarily disclosed to the public." Complaint ¶ 19; Thro Decl. ¶ 8 and Exh. 6. Certainly, this was an admission that the FRB was withholding documents responsive to GATA's FOIA request, which demanded records concerning "gold swaps."

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and by stabilizing the indebtedness through **gold swaps**, or by borrowing from the IMF." P. 5 (emphasis added). Moreover, it is not inconceivable that some of the referenced South African "gold swaps" occurred with the FRB, or that the FRB has records of what these gold swaps were. In either case, the documents should have been disclosed.
http://www.federalreserve.gov/pubs/ifdp/2005/839/ifdp839.htm

Because of FRB's refusal to provide GATA with a Vaughn Index prior to this litigation, it is not certain which specific withheld documents Governor Warsh was referring to in his letter.

D. GATA's Declarations Demonstrate that Gold Swaps Occur. The FRB's Vaughn Index indicates that America's central bank, *see* Fox News v. FRB, 601 F.3d at 159, the FRB, is oblivious to the fact that gold swaps have ever been entered into anywhere in world during the last two decades. This would seem, on its face, a highly dubious proposition, given the enormous professional staff at the FRB.[16] The FRB's own website reveals South Africa gold swap information. *See* p. 19 n.15, *supra*. As discussed below, the declarations of Chris Powell, Adrian Douglas, and James Turk, all knowledgeable about world gold markets, demonstrate that gold swaps are one of the mechanisms used by central banks to conceal interventions into gold markets to suppress the price of gold, and explain where the existence of gold swaps has come to public light and has been acknowledged by central bankers. International gold markets expert James Turk explains that "Gold swaps are generally entered into between central banks or government treasuries. 'Gold swaps' involve a swap, or exchange, of gold for either other gold or currency, with a promise to unwind the transaction at a later time." Turk Decl. ¶ 2. The Department of the Treasury's weekly statement of U.S. International Reserve Position includes a line for "gold (including gold deposits, and, if appropriate, gold swapped." Turk Decl. ¶ 5. The International Monetary Fund published a study in October 2001 explaining, *inter alia*, gold swaps. Turk Decl. ¶ 12. The Bank for International Settlements ("BIS") disclosed recently a

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[16] In 1993, FRB Chairman Greenspan reported to Congressman Henry Gonzales (D-TX) that the FRB employed 360 economists, 11 statisticians, 122 officers, for a total of 493 persons, plus a professional support staff of 237. *See* Robert D. Auerbach, Deception and Abuse at the Fed: Henry B. Gonzalez Battles Alan Greenspan's Bank, Univ. of Tx. Press (2008), pp. 141-42.

380-tonne gold swap with a commercial bank. Turk Decl. ¶ 6. The London Telegraph and Wall Street Journal, and Financial Times all reported on the BIS gold swap. Turk Decl. ¶ 10-11. Newspaper editor Chris Powell explained that at the January 1995 meeting of the FRB's Federal Open Market Committee, the general counsel of the U.S. Federal Reserve Board, J. Virgil Mattingly, explained that the consensus among White House/Treasury/Fed lawyers was that the "gold swaps" entered into by the U.S. Treasury Department's Exchange Stabilization Fund were lawful. Powell Decl. ¶ 6. In July 1998, then FRB Chairman **Alan Greenspan** told Congress "Central banks stand ready to **lease gold** in increasing quantities...." Powell Decl. ¶ 7. In 2003, the annual report of the Reserve Bank of Australia revealed: "Foreign currency reserve assets and gold are held primarily to support intervention in the foreign exchange market...." Powell Decl. ¶ 8. FRB Vice Chairman Kevin Warsh's denial of GATA's 2009 FOIA Appeal for "gold swap" records was denied because "[t]his includes **information relating to swap arrangements with foreign banks** on behalf of the Federal Reserve System and is **not the type of information that is customarily disclosed** to the public. This information was properly withheld from you." Powell Dec. ¶ 18. GATA Director Adrian Douglas explained how in recent Congressional Hearings FRB General Counsel Scott Alvarez has been willing to allow an audit of the physical verification of the nation's gold stocks, but not "any liens, claims or encumbrances against the asset." Douglas Decl. ¶ 16. Also, FRB General Counsel Scott Alvarez testified that "Federal Reserve transactions with foreign governments is disclosed in summary in our balance sheet but also the facilities, the specific swap facilities we have is listed in detail in the information we make available to the public." Douglas Decl. ¶ 17. Further, FRB General Counsel Scott Alvarez offered to provide Congress information about "transactions" where the Federal Reserve has

been involved in the gold market. Douglas Decl. ¶ 18. The pledge of the FRB General Counsel to Congress supports disclosure to GATA of gold swap records in this litigation.

E. FRB's Search Procedures Were Inadequate on Their Face. Defendant's explanation of the FRB search for records in response to GATA's FOIA requests is set forth in the Declaration of Alison M. Thro, Senior Legal Counsel in the FRB's Legal Division, submitted in support of defendant's motion for summary judgment. Ms. Thro admitted that the FRB has no central records repository, and that the response system she employs does not necessarily account for all responsive documents. *See* Thro Decl., 11. And she never listed all of the possible sources of responsive records within the FRB. She described the steps she took to retrieve responsive documents, but she fails to account for the following:

1. Ms. Thro does not account for the various divisions of the FRB or other federal reserve banks where responsive documents may be located.[17] For example, by letter dated May

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[17] The FRB apparently is attempting to sever itself, for FOIA purposes, from its subsidiaries. Despite listing the various steps taken to search for records, defendant does not set forth a comprehensive list of the possible sources of records. *See* Def. Mem. S.J., pp. 6-10. However, the FOMC and the other federal reserve distirct banks are part of the federal reserve system, and should be covered by GATA's FOIA requests. *See, e.g.*, the following extract from the FRB website concerning the structure of the federal reserve system (http://www.federalreserve.gov/pubs/frseries/frseri3.htm):

"**Federal Reserve Banks** operate under the general supervision of the **Board of Governors** in Washington. Each Bank has a nine-member Board of Directors that oversees its operations...

Federal Reserve Banks generate their own income, primarily from interest earned on government securities that are acquired in the course of Federal Reserve monetary policy actions. A secondary source of income is derived from the provision of priced services to depository institutions, as required by the Monetary Control Act of 1980...

Monetary Policy Role
The primary responsibility of the central bank is to influence the flow of money and credit in the nation's economy. The Federal Reserve Banks are involved in this function in several ways. First,

12, 2009, FRB informed GATA that it "was extending its period to respond to the FOIA Request until May 27, 2009 in order to consult with another agency or with two or more components of the Board having a substantial interest in the determination of the request." Thro Decl. ¶ 4, p. 5. But there is no further information about what agency or components were consulted or may have been asked to provide information responsive to GATA's FOIA request.

2. Ms. Thro describes only in a cursory manner whatever search was conducted by FRBNY where apparently no electronic search was performed and certain staff members conducted a manual search of their files. Thro Decl. ¶ 16.

3. There was no search of the other "federal district banks" for responsive records, but there should have been. *See* Fox News v. FRB, 601 F.3d 158, 162 (2d Cir. 2010).

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five of the twelve presidents of the Federal Reserve Banks serve, along with the seven members of the Board of Governors, as members of the **Federal Open Market Committee** (FOMC). The president of the Federal Reserve Bank of New York serves on a continuous basis; the other presidents serve one-year terms on a rotating basis. The FOMC meets periodically in Washington, D.C., and determines policy with respect to purchases and sales of government securities in the open market, actions that in turn affect the availability of money and credit in the economy.

Second, the boards of directors of the Federal Reserve Banks initiate changes in the discount rate, the rate of interest on loans made by Reserve Banks to depository institutions at the "discount window." Discount-rate changes must be approved by the Board of Governors....

Each Federal Reserve Bank has a research staff to gather and analyze a wide range of economic data and to interpret conditions and developments in the economy. This research assists the FOMC in the formulation and implementation of monetary policy. It also contributes to informed decision making by the Federal Reserve Banks in bank supervisory matters and other areas....

The Federal Reserve System, through the Reserve Banks, performs various services for the U.S. Treasury and other government, quasi-government, and international agencies...."

IV. THE DELIBERATIVE PROCESS EXEMPTION — FOIA EXEMPTION 5 — DOES NOT APPLY AS CLAIMED BY DEFENDANT.

Defendant maintains that every single one of the withheld records responsive to GATA's request need not be disclosed because they are deliberative and pre-decisional inter-agency memoranda or other such communications, and that withholding them from the public is countenanced by FOIA exemption (b)(5), 5 U.S.C. §552(b)(5) ("Exemption 5"). GATA submits that Exemption 5 does not apply to certain of the documents, and other documents do not meet the judicially-devised test for exemption.[18]

The Supreme Court has construed Exemption 5 to "exempt those documents, and only those documents, that are normally privileged in the civil discovery context." National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). Accordingly, while the exemption has been held to encompass the attorney work-product, attorney-client, and deliberative process privileges, *see, e.g., id.*, and Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980), defendant must prove two distinct elements with respect to each such record for which Exemption 5 is claimed. As the Supreme Court has put it, "to qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." Department of the Interior v. Klamath Water Users Protective Association, 532 U.S. 1, 8 (2001).

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[18] As indicated below, for example, GATA presumably would have no need to see drafts of a "draft" letter or memo if the letter or memo, as finalized, were produced in Vaughn Index Items 7 and 11. *See* pp. 32, 34, *infra.*

The FRB claims that the documents it seeks to withhold from disclosure are protected by the deliberative process privilege.[19] But the deliberative process privilege shields from mandatory disclosure only communications that are both (i) "predecisional," *i.e.*, that were made during agency consideration of a proposed action, and (ii) "deliberative," in that they "make recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). *See also* Coastal States Corp. v. DOE, 617 F.2d at 867-70. As discussed below, several of the documents for which defendant claims Exemption 5 do not appear to be related to any predecisional, policy matters.[20] The privilege — properly asserted — serves to insure open, uninhibited, and robust debate of various options by eliminating the fear of disclosure of preliminary viewpoints. *See* Coastal States, 617 F.2d at 866. Thus, by shielding predecisional deliberations from public scrutiny, the quality of final governmental decisions presumably would be enhanced. *See* NLRB v. Sears, 421 U.S. at 149-51. However, absent a showing that the withheld documents are both predecisional and deliberative, they should be disclosed. Plaintiff submits that defendant has failed to demonstrate that certain of the documents it seeks to withhold are either predecisional or deliberative.

As discussed below, certain of the documents withheld by FRB do not appear to be predecisional, as there is no description of the decision they preceded or to which they were related. Similarly, it is not clear that certain of the documents contain deliberative information.

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[19] Defendant also claims that the attorney-client privilege applies to two of the documents in the Vaughn Index, Items 11 and 12. *See* Thro Decl. ¶¶ 26-27.

[20] *See, e.g.*, Thro Decl. Exh. 8; Vaughn Index Items 3-4 (finalized version of 2/23/93 memo discussing the drop in gold prices); Item 8 (9-page updated memo discussing issues related to swap arrangements); Item 10 (10-page "notes" of committee meeting); Item 12 (5-page memo containing legal analysis of federal laws).

In addition, Exemption 5 does not always allow for entire documents to be withheld, and factual information that is not deliberative in nature must be disclosed. *See* 5 U.S.C. § 552(b). Although it can be difficult, if not impossible, for a FOIA requester to prove that an undisclosed document contains factual information that should have been disclosed, the breadth of certain redactions in the withheld FRB documents would point to such a conclusion.[21]

To be deliberative and pre-decisional, a document must be related to a policy decision. *See* Coastal States, 617 F.2d at 866; Jordan v. U.S. Dept. of Justice, 591 F.2d 753, 772-74 (D.C. Cir. 1978). And even pre-decisional recommendations, which would otherwise be exempt, lose the protection of the privilege if an agency, in making a final decision, chooses expressly to adopt them or incorporate them by reference. Indeed, Exemption 5 does not apply in the case of "final opinions" which explain agency action already taken or an agency decision already made. *See* Sears, 421 U.S. at 153-54. Nor does the exemption protect a document which is merely peripheral to actual policy formation, and does not "bear on the formulation or exercise of policy-oriented judgment." Ethyl Corp., 25 F.3d at 1248. Asserting this exemption may require a recitation of the relevant facts concerning "the identity and position of the author and any recipients of the document, along with the place of those persons within the decisional hierarchy." *Id*. *See also* Access Reports v. Dep't of Justice, 926 F.2d 1192, 1195 (D.C.Cir. 1991). Where defendant claims a document is deliberative and predecisional, but does not identify the finalized document — or cannot even say that a document was finalized (*e.g.*, Vaughn Index Item 20), GATA submits that the document must be disclosed.

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[21] *See, e.g.*, Vaughn Index Items Nos. 3, 4, and 5 (unknown portions of transmittal memos redacted; virtually all of 9-page analysis redacted).

In this case, the FRB has argued that Exemption 5 bars disclosure of every document withheld because "disclosure of communications such as this would have a chilling effect on intra-agency communications," *see* Def. MSJ, Exhibit 8, Column 2, Documents 1-4, or because "disclosure of communications such as this would have a chilling effect on communications by government employees," *see* Def. MSJ, Exhibit 8, Column 2, Documents 14-20, or words to similar effect. *See also* Thro Decl., ¶¶ 21, 23-30. Defendant's argument is unpersuasive, and it is demonstrably faulty, at least with respect to certain of the documents identified by the FRB, for the reasons set out below:

A. Defendant Has Not Demonstrated That Each of the Withheld Records Is Predecisional and Deliberative

GATA's 2009 FOIA request asked for records during the period January 1, 1990 to April 14, 2009, including the documents that had been withheld by the FRB in response to GATA's similar 2007 FOIA request. As stated above (p. 6, *supra*), in responding to GATA's 2009 FOIA request, the FRB identified no responsive documents, except for (i) documents that had been withheld in response to GATA's 2007 FOIA request, plus (ii) two additional documents retrieved from the FOMC that — without good reason[22] — had not been retrieved in response to GATA's 2007 FOIA request. Later, during the pendency of this litigation, FRB released certain portions of some of the documents that had been withheld, although they were heavily redacted. *See* p. 8, *supra*, Olson Decl. ¶ 9. Defendant now claims that all of the withheld documents and portions of

[22] Defendant claims that the FOMC was contacted in 2009 "in order to ensure that the Board searched all areas" likely to have responsive records (*see* Thro Decl. ¶ 17, Def. MSJ p. 9), but FOMC was also apparently contacted regarding GATA's 2007 FOIA request and it is difficult to imagine when, and for what reasons, FOMC would not be contacted regarding a FOIA request. Furthermore, the FOMC documents were redacted without any explanation to GATA.

documents have been properly withheld under FOIA Exemption 5, since each document reflects the FRB's deliberative process, as "pre-decisional, deliberative communications." *See* Thro Decl., Exh. 8, column 2. In order to support such a position, however, defendant must demonstrate the decision to which the communication relates. Defendant claims that the documents reflect the FRB's formative group thinking in the process of working out its policy and decisions, but in virtually all cases there is no evidence about what the claimed policy and decisions are, or when they were made or finalized, and how, if at all, they are different from the policy and decisions apparently discussed in the withheld documents.

