IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEYOND NUCLEAR, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF ENERGY, *et al.*, Defendants.	No. 1:16-cv-01641 (TSC)

DEFENDANTS' COMBINED REPLY IN SUPPORT OF THEIR MOTION TO STRIKE AND OPPOSITION TO PLAINTIFFS' MOTION TO SUPPLEMENT THE RECORD AND TO SUBMIT EXTRA-RECORD DOCUMENTS

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On October 18, 2016, Defendants served the certified administrative record in this case on Plaintiffs. That record comprises over 27,000 pages of the documents that Defendant DOE considered, directly or indirectly, in determining that the proposed transportation of target material in liquid form, rather than in the form of a solid powder, from a Canadian research reactor to the Savannah River Site, represented neither a substantial change to the proposed action nor significant new circumstances or information relevant to environmental concerns requiring the preparation of a supplemental environmental impact statement ("EIS") or new EIS. DOE documented that determination in the 2013 Supplement Analysis and confirmed it in the 2015 Supplement Analysis, in accordance with the agency's NEPA regulations. The certified administrative record supporting the determination made in the two Supplement Analyses is entitled to a presumption of regularity that Plaintiffs have not come close to rebutting.

Plaintiffs attempt to attack the certified administrative record by asking the Court to consider three documents, which they referenced in their cross-motion for summary judgment but have only belatedly moved the Court to admit: an "Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants" published by the Atomic Energy Commission ("AEC") (hereafter, "AEC Survey") over twenty years before the record of decision adopting the Acceptance Program for radioactive materials from foreign research reactors; and two declarations that were never submitted to DOE and that, accordingly, are not part of the administrative record before this Court. Plaintiffs' motion seeking consideration of these documents is not only untimely but falls far short of meeting the narrow exceptions recognized in the D.C. Circuit for the consideration of extra-record materials in an APA case such as this. Defendants' motion to strike should therefore be granted, and Plaintiffs' motion to supplement the record and to submit extra-record documents should be denied.

1. The Court should not supplement the record with the AEC Survey.

Plaintiffs argue that the Court should supplement the certified administrative record with the AEC Survey under two of the factors considered in the D.C. Circuit for supplementation of administrative records: whether the agency "'deliberately or negligently excluded documents that may have been adverse to its decision'"; and whether background information is "needed 'to determine whether the agency considered all the relevant factors.'" *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010) (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)); ECF 25 at 17-18. In the alternative, Plaintiffs argue that the AEC Survey should be considered to "complete" the administrative record. ECF 25 at 18-19 (citing *Oceana, Inc. v. Pritzker*, __ F. Supp. 3d __, 2016 WL 6581169 (D.D.C. Nov. 4, 2016)). None of these arguments has merit.

A. The AEC Survey does not implicate either *Dania Beach* factor invoked by Plaintiffs.

It was neither negligent of DOE not to have included the AEC Survey in the certified administrative record nor does the Court need to examine that document to determine whether DOE considered all the relevant factors in its 2013 and 2015 Supplement Analyses. That is because the radioactive materials considered in the AEC Survey are different from the target material at issue here, thus inviting an apples versus oranges comparison. In addition, any generic discussion of transportation-related risks in the Survey is superseded by or cumulative of the subsequent 1977 NRC FEIS, which is in the record (AR 1).[1]

The AEC Survey provided "a general analysis of the impact on the environment of transporting radioactive materials to and from a light-water nuclear reactor in accordance with

[1] NRC, Final Environmental Impact Statement on the Transportation of Radioactive Material by Air and Other Modes (December 1977).

the regulatory standards and requirements of the Atomic Energy Commission and the Department of Transportation."[2] By its own terms, the AEC Survey concerned different nuclear reactors (power-producing light-water reactors) and different radioactive materials (spent nuclear fuels and radioactive wastes) from the foreign research reactors and target material at issue here. The Survey's scope is limited to light-water reactors used to generate electricity, and the spent nuclear fuel and radioactive wastes associated with *those* reactors.

