

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20394

In the Matter of

Paul L. Chancey, Jr., CPA,

Respondent.

REPLY IN SUPPORT OF RESPONDENT PAUL L. CHANCEY, JR.'s
MOTION FOR A MORE DEFINITE STATEMENT

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PRELIMINARY STATEMENT

Pursuant to 17 C.F.R. § 201.220(d), Respondent Paul L. Chancey, Jr. hereby submits this Reply in Support of his Motion for a More Definite Statement as to certain allegations in the Order Instituting Public Administrative and Cease-and-Desist Proceedings (“OIP”) dated July 13, 2021. After considering the Division of Enforcement’s Opposition, Mr. Chancey respectfully submits that the OIP fails to meet the requisite legal standard, and he continues to seek a limited order requiring the Division to provide a more definite statement as to two specific allegations:

1. At what time the Division contends that “MiMedx and Distributor agreed that Distributor’s payments would be applied to the oldest outstanding invoice,”¹ as mentioned in paragraph 19 of the OIP (Request 3 in Mr. Chancey’s Motion for a More Definite Statement) (hereinafter, “Request 3”) and
2. What “material changes” the Division alleges were made in the MiMedx restatement “for revenue prematurely recognized on sales to Distributor in 2015 and 2016” in paragraph 21 of the OIP (Request 4 in Mr. Chancey’s Motion for a More Definite Statement) (hereafter, “Request 4”).

Though the Division formally opposes Mr. Chancey’s Motion for a More Definite Statement, its Opposition provides clarification to seven out of Mr. Chancey’s nine requests. Given the additional information provided in the Division’s Opposition, Mr. Chancey no longer is pursuing Requests 1, 2, 5, 6, 7, 8, and 9 from his Motion for a More Definite Statement.

Mr. Chancey continues to seek a more definite statement as to Requests 3 and 4 in order to fill in the holes in the OIP. In fact, the Division’s Opposition confirms not only the vagueness,

¹ For the purposes of this Reply, Mr. Chancey uses the term “Distributor” when referring to MiMedx distributor AvKare.

but also the lack of factual support, for these allegations. In order to answer the OIP's allegations, Mr. Chancey needs "the factual and legal basis alleged" to be "set forth ... in such *detail* as will permit a *specific* response thereto" and as is required in the Commission's Rules of Practice. 17 C.F.R. § 201.200(b)(3) (emphasis added); OIP at 15 (directing Mr. Chancey to "file an Answer to the allegations contained in this Order"). In order to defend himself against the OIP's allegations, Mr. Chancey is entitled to an adequate opportunity to prepare, which he will only have if he is "sufficiently informed of the charges against [hi]m". *David F. Bandimere*, Admin. Proc. File No. 3-15124, 2013 SEC LEXIS 452, at *3 (ALJ Feb. 11, 2013) (order). The Division's obligation to specify its allegations is especially pronounced in these proceedings, where its allegations span six years and implicate at least 350,000 documents. It is neither reasonable, nor legally permissible, to require Mr. Chancey to prepare defenses to every possible interpretation of the Division's vague and apparently factually unsupported allegations. The Division should be readily able to clarify the areas in which its allegations are ambiguous. In the alternative, the Division should amend the OIP to remove any allegations that lack factual support. *See* 17 C.F.R. § 201.200(d) (setting out the process for amending an OIP).

As addressed in Mr. Chancey's Requests 3 and 4, there are several ambiguities in the OIP that the Division fails to clarify in its Opposition, and which therefore still require a more definite statement. The Commission should grant this motion and order the Division to provide additional clarity in response to Requests 3 and 4. Without that clarity, Mr. Chancey will be unable to adequately prepare his defense, especially considering the 350,000-document investigative file and the more than five years that have passed since the audits at issue in the OIP. Moreover, in light of admissions in the Division's Opposition, Mr. Chancey now questions whether portions of the allegations contained in paragraphs 19 and 21 of the OIP have the

requisite factual support. If the Division is unable to provide a more definite statement that answers Mr. Chancey's basic questions, because the Division does not know the facts that undergird its allegations contained in paragraphs 19 and 21, then the Division should amend the OIP in conformity with the factual support the Division actually possesses.

