

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

FARM LABOR ORGANIZING COMMITTEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 20-645 (KBJ)
	)	
U.S. DEPARTMENT OF LABOR,	)	
	)	
Defendant.	)	
	)	

**PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff Farm Labor Organizing Committee (FLOC) moves for summary judgment in this Freedom of Information Act case against Defendant U.S. Department of Labor (DOL). In support of this motion, FLOC submits the accompanying Memorandum in Support of Plaintiff’s Cross-Motion for Summary Judgment and in Opposition to Defendant’s Motion for Summary Judgment; Plaintiff’s Response to Defendant’s Statement of Facts and Plaintiff’s Cross-Statement of Undisputed Material Facts; Declaration of Justin Flores and accompanying exhibits; Declaration of Michael T. Kirkpatrick; Declaration of Wendy Liu and accompanying exhibits; and a proposed order.

Dated: April 8, 2021

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF PLAINTIFF’S CROSS-MOTION  
FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT**

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April 8, 2021

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## INTRODUCTION

The issue in this Freedom of Information Act (FOIA) case is simple: Did the Department of Labor (DOL) correctly withhold from requester Farm Labor Organizing Committee (FLOC) the names of companies that purchase tobacco from agricultural employers?

The answer is likewise simple: No, DOL's assertion that the requested information is "confidential" and exempt from disclosure under FOIA exemption 4 is wrong. DOL has failed to show that the agricultural employers who provided the information to DOL customarily and actually keep private the names of the tobacco purchasers. And the factual record lacks any evidence that DOL provided any assurance to the agricultural employers that DOL would keep the information private. Moreover, the disclosure of the withheld information would not result in reasonably foreseeable harm to an interest protected by exemption 4 because, among other things, such information has been previously disclosed, including by the tobacco companies themselves.

The Court should grant FLOC's motion for summary judgment, deny DOL's motion for summary judgment, and order DOL to disclose the names of the tobacco companies that the agricultural employers provided to DOL.

## FACTUAL BACKGROUND

In the tobacco industry, agricultural employers (also called growers) pay the wages and set the working conditions for the farmworkers they employ. Flores Decl. ¶ 5. Plaintiff Farm Labor Organizing Committee (FLOC) is a farmworker labor union that seeks to improve conditions for farmworkers by, among other things, working with all participants in the agricultural supply chain—corporations, growers, and farmworkers. *Id.* ¶ 2.

For agricultural employers engaged in interstate commerce, working conditions are federally regulated. *Id.* ¶ 5. DOL's Wage and Hour Division is responsible for enforcing several

statutes that establish standards of employment relating to wages, housing, and other working conditions. *See Major Laws Administered/Enforced*, DOL Wage and Hour Division, <https://www.dol.gov/agencies/whd/laws-and-regulations/laws> (last visited Apr. 7, 2021) (collecting statutes). To determine whether growers comply with these federal statutes, DOL conducts investigations to determine (i) whether one of the statutes enforced by DOL applies to the grower; and (ii) whether the workers employed by the grower are paid and employed in compliance with federal law. Torres Decl. ¶¶ 4–5. In an investigation, a DOL agent interviews the grower, and collects from the grower information about the identities of the purchasers of the grower’s tobacco. *See id.* ¶ 5. This information permits DOL to determine whether the grower is involved in interstate commerce and covered by the federal statutes enforced by DOL. *See Flores Decl.* ¶ 5. In connection with DOL’s investigation into the grower’s practices, the DOL agent prepares a narrative report that summarizes the investigative process, discussions with the grower, and the findings and conclusions of the investigation. Torres Decl. ¶ 4.

On June 7, 2018, FLOC submitted to DOL a FOIA request for records of DOL’s investigations conducted in 2015, 2016, or 2017 that found that an agricultural employer had violated a federal law or regulation. Dkt. 15-1, Ex. 1 (FOIA Request). FLOC limited its FOIA request to agricultural employers in North Carolina, Kentucky, Tennessee, and Virginia that sold tobacco to RJ Reynolds Tobacco Company, Universal Leaf Corporation, Altria, or Alliance One International. DOL completed its production on March 3, 2021, ECF 15-1, Ex. 4 (3/3/2021 DOL Letter), and produced to FLOC narrative reports for approximately seventy-seven agricultural employers. *See Liu Decl.* ¶ 4. For sixty-one of the agricultural employers, DOL invoked FOIA exemption 4 to redact the names of some—but not all—of the tobacco buyers included in

investigation reports on the agricultural employers. In this case, FLOC challenges DOL’s withholding of those names.<sup>1</sup>

### LEGAL STANDARD

“FOIA cases typically and appropriately are decided on motions for summary judgment.” *Reps. Comm. for Freedom of the Press v. FBI*, 369 F. Supp. 3d 212, 218–19 (D.D.C. 2019). Summary judgment is appropriate when “there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The court must “analyze all underlying facts and inferences in the light most favorable to the FOIA requester.” *Neuman v. United States*, 70 F. Supp. 3d 416, 421 (D.D.C. 2014). The court reviews de novo the agency’s withholding of information. 5 U.S.C. § 552(a)(4)(B).

In FOIA cases, “the burden [is] on the agency to sustain its action, and the agency therefore bears the burden of proving that it has not improperly withheld the requested records.” *Citizens for Resp. & Ethics in Wash. v. U.S. Dep’t of Just.*, 922 F.3d 480, 487 (D.C. Cir. 2019) (internal quotation marks and citations omitted). The government “bears the burden of proving the applicability of any statutory exemption it asserts in denying a FOIA request,” *Maydak v. U.S. Dep’t of Just.*, 218 F.3d 760, 764 (D.C. Cir. 2000), and it must furnish “detailed and specific

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<sup>1</sup> These redactions are on the following pages: Bates Nos. 12, 16, 21, 46, 50, 53, 63, 65, 76, 80, 82, 94, 98, 106, 112, 154, 157, 165, 231, 233, 238, 240, 254, 263–64, 266, 272, 277, 279, 281, 286, 290, 295, 298–99, 302, 304, 313, 316, 324, 326, 332, 335–36, 338, 343–44, 346–47, 352, 355, 359, 369, 372, 375, 377, 379–80, 389–90, 392–93, 398–99, 402–03, 419, 422–23, 425, 427, 430, 432, 434, 448, 451, 485, 490, 497, 500, 518, 523–24, 526, 536, 544, 553, 577, 579–80, 582–83, 585, 594, 597, 608, 612, 615, 618, 625, 634, 668, 692, 709, 727, 752, 773, 779, 808, 813, 820, 824, 834, 845, 849, 853, 862–63, 868, 878, 887, 892, 903, 912, 915, 932, 941, 945, 959, 967, 981, 988, 1010, 1024, 1041, 1048, 1050, 1054, 1065–66, 1069, 1090, 1097, 1115, 1119, 1126, 1130, 1139–40, 1147, 1152, 1155, 1158, 1161, and 1176. *See* Kirkpatrick Decl. ¶¶ 2–5.

The Declaration of Patrice Rachel Torres states that Bates Nos. 390, 392, 490, 497, 580, 583, 585, 615, and 625 contain redactions that do not reflect the names of tobacco buyers. *See* Torres Decl. ¶ 12 n.2. To be sure, FLOC does not challenge the withholding of information other than the names of tobacco buyers. However, none of the specific pages cited in footnote 2 of the Torres Declaration clearly indicates that names of tobacco buyers are not redacted from those pages, and several of those pages *do* redact the names of tobacco buyers. *See, e.g.*, Liu Decl., Ex. 3 (FOIA Production) at Bates No. 392 (stating that “[t]he AGER has tobacco contracts with:” and redacting the information that follows); *see also* Kirkpatrick Decl. ¶ 5.

information” to justify its withholding. *Campbell v. U.S. Dep’t of Just.*, 164 F.3d 20, 30 (D.C. Cir. 1998). The government’s burden “does not shift even when the requester files a cross-motion for summary judgment.” *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90, 99 (D.D.C. 2019) (citing *Pub. Citizen Health Rsch. Grp. v. FDA*, 185 F.3d 898, 904–05 (D.C. Cir. 1999)). Rather, “the Government ultimately has the onus of proving that the documents are exempt from disclosure,” whereas the “burden upon the requester is merely to establish the absence of material factual issues before a summary disposition of the case could permissibly occur.” *Pub. Citizen Health Rsch. Grp.*, 185 F.3d at 904–05 (internal marks and citations omitted).

To be awarded summary judgment, the government must “establish beyond factual dispute” that the information that it has withheld has “a factually indisputable right to protection under one of the statutory exemptions.” *See Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 584 (D.C. Cir. 2020). “[S]ummary judgment may be granted on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.” *Id.* (citation omitted). By contrast, “[w]hen an agency seeks to protect material which, even on the agency’s version of the facts, falls outside the proffered exemption, summary judgment in favor of the FOIA plaintiff is appropriate.” *Petroleum Info. Corp. v. U.S. Dep’t of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992).

If the government fails to satisfy its burden to show that its withholding of information was proper, then the information at issue should be disclosed. *See Maydak*, 218 F.3d at 769 (ordering that the withheld information be released where “[t]here is simply nothing in the record to substantiate the DOJ’s claims that dire consequences will flow from the release of the requested

documents,” citing considerations of “judicial finality and economy, avoiding delay, and fairness”); *see also Evans*, 951 F.3d at 587 (noting that the D.C. Circuit has “discouraged serial summary judgment motions after the government’s first loss”).

### ARGUMENT

FOIA exemption 4 provides that an agency may withhold “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). Information is “confidential” within the meaning of exemption 4 where it is “customarily and actually treated as private by its owner” and “provided to the government under an assurance of privacy.” *Food Mktg. Inst. v. Argus Leader (FMI)*, 139 S. Ct. 2356, 2366 (2019). In *FMI*, The Supreme Court held that the first prong is required, but left open the question whether the second prong also must be satisfied. *Id.* at 2363.<sup>2</sup>

Here, the names of tobacco buyers are not exempt from disclosure under FOIA exemption 4 because the names are not confidential. *First*, this information was not customarily or actually kept private by the agricultural employers that communicated that information to DOL. *Second*, the information was communicated to the DOL investigator without an assurance of privacy. *Third*, disclosure would not risk any reasonably foreseeable harm to an interest protected by exemption 4, as required to sustain DOL’s withholding under the FOIA Improvement Act of 2016.

**I. The names of the tobacco companies that purchased from agricultural employers are not “confidential” information under FOIA exemption 4.**

**A. The information at issue was not customarily or actually kept private.**

Under exemption 4, “confidential” means “private” or “secret,” *FMI*, 139 S. Ct. at 2363. To fall under exemption 4, therefore, the information at issue must be “customarily kept private,

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<sup>2</sup> DOL cites several cases predating *FMI* to support its withholding of information under exemption 4, *see* Def. Mem. at 21-22 (collecting cases), but those cases do not apply the correct test.

or at least closely held” and also “actually treated as private.” *Id.* at 2363, 2366. Here, DOL withheld the names of certain tobacco-company buyers from DOL’s narrative reports about sixty-one agricultural employers. Because the names were not customarily and actually kept private or secret, DOL erred in withholding the names.