The AEC Survey does not address materials transported from foreign research reactors, which are used for medical and scientific purposes rather than power generation, and it does not mention the transportation of target material, in any form. As we have explained (ECF 22 at 4-5), target material is neither radioactive waste nor spent nuclear fuel; as the residue of chemical processes used to produce and isolate Molybdenum-99, the target material at issue here differs in chemical and physical form from the commercial spent nuclear fuel (fuel rods containing uranium dioxide pellets) and solid radioactive wastes (sludges, resins, and contaminated clothing and rags) evaluated in the AEC Survey (ECF 19-1 at 11), and later considered in the 1977 NRC FEIS. *Compare* AR 1:0035 (fuel rods); 0228-29 (radioactive wastes) *with* AR 22:8349 ("target material may be transported in one of two solid powder forms – as a calcine or an oxide"). Those differences in chemical and physical form are one reason the 1996 FRR FEIS analyzed the impacts of transporting target material separately from the impacts of transporting spent nuclear fuel. *See* AR 22:8350-55; 9014-18. Simply put, the 1972 AEC Survey does not evidence an alleged 40-year policy against shipping target material in a liquid form because that document

[2] Plaintiffs still have not provided a copy of the 1972 AEC Survey to Defendants or to the Court. While Defendants have located what they believe is a true and correct copy of the document, Defendants do not know whether the AEC Survey to which Plaintiffs refer is identical. The quoted language describing the scope of the AEC Survey appears on the title page of the document obtained by Defendants.

did not consider the shipping of target material in any form. It was not negligent or improper for DOE to exclude it from the certified administrative record.

To be sure, DOE did include in the certified administrative record the 1977 NRC FEIS, which also focuses on materials transported from light-water reactors. AR 1. But unlike the AEC Survey, the 1977 NRC FEIS was a final environmental impact statement, and it has "served as a benchmark EIS" for subsequent environmental analyses. AR 51:17,388 (DOE Resource Handbook reviewing DOE transportation analyses).[3] The 1977 NRC FEIS was cited to that effect in the 1996 FRR FEIS. AR 22:9014-9015. The 1977 NRC FEIS also marked the introduction of the RADTRAN model that DOE used (as updated) in the 2013 Supplement Analysis Letter Report. AR 1:0324-0333; AR 101:26,383. To the extent the AEC Survey's contents may also be germane to issues involved in transporting radioactive material more generally, the Survey is either superseded by or cumulative of the analysis in the 1977 NRC FEIS.[4] Plaintiffs have not demonstrated that the AEC Survey has, or should have had, independent bearing on DOE's analysis of the impacts of transporting target material in liquid rather than solid powder form some 40 years later.

Plaintiffs have not shown that the certified administrative record improperly excluded the AEC Survey, or that the AEC Survey reflects relevant factors DOE failed to consider. The

[3] This reference and additional pages cited from AR 1 are attached to this reply for inclusion in the Joint Appendix. Hard copies will be promptly delivered to the Court.

[4] Plaintiffs attempt to bolster the significance of the AEC Survey by citing NRC's regulations at 10 C.F.R. Part 51, and Table S-4 incorporated into 10 C.F.R. § 51.52. ECF 25 at 16. This Hail Mary pass falls short. While the AEC Survey may well remain a basis for the environmental criteria spelled out in the NRC's regulations at 10 C.F.R. § 51.52, those regulations by their terms are limited to NRC licensing and related regulatory decisions involving the removal of spent nuclear fuel and radioactive wastes from light-water reactors used to generate power. The regulations do not on their face have any applicability to DOE shipments of target material from foreign research reactors, and Plaintiffs have failed to show otherwise.

NEPA issue before DOE in 2013 and 2015 was whether the transportation of target materials in liquid form rather than solid powder form represented a substantial change in the proposed action relevant to environmental concerns or constituted new circumstances or information relevant to environmental concerns and bearing on the proposed action or impacts. 10 C.F.R. § 1021.314(c); 40 C.F.R. § 1502.9(c)(1). After carefully evaluating potential impacts using the most up to date information available, including the NRC's certification of the NAC-LWT cask for use in transporting liquid target material, DOE concluded that the impacts of transporting liquid target material would not be significantly different from the impacts of transporting solid powder target material that DOE had thoroughly reviewed and discussed in the 1996 FRR FEIS. AR 101:26,371. The certified administrative record contains the documents considered directly and indirectly by DOE in making that determination. Plaintiffs have not shown that designation of the record was improper or incomplete.