ARGUMENT

- I. The Division's Opposition did not provide any clarity as to Requests 3 and 4, and so Mr. Chancey still seeks a more definite statement as to these requests.

- A. Request 3

In Request 3 of his Motion for a More Definite Statement (the first request in this Reply) Mr. Chancey asks the Division to clarify at what time it contends that "MiMedx and Distributor agreed that Distributor's payments would be applied to the oldest outstanding invoice" in paragraph 19 of the OIP. Mot. for a More Definite Statement ("Mot.") at 1 (quoting OIP ¶ 19). In its response to Request 3, the Division attempts to downplay this ambiguity and duck its pleading obligation by asserting that "the exact date" of the agreement "is not relevant to the Division's claims." Opp. at 6. But the Division not only neglects to give Mr. Chancey an "exact date," it also fails to specify a year between 2013 and 2016 when the agreement allegedly was reached. *Id.* ("The Division has alleged that the agreement between MiMedx and Distributor in this regard occurred before the 2016 audit and sometime at or after MiMedx and Distributor entered into the side arrangement in 2013.").

Moreover, the specific time frame when this alleged agreement was reached is relevant. The lack of any specific time frame makes it exceedingly difficult for Mr. Chancey to determine from the extensive investigative file what the allegation encompasses and, more specifically, whether an agreement actually was ever reached. Without a more specific time frame within the three-year period identified by the Division, Mr. Chancey cannot conduct adequate discovery or

properly evaluate the evidence in this matter for purposes of his defense. The Division's allegation here is less specific than the allegations in *David F. Bandimere*, where "the OIP only allege[d] the dates Bandimere took or began taking certain actions by year." Admin. Proc. File No. 3-15124, 2019 SEC LEXIS 491, at *6 (ALJ Mar. 15, 2019) (order). Because of the ambiguity about timing in *Bandimere*, the Administrative Law Judge ordered the Division to identify "when and where the alleged misrepresentations or omissions occurred." *Id.* at *11. Likewise, the Division's failure to specify when it alleges MiMedx and Distributor reached an agreement requires a more definite statement.

The Division's Opposition also introduces further ambiguity by saying "the exact date" of the alleged agreement between MiMedx and Distributor "is not relevant to the Division's claims" and the only relevant fact is that Mr. Chancey "was aware of this *payment practice* at least as early as the 2016 audit." Opp. at 6 (emphasis added). The OIP explicitly describes the application of payments to the oldest outstanding invoice as an *agreement* reached between MiMedx and Distributor. OIP ¶ 19. But now, for the first time in its Opposition, the Division describes it as a "payment practice." Opp. at 6. The Division has thus transformed this allegation into a moving target. Alleging an "agreement" is materially different from alleging a "payment practice." The Division's Opposition has introduced uncertainty about whether it will seek to prove there was an "agreement" between MiMedx and Distributor, or if the Division will only argue that there was a "payment practice" between the parties. How Mr. Chancey defends himself will depend on what the Division alleges on this point; he shouldn't be required to guess as to what the Division is alleging.

B. Request 4

In Request 4 of his Motion for a More Definite Statement (the second request in this Reply) Mr. Chancey asks the Division to specify what "material changes" the Division alleges

were made in the MiMedx restatement “for revenue prematurely recognized on sales to Distributor in 2015 and 2016” in paragraph 21 of the OIP. Mot. at 4 (quoting OIP ¶ 21).² The Division’s Opposition does not answer Mr. Chancey’s request for clarification. Instead, the Division cites two pieces of information, neither of which, either individually or in combination, provides any clarity in response to the request.

First, the Division states the amount by which MiMedx’s *total* sales from 2015 and 2016 were restated. Opp. at 6. This gives insight into MiMedx’s overall revenue recognition problem, but it does not provide any clarity about the “material changes” that the OIP alleges were reflected in the restatement specifically for prematurely recognized revenue from sales to Distributor. As the Opposition admits, the restatement of MiMedx’s net sales included improperly recognized revenue from multiple other distributors. *Id.* The Division, however, provides no answer to what amount of MiMedx’s total restated revenue can be attributed to revenue prematurely recognized from Distributor. *See id.*

Second, the Division asserts that Distributor accounted for a material portion of MiMedx’s total revenue in 2015 and 2016. *Id.* at 6–7. This gives insight into the significance of Distributor’s sales for MiMedx, but, again, fails to provide clarity regarding the specific modifications the Division alleges were made to MiMedx’s financial statements based on prematurely recorded revenue from sales to Distributor.