**1. The record lacks evidence showing that the agricultural employers customarily and actually keep private the names of tobacco-company buyers.**

Without dispute, the factual record in this case lacks any sworn statement that any of the sixty-one agricultural employers customarily and actually keep the names of tobacco buyers private or even closely held. *See generally* Dkt. 15-1. The only sworn evidence adduced by DOL relative to the growers’ confidentiality claims is a declaration from the agency. That declaration, however, does not attest that any of these sixty-one growers customarily and actually keep private the names of tobacco buyers. *See generally* Torres Decl.

Rather than providing testimony specific to the sixty-one growers at issue, the agency declaration states that in “the experience of [DOL] staff,” agricultural employers “typically” do not “disclose publicly” information about tobacco purchasers and that “some agricultural employers” ask that DOL investigators “hold such information in confidence.” *See id.* ¶ 15. These assertions lack “reasonable specificity of detail” and are rather “merely conclusory statements.” *See Evans*, 951 F.3d at 584 (citation omitted). The statements also do not appear to be based on the declarant’s personal knowledge, but rather on “information conveyed to [the declarant] by other individuals in [her] office.” Torres Decl. ¶ 2. The statements are thus inadmissible. *See Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 110–11 (stating that, “as is the case for all affidavits,” “agency affidavits must be made on personal knowledge” (internal quotation marks and citation omitted)). These “[c]onclusory statements by an agency official about what the agency

official may believe about how a submitter customarily treats the information at issue are simply insufficient” to carry the agency’s burden under FOIA. *Id.* at 111.

Importantly, the agency declaration attests that DOL sent the growers letters to provide them with an opportunity to object to the disclosure of the information in the DOL narrative reports and to notify them “that if they failed to respond to the letter, [DOL] would release the commercial information.” Torres Decl. ¶ 16. Of the seventy-six growers it contacted, DOL received responses from only eight growers.<sup>3</sup> *Id.* ¶¶ 16, 18. At a minimum, in light of DOL’s explicit statement that failure to respond would result in release of the information at issue, summary judgment is warranted in favor of FLOC as to all the growers who did *not* respond to DOL’s letter. As to those growers, there is both no evidence that the agricultural employer considers the information confidential and evidence that it was made aware of—and declined to object to—the release of the information. DOL thus has not satisfied its burden to show that its redactions from the narrative reports concerning its investigations of those growers were justified under exemption 4.

As to the eight growers who submitted letter responses,<sup>4</sup> DOL fails to offer any admissible evidence showing that these eight growers keep the names of tobacco buyers “private” or “secret.” The assertions in the eight letters are inadmissible hearsay. *See Humane Soc’y Int’l v. U.S. Fish & Wildlife Servs.*, No. CV 16-720 (TJK), 2021 WL 1197726, at \*3 (D.D.C. Mar. 29, 2021) (“[S]tatements that are impermissible hearsay ... are precluded from consideration by the Court.” (citation omitted)); *see also Pub. Citizen Health Rsch. Grp. v. Nat’l Insts. of Health*, 209 F. Supp.

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<sup>3</sup> It is unclear why DOL contacted seventy-six growers if the redacted narrative reports concern only sixty-one growers. *See* Liu Decl. ¶ 5 (records challenged by FLOC are for the narrative reports regarding sixty-one growers). DOL has not explained the mismatch.

<sup>4</sup> These eight growers are: Caroll Coffman, Dennis Burnett, Brian Forsee from Maple Heights Farm, Bruce Wade from Wade Farms Labor Management, LLC, Wellington Bacon, Jr., Doug Dunaway, William Austin Newton, and Steve Hamilton. *See* Dkt. 15-1, Ex. 5 (grower letters).

2d 37, 48 n.7 (D.D.C. 2002) (“Due to hearsay concerns, the Court does not rely on these letters in reaching its decision.”). And at least five of the letters—from Carroll Coffman, Doug Dunaway, Brian Forsee from Maple Heights Farm, William Austin Newton, and Steve Hamilton—are nearly identical, *see* Dkt. 15-1, Ex. 5, which calls into question the veracity of their boilerplate statements. These five letters also contain demonstrably false claims of confidentiality: They claim, for example, that “the types ... of crops on our farms” is confidential information that is not “known to the public.” *See id.* However, because each of the five growers employ H-2A workers, that information is required by regulation to be disclosed on a form that is “promptly place[d] for public examination.” *See* 20 C.F.R. § 655.144(a); *see also* Flores Decl. ¶¶ 10–15, Exs. 3–7 (forms from the five growers). And even putting aside the hearsay problem and the inaccurate statements in five of the letters, the eight letters fail to describe any steps that the growers take to closely guard the information or limit its disclosure to a select few. *Cf. N.Y. Times Co. v. FDA*, No. 19-CV-4740 (VEC), 2021 WL 1178126, at \*13 (S.D.N.Y. Mar. 29, 2021) (information shared with third parties has been found to be confidential where “there has been some accompanying indication that the company took steps to ensure that the information remained closely held or guarded, or there was at least an implicit understanding that the information would remain limited to a select audience” (citations omitted)).

Moreover, growers have not kept the names of tobacco buyers private or secret because they have communicated that information to FLOC on several occasions. *See* Flores Decl. ¶ 21. And DOL’s assertions that the names of tobacco-company buyers are “confidential” are belied by the fact that the names of tobacco buyers were displayed on posters that would have been visible to the grower’s employees and anyone with access to the grower’s premises. *Id.* ¶¶ 6–7. For example, according to Alliance One International (Alliance One), it has requested that its

contracted agricultural employers display posters bearing its name somewhere “visible to workers” and also has distributed raincoats with Alliance One’s logo to the workers. *Id.* ¶¶ 6–8, Exs. 1–2. And growers have, in fact, displayed posters bearing Alliance One’s name, as well as posters bearing Philip Morris International’s name, on the growers’ premises—including in the workers’ housing facilities. *Id.* ¶ 7. Thus, at these tobacco companies’ requests, the growers made the names visible to workers, workers’ guests, and others who visited the locations where the posters were displayed. *Id.* ¶¶ 6–7, Exs. 1–2. Although information is confidential where it is “known only to a limited few,” *FMI*, 139 S. Ct. at 2363 (citation omitted), information available to that many people is not confidential. *See Ctr. for Investigative Reporting v. U.S. Dep’t of Lab.*, 470 F. Supp. 3d 1096, 1113–14 (N.D. Cal. 2020) (stating that a form was not confidential where the company was required to post the form for current employees and provide the form upon request to employees and their representatives).

Further, in many of the narrative reports that were produced in response to FLOC’s FOIA request, DOL redacted some tobacco company names but not others—*within the same narrative report*. *E.g.*, Liu Decl., Ex. 3 (FOIA production) at Bates Nos. 11–12 (showing that Durham Brothers Farms, LLC sells tobacco to US Smokeless Tobacco, Hail and Cotton, Phillip Morris, Japanese Tobacco International, and Gallatin Re-Drying, but redacting the names of other tobacco companies); *see also id.* at Bates Nos. 16, 21 (showing that Jeff Moore sells tobacco to US Tobacco and Phillip Morris USA, but redacting the name of another tobacco company). These disclosures belie the notion that it is a “custom” for an agricultural employer to keep the identity of a tobacco purchaser confidential. *See Am. Small Bus. League v. U.S. Dep’t of Def.*, No. C 18-01979 WHA, 2019 WL 4416613, at \*3 (N.D. Cal. Sept. 15, 2019) (“Lockheed Martin’s selective disclosure of

supposed confidential information (*i.e.*, supplier names ... ) undercuts its vague contention that the company ‘customarily’ treats said information as confidential.”).

In sum: Only eight growers of the sixty-one at issue objected to disclosure of the requested information, there is no admissible evidence that *any* of the sixty-one growers who provided the names of tobacco buyers to DOL customarily and actually keep that information “private” or “secret,” and there is evidence that the information was not closely guarded. Summary judgment in favor of FLOC is thus warranted.<sup>5</sup>

## **2. The tobacco companies’ assertions of confidentiality should be rejected.**

Although DOL did not redact the names of many tobacco companies, it did redact others at the request of four companies identified in the narrative reports—Alliance One, China Tobacco International North America (China Tobacco), R.J. Reynolds Tobacco Company (together with its affiliated entities, RJ Reynolds), and Universal Corporation (Universal Leaf)<sup>6</sup>—each of which asked that its name be kept confidential. *See* Def. Br. at 13–14. DOL’s withholding of information at the request of the tobacco companies was wrong.<sup>7</sup>

**a.** The tobacco companies did not submit the information at issue. The names that were redacted from the narrative reports were communicated to DOL by the agricultural

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<sup>5</sup> DOL contends that “it is beyond cavil that disclosing” the names of the tobacco companies “does not serve the basic purpose of FOIA.” Def. Mem. at 14 n.2 (alterations and citations omitted). That accusation “does not affect [the Court’s] inquiry.” *Citizens for Resp. & Ethics in Wash. v. U.S. Dep’t of Just.*, 746 F.3d 1082, 1095 n.4 (D.C. Cir. 2014). It is also wrong: The purpose of FOIA is “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). DOL’s withholding of non-exempt information concerning a government investigation into labor practices does not accomplish that purpose.

<sup>6</sup> Universal Leaf also refers to Universal Leaf Tobacco Company, Inc., and Universal Leaf North America US, Inc.

<sup>7</sup> In DOL’s March 3, 2021 re-release of records, DOL disclosed the names of BIT, Phillip Morris USA, King Burley Tobacco Warehouse, and North America Tobacco Company. Kirkpatrick Decl. ¶ 3. These names had previously been redacted from DOL’s production of records. *Id.*; *see also* Dkt. 15-1, Ex. 4 (3/3/2021 DOL Letter). The fact that DOL first redacted these names, but then unredacted these names, suggests that DOL was categorically withholding that information without a specific determination that it was actually and customarily kept confidential.

employers, not the tobacco companies. DOL provides no legal authority for its withholding of information based on assertions from persons who did not submit the information at issue. DOL cites Executive Order 12,600 to justify its conferring with the *submitters* of the information at issue. *See* Def. Mem. at 3. But the submitters were the growers, and Executive Order 12,600 does not provide a basis for DOL to confer with persons who did not submit the information at issue. *See generally* Exec. Order No. 12,600, 52 Fed. Reg. 23,781, 1987 WL 959922 (providing notification procedures for the submitters of information). DOL’s regulations on assessing “[c]onfidential commercial information” for purposes of FOIA exemption 4—which DOL does not cite—likewise provide no authority for DOL to contact anyone other than the submitters of the information at issue. *See* 29 C.F.R. § 70.26 (setting forth procedures for submitters to object to disclosure of information). DOL cites no authority for its assertion that “courts may evaluate an agency’s protection of confidential commercial information relating to third party commercial entities when their information happens to be included in the information provided by the submitter.” Torres Decl. ¶ 14. Further, the focus on the submitter in Executive Order 12,600 and DOL’s regulations makes sense: If the submitter did not treat the information that it provided to the government as private, then that information, by definition, is not closely held.

