IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Brian S. Hooker, Ph.D., P.E. Plaintiff, v. Kathleen Sebelius as Secretary of the United States Department of Health and Human Services, and Thomas R. Frieden, MD, MPH as Director, The Centers for Disease Control and Prevention, Defendants.	)	Civil Action No. 11-cv-01275 (ABJ)

RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Comes by Counsel and for his response to Defendants' Motion for Summary Judgment, states as set out hereinafter.

INTRODUCTION

This case, of course, involves FOIA requests by Dr. Hooker for information from the CDC relating to the use of mercury in the form of Thimerosal in vaccines and resulting publications about its safety. Fortunately, Dr. Hooker was able to obtain from former Congressman Dr. Weldon unredacted versions of these emails which he has been able to compare to the redacted emails he received from the CDC. Clearly, the CDC has improperly redacted information. One example of that is presented here in this introduction. An article published in Pediatrics in 2003 claimed that the Danish study proved that mercury in the form of

Thimerosal was safe because the autism rate went up in Denmark after mercury was taken out of vaccines. As this email proves, the opposite was true.

In comparing the redacted version [Exhibit 5B] and the unredacted version [Exhibit 5C] of emails between Danish (Madsen et al.) article coauthors and CDC employees, it may be seen that the CDC is withholding the fact that earlier versions of the Madsen et al. paper were rejected by The Journal of the American Medical Association (JAMA) and Lancet, prior to publication in Pediatrics in 2003. A most relevant email is set out here with the redacted portions appearing in strikethrough;

> From: Kreesten Maldgaard Madsen [KMM@SOCI.AU.DK]
> Sent: Wednesday, November 13, 2002 5:33 AM
> To: Marlene Briciet Lauritsen; Paul Thorsen; Schendel, Diana
> Subject: RE: Manuscript about Thimerosal and autism
>
> Hi Marlene,
> ~~***I don't remember the actual phrasing of the rejection from JAMA – In the sence of "is it worth trying again given the situation". I all cases your point about the decreasing rates in 2001 seems to be of importance and probably should be added.***~~ I am not currently at the university but I will contact you and Poul tomorrow to make up our minds. Best regards, Kreesten
>
> -----Original Message-----
> From: Marlene Briciet Lauritsen [mailto:mbl@dadlnet.dk]
> Sent: Wed 13-11-2002 09:24
> To: Paul Thorsen; Kreesten Meldgaard Madsen; dcs6@cdc.gov
> Cc:
> Subject: Manuscript about Thimerosal and autism
>
> Dear Poul, Kreesten and Diane Schendel
> Attached I send you the short and long manuscript about Thimerosal and autism in Denmark**.** ~~***The long manuscript has been submitted to JAMA*** *and includes both data on the incidence and prevalence of autism**.** The shorter version includes only incidence data* ***and has been submitted to Lancet. Unfortunately, both manuscript have been rejected.***~~
> I need to tell you that the figures in the manuscripts do not include the latest data from 2001. I only have these figures as a paper version and they are at work ~~*while I am working at home these days.*~~ But the incidence and prevalence are still decreasing in 2001. ~~*Also, the manuscript submitted to JAMA do not cite some of the latest papers on the prevalence of autism which I will do in case it should be submitted again.*~~

I look forward to hear from you again.
Best regards
Marlene

(Italics and bold added for emphasis. Words that were redacted appear in strikethrough type. Original documents attached as Exhibit 5B and 5C.)

The following quote from Madsen's email, the lead author in the Pediatrics 2003 paper, to his coauthors and a member of the CDC staff has the following telling statement which the CDC redacted from the information given to Dr. Hooker;

~~"I[n](sic) all cases your point about the decreasing rates in 2001 seems to be of importance and probably should be added."~~

Amazingly, the paper published in Pediatrics in 2003 said the rates increased rather than decreased. This has been and remains the basis for the CDC's claim that mercury in the form of Thimerosal is safe and has nothing to do with autism.

In order to ensure publication by Pediatrics, the following letter was sent by Dr. Cordero to the editor of the journal Pediatrics:

Jose F. Cordero, M.D., M.P.H.
Assistant Surgeon General
Director
National Center on Birth Defects and Developmental Disabilities

Jerold F. Lucey, M.D.
Editor in Chief
PEDIATRICS

*** Because **mercury in its inorganic form is known to have serious neurologic effects**, many parents have speculated that the increased number of vaccines (many of which contained Thimerosal) may have been a significant factor in the recent rise in autism. The Danish study is a powerful epidemiologic study of this issue and capitalizes on the Danish health registry system that incorporates all health encounters into disease and exposure specific registries. In addition, a key strength of the study is the ability to examine rates of autism prior to and after the *discontinuation* of vaccines containing Thimerosal in Denmark in 1992. Contrary to what would be expected if Thimerosal was linked to autism) the **authors did not observe a decline in the rate of autism with the removal of Thimerosal** containing vaccines.

I feel this is a very important study that deserves thoughtful consideration by the Journal. **Its findings provide one strong piece of evidence that Thimerosal is not causally linked to autism.**
(emphasis added)
[Exhibit 5D]

Thus, a deception was set in motion that has become the generally accepted consensus within federal bureaucracy including not only the CDC but the Institute of Medicine and the National Institutes of Health, the news media and the public in general, that mercury is perfectly safe in vaccines despite Dr. Cordero description of mercury above as having "serious neurological effects".

This information is an example of the improper handling of these FOIA requests by the CDC. The information above will be discussed in more detail below along with other factual situations.

EXHIBITS

A number of exhibits are contained in this Response, some being emails over ten years old. All these documents have been scanned with optical character recognition software, but some are still difficult to read, copy and paste from. Some of the quotes from these exhibits are short but the exhibits themselves are relatively long. There was never any indication that the use of O.C.R. on these documents in any way changed their content.

