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 15 IN THE UNITED STATES DISTRICT COURT
 16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 17 SAN FRANCISCO DIVISION

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 19 PEOPLE OF THE STATE OF CALIFORNIA
 ex. rel. EDMUND G. BROWN JR.,
 20 ATTORNEY GENERAL OF THE STATE OF
 CALIFORNIA,
 21 Plaintiff,
 22 vs.
 23 UNITED STATES FOOD & DRUG
 ADMINISTRATION,
 24 Defendant.

Case No.: No. C08-02741 MEJ
 JOINT CASE MANAGEMENT
 STATEMENT AND [PROPOSED] ORDER
 Date: September 4, 2008
 Time: 10:00 a.m.
 Place: Courtroom B, 15th Floor
 Magistrate Judge: Hon. Maria-Elena James

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1 governments. FDA also contends that an index akin to that described in *Harvey's Wagon*
2 *Wheel, Inc. v. NLRB*, 550 F.2d 1139, 1141 (9th Cir.1976)) is being prepared for plaintiff as part
3 of a government relations program that may have the effect of mootng this case.

4 There are disputed factual issues regarding (1) whether FDA has produced all of the non-
5 exempt documents and portions of documents called for by the People's FOIA requests, and (2)
6 whether FDA has had enough time to complete its review and production of documents and a
7 *Vaughn* index that complies with the law.

8 3. Legal issues:

9 The Freedom of Information Act requires that government agencies shall, on receipt of a
10 proper request, promptly disclose their records unless those records are subject to withholding
11 pursuant to one of FOIA's exemptions.

12 The People assert the following:

- 13 (a) Pursuant to 5 U.S.C. § 552(a)(3), the People have a right of access to the
14 requested records and portions of records FDA has withheld, as they are not
15 exempt from disclosure under FOIA and thus have been improperly withheld;
- 16 (b) Pursuant to 5 U.S.C. § 552(b), even if it were to be established that any of the
17 requested records contained information exempt from disclosure under 5 U.S.C. §
18 552(b), the People have a right of access to all reasonably segregable non-exempt
19 portions of such records, and FOIA requires their disclosure;
- 20 (c) Under applicable Ninth Circuit precedent, FDA must produce a *Vaughn* index that
21 lists all the documents and portions of documents withheld, and the justification
22 for their withholding, without further delay;
- 23 (d) Even if the records sought were otherwise exempt from required disclosure under
24 5 U.S.C. § 552(b), there is a strong public interest in their disclosure, and FDA
25 should exercise its discretion to disclose the requested records; and
- 26 (e) The People are entitled to costs and attorneys' fees pursuant to 5 U.S.C. §
27 552(a)(4)(E).

1 FDA asserts that no FOIA response is yet due pursuant to *Open America v. Watergate*
2 *Special Prosecution Force*, 547 F.2d 605, 616 (D.C.Cir. 1976).

3 Thus, the following legal issues are disputed:

- 4 (a) Whether any documents or portions thereof that FDA has not produced to
5 the People are exempt from disclosure under FOIA and therefore properly
6 withheld;
- 7 (b) The appropriate timing of FDA's production of a *Vaughn* index; and
- 8 (c) Whether the People are entitled to costs and attorneys' fees under 5 U.S.C.
9 section 552(a)(4)(E).

10 4. Motions/Narrowing of Issues: The People filed and submitted a Motion for
11 *Vaughn* Index on March 21, 2008. It is set for hearing on October 2, 2008.

12 In addition, the parties believe this case is suitable for disposition on a motion and cross-
13 motion for summary judgment. The parties will meet and confer prior to the filing of cross-
14 motions for summary judgment in an attempt to reduce the number of documents in the litigation
15 and to narrow the dispositive issues. The parties agree that it would not be appropriate for the
16 Court to set a schedule for hearing any summary judgment motion until the People have had the
17 opportunity to review a *Vaughn* index.

18 5. Amendment of pleadings: The parties do not expect any amendments to the
19 pleadings.

20 6. Evidence preservation: The People do not believe they have any evidence – other
21 than correspondence attached to the Complaint, and subsequent documents provided by FDA –
22 relevant to the issues reasonably evident in this action. FDA contends that, depending upon
23 whether the People contest the relevance and operation of the queue, it may be relevant to
24 present evidence regarding the length of the queue and where the People's request lies within it.