Here, the submitters of the information to DOL—the “person imparting [the information],” *see FMI*, 139 S. Ct. at 2363—were the agricultural employers. If the agricultural employer did not consider the information confidential, that is the end of the matter for purposes of exemption 4. *Cf. id.* (stating that “it is hard to see how information could be deemed confidential if its owner shares it freely”).

**b.** In any event, that Alliance One, China Tobacco, RJ Reynolds, and Universal Leaf had no reasonable expectation of confidentiality is shown by the evidence that the growers do not

customarily or actually keep their names private. *See supra* at I.A.1. Similarly, the tobacco companies do not keep secret the information at issue.

For example, according to Alliance One, it requests that the agricultural employers with whom it holds contracts display posters bearing its name somewhere “visible to workers,” and has distributed raincoats bearing its logo to growers’ workers, as discussed above. Flores Decl. ¶¶ 6–8, Exs. 1–2. Alliance One also shares information about its growers with its “field technicians.” *See* Liu Decl. ¶ 1, Ex. 1 (Alliance One website). In addition, Alliance One supplies tobacco to the tobacco company Philip Morris International and has assigned grower contracts to that company. Flores Decl. ¶ 17, Exs. 9–10 (Alliance One press release). Because Alliance One shares the identities of its grower-suppliers with more than “a limited few,” *see FMI*, 139 S. Ct. at 2363 (citation omitted), redacting its name from the narrative reports concerning the sixty-one growers is not justified under exemption 4. *See Farmworker Just. v. U.S. Dep’t of Agric.*, No. 19-CV-1946 (DLF), 2021 WL 827162, at \*2 (D.D.C. Mar. 4, 2021) (information shared with the paid members of the Georgia Farm Bureau was not “confidential” under exemption 4); *see also Center for Investigative Reporting*, 470 F. Supp. 3d at 1114 (information shared with current and former employees, and their representatives, was not “confidential” under exemption 4).<sup>8</sup>

Likewise, RJ Reynolds and Universal Leaf do not “customarily” treat the identities of their grower-suppliers as private or secret. RJ Reynolds has publicly *advertised* its relationship with an agricultural employer in a marketing brochure, in which it named the tobacco grower J.B. Rose & Sons, Inc., as one of its “Most Valuable Partner[s]” and a supplier for its affiliate Santa Fe Tobacco

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<sup>8</sup> Alliance One’s objection seems to be based on a misunderstanding about the information at issue. Its declarant states: “I understand that as part of the above referenced legal proceeding, [FLOC] has requested documents that disclose the specific farms that serve as the sources of supply for” Alliance One. Dkt. 15-1, at 112, ¶ 3. At issue here, however, is not a request for a list of Alliance One’s suppliers, but rather the names of buyers from a discrete number of growers whom DOL found violated federal law.

Company. *See* Flores Decl. ¶ 16, Ex. 8 at 43. Although RJ Reynolds submitted a declaration that quoted two contractual confidentiality provisions, *see* Dkt. 15-1, 104–105, those provisions do not appear to bar the disclosure of the fact that a grower sells to the tobacco company. The first provision purports to be from a contract among RJ Reynolds entities, not a contract with a *grower*. Dkt. 15-1, at 104, ¶ 26. The second quoted provision purports to be from a “standard” contract with an unidentified grower, but it calls for confidentiality of the specific terms of the contract, not disclosure of its existence. *Id.* at 105, ¶ 31 (requiring confidential treatment of “the nature of the substance of activities that it performs in accordance with this Agreement and the terms, provisions, specifications, and pricing contained in this Agreement.”). And RJ Reynolds’s marketing brochure touting its business with a specific grower, *see* Flores Decl. ¶ 16, Ex. 8 at 43, belies RJ Reynolds’s assertion that the mere existence of a grower-supplier relationship is confidential information.

As for Universal Leaf, that company also shares information about growers with its “leaf technicians” and “mobile agronomy staff,” Liu Decl., Ex. 2 (Universal Leaf brochure), and the same Universal Leaf representative who submitted a letter asserting confidentiality, *see* Dkt. 15-1 at 97–98, has provided the names of Universal Leaf’s grower-suppliers to FLOC in multiple instances. *See* Flores Decl. ¶ 18, Ex. 11 (confirming contracts with identified tobacco growers). The Universal Leaf representative has even disclosed to FLOC that it purchases from two of the growers who are addressed in the narrative reports at issue: Christopher Lee Smith (Bates No. 727) and Wayne Day (Bates No. 1176). Flores Decl. ¶ 18, Ex. 11 (emails from Preston Wigner from Universal Leaf to FLOC confirming that Universal Leaf purchases tobacco from these growers). Companies that have voluntarily disclosed their grower relationships do not “customarily” keep that information private. *See Renewable Fuels Ass’n v. EPA*, No. CV 18-2031 (JEB), 2021 WL

602913, at \*7 (D.D.C. Feb. 16, 2021) (stating that “it is difficult to say that [a refinery] ‘customarily’ treated” its name and location as confidential where that information was kept secret in a 2015 petition but disclosed in a 2016 petition). The companies’ actual conduct, not an excerpt from a contract that may or may not have been with any of the growers at issue in this case, shows that the information FLOC sought is not confidential within the meaning of exemption 4.

The relationships that tobacco companies have with growers also are disclosed in other materials, including in public filings. For example, the fact that Alliance One purchased tobacco from certain growers in Kentucky is publicly available information in court filings in a case alleging violations of the Fair Labor Standards Act. *See* Tracy Dillard Dep. Tr. at 23:17–25, *Murillo v. Dillard*, No. 15-CV-00069 (W.D. Ky. July 21, 2017), ECF No. 105-2 (disclosing that the grower sells to Alliance One International and Japan Tobacco International); *see also* Carolyn Dillard Dep. Tr. at 41:20–42:3, *Murillo v. Dillard*, No. 15-CV-00069 (W.D. Ky. July 21, 2017), ECF No. 105-3 (same). And DOL has produced documents in response to another FOIA request that disclosed that Alliance One and RJ Reynolds purchased tobacco from certain agricultural employers—including one of the agricultural employers at issue here. *See* Flores Decl. ¶ 22, Ex. 12 (prior FOIA production) (identifying that Strickland Farms’ “tobacco was sold to Alliance One International” and that “Anderson Farm . . . sold tobacco to RJ Reynolds and Phillip Morris”); *see also* Liu Decl., Ex. 3 (FOIA Production) at Bates Nos. 932, 941, 945 (tobacco buyer names redacted from the narrative reports about Strickland Farms). Where information has been released publicly, it is not “confidential” under exemption 4. *See, e.g., Am. Soc’y for the Prevention of Cruelty to Animals v. Animal & Plant Health Inspection Serv.*, No. 19 Civ. 3112 (NRB), 2021 WL 1163627, at \*5–6 (S.D.N.Y. Mar. 25, 2021) (information was not “confidential” under exemption

4 where the government agencies had previously released that information in response to FOIA requests).

Finally, although the declarations from RJ Reynolds, Universal Leaf, and China Tobacco state that each company's contracts with growers contain confidentiality provisions, none attaches a copy of any contract with any of the sixty-one growers. *See* Dkt. 15-1, Ex. 6 (tobacco company declarations). Rather, for the truth of the matter asserted, RJ Reynolds and Universal Leaf copy and paste into their respective declarations paragraphs that purport to be standard confidentiality provisions from previous contracts, and China Tobacco summarizes the substance of a purported confidentiality provision. *Id.* at 105–16, ¶¶ 26, 31 (RJ Reynolds); *id.* at 109, ¶ 7 (Universal Leaf); *id.* at 155, ¶ 5 (China Tobacco). The declaration from Alliance One does not cite any grower contract, but rather asserts that a purported confidentiality provision is a “standard” term in a letter setting forth the terms of employment for Alliance One's employees. *Id.* at 113, ¶ 3. These assertions regarding purported confidentiality provisions are hearsay that should be disregarded by the Court. *Cf. Humane Soc’y Int’l*, 2021 WL 1197726, at \*3 (“[S]tatements that are impermissible hearsay ... are precluded from consideration by the Court.” (citation omitted)); *see also Ragsdale v. Holder*, 668 F. Supp. 2d 7, 16 (D.D.C. 2009) (“[H]earsay cannot be considered in awarding or avoiding summary judgment.”). Moreover, the substance of the declarations is inadequate for the reasons discussed more specifically above. *See supra* at pp. 13–14.<sup>9</sup>

**B. The information was not submitted under an assurance of privacy.**

In *FMI*, the Supreme Court posited, without deciding, that even where information is both customarily and actually treated as confidential, the information might “lose its confidential

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<sup>9</sup> DOL has also submitted letters from attorneys for RJ Reynolds, Alliance One, and Universal Leaf. These letters are also inadmissible hearsay. *Cf. Pub. Citizen Health Rsch. Grp.*, 209 F. Supp. 2d at 48 n.7 (“Due to hearsay concerns, the Court does not rely on these letters in reaching its decision.”).

character” if it was communicated without an assurance that the government would keep it secret. 139 S. Ct. at 2363. Since *FMI*, the D.C. Circuit has not addressed whether exemption 4 requires that the government provide an assurance that the information will be kept private. The best reading of exemption 4, however, is that information is “confidential” under exemption 4 only where the government has provided the submitter with an assurance of confidentiality.

Here, DOL’s redactions are also improper because there is no evidence that the agricultural employers provided the names of tobacco buyers to the government under an assurance that the government would keep the information private. Indeed, DOL’s only citations to the record to support its contention that the agricultural employers received assurances of privacy are to materials that are not in the record. *See* Def. Mem. at 18 (citing the “Tobacco Decl.” and “A&M Decl.,” which are not among the materials DOL submitted with its motion). Therefore, even if the names of tobacco buyers are “confidential” information (and they are not), the “confidential” character of that information was lost when it was communicated to DOL in the absence of any assurances of privacy.

1. *FMI* held that “confidential” under exemption 4 means the “ordinary, contemporary, common meaning” of the term. 139 S. Ct. at 2362. The ordinary meaning of “confidential” is that the information is provided “in confidence.” *Id.* at 2363 (citing 1 Oxford Universal Dictionary Illustrated 367 (3d ed. 1961), and Webster’s New World Dictionary 158 (1960)). Although *FMI* did not need to reach the question of whether exemption 4 required assurances of privacy, the Supreme Court contemplated that such a requirement was supported by the ordinary meaning of the term “confidential.” *Id.* It stated that “[c]ontemporary dictionaries suggest two conditions that might be required for information communicated to another to be considered confidential,” and explained that the second condition is that “information might be

considered confidential only if the party receiving it provides some assurance that it will remain secret.” *Id.*

The legislative history of exemption 4 likewise supports an assurance-of-privacy requirement. The House Report stated that exemption 4 encompasses information “where the Government has obligated itself in good faith not to disclose documents or information which it receives.” H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). And it explained that information that “is given to an agency *in confidence*” is confidential. *Id.* (emphasis added).