Thus, DOE's certification of a record without the AEC Survey does not implicate either of the *Dania Beach* factors urged by Plaintiffs. Because the AEC Survey did not address the transportation of the radioactive materials under consideration in the 2013 and 2015 Supplement Analyses, it is not a document adverse to DOE's position in those documents, and DOE had no need to consider the Survey otherwise. Nor is the AEC Survey background information relevant to showing whether DOE considered all relevant factors. Moreover, the *Dania Beach* exception for background information is intended to permit *the agency* to submit additional background information to show that it *did* consider relevant factors; it is not a blank check for plaintiffs to submit extra-record materials. *See Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285-287 (D.C. Cir. 1981) (affirming order striking affidavits submitted by petitioners in APA case because affiants were not agency employees who could shed light on agency's decisionmaking process)

(cited in *James Madison Ltd. By Hecht v. Ludwig*, 82 F.3d 1085,1095 (D.C. Cir. 1996), cited in turn by *Am. Wildlands,* 530 F.3d at 1002). Because the AEC Survey does not address the potential environmental impacts of the transportation of target material, the Survey was neither negligently excluded from the record nor is it background material probative of whether the agency considered all relevant factors. *Dania Beach*, 628 F.3d at 590. Plaintiffs have failed to prove otherwise.

B. Consideration of the AEC Survey is not necessary to "complete" the administrative record in this case.

Consideration of the AEC Survey is also not necessary to "complete" the substantial administrative record in this case. *See Oceana*, 2016 WL 6581169, at *4. Plaintiffs fail to prove, as they must to sustain their completion argument, that the AEC Survey was "'before the actual decisionmakers involved in the determination'" and was considered by them. *Grunewald v. Jarvis*, 924 F. Supp. 2d 355, 357 (D.D.C. 2013) (quoting *Sara Lee Corp. v. Am. Bakers Ass'n*, 252 F.R.D. 31, 34 (D.D.C. 2008)). The Court should defer to the agency's certification that the administrative record contains the documents DOE considered because it was DOE "that did the 'considering,'" *Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 57 (D.D.C. 2003), *vacated on other grounds by Fund for Animals, Inc. v. Hogan*, 428 F.3d 1059 (D.C. Cir. 2005), *and* because the materials relevant to analyzing the impacts associated with the transportation of target material directly implicate agency technical and scientific expertise. *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453, 463 (1972).

Despite insinuating, through their citation to *Oceana, Inc. v. Pritzker*, that the AEC Survey was "before" DOE (ECF 25 at 18), Plaintiffs have failed to provide "'non-speculative, concrete evidence to support their belief" that the AEC Survey was "directly or indirectly considered by the actual decision makers involved in the challenged action.'" *Oceana*, 2016 WL

6581169, at *4 (quoting *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 20 (D.D.C. 2013)). While the AEC Survey was cited as a reference in the 1977 NRC FEIS, the mere citation of the AEC Survey in an administrative record document does not, *ipso facto*, mean that the Survey was "before" DOE decisionmakers and part of the record. *See Grunewald*, 924 F. Supp. 2d at 358; *Cape Hatteras Access Preservation All. v. U.S. Dep't of the Interior*, 667 F. Supp. 2d 111, 114 (D.D.C. 2009). To the contrary, as noted in one of the decisions cited by Plaintiffs (ECF 25 at 18), a decision-maker compiling an administrative record "is not obligated to include every potentially relevant document existing within its agency." *Earthworks, Inc. v. U.S. Dep't of Interior*, 279 F.R.D. 180, 184 (D.D.C. 2012) (quoting *Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 7 (D.D.C. 2006) (internal quotation marks omitted)). "[I]nterpreting the word 'before' so broadly as to encompass any potentially relevant document existing within the agency or in the hands of a third party would render judicial review meaningless.'" *Pac. Shores*, 448 F. Supp. 2d at 5 (quoting *Fund for Animals*, 245 F. Supp. 2d at 57 n.7 (internal quotation marks omitted)).