DEFENDANTS' STATEMENT OF GENUINE ISSUES AND MATERIAL FACTS IN DISPUTE

I. Despite CDC's Claims, the Danish Authors of the Study Published in Pediatrics 2003 Were Not Acting As "Outside Consultants" to the CDC

Exemption 5 for emails to and from individuals outside of the CDC is applied to those individuals acting as "consultants" only. It is clear from the emails received by Mr. Jeffrey A. Trelka via a FOIA request for documents pertaining to the Denmark Thimerosal publications

(Madsen et al. 2003, Stehr-Green et al. 2003) [Exhibit 1A, Dec. Trelka], that the group of researchers from Denmark was not acting as consultants to the CDC. Instead, the Denmark group was acting independently of the CDC and based on a June 13, 2001 email from Dr. Kreesten Madsen (Aarhus University, Aarhus, Denmark) to Dr. Diane Simpson (Deputy Director of the NIP at the CDC), the research associated with the Madsen et al. 2003 publication had started at least six months prior to the CDC's initial contact with the "Denmark group" as Dr. Madsen stated,

> "An article is soon to be published on secular trends in the incidence and prevalence of autism in Denmark. The work was started before I started working with autism six months ago and I have not been part of that."
> [Exhibit 1B]

Another email between Dr. Simpson and Dr. Paul Stehr-Green (outside consultant to the CDC), dated August 2, 2001, makes it clear that the CDC did not even have permission to look at the research data in the Madsen et al. 2003 publication as Diane Simpson states,

> "Persons within NCBDDD [National Center for Birth Defects and Developmental Disabilities] have seen the autism data from the registry (and have helped cleared [sic] up some coding problems) but evidently feel they cannot share it with us at NIP [National Immunization Program] without the permission of Preben-Bo [Mortensen who was a coauthor on the Madsen et al. 2003 publication] who has said 'NO' to release before he publishes."
> [Exhibit 1C see yellow highlight]

Thus, the Denmark group was working independently of the CDC and was not acting in a "consultant" role.

II. Thomas Verstraeten Was Not Working as an "Outside Consultant" to the CDC After He Left the CDC to Work for Glaxo SmithKline

The CDC is claiming that Dr. Verstraeten was acting as an outside consultant and therefore Exemption 4 applies. However, in a letter to the editor of the Journal Pediatrics that appeared in 2004, regarding the Verstraeten et al. 2003 publication, Dr. Verstraeten states,

> "Although I have been involved in some of the discussions concerning additional analyses that were undertaken after my departure from the CDC, I did not perform any of these additional analyses myself, nor did I instigate them."
> [Exhibit 2A]

This statement seems to directly contradict that Dr. Verstraeten was working as an outside consultant to the CDC.

III. Dr. Robert Chen Did Not Retain His Email Replies in an Important Discussion with Dr's Verstraeten and Miller, Regarding Whether to Grant WHO Money to Dr. Miller for the U.K. Thimerosal Study – CDC's Claims of Search Are Insufficient

This begs the question, "Why did Dr. Chen not retain any of his email replies?" Also, it is curious that these replies could not be obtained by some type of archival system as typically, emails are not stored directly on an individual's hard drive, but are instead maintained on a central server. Given the definition of a record as laid out in 44 USC 3301[1], Chen's correspondences with Tom Verstraeten and Liz Miller about her WHO grant to look at Thimerosal and autism constitutes a record. Chen's deliberation with Miller/Verstraeten would have been key to show how and why they moved forward with the U.K. work. Chen shows up in other emails (Exhibits 3A & 3B), therefore his replies may be on other hard drives .

A FOIA request was submitted by Dr. Hooker to the CDC on March 1, 2011 to obtain "written statements of the CDC policies governing retention of email records by employees from 1998 to present." However, the CDC has not yet responded with any information.

"FOIA is a records access and disclosure law. Records subject to FOIA (that is, FOIA records) are the records in the possession of an agency regardless of storage medium. FOIA

[1] "... includes all books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, function, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them..."

records may exist anywhere within the agency or be in the agency's legal custody, such as at a Federal record center. FOIA records must be made available upon request, unless one of the nine FOIA exemptions applies.

FOIA basically covers all Government records, regardless of whether they are FRA or non-FRA records. Thus an email message that is not an FRA record could still fall within the scope of an FOIA request." (www.cdc.gov/od/foia/policies/emailuse.htm)

The agency should be able to search the "Federal Record Center" which should be resident at the CDC. After a certain period of time (variable depending upon agency), the records are turned over to the "Electronic Record Archives" at the National Archives (http://www.archives.gov/records-mgmt/era/).

CDC made the following assertion in regard to the search for Chen's emails:

> 53. After receipt of the appeal, CDC conducted an additional search of the NIP files and did not locate additional emails. Id. ¶ 60. CDC also confirmed with Dr. Chen that he did not have any additional emails. Id. ¶ 61. This was communicated to Dr. Hooker via a letter dated July 19, 2005. Id. ¶ 62.

The CDC, in their claim of a material fact not in dispute in this ¶53, makes no contention of searching a type of archival system or a claim that one does not exist. This is not an adequate response in view of Federal requirements discussed above in regard to FOIA and FRA. At the very least, a research is called for in regard to all storage mediums at the CDC and also the electronic record archives at the National Archives. Furthermore, since Dr. Chen may have simply deleted these emails, a forensic inspection on behalf of the plaintiff should be allowed and performed on all his hard drives, past and present.

Thus, Robert Chen should have saved all of his replies and the CDC's excuse that he erased his replies is dubious at best. Given the nature of CDC's redactions, the Plaintiff Brian

Hooker has serious questions in regard to the missing Chen emails. Certainly, factual issues exist here which should be open to discovery.

IV. Discussions in the CDC Regarding Thimerosal in Vaccines Were Not Predecisional as the CDC was Deliberating Whether to Recommend Thimerosal-Free Vaccines Versus Thimerosal-Containing Vaccines

In a July 31, 1999 letter (obtained via FOIA from the CDC by Dr. Hooker) [Exhibit 4a] to Dr. Jeffery Koplan, former Director of the CDC, Mr. John Jabara, Vice President and Director of the Vaccine Business Unit of SmithKline Beecham Pharmaceuticals, stated that U.S. supplies for a fully Thimerosal-free DTaP vaccine could be met in the first half of 2000 using SmithKline Beecham's Infanrix vaccine. This constituted an increased inventory of Infanrix by SmithKline Beecham, specifically in response to the July 7 FDA/USPHS Joint Statement calling for the removal of Thimerosal from infant vaccines as quickly as possible. Officials at SmithKline Beecham recognized that the three doses of Thimerosal-containing DTaP vaccine administered to infants of six months of age or younger as a part of the recommended infant vaccination schedule constituted a significant amount of the total Thimerosal exposure of infants in this age group.