In general, the courts have determined that a document is "deliberative" when it is related in fact to the process by which the particular policy was formulated. *See, e.g.*, Coastal States, 617 F.2d at 866-67; Jordan v. United States Dep't of Justice, 591 F.2d at 774. Relevant factors are whether the document formed a critical or essential link in a specified consultative process, reflects the personal opinions of the writer rather than the policy of the agency, and, if released, would inaccurately reflect or prematurely disclose the views of the agency. Designed to prevent disclosure of documents which would be harmful to the consultative functions of government, it was not intended to prevent disclosure of intra-agency memoranda routinely disclosable in private litigation, nor does it prevent disclosure of documents regarding a decision already reached. *See* NLRB v. Sears, 421 U.S. at 148-152. However, if the document reflects the decision or policy that was adopted, there is no basis for withholding it under Exemption 5. *Id.*, 421 U.S. at 155.

Even if a record is partially exempt under the deliberative process exception, moreover, that exemption does not reach "purely factual" material. EPA v. Mink, 410 U.S. at 87-88

("memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery"). *See also* 5 U.S.C. § 552(b).

With these principles in mind, defendant's claim of pre-decisional, deliberative communications should be examined. Since the documents have not been produced, of course, they must be examined in light of the descriptions and representations concerning the documents set forth in defendant's Vaughn Index. *See* Thro Decl., Exh. 8.

1. **Vaughn Index Items 1-6 (46 pages).** Each of the documents apparently — FRB is not certain about the memo discussed in Item 1 — concerns a 1993 memorandum, entitled "The Drop in the Gold Price Resulting from a Sale of All Official Gold." **Item 1** is an e-mail chain "commenting on and asking questions about" a 1993 memo, said to be concerning a staff memorandum entitled "Gold Price Memo," and responding to such questions. Although FRB claims that the document reflects "pre-decisional, deliberative comments" about a memo to be sent to the FRB, there is no indication that the memo was changed in any way or actually delivered to the FRB, or that any decision or deliberation was involved at all. The memo itself was not produced by the FRB, although the FRB has provided no sufficient explanation as to why not. It is not even clear why the memo is considered a draft, although the redactions to Document 1 could shed light on this. According to the Vaughn Index (item 2, p.1), the memo in **Item 2** "appears to be a later draft of the memorandum identified in the emails identified as item 1, above." Since the memo in Item 2 is represented to be an earlier draft of the memo identified in Item 3, GATA would accept the memo identified in Item 3.

With respect to the memo in **Item 3**, however, entitled "The Drop in Gold Price Resulting from a Sale of All Official Gold," the FRB says that the document is exempt from disclosure because it "provides staff's views on the effects of a hypothetical sale of gold," and that the one-page transmittal memo accompanying it is exempt from disclosure because it "summarizes an issue that may be the subject of further staff study...." These are not valid Exemption 5 defenses. The February 22, 1993 memo, as far as can be determined, is a final product, and is not part of any pre-decisional process. (Indeed, see Item 4, where the same memo is transmitted three years later.) Nor are there any apparent policy deliberations or concerns evident in the defendant's submission. And any "pre-decisional" concerns regarding the one-page transmittal memo are similarly absent. There is no indication in the Vaughn Index that these items are part and parcel of any pre-decisional, deliberative process. The fact that staff wrote them is not a defense to production, unless the documents are deliberative, pre-decisional items with respect to the formulation of policy. *See*, *e.g.*, Coastal States Gas Corp. v. DOE, 617 F.2d at 867; Mead Data Center v. U.S. Dept. of the Air Force, 566 F.2d 242, 257 (D.C. Cir. 1977).

Item 4 is identified as a January 2, 1996 four-page memo and is said to be redacted because it "provides updated analysis and discussion of the subjects covered in [the 1993 memo in Item 3]" and it transmits a copy of that February 22, 1993 memo, proving that the 1993 memo was not pre-decisional. As to the Vaughn Index's claim (Items 3 and 4) that factual material contained in the 1993 memo has been provided to some reasonable extent, it is difficult for GATA to evaluate that claim. However, the factual information provided would not indicate

eligibility for exemption.[23] **Item 5** is a January 24, 1996 cover memo of one page, attaching two documents (the same two as Item 4), and **Item 6** is a copy of the first page of Item 5. There is no basis for the application of Exemption 5; the withheld documents are not said to contain any pre-decisional, deliberative materials, but only "materials...regarding issues of interest to the Board or decisions to be made by the Board," as wells "comments" regarding a Treasury request and Mr. Truman's "candid assessment of the basis of a Treasury decision." Exemption 5 simply does not apply to such matters.

2. **Vaughn Index Items 7-8 (24 pages)**. **Item 7** consists of (i) a 9-page memo to the FRB Chairman from the FRB staff, and (ii) a 2-page transmittal memo, each of which is entitled "Issues Related to Review of System's Swap Arrangements" and dated December 27, 1995. **Item 8** is the same 9-page memo, updated to March 14, 1996, together with a 1-page transmittal memo from the FOMC secretariat to the FOMC. The FRB claims that all of the documents are privileged under Exemptions 4 and 5.[24] It is not clear how the 9-page memo, which is said to discuss currency swap arrangements with foreign banks, would be protected by Exemption 5. There is no pre-decisional, deliberative matters referred to, and Exemption 5 would appear not to apply. Obviously, if the memo in Item 7 is a draft of the memo in Item 8, only the finalized version may need to be produced. However, despite the FRB claim that the memo in Item 7 has been "updated" to the memo in Item 8 (*see* Thro Decl., Exh. 8, p. 6), it is not clear from the FRB submission that the "earlier" memo is a draft. Each memo may have been a final product. As to

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[23] According to the Vaughn Index, the 4-page memo in Item 4 does not appear to be predecisional or deliberative, and the memo it attaches appears to be a final version.

[24] The FRB claim related to Exemption 4 is discussed at pages 38-44, *infra*.

the transmittal memos, the FRB claims that each contains staff analysis, but there is no showing that any such analysis is pre-decisional or deliberative, or that any policy decision concerning these matters was subsequently discussed or reached, or, if reached, was not identical to any staff proposals. It is submitted that Exemption 5 would therefore not apply.

3. **Vaughn Index Item 9 (16 pages)**. A 2-page memo of March 7, 1997, transmitting a "briefing draft" of 14 pages (including 8 pages of charts and graphs, which have been withheld without any purported justification) is said to be exempt because it provides "policy analysis to government decisionmakers." But that is no ground for exemption. The documents are not said to be pre-decisional, and there is no reference to any later decision (which may have been in accord with the draft's recommendations, in which case no exemption would obtain). On their face, it is submitted, the documents are not exempt as claimed by FRB.

4. **Vaughn Index Item 10 (7 pages)**. Similarly, Exemption 5 does not apply to the 1-page memo of April 29, 1997 — which "discusses the circumstances reflected in" the attached 6-page document entitled "Gold and Foreign Exchange Committee Discussion on Gold Market" — as claimed by defendant. The 6-page document — even if not a "verbatim recounting" of the discussion reported on — are simply notes of that discussion, and the transmittal memo is not exempt simply because it "discusses the circumstances" of the discussion reflected in the attachment, or is said to be "analytical." Government communications are not exempt under Exemption 5 simply because they are inter-governmental. They must be deliberative, pre-decisional documents. These clearly are not.

5. **Vaughn Index Item 11 (17 pages).** Again, FRB's claim of exemption under Exemption 5 appears to be off the mark. This 4-page memo of June 9, 1997 transmitting (i) a 9-

page document discussing gold custody services offered by FRBNY, (ii) a 2-page letter from a foreign bank to FRBNY, and (iii) a 2-page staff comment are withheld under the rubric of pre-decisional, deliberative communications. But only the 2-page staff comment could possibly be so classified, and even that document should be produced in light of FRB's failure to disclosure subsequent documents shedding light on what decision was actually made. The Index says nothing about the transmittal memo that would accord the privilege to that document, and certainly the 9-page "discussion" (perhaps "explanation" would be more apt) document would not qualify. Assuming relevant information were provided, the 2-page staff comment could possibly qualify for exemption, but not if the staff comments were in line with the decision actually made. In the absence of such information, all of the documents should be disclosed. *See* NLRB v. Sears, 421 U.S. at 148-55.[25] And defendant's half-hearted attempt to apply Exemption 5 because of the attorney-client privilege surely must fail. *See, e.g.*, Coastal States Gas Corp., 617 F.2d at 854, Mead Data Centers, 566 F.2d at 253.

6. **Vaughn Index Item 12 (5 pages).** This 5-page memo from one FRB attorney to another, concerning "Ability of federal reserve banks to engage in Gold Transactions," is said be pre-decisional, deliberative, and subject to the attorney-client privilege. Again, however, defendant has failed to produce any evidence, or even assertions, about the actual policy that supposedly was discussed, or whether it was in fact adopted — whether in accord with or contrary to the analysis in the memo. The fact that the analysis may have been composed by an attorney, it is submitted, does not help FRB's cause. For example, no information has been

[25] Defendant claims that Item 11 also is privileged under Exemption 4, but it is not. *See* pages 42-45, *infra*.

provided that would indicate such information was confidential. *E.g.*, Coastal States Gas Corp., 617 F.2d at 854.

7. **Vaughn Index Item 13 (2 pages)**. This 2-page assemblage of e-mail traffic, dated May 9-10, 2001, has to do with allegations that the FRB is manipulating the gold market, including the FRB's involvement in gold swaps, and is said to be privileged because it concerns internal communications about how to respond to such allegations. Again, the word "pre-decisional" is used by the FRB, but there is no reference to any subsequent policy or decision that was adopted or rejected. Clearly, Exemption 5 would not apply here, at least on the merely conclusory showing made by the FRB. For example, if the FRB later made a decision concerning how to respond to such allegations (*see* Item 14, below) consistent with the staff recommendations, the documents should be produced. *See* NLRB v. Sears, 421 U.S. at 150-55.

8. **Vaughn Index Item 14 (1 page)**. This 1-page internal communication, dated May 10, 2001, is said to contain advice on how to respond to a letter alleging that FRB is manipulating the gold market. This would not appear to be pre-decisional, but rather reflective of a decision or policy already made, and, if so, Exemption 5 clearly would not apply.

9. **Vaughn Index Item 15 (3 pages)**. This 2-page internal communication, dated May 10, 2001, accompanied by one page of unsigned handwritten notes, supposedly by an attorney, is said to "discuss[] issues that would arise in the case of a potential repo or swap transaction involving Treasury gold." It is allegedly pre-decisional and deliberative, but the FRB has identified no related policy or decision related thereto. And no attorney-client privilege is ever claimed. Exemption 5, therefore, should not apply.

10. **Vaughn Index Items 16-17 (4 pages).** These September 21, 2002 documents, a 1-page draft letter responding to U.S. Senator Judd Gregg (R-NH) concerning U.S. gold reserves, and an August 21, 2002 email exchange between FRB staff and FRBNY staff concerning such responses, are said to be privileged despite the fact that the FRB cannot determine whether the letter as drafted was actually sent. Under these circumstances, it should be presumed that the final letter corresponded to the draft, and the document should be disclosed. The FRB claim of any chilling effect resulting from disclosure, it is submitted, is stretched beyond reason. In any event, in the absence of an adequate showing about the letter actually sent to Sen. Gregg, Exemption 5 should not apply.

11. **Vaughn Index Items 18-19 (4 pages).** Technically, Exemption 5 could be said to apply to these June 2002 draft responses to U.S. Congressman Ron Paul (R-TX), regarding his inquiry as to why members of the IMF are forbidden to link the value of their currencies to gold, in light of the FRB's representation that the redacted portions of the letter that was finalized and sent to Rep. Paul "differ significantly." It is unknown, of course, what the FRB means by the phrase "differ significantly," or why the finalized letter to Rep. Paul was not produced.

12. **Vaughn Index Item 20 (2 pages).** This 2-page draft letter to U.S. Senator Byron Dorgan (D-ND) dated July 5, 2002, regarding the dismissal of a lawsuit is not privileged under Exemption 5 for the same reasons discussed above with respect to Items 16-17. Where the FRB cannot even determine the existence/language of the letter actually sent, if any, it should be presumed that the final letter corresponded to the draft, and the document should be disclosed. The FRB claim of any chilling effect resulting from disclosure, it is submitted, is stretched beyond reason.

B. Even if Pre-Decisional and Deliberative, Release of at least Certain of the Documents is in the Public Interest and Should be Ordered.

In addition to the three documents claimed to be properly withheld from disclosure under FOIA Exemption 4, discussed below, all of the documents and portions of documents in issue in this litigation are being withheld under FOIA Exemption 5 — and without any apparent good reason. The fact that this material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The FRB regulations implementing the FOIA provide that, "Except where disclosure is expressly prohibited by statute, regulation, or order, the Board may release records that are exempt from mandatory disclosure whenever the Board [or other designated person] acting pursuant to this part or 12 CFR part 265, determines that such disclosure would be in the public interest." 12 C.F.R. § 261.14(c). GATA expressly invoked this regulation in its FOIA appeal, and the FRB expressly denied such relief. *See* Complaint, Exhibits C and D. Nevertheless, months after the filing of GATA's Complaint herein, and just prior to the filing of defendant's motion for summary judgment, the FRB released certain portions of the withheld records, although most of those items were heavily redacted. *See* Olson Decl. ¶ 9. GATA submits that much more should have been disclosed — and much sooner.

Unlike certain legal proscriptions against the release of certain information — such as classified information — there is no legal impediment to discretionary release of information which technically could be withheld under FOIA Exemption 5. In the case of FOIA Exemption 5, the entire matter should be determined by weighing the public interest in obtaining the information against any likely detriment in light of the information being released. In this case, any such detriment is hard to imagine based upon what FRB has argued thus far. Moreover, FRB

would have no legitimate concern that, in exercising its administrative discretion with respect to particular information, it would be impairing its ability to invoke applicable FOIA exemptions for any arguably similar information in the future. *See, e.g.*, Dept. of the Air Force v. Rose, 425 U.S. 352 (1976); Mobil Oil Corp. v. EPA, 879 F.2d 698 (9th Cir. 1989). *See also* Mehl v. EPA, 797 F. Supp. 43, 47 (D.D.C. 1992).[26]

V. DEFENDANT HAS FAILED TO DEMONSTRATE THAT THE DOCUMENTS WITHHELD BY REASON OF FOIA EXEMPTION 4 ARE PROTECTED FROM DISCLOSURE.