25 7. Disclosures: The parties agree that initial disclosures should not be required given
26 the nature of this case. Plaintiff contends that the documents that would be required as its initial
27 disclosures are attached to the complaint.

28 8. Discovery: The parties do not presently intend to conduct discovery.

1 9. Class actions: This is not a class action.

2 10. Related cases: The People are not aware of any related cases or proceedings
3 pending before another judge of this Court, or before another court or administrative body.

4 11. Relief: The People seek the following relief:

5 (a) An itemized index from FDA, for all withheld documents and portions of
6 documents, containing all information needed to evaluate each claimed exemption, including but
7 not limited to identification of the segregable portions of the documents withheld, the nature of
8 the information contained in each portion, whether factual information is contained in each
9 portion, and the specific justification for withholding of each such portion (“*Vaughn* index”);

10 (b) An injunction against continued withholding of all records or portions of
11 records improperly withheld, and an order directing their immediate disclosure to the People;

12 (c) An award of costs and attorneys’ fees to the People pursuant to 5 U.S.C. §
13 552(a)(4)(E); and

14 (d) Such other and further relief as the Court shall deem just and proper.

15 12. Settlement and ADR: The parties do not believe this case is a good prospect for
16 settlement. An ADR Phone Conference is scheduled to take place on September 2, 2008. The
17 parties do not request assignment to any additional ADR process at this time.

18 13. Consent to Magistrate Judge for All Purposes: The parties consent to the
19 assignment of this case to a United States Magistrate Judge.

20 14. Other references: The parties do not request reference to binding arbitration, a
21 special master, or the Judicial Panel on Multidistrict Litigation.

22 15. Narrowing of the Issues: The parties will meet and confer prior to the filing of
23 cross-motions for summary judgment in an attempt to agree on a briefing schedule, reduce the
24 number of documents in the litigation, and narrow the dispositive issues.

25 16. Expedited schedule: The People believe that this is the type of case that can and
26 should be handled on an expedited basis with streamlined procedures.

27 17. Scheduling: The People believe that, given the time that has elapsed, the Court
28 should order FDA to produce a *Vaughn* index promptly, and not set a schedule for the filing of

1 cross-motions for summary judgment until FDA has done so. It is the People's view that the
2 interests of judicial economy require a single hearing for the parties' cross-motions for summary
3 judgment. The People's ability to file a motion for summary judgment, however, will depend on
4 the timing of their receipt of an adequate *Vaughn* index, as without it they may need to move for
5 supplementation of FDA's index prior to filing the summary judgment motion.

6 18. Trial: The parties do not anticipate that there will be a trial in this case. However,
7 in the event the action is not resolved through dispositive motion(s) for summary judgment, the
8 People estimate that a trial will last no longer than 2 days. Such a trial would be a bench trial.
9 Depending on the issues, it may be possible to reduce the length of the trial by stipulation, use of
10 summaries or statements or other expedited means of presenting evidence. Should the Court
11 determine, after the filing of any dispositive motion(s), that there remain triable issues of fact, the
12 People propose that a further case management conference be held for the purpose of setting a
13 trial schedule.

14 19. Disclosure of Non-party Interested Entities or Persons: Not applicable.

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16 Respectfully submitted,
17 EDMUND G. BROWN JR.
18 Attorney General of the State of California

JOSEPH A. RUSSONIELLO
United States Attorney

19 _____/s/_____
20 Laura J. Zuckerman
21 Deputy Attorney General
22 Dated: August 28, 2008

_____/s/_____
Abraham Simmons
Assistant United States Attorney
Dated: August 28, 2008

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24 **CASE MANAGEMENT ORDER**

25 The Case Management Statement and Proposed Order is hereby adopted by the Court as

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the Case Management Order for the case and the parties are ordered to comply with this Order.

In addition, the Court orders: The Case Management Conference originally set for September 4, 2008 is vacated. The Court will set a case management schedule after it rules on Plaintiff's motion for *Vaugh Index*.

Dated: September 4, 2008

HON. MARIA-ELENA JAMES
Chief Magistrate Judge
United States District Court