The letter continues to describe that the vaccine contracting department of the CDC had approached SmithKline Beecham about an exclusive contract for the Infanrix vaccine until other manufacturers' Thimerosal-free formulations were licensed. Mr. Jabara's letter was evidently in response to the CDC's vaccine contracting department's "offer".

However, Dr. Koplan in his November 26, 1999 reply (obtained via FOIA from the CDC by Dr. Hooker) [Exhibit 4b] states that the CDC plans to "continue to provide the States with a choice among currently licensed brands of the DTaP vaccine." In other words, the CDC would NOT provide SmithKline Beecham with an exclusive contract for DTaP for the first half of 2000

and further would NOT recommend the Infanrix formulation over any competitive, Thimerosal-containing product. Thus, regarding the pre-decisional nature of the (b)(5) exemption, the CDC had already made its *decision* regarding Thimerosal-containing vaccines: that they were safe enough not to make a preference for Thimerosal-free formulations. The way the (b)(5) exemption was applied in the four FOIA requests currently under consideration by the DC District Court was incorrect because the nature of the work was not "pre-decisional" at all. Since the CDC already had a pre-existing policy in place regarding Thimerosal, this was a moot point.

In an additional July 5, 1999 correspondence [Exhibit 4C], obtained by parent FOIA to the FDA [Exhibit 4d, Declaration of Ms. Lyn Redwood], sent from a liaison group to the American Academy of Pediatrics prior to their release of their Thimerosal position statement made on July 7, 1999, key vaccine policy makers state, "We continue to be gravely troubled by the recommendation to encourage 'use [of] vaccines that do not contain Thimerosal'". This represents the opinion of the key vaccine players in the CDC (at the time, Walter Orenstein, Director of the National Immigration Program, and Jose Cordero, Director, National Center on Birth Defects and Developmental Disorders). This shows that even back that far the CDC had made up its mind not to prefer Thimerosal-free vaccines over Thimerosal-containing vaccines.

IV. Unredacted Versions of Emails Were Obtained From Dr. David Weldon's Office (Former Member of Congress) [Exhibit 5]. These Emails When Compared to the Redacted Emails Furnished Hooker Cast Doubt on the Veracity of the Denmark (Madsen et al. 2003 Study) and Also Show a Pattern of Deception On the Part of the CDC

In comparing the redacted version [Exhibit 5B] and the unredacted version [Exhibit 5C] of emails between Madsen et al. 2003 publication coauthors and CDC employees, it may be seen that the CDC is withholding the fact that earlier versions of the Madsen et al. 2003 publication were rejected by The Journal of the American Medical Association (JAMA) and Lancet, prior to publication in Pediatrics. In spite of the two rejections, which would connote significant

weakness in the research presented in the publication, Dr. Jose Cordero, then Director of the National Center for Birth Defects and Developmental Disabilities of the CDC, wrote a recommendation letter [Exhibit 5D] for "expedited review and consideration" of the manuscript. Dr. Cordero also wrote in his letter,

> "The Danish study is a powerful epidmeiologic [sic] study of this issue…" and "Its findings provide one strong piece of evidence that Thimerosal is not causally linked to autism."

Although the revelation that the Madsen et al. 2003 publication had been rejected by two front line medical journals may have caused significant embarrassment to Dr. Cordero and the CDC if this had been released via the FOIA, 74 FR 4683, the January 21, 2009 Presidential Memorandum regarding the FOIA [Exhibit 5E] states,

> "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

In addition, both the redacted and unredacted versions of the Madsen/Lauritsen emails make it clear that the Denmark coauthors with the CDC's full knowledge were considering removing 2001 autism incidence data that show a pronounced downward trend between the years 1999 and 2001 in all age groups (2-4 year olds, 5-6 year olds and 7-9 year olds) after the removal of Thimerosal. The unredacted information obtained by Dr. Weldon's office includes peer review comments from the journal Pediatrics [Exhibit 5F] that state

> "The drop of incidence shown for the most recent years is perhaps the most dramatic feature of the figure and is seen in the oldest age group as well as the youngest. The authors do not discuss whether incomplete ascertainment in the youngest children or delay in the recording of data in the most recent years might play a role in this decline, *or the possibility that this decrease might have come through the elimination of Thimerosal*." (italics added).

In the final version of the publication [Exhibit 5G], the 2001 incidence data were removed from the figure, which obviated the downward trend highlighted by the peer reviewer.

This makes it appear that the Danish researchers, the CDC and the Journal of Pediatrics colluded to exclude the data showing a downward trend, substituting it with a claim of an upward trend in the Journal of Pediatrics 2003. This article has been the foundation for the claim and the widespread belief that mercury in the form of Thimerosal is safe in vaccines and has nothing to do with autism. In contrast, if that article had accurately reported a downturn in autism in Denmark, that true statement could have only led to the conclusion that mercury in the form of Thimerosal is a factor in causing autism.

VI. The CDC has Applied an Unequal Weighting of Exemption 5, Depending on the Subject Material of the Research Study Materials Obtained via the FOIA

The submitted exhibits [Exhibits 6A, 6B, 6C and 6D] are the result of a FOIA request for information related to the publication, "Risk Factors for Autism: Prenatal Factors, Parental Psychiatric History, and Socioeconomic Status," published in the American Journal of Epidemiology (AJE) in 2005. In this case, the CDC disclosed a significant amount of materials including (1) drafts of the manuscript, (2) data associated with the manuscript, (3) unredacted email traffic between the coauthors and (4) AJE peer reviewer comments with rebuttal from CDC and Denmark group authors. A total of 340 pages were released from the CDC in response to this request.