The Division has had the benefit of a multi-year investigation to determine how much of Distributor’s prematurely recognized revenue was reflected in MiMedx’s restatement, but it has not provided an answer to this most basic question about its allegation. There are numerous possible scenarios in which revenue from Distributor could account for a material portion of

² By alleging “material changes”, the Division appears to be alleging that the changes to MiMedx’s originally filed financial statements were “material” from the perspective of the federal securities laws.

MiMedx's total revenue but not a material portion of its improperly recognized revenue. In any case, given the information provided by the Division in its Opposition, Mr. Chancey is left, once again, to guess as to what the Division alleges. All Mr. Chancey can do is guess. Neither he nor CB preformed the audit work for MiMedx's restatement. *See* OIP ¶¶ 6, 21 (alleging "CB acted as MiMedx's independent auditor from June 9, 2008, to August 4, 2017" and MiMedx restated its financial statements in 2020). Without knowing what revisions the Division is alleging, Mr. Chancey cannot properly defend against the allegation that "MiMedx's restatements included material changes for revenue prematurely recognized on sales to Distributor in 2015 and 2016." OIP ¶ 21.

- II. The size of the investigative file and the significant passage of time both support Mr. Chancey's Motion for a More Definite Statement.

The Division argues in its Opposition that neither the investigative file nor the passage of time "supports [Mr. Chancey's] request for a more definite statement." Opp. at 10. Importantly, the Division doesn't contest the fact that the investigative file in this case is vast—more than four times the size of the file in *David Pruitt*, where the Administrative Law Judge granted the motion for a more definite statement in part. Motion for a More Definite Statement at 6, *David Pruitt*, Admin. Proc. File No. 3-17950, 2017 SEC LEXIS 1945 (June 6, 2017); Admin. Proc. File No. 3-17950, 2017 SEC LEXIS 1945, at *1 (ALJ June 12, 2017) (order). Nor does it deny that more than eight years have passed since some of the conduct alleged in the OIP—three years more than the time elapsed in *J.W. Barclay & Co.*, where the Administrative Law Judge granted the motion for a more definite statement in part. Admin. Proc. File No. 3-10765, 2002 SEC LEXIS 3456, at *2 (ALJ June 13, 2002) (order). The Division also seems to agree with the statement of law that a large investigative file and a significant passage of time are each factors that

administrative law judges have found to weigh in favor of motions for more definite statement in the past. *See Opp.* at 10–12.

Instead, the Division argues that in this particular instance, the 350,000-document investigative file and passage of eight years do not support Mr. Chancey's request for a more definite statement. *Id.* According to the Division, this is because, in each Administrative Law Judge decision cited by Mr. Chancey, there is at least one factor weighing in favor of the respondent's motion for a more definite statement that is absent in Mr. Chancey's motion. But the Division misconstrues these decisions and overlooks the fact that there is also at least one factor present to support Mr. Chancey's motion that is missing in each of the referenced decisions. Upon closer examination, Mr. Chancey has demonstrated that the factors present here favor the Commission ordering the Division to provide a more definite statement addressing his outstanding requests.

In order for a more definite statement to be justified, as prior decisions make clear, it is not required that every potential factor to support a movant's request be present. In *David F. Pruitt*, there was only one respondent and no significant passage of time. Motion for a More Definite Statement at 1–2, 6, *David F. Pruitt*, 2017 SEC LEXIS 1945. But the investigative file was large, and there was considerable ambiguity about which internal controls the Division alleged were violated and which books and records it alleged were falsified. *Id.* at 6; *David F. Pruitt*, 2017 SEC LEXIS 1945, at *5. In that instance, the Administrative Law Judge granted the motion in part. *David F. Pruitt*, 2017 SEC LEXIS 1945, at *1. In *Donald T. Sheldon*, the respondents were given access to the entire investigative file and had personal documents from which they could derive missing information. Admin. Proc. File No. 3-6626, 1986 SEC LEXIS 2293, at *5–6 (ALJ June 9, 1986) (order). But the investigative file was large, and there were