Defendant argues that three documents the FRB seeks to withhold from disclosure — which it claims are relevant to "currency swaps," but not "gold swaps" — are exempt from disclosure under FOIA **Exemption 4** (5 U.S.C. § 552(b)(4)), as well as Exemption 5. *See* Def. MSJ, pp. 21-29; Thro Decl. Exh. 8, pp. 5-6, 8 (Items 7, 8, and 11). As indicated above, most of the documents are not exempt from disclosure under Exemption 5, and GATA submits that Exemption 4 offers no protection either.

Under Exemption 4, the documents in question are designated in the Vaughn Index as:

- **Item 7** (a December 27, 1995 transmittal memorandum attaching a 9-page memorandum to the FRB chairman from FRB staff concerning currency swap arrangements);
- **Item 8** (an updated version of that same December 27, 1995 memorandum with a one-page transmittal), and
- **Item 11**, consisting of 17 pages, including:

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[26] Although FRB appears to be ignoring the "new transparency" directive of President Obama, it is not the only federal agency so acting. *See, e.g.*, "Agencies less open than Obama promised," Sharon Thiemer (AP) (Mar. 17, 2010) (http://www.philly.com/inquirer/world_us/88050832.html) (archived by Google).

> (i) a 4-page memo to the FRB regarding a request by the FRBNY to open a **Special Purpose Gold Custody account** to facilitate a swap arrangement between a foreign central bank and a U.S. bank, as well as
> (ii) a 9-page document discussing **gold custody services** offered by the FRBNY and proposing changes that would allow **swaps**, and
> (iii) a 2-page staff comment about the proposed arrangement.

Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." Defendant makes no claim that any trade secret is involved, so it is necessary to consider whether disclosure would reveal exempt "commercial or financial information" under the test adopted by the D.C. Circuit in National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), and refined in National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976), and Gulf & Western Industries v. United States, 615 F.2d 527 (D.C. Cir. 1979). The issue is purely one concerning commercial/financial information that the FRB maintains is confidential. Such information falls within the commercial/financial prong of Exemption 4 only if the government is able to demonstrate that it is (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. *See* Public Citizen Health Research Group v. Food and Drug Administration, 704 F.2d 1280, 1290-91 (D.C. Cir. 1983); National Parks v. Morton, 498 F.2d at 766.

Vaughn Index Items 7, 8, and 11 are among the documents withheld from GATA until the filing of this litigation, and ultimately provided "in part" in June 2010, just prior to the filing of defendant's motion for summary judgment. *See* Olson Decl. p. 2, n.1. All three items are said to have been "**redacted**." *See* Thro Decl., Exh. 8, pp. 5-6 (emphasis added). This is a bit of an understatement, as there are **virtually no words on most pages**, except for a statement of the

FOIA exemption claimed.[27] All three documents are said to relate to **currency swap** arrangements of the United States, and not to relate to **gold swap** arrangements, although it is not clear whether any of the documents makes mention of gold swap arrangements. *See* Thro Decl., Exh. 8.

For the records to be exempt, that statute provides that defendant has the burden of demonstrating that the responsive records contain (i) information that was obtained from a person, (ii) which information is commercial or financial, and (iii) which information is privileged or confidential. *Id. See* 5 U.S.C. § 552(b)(4). GATA submits that the defendant has not made such a showing in this case.

(i) **Obtained from a person**. The first requirement precludes Exemption 4 protection for any information generated by the federal government. The Vaughn Index reveals that Items 7, 8, and 11 were not provided by a "person," but were created by FRB or the FRBNY. *See* Exhibit 8 to Def. MSJ, pp. 5-6 (Vaughn Index Items 7, 8 and 11). *See, e.g.*, Bloomberg, L.P. v. Board of Governors of the Federal Reserve, 601 F.3d 143, 148-49 (2d Cir. 2010); Buffalo Evening News, Inc. v. SBA, 666 F. Supp. 467, 469 (W.D.N.Y. 1987). FRB claims that such documents include or relate information provided by foreign central banks ("FCBs"), but this does not change the fact that the records in question appear to have been created by FRB and/or the FRBNY. To the extent that the records contain and disclose information provided by FCBs, it could possibly be

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[27] Item 7 also contains an opening paragraph and an exhibit indicating extant "swap arrangements" as of December 29, 1995; Item 8, dated March 15, 1996, contains a transmittal memo and the same exhibit as revealed in Item 7; and Item 11 contains one sentence and a footnote from a June 9, 1997 transmittal memo. The redactions on these documents would appear to be in the 99 percent range. As indicated above (pp. 32-33), all three documents are said to be pre-decisional, but it is not apparent to what, and Exemption 5 clearly should not apply.

considered information obtained from a "person"; however, in such circumstances, a substantial portion of the records obviously could be provided. FRB here has provided virtually none of the information in question. *See* Olson Decl. ¶ 9.

(ii) **Commercial or financial information.** It is unclear why the FRB, as a government agency, would be engaged with FCBs in commercial transactions involving gold which are not disclosed to the public. Much — but presumably not all — of the information disclosed in Items 7, 8, and 11 may appear to be commercial in nature, since the general subject matter appears to be arrangements between FRB or FRBNY and FCBs. Even if the term "commercial or financial" is given broad meaning, a showing that these documents fall in that category is still required for Exemption 4 protection. *See, e.g.*, National Parks v. Kleppe, 547 F.2d at 684-85. Here, defendant has attempted to group all of the record information under one category — commercial — but it seems clear that there are other interests at stake. For example, some of the information was provided by FRBNY to comply with Regulation N, indicating important regulatory interests.[28] Even if the documents were deemed to be commercial information for purposes of Exemption 4, they do not appear to meet the test of confidentiality required in order to be considered privileged from disclosure under FOIA Exemption 4.

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[28] Regulation N provides in pertinent part, for example (12 C.F.R. § 214.2), that "each Federal Reserve Bank shall promptly submit to the Board of Governors of the Federal Reserve System in writing full information concerning all existing relationships and transactions of any kind heretofore entered into by such Federal Reserve Bank with any foreign bank or..." so that FRB "may perform its statutory duty of exercising special supervision over all relationships and transactions of any kind entered into by any Federal Reserve Bank with any foreign bank or banker or with any group of foreign banks or bankers ...." *See also* 12 CFR § 214.4(a) (FRB permission required to open accounts with FCBs).

(iii) **Privileged or confidential**. As discussed above, assuming this Court were to determine that the documents in question were considered to have been provided by a "person," and even if the information were considered to be commercial in nature for purposes of Exemption 4, such information would not be protected from disclosure under Exemption 4 unless it were deemed privileged or confidential. PCHRG, 704 F.2d at 1290-91. The first inquiry under this standard is whether the information was voluntarily submitted to the government. *See* Nat'l. Assoc. of Home Builders v. Norton, 309 F.3d 26, 28-29 (2002). GATA submits that it was not. None of these documents appears to be confidential in any privileged sense of that word. For example, Item 11 is a 9-page document discussing gold custody services offered by the FRBNY which should not be considered confidential for purposes of Exemption 4. As far as can be determined from defendant's submissions, these documents concern a 1995 request to open an account that would appear to allow for gold swaps, and the FRB documents simply discuss the FRB and/or FRBNY arrangements — existing and proposed — with respect to such accounts. Apparently, the documents do not contain any information about whether the proposed arrangement was approved.[29] Even if the foreign bank's identity were considered confidential, it could be redacted. Nothing in the defendant's submission would appear to justify a "confidential" designation for Item 11.

It is important to focus, of course, upon precisely what information is being discussed. To the extent that the information in question is not commercial information provided by a "person," but rather regulatory information compiled by FRB, FRB has failed the Exemption 4

[29] Indeed, it is difficult to understand why other, later documents concerning this proposed gold custody account arrangement were not found and disclosed.

test. However, if the information is "commercial" and was provided by a "person," the focus becomes whether the material was submitted "voluntarily." *See* Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992). FRB argues that the records in question — or at least certain information reflected in those records — were submitted voluntarily. But that argument is based upon the simple fact that the FCBs were not required to enter into certain transactions needing FRB approval. *See* Def. Mem. S.J., pp. 26-27; Dzina Decl. ¶ 12; Fogarty Decl. ¶ 11. Surely it does not apply here, where, if the FCBs elected to enter into such transactions, the parties were required to provide the information to FRB. *See* 12 C.F.R. §§ 214.2; 214.4(a).[30] In other words, FRB cannot credibly argue that the information in question — which FCBs (and/or the federal reserve bank they were transacting with) were obliged to reveal to the FRB under Regulation N — would be considered voluntarily submitted for purposes of withholding from disclosure under FOIA. Indeed, although the decision of a FCB to enter into a swap agreement might be considered voluntary, the submission of information required by the FRB in order for such an arrangement to become legally possible certainly cannot be considered voluntary.[31]

FRB invests a good part of its brief in trying to convince this Court that the FCB information was provided voluntarily, but then, in recognition of the language of Regulation N, argues that it does not matter, and that even if the information was required to be furnished (per

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[30] 12 C.F.R. section 214.4(a) provides: "(a) No Federal Reserve Bank shall enter into any agreement, contract, or understanding with any foreign bank or banker or with any group of foreign banks or bankers or with any foreign State without first obtaining the permission of the Board of Governors of the Federal Reserve System."

[31] Defendant's argument that revelation of certain of the information would result in a drop-off of "program effectiveness" (Dzina Decl. ¶ 12; Fogarty Dec. ¶ 15-16) is speculative and should be rejected. *See* Bloomberg, L.P. v. Board of Governors, 649 F. Supp. 262, 278-79 (S.D.N.Y 2009), *aff'd*, 601 F.3d 143 (2d Cir. 2010).

Regulation N), Exemption 4 still should apply, on the theory that, otherwise, the effectiveness of a government program would be impaired. *See* Def. Mem. S.J., p. 29 n.8. GATA submits that there has been no convincing showing that any government program would be impaired by disclosure of the information FRB seeks to withhold. The Dzina and Fogarty declarations merely recite the unsurprising surmise that — despite the fact that account information is indeed sometimes disclosed to the public — arbitrary disclosure of certain matters without a FCB's consent could have a negative effect on relationships with FCBs. However, FRB has made no showing to GATA or to this Court what information would be disclosed and why reasonable portions of the documents could not be segregated and withheld while other portions could be disclosed. In fact, virtually no portions of these documents have been disclosed. Defendant's declarations and legal brief speak in generalities, leaving an "all-or-nothing" impression that appears unreasonable in light of the information that is known. A closer look, however, would seem to leave room for some disclosure. Mr. Fogarty, for example, says that "portions of Document 11 identify particular FCBs and the details of transactions or account arrangements...." Fogarty Decl. ¶ 4, p. 2. Mr. Dzina offers similar language with respect to Items 7 and 8. *See* Dzina Decl. ¶ 4, pp. 2-3. The Vaughn Index, however, indicates a "paper ... that examines some of the issues involved in a thorough review of the existing Federal Reserve swap arrangements." Thro Decl., Exh. 8, Item 7. There follow a number of pages with nothing at all disclosed, and an exhibit, at the end, that details the FCB names and agreed amounts of existing swap agreements. *Id.* GATA submits that the defendant's documents do not adequately explain what it is that FRB does not want to disclose, nor why certain significant portions of Items 7, 8, and 11 could not be disclosed even if particular FCB arrangements are kept secret. It would appear, however, that

FRB's arguments are similar to those recently rejected by the Second Circuit, and they should be rejected here as well. *See* Bloomberg, L.P. v. Board of Governors of the Federal Reserve System, 601 F.3d at 149-51.

CONCLUSION

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

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOLD ANTI-TRUST ACTION COMMITTEE, INC.,	)	
Plaintiff,	)	
	)	Civil Action No. 09-2436 (ESH)
v.	)	
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,	)	
Defendant.	)	

PLAINTIFF'S STATEMENT OF MATERIAL FACTS
AS TO WHICH A GENUINE ISSUE EXISTS
IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Gold Anti-Trust Action Committee ("GATA"), pursuant to Local Civil Rule 7(h)(1), submits the following statement of material facts as to which plaintiff submits a genuine issue exists, in opposition to defendant's motion for summary judgment herein. Plaintiff believes that the factual matters set forth are in dispute and that, absent discovery and/or a further showing by defendant on such matters, such disputes preclude entry of summary judgment in favor of either party herein. The disputed facts are as follows:

1. The Federal Reserve Board ("FRB"), in conducting its search in response to GATA's FOIA request of April 14, 2009, did not seek records from all sources likely to have records responsive to GATA's request. *See* Complaint ¶ 20. This allegation of fact is supported by paragraph 7 of the Declaration of William J. Olson ("Olson Decl.") submitted by GATA, and is at odds with the Memorandum in Support of Defendant's Motion for Summary

Judgment ("Def. Mem. S.J.") and the Declaration of FRB legal counsel Alison M. Thro ("Thro Decl.").

Explanation of the Dispute: Defendant has alleged (Def. Mem. S.J. pp.6-11; Thro Decl. ¶¶ 10-18) that FRB's search was complete, or at least reasonably calculated to produce all responsive documents. GATA contends that it was not, and asserts that there are certain other possible sources of responsive information. *See* GATA Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment ("GATA Mem. Opp."), pp. 13-24. *See* Olson Decl. ¶ 7. GATA has submitted the declaration of its counsel, William J. Olson, pursuant to Rule 56(f), F.R. Civ. P., indicating the need for discovery on this point. The essence of the disputed factual matter is as follows:

Ms. Thro nowhere describes comprehensively the FRB system of records, including agency divisions as well as record-keeping systems, from which records could have been sought. Rather, for the most part, Ms. Thro describes only the entities and/or records systems from which she — or her staff — sought records. *See* Thro Decl. ¶¶ 10-18.

According to her declaration, Ms. Thro or others sought records from the following four sources:

- Legal Division FOIA staff members at FRB re GATA's 2007 FOIA request (Thro Decl. ¶ 12);
- Office of the Secretary (OSEC) at FRB to search electronic database ("FIRMA") and records in FRB's FOI Office (Thro Decl. ¶¶ 13-15)[1];

[1] Ms. Thro indicated that certain FIRMA files were not searched, based upon her belief that such files were not "reasonably likely to include information related to gold

- "Subject matter experts" in the FRB Legal Division and at the Federal Reserve Bank of New York ("FRBNY"), who are said to have conducted a "manual search of their files" (Thro Decl. ¶ 16.); and
- Staff in the Secretariat of the Federal Open Market Committee ("FOMC"), which are said to have "conducted a computerized search of both the Secretariat's internal document library, the Board's public website, and the FOMC's FOIA log (Thro Decl. ¶ 17).[2]

GATA submits that the above sources do not fairly represent "every record system within the Board that was reasonably likely to produce responsive documents" as alleged by FRB (Thro Decl. ¶ 18). One obvious missing item is the electronic file database at the FRBNY. Another is a search of all data at the other federal reserve banks.[3] Indeed, GATA contests the

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swaps…" (Thro Decl. ¶ 15, p. 8), but the basis for her conclusory exclusion of this category of records was not revealed.