In *Renewable Fuels Association v. EPA*, No. CV 18-2031 (JEB), 2021 WL 602913 (D.D.C. Feb. 16, 2021), the district court declined to hold that information loses its confidential character absent assurances of privacy, on the ground that *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), directed otherwise. 2021 WL 602913, at \*7. *Critical Mass*, however, does not mandate that conclusion. For starters, *Critical Mass* does not supply the applicable test for “confidentiality” under exemption 4 following *FMI*. In *Critical Mass*, the D.C. Circuit distinguished between voluntarily and compulsorily submitted information and held that “confidential” had different meanings for each. 975 F.2d at 872. The Supreme Court, however, considered *Critical Mass*, rejected its dichotomy, and held that “confidential” has a uniform meaning of “private” or “secret,” regardless of how the information was submitted. *FMI*, 139 S. Ct. at 2365 (discussing *Critical Mass*). *FMI* overruled the test that *Critical Mass* applied to compulsorily submitted information, and it adopted a test *different* from the one that *Critical Mass* applied to voluntarily submitted information. *Compare FMI*, 139 S. Ct. at 2366 (information is confidential “[a]t least where [it] is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy”), *with Critical Mass*, 975 F.2d at 872 (information is confidential where “it is of a kind that the provider

would not customarily make available to the public”). Whereas the *Critical Mass* standard asked whether the information is “customarily” disclosed publicly, the *FMI* standard asks if the information is “customarily” *and* “actually” treated as private by the owner of that information.

The conclusion in *Renewable Fuels* that *Critical Mass* precludes an assurance-of-privacy requirement is difficult to square with the Supreme Court’s decision, which both expressly overruled D.C. Circuit precedent on the scope of exemption 4 and left open the question whether “information might be considered confidential only if the party receiving it provides some assurance that it will remain secret.” *FMI*, 139 S. Ct. at 2363. Furthermore, nothing in *Critical Mass* forecloses an assurance-of-privacy requirement. *Critical Mass* did not address assurances of privacy, let alone hold that assurances of privacy are (or are not) required for information to be “confidential.”

Here, DOL did not provide any assurances that it would keep the names of tobacco-company buyers private. *See Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 113 (declining to resolve whether exemption 4 requires assurances of privacy, but noting that “if Exemption 4 does so, the defendants must supply at least *some* evidence that this assurance was given”). That same information had been disclosed in response to FOIA requests in the past. Flores Decl. ¶ 22, Ex. 12 (prior FOIA production). There is no mention in any of the narrative reports that the DOL agent provided any assurance to the grower being interviewed that DOL would keep the information private. *See generally* Liu Decl., Ex. 3 (FOIA Production). It did not redact the names of several tobacco companies from the same reports. *See supra* at pp. 9–10. And DOL sent letters to the growers stating that the information would be disclosed absent objection. Torres Decl. ¶ 16. Each of these things is inconsistent with the notion that DOL had provided assurances of privacy.

The narrative reports for only one grower (of the sixty-one growers at issue) references the grower's reluctance to reveal information about tobacco buyers. *See* Liu Decl., Ex. 3 (FOIA Production) at Bates No. 820. Even there, the grower appears to have volunteered the names of "some of the big buyers." *Id.* (naming US Tobacco and another company, whose name was redacted). And if the DOL agent provided an assurance that the information would be kept confidential, such an assurance presumably would have been reflected in the agent's narrative report on the grower. It was not. *See id.* Further, the absence of any indication in the reports concerning the other growers that they were reluctant to provide the names of buyers to the DOL agent is an additional indication that confidentiality was not raised as an issue, much less that DOL provided an assurance.

Thus, DOL offers no evidence that it provided any assurances, either express or implied, that it would keep the information at issue private. The agency declaration states that DOL's investigators "frequently offer verbal assurances of confidentiality," *see* Torres Decl. ¶ 5, but that assertion is conclusory, made without personal knowledge, and is not specific to any of the reports at issue. *See Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 110–11 (rejecting statements in an agency affidavit that were conclusory and made without personal knowledge). DOL has also not offered any sworn statement from any of the agricultural employers that an assurance of privacy was provided (indeed, there are no affidavits or declarations from the agricultural employers), and the eight letters submitted by the agricultural employers (which are inadmissible hearsay) contain no statements that they provided the information under an assurance that DOL would keep the information private. *See* Dkt. 15-1, Ex. 5 (grower letters). Tellingly, the only citations in DOL's brief to support that DOL's investigators "do, in fact, assure [the growers] that

they will hold this information in confidence” are to materials *that are not in the record*. See Def. Mem. at 18 (citing the “Tobacco Decl.” and “A&M Decl.”).

2. DOL proposes an alternative test for considering assurances of privacy under exemption 4. Rather than requiring assurances in all circumstances, DOL contends that “express or implied assurances of privacy are only necessary . . . in those specific contexts where there might be reason to expect that the government would disclose the information in question.” Def. Mem. at 16–17. *Renewable Fuels* articulated a similar test: “The better approach would be that privately held information is generally confidential absent an express statement by the agency that it would not keep information private, or a clear implication to that effect (for example, a history of releasing the information at issue).” 2021 WL 602913, at \*8.

To begin with, the tests proposed by DOL and *Renewable Fuels* contravene well-settled law on FOIA. “FOIA mandates a ‘strong presumption in favor of disclosure,’ and that the statutory exemptions, which are exclusive, are to be ‘narrowly construed.’” *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (citations omitted); *Milner v. Dep’t of the Navy*, 562 U.S. 562, 565 (2011) (FOIA exemptions “must be narrowly construed” (citation omitted)). “[D]isclosure, not secrecy, is the dominant objective of the Act.” *Dep’t of the Air Force*, 425 U.S. at 361. Under DOL’s and *Renewable Fuels*’ tests, information remains confidential unless proven otherwise; these tests are essentially a rebuttable presumption that information is confidential and cannot be disclosed. That interpretation fails to narrowly construe exemption 4 and ignores FOIA’s strong presumption in favor of disclosure. Moreover, none of the cases cited in *Renewable Fuels* mentions, let alone explains, the proffered test. See *Renewable Fuels*, 2021 WL 602913, at \*8 (citing *Gellman v. Dep’t of Homeland Sec.*, No. 16-CV-635 (CRC), 2020 WL 1323896, at \*11 n.12 (D.D.C. Mar. 20, 2020) and *WP Co. v. U.S. Small Bus. Admin.*, No. CV 20-1240 (JEB), 2020

WL 6504534, at \*9 (D.D.C. Nov. 5, 2020)). *Renewable Fuels* also cites guidance issued by the Justice Department’s Office of Information Policy, *see* 2021 WL 602913, at \*8, but “the guidance issued by the Office of Information Policy on Exemption 4 is just that—guidance.” *Citizens for Resp. & Ethics in Wash. v. U.S. Dep’t of Com.*, No. 1:18-CV-03022 (CJN), 2020 WL 4732095, at \*4 (D.D.C. Aug. 14, 2020).

Regardless, even under the tests proposed by DOL and *Renewable Fuels*, the names of the tobacco buyers are not confidential. *Renewable Fuels* concluded that privately held information is not confidential where there is “a history of releasing the information at issue” or some other “clear implication” that the information would not be kept private. 2021 WL 602913, at \*8. That history existed here: DOL had disclosed the names of tobacco buyers in response to other FOIA requests. Flores Decl. ¶ 22, Ex. 12 (prior FOIA production). And DOL had even written to the growers and notified them that it would disclose the information at issue if DOL did not receive a response within a prescribed period of time, Torres Decl. ¶ 16—DOL’s letters to the growers are inconsistent with the notion that DOL had provided an assurance of confidentiality. Accordingly, there would have been strong “reason to expect,” Def. Mem. at 16, that the information would be disclosed. *See Am. Soc’y*, 2021 WL 1163627, at \*5–6 (submitters of information “had no reasonable expectation that the Agencies would treat the information as confidential” where the government agencies had previously released that information in response to FOIA requests).

**3.** At a minimum, as several courts have concluded, without deciding whether assurances of privacy are required, that “whether the agency provided an ‘assurance of privacy’ is undoubtedly *relevant* to determining whether commercial information possessed by [the agency] is ‘confidential.’” *WP Co.*, 2020 WL 6504534, at \*9 (quoting *Shapiro v. Dep’t of Just.*, No. 12-CV-313 (BAH), 2020 WL 3615511, at \*26 (D.D.C. July 2, 2020)); *Stotter v. U.S. Agency for Int’l*

*Dev.*, No. 14-CV-2156 (KBJ), 2020 WL 5878033, at \*5 (D.D.C. Oct. 3, 2020) (“[I]t is clear beyond cavil that whether the agency provided an ‘assurance of privacy’ when it received the information is relevant to determining whether financial information that is shared with the government is ‘confidential’ pursuant to the FOIA’s Exemption 4”); *accord Am. Soc’y*, 2021 WL 1163627, at \*4 (“While the Supreme Court in *Argus Leader* did not resolve the issue of whether government assurances are *necessary* to satisfy Exemption 4, such assurances are indisputably *relevant* to the Exemption 4 analysis.” (emphasis in original)).

Indeed, *FMI* cites favorably cases that found information to be confidential where it was “reveal[ed] to the government under the express or implied promise of confidentiality.” *FMI*, 139 S. Ct. at 2363 (quoting *GSA v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969)), or where “the government ‘agreed to treat [the information] as confidential,’” *id.* (quoting *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971)). Since *FMI*, courts in this district have taken similar approaches. *See, e.g., Humane Soc’y Int’l*, 2021 WL 1197726, at \*5 (considering “representations the government makes in connection with obtaining information” as a “factor[]” in assessing confidentiality and concluding that the information was not confidential (collecting cases)); *see also Leopold v. U.S. Dep’t of Just.*, No. CV 19-3192 (RC), 2021 WL 124489, at \*6 (D.D.C. Jan. 13, 2021) (finding the information confidential because “[i]mportantly,” it was provided “based on the express assurance that this information would remain confidential”).

As explained above, there is no admissible evidence that DOL provided any explicit or implicit assurances to the agricultural employers that it would keep private the names of tobacco buyers in the narrative reports prepared as part of the DOL investigations of the agricultural employers. Indeed, because DOL had previously released the names of tobacco-company buyers in other FOIA productions, the agricultural employers “had no reasonable expectation” that the

government would treat such information as confidential. *See Am. Soc’y*, 2021 WL 1163627, at \*5–6 (prior agency decision to release information in response to FOIA requests provided submitters of information with “notice that it was the Agencies’ policy to release that information in response to a FOIA request” and constituted “government assurances of publicity”). Therefore, the names of tobacco buyers are not information within the scope of exemption 4.