multiple respondents and allegations. *Id.* at *6. Again, in that instance, the Administrative Law Judge granted the motion in part. *Id.* Further, in *David F. Bandimere*, there were no allegations about a large investigative file or a significant passage of time, and there were only two respondents. *See David F. Bandimere*, 2019 SEC LEXIS 491 (no mention of the size of the investigative file or the amount of time that had passed); Reply in Support of Motion for More Definite Statement, *David F. Bandimere*, 2019 SEC LEXIS 491 (Jan. 16, 2019) (same); Division’s Opposition to Motion for More Definite Statement, *David F. Bandimere*, 2019 SEC LEXIS 491 (Jan. 11, 2019) (same). But the Division was alleging fraud, and the OIP failed to specify the timing of Bandimere’s alleged conduct and to which investors he said what. *David F. Bandimere*, 2019 SEC LEXIS 491, at *6–7, *8. That was enough for the Administrative Law Judge to grant the motion in part. *Id.* at *8–9. Finally, even in *J.W. Barclay & Co.*, where there was a large investigative file, a significant passage of time, and multiple respondents and allegations, the Administrative Law Judge did not mention whether the Division had produced the entire investigative file or whether the respondents had personal files from which they could derive missing information. 2002 SEC LEXIS 3456, at *2. Similar to the other movants, who each had their motions for a more definite statement granted in part, Mr. Chancey’s motion is supported by several factors to justify the Commission ordering the Division to provide a more definite statement.

The investigative file in this case is already enormous, and Mr. Chancey has not yet received confirmation from the Division that he has received all of it. E-mail from Stephen McKenna, Senior Trial Attorney, SEC, to Jeffrey Kane, Counsel, Akin Gump Strauss Hauer & Feld LLP (Aug. 11, 2021, 14:41 EST) (failing to respond to Mr. Kane’s question, “Should we expect subsequent productions from you, or have you now turned over all of the documents from

the investigative file that you intend to produce?”) (Ex. 1). The Division also is withholding an unknown number of additional documents, based in part on the stay in a parallel civil matter. *See* Div. of Enf’t’s Withheld Doc. List for July 21, 2021 Prod. to Paul L. Chancey, Jr., CPA, entry no. 6 (Ex. 2). The Division has not alleged that Mr. Chancey can derive the missing information from his personal files. And a significant amount of time has passed between the conduct alleged in the OIP and the issuance of the OIP. *See* OIP at 1, ¶¶ 1, 13, 16, 17 (indicating that over eight years passed between the alleged conduct in 2012 and the issuance of the OIP on July 13, 2021 and five years have passed since the audit years in question). As the Division seems to concede, these factors generally weigh in favor of a motion for a more definite statement, and they do so here.

III. The Division’s Opposition admits to not having a factual basis to support some of its allegations.

As described in Section I above, the Division hasn’t provided any clarity to address the ambiguities identified in Mr. Chancey’s Requests 3 and 4. It has thus contravened both Mr. Chancey’s right “to be sufficiently informed of the charges against [hi]m” so that he can defend himself and the requirement in the Commission’s Rules of Practice that if an OIP requires an answer, it must “set forth the factual and legal basis alleged.” *David F. Bandimere*, 2013 SEC LEXIS 452, at *3 (quoting, in the second instance, 17 C.F.R. § 201.200(b)(3)). For this reason, as well as the other factors laid out in Section II above, the Commission should order the Division to provide a more definite statement.

As significant as the remaining ambiguities are, more problematic is the fact that the Division’s Opposition apparently admits that it has no factual basis to support portions of its allegations in paragraphs 19 and 21 of the OIP. The Division admits this explicitly in its response to Request 3 and does so substantively in its response to Request 4.