However, regarding the FOIA requests in this current complaint, only a paucity of material is released in highly redacted form. For the FOIA request for the Denmark publication, "Thimerosal and the Occurrence of Autism: Negative Ecological Evidence from Danish Population-Based Data," a total of 80 pages were released initially [Exhibits 6E and 6F], none of which had anything to do with the original request. Upon appeal to the DHHS FOIA appeals office, an additional 55 pages of information was released [Exhibit 6G]. This included 20 pages of highly redacted email correspondences and an additional 35 pages of information that had

nothing to do with the original request. All peer review comments were deleted as well as the draft manuscript.

For the FOIA request for correspondences between the CDC and Dr. Thomas Verstraeten after he left the CDC to become an employee of vaccine manufacturer, Glaxo SmithKline, I received a total of 242 pages. However, none of the documents included any correspondences based on the publication, "Safety of Thimerosal-Containing Vaccines: A Two-Phase Study of Computerized Health Maintenance Organization Databases," prior to the date of its acceptance in the journal Pediatrics. This is despite the fact that Dr. Verstraeten was listed as first author on the publication.

VII. The CDC Has Consistently Denied Any Causal Relationship Between Thimerosal-Containing Vaccines and Autism. This Has Been Based Primarily on Five Epidemiological Studies Published in 2003 and 2004

In 2004, the CDC commissioned the Institute of Medicine (IOM) of the U.S. National Academy of Sciences to review published information to rule on the biological plausibility of a causal relationship between Thimerosal-containing vaccines and autism. Based solely on five epidemiological studies, the Immunization Safety Review Committee of the IOM ruled that a relationship between Thimerosal-containing vaccines and autism was not biologically plausible. In order to provide the Judge some perspective on the quality of the five epidemiological studies as well as their relationship to the CDC, Dr. Brian Hooker (who holds a PhD in Biochemical Engineering) has prepared a critique of each of the five studies [Exhibit 7].

VIII. Thimerosal Timeline Document

In order to provide some context and background for the Thimerosal-autism controversy, Dr. Brian S. Hooker has constructed the attached timeline of the events (Exhibit 8) leading to the latest research showing a connection between Thimerosal-containing vaccines and autism.

The timeline document includes the 1991 discovery (by Maurine Hilleman at Merck) that the cumulative effect of Thimerosal in infant vaccines could exceed recommended safe limits for mercury as well as the initial response of the CDC to commission epidemiology research to elucidate any link between Thimerosal and neurodevelopmental disabilities, while quietly maintaining a policy to continue to recommend Thimerosal-containing vaccines for children from 1999 to 2004. After the 5 fatally flawed, CDC-sponsored studies were presented to the Institute of Medicine (IOM) Immunization Safety Review Committee in 2004, the CDC, based on the IOM's subsequent report, strongly and publicly recommended Thimerosal-containing vaccines.

Subsequently, the 2004 IOM report was used to deny justice to families participating in the National Vaccine Injury Compensation Program Autism Omnibus test cases heard in 2007. Each of three cases were dismissed based on the CDC's stance that Thimerosal is not causally linked to autism.

However, new science is included in the timeline document, starting in 2006 through the present, where strong evidence showing a causal link between Thimerosal and autism is presented. This is not an exhaustive list but includes 10 of the most important epidemiological and mechanistic evidence of a link. Despite this evidence, the IOM has not reconsidered its 2004 report and the CDC continues to assert the absence of any causal relationship.

The CDC's timeline (http://www.cdc.gov/vaccinesafety/concerns/Thimerosal/Thimerosal_timeline.html) concerning Thimerosal and autism, only includes literature supporting their assertion that there is no connection between Thimerosal-containing vaccine and autism.

IX. In Motion for Summary Judgment, Defendants Assert, "There is No Public Interest in … Poul Thorsen's Personal Life." Given the Current Federal Criminal Charges that Dr. Thorsen Faces, There is Strong Public Interest in his Personal Life, Especially that Being Disclosed to CDC Employees

Dr. Thorsen, the Denmark chief collaborator with the National Center for Birth Defects and Developmental Disabilities of the CDC, was indicted in U.S. Federal Court, Atlanta Division, on April 13, 2011 for 13 counts of fraud. The criminal indictment [Exhibit 9A] asserts that he obtained over $1 million of CDC funds in his scheme to defraud. This casts significant doubt over the veracity of the work of Dr. Thorsen, including the paper which he coauthored regarding Thimerosal and autism (Madsen et al. 2003).

X. In the Preamble of the CDC's November 4, 2011 Motion for Summary Judgment, it States "As of the Date of this Filing, HHS and CDC have Satisfied all of their Obligations with Respect to Plaintiff's Above-Referenced FOIA Requests." This is Simply Not True as Evidenced by Another FOIA Request Made by Mr. Jeffrey A. Trelka

As the result of a FOIA request filed by Mr. Jeffrey Trelka [Declaration of Mr. Trelka, Exhibit 1A] for documents pertaining to the Denmark Thimerosal publications (Madsen et al. 2003, Stehr-Green et al. 2003), 293 pages of additional documents were released from the National Immunization Program (which did not show any responsive documents for the Hooker FOIA requests in question) [Exhibits 11A, 11B and 11C]. These pages were not included in the Vaughn Index submitted by the Defendants. Curiously, in the documents obtained by Mr. Trelka, all emails originating from Dr. Roger Bernier and Dr. Walter Orenstein are completely redacted. No specific reason was given for these redactions but this is important as Dr. Bernier and Dr. Orenstein were the highest ranking officials "represented" within the email threads. These documents should be released in their entirety.

PLAINTIFF'S REBUTTAL TO MATERIAL FACTS NOT IN DISPUTE

Plaintiff, by Counsel below, has included the paragraphs he disputes in the Defendant's Statement of Material Facts Not In Dispute. In other words, where he disputes their statements, he hereinafter places their numbered statement and his rebuttal thereto. These rebuttals, eight in number, are almost, if not often identical to the Defendant's Statement of Genuine Issues and Material Facts In Dispute. This repetition is done in an attempt to provide the Court with easy access to the real issues in this case by comparing the statements of the Defendants to the rebuttal of the Plaintiff.

COUNT 1

5. Program staff in each of the offices searched for the records sought by Dr. Hooker. *Id*. ¶ 10. The NIP did not find any responsive records. *Id*.

