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

AMERICAN BAR ASSOCIATION, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,

Defendants.

Civil Action No. 16-2476-TJK

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' SUPPLEMENTAL MOTION TO ALLOW FOR EXTRA-RECORD REVIEW OR, IN THE ALTERNATIVE, TO ALLOW FOR JUDICIAL NOTICE**

As the Department of Education ("the Department") explained in its opposition to Plaintiffs' first motion requesting review of extra-record evidence, it is hornbook law that, in cases like this one, judicial review of agency actions under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 552, 706 is on the basis of the administrative record, which consists of the materials considered directly or indirectly by the agency at the time of its decision. It is also hornbook law that absent clear evidence to the contrary, the agency is presumed to properly designate the administrative record.

Plaintiffs however once again ask this Court to go beyond the duly designated administrative record to include internal email correspondence solely between individuals at FedLoan Servicing, the Department's contractor for the Public Service Loan Forgiveness Program ("PSLF"). The identified correspondence postdates the filing of this case and the alleged agency actions at issue, and thus could not have been considered by the Department prior to its decisions. Moreover, none of the emails in question

include any Department personnel, and thus at most reflect the views of certain FedLoan Servicing employees. Because these materials were necessarily not before the Department at the time of the decisions at issue in this case, Plaintiffs cannot meet the high bar for consideration of extra-record evidence.

## ARGUMENT

This is Plaintiffs' second request that the Court consider evidence outside of the administrative record. *See* Pls.' Mot. for Extra-Record Review, ECF No. 24. The prior motion is still pending before this Court. As the Department explained in its opposition to that motion, Plaintiffs have not met the high bar necessary to allow for supplementation of the administrative record, nor is judicial notice an appropriate procedure in administrative review cases. *See* Defs.' Opp'n to Pls.' Mot. for Extra-Record Review ("Defs.' Opp'n") at 2-7, ECF No. 30. In the instant motion, Plaintiffs renew their request (and add several pages of argument on the merits) to ask the Court to consider three emails sent to and from employees of FedLoan Servicing during June and July of 2017—more than six months after this case was commenced and the Department's last communications with any of the plaintiffs regarding the determinations at issue in this case. As with Plaintiffs' first request, the Court should deny it.

### I. THE EMAIL CORRESPONDENCE WAS NOT BEFORE THE AGENCY DECISIONMAKERS AND THUS DO NOT WARRANT INCLUSION IN THE ADMINISTRATIVE RECORD.

Under the APA "[j]udicial review of administrative action should normally be based on the full administrative record that was before a decisionmaker at the time the challenged action was taken . . . ." *Cmty. For Creative Non-Violence v. Lujan*, 908 F.2d 992, 998 (D.C. Cir. 1990) (citation omitted); *see also Am. Wildlands v. Kempthorne*, 530

F.3d 991, 1002 (D.C. Cir. 2008). The administrative record for any particular action "includes all materials compiled by the agency that were before the agency at the time the decision was made," *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (citations omitted), and entails "all documents that the agency directly or indirectly considered," *Am. Wild Horse Preservation Campaign v. Salazar*, 859 F. Supp. 2d 33, 41 (D.D.C. 2012) (citation omitted).

Notably, as the Department has explained, these principles limit the administrative record to materials that were before the relevant decisionmakers at the time of the decision. *See* Defs.' Opp'n at 2-3. "[I]f a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *Am. Wild Horse*, 859 F. Supp. 2d at 41 (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 685, 792 (D.C. Cir. 1984)).

Moreover, a plaintiff seeking to supplement the administrative record faces a high bar. *See* Defs.' Opp'n at 3; *see also, e.g.*, *Pac. Shores Subdivision v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) ("[A]bsent clear evidence to the contrary, an agency is entitled to a strong presumption of regularity, that it properly designated the administrative record."). A plaintiff must "put forth concrete evidence that the documents it seeks to 'add' to the record were actually before the decisionmakers." *Tindal v. McHugh*, 945 F. Supp. 2d 111, 123 (D.D.C. 2013) (citation omitted); *see also Sara Lee Corp. v. Am. Bakers Ass'n*, 252 F.R.D. 31, 34 (D.D.C. 2008) (plaintiff "must identify reasonable, non-speculative grounds for its belief that the documents were considered by the agency and not included in the record" (citation omitted)).

Here, Plaintiffs cannot come close to meeting this standard, which they ignore in their motion. Plaintiffs have identified three extra-record emails that they ask the Court to review. Plaintiffs claim that the emails demonstrate that the agency changed its interpretation of the statute and operative regulation governing the PSLF. Each of these emails purports to be internal correspondence between various employees of FedLoan Servicing in June or July of 2017. *See* Pls.' Suppl. Mot. for Extra-Record Review ("Pls.' Suppl. Mot.") Exs. C-E. Each of these emails, then, postdates the December 2016 commencement of this case by more than six months and postdates by many more months most of the Department's correspondence with any of the Plaintiffs regarding the determinations at issue in this case.