In its response to Request 3, the Division expressly admits it does not know when MiMedx and Distributor reached the alleged agreement to apply payments to the oldest outstanding invoices. Opp. at 6. The Division's concession calls into question, among other things, whether an agreement was ever reached and who reached such an agreement on behalf of the parties. Further, the Division exacerbates the problem by backing away from the characterization of the allegation as an "agreement" and instead calling it a "payment practice." *Id.*

In its response to Request 4, the Division substantively admits to having no factual basis for its assertion that MiMedx made "material changes" to its financial statements due specifically to prematurely recognizing revenue on sales to Distributor in 2015 and 2016. *Id.* at 6-7. Presumably, in order to allege that changes were made for this specific reason, and allege the materiality of those changes, the Division would need to know what those specific changes were. Yet, in its Opposition, while defending its vague allegation, the Division merely explains its assumption that a material portion of the restated revenue was from sales to Distributor. Instead of identifying the material changes the OIP alleges were made, the Opposition merely asserts that the overall change to MiMedx's net sales for improperly recognized revenue was significant, and sales to Distributor represented a large portion of MiMedx's total sales. The Opposition fails, however, to offer a specific amount of revenue, let alone a calculation for that revenue, upon which the Division relied to allege that MiMedx's restatements included "material changes" for improperly recognized revenue on sales to Distributor.

If the Division is unable to provide a more definite statement and answer Mr. Chancey's Requests 3 and 4, because it does not itself know the answers as to when (or whether) an agreement was reached and what material revisions were reflected in the MiMedx restatement

for revenue prematurely recognized on sales to Distributor, then the Division should amend the OIP and remove any allegations that the Division cannot “ground[] in fact.” 17 C.F.R.

§ 201.153(b)(1)(ii); *see also id.* § 201.200(d) (laying out the process for amending an OIP).

CONCLUSION

For the reasons set forth above, the Commission should grant Mr. Chancey’s Motion for a More Definite Statement. If the Division cannot provide the more definite statement that Mr. Chancey seeks because of a lack of a factual basis, the Division should amend the OIP.

Respectfully submitted,

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Dated: August 21, 2021

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Certificate of Service

In accordance with 17 C.F.R. §§ 201.150, .151, I certify that a copy of Respondent's Reply in Support of his Motion for a More Definite Statement was served on the following on August 21, 2021, via the methods indicated below.

I further certify that, with the exception of the Securities and Exchange Commission, Vanessa A. Countryman, Secretary, a copy was served on the below on August 20, 2021, but due to system issues, we were unable to file via eFAP. *See* Respondent's Certification of Inability to File Electronically and attached exhibits, filed August 21, 2021.

Securities and Exchange Commission
Vanessa A. Countryman, Secretary
(Via eFAP system)

Stephen C. McKenna, Esq.
Securities and Exchange Commission
(Via Email: McKennas@sec.gov)

Mark L. Williams, Esq.
Securities and Exchange Commission
(Via Email: WilliamsML@sec.gov)

Kenneth Stalzer
Securities and Exchange Commission
(Via Email: StalzerK@sec.gov)

Scott Wesley (Div. of Enforcement Paralegal)
Securities and Exchange Commission
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Nicole L. Nesvig (Div. of Enforcement Paralegal)
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(Via Email: nesvign@sec.gov)

/s/ Claudius B. Modesti Dated: August 21, 2021
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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20394

In the Matter of

Paul L. Chancey, Jr., CPA,

Respondent.

**RESPONDENT PAUL L. CHANCEY, JR.'S INDEX OF EXHIBITS TO
REPLY IN SUPPORT OF MOTION FOR MORE DEFINITE STATEMENT**

<u>Exhibit</u>	<u>Description</u>
1	E-mail from Stephen McKenna to Jeffrey Kane, dated Aug. 11, 2021
2	Division of Enforcement's Withheld Document List for July 21, 2021 Production to Paul L. Chancey, Jr., CPA

Respondent Chancey's EX 1

From: [McKenna, Stephen C.](#)
Sent: Wednesday, August 11, 2021 2:41:55 PM
To: [Kane, Jeffrey](#); [Williams, Mark L](#)
Cc: [Connolly, Chuck](#); [Fires, Michael](#); [John, Hillary](#); [Modesti, Claudius](#)
Subject: RE: In the Matter of Paul Chancey, Motion for Protective Order
Sensitivity: Normal

Thanks for this Jeff. We will make the changes and get on file.