**II. Disclosing the names of tobacco purchasers would not result in reasonably foreseeable harm to an interest protected by FOIA exemption 4.**

Pursuant to the FOIA Improvement Act of 2016, information must be disclosed, even if it falls within the scope of a FOIA exemption, unless “the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.” *See* 5 U.S.C. § 552(a)(8)(A)(i). The FOIA Improvement Act “impose[s] an independent and meaningful burden on agencies” that “was intended to restrict agencies’ discretion in withholding documents under FOIA.” *Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 106 (citations omitted). Here, DOL does not assert that disclosing the names of tobacco-company buyers would harm any governmental interest. It asserts, however, that disclosure would harm the interests of the tobacco companies and the growers.<sup>10</sup>

First, DOL argues that disclosing the names of the tobacco-company purchasers would harm the business interests of the tobacco companies. *See* Def. Mem. at 19–20. To the extent that the interests of the tobacco companies are relevant, disclosing the mere existence of the grower-suppliers’ relationships would not result in a reasonably foreseeable harm to an interest protected by exemption 4. Indeed, that information has been disclosed for several tobacco companies in the

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<sup>10</sup> No appellate court has addressed the FOIA Improvement Act’s foreseeable-harm standard for exemption 4 cases, and district courts have disagreed over what interests are protected under exemption 4. *See, e.g., N.Y. Times Co. v. U.S. Dep’t of Just.*, No. 19 CIV. 1424 (KPF), 2021 WL 371784, at \*15 n.15 (S.D.N.Y. Feb. 3, 2021) (collecting cases). Here, none of the interests identified by DOL justify withholding.

records that DOL produced in this case, *see, e.g.*, Liu Decl., Ex. 3 (FOIA Production) at Bates Nos. 11–12, 16, 21 (identifying US Smokeless Tobacco, Hail and Cotton, Japanese Tobacco International, Gallatin Re-Drying, US Tobacco, and Phillip Morris USA), and it has been disclosed in response to a prior FOIA request from FLOC, including for one of the growers at issue here. *See* Flores Decl. ¶ 21, Ex. 12 (prior FOIA production) (identifying that Strickland Farms’ “tobacco was sold to Alliance One International”).<sup>11</sup> And RJ Reynolds and Universal Leaf, both of which submitted declarations asserting confidentiality (Dkt. 15-1), have voluntarily disclosed the identities of the tobacco growers from whom they purchase—indeed, Universal Leaf has even disclosed that information for two of the growers who are at issue in this case. *See* Flores Decl. ¶¶ 16, 18, 20, Exs. 8, 11.

DOL relies on declarations from the four tobacco companies, which assert that disclosing the identities of the companies’ grower-supplier relationships will result in competitive harm because competitors will “poach” the tobacco companies’ growers and disrupt their supply chains. *See* Dkt. 15-1 at 105–06, ¶¶ 34–39 (RJ Reynolds); *id.* at 109–110, ¶¶ 8–10 (Universal Leaf); *id.* at 113, ¶ 4 (Alliance One); *accord id.* at 115, ¶ 7 (China Tobacco) (stating disclosure “could result in competitive harm to [China Tobacco]” without further explanation). That concern, however, does not ring true because the growers at issue here are ones that DOL found to have violated federal law, *see id.*, Ex. 2 (FOIA Request), and the tobacco companies purport to want to eliminate such employers from their supply chain. *See, e.g.*, Dkt. 15-1 at 105, ¶ 32 (RJ Reynolds) (grower contracts require the growers “to follow the law and certain best practices that protect . . . worker rights”). Further, given that the same grower often sells to multiple buyers, multiple tobacco companies already know of the existence and identity of a particular grower. *See, e.g.*, Liu Decl.,

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<sup>11</sup> In its FOIA production here, DOL redacted the names of tobacco buyers from the DOL narrative reports regarding Strickland Farms. *See* Liu Decl., Ex. 3 (FOIA Production) at Bates Nos. 932, 941, 945.

Ex. 3 (FOIA Production) at Bates Nos. 11–12 (showing that Durham Brothers Farms, LLC sells tobacco to US Smokeless Tobacco, Hail and Cotton, Phillip Morris, Japanese Tobacco International, and Gallatin Re-Drying). It also is implausible that RJ Reynolds would identify its “[m]ost [v]aluable” tobacco grower in a marketing brochure, *see* Flores Decl. ¶ 16, Ex. 8, if RJ Reynolds actually feared “poaching” of its growers as it claims.

Second, DOL contends that disclosing the names of tobacco-company buyers would harm the business interests of the agricultural employers. Assuming that these interests are protected by exemption 4, DOL offers no evidence that releasing the names of tobacco buyers will result in any such harm. Indeed, DOL’s speculative assertion offers no detail about how the agricultural employers would be harmed. *See* Def. Mem. at 21 (stating that disclosure “might very well” result in harm); *see also* Torres Decl. ¶ 21 (stating that disclosure “could harm” an agricultural employer or “would put” the agricultural employer “at a competitive disadvantage,” without any citations to the factual record or assertions of personal knowledge on the issue). And the fact that only eight of the sixty-one growers objected to disclosure belies DOL’s assertion.

Because DOL has failed to show that disclosing the names of tobacco-company buyers will result in reasonably foreseeable harm to an interest protected by exemption 4, the Court should grant FLOC’s motion for summary judgment.

### **CONCLUSION**

For the foregoing reasons, FLOC’s motion for summary judgment should be granted, DOL’s motion for summary judgment should be denied, and the Court should order that DOL disclose the information at issue.

Dated: April 8, 2021

Respectfully submitted,

/s/ Wendy Liu

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FARM LABOR ORGANIZING COMMITTEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 20-645 (KBJ)
	)	
U.S. DEPARTMENT OF LABOR,	)	
	)	
Defendant.	)	
	)	

**PLAINTIFF’S RESPONSE TO DEFENDANT’S STATEMENT OF FACTS AND  
PLAINTIFF’S CROSS-STATEMENT OF UNDISPUTED MATERIAL FACTS**

*Defendant’s Statements and Plaintiff’s Responses*

**I. INVESTIGATIONS AND DATA COLLECTION BY DOL**

1. DOL’s Wage and Hour Division (“WHD”) is responsible for administering and enforcing a number of statutes that extend protections to different types of agricultural workers, including the Migrant and Seasonal Worker Protection Act (“MSPA”) and worker protections for temporary nonimmigrant agricultural workers admitted to the country under section 218 of the Immigration and Nationality Act (“H-2A workers”). The MSPA protects migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures, and recordkeeping. The H-2A visa program establishes standards related to recruitment, wages, housing, transportation, working conditions, and recordkeeping for employers of H-2A workers. Decl. of Patrice Rachel Torres (“Torres Decl.”) ¶ 3.

**PLAINTIFF’S RESPONSE:** Undisputed as to the facts stated herein. Further, according to its website, WHD also administers and enforces the Fair Labor Standards Act. *See* Wage and

Hour Division, “Major Laws Administered/Enforced,” *available at* <https://www.dol.gov/agencies/whd/laws-and-regulations/laws>.

2. To enforce these laws, WHD conducts investigations to determine whether one or more of the laws administered by the agency apply to a particular employer and, if so, whether workers are paid and employed in accordance with those laws. Investigations may include activities such as examining records, taking notes or making transcriptions or photocopies essential to the investigation, and interviewing employees. WHD’s investigators maintain narrative reports, which typically includes a general summary of the investigative process, any negotiations and discussions with the employer and/or their authorized representative, as well as findings and conclusions. When all the fact-finding steps have been completed, the investigator typically meets with the employer to explain any potential violations and how to correct them, and a determination letter may be issued, depending on the program and the type of violation, if violations were found to have occurred. Torres Decl. ¶ 4.

**PLAINTIFF’S RESPONSE:** Undisputed.

3. During an investigation, WHD often requests business information, such as annual dollar volume for a given time period, number of employees, and payroll records. In addition, WHD sometimes requests information concerning companies or persons to whom an agricultural employer has sold or will sell a product. If provided, this information may be included in the narrative report. WHD investigators frequently offer verbal assurances of confidentiality in order to obtain requested information. Torres Decl. ¶ 5.

**PLAINTIFF’S RESPONSE:** Disputed in part. Undisputed as to the first three sentences. Disputed that “WHD investigators frequently offer verbal assurances of confidentiality in order to obtain requested information.” The cited declaration is deficient for lack of personal knowledge.

See Pl. Mem. at 6–7. Further, there is no admissible evidence in the record showing that any of the 61 growers provided the information under an assurance that DOL would keep that information private; indeed, in the redacted narrative reports at issue, there is no mention of whether any assurances of privacy were provided. *See generally* Liu Decl., Ex. 3 (FOIA Production); *see also* Pl. Mem. at 19–20.

## **II. PROCESSING OF PLAINTIFF’S FOIA REQUEST**

4. Plaintiff Farm Labor Organizing Committee submitted a FOIA request to DOL dated June 7, 2018, which sought:

the final findings of any US DOL investigation that resulted in a determination of a violation of any federal law or regulation in which US DOL determined as part of any such investigation that the specific farmer, agricultural employer, and/or farm labor contractor sold tobacco to the RJ Reynolds Tobacco Company, Universal Leaf Corporation, Altria, or Alliance One International. This request is limited to the states of North Carolina, Kentucky, Tennessee, and Virginia and the time frame sought is for any such investigation that was conducted in 2015, 2016, or 2017.

Torres Decl. ¶ 6.

**PLAINTIFF’S RESPONSE:** Undisputed.

5. Plaintiff filed the above-captioned lawsuit on March 5, 2020, in which it challenged DOL’s handling of Plaintiff’s FOIA request. Torres Decl. ¶ 7.

**PLAINTIFF’S RESPONSE:** Undisputed. The complaint speaks for itself. *See* Dkt. 1.

6. Plaintiff and DOL subsequently reached an agreement regarding the method and scope of the search that DOL was to perform. Specifically, WHD agreed to conduct an electronic search of the Wage and Hour Investigative Support and Reporting Database (“WHISARD”) for potentially responsive investigations and to search the narrative reports, which are stored in WHISARD, to determine whether the investigated employer sold tobacco to any of the entities referenced in the request. Once the relevant narratives were identified, DOL agreed to produce all nonexempt information contained in those documents. Torres Decl. ¶ 8.

**PLAINTIFF’S RESPONSE:** Undisputed as to the first two sentences. As to the third sentence, Plaintiff disputes the Department of Labor’s (DOL) use of the term “nonexempt,” which is a legal assertion.

7. WHD completed its search on July 15, 2020, which identified 95 potentially relevant cases, with narratives totaling 1,656 pages. After reviewing these potentially responsive pages, WHD released 1,178 pages that were actually responsive to the request. Torres Decl. ¶ 9.