REBUTTAL: In a separate FOIA request submitted by Mr. Jeffrey A. Trelka [Exhibit 1A] for records associated with the two studies referred to in point 1 above, 293 pages of documents were released from the National Immunization Program. These pages were not included in the Vaughn Index submitted by the Defendants. Curiously, in the documents obtained by Mr. Trelka, all emails originating from Dr. Roger Bernier and Dr. Walter Orenstein are completely redacted. No specific reason was given for these redactions but this is important as Dr. Bernier and Dr. Orenstein were the highest ranking officials "represented" within the email threads.

12. On September 8, 2006, CDC released additional documents to Dr. Hooker. *Id*. ¶ 17.

REBUTTAL: Upon appeal, additional documents were released on the DHHS FOIA appeals office on September 8, 2006. These were not a part of the original search but were released on upon appeal.

15. The correspondence withheld or redacted under Exemption 5 were among CDC employees and Poul Thorsen, Kreesten Madsen, Marlene Lauritsen, and Preben Mortensen. These four individuals were authors of a manuscript entitled "Thimerosal and the Occurrence of Autism: Negative Ecological Evidence From Danish Population-Based Data." *Id*. ¶ 23. CDC collaborated with the authors of this manuscript and, therefore, the authors were considered temporary consultants to the CDC. *Id*.

REBUTTAL: Denmark authors were not acting as "outside consultants" to the CDC. Exemption 5 for emails to and from individuals outside of the CDC is applied to those individuals acting as "consultants" only. It is clear from the emails received by Mr. Jeffrey A. Trelka via a FOIA request for documents pertaining to the Denmark Thimerosal publications (Madsen et al. 2003, Stehr-Green et al. 2003) [Exhibit 1A, Declaration from Mr. Jeffrey A. Trelka], that the group of researchers from Denmark was not acting as consultants to the CDC. Instead, the Denmark group was acting independently of the CDC and based on a June 13, 2001 email from Dr. Kreesten Madsen (Aarhus University, Aarhus, Denmark) to Dr. Diane Simpson (Deputy Director of the NIP at the CDC), the research associated with the Madsen et al. 2003 publication had started at least six months prior to the CDC's initial contact with the "Denmark group" as Dr. Madsen stated,

> "An article is soon to be published on secular trends in the incidence and prevalence of autism in Denmark. The work was started before I started working with autism six months ago and I have not been part of that." [Exhibit 1B].

Another email between Dr. Simpson and Dr. Paul Stehr-Green (outside consultant to the CDC), dated August 2, 2001, makes it clear that the CDC did not even have

permission to look at the research data in the Madsen et al. 2003 publication as Diane Simpson states,

> "Persons within NCBDDD [National Center for Birth Defects and Developmental Disabilities] have seen the autism data from the registry (and have helped cleared [sic] up some coding problems) but evidently feel they cannot share it with us at NIP [National Immunization Program] without the permission of Preben-Bo [Mortensen who was a coauthor on the Madsen et al. 2003 publication] who has said 'NO' to release before he publishes." [Exhibit 1C].

Thus, the Denmark group was working independently of the CDC and was not acting in a "consultant" role.

16. The portions withheld or redacted under Exemption 5 are intra-agency discussions that would not be available to a party in civil litigation. *Id.* ¶ 24.

REBUTTAL: Unredacted versions of emails originally released via FOIA (the "Denmark emails" are a part of this complaint) were obtained from Dr. David Weldon's office (Former Member of Congress, Florida 15th District) [Exhibit 5A, Declaration of Mr. Stuart Burns, Former Chief of Staff of Congressman Weldon's office] . These emails cast doubt on the veracity of the Denmark (Madsen et al. 2003) study and also show a pattern of deception on the part of the CDC.

In comparing the redacted version [Exhibit 5B] and the unredacted version [Exhibit 5C] of emails between Madsen et al. 2003 publication coauthors and CDC employees, it may be seen that the CDC is withholding the fact that earlier versions of the Madsen et al. 2003 publication were rejected by The Journal of the American Medical Association (JAMA) and Lancet, prior to publication in Pediatrics.

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> Sent: Wednesday, November 13, 2002 5:33 AM
> To: Marlene Briciet Lauritsen; Paul Thorsen; Schendel, Diana
> Subject: RE: Manuscript about Thimerosal and autism
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> Hi Marlene,

~~I don't remember the actual phrasing of the rejection from JAMA – In the sence of "is it worth trying again given the situation". I all cases your point about the decreasing rates in 2001 seems to be of importance and probably should be added.~~ I am not currently at the university but I will contact you and Poul tomorrow to make up our minds. Best regards, Kreesten

-----Original Message-----
From: Marlene Briciet Lauritsen [mailto:mbl@dadlnet.dk]
Sent: Wed 13-11-2002 09:24
To: Paul Thorsen; Kreesten Meldgaard Madsen; dcs6@cdc.gov
Cc:
Subject: Manuscript about Thimerosal and autism

Dear Poul, Kreesten and Diane Schendel

Attached I send you the short and long manuscript about Thimerosal and autism in Denmark***. ~~The long manuscript has been submitted to JAMA and includes both data on the incidence and prevalence of autism. The shorter version includes only incidence data~~ and has been submitted to Lancet. ~~Unfortunately, both manuscript have been rejected.~~***

I need to tell you that the figures in the manuscripts do not include the latest data from 2001. I only have these figures as a paper version and they are at work ~~while I am working at home these days.~~ But the incidence and prevalence are still decreasing in 2001. ~~*Also, the manuscript submitted to JAMA do not cite some of the latest papers on the prevalence of autism which I will do in case it should be submitted again.*~~

I look forward to hear from you again.

Best regards

Marlene

In spite of the two rejections, which would connote significant weakness in the research presented in the publication, Dr. Jose Cordero, then Director of the National Center for Birth Defects and Developmental Disabilities of the CDC, wrote a recommendation letter [Exhibit 5D] for "expedited review and consideration" of the manuscript. Dr. Cordero also wrote in his letter, "The Danish study is a powerful epidmeiologic [sic] study of this issue…" and "Its findings provide one strong piece of evidence that Thimerosal is not causally linked to autism."