[2] Interestingly, one of the items of complaint in GATA's letter of August 20, 2009, appealing FRB's partial denial of GATA's FOIA request was an item — not produced by FRB, and retrieved by GATA from the electronic website — expressly discussing "gold swaps." FRB's appeal denial letter of September 17, 2009 dismissed that GATA objection on the unsupported theory that FRB had no obligation to produce documents accessible to the public, as well as the theory that missing a document did not prove a faulty search. *See* Complaint, Exh. D.

[3] The FRB website highlights the following introductory information relative to the 12 federal reserve district banks:

"To carry out the day–to–day operations of the Federal Reserve System — the nation's central bank — the United States has been divided into twelve Federal Reserve Districts, each with a Reserve Bank. Reserve Banks provide many services to depository institutions and to the public, such as processing electronic payments, currency, and checks. They carry out many of the System's responsibilities for supervising banks. They also help in framing monetary policy, in part by reporting on economic developments in their regions.

determination by Ms. Thro and perhaps others that certain electronic files in FIRMA were not likely to contain responsive documents (Thro Decl. ¶ 15, p. 8). *See* GATA Mem. Opp., p. 16. There may be other missing items, as well. GATA is not even certain that FRB searched for all "gold swap" records, or limited its search to those involving the United States. *See* Olson Decl. ¶ 7. In any event, it is important for FOIA requesters to know — if there is to be a limitation on an agency's record search — what record systems are available for search, and which of those record systems were excluded from the search.

2. FRB, in retrieving records in response to GATA's FOIA request of April 14, 2009, did not obtain records responsive to GATA's request that generally are known to exist and must be in the possession or control of FRB. *See* Complaint ¶ 18 and Exhibit C. This allegation of fact, which also may go to the adequacy of the FRB search, is supported by the Declarations of Chris Powell, Adrian Douglas, and James Turk submitted by GATA, and is at odds with the arguments of defense counsel (Def. Mem. S.J. pp. 6-11), and the Declaration of FRB legal counsel Alison M. Thro.

Explanation of the Dispute: Defendant asserts the reasonableness of its search (Def. Mem. S.J. pp. 6-11; Thro Decl. ¶¶ 10-18) without regard to whether that search reasonably accounted for all responsive documents. As GATA pointed out in its administrative appeal, for example, FRB did not even disclose the existence of a 2005 paper — accessible on the FRB website — that expressly references "gold swaps." GATA has submitted the declarations of

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As required by the Federal Reserve Act of 1913, each of the Reserve Banks is supervised by a board of nine directors who are familiar with economic and credit conditions in the district. Similarly, each of the twenty-five Reserve Bank Branches has a board of five or seven directors who are familiar with conditions in the area encompassed by the Branch."

Chris Powell, Adrian Douglas, and James Turk, which refer to a number of documents involving "gold swaps," copies of which GATA believes the FRB must have within its possession or control. Again, the declaration of GATA's counsel, pursuant to Rule 56(f), Fed. R. Civ. P., indicates the need for discovery on this point.

3. Many of Vaughn Index Items 1-20 are not predecisional, deliberative documents. As pointed out in GATA's memorandum of points and authorities in opposition to defendant's motion for summary judgment, a number of the items claimed by defendant to be exempt as pre-decisional and deliberative under FOIA Exemption 5 do not appear to qualify for that exemption. *See* GATA Mem. Opp., pp. 28-36. In addition to GATA's legal arguments, an examination of the actual documents may be determinative of some of the issues involved. For example, as GATA has pointed out, the memorandum which is part of Vaughn Index Item 2 may indeed be a deliberative, pre-decisional draft of the memo which is part of Vaughn Index Item 3, in which case only the finalized memorandum may need to be produced. *See* GATA Mem. Opp., pp. 30-31. Similarly, the memorandum identified in Vaughn Index Item 7 may be a pre-decisional draft of that "finalized" in Item 8, in which case only the finalized version may need to be produced. *See* GATA Mem. Opp., p. 32. For the factual, as well as legal, reasons asserted by GATA (*see* GATA Mem. Opp., pp. 33-35), the same rationale applies to most of the documents identified as Vaughn Index Items 9-12.

GATA submits that most of these disputed questions can only be resolved by this Court after an *in camera* review of the limited number of documents withheld, as the court did in Lee v. Federal Deposit Insurance Corp., 923 F. Supp. 451 (S.D.N.Y. 1996), finding that "the

documents that were withheld are not so numerous as to make *in camera* review unduly burdensome." *Id*. at 454.

4. Vaughn Index Items 7, 8, and 11 were not voluntarily submitted by a person, and should not be considered confidential for purposes of FOIA Exemption 4. For the reasons set forth in its memorandum of points and authorities in opposition to defendant's motion for summary judgment, GATA submits that there are genuine issues concerning the facts asserted by FRB in support of its claim that Vaughn Index Items 7, 8, and 11 are privileged under FOIA Exemption 4. *See* GATA Mem. Opp., pp. 38-45. As GATA explained, FRB's declarations and legal brief speak in generalities, leaving an "all-or-nothing" impression that appears unreasonable in light of the information that is described in the Vaughn Index and in light of FRB's lack of a reasonable explanation concerning what it is that FRB does not want to disclose, and why certain significant portions of Items 7, 8, and 11 could not be disclosed even if particular FRB arrangements must be kept secret. GATA submits that this Court's *in camera* review of the documents, if the Court deems such a review appropriate, would help resolve the controversy.

5. Certain other factual allegations of defendant concerning the withheld documents are disputed by GATA. At pages 7-13 (paragraphs 16-30) of its Statement of Material Facts Not in Genuine Dispute ("Def. SOMF"), defendant recites a litany of purported facts, most from the declaration of Alison Thro, FRB legal counsel who assisted with the response to GATA's 2009 FOIA request. Many of the allegations of fact in those paragraphs cannot be admitted or denied by GATA because in some cases they are combined factual/legal questions, and in others they go to the very substance of the documents that are being withheld by FRB, and

would require seeing the document to make a judgment about the truth of the FRB assertion. GATA offers three examples:

a. GATA disputes FRB's assertion, concerning all of the withheld documents, that "[a]s to documents redacted, the portions released consisted of the names of the author(s) and recipient(s) of the document, information concerning the subject matter of the document, and factual material that was not subject to an exemption and that was segregable from the deliberative material withheld." That assertion could only be verified by reviewing the document itself, which is one of the reasons why GATA is seeking an order requiring FRB to furnish the documents for an *in camera* review by this Court. *See* Declaration of William J. Olson ¶ 6.

b. Similarly, assertions in defendant's SOMF that Vaughn Index Items 1-12 "contain staff analysis and recommendations concerning matters of interest to the Board and the FOMC in carrying out their statutory functions relating to the setting or consideration of economic and monetary policy," and that their disclosure "would discourage frank, open discussions on matters of policy between subordinates and supervisors," and "could result in premature disclosure of proposed policies before they are adopted and could create public confusion by suggesting reasons and rationales for government decisions that were not in fact the basis for those decisions" (Def. SOMF ¶ 18) are more akin to legal argument than factual assertion; obviously, without seeing the documents, GATA cannot respond in full, except to say that it challenges those FRB assertions, and similar assertions made by the defendant in its SOMF. *See* Declaration of William J. Olson ¶ 6.

c. Lastly, defendant's assertions concerning Vaughn Index Item 15 — said to be "a September 17, 2001 draft document entitled 'Confidential Draft: Potential repo/swap involving Treasury gold'" — are that it is unsigned, but contains handwritten notes, and FRB admits that it does not know but merely surmises that this was a "preliminary draft document exchanged between an attorney and his or her supervisor," that it was "prepared in anticipation of it being relied on in making decisions and contains the analysis and thought process of the parties drafting and commenting on it," and that its release "would have a chilling effect on the deliberative communications among agency staff." *See* Def. SOMF ¶ 21, pp. 9-10. Records responsive to FOIA requests are to be disclosed unless the basis for an exemption is demonstrated, and a basis may not be merely surmised.

Respectfully submitted,

/s/ William J. Olson

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOLD ANTI-TRUST ACTION COMMITTEE, INC.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 09-02436 (ESH)
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,	)	
Defendant.	)	

DECLARATION OF CHRIS POWELL

1. My name is Chris Powell. I am managing editor of the Journal Inquirer newspaper in Manchester, Connecticut. http://www.journalinquirer.com/. I also serve as secretary-treasurer and co-founder of Gold Anti-Trust Action Committee Inc., also known as GATA, the plaintiff in this action. http://www.gata.org/. Additionally, I serve on the board of directors of the Connecticut Council on Freedom of Information.

2. As a journalist and as a student of the history of gold and central banking for many years, I have researched the ways governments have sought to suppress the price of gold. It is my belief that the U.S. Government — through the U.S. Department of the Treasury (and its Exchange Stabilization Fund[1]) and the Federal Reserve System — continue to intervene in supposedly free markets to suppress the price of gold through various mechanisms, prominent among which are "**gold swaps**." Gold swaps are exchanges of gold between central banks

[1] http://www.ustreas.gov/offices/international-affairs/esf/ ("The legal basis of the ESF is the Gold Reserve Act of 1934 [which provides] 'the Secretary …, with the approval of the President, may deal in gold, foreign exchange, and other instruments of credit and securities.'")

allowing one central bank to intervene in the gold market on behalf of another central bank, generally to give anonymity to the central bank that wants to undertake the intervention. Based on my study, it is inconceivable that the Board of Governors of the Federal Reserve System, the Federal Reserve Board ("FRB"), and the Federal Reserve Bank of New York have no records relating to "gold swaps" other than those disclosed or identified in the Vaughn index in this case or previously released to GATA relating to use of this technique for central bank intervention in gold markets. However, it is not unexpected that the FRB would not want the public to be aware of these practices. Some history of how governments have sought to control the price of gold helps explain the basis for my belief that such records exist and that the FRB, at the center of the U.S. banking system and dealings with foreign central banks, must have them.

3. During the later part of the 19th Century, the United States operated under a **gold standard**. It was abandoned during World War I, restored briefly in the 1920s, and then abandoned again during the Great Depression. Under a gold standard, governments fix the price of gold to a precise value in their currencies, a price at which governments exchange their currencies for gold, currencies that are backed by gold.

4. Throughout the 1960s the United States and Great Britain attempted to hold the price of gold at $35 per ounce in a public arrangement of the dishoarding of U.S. gold reserves. This arrangement came to be known as the **London Gold Pool**. As monetary inflation rose, the London Gold Pool was overwhelmed by demand and was shut down abruptly in April 1968.

5. Three years later, in 1971, the United States **repudiated the remaining convertibility of the dollar into gold** — convertibility for foreign government treasuries that wanted to exchange dollars for gold. At that moment currencies began to **float** against each other and against gold — or so the world was told. For since 1971 the **gold price suppression scheme** has been undertaken largely surreptitiously, seldom acknowledged. But aspects of this surreptitious government program have been revealed from time to time, as this declaration will demonstrate.

6. The gold price suppression scheme became a matter of public record when the minutes of the January 1995 meeting of the Fed's Federal Open Market Committee were released. During that meeting, the general counsel of the U.S. Federal Reserve Board, **J. Virgil Mattingly**, explained that the consensus among White House/Treasury/Fed lawyers was that the "gold swaps" entered into by the U.S. Treasury Department's Exchange Stabilization Fund were lawful:

> MR. MATTINGLY. It's pretty clear that **these ESF** [Exchange Stabilization Fund] **operations are authorized**. I don't think there is a **legal** problem in terms of the **authority**. The statute is very broadly worded in terms of words like "credit" — **it has covered things like the gold swaps** — and it confers broad authority. Counsel at the White House called the Treasury's General Counsel today and asked "Are you sure?" And the Treasury's General Counsel said "I am sure." Everyone is satisfied that a legal issue is not involved, if that helps.[2] [Emphasis added.]

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[2] http://www.federalreserve.gov/monetarypolicy/files/FOMC19950201meeting.pdf, p. 69. Later, FRB Chairman Alan Greenspan and the General Counsel of the Federal Open Market Committee, Virgil Mattingly, vigorously denied to two U.S. senators, who had inquired of the FRB on GATA's behalf, that the FRB had gold swap arrangements. http://www.gata.org/node/1181

7. The gold price suppression scheme was again a matter of public record in July 1998, when Federal Reserve Chairman **Alan Greenspan** told Congress:

> Central banks stand ready to **lease gold** in increasing quantities should the price rise.[3] [Emphasis added.]

In this testimony, Greenspan contradicted the usual central bank explanation for leasing (swapping) gold — which was supposedly to earn a little interest on a dead asset — and admitted that gold leasing is all about suppressing the price.

8. The **Washington Agreement on Gold**, made by the European central banks in 1999, was another admission — even a proclamation — that central banks were working together to control the gold price. The central banks making the Washington Agreement claimed that, by restricting their gold sales and leasing, they meant to prevent the gold price from falling too hard. But even if you believed that explanation, it was still collusive intervention in the gold market.[4]

9. **Barrick Gold Corporation**, then the largest gold-mining company in the world, confessed to the gold price suppression scheme in U.S. District Court in New Orleans on February 28, 2003. That is when Barrick filed a motion to dismiss Blanchard & Co.'s anti-trust lawsuit against Barrick and its bullion banker, JPMorganChase, for rigging the gold

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[3] Greenspan's admission is still posted at the Fed's website: http://www.federalreserve.gov/boarddocs/testimony/1998/19980724.htm
That testimony is historically significant for another reason as well — it is credited for having persuaded Congress not to regulate the sort of financial derivatives that have since devastated the world financial system.

[4] http://www.reserveasset.gold.org/central_bank_agreements/cbga1/. This agreement has been renewed twice, in 2004 and in 2009.

market. Barrick's motion virtually admitted that it was acting as an agent of central banks by borrowing gold from central banks through Morgan Chase and selling it, but could not be sued alone, without joining foreign central banks in the lawsuit.[5] While the lawsuit was settled confidentially, simultaneously Barrick announced that it would stop hedging its gold production — that it would stop borrowing gold against the company's future production and selling it to raise cash — the activity at the heart of the lawsuit.

10. The **Reserve Bank of Australia** confirmed the gold price suppression scheme in its annual report for 2003:

> Foreign currency reserve assets and **gold** are held primarily to support **intervention** in the foreign exchange market.[6] [Emphasis added.]

11. Perhaps the most brazen admission of the Western central bank scheme to suppress the gold price was made by the head of the monetary and economic department of the **Bank for International Settlements** ("BIS"), William S. White, in a speech to a BIS conference in Basel, Switzerland, in June 2005. There are five main purposes of central bank cooperation, White announced, and one of them is:

> the provision of international credits and joint efforts to **influence asset prices (especially gold** and foreign exchange) in circumstances where this might be thought useful.[7] [Emphasis added.]