**PLAINTIFF’S RESPONSE:** Disputed in part. Undisputed that DOL states that it completed its search on July 15, 2020, and that DOL states it reviewed 1,656 pages. *See* Dkt. 15-1, Ex. 2 (10/19/2020 DOL Letter). Undisputed that DOL released 1,178 pages, some of which were redacted in part. *See* Dkt. 15-1, Ex. 4 (3/3/2021 DOL Letter).

Plaintiff disputes WHD’s use of the terms “relevant” and “responsive,” which are legal terms.

8. WHD produced documents to Plaintiff on August 17, 2020, September 17, 2020, and October 19, 2020. WHD withheld some information in those records pursuant to 5 U.S.C. § 552(b)(4), 5 U.S.C. § 552(b)(5), 5 U.S.C. § 552(b)(7)(C), 5 U.S.C. § 552(b)(7)(D), and 5 U.S.C. § 552(b)(7)(E). WHD further notified the Plaintiff that it had provisionally redacted certain information using the marking “Under review – Exem. 4.” These redactions concerned information that WHD identified as potentially subject to Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), but for which WHD had not yet made a final determination as to the information’s exempt status because WHD was in the process of obtaining input from submitters of such information pursuant to Executive Order 12,600. WHD notified Plaintiff that it would provide a release determination once such processes were complete. Torres Decl. ¶ 10.

**PLAINTIFF’S RESPONSE:** Disputed in part. Undisputed that WHD made rolling productions on August 17, 2020, September 17, 2020, and October 19, 2020. *See* Dkt. 15-1, Ex. 2 (DOL Letters). DOL made its first production on August 17, 2020, consisting of 418 pages; its second production on September 17, 2020, consisting of 529 pages; and its third production on October 19, 2020, consisting of 231 pages. *Id.* On November 17, 2020, DOL re-released its previously produced documents, in which some pages were redacted in part. Dkt. 15-1, Ex. 3 (11/17/2020 DOL Letter). On March 3, 2021, DOL again re-released its previously produced documents, in which some pages were redacted in part and some redactions from DOL’s prior productions were removed. Dkt. 15-1, Ex. 4 (3/3/2021 DOL Letter).

Plaintiff disputes DOL’s invocations of FOIA exemption 4, 5 U.S.C. § 552(B)(4), and Executive Order 12,600, which are legal assertions.

9. In November of 2020, WHD completed its Executive Order 12,600 submitter process, discussed in more detail below, and subsequently re-released all records produced from August to October 2020, totaling 1,178 pages. WHD notified the Plaintiff that it had completed its review of all information previously marked as “Under review-Exem. 4,” and the supplemental release consisted of its final determination for such material. Torres Decl. ¶ 11.

**PLAINTIFF’S RESPONSE:** Disputed in part. Undisputed that on November 17, 2020, DOL re-released its previously produced documents, in which some pages were redacted in part. Dkt. 15-1, Ex. 3 (11/17/2020 DOL Letter). On March 3, 2021, DOL again re-released its previously produced documents, in which some pages were redacted in part and some redactions from DOL’s prior productions were removed. Dkt. 15-1, Ex. 4 (3/3/2021 DOL Letter).

Plaintiff disputes DOL’s invocations of Executive Order 12,600 and “Exem. 4,” which are legal assertions.

10. On December 15, 2020, Plaintiff notified DOL that after reviewing the productions, the only issue it planned to challenge at summary judgment was DOL's withholding of tobacco buyers' names under Exemption 4 of the FOIA. Torres Decl. ¶ 12.

**PLAINTIFF'S RESPONSE:** Disputed in part. Undisputed that FLOC challenges DOL's withholding of tobacco buyer names under FOIA exemption 4. *See* Kirkpatrick Decl. ¶¶ 2–5; *see also* Pl. Mem. Disputed as to footnote 2 of paragraph 12 of the cited Torres Declaration, which asserts that information redacted on certain pages does not reflect the names of tobacco buyers. There are multiple names redacted on the pages cited, and Plaintiff challenges the redactions of all tobacco buyer names that are reflected on those pages. *See* Kirkpatrick Decl. ¶ 5.

11. In the process of preparing this declaration, WHD conducted a supplemental review of the responsive records and determined it should release additional information. On March 3, 2021, WHD notified the Plaintiff that it was releasing additional information that it previously redacted pursuant to Exemption 4 of the FOIA on pages 377, 380, 375, 653, and 915 of the production. Torres Decl. ¶ 13.

**PLAINTIFF'S RESPONSE:** Undisputed as to the facts stated herein. Disputed as to DOL's invocation of FOIA exemption 4, which is a legal assertion.

### **III. WHD SUBMITTER NOTIFICATION PROCESS AND REVIEW OF CHALLENGED INFORMATION**

12. Exemption 4 of the FOIA protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” The exemption covers two categories of information; 1) information that constitutes a trade secret; and 2) information that is a) commercial or financial; b) obtained from a person, and c) privileged or confidential. Unlike other FOIA exemptions which allow agencies to evaluate withholding of information without third party weigh-in, Executive Order 12,600 requires federal agencies to confer with submitters of

commercial information when their information is requested under the FOIA. However, Exemption 4 itself does not limit agencies to protecting only the commercial information of the submitter, and courts may evaluate an agency's protection of confidential commercial information relating to third party commercial entities when their information happens to be included in the information provided by the submitter. Torres Decl. ¶ 14.

**PLAINTIFF'S RESPONSE:** Disputed. These statements are legal arguments. The cited declaration is deficient and is insufficient to meet DOL's burden. *See* Pl. Mem. at 6–7. And the fourth sentence of the above paragraph is a legal conclusion that Plaintiff challenges. *Id.* at 10–11.

13. As noted above, during the course of an investigation, WHD sometimes requests information concerning companies or persons to whom an agricultural employer has sold or will sell a product. It is the experience of WHD staff that because of the competitive nature of the agricultural industry, this is not information that agricultural employers typically disclose publicly, and as a result, some agricultural employers are hesitant to provide such information to investigators and consequently ask WHD investigators to hold such information in confidence. Torres Decl. ¶ 15.

**PLAINTIFF'S RESPONSE:** Disputed in part. Undisputed that during an investigation, DOL asks the agricultural employer for the names of the companies or persons that purchase from the agricultural employer. *See* Torres Decl. ¶¶ 4–5. Disputed as to the second and third sentences in this paragraph. The cited declaration is deficient and is insufficient to meet DOL's burden, and there is evidence that the agricultural employers do not keep the names of tobacco buyers closely held. *See* Flores Decl. ¶¶ 6–8, 21, Exs. 1–2; *see also* Pl. Mem. at 6–10.

14. With that in mind, between August 3, 2020 and October 19, 2020, WHD sent letters to 76 agricultural employers (“AGERS”) referenced in the documents responsive to Plaintiff's

FOIA request. The letters notified the AGERs that WHD received a FOIA request for final findings of investigations that resulted in a violation of federal agricultural law wherein the agricultural employer sold tobacco to RJ Reynolds Tobacco Company, Universal Leaf Corporation, Altria, or Alliance One International. The letters further stated that WHD was providing the AGERs with an opportunity to present specific objections to the disclosure of certain information contained in the responsive records. AGERs were provided with ten business days from the date of the letter to respond. The letters notified the AGERs that if they failed to respond to the letter, WHD would release the commercial information. Torres Decl. ¶ 16.

**PLAINTIFF'S RESPONSE:** Undisputed.

15. Between September 11, 2020, and October 22, 2020, WHD also sent letters to 20 agricultural buyers referenced in the documents responsive to Plaintiff's FOIA request. The letter notified the agricultural buyers that WHD received a FOIA request for final findings of investigations that resulted in a violation of federal agricultural law wherein the agricultural employer sold tobacco to RJ Reynolds Tobacco Company, Universal Leaf Corporation, Altria, or Alliance One International. The letters further stated that WHD was providing the buyers with a sample document of the information pertaining to them and was providing them an opportunity to present specific objections to the disclosure of similar information pertaining to them that were in the responsive records. Buyers were provided with five business days to respond to the letter. The letters notified the buyers that if they failed to respond to the letter, WHD would release the commercial information. Torres Decl. ¶ 17.

**PLAINTIFF'S RESPONSE:** Undisputed.

16. WHD received responses from eight AGERs who asserted that information relating to their crops' buyers is confidential, commercial information that they do not disclose to the public. Torres Decl. ¶ 18.

**PLAINTIFF'S RESPONSE:** Disputed in part. Undisputed that DOL received letters from eight agricultural employers, *see* Dkt. 15-1, Ex. 5 (grower letters). Otherwise, disputed because the letter responses and the cited declaration are deficient and do not satisfy DOL's burden, *see* Pl. Mem. at 6–8 & Flores Decl. ¶¶ 10–15, Exs. 3–7, and there is evidence that the growers do not keep the names of tobacco buyers private or closely held. *See* Flores Decl. ¶¶ 6–15, 21, Exs. 3–7; *see also* Tracy Dillard Dep. Tr. at 23:17–25, *Murillo v. Dillard*, No. 15-CV-00069 (W.D. Ky July 21, 2017), ECF No. 105-2 (disclosing that the grower sells to Alliance One International and Japan Tobacco International); Carolyn Dillard Dep. Tr. at 41:20-42:3, *Murillo v. Dillard*, No. 15-CV-00069 (W.D. Ky July 21, 2017), ECF No. 105-3 (same).

Also disputed because DOL's statement reflects a legal conclusion that Plaintiff challenges. *See* Pl. Mem. at 6–10.

17. As it pertains to the information that Plaintiff is challenging, WHD also received responses from three tobacco buyers who asserted that information relating to who they buy tobacco from is confidential, commercial information that they do not disclose to the public. Torres Decl. ¶ 19.

**PLAINTIFF'S RESPONSE:** Disputed. DOL's statement reflects a legal conclusion that Plaintiff challenges. The cited declaration is deficient and does not satisfy DOL's burden. *See* Pl. Mem. at 6–7. DOL received responses from tobacco companies (declarations from four companies, and letter responses from three of those companies), *see* Dkt. 15-1, Ex. 6, but these responses are deficient and do not satisfy DOL's burden. *See* Pl. Mem. at 10–15. Further, there is

evidence that the tobacco companies do not keep the names of tobacco buyers private or closely held. *See* Flores Decl. ¶¶ 6, 8, 16–20, Exs. 1–2, 8–11; *see also* Pl. Mem. at 11–15.

18. Upon receipt of the responses described above, WHD undertook an independent assessment in which it considered a number of relevant factors. First, WHD reviewed publicly available information, including any available websites, to determine whether any of the withheld information was already available in the public domain. WHD did not identify any publicly available source that revealed the relationships between any specific AGER and tobacco purchaser. WHD is also unaware of any reason to doubt that the AGERs and tobacco buyers who responded to WHD’s letters actually and customarily keep their buyer-seller relationships confidential. Torres Decl. ¶ 20.