Although the revelation that the Madsen et al. 2003 publication had been rejected by two front line medical journals may have caused significant embarrassment to Dr.

Cordero and the CDC if this had been released via the FOIA. The January 21, 2009 Presidential Memorandum (74 FR 4683) regarding the FOIA [Exhibit 5E] states,

> "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

In addition, both the redacted and unredacted versions of the Madsen/Lauritsen emails make it clear that the Denmark coauthors with the CDC's full knowledge were considering removing 2001 autism incidence data that show a pronounced downward trend between the years 1999 and 2001 in all age groups (2-4 year olds, 5-6 year olds and 7-9 year olds) after the removal of Thimerosal (and ultimately the downward trend of autism in Denmark was removed). The unredacted information obtained by Dr. Weldon's office includes peer review comments from the journal Pediatrics [Exhibit 5F] that state

> "The drop of incidence shown for the most recent years is perhaps the most dramatic feature of the figure and is seen in the oldest age group as well as the youngest. The authors do not discuss whether incomplete ascertainment in the youngest children or delay in the recording of data in the most recent years might play a role in this decline, *or the possibility that this decrease might have come through the elimination of Thimerosal*." (italics added).

In the final version of the publication [Exhibit 5G], the 2001 incidence data were removed from the figure, which obviated the downward trend highlighted by the peer reviewer.

20. There is no public interest in Kreesten Madsen's mobile phone number or Poul Thorsen's personal life. *Id.* As the privacy interests outweigh any public interest in disclosure, release of this information would constitute a clearly unwarranted invasion of personal privacy. *Id.*

REBUTTAL: Given the current Federal, criminal charges that Dr. Thorsen faces, there is strong public interest in his personal life, especially that being disclosed to CDC

employees. Dr. Thorsen, the Denmark chief collaborator with the National Center for Birth Defects and Developmental Disabilities of the CDC, was indicted in U.S. Federal Court, Atlanta Division, on April 13, 2011 for 13 counts of fraud. The criminal indictment [Exhibit 9A] asserts that he obtained over $1 million of CDC funds in his scheme to defraud. This casts significant doubt over the veracity of the work of Dr. Thorsen, including the above referenced paper (Rebuttal to #16) which he coauthored regarding Thimerosal and autism (Madsen et al. 2003).

COUNTS TWO AND THREE

34. Draft manuscripts and correspondence are by their nature pre-decisional and deliberative. In this case, draft manuscripts and correspondence were circulated for comment and consideration of whether any changes should be made before publication.

REBUTTAL: The predecisional aspect of the Defendants argument would imply that CDC scientists were in the process of formulating policy regarding the use of Thimerosal-containing vaccines. However, documents show that CDC had made decided against a preference for Thimerosal-free vaccines as early as July, 1999.

In a July 31, 1999 letter (obtained via FOIA from the CDC by Dr. Hooker) [Exhibit 4a] to Dr. Jeffery Koplan, former Director of the CDC, Mr. John Jabara, Vice President and Director of the Vaccine Business Unit of SmithKline Beecham Pharmaceuticals, stated that U.S. supplies for a fully Thimerosal-free DTaP vaccine could be met in the first half of 2000 using SmithKline Beecham's Infanrix vaccine. This constituted an increased inventory of Infanrix by SmithKline Beecham, specifically in response to the July 7 FDA/USPHS Joint Statement calling for the removal of Thimerosal from infant vaccines as quickly as possible. Officials at SmithKline

Beecham recognized that the three doses of Thimerosal-containing DTaP vaccine administered to infants of six months of age or younger as a part of the recommended infant vaccination schedule constituted a significant amount of the total Thimerosal exposure of infants in this age group.

The letter continues to describe that the vaccine contracting department of the CDC had approached SmithKline Beecham about an exclusive contract for the Infanrix vaccine until other manufacturers' Thimerosal-free formulations were licensed. Mr. Jabara's letter was evidently in response to the CDC's vaccine contracting department's "offer".

However, Dr. Koplan in his November 26, 1999 reply (obtained via FOIA from the CDC by Dr. Hooker) [Exhibit 4b] states that the CDC plans to "continue to provide the States with a choice among currently licensed brands of the DTaP vaccine." In other words, the CDC would NOT provide SmithKline Beecham with an exclusive contract for DTaP for the first half of 2000 and further would NOT recommend the Infanrix formulation without mercury over any competitive, Thimerosal-containing product. Thus, regarding the pre-decisional nature of the (b)(5) exemption, the CDC had already made its *decision* regarding Thimerosal-containing vaccines: that they were safe enough not to make a preference for Thimerosal-free formulations. The way the (b)(5) exemption was applied in the four FOIA requests currently under consideration by this U.S. District Court was incorrect because the nature of the work was not "pre-decisional" at all. Since the CDC already had a pre-existing policy in place regarding Thimerosal, this was a moot point.

In an additional July 5, 1999 correspondence [Exhibit 4C], obtained by FOIA to the FDA [Exhibit 4D, Declaration of Ms. Lyn Redwood], sent from a Federal liaison group (including CDC) to the American Academy of Pediatrics prior to their release of their Thimerosal position statement made on July 7, 1999, key vaccine policy makers state, "We continue to be gravely troubled by the recommendation to encourage 'use [of] vaccines that do not contain Thimerosal'". This represents the opinion of the key vaccine players in the CDC (at the time, Walter Orenstein, Director of the National Immigration Program, and Jose Cordero, Director, National Center on Birth Defects and Developmental Disorders). This shows that even back that far the CDC had made up its mind not to prefer Thimerosal-free vaccines over Thimerosal-containing vaccines.

39. Dr. Thomas Verstraeten was also a co-author on this manuscript. *Id*. ¶ 46. Dr. Verstraeten was a CDC employee when he began working on this, and other, manuscripts that are the subject of the withheld or redacted emails. *Id*. Dr. Verstraeten left CDC in 2001 to work in the private sector, but continued to work on the manuscripts he co-authored after leaving CDC. *Id*.