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[5] http://www.gata.org/files/BarrickConfessionMotionToDismiss.pdf

[6] The bank's report is still posted at its website: http://www.rba.gov.au/publications/annual-reports/rba/2003/pdf/2003-report.pdf

[7] http://www.gata.org/node/4279

12. In January 2009 a remarkable 16-page memorandum was discovered in the archive of the late Federal Reserve Chairman **William McChesney Martin**. The memorandum is dated April 5, 1961, and is titled "U.S. Foreign Exchange Operations: Needs and Methods." It reveals a detailed plan of surreptitious intervention to rig the currency and gold markets to support the dollar and to conceal or obscure U.S. government records and reports **so that the rigging might not be discovered**.[8]

13. In August 2009 the international journalist Max Keiser reported an interview he had with the **Bundesbank**, Germany's central bank, in which he was told that all of Germany's gold reserves were held in New York.[9] GATA consultant Rob Kirby of Kirby Analytics in Toronto then pressed the **Bundesbank** for clarification. On August 24, 2009, the Bundesbank replied to Kirby by e-mail with a supposed denial of Keiser's report that actually confirmed its essential accuracy.

> The Deutsche Bundesbank keeps a large part of its gold holdings in its own vaults in Germany, while **some** of its gold is also **stored with the central banks located at major gold trading centers**. This has historical and market-related reasons, the gold having been transferred to the Bundesbank at these trading centers. Moreover, the Bundesbank needs to hold gold at the various trading centers **in order to conduct its gold activities**.[10] [Emphasis added.]

The Bundesbank did not specify those "gold activities" and those "trading centers." But those "activities" can mean only that the Bundesbank is or recently has been surreptitiously active in

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8 http://fraser.stlouisfed.org/docs/historical/martin/23_06_19610405.pdf

9 http://www.youtube.com/watch?v=EzVhzoAqMhU

10 http://www.gata.org/node/7713

the gold market, perhaps at the behest of others — like the United States, likely the largest custodian of German gold outside that country.

14. In September 2009 a New York financial market professional and student of history, Geoffrey Batt, posted at the Zero Hedge website three declassified U.S. government documents involving the gold market. The first was a long cable dated March 6, 1968, from someone named Deming at the U.S. Embassy in Paris to the State Department in Washington.[11] The cable described the strains on the London Gold Pool, the gold-dishoarding mechanism established by the U.S. Treasury and the Bank of England to hold the gold price to the official price of $35 per ounce. The London Gold Pool was to last only six months after this cable. The cable is a detailed speculation on what would have to be done to control the gold price and particularly to convince investors "that there is no point any more in speculating on an increase in the price of gold" and "to establish beyond doubt" that the world financial system "is immune to gold losses" by central banks. The cable recommends creation of a "new reserve asset" with "gold-like qualities" to replace gold and prevent gold from gaining value. To accomplish this, the cable proposes "monthly or quarterly reshuffles" of gold reserves among central banks — what the cable calls a "reshuffle club" that would apply gold where market intervention seemed most necessary. These "reshuffles" sound like the central bank gold swaps of recent years. The idea, the cable says, is for the central banks "to remain the masters of gold."

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[11] http://www.zerohedge.com/article/declassified-state-dept-data-highlights-global-high-level-arrangement-remain-masters-gold

15. Also in September 2009, Zero Hedge's Geoffrey Batt disclosed a memorandum from the Central Intelligence Agency dated December 4, 1968, several months after the collapse of the London Gold Pool. The CIA memo said that to keep the dollar strong and prevent "a major outflow of gold," U.S. strategy would be:

> – To isolate official from private gold markets by obtaining a pledge from central banks that they will neither buy nor sell gold except to each other….
>
> -- To bring South Africa to sell its current production of gold in the private market, and thus **keep the private price down**.[12] [Emphasis added.]

16. The third declassified U.S. government document published by Geoffrey Batt at Zero Hedge, also in September 2009, was written on June 3, 1975, four years after the last bit of official fixed convertibility of the dollar and gold had been eliminated. At that point the world had been told that currencies henceforth would float against each other and gold would be free trading. The document is a seven-page memorandum from Federal Reserve Board Chairman Arthur Burns to President Gerald Ford. It is all about controlling the gold price through foreign policy and defeating any free market for gold. Burns tells the president:

> I have a secret understanding in writing with the Bundesbank, concurred in by Mr. Schmidt [Helmut Schmidt, West Germany's Chancellor at the time] that Germany will not buy gold, either from the market or from another government, at a price above the official price of $42.22 per ounce…. I am convinced that by far the best position for us to take at this time is to resist

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[12] http://www.zerohedge.com/article/cia-chimes-gold-control-highlights-historical-gold-foreign-holdings-shortfunding

> arrangements that provide wide latitude for central banks and governments to purchase gold at a market-related price.[13]

17. In the instant case, GATA's Freedom of Information Act ("FOIA") litigation with the FRB, records have been denied to GATA on the grounds that disclosure would compromise certain private proprietary interests under FOIA exemption 4 ("trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential…."). A denial based on proprietary interests suggests that the U.S. gold reserve has been placed, at least partly, in private hands.

18. GATA brought an appeal of the FRB's denial of its 2009 FOIA request, and this appeal was directed to a full member of the FRB, Vice Chairman Kevin M. Warsh, formerly a member of the President's Working Group on Financial Markets, nicknamed the Plunge Protection Team. Mr. Warsh denied GATA's appeal on September 17, 2009, and let slip an admission at odds with FRB's position in this litigation:

> In connection with your appeal, I have confirmed that the information withheld under Exemption 4 consists of confidential commercial or financial information relating to the operations of the Federal Reserve Banks that was obtained within the meaning of exemption 4. This includes **information relating to swap arrangements with foreign banks** on behalf of the Federal Reserve System and is **not the type of information that is customarily disclosed** to the public. This information was properly withheld from you.[14] [Emphasis added.]

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[13] http://www.gata.org/files/FedArthurBurnsOnGold-6-03-1975.pdf

[14] Complaint ¶19 and Exhibit D. http://www.gata.org/files/GATAFedResponse-09-17-2009.pdf

Of course FRB Governor Warsh did not say that the FRB had swapped gold lately, only that it has arrangements to do so — and, just as important, that the FRB does not want the public and the markets to know about those arrangements, and does not want the public and the markets to know about the disposition of U.S. gold reserves.

19. GATA has had help in publicizing government manipulation of the gold market. First, in 2004 **Sprott Asset Management** in Toronto issued a comprehensive report written by Sprott's chief investment strategist, John Embry, and his assistant, Andrew Hepburn, titled "Not Free, Not Fair — the Long-Term Manipulation of the Gold Price."[15]

20. Then, in 2006, the **Cheuvreux brokerage house of Credit Agricole**, the major French bank, issued its own report confirming GATA's findings of manipulation in the gold market entitled "Remonetization of Gold: Start Hoarding."[16]

21. In 2007, **Citigroup** published a report titled "Gold: Riding the Reflationary Rescue," written by its analysts John H. Hill and Graham Wark, declaring:

> Gold undoubtedly faced headwinds this year from resurgent **central bank selling**, which was clearly timed **to cap the gold price**.[17] [Emphasis added.]

22. It is widely acknowledged that **annual world gold production** has been about 2,400 tonnes, that **annual net world gold demand** has been about 3,400 tonnes, that gold production has been falling as demand has been rising, and that the thousand-tonne gap

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[15] http://www.sprott.com/docs/PressReleases/20_not_free_not_fair.pdf

[16] http://www.gata.org/files/CheuvreuxGoldReport.pdf

[17] GATA can provide a copy of this report to the Court upon request.

between production and net demand has been filled mainly by central bank dishoarding and leasing. Without this central bank intervention supplying more than a quarter of annual demand, it is beyond question that the price of gold would be much higher. Certainly not all dishoarding was innocent management of a foreign exchange reserve portfolio.

23. For years the **International Monetary Fund**, the central bank of the central banks, has been openly intervening in the gold market by threatening to sell gold. The IMF said its intent in selling gold was to raise money to lend to poor nations. This explanation was ridiculous on its face, though the IMF has never been challenged about it in the financial press. Indeed, the financial press seems quite willing to tell the world that central banks, which lately have effortlessly conjured into existence fantastic amounts of money in many currencies, could find a little money to help poor countries only by selling gold. Of course, the intent of the IMF and its member central banks was not to help poor countries but to intimidate the gold market and control the gold price. That the IMF intimidated the gold market so long with this threat of gold sales was all the more remarkable because the IMF probably has never had any gold to sell in the first place. In April 2008 I wrote to the managing director of the IMF, Dominque Strauss-Kahn, with five questions about the IMF's gold. I copied the letter to the IMF's press office by e-mail, and quickly began to get some answers from one of its press officers, Conny Lotze.

a. My first question to the IMF was: "Your Internet site says the IMF holds 3,217 metric tons of gold 'at designated depositories.' Which depositories are these?" Conny Lotze of the IMF replied, but not specifically. She wrote: "The fund's gold is distributed across a

number of official depositories." She noted that the IMF's rules designate the United States, Britain, France, and India as IMF depositories.

b. My second question was: "If you would prefer not to identify the depositories for security reasons, could you at least identify the national and private custodians of the IMF's gold and the amounts of IMF gold held by each?" Conny Lotze replied, again not very specifically: "All of the designated depositories are official."

c. My third question was: "Is the IMF's gold at these depositories allocated — that is, specifically identified as belonging to the IMF — or is it merged with other gold in storage at these depositories?" Conny Lotze replied, still not very specifically: "The fund's gold is properly accounted for at all its depositories."

d. My fourth question was: "Do the IMF's member countries count the IMF's gold as part of their own national reserves, or do they count and identify the IMF's gold separately?" Conny Lotze replied a bit ambiguously: "Members do not include IMF gold within their reserves because it is an asset of the IMF. Members include their reserve position in the fund in their international reserves." This sounded to me as if the IMF members were still counting as their own the gold that supposedly belongs to the IMF — that the IMF members were just listing the gold assets in another column on their own books.

e. My fifth question to the IMF was: "Does the IMF have assurances from the depositories that its gold is not leased or swapped or otherwise encumbered? If so, what are these assurances?" Conny Lotze replied: "Under the fund's Articles of Agreement it is not authorized to engage in these transactions in gold." The response addressed only whether the

IMF itself was swapping or leasing gold, not whether the custodians of the IMF's gold were swapping or leasing it.

f. This prompted me to raise one more question for Conny Lotze: "Is there any audit of the IMF's gold that is available to the public? I ask because, if the amount of IMF gold held by each depository nation is not public information, there does not seem to be much documentation for the IMF's gold, nor any documentation for the assurance that its custody is just fine. Without any details or documentation, the IMF's answer seems to be simply that it should be trusted — that it has the gold it says it has, somewhere." And that was the last I heard from Conny Lotze. She did not answer me again. I had spoken a word that is increasingly unspeakable in the gold section of central banking: audit.

24. Lately central bankers often have complained about what they call "imbalances" in the world financial system. That is, certain countries, particularly in Asia, run big trade surpluses, while other countries, especially the United States, run big trade deficits and consume far more than they produce, living off the rest of the world. These complaints by the central bankers about "imbalances" are brazenly hypocritical, since these imbalances have been caused by the central banks themselves, caused by their constant interventions in the currency, bond, and commodity markets to prevent those markets from coming into balance through ordinary market action lest certain political interests be disturbed. When markets balance themselves they often do it brutally, causing great damage to many of their participants. The United States enacted a central banking system in 1913 because for almost 150 years, the country had suffered a catastrophic deflation every decade or so. Central

banking was created in the name of preventing those catastrophic deflations. The problem with central banking has been mainly the old problem of power — it corrupts.

25. Central bankers are supposed to be more capable of restraint than ordinary politicians, and maybe some are, but they are not always or even often capable of the *necessary* restraint. One market intervention encourages another, and another, and increases the political pressure to keep intervening to benefit special interests rather than the general interest — to benefit especially the financial interests, the banking and investment banking industries. These interventions, subsidies to special interests, increasingly are needed to prevent the previous imbalances from imploding. And so we have come to an era of regular market interventions by central banks — so much so that the main purpose of central banking now is to prevent ordinary markets from functioning at all.

26. By manipulating the value of money, central banking controls the value of all labor, services, and real goods, and yet it is conducted almost entirely in secret — because in choosing winners and losers in the economy, advancing infinite amounts of money to some participants in the markets but not to others, administering the ultimate patronage, central banking cannot survive scrutiny. Yet the secrecy of central banking now is taken for granted even in nominally democratic countries. What other agency of a democratic government could get away with the principle that was articulated on national television in the United States in 1994 by the vice chairman of the Federal Reserve, Alan Blinder? Blinder declared: "The last duty of a central banker is to tell the public the truth."[18]

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[18] PBS Nightly Business Report, 1994, quoted at: http://www.opednews.com/articles/THE-FED-INDEPENDENCE-SCA-by-Kent-Welton-0911

27. Although some take government secrecy in central banking for granted, even as the evidence of market intervention and manipulation explodes all around them, GATA does not.[19]

28. I believe that FRB, in refusing to furnish substantial records reflecting gold swap transactions, actual and/or proposed, during the period 1990 through 2009, as GATA requested, either (i) has not conducted an adequate search for these records, or (ii) is not being forthcoming with this Court. It is inconceivable, for example, that the FRB would not have records reflective of the various specific incidents described above which occurred during the nearly 20-year period (January 1, 1990 — April 14, 2009) for which records were requested.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed, this 22nd day of September, 2010.

Chris Powell

12-826.html.

[19] Such acceptance of secrecy is reminiscent of the bumbling police detective played by Leslie Nielsen in the "Naked Gun" movies admonishing the assembled public — "move on, nothing to see here, please disperse." http://www.youtube.com/watch?v=rSjK2Oqrgic

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOLD ANTI-TRUST ACTION COMMITTEE, INC.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 09-02436 (ESH)
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,	)	
Defendant.	)	

DECLARATION OF ADRIAN DOUGLAS

1. My name is Adrian Douglas. I graduated from Cambridge University in 1980 with a degree in natural sciences. I worked for 20 years in the oil and gas industry. I serve as a member of the Board of Directors of GATA, the plaintiff herein. My study of commercial enterprise pricing led to my interest in the market pricing mechanisms of financial assets. As a result, I developed a unique algorithm and methodology for analyzing financial futures markets, and in particular for identifying appropriate entry and exit points. The technique has been named "Market Force Analysis" and I publish the market letter of that name. www.MarketForceAnalysis.com. I have studied and written about the gold market for many years.

2. I submit this Declaration to supplement the Declaration of Chris Powell in this case which relates to evidence that the Federal Reserve Board ("FRB"), the Federal Reserve's Federal Open Market Committee ("FOMC"), and others, including the Federal Reserve Bank of New York ("FRBNY") all act to suppress gold prices through the use of mechanisms such as "gold swaps." My declaration illustrates the interest of the FRB and the FOMC in affecting the price

of gold generally, and supports the notion that FRB would have significant documentation concerning "gold swaps" as requested by GATA.