As we showed (ECF 22 at 8-9), Plaintiffs' argument that the AEC Survey was before DOE decisionmakers is nothing more than a version of the "consideration by citation" argument rejected by other courts. *Grunewald*, 924 F. Supp. 2d at 358; *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1277 (D. Colo. 2010). Having failed to come forward with concrete evidence that the AEC Survey was actually considered by DOE in preparing the 2013 and 2015 Supplement Analyses, Plaintiffs have failed to overcome the presumption of regularity applicable to the certified administrative record. *Oceana*, 2016 WL 6581169, at *4; *Grunewald*, 924 F. Supp. 2d at 358; *Pac. Shores*, 448 F. Supp. 2d at 6. Their motion to supplement the

record with the AEC Survey should be denied, and Defendants' motion to strike with respect to that document should be granted.

2. The Court should also decline to consider the Resnikoff and Corrected Edwards Declarations.

Plaintiffs' contention that the Court should admit the Resnikoff and Corrected Edwards Declarations involves somewhat different considerations, because Plaintiffs concede that neither declaration was before DOE prior to its determination whether to supplement the FRR FEIS. ECF 25 at 21; *see also* ECF 16 at 17 n.11. Plaintiffs nevertheless argue that the Court should consider these extra-record declarations purportedly "to expose factors that the DOE failed to consider in its decision not to prepare an EIS, and which Plaintiffs would have pointed out in their comments had they had an opportunity to respond to a draft EIS." ECF 25 at 23. While acknowledging that courts consider extra-record material only in "unusual circumstances," Plaintiffs argue that Federal Rule of Evidence 702 and the *Dania Beach* factors allow the supplementation of administrative records if "background information was needed to determine whether the agency considered all the relevant factors." *See id*. at 22; *Dania Beach*, 628 F.3d at 590 (internal quotation marks eliminated). As noted above (*supra* at 5), the background material exception is intended to allow submissions by the agency defendant to explain its decision and is not a basis for including a plaintiff's litigation affidavits.

Defendants' Combined Reply/Opposition Memorandum demonstrated in detail why neither declaration should be considered under any of the narrow exceptions recognized in the D.C. Circuit for consideration of extra-record material in an APA case such as this. ECF 22 at 10-16. We will not repeat those arguments, which Plaintiffs have not rebutted, and will focus here instead on the specific grounds cited by Plaintiffs for consideration of these declarations in their motion to supplement. Those grounds offer Plaintiffs no support.

Plaintiffs' invocation of Rule 702, regarding expert witness testimony, is unavailing because in an APA action such as this the Court is not a "trier of fact." Fed. R. Evid. 702(a). Rule 702 generally allows a witness qualified as an expert to testify in the form of an opinion or otherwise if, *inter alia*, "the expert's scientific, technical, or other specialized knowledge will *help the trier of fact* to understand the evidence or to determine a fact in issue." *Id.* (emphasis added)).[5] In an APA case, however, "the district judge sits as an appellate tribunal," and "[t]he 'entire case' on review is a question of law." *Silver State Land, LLC v. Schneider*, 145 F. Supp. 3d 113, 123-24 (D.D.C. 2015) (quoting *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)), *aff'd*, No. 16-5018, 2016 WL 7321392 (D.C. Cir. Dec. 16, 2016); *see also Mayo v. Jarvis*, 177 F. Supp. 3d 91, 105 (D.D.C. 2016) (same principle applied in a NEPA case), *amended*, No. CV 14-1751 (RC), 2016 WL 4083308 (D.D.C. Aug. 1, 2016). The Court's role is to review the administrative record already in existence and presented by the agency, "not some new record made initially in the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). Here, there are no facts to be tried, and accordingly expert witness opinion testimony would not assist the Court. Tellingly, Plaintiffs do not cite a single case in the D.C. Circuit in which the consideration of extra-record testimony under Rule 702 was upheld in an APA case.