REBUTTAL: It appears that the CDC is suggesting here that Dr. Verstraeten was acting as an outside consultant. However, in a letter to the editor of the Journal Pediatrics that appeared in 2004, regarding the Verstraeten et al. 2003 publication, Dr. Verstraeten states, "Although I have been involved in some of the discussions concerning additional analyses that were undertaken after my departure from the CDC, I did not perform any of these additional analyses myself, nor did I instigate them." [Exhibit 2A] This statement seems to directly contradict that Dr. Verstraeten was working as an outside consultant to the CDC.

COUNT FOUR

53. After receipt of the appeal, CDC conducted an additional search of the NIP files and did not locate additional emails. *Id*. ¶ 60. CDC also confirmed with Dr. Chen that he did not have any additional emails. *Id*. ¶ 61. This was communicated to Dr. Hooker via a letter dated July 19, 2005. *Id*. ¶ 62.

REBUTTAL: This begs the question, "Why did Dr. Chen not retain any of his email replies?" Also, it is curious that these replies could not be obtained by some type of archival system as typically, emails are not stored directly on an individual's harddrive, but are instead maintained on a central server. Given the definition of a record as laid out in 44 USC 3301[2], Chen's correspondences with Tom Verstraeten and Liz Miller about her WHO grant to look at Thimerosal and autism constitutes a record. Chen's deliberation with Miller/Verstraeten would have been key to show how and why they moved forward with the U.K. work. A FOIA request was submitted by Dr. Hooker to the CDC on March 1, 2011 to obtain "written statements of the CDC policies governing retention of email records by employees from 1998 to present." However, the CDC has not yet responded with any information.

FOIA is a records access and disclosure law. Records subject to FOIA (that is, FOIA records) are the records in the possession of an agency regardless of storage medium. FOIA records may exist anywhere within the agency or be in the agency's legal

[2] "... includes all books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, function, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them..."

custody, such as at a Federal record center. FOIA records must be made available upon request, unless one of the nine FOIA exemptions applies.

FOIA basically covers all Government records, regardless of whether they are FRA or non-FRA records. Thus an E-mail message that is not an FRA record could still fall within the scope of an FOIA request." (www.cdc.gov/od/foia/policies/emailuse.htm)

The agency should be able to search the "Federal Record Center" which should be resident at the CDC. After a certain period of time (variable depending upon agency), the records are turned over to the "Electronic Record Archives" at the National Archives (http://www.archives.gov/records-mgmt/era/).

CDC made the following assertion in regard to the search for Chen's emails:

> 53. After receipt of the appeal, CDC conducted an additional search of the NIP files and did not locate additional emails. *Id*. ¶ 60. CDC also confirmed with Dr. Chen that he did not have any additional emails. *Id*. ¶ 61. This was communicated to Dr. Hooker via a letter dated July 19, 2005. *Id*. ¶ 62.

The CDC, in their claim of a material fact not in dispute in this ¶53, makes no contention of searching a type of archival system or a claim that one does not exist. This is not an adequate response in view of Federal requirements discussed above in regard to FOIA and FRA. At the very least, a research is called for in regard to all storage mediums at the CDC and also the electronic record archives at the National Archives. Furthermore, since Dr. Chen may have simply deleted these emails, a forensic inspection on behalf of the plaintiff should be allowed and performed on all his hard drives, past and present.

Thus, Robert Chen should have saved all of his replies and the CDC's excuse that he erased his replies is dubious at best. Given the nature of CDC's redactions, the

Plaintiff Brian Hooker has serious questions in regard to the missing Chen emails.

Certainly, factual issues exist here which should be open to discovery.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Brian S. Hooker, Ph.D., P.E. Plaintiff, v. Kathleen Sebelius as Secretary of the United States Department of Health and Human Services, and Thomas R. Frieden, MD, MPH as Director, The Centers for Disease Control and Prevention, Defendants.	)	Civil Action No. 11-cv-01275 (ABJ)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff has no objection for the most part to the case law presented by the Defendants. Plaintiff does object strenuously to their claim that case law is appropriately applied to the information they've provided to Dr. Hooker. As shown heretofore, the Defendants have stretched, if not broken, the rules in terms of what they provided, and in particular, in the way they redacted information. Factually, the Defendants have claimed exemptions from disclosure which they are not entitled to. They appropriately cite *Weisberg v. Dep't of Justice,* 627 F.2d 365, 368 (D.C. Cir. 1980). The Declaration of Carol Maloney repeatedly invokes Exemption 5 by doing such things as claiming the Danish authors were considered temporary consultants to the CDC. This is clearly a conclusion and these supporting facts provided by Plaintiff are contrary to the facts presented by the Defendants. The Defendants also cite *CREW*, 478 F. Supp.

2d at 80, for the proposition that nondisclosure of documents is proper if it's demonstrated "that the information withheld logically falls within the claimed exemption and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." Plaintiff argues that this is clearly a case of bad faith and also that many of the exemptions claimed are controverted by the evidence in the record. A more lengthy quote of the *CREW* case is as follows:

> In a FOIA case, the Court may award summary judgment solely on the basis of information provided by the department or agency in declarations [**6] when the declarations describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, **and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith**." Military Audit Project v. Casey, 211 U.S. App. D.C. 135, 656 F.2d 724, 738 (D.C. Cir. 1981); see also Gallant v. NLRB, 307 U.S. App. D.C. 27, 26 F.3d 168, 171 (D.C. Cir. 1994). An agency must demonstrate that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly [or partially] exempt from the Act's inspection requirements." Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978) (internal citation and quotation marks omitted). **An agency's declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents."** SafeCard Services v. SEC, 288 U.S. App. D.C. 324, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal citation and quotation marks omitted).

Citizens for Responsibility & Ethics v. United States Dep't of Labor, 478 F. Supp. 2d 77, 80 (D.D.C. 2007). See also **FPL Group, Inc. v. IRS, 698 F. Supp. 2d 66, 77 (D.D.C. 2010)**

The Plaintiff, Dr. Hooker, asserts that in this instance, the Defendants should no longer be accorded "a presumption of good faith" as this has been rebutted by much more than pure speculation (for instance, the redaction of the Madsen emails as shown in Exhibits 5B and 5C). The Supreme Court commented more than 30 years ago that "Congress did not design the FOIA

exemptions to be mandatory bars to disclosure." **Chrysler Corp. v. Brown, 441 U.S. 281, 293 (U.S. 1979)**

74 FR 4683, the January 21, 2009 Presidential Memorandum [Exhibit 5E] regarding the FOIA states:

> The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.