3. The FOMC meets eight times per year to discuss and set interest rate policy. The minutes of these meetings are only released five years after the meeting. This more or less guarantees that very few people will ever read them. Furthermore, the minutes are heavily redacted and edited. Robert Auerbach, in his 2008 book, Deception and Abuse at the Fed, documents how FRB officials falsely denied before Congress the existence of verbatim transcripts of FOMC meetings which existed. The Sunshine Act of 1976 required all "agencies" to promptly make available to the public transcripts, recordings, or minutes of discussions in official meetings. For 17 years, FRB officials misled Congress in denying that verbatim transcripts or tape recordings existed. They claimed that recordings were taped over and transcripts were destroyed, leaving only the redacted and edited minutes in their archives. However, in very direct questioning by Henry Gonzalez before the House Banking Committee in 1993, it became clear the FRB had been lying. Shortly thereafter, Alan Greenspan ordered tapes and transcripts to be destroyed. It is clear from such actions that the information contained in those transcripts must be very damaging to the FRB.

4. After reading Mr. Auerbach's book, I was inspired to dredge through the published FOMC minutes. What I found is quite astounding, and serves as documented evidence that the FRB manipulates the gold market.

> 5. In the March 21, 1978 FOMC meeting, the following exchange took place:
> CHAIRMAN MILLER. The Treasury has severe reservations about it. Originally, two weeks ago, they were taking the position that they would not be in favor of it - that it raised too many problems for them. Since then I think they have become a little more open minded about it. However, I think the first

> avenue is apt to be the **sale of gold**. Sales of gold were under consideration and were deferred partly because of the French elections, which are now over. So I think it's likely that the Treasury will start a program of selling gold, which I personally would favor. There are a lot of advantages in using gold because at least then we don't end up with debt and the currency risks that go with it. So I think that's an avenue that should be pursued. There has been a discussion about the level of gold sales that are possible--what the market can absorb and that sort of thing. Henry can correct me, but I believe the Treasury feels that they could sell about 300,000 ounces a month.
>
> MR. WALLICH. That would be a very moderate amount--something like less than 60 million. And bear in mind that unless they can develop a means of **selling the gold for foreign currency** in a way that doesn't cause holders of dollars to buy that foreign currency in order to buy the gold, it could be completely counterproductive. Then there isn't going to be much of a net effect. There is some because after all we are importers of gold, which may reduce the imports of gold and may make the trade balance look a little better. There is some portfolio shift when there is gold in portfolios instead of dollars, so I wouldn't say it's without effect but there are lots of qualifications on the possible success.
>
> CHAIRMAN MILLER. The nice thing about this problem is that it's surrounded by dilemmas! Everything you do has an adverse effect on something else. Nothing is ideal. I might add that we live in a situation where the market is very realistic, very factual. That's why the possibility that gold would be sold caused the gold price to drop by $5. **You don't have to sell gold, you just have to breathe [that you may] one day**.[1] [Emphasis added.]

The last sentence by Chairman William Miller (FRB Chairman 1978-1979), telling the committee that the gold market can be manipulated by propaganda, is very significant. This manipulative deception has been played out time and time again since then. This is why official gold sales are always announced in advance, and the announcements are repeated many times, as happened with the IMF gold sales.

6. At the FOMC meeting of July 9, 1980, the following discussion took place:

[1] http://www.federalreserve.gov/monetarypolicy/files/FOMC19780321meeting.pdf

MR. BAUGHMAN. Is it considered a political no-no to sell gold in the current environment?

CHAIRMAN VOLCKER. Oh, I don't think so, necessarily. I don't think it's a political problem in the sense that you may be suggesting. It's a question of whether it's very useful or desirable at this stage. [If we sold gold], we'd have to do it alone; I think that's pretty clear. It isn't anything that's ruled out a priori, but it's a practical matter of whether it's a good idea.

MR. BAUGHMAN. Well, it's between selling assets and borrowing money. That seems to me the significant difference.

VICE CHAIRMAN SOLOMON. The psychology, Ernie, is that **[selling gold] seems to be much more effective if it's a component of an overall package of forceful measures than if it is done by itself**. In the present climate it would look like a major act of weakness. And that might spur some additional dollar selling **unless we did it on an enormously massive scale**, not just the levels that we have before. On the other hand, if the situation gets to a point where once again we have to begin thinking carefully of a package, then along with some monetary policy measures it would be appropriate and add to the effectiveness--this is my own personal feeling--to do some substantial gold selling. And in that situation I think the Congress would understand that. We'd have less of a political problem also. So I think both factors operate.

CHAIRMAN VOLCKER. I should say, in connection with the political problem, that I don't think there are any great **political constraints** so far as the thinking in the Administration is concerned. There are politicians who would make a noise that would reflect upon the credibility of the action. If we sell some gold and then immediately get some congressional opposition, the market would say: "Well, they're not going to sell very much because there's too much opposition." And, therefore, it might not be very productive **in terms of the impact we'd want to achieve.**

MR. BAUGHMAN. There would be some **grass roots opposition** to it. I can report that, but I don't have any impression—

CHAIRMAN VOLCKER. Perhaps I spoke a little misleadingly because that kind of opposition, I think, does reflect on the credibility of the action. It raises questions about whether it could be sustained and what the [total] amount would be and whether it's really an accepted technique or not, even though in some sense I think it's not a political deal for the Administration except in terms of appraising that reaction. **I can't quite see the Congress opposing it** in a formal

> sense but there would be **a lot of noise by these limited groups**. We have to ratify these transactions.
>
> MR. SCHULTZ. So moved.[2] [Emphasis added.]

What is noteworthy is the comment by Vice Chairman Solomon, when he says selling gold:

> *seems to be much more effective if it's a component of an overall package of forceful measures than if it is done by itself. In the present climate it would look like a major act of weakness. And that might spur some additional dollar selling unless we did it on an enormously massive scale, not just the levels that we have before.* [Italics added.]

This is without a doubt a proposal to undertake gold market manipulation and, what's more, it is proposed to be on an "*an enormously massive scale.*" This is not a discussion about selling gold based on a motivation to maximize the profit from such sales. Furthermore, the Vice Chairman admits to previous gold market intervention when he recommends increased selling of gold that is "*not just the levels that we have before.*" [Italics added.]

> 7. In December 1994 this exchange took place at an FOMC meeting:
>
> CHAIRMAN GREENSPAN. President Jordan.
>
> MR. JORDAN. I think the main part of our problem right now is inflation psychology. It certainly reflects the lack of a nominal anchor. It suggests that it would be helpful to have a politically supported mandate to attain and maintain a stable value of the dollar. **If somehow we could achieve the conditions of a true gold standard -- without gold** but the steady purchasing power of money **in the minds of people**--over time it would make some of these short-term things that we go through a lot easier to deal with.[3] [Emphasis added.]

Achieving the conditions of a true gold standard without gold, of course, would appear to involve deception and could be likened to a confidence trick. (It should be noted that the last

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[2] http://www.federalreserve.gov/monetarypolicy/files/FOMC19800709meeting.pdf

[3] http://www.federalreserve.gov/monetarypolicy/files/FOMC19941220meeting.pdf

sentence in the above-quotation is missing, having been redacted. It would be extremely interesting to know the full extent of the discussion).

8. Alan Greenspan confirmed in response to a question posed by Rep. Ron Paul in testimony before congress in 2005 that this financial wizardry has actually been implemented.

> MR. GREENSPAN: So that the question is: Would there be any advantage, at this particular stage, in going back to the **gold standard**? And the answer is: I don't think so, because **we're acting as though we were there.** Would it have been a question at least open in 1981, as you put it? And the answer is yes. Remember, the gold price was $800 an ounce. We were dealing with extraordinary imbalances, interest rates were up sharply, the system looked to be highly unstable – and we needed to do something. Now, we did something. The United States – Paul Volcker, as you may recall, in 1979 came into office and put a very severe clamp on the expansion of credit, and that led to a long sequence of events here, which we are benefiting from up to this date. So I think central banking, I believe, has learned the dangers of fiat money, and I think, as a consequence of that, we've behaved as though there are, indeed, real reserves underneath the system.[4] [Emphasis added.]

The last sentence is exactly what Mr. Jordan was pondering in the FOMC meeting of December 1994. How to have a gold standard without using gold! Mr. Greenspan says they "behaved as though there are, indeed, real reserves underneath the system." I think it is safe to say there is some financial wizardry that is apparent by implication. One either has real reserves or one does not; to behave as if there are, when there are not, is a confidence trick which is doomed to fail at some stage.

9. In an FOMC meeting of Dec. 22, 1992, the FRB Governors reveled in the fact that accounting errors in gold shipments could improve the USA balance of trade numbers.

CHAIRMAN GREENSPAN. Did I hear you correctly when you said that the gold exports in October appear to have come from the coffers of the Federal Reserve Bank of New York? Has anyone looked lately?

MR. TRUMAN. Well, I didn't want to tell too many secrets in this temple!

VICE CHAIRMAN CORRIGAN. Obviously, we knew what happened to the gold, but I don't think we knew what it did to exports.

MR. TRUMAN. What happens in the Census data is that the Federal Reserve Bank of New York is treated as a foreign country. [Laughter] And when a real foreign country takes some of the gold out of New York and ships it abroad, it counts first as imports and then as exports. However, the import side is not picked up in the Census data. So there you get the export side of it.

MR. LAWARE. Great accounting!

MR. BOEHNE. Great confidence building!

MR. TRUMAN. That's because you haven't been filling out your import documents!

MR. ANGELL. Let me run this by again. You mean a country owns gold and has it stored in the Federal Reserve Bank of New York and if they ship it out, that's an export?

MR. TRUMAN. And in the balance of payments accounts it also counts as an import, so it washes out.

CHAIRMAN GREENSPAN. The Federal Reserve Bank's basement is a foreign country. When they move it out of the basement into the United States, it's an import. Then, when they ship it out again, it's an export.

MR. ANGELL. That makes sense!

MR. TRUMAN. And sometimes when they sell the gold, it might be sold into the United States, so it should count as an import. It doesn't necessarily always show up as an export.

MR. BOEHNE. That really clarifies it!

MR. KELLEY. **Does it have to get out of your vault at all in order to be considered an import and an export?**

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[4] http://www.lewrockwell.com/paul/paul267.html

> VICE CHAIRMAN CORRIGAN. Well, I'm not even going to try to answer that. In this particular case I know what happened, so I think…[5] [Emphasis added.]

The most intriguing part of this discussion is the question by Mr. Kelley *"Does it have to get out of your vault at all in order to be considered an import and an export"* (Italics added.) While there is no explanation of the thinking behind Kelley's question (it was probably redacted), it is reasonable to extrapolate the inference that "ledger entries" for gold movements could be made to the import or export accounts without any gold having been physically moved.

10. In a May 18, 1993 FOMC meeting, there was much discussion about how gold influences public attitude toward inflation. There were discussions about interfering in the gold market to change the public's expectation of inflation, and such postulated interference was even regarded as amusing by the FOMC:

> MR. ANGELL. Here's what I think would happen. I don't think we should increase interest rates by 300 basis points but, if we did, I'm quite certain the **price of gold** would immediately begin a [sharp], quick [drop]. It would happen so fast you'd just have to go and watch it on the screen. If we made a 100 basis point increase in the fed funds rate, the **price of gold** surely would turn back down unless the situation is worse than I anticipate. If we made a 50 basis point increase in the fed funds rate, I don't know what would happen to the **price of gold** but I'd sure like to find out! [Laughter]… People can talk about **gold's price** being due to what the Chinese are buying; that's the silliest nonsense that ever was. The **price of gold** is largely determined by what people who do not have trust in [sic] fiat money system want to use for an escape out of any currency, and they want to gain security through owning gold. Now, if annual gold production and consumption amount to 2 percent of the world's stock, a change of 10 percent in the amount produced or consumed is not going to change the price very much. But attitudes about inflation will change it. [Emphasis added.]

Later in the same meeting, Mr. Greenspan took up on this line of thinking:

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[5] http://www.federalreserve.gov/monetarypolicy/files/FOMC19921222meeting.pdf

> ALAN GREENSPAN: I have one other issue I'd like to throw on the table. I hesitate to do it, but let me tell you some of the issues that are involved here. **If we are dealing with psychology**, then the thermometers one uses to measure it have an effect. I was raising the question on the side with Governor Mullins of **what would happen if the Treasury sold a little gold in this market.** There's an interesting question here because if the gold price broke in that context, the **thermometer** would not be just a measuring tool. It would basically affect the underlying psychology. **Now, we don't have the legal right to sell gold but I'm just frankly curious about what people's views are** on situations of this nature because something unusual is involved in policy here. We're not just going through the standard policy where the money supply is expanding, the economy is expanding, and the Fed tightens. This is a wholly different thing. Anyway, I'm most curious to get your views in these various respects, so please don't be afraid to throw things out on the table.[6] [Emphasis added.]

Mr. Greenspan thus seems to indicate that if the gold price could be significantly depressed, then the public's inflation expectations could be radically altered.

11. In an FOMC meeting on January 31, 1995, Virgil Mattingly, General Counsel, said the following.

> MR. MATTINGLY. It's pretty clear that these ESF operations are authorized. I don't think there is a legal problem in terms of the authority. The statute is very broadly worded in terms of words like "credit"--it has covered things like the gold swaps--and it confers broad authority. Counsel at the White House called the Treasury's General Counsel today and asked "Are you sure?" And the Treasury's General Counsel said "I am sure." Everyone is satisfied that a legal issue is not involved, if that helps.[7]

This comment suggests that the US gold stock has been mobilized in the market. When Senator Jim Bunning pursued this matter with Greenspan, Mattingly responded:

> These inquiries focus primarily on a statement attributed to me that appears on Page 69 of the published transcript of the January 31-February 1, 1995, FOMC meeting to the effect that the Exchange Stabilization Fund ("ESF") has engaged in "gold swaps." Given the passage of time, some six years, I have no clear recollection of exactly what I said that day but I can confirm that I have no

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6 http://www.federalreserve.gov/monetarypolicy/files/FOMC19930518meeting.pdf

7 http://www.federalreserve.gov/monetarypolicy/files/FOMC19950201meeting.pdf

> knowledge of any "gold swaps" by either the Federal Reserve or the ESF. I believe that my remarks, which were intended as a general description of the authority possessed by the Secretary of the Treasury to utilize the ESF, were transcribed inaccurately or otherwise became garbled.

Mr. Mattingly's rationale — that his comments "were transcribed inaccurately or otherwise became garbled" — does not pass the smell test. This is the same organization that misled Congress for 17 years about the existence of any transcripts or recordings of the FOMC meetings. Notice the very clever inference "I can confirm that I have no knowledge of any 'gold swaps' by either the Federal Reserve or the ESF." He doesn't specify what type of "knowledge" he is talking about. Is it knowledge that any swaps were ever made, or is it knowledge of the details of swap arrangements that were made? In any case, he is professing not to know; he is not denying that any swaps have occurred.