**PLAINTIFF’S RESPONSE:** Disputed in part. Undisputed as to the first three sentences. Disputed as to the fourth sentence. Plaintiff disputes that “the AGERs and tobacco buyers who responded to WHD’s letters actually and customarily keep their buyer-seller relationships confidential,” which is a legal argument that Plaintiff challenges. *See* Pl. Mem. at 5–15. Plaintiff disputes that WHD is unaware of any reason to doubt the veracity of the responses. For example, the name of tobacco buyer Alliance One International (Alliance One) would have been visible to the agricultural employer’s employees and anyone with access to the agricultural employer’s premises, and information regarding the relationships between agricultural employers and Alliance One, R.J. Reynolds Tobacco Company (together with its affiliated entities, RJ Reynolds), and Universal Corporation (Universal Leaf)<sup>12</sup> has been disclosed previously, including by those tobacco companies themselves. *See* Flores Decl. ¶¶ 6–8, 16–22, Exs. 1–2, 8–12; *see also* Pl. Mem. at 11–15.

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<sup>12</sup> Universal Leaf also refers to Universal Leaf Tobacco Company, Inc., and Universal Leaf North America US, Inc.

19. WHD also considered the fact that tobacco contracts between many AGERs and tobacco purchasers include confidentiality clauses that prohibit them from disclosing the identity of their tobacco customers. Revealing this information, could harm their ability to obtain future contracts from their current clients and result in poaching of their current clients by other AGERs. Even in the absence of a confidentiality provision, disclosure of an AGER's tobacco purchaser would put the AGER at a competitive disadvantage with other AGERs. Torres Decl. ¶ 21.

**PLAINTIFF'S RESPONSE:** Disputed. The cited declaration is deficient and does not satisfy DOL's burden. *See* Pl. Mem. at 6–7. Furthermore, the contracts and confidentiality clauses, which are cited within the Torres Declaration and reflected in DOL's statements herein, are deficient and do not satisfy DOL's burden, and there is evidence that the tobacco companies have disclosed their relationships with tobacco growers. *See* Flores Decl. ¶¶ 6–8, 16–22, Exs. 1–2, 8–12; *see also* Pl. Mem. at 11–15.

20. WHD also considered representations that the tobacco industry is a highly competitive private industry and that tobacco manufacturers spend a tremendous amount of time identifying, growing, and cultivating their list of growers. Tobacco buyers stated that disclosure of their growers could result in harm because competitors could poach their growers, resulting in an inability to acquire high quality tobacco. As a result, these buyers do not publicly disclose the identities of their growers and have implemented a number of measures to maintain the confidentiality of their grower lists, including, among other things, negotiating contracts with agricultural farmers that include non-disclosure provisions and providing access to this information only to personnel who require it. Torres Decl. ¶ 22.

**PLAINTIFF'S RESPONSE:** Disputed. The cited declaration is deficient and is insufficient to meet Defendant's burden. *See* Pl. Mem. at 6–7. Furthermore, there is evidence that

the tobacco company buyers have disclosed their relationships with tobacco growers. Flores Decl. ¶¶ 6–8, 16–22, Exs. 1–2, 8–12; *see also* Pl. Mem. at 11–15.

21. After reviewing the various letters received and conducting an independent assessment, WHD determined it was appropriate to withhold references relating to any crop buyers from the investigations of the eight AGERs who objected to the disclosure of such information in their responses. WHD also determined it was appropriate to withhold any references to six tobacco buyers throughout the records. These included three companies that responded to WHD with objections, two companies that are subsidiaries of companies that responded to WHD’s letter, and one company that indicated interest in their information being withheld but needed additional time to provide a response. In the process of preparing this declaration, DOL conferred with the latter tobacco buyer and determined that they provided a sufficient explanation for redacting references to them throughout the record. Torres Decl. ¶ 23

**PLAINTIFF’S RESPONSE:** Disputed in part. Undisputed as to the fact that DOL received letter responses from eight agricultural employers. *See* Dkt. 15-1, Ex. 5 (grower letters). DOL also received declarations from four tobacco companies and letter responses from three of those four tobacco companies. *See* Dkt. 15-1, Ex. 6 (tobacco company letters and declarations). Disputed to the extent that DOL’s statements reflect legal conclusions about whether DOL’s withholding of information was “appropriate” or whether statements from a tobacco buyer were “sufficient” to justify DOL’s withholding of information. *See* Pl. Mem. at 5–25. Indeed, there is evidence that the names of tobacco buyers are not information that is private or closely guarded. *See* Flores Decl. ¶¶ 6–22, Exs. 1–12.

22. In each of these cases, DOL concluded that the buyer-seller relationship between the specific AGERs and tobacco purchasers constituted confidential commercial information that

was obtained from a person and was therefore properly protected from disclosure pursuant to FOIA Exemption 4. Torres Decl. ¶ 24.

**PLAINTIFF’S RESPONSE:** Disputed. DOL’s statement is a legal conclusion that Plaintiff challenges. *See* Pl. Mem. at 5–25.

***Plaintiff’s Counter-Statement of Undisputed Facts***

23. Plaintiff Farm Labor Organizing Committee (FLOC) is a farmworker labor union that seeks to improve the conditions for farmworkers by, among other things, working with all participants in the agricultural supply chain—corporations, growers, and farmworkers—to address and improve the working conditions for farmworkers. Flores Decl. ¶ 2.

24. In the tobacco industry, agricultural employers (also called growers) pay the wages and set the working conditions for the farmworkers they employ. *Id.* ¶ 5.

25. To the extent that the agricultural employer engages in interstate commerce, the working conditions provided by that employer are federally regulated. *Id.* ¶ 5.

26. In its production of documents responsive to Plaintiff’s FOIA request, DOL produced narrative reports from its investigations of agricultural employers. *See* Liu Decl., Ex. 3 (FOIA Production). These narrative reports reflect the DOL agent’s investigation of the agricultural employer and incorporate information that the agricultural employer provided to the DOL agent during the investigation. *See* Torres Decl. ¶ 4.

27. DOL invoked FOIA exemption 4 to justify its withholding from the records that it produced of the names of tobacco companies that purchased tobacco from the agricultural employer. Dkt. 15-1, Ex. 4 (3/3/2021 DOL Letter).

28. From some of the pages of the narrative reports that DOL produced, DOL redacted the names of some tobacco companies that the agricultural employer told DOL were purchasers of the agricultural employer's tobacco. *See* Liu Decl., Ex. 3 (FOIA Production).

29. From some of the pages of the narrative reports that DOL produced, DOL did not redact the names of other tobacco companies that the agricultural employer told DOL were purchasers of the agricultural employer's tobacco. *See id.* For example, Philip Morris USA, US Tobacco, US Smokeless Tobacco, and Japanese Tobacco International are disclosed on some pages as purchasers of the tobacco sold by some agricultural employers. *Id.* at Bates Nos. 11–12, 16.

30. On December 15, 2020, Plaintiff informed DOL through counsel that the names of tobacco buyers appeared to have been redacted from the following pages of DOL's FOIA productions: Bates Nos. 12, 16, 21, 46, 50, 53, 63, 65, 76, 80, 82, 94, 98, 106, 112, 154, 157, 165, 231, 233, 238, 240, 254, 263-64, 266, 272, 277, 279, 281, 286, 290, 295, 298-99, 302, 304, 313, 316, 324, 326, 332, 335-36, 338, 343-44, 346-47, 352, 355, 359, 369, 372, 375, 377, 379-80, 389-90, 392-93, 398-99, 402-03, 419, 422-23, 425, 427, 430, 432, 434, 448, 451, 485, 490, 497, 500, 518, 523-24, 526, 536, 544, 553, 577, 579-80, 582-83, 585, 594, 597, 608, 612, 615, 618, 625, 634, 653, 668, 692, 709, 727, 752, 773, 779, 808, 813, 820, 824, 834, 845, 849, 853, 862-63, 868, 878, 887, 892, 903, 912, 915, 932, 941, 945, 959, 967, 981, 988, 1010, 1024, 1041, 1048, 1050, 1054, 1065-66, 1069, 1090, 1097, 1115, 1119, 1126, 1130, 1139-40, 1147, 1152, 1155, 1158, 1161, and 1176. Kirkpatrick Decl. ¶ 1.

31. On March 3, 2021, DOL re-released its FOIA production and released information that had been previously redacted on Bates Nos. 377, 380, 375, 653, and 915. Dkt. 15-1, Ex. 4 (3/3/2021 DOL Letter). Specifically, DOL released the names of BIT (Bates No. 915), Phillip

Morris USA and King Burley Tobacco Warehouse (Bates No. 653), and North America Tobacco Company (San Gabriel, CA) (Bates Nos. 375, 377, 380). Kirkpatrick Decl. ¶ 3.

32. Because DOL released the names of tobacco buyers on Bates No. 653, FLOC no longer challenges DOL's withholding of information on Bates No. 653. Kirkpatrick Decl. ¶ 4. To the extent that there are tobacco buyer names redacted on Bates Nos. 377, 380, 375, and 915, FLOC continues to challenge the withholding of that information. *Id.*

33. Footnote 2 of the Declaration of Patrice Rachel Torres asserts that on Bates Nos. 390, 392, 490, 497, 580, 583, 585, 615, and 625, DOL identified that there were redactions for information that did not reflect the names of tobacco buyers. Torres Decl. ¶ 12 n.2. To the extent that there are tobacco buyer names redacted on these pages, FLOC continues to challenge the withholding of that information. Kirkpatrick Decl. ¶ 5.

34. FLOC's Cross-Motion for Summary Judgment challenges DOL's withholding of tobacco buyer names on the following pages: Bates Nos. 12, 16, 21, 46, 50, 53, 63, 65, 76, 80, 82, 94, 98, 106, 112, 154, 157, 165, 231, 233, 238, 240, 254, 263-64, 266, 272, 277, 279, 281, 286, 290, 295, 298-99, 302, 304, 313, 316, 324, 326, 332, 335-36, 338, 343-44, 346-47, 352, 355, 359, 369, 372, 375, 377, 379-80, 389-90, 392-93, 398-99, 402-03, 419, 422-23, 425, 427, 430, 432, 434, 448, 451, 485, 490, 497, 500, 518, 523-24, 526, 536, 544, 553, 577, 579-80, 582-83, 585, 594, 597, 608, 612, 615, 618, 625, 634, 668, 692, 709, 727, 752, 773, 779, 808, 813, 820, 824, 834, 845, 849, 853, 862-63, 868, 878, 887, 892, 903, 912, 915, 932, 941, 945, 959, 967, 981, 988, 1010, 1024, 1041, 1048, 1050, 1054, 1065-66, 1069, 1090, 1097, 1115, 1119, 1126, 1130, 1139-40, 1147, 1152, 1155, 1158, 1161, and 1176. Kirkpatrick Decl. ¶¶ 2-5.

35. For the redacted narrative reports challenged by Plaintiff, the agricultural employer provided the information to DOL. *See* Torres Decl. ¶ 4 (narrative report reflects “negotiations and discussions with the [agricultural] employer”).