The Defendants claim deliberative process by supplying Exemption 5 throughout these documents, however almost all of the documents are post-1999 and as set out previously, the CDC made a determination in 1999 to support the use of Thimerosal (mercury) containing vaccines as of that time period. Therefore, attempts to justify that position since then, are not pre-decisional, they are post-decisional.

> A document must meet two requirements for the deliberative process privilege to apply. First, the document must be predecisional -- it must have been generated before the adoption of an agency's policy or decision.

FTC v. Warner Communications, Inc., 742 F.2d 1156, 1161 (9th Cir. Cal. 1984)

Furthermore, the need for full disclosure by the Defendants clearly overrides the need for the Defendants to have their deliberative process protected. The question of whether or not vaccines are safe with Thimerosal in them is one potentially of monumental proportions to the public and Dr. Hooker.

> The deliberative process privilege is a qualified one. A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure. See United States v. Leggett & Platt, Inc., 542 F.2d 655, 658 (6th Cir. 1976), cert. denied, 430 U.S. 945, 51 L. Ed. 2d 792, 97 S. Ct. 1579 (1977); [**11] United States v. American Telephone and Telegraph Co., 524 F. Supp. 1381, 1386 n.14 (D.D.C. 1981). HN12Among the factors to be considered in making this determination are: 1) the relevance of the evidence; 2) the availability of

> other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.

FTC v. Warner Communications, Inc., 742 F.2d 1156, 1161 (9th Cir. Cal. 1984)

The revelation in the Madsen and Lauritsen emails (Exhibits 5B and 5C) that the Danish paper was rejected by JAMA and Lancet before it was accepted by Pediatrics and published in 2003 is factual material and there is no basis to exempt it. The Vaughn index lists this as Document 1 and claims "the redacted information is the discussion regarding the submission of a manuscript for publication and the discussion of different drafts of the manuscript." In reality, the discussion is in regard to two rejections and how to get the paper published. It is interesting to note that in the initial message there is clear, unredacted, mention that the incidence and prevalence of autism were decreasing in 2001, while in the reply email the statement that that's important and probably should be added is redacted. [Exhibit 5B]

This information is of particular importance to Dr. Hooker as he has a child with a case in Vaccine Court. The information that he seeks in this instance may be of great benefit to his son's case [Exhibit 5A]. Therefore, his need for the allegedly deliberative materials far outweighs the Defendant's interest in non-disclosure.

> [M]emoranda consisting only of compiled factual material [*88] or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government.

EPA v. Mink, 410 U.S. 73, 87-88 (U.S. 1973)

> "[f]actual material is not protected under the deliberative process privilege unless it is 'inextricably intertwined' with the deliberative material." Judicial Watch, Inc. v. Dep't of Justice, 432 F.3d 366, 372, 369 U.S. App. D.C. 49 (D.C. Cir. 2005) (quoting In re Sealed Case, 121 F.3d 729, 737, 326 U.S. App. D.C. 276 (D.C. Cir. 1997) (per curiam)). "[E]ven if some materials from the requested record are exempt from disclosure, any 'reasonably

segregable' information from those documents must be disclosed after redaction of the exempt information unless the [non-]exempt portions are 'inextricably intertwined with exempt portions.'" Johnson v. Executive Office for U.S. Attorneys, 310 F.3d 771, 776, 354 U.S. App. D.C. 49 (D.C. Cir. 2002) (quoting 5 U.S.C. § 552(b) and Mead Data Cent., Inc. v. Dep't of the Air Force, 566 F.2d 242, 260, 184 U.S. App. D.C. 350 (D.C. Cir. 1977)).

FPL Group, Inc. v. IRS, 698 F. Supp. 2d 66, 81 (D.D.C. 2010)

ARGUMENT

I. SUING A PROPER PARTY DEFENDANT

Defendants contend this suit has not been filed against Health and Human Services nor against Centers for Disease Control, but rather against the Secretary and the Director of the respective agencies. It was the intent of the Plaintiff to bring those agencies before the Court by suing and serving the Secretary and Director. Plaintiff will move to amend the Complaint to eliminate the names of the two individuals and retain the agencies in question.

II. CDC HAS NOT PROPERLY ASSERTED EXEMPTION 5

Exemption 5 does not apply to factual matters and it is heretofore stated. Therefore, the exemptions the Danish papers rejection by JAMA and Lancet are not properly in Exemption 5. This is just one of many examples. On November 7th, 2011, HHS sent Plaintiff's Counsel a letter with forty pages releasing additional documents [Exhibit 11], referencing the Declaration of Carol Maloney. These documents are almost all redacted either in regard to Exemption 5 or 6. Dr. Hooker is not particularly concerned with Exemption 6 redactions as they appear to be for the most part in regard to email addresses, phone numbers, etc. There is a considerable concern about the extensive redaction for many of these documents in light of other redactions which we

know have taken place. There is a whole series of emails with the subject line "P3R Regarding Your Article In Pediatrics". These begin December 18th, 2003, after the article was actually published and continue at least until February 23rd, 2004.

Defendants state in Paragraph 43, their Motion:

> In addition, CDC evaluated the privacy interest inherent in each piece of information against the public interest in disclosure and shedding light on HHS's performance of its statutory duties. *Id*. In withholding the information, the individual's privacy interests outweighed any public interest in disclosure of the withheld information. *Id*. Disclosure of the withheld information would reveal nothing about the operations or activities of HHS, or any component thereof. *Id*.

Clearly this is an understatement of both the public interest and that of Dr. Hooker. It also an overstatement of CDC's and its individual employees comparable privacy interests.

CONCLUSION

As has been explained heretofore, the CDC improperly redacted information, may have redacted additional information and may well have improperly withheld documents. This should be the subject of discovery and in-camera inspections. The disappearance of the Chen emails, likewise, should be subject to discovery which might well include examinations of his hard drives and other data storage.

For these reasons, the Court is respectfully asked to deny the government's Motion for Summary Judgment.

Respectfully submitted,

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