12. In the July 1991 meeting of the FOMC, the following discussion took place:

> ALAN GREENSPAN: Why have commodity prices failed to decline as much as they ordinarily would during recession periods? Now, it also looks as if commodity prices are not spiking upward in a recovery like they ordinarily would. So, we have a different picture in commodity prices than I've seen in a recession and, frankly, I'm very puzzled by it. At the same time that commodity prices do not show the extent of the recovery, I think it's somewhat strange that gold prices failed to move down. Given central banks' reduced willingness to own gold, or given what I see as a reluctance in the foreign central banks and others to hold as large gold stocks, given countries in southeast Asia who have changed their attitudes [toward gold], and given the Soviet Union [sales], I don't understand why gold prices do not come down. It suggests to me **that there may be some what we call "crazies" out there who believe that gold is a good [inflation hedge].** And I guess I think that [inflation concern] is in the long bond.[8] [Emphasis added.]

Alan Greenspan labels as "crazies" those investors who want to protect their

[8] http://www.federalreserve.gov/monetarypolicy/files/FOMC19910703meeting.pdf

wealth against the promiscuous money creation of his Federal Reserve System. However, in 1966, Mr. Greenspan had written an article titled "Gold and Economic Freedom" in which he recognized the unique properties of gold as an inflation hedge:

> In the absence of the gold standard, there is no way to protect savings from confiscation through inflation. There is no safe store of value. If there were, the government would have to make its holding illegal, as was done in the case of gold. If everyone decided, for example, to convert all his bank deposits to silver or copper or any other good, and thereafter declined to accept checks as payment for goods, bank deposits would lose their purchasing power and government-created bank credit would be worthless as a claim on goods. The financial policy of the welfare state requires that there be no way for the owners of wealth to protect themselves. **This is the shabby secret of the welfare statists' tirades against gold. Deficit spending is simply a scheme for the confiscation of wealth. Gold stands in the way of this insidious process. It stands as a protector of property rights. If one grasps this, one has no difficulty in understanding the statists' antagonism toward the gold standard.**[9] [Emphasis added.]

And clearly, once Greenspan had become a "statist," he joined the antagonists of gold.

13. The following is a very enlightening discussion in the July 1995 FOMC meeting.

> CHAIRMAN GREENSPAN. I think I've got it! [Laughter] You are telling me that the SDR certificate comes out of the Treasury and we cancel the Treasury obligation and it is wholly an asset swap so that the debt to the public of the U.S. Treasury goes down by that amount. Is that what happens? That solves President Jordan's problem too! [Laughter]
>
> MR. JORDAN. Can I follow up on that? The same thing happened when we changed the price of an ounce of gold from $35 to $38 and then to $42.22. The Treasury got a windfall of about $1 billion to $1.2 billion in both of those so-called devaluations. So an issue on this is: What was the dollar price of SDRs that we monetized? You say I have an asset on my balance sheet and I don't know what the value of it is.
>
> CHAIRMAN GREENSPAN. It's about $42.
>
> MR. TRUMAN. It's $42.22; it's equivalent to the official price of gold.

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[9] http://www.321gold.com/fed/greenspan/1966.html

> MR. JORDAN. We do this at the official U.S. Treasury price of gold?
>
> CHAIRMAN GREENSPAN. **Do you mean that we can lower the debt to the public by moving the price of gold up to the market price?** That could cut the debt back by a not insignificant amount!
>
> MR. JORDAN. I have been trying not to mention that publicly for fear that someone might want to do it.
>
> CHAIRMAN GREENSPAN. It's probably too late; we just mentioned it.
>
> MR. JORDAN. It will become known five years from now!
>
> MR. LINDSEY. Five years from now, it will be read in the transcript for this meeting.
>
> MR. BLINDER. **By which time it already will have been done**.[10] [Emphasis added.]

This exchange is extremely significant because it recognizes that external debt of the USA will eventually have to be balanced with the amount of gold claimed to be held by the Treasury. Interestingly enough the FRB does not want this information to be known, as this would essentially devalue the dollar overnight and result in instant hyperinflation. But as Greenspan points out, it would also inflate away the debt.

It should also be noted that the five-year delay in releasing information to the public is clearly viewed by the FRB as a way to disadvantage the public. When the FRB/Treasury is forced by market conditions to balance its debt with its gold holdings, the dollar will be massively devalued and the value of gold will be multiples of its current price. This would certainly make it advantageous to be one of the "crazies," as Mr. Greenspan affectionately refers to gold investors, when that comes to pass.

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[10] http://www.federalreserve.gov/monetarypolicy/files/FOMC19950706meeting.pdf

14. I believe the following can be concluded from these insights into the deliberations of the FOMC:

- The FRB has on several occasions discussed targeting gold prices with FRB policies.
- The FRB admits that propaganda is effective against gold investors in that just mentioning the possibility of selling gold can drive down prices.
- The FRB contemplated interfering in the gold market, even on a massive scale.
- The FRB admits that it has sold gold in the past with the intention of bringing down gold prices.
- The record shows that the FRB opined that the statutes of the ESF have covered "the gold swaps." Despite claims that this statement has been inaccurately transcribed or garbled, recent information suggests otherwise.

The FRB does not want it to be publicly known that the external debt could be substantially reduced by revaluing official gold at the market price, in case someone wants to do it. This is an admission that the official price of gold of $42.22/oz is smoke and mirrors. The ability of the FRB/Treasury to create money is linked to the only liquid collateral they have, which is gold. The gold price that is required to make the value of the US gold equal to the dollars issued is multiples of the current price, and is heavily dependent on how much unencumbered gold the Treasury still holds. The FRB expressed the utility of having the virtues of a gold standard without using gold! Greenspan later confirmed that the FRB was behaving as if it were on a gold standard, as if there were real reserves underneath the system. This supports GATA's claims that the gold price has been suppressed by an increase in the supply of "paper gold"; gold that investors believe they have bought and own, when the only thing they hold is a certificate that says they own the gold. This is the case with London Bullion Marketing Association ("LBMA")

unallocated gold accounts, unbacked Exchange Traded Funds ("ETF's"), pool accounts and gold derivatives. The demand for real physical gold bullion is surging in the face of an impending daisy-chain of sovereign debt defaults. This threatens to expose the confidence trick that much more gold has been sold than exists in the world. I have explained this in an article, "The Tiny Market that is the World's Biggest."[11]

15. While the Federal Reserve may occasionally "behave" as if there are real reserves under the US dollar, the reality is that there are none. A study of the heavily redacted and edited minutes of the FOMC meetings reveal a penchant for targeting and manipulating gold prices, and deceiving Congress and the general public. The words of Alan Greenspan from his 1966 article "Gold and Economic Freedom" could not be more relevant:

> *This is the shabby secret of the welfare statists' tirades against gold. Deficit spending is simply a scheme for the confiscation of wealth. Gold stands in the way of this insidious process. It stands as a protector of property rights. If one grasps this, one has no difficulty in understanding the statists' antagonism toward the gold standard.* [Italics added.]

We are now in an era of unprecedented deficit spending, which means confiscation of wealth will also be unprecedented. The sooner the American people know the truth about efforts by the FRB to suppress the price of gold, the better.

16. Additional important information came to light during the September 25, 2009 Testimony of Scott Alvarez, FRB General Counsel, under Questioning from Rep. Alan Grayson, during the Federal Reserve Congressional Oversight Hearing.

> Grayson: Let's go on to something else. Does the Federal Reserve actually **possess all the gold that's listed on their balance sheet**? Do they actually possess it?

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[11] http://www.gata.org/node/8248

> Scott Alvarez: Yes.
>
> Grayson: Has that been audited by the GAO?
>
> Alvarez: I believe that's within the GAO's authority to audit. It's certainly something that our independent accountant is able to verify and does.
>
> Grayson: So if I go in and ask for a GAO audit you won't oppose it, right?
>
> Alvarez**: to auditing the presence of the gold on the facility**. I don't see any reason to object to that.[12] [Emphasis added]

Therefore, Alvarez testified under oath that the FRB "possesses all the gold that is listed on its balance sheet." To find how much this is we can reference the 2009 FRB Annual Report

http://www.federalreserve.gov/boarddocs/rptcongress/annual09/pdf/AR09.pdf

Page 434 lists the "gold stock" on the balance sheet of the FRB as $11.04 billion. The official gold price is $42.22/oz., which gives an FRB gold stock of 261.5 million ounces. This means that Scott Alvarez testified that the FRB actually possesses 261.5 million ounces. But when asked if a GAO audit could be performed, he deliberately limited the scope of the audit in his response to "auditing the presence of the gold on the facility." An audit of an asset is not meaningful unless the audit not only includes **physical verification** of the asset but also **any liens, claims or encumbrances** against the asset. Limiting a GAO audit of FRB gold to only its physical presence would not bring to light any possible changes in title to the gold. **This is exactly why central banks undertake swap arrangements with other central banks,** so that mobilization of the gold into the market place can be obfuscated and escape being uncovered by just a simple physical inventory-type audit.

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[12] The video of this exchange is at http://www.youtube.com/watch?v=igIW_htYQwM

FRB General Counsel Scott Alvarez's deliberate restriction of any potential GAO audit to only a physical gold audit support GATA's suspicions that swaps have indeed taken place. The confirmation from the FRB's own Governor Kevin M. Warsh that there are swap arrangements in place in his denial of GATA's FOIA appeal would also dovetail into Alvarez sidestepping the question as to whether he would oppose a full, unrestricted GAO audit.

17. During the same Congressional hearing Scott Alvarez, FRB General Counsel, was questioned by Rep. Judy Biggert:

> Biggert: Would greater transparency improve the international confidence in the dollar or would it lessen it?
>
> Alvarez: Information about the Federal Reserve's transactions, the overall information about Federal Reserve transactions with foreign governments is **disclosed in summary** on our balance sheet but also the facilities, **the specific swap facilities that we have are listed in detail in the information we make available to the public**. That already is OK and doesn't undermine confidence.[13] [Emphasis added]

This appears to be in contradiction of the statement of Kevin M. Warsh in his response to GATA's request for documents relating to gold swaps when he stated "This includes information relating to swap arrangements with foreign banks on behalf of the Federal Reserve System and is not the type of information that is customarily disclosed to the public. This information was properly withheld from you." *See* Complaint, Exh. D, p. 3. The FRB's own General Counsel said under oath to Congress that details of swap facilities are listed in information made available to the public. A statement made under oath to Congress should be binding upon the FRB.

The relevant segment is 2:10-2:40.

[13] http://www.youtube.com/watch?v=7EoPen-ce3U&feature=related The relevant segment is 2:47-3:19.

18. During the same hearing Scott Alvarez was questioned by Rep. Ron Paul:

> Paul: Are you aware of any precise times that the Federal Reserve gets involved in the dollar, err, I mean the gold market because actually there is authority for at least the Exchange Stabilization Fund to be involved. What do you know about the Fed ever being involved in the gold market whether it is the futures market or loaning gold because a lot of central banks are in the loaning and selling of gold constantly?
>
> Alvarez: The Federal Reserve Bank of New York is a trustee for some of the gold stock of foreign central banks, and it holds the gold but it doesn't conduct transactions itself in that gold; that is done by the foreign central banks.
>
> Paul: **You have no evidence that our Federal Reserve has ever been involved in the gold market?**
>
> Alvarez: I confess not to being an expert in **transactions** we might have done in **gold** over the **history** of the Federal Reserve **but we could get you that information**.
>
> Paul: Of course, what I am suggesting and the reason for the audit is to find out **whether indirectly we might be involved by going to another central bank or a government and doing the work we want to do** and that's why I think a full audit is necessary. [Emphasis added.][14]

Scott Alvarez, FRB General Counsel, promised Congressman Paul that he could provide a complete history of all the transactions the FRB has ever been involved in with respect to gold. He did not indicate that this information was secret or not generally made available. This statement made under oath again appears to contradict the position expressed by Kevin M. Warsh.

16. I believe that the FRB possesses significant documentation concerning "gold swaps" and other federal government and FRB gold manipulation efforts over the past 20 years,

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[14] http://www.youtube.com/watch?v=7EoPen-ce3U&feature=related
The relevant segment is 5:38-6:46.

although with the exception of the documents alluded to in the Declaration of Chris Powell and this Declaration, I cannot describe precisely what they may be.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed, this 23rd day of September, 2010.

Adrian Douglas

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOLD ANTI-TRUST ACTION COMMITTEE, INC.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 09-2436 (ESH)
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,	)	
Defendant.	)	

DECLARATION OF JAMES TURK

1. My name is James Turk. I am the publisher and editor of the Free Gold Money Report ("FGMR") (www.fgmr.com). I also am the founder and chairman of GoldMoney (www.goldmoney.com), which provides a convenient and economical way to buy and sell gold, silver, and platinum online, using the digital gold currency for which I was awarded four U.S. patents. I have specialized in international banking, finance, and investments since graduating in 1969 from George Washington University with a B.A. degree in International Economics. I began my business career with The Chase Manhattan Bank (now J.P. Morgan Chase), which included assignments in Thailand, the Philippines, and Hong Kong. In 1980, I joined the private investment and trading company of a prominent precious metals trader. I moved to the United Arab Emirates in December 1983 to be appointed manager of the Commodity Department of the Abu Dhabi Investment Authority, a position I held until resigning in 1987 to begin FGMR. I have written several monographs on money and banking and was the co-author of "The Coming Collapse of the Dollar" (Doubleday, 2004) (www.dollarcollapse.com). I serve as a consultant to GATA, the plaintiff in this action against the Federal Reserve Board ("FRB").

2. I am writing to explain **gold swaps**, as that term is used internationally with respect to gold bullion transactions. Gold swaps are generally entered into between central banks or government treasuries. "Gold swaps" involve a swap, or exchange, of gold for either other gold or currency, with a promise to unwind the transaction at a later time. Gold swaps are sometimes thought of as leases or loans of gold for a period of time, allowing one receiving party the right to use that gold and the other receiving party the right to use what it received in the swap. It is possible that the right to unwind the transaction could be limited to a fixed period of time, and if not unwound the swap would become the equivalent of a sale. It is also possible that physical possession of the gold not be transferred during the period of the swap.

3. A **swap of gold for currency** would appear to create reporting problems based on current central bank practices that allow one asset to be owned by two central banks, a deceptive double-counting that defies Generally Accepted Accounting Principles. For example, the central bank acquiring interest in and often possession of gold through a swap may be found reporting that gold as if it were its own, while the central bank giving up the interest in and often possession of the gold subject to the swap may be found continuing to report the gold as if it were unencumbered and stored in its vault. In my experience, the public is never informed of the details of gold swaps.

4. A **swap of gold for gold** might seem to be without purpose, but the purpose could involve a desire to hide a transaction from public view. In other words, the gold that is subject to a swap may not be fully owned by or in the possession of the central bank or Treasury, but may continue to be reported as if it were fully owned by the agency in question.