The conclusion that Rule 702 provides no basis for this Court to consider the Resnikoff and Corrected Edwards declarations finds additional support in the fundamental tenets of APA review in NEPA Cases. It is bedrock principle that "a battle of the experts . . . is frowned upon

[5] Rule 706 permits a court to appoint an expert "that the parties agree on" or "of its own choosing." Fed. R. Evid. 706. Plaintiffs do not proffer Dr. Resnikoff or Dr. Edwards under this rule, and Defendants reserve the right to challenge the admission of any testimony from Dr. Resnikoff and Dr. Edwards under any rule. Among other reasons, there are serious deficiencies in their respective statements. *See* ECF 22 at 24-26.

within the context of an APA challenge to agency decisionmaking." *Delta Air Lines, Inc. v. Exp.-Imp. Bank of United States*, 85 F. Supp. 3d 436, 472 (D.D.C. 2015) (citations omitted). In *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989), the leading Supreme Court decision on the supplementation of EISs, the Court confirmed specifically that battles of the experts are not appropriate in determining whether an agency properly declined to supplement an EIS. In that case, the Court reviewed a NEPA challenge to an Army Corps of Engineers ("Corps") decision not to prepare a supplement to an EIS on the proposed construction of a dam, despite having received two reports with new information on the dam's potential impacts on fishing and water turbidity. *Id*. at 369. The Corps discounted the reports, relying instead on the opinions of the Corps' own experts and independent experts whom the Corps consulted. *Id*. The Supreme Court deferred to that choice. The Court described the question presented as "a classic example of a factual dispute the resolution of which implicates substantial agency expertise," *id*. at 376, warranting deference. The Supreme Court cautioned courts to avoid a battle of the experts, stating that "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Id.* at 378. Thus, "it is not [the court's] job to referee battles among experts; [it] is only to evaluate the rationality of [the agency's] decision." *Mississippi v. EPA*, 744 F.3d 1334, 1348 (D.C. Cir. 2013).

Consideration of the Resnikoff and Corrected Edwards declarations would involve this Court in the kind of second-guessing of agency technical expertise that the Supreme Court in *Marsh* held that courts reviewing agency factual determinations should avoid. Dr. Resnikoff's Declaration disputes factual determinations underlying the NRC's certification of the NAC-LWT transportation cask for shipments of target material in liquid form. ECF 16-2, ¶¶ 3-17. The

Corrected Declaration of Dr. Edwards disputes factual determinations pertaining to the radionuclides present in target material, with respect to potential risks of drinking water contamination in the event of a breach of the massive NAC-LWT transportation cask. ECF 19-2, ¶¶ 7-25. Our previous memorandum demonstrated that DOE *did* consider the risks of fire, the inventory of radionuclides, and the accident risks involving leakage into bodies of water. ECF 22 at 13-16. *See* AR 101:26,375-26,394; AR 139:27,341-27,353. Consideration of the Resnikoff and Corrected Edwards Declarations would put this Court in the position of second-guessing DOE determinations about transportation risks that fall squarely within the technical expertise of DOE. *Marsh*, 490 U.S. at 377. This Court should decline Plaintiffs' invitation to engage in such second-guessing.

Plaintiffs also argue that the Court can consider both declarations as "background information . . . needed to determine whether the agency considered all the relevant factors," citing *Dania Beach*, 628 F.3d at 590, and *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 869 (E.D. Cal. 2010) ("*SLDMWA I*"). But the Resnikoff and Corrected Edwards Declarations do not shed light on DOE's decision-making. Plaintiffs proffer the Resnikoff and Corrected Edwards Declarations purely for advocacy purposes, allegedly to "expose" factors that DOE did not consider, but in substance to disagree with the agency's conclusions. ECF 25 at 23. This is not the intent of the exception for background information, *Envt'l Def. Fund*, 657 F.2d at 285, and in applying that exception, the D.C. Circuit has upheld the rejection of extra-record letters that disagreed with an agency's conclusions. *Am. Wildlands*, 530 F.3d at 1002 (affirming district court's determination that letters did not "shed[ ] light" on factors not considered by the agency (2006 WL 2780702)). The Court should follow *American Wildlands* in rejecting the Resnikoff and Corrected Edwards Declarations here.