Further, none of these emails purports to include any employees of the Department, and Plaintiffs do not even allege that the Department was aware of or saw these emails. Necessarily, these emails could not have been before the Department if they never involved or were seen by any employee of the Department. Plaintiffs fail to explain how documents that the Department could not have considered in making the challenged decisions could be included in the administrative record. At most these emails reflect only the views and interpretations of FedLoan Servicing employees, and do not represent those of the Department or otherwise bind the Department.

In their reply in support of their first motion for extra-record review, Plaintiffs suggest that the Court may consider evidence beyond the record when it is relevant to "issue[s] that go[] beyond the intended scope of the administrative record." Pls.' Reply in Support of Mot. for Extra-Record Review ("Pls.' Reply ") at 7, ECF No. 32. Plaintiffs cite two such situations—where a plaintiff's Article III standing is challenged and where

the administrative record is so spare as to preclude effective judicial review. *Id.* at 7-8. Neither example has any relevance to Plaintiffs' request here.

First, courts may go beyond the administrative record in determining standing because standing is a jurisdictional issue. *See, e.g.*, *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 174 (D.C. Cir. 2012) (holding that "when the administrative record fails to establish a substantial probability as to any element of standing, 'the petitioner *must* supplement the record to the extent necessary to explain and substantiate its entitlement to judicial review'" (quoting *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (emphasis added))). That principle has no bearing on whether and under what circumstances the Court may go beyond the administrative record in determining the merits of an APA claim, as Plaintiffs suggest.

Second, while supplementation of the administrative record is permitted in extreme cases where "the record itself is so deficient as to preclude effective review" of the agency action, *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013), Plaintiffs make no showing that the over-300 page administrative record designated in this case precludes judicial review. Indeed, their repeated assurances that the administrative record is sufficient to grant Plaintiffs' motion for summary judgment, *see, e.g.*, Pls.' Suppl. Mot. at 1 (citing "existence of record evidence" purportedly disputing the Department's positions); *id.* at 3 (arguing that "plain import of the record" contradicts Department's positions); Pls.' Reply at 8 (describing the record as "already sufficient—without the emails—for the Court to determine that the Department changed its interpretation"), belie any notion that consideration of these emails is somehow "necessary to enable judicial review to become effective." *Silver State Land, LLC v.*

*Beaudreau*, 59 F. Supp. 3d 158, 164 (D.D.C. 2014) (quoting *Calloway v. Harvey*, 590 F. Supp. 2d 29, 38 (D.D.C. 2008)). Nor have Plaintiffs demonstrated that emails sent over six months after this case was commenced and involving no Department personnel could provide for more effective review of the Department's alleged actions than the properly designated administrative record.

## II. THE COURT SHOULD NOT TAKE JUDICIAL NOTICE OF THE EMAILS

In the alternative, Plaintiffs once again ask the Court to take judicial notice of the emails. However, this Court has recognized that "judicial notice of an adjudicative fact not part of the administrative record generally is irrelevant to the court's analysis of the merits." *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 32 n.14 (D.D.C. 2013). Instead, a court may only "consider an adjudicative fact subject to judicial notice that is *not* part of the administrative record if it qualifies for supplementation as extra-record evidence." *Id.*

In their reply in support of their first motion, Plaintiffs conceded, as they must, that *District Hospital* "correctly lay[s] out the standard," but attempted to distinguish it on the ground that Plaintiffs are not introducing extra-record emails "to suggest that they were 'before' the Department when it made its determinations regarding Plaintiffs' eligibility to participate in the PSLF program, but to demonstrate . . . that the Department changed its interpretations." Pls.' Reply at 9 n.3. But that does not explain why or how the Court could take judicial notice of these emails. Rather, *District Hospital* is clear—a Court can only consider extra-record evidence where the plaintiff satisfies the high bar necessary to supplement the administrative record, and judicial notice does not permit the

plaintiff to circumvent that standard. 971 F. Supp. 2d at 32 n.14. Plaintiffs have not met that standard, *see supra* Pt. I, and judicial notice cannot rescue them here.

**CONCLUSION**

For the foregoing reasons, the Court should deny Plaintiffs' supplemental motion to allow extra-record review or, in the alternative, to allow for judicial notice.

Dated: December 22, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 22, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

*/s/ Chetan A. Patil*
CHETAN A. PATIL