5. An illustration of the reporting problems can be seen on the September 20, 2010, U.S. Department of Treasury weekly press release entitled "**U.S. International Reserve Position**," which presents the nation's "Official reserve assets,"[1] including a line labeled: "gold (including gold deposits and, if appropriate, gold swapped)." The footnote to this line states: "Gold stock is valued monthly at $42.2222 per fine troy ounce."[2] The U.S. Treasury Department therefore combines into one line: (i) gold, (ii) gold deposits, and (iii) gold swaps. These terms are not defined, and neither is the term "gold stock" in the footnote of the report, but gold stored safely in a Treasury vault like the one located at Ft. Knox, Kentucky is fundamentally different by logic and Generally Accepted Accounting Principles from gold loaned, swapped, leased, or deposited because gold transacted in these ways is no longer in the Treasury's possession, or fully owned by the Treasury. This aggregate form of reporting gives the public no understanding as to how much of the nation's gold is the subject of secret gold swaps with foreign central banks.

6. Some interesting recent history illustrates certain aspects of gold swaps. On July 7, 2010, it was reported by the Wall Street Journal that footnotes in a financial report issued by the **Bank for International Settlements** ("BIS") in Basel, Switzerland, disclose that in 2009 the BIS completed a 380-tonne gold swap with an unnamed commercial bank.[3] Unfortunately, the BIS has disclosed too little information for any of us outside the inner circle of central bankers to

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[1] The footnote to the term "Official reserve assets" states "Includes holdings of the Treasury's Exchange Stabilization Fund (ESF) and the Federal Reserve's System Open Market Account (SOMA), valued at current market exchange rates...."

[2] http://treasury.gov/press/releases/20109201520104590.htm.

[3] http://online.wsj.com/article/SB10001424052748704178004575351421947803404.html?mg=com-wsj#printMode

truly understand what happened here. Consequently, there have been various interpretations by market participants of what this gold swap means.

7. There are indications that this gold swap was with **Portugal**.[4] First, Portugal reports owning 382 tonnes of gold, which is very close to the weight of metal swapped with the BIS. Second, as Portugal is one of the notorious over-indebted and spendthrift European "PIGS" countries (Portugal, Italy, Greece, and Spain), Portugal might be willing to complete unusual and even extraordinary transactions to give the appearance of improving its financial position, which could occur because it might still record ownership of the gold that had been swapped even though it no longer owed that gold completely and may not even have been in possession of it, while concurrently bolstering its cash position with the currency received as proceeds from the swap.

8. Before it was announced that the BIS swap was with a commercial bank, the mainstream interpretation was that a troubled sovereign borrower or perhaps even the European Central Bank itself needed liquidity and so used gold to borrow currency. But there was another potential reason for the swap even if it received little attention — the BIS may have been running out of physical metal for its interventions in the gold market and needed to acquire physical gold. Consequently, the BIS may have swapped currency for delivery of physical gold (or perhaps swapped for the right to have Portugal deliver when calls it had sold were exercised).

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[4] Financial Times noted that "sovereign borrowers typically do not post collateral" on derivative trading, and reported that "Portugal has become the first eurozone country to agree to set aside cash — or other assets [N.B., possibly gold?] — against derivative transactions in a decision intended to reduce its funding costs." A. Sakoui & P. Wise, "Portugal takes Eurozone derivatives set-aside decision" Financial Times (Jul. 27, 2010). http://www.ft.com/cms/s/0/10ea1ac2-99ad-11df-a852-00144feab49a.html

9. If Portugal were able to repay the loan and put the 380 tonnes of gold back in its vault, BIS would be deprived of the use of the gold and would drive the gold price sky-high, given the dearth of sellers of physical metal at current prices because the preponderance of current holders of physical metal recognize that current prices fundamentally undervalue gold. Sky-high prices would blow up the gold cartel and its efforts to continue capping the gold price as it operates its staged retreat, letting gold rise every year but not too much so as not to draw attention to it and the resulting consequences of ever-depreciating fiat currencies.

10. Of course, all of the above discussion about Portugal is just reasoned speculation at this point. My explanation to decipher the BIS swap seems logical, but we may never know the true reason because central banks continue to operate in secret. However, this illustration helps explain what a "gold swap" is, how it operates and the deception that may result both from the lack of transparency in central bank financial reporting and from central banks' unwillingness to prepare their annual financial accounts in accordance with Generally Accepted Accounting Principles.

11. Articles in the financial press about the recent BIS gold swap disclose additional information about gold swaps, but all observers are left somewhat in the dark by secret central bank transactions.

a. For example, the article by Rowena Mason "Secret Gold Swap Has Spooked the Market," London Telegraph (July 11, 2010), reports on the analysis of one gold markets observer (Jim Sinclair), as follows:

> 'Gold swaps are usually undertaken by monetary authorities.... The gold is exchanged for foreign exchange deposits with an agreement that the transaction be unwound at a future time at an agreed price....' Historically swaps occur when entities like the IMF have a need for foreign exchange,

> but do not wish to sell the gold. In this case, gold is a leveraging device for needed currency to meet requirements.... The many reports that characterise the large IMF gold swap as a sale of gold into the markets do not understand the difference between a swap and a lease.[5]

b. The Wall Street Journal reported that "The Bank for International Settlements said it loaned billions of dollars backed by gold to commercial banks in recent months. Most of the loans — known as gold swaps — were conducted with European banks in exchange for foreign currencies, mainly U.S. dollars, according to data released last week in the BIS's annual report." C. Cui & L. Pleven, "Commercial Banks Used Gold Swaps," Wall Street Journal, (July 7, 2010).[6]

c. The Wall Street Journal described the BIS gold swap as follows: "exchanging their gold with the BIS in return for cash, agreeing to repurchase the gold at a later date." C. Cui and L. Pleven, "Central Banks Swap Tons of Gold to Raise Cash, Surprising Market," Wall Street Journal (July 7, 2010).[7]

12. The difference between gold swaps and gold loans is discussed in "The Macroeconomic Statistical Treatment of Reverse Transactions," a study for the International Monetary Fund, October 2001.[8]

13. I understand that, other than Congressional correspondence, articles, and documents on the Internet, and documents developed over the years by GATA and others including

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[5] http://www.telegraph.co.uk/finance/markets/7884272/Secret-gold-swap-has-spooked-the-market.html

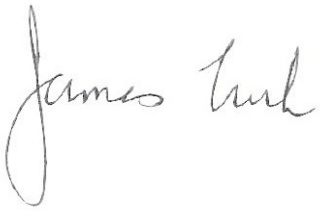
[6] http://online.wsj.com/article/SB10001424052748704545004575353403943560776.html

[7] http://online.wsj.com/article/SB10001424052748704178004575351421947803404.html

inquiries to persons in government about gold swaps and related issues, the FRB has identified very few documents related to gold swaps responsive to GATA's FOIA requests at issue in this case and no documents at all regarding U.S. gold swaps. Gold swaps are not unknown in international gold markets, and if the FRB truly had virtually no records over the last 20 years of any gold swaps occurring anywhere in the world, including gold swaps engaged in by the United States, it would be highly perplexing.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed, this 26th day of September, 2010.



James Turk

[8] http://www.imf.org/external/pubs/ft/bop/2001/01-16.pdf

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOLD ANTI-TRUST ACTION COMMITTEE, INC.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 09-2436 (ESH)
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,	)	
Defendant.	)	

DECLARATION OF WILLIAM J. OLSON

1. My name is William J. Olson. I am attorney of record for Gold Anti-Trust Action Committee, Inc. ("GATA"), the plaintiff in the above-captioned case filed against defendant, Board of Governors of the Federal Reserve System, also known as the Federal Reserve Board ("FRB"), under the Freedom of Information Act, 5 U.S.C. section 552 ("FOIA").

2. This Declaration is submitted pursuant to Rule 56(f), Federal Rules of Civil Procedure, in support of both:

(i) GATA's Motion for In Camera Review and Limited Discovery herein ("GATA Motion"); and

(ii) GATA's Statement of Material Facts as to Which a Genuine Issue Exists ("GATA SOMF"), opposing Defendant's Motion for Summary Judgment.

3. As set forth in the GATA SOMF (as well as the GATA Motion and Memorandum of Points and Authorities in Support of the GATA Motion ("GATA Mem.")), there are significant factual issues in dispute in this case. Issues in dispute include both (i) the characterization and substance of most of the documents withheld by defendant (where *in*

camera review of those documents by this Court would be the most efficient and fair way to resolve those issues), and (ii) the adequacy of the search conducted by defendant in response to plaintiff's FOIA request (where allowing plaintiff to conduct limited discovery of defendant concerning the presence or absence of additional responsive records would be in the interest of justice).

4. Although GATA has filed a Memorandum of Points and Authorities in Opposition to the Defendant's Motion for Summary Judgment, GATA is in an unfair position with respect to evaluating both (i) the documents being withheld by FRB, as well as (ii) the search that FRB says that it conducted.

5. With respect to the documents being withheld by FRB, GATA knew virtually nothing about them until well into this litigation, and it was only with the filing of Defendant's Motion for Summary Judgment with its attachments, including a Vaughn Index and the declaration of Alison Thro describing the FRB search and discussing the various documents, that GATA had an opportunity to evaluate realistically the FRB's claim that the withheld documents are privileged under FOIA Exemptions 4 and 5.[1] As is evident from GATA's memorandum in opposition to the FRB motion, GATA does not agree — for the most part — that the documents should be exempt. As to whether some of the documents should be considered exempt — such as documents described as drafts of finalized documents that FRB has produced — it is impossible to make that determination without actually seeing the

[1] During the pendency of this litigation, but some weeks prior to filing its motion for summary judgment, defendant furnished a draft Vaughn Index — different from the one that was ultimately filed — but GATA did not find it helpful in answering many factual questions that still exist concerning withheld documents.

documents. It is GATA's belief that the fairest and most efficient way of resolving the various factual issues surrounding the documents would be for this Court to examine them, *in camera*.

6. With respect to defendant's specific representations describing the documents — which defendant claims are undisputed material facts, GATA can only respond as it has in its memorandum in opposition. It would appear, as set forth in that memorandum, that the defendant's descriptions do not warrant the claimed **FOIA exemptions under 5 U.S.C. sections 552(b)(4) and (5)**. *See* GATA Mem. Opp., pp. 24-45. In describing the documents responsive to GATA's FOIA request, defendant made judgments about what portions of those documents could be disclosed consistent with the claimed exemptions, and defendant asserts that it was "not possible to disclose any additional portions, as any releasable material was inextricably intertwined with exempt information such that disclosure would reveal the exempt information." *See* FRB SUF ¶ 17. GATA believes that much more of the withheld documents could have been released, but obviously, since the documents have not been disclosed, it is impossible to be sure about that determination. It may be that this issue could only be resolved by *in camera* inspection of the documents themselves.

7. With respect to the **adequacy of the FRB search**, GATA has attempted, in its memorandum in opposition to FRB's motion for summary judgment, to describe the issues GATA believes exist. GATA believes that the FRB search did not encompass all sources of records reasonably likely to be responsive to GATA's request. *See* GATA Mem. Opp., pp. 14-24. GATA believes that the basis for FRB's contention that an adequate search has been conducted (*see* GATA Mem., pp. 11-24) should be probed and examined on discovery. For example, the "topic of plaintiff's FOI request" was not limited to gold swaps involving the

United States of the Federal Reserve, as alleged by defendant. *See* FRB SUF ¶ 16. GATA's FOIA request sought records concerning any gold swaps, including swaps not involving the United States. *See* Complaint, Exh. A, p. 4. It is unknown by GATA whether FRB incorrectly limited the scope of its search.

8. In addition to those issues, GATA believes that FRB has many **documents** regarding "gold swaps" — which is the subject of GATA's FOIA request — that **have not yet been identified** by FRB. That belief is supported by the declarations of Chris Powell, Adrian Douglas, and James Turk, which have been filed in support of GATA's opposition to FRB's motion for summary judgment. Each declaration describes or alludes to documents that GATA believes should have been identified by FRB if FRB has possession or control of such documents. GATA believes that FRB's knowledge about the existence and location of such documents should be probed and examined on written discovery in this action.

9. The **documents thus far disclosed** by FRB in response to GATA's 2007 FOIA request, for the most part, were correspondence between the FRB and Members of Congress and members of the public, newspaper and Internet articles, and documents from the FRB and Treasury websites, as well as a smattering of other random documents such as documents written by GATA, minutes of a meeting of the Federal Open Market Committee, a research paper not related to gold swaps, a pleading from litigation in which GATA had been involved, etc. Documents released in response to GATA's 2009 FOIA request were so heavily redacted that they are difficult to characterize. However, they appear to be FRB internal documents relating to currency swaps, how possible gold sales would affect the price of gold, and how the nation's gold could be better used. A June 9, 2997 memorandum relates to a gold swap

arrangement with an unnamed party where the Federal Reserve Bank of New York would have custody of the gold. A May 24, 2000 memorandum relates to the ability of Federal Reserve Banks to Engage in Gold Transactions. One cannot tell whether any of these documents involve gold swaps engaged in by the FRB or U.S. Treasury Department, or gold swaps engaged in by any other country in the world, the International Monetary Fund, or the Bank for International Settlements. From the little of these documents that has been disclosed (e.g., date, title, author, and a bit of text), it would appear that only a few could address issues relating to gold swaps of the sort raised in the Declarations of Messrs. Powell, Douglas and Turk in this case.

10. Of the documents currently being withheld by FRB, those identified as **Items 11, 13 and 15** in the FRB's Vaughn Index, are said to mention or involve "gold swaps," and appear to be among the types of records that GATA believes must exist in much higher numbers somewhere in the records of FRB or its personnel.

11. The discovery GATA seeks is the bare minimum that GATA believes is necessary to test the adequacy of the FRB search related to GATA's FOIA request. GATA probably could accomplish more by way of deposition of certain FRB officials, but believes, in light of normal practice in FOIA cases, that less intrusive discovery, such as by written interrogatories, would be more appropriate, at least initially. In my judgment, such discovery would be important to assist the court in evaluating GATA's claim as well as the FRB's defenses to this action.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed, this 27TH day of September, 2010.

William J. Olson

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOLD ANTI-TRUST ACTION COMMITTEE, INC.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 09-2436 (ESH)
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ,	)	
Defendant.	)	

ORDER

Upon consideration of defendant's motion for summary judgment, and memorandum of points and authorities in support thereof, together with the declarations of Alison M. Thro, Thomas Fogarty and Richard Dzina, and statement of material facts not in genuine dispute, and upon consideration of plaintiff's memorandum of points and authorities in opposition to defendant's motion for summary judgment, together with the declarations of Chris Powell, Adrian Douglas, James Turk, and William J. Olson, and plaintiff's statement of material facts as to which a genuine issue exists, and defendant's reply memorandum, it appearing to the Court that genuine issues of material fact exist concerning the adequacy of the search conducted by defendant in response to plaintiff's request under the Freedom of Information Act, as well as with respect to the FOIA exemptions claimed by defendant, it is by the Court, this ___ day of _____, 2010,

ORDERED that defendant's motion for summary judgment be, and it hereby is, denied.

_____
ELLEN S. HUVELLE
U.S. District Court Judge

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