As for *SLDMWA I*, Plaintiffs' citation to that district court opinion fails to inform this Court that the Ninth Circuit largely reversed the district court's decision in a lengthy opinion that was sharply critical of the district court's consideration of expert declarations, witness testimony, and reports proffered by the plaintiffs and intervenors in that case. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602-04, 621, 631-32 (9th Cir. 2014) ("*SLDMWA II*"). And although the Ninth Circuit did not overturn the district court's appointment of experts under Federal Rule of Evidence 706, purportedly to assist the district court in understanding complex technical and scientific matters, the Ninth Circuit did reverse the district court's conclusions, based on the testimony of those same experts, that the agency was arbitrary and capricious. *See id*. at 611, 620-21. As the Ninth Circuit noted in *SLDMWA II*, if a court in review is unable to evaluate the challenged agency action on the basis of the record before it, "the proper course" is to remand to the agency for an explanation, not to conduct *de novo* fact-finding with expert witnesses. *Id*. at 602 (quoting *Fla. Power & Light Co.*, 470 U.S. at 744). There is no occasion, on the basis of the certified administrative record, for the Court to consider the extra-record Resnikoff and Corrected Edwards Declarations.

3. <u>Plaintiffs' Motion to Supplement is untimely and should be rejected on that basis alone</u>.

Plaintiffs waited until the end of summary judgment briefing to file their motion to supplement the record. ECF 26. Defendants only became aware of Plaintiffs' intention to supplement the administrative record when we saw Plaintiffs' cross-motion for summary judgment on November 22, 2016, which attached two of the three extra-record documents. Defendants demonstrated, in support of our motion to strike, that Plaintiffs' submission of extra-record documents as attachments to their cross-motion and failure to timely move to supplement the record prior to filing a dispositive motion results in forfeiture of their opportunity to

supplement the record. ECF 22 at 7-8 (citing *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) and *Banner Health v. Burwell*, 126 F. Supp. 3d 28, 60-61 (D.D.C. 2015)).

Plaintiffs' attempt to distinguish these cases is not persuasive. Plaintiffs received a CD containing the certified administrative record on October 19, 2016. Under the stipulated, Court-approved, briefing schedule, Plaintiffs' cross-motion for summary judgment was due on November 22, 2016, over a month later. *See* Minute Order, Sept. 30, 2016. Moreover, Plaintiffs were aware of the 2013 and 2015 Supplement Analyses well before they filed their original complaint on August 12, 2016, attaching both documents. *See* ECF 1. The Resnikoff and Corrected Edwards Declarations dispute facts contained or summarized in those Supplement Analyses, so a timely motion to supplement could have been submitted to the Court at any time up to and including the filing of the Complaint. Contrary to Plaintiffs' argument (ECF 25 at 20), the court's disapproval in *Banner Health* of requests to supplement submitted simultaneously with a dispositive motion was not a function of the length of the litigation in that case. *See Banner Health*, 126 F. Supp. 3d at 60-61. Here, in any event, Plaintiffs waited two weeks *after* submission of their dispositive motion to move to supplement—leading to a flurry of last-minute briefing on an already accelerated schedule. Plaintiffs' tardiness in moving to supplement the record is a separate and independent basis for denying Plaintiffs' motion to supplement and granting Defendants' motion to strike.

4. Conclusion

Accordingly, for the reasons set forth above and in Defendants' Combined Reply/Opposition Memorandum, ECF 22, Defendants respectfully submit that their Motion to Strike should be granted, and that Plaintiffs' Motion to Supplement the Record and to Submit Extra-Record Documents should be denied.

Respectfully submitted this 10th day of January, 2017,

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2017, I electronically filed the foregoing document and its attachments with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties.

/s/ Judith E. Coleman