From: Kane, Jeffrey <jwkane@akingump.com>
Sent: Friday, August 6, 2021 3:14 PM
To: McKenna, Stephen C. <McKennaS@SEC.GOV>; Williams, Mark L <williamsml@SEC.GOV>
Cc: Connolly, Chuck <cconnolly@akingump.com>; Fires, Michael <mfires@akingump.com>; John, Hillary <hjohn@akingump.com>; Modesti, Claudius <cmodesti@akingump.com>
Subject: RE: In the Matter of Paul Chancey, Motion for Protective Order

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Thanks, Steve. A couple of nits in the motion. We are OK with your changes to the proposed protective order.

Relatedly, as you know, we received the hard drive last week. Should we expect subsequent productions from you, or have you now turned over all of the documents from the investigative file that you intend to produce?

Jeffrey Kane

AKIN GUMP STRAUSS HAUER & FELD LLP

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Fax: +1 202.887.4288 | jwkane@akingump.com | akingump.com | [Bio](#)

From: McKenna, Stephen C. <McKennaS@SEC.GOV>
Sent: Friday, August 6, 2021 16:02
To: Modesti, Claudius <cmodesti@akingump.com>; Kane, Jeffrey <jwkane@akingump.com>
Cc: Williams, Mark L <williamsml@SEC.GOV>
Subject: RE: In the Matter of Paul Chancey, Motion for Protective Order

****EXTERNAL Email****

Claudius and Jeff,

In view of the recent order confirming that this matter is set for a hearing before the Commission and the Office of Administrative Law Judges is not involved at this point, we think it appropriate to go ahead and move for the Protective Order at this time. A draft motion along with the Proposed Order are attached. Please note one proposed change in the Protective Order and let us know if you approve or have any comments.

Have a nice weekend,
Steve

OS Received 08/23/2021



Stephen C. McKenna

Senior Trial Attorney

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The information contained in this e-mail message is intended only for the personal and confidential use of the recipient(s) named above. If you have received this communication in error, please notify us immediately by e-mail, and delete the original message.

Respondent Chancey's EX 4

Division of Enforcement's Withheld Document List
for July 21, 2021 Production to Paul L. Chancey, Jr., CPA
In the Matter of Paul Chancey
Admin. Proceeding File No. 3-30296

	Document or Category	Date or Dates	Author or Authors	Basis for Withholding or Redaction
1	Action memoranda and draft action memoranda	Various	Kevin Cuomo, Ty Cottril and other Commission attorneys and/or accountants	Attorney Work Product; Attorney Client Communications; Deliberative Process Privilege; Internal Writing of Commission Employee
2	Internal SEC emails, notes, and memoranda	Various	Kevin Cuomo, Ty Cottril and other Commission attorneys and/or accountants	Attorney Work Product; Attorney Client Communications; Deliberative Process Privilege; Internal Writing of Commission Employee
3	Phone logs	Various	Kevin Cuomo, Ty Cottril and other Commission attorneys and/or accountants	Attorney Work Product; Attorney Client Communications; Internal Writing of Commission Employee
4	Internal SEC spreadsheets and databases	Various	Kevin Cuomo, Ty Cottril and other Commission attorneys and/or accountants	Attorney Work Product; Internal Writing of Commission Employee
5	Sidley cover letters, MMDX_01_00000001 - MMDX_01_000000615 & SEC-MMDX-E-0000001 - SEC-MMDX-E-0000002	Various	MiMedx counsel at Sidley Austin	Withheld under the Stipulation and Order entered on May 20, 2021 in SEC v., MiMedx, et al. (ECF #83) excluding production of: "Communications, written or oral, with counsel for MiMedx Group, Inc. or its audit committee, including any factual presentations."
6	Documents obtained by	Various		Attorney Work Product;

	the SEC from the Government and/or other law enforcement agencies			Law Enforcement Privilege; also withheld under ECF #83 excluding production of: "Documents obtained by the SEC from the Government and/or other law enforcement agencies."
--	-------------------------------------------------------------------	--	--	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------