36. The tobacco company whose name is redacted from the narrative report did not provide the redacted information in the narrative report to DOL. *See id.*; *see generally* Liu Decl., Ex. 3 (FOIA Production).

37. The records produced by DOL on March 3, 2021, in response to FLOC’s FOIA request reflects DOL’s narrative reports for approximately 77 agricultural employers. Liu Decl. ¶ 5.

38. The redactions challenged by Plaintiff are from pages of the narrative reports for 61 agricultural employers. Liu Decl. ¶ 5.

39. DOL redacted the names of some tobacco buyers but not other tobacco buyers—within the same narrative report. Liu Decl. ¶ 5.

40. For more than half of the 61 agricultural employers about whom DOL produced redacted narrative reports challenged by FLOC, the narrative report about the grower identified one or more tobacco buyer by name, but redacted the name(s) of other tobacco buyer(s). *Id.*

41. There is no affidavit or declaration in the record from any of the agricultural employers referenced in the redacted narrative reports. *See generally* Dkt. 15-1.

42. There is no statement in DOL’s agency declaration (the Torres Declaration) attesting that any of the 61 agricultural employers at issue here customarily and actually keep private the names of the tobacco companies that purchase from their farms. *See generally* Torres Decl.

43. The Torres Declaration attests that DOL sent the growers letters to provide them with an opportunity to object to the disclosure of the information in the DOL narrative reports and to notify them “that if they failed to respond to the letter, [DOL] would release the commercial information.” Torres Decl. ¶ 16.

44. Of the 76 growers it contacted, DOL received responses from eight growers only. *See* Torres Decl. ¶ 18.

45. All but eight of the 76 growers that DOL contacted did not assert that the information in the narrative reports about the grower was confidential. *Id.*

46. The statements in the letters from agricultural employers from Carroll Coffman, Doug Dunaway, Brian Forsee from Maple Heights Farm, William Austin Newton, and Steve Hamilton are near-identical. *See* Dkt. 15-1, at Ex. 5.

47. Information about the types and amounts of crops on an agricultural employer’s farm is not usually kept private. Flores Decl. ¶ 10. For example, that information has been disclosed publicly on grower websites. *Id.*

48. To the extent that a grower employs H-2A workers, information about the wages that employees are paid and the types of crops that are grown on the farm is disclosed on a form called an “agricultural clearance order,” which is required to be posted publicly. Flores Decl. ¶¶ 10–15, Exs. 3–7.

49. The agricultural clearance orders for Carroll Coffman, Doug Dunaway, Brian Forsee from Maple Heights Farm, William Austin Newton, and Steve Hamilton are publicly available. *Id.* These agricultural clearance orders disclose, among other things, the wages that employees are paid and the types of crops that are grown on the farms for those growers. *Id.*

50. The names of tobacco company buyers can often be deduced based on posters and branded clothing that are visible on a grower's premises. For example, Alliance One says that it requires that posters displaying its name be "visible to workers" at the agricultural employers with whom Alliance One has contracts to purchase tobacco. Flores Decl. ¶¶ 6–7, Exs. 1–2.

51. Growers have, in fact, displayed posters bearing Alliance One's name, as well as posters bearing Philip Morris International's name, on the growers' premises, including in the workers' housing facilities. *Id.* ¶ 7.

52. At the requests of Alliance One and Phillip Morris International, the growers made the names of those tobacco companies visible to workers, workers' guests, and others who visited the locations where the posters were displayed. *Id.* ¶¶ 6–7.

53. Tobacco companies also sometimes provide items to workers that disclose the identity of the companies that purchase tobacco from the agricultural employer. *Id.* ¶ 8. For example, Alliance One has distributed raincoats bearing its logo to workers at the agricultural employers from whom Alliance One purchases tobacco. *Id.* ¶ 8.

54. Alliance One shares information about its growers with Alliance One's "field technicians." *See* Liu Decl., Ex. 1 (Alliance One website).

55. Universal Leaf shares information about growers with its "leaf technicians" and "mobile agronomy staff." *See* Liu Decl., Ex. 2 (Universal Leaf brochure).

56. In a marketing brochure, RJ Reynolds named the tobacco grower J.B. Rose & Sons, Inc., as one of its "Most Valuable Partner[s]" and a supplier for the RJ Reynolds affiliate Santa Fe Tobacco Company. *See* Flores Decl. ¶ 16, Ex. 8 (RJ Reynolds Brochure at pg. 43).

57. Universal Leaf has voluntarily disclosed its grower-supplier relationships to FLOC at least several times. *See* Flores Decl. ¶¶ 18, 20, Ex. 11 (confirming contracts with certain growers).

58. In general, Philip Morris International does not contract directly with growers, but instead obtains its tobacco from Universal Leaf and Alliance One. Flores Decl. ¶ 17, Exs. 9–10. Alliance One has assigned several grower contracts to Philip Morris International. *Id.*

59. Universal Leaf has confirmed by phone and email to FLOC whether they have contracts with certain tobacco growers. *Id.* ¶ 18, Ex. 11; *id.* ¶ 20.

60. By email, Preston Wigner from Universal Leaf informed FLOC that Universal Leaf purchases tobacco from two growers who are reflected in the redacted narrative reports at issue in this case: Christopher Lee Smith (Bates No. 727) and Wayne Day (Bates No. 1176). *Id.* ¶ 18, Ex. 11.

61. Preston Wigner from Universal Leaf also has informed FLOC by phone, in multiple instances, whether Universal Leaf purchases tobacco from a particular grower. *Id.* ¶ 18, Ex. 11; *id.* ¶ 20.

62. On occasion, Alliance One has disclosed to FLOC that it does not have a contract with a particular grower. *Id.* ¶ 19.

63. On occasion, Alliance One and Universal Leaf have confirmed to FLOC the identities of their grower-suppliers, without explicitly asking that the names of those growers be kept confidential. *Id.* ¶ 20.

64. On at least five occasions, growers have told FLOC the names of tobacco companies to whom they sell their tobacco, without any assurance of confidentiality. *Id.* ¶ 21.

65. The fact that Alliance One purchased tobacco from certain growers in Kentucky is publicly available information in court filings in a case alleging violations of the Fair Labor Standards Act. *See* Tracy Dillard Dep. Tr. at 23:17–25, *Murillo v. Dillard*, No. 15-CV-00069 (W.D. Ky July 21, 2017), ECF No. 105-2 (disclosing that the grower sells to Alliance One International and Japan Tobacco International); *see also* Carolyn Dillard Dep. Tr. at 41:20-42:3, *Murillo v. Dillard*, No. 15-CV-00069 (W.D. Ky July 21, 2017), ECF No. 105-3 (same).

66. DOL produced documents in response to another FOIA request that disclosed that Alliance One and RJ Reynolds purchased tobacco from certain agricultural employers—including one of the 61 agricultural employers at issue here. *See* Flores Decl. ¶ 22, Ex. 12 (prior FOIA Production) (identifying that “Strickland Farm’s . . . tobacco was sold to Alliance One”); *id.* (identifying that “Anderson Farm sells . . . its tobacco to Reynolds and Phillip Morris”); *see also* Liu Decl., Ex. 3 (FOIA Production) at Bates Nos. 932, 941, 945 (tobacco buyer names redacted from the narrative reports about Strickland Farms).

67. None of the declarations from RJ Reynolds, Alliance One, Universal Leaf, and China Tobacco International (North America), submitted in connection with the above-captioned action, attaches a copy of a contract with any of the growers that are the subject of the narrative reports produced by DOL. *See* Dkt. 15-1, Ex. 6 (tobacco company declarations).

68. None of the declarations from RJ Reynolds, Alliance One, Universal Leaf, and China Tobacco International (North America), submitted in connection with the above-captioned action, attaches a copy of any contract containing the purported confidentiality provisions cited in their declarations. *See id.*

69. There is no admissible evidence in the factual record that during DOL’s investigations of the 61 agricultural employers at issue, any of the 61 agricultural employers

provided the redacted information in the redacted narrative reports to DOL under an assurance of privacy from DOL. *See generally* Dkt. 15-1; *see also* Liu Decl., Ex. 3 (FOIA Production).

70. There is no statement in any of the narrative reports produced by DOL that mentions or reflects that DOL provided an assurance of privacy to the agricultural employer that DOL would keep private the names of tobacco buyers. *See generally* Liu Decl., Ex. 3 (FOIA Production).

71. The “Tobacco Decl.” and “A&M Decl.,” which DOL cites in their Memorandum of Law, are not in the factual record of this case. *See generally* Dkt. 15-1.

72. DOL’s investigations of the agricultural employers that are reflected in the narrative reports were conducted before the Supreme Court’s decision in *Food Marketing Institute v. Argus Leader (FMI)*, 139 S. Ct. 2356 (2019). *See* Dkt. 15-1, Ex. 4 (3/3/2021 DOL Letter) (DOL identified investigations where “the investigation occurred in 2015, 2016, or 2017”).

73. There is no evidence in the record showing that DOL provided any of the 61 agricultural employers referenced in the redacted narrative reports with an express or implied assurance that DOL would keep the names of tobacco buyers private. *See generally* Dkt. 15-1; *see also* Liu Decl., Ex. 3 (FOIA Production).

74. There is no sworn statement in the record from any of the 61 agricultural employers referenced in the redacted narrative reports. *See generally* Dkt. 15-1.

75. There is no statement within any of the letter responses from the eight agricultural employers that during DOL’s investigation of that agricultural employer, they provided the names of tobacco buyers to DOL under an assurance of privacy. *See* Dkt. 15-1, Ex. 5 (grower letters).

76. The fact that certain growers have sold tobacco to Alliance One has been disclosed previously—including for one of the growers at issue here. Flores Decl. ¶¶ 20, 22, Ex. 12

(identifying that Strickland Farm’s “tobacco was sold to Alliance One”); Liu Decl., Ex. 3 (FOIA Production) at Bates Nos. 932, 941, 945 (redacting tobacco buyer names from the narrative reports about Strickland Farms); *see also* Tracy Dillard Dep. Tr. at 23:17–25, *Murillo v. Dillard*, No. 15-CV-00069 (W.D. Ky July 21, 2017), ECF No. 105-2 (disclosing that the grower sells to Alliance One International and Japan Tobacco International); Carolyn Dillard Dep. Tr. at 41:20-42:3, *Murillo v. Dillard*, No. 15-CV-00069 (W.D. Ky July 21, 2017), ECF No. 105-3 (same).

77. The fact that certain growers have sold tobacco to RJ Reynolds has been disclosed previously. Flores Decl. ¶¶ 16, 22, Exs. 8, 12.

78. The fact that certain growers have sold tobacco Universal Leaf has been disclosed previously—including for two of the growers at issue here. Flores Decl. ¶¶ 18, 20, Ex. 11.

Dated: April 8, 2021

Respectfully submitted,

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