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Sagebrush Sea Campaign

**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

WESTERN WATERSHEDS PROJECT,)
BIODIVERSITY CONSERVATION)
ALLIANCE, CENTER FOR NATIVE)
ECOSYSTEMS, OREGON NATURAL)
DESERT ASSOCIATION, and the)
SAGEBRUSH SEA CAMPAIGN)
)
Plaintiffs,)
vs.)
)
DIRK KEMPTHORNE, Secretary of the)
Department of the Interior, and the)
UNITED STATES FISH AND)
WILDLIFE SERVICE, an agency of the)
United States,)
)
Defendants.)
_____)

Case No. 06-CV-00127

**PLAINTIFFS’ REPLY BRIEF IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT, AND
RESPONSE BRIEF IN OPPOSITION
TO DEFENDANTS’ CROSS-MOTION
FOR SUMMARY JUDGMENT¹**

¹ This brief is both a Reply Brief in Support of Western Watersheds’ Motion for Summary Judgment under Local Rule 7.1(b)(1), and a Response Brief in Opposition to Defendants’ Cross-Motion for Summary Judgment under Local Rule 7.1(c)(1). As such, the Local Rules allow 30 pages for this brief.

INTRODUCTION

In their Response and Cross-Motion for Summary Judgment, Defendants U.S. Fish and Wildlife Service *et al.* (“the Service”) do not even argue that Western Watersheds’ listing petition failed to meet the minimal regulatory requirements for listing petitions under the ESA. *See* 50 C.F.R. § 424.14(b)(2)(i)-(iv) (requiring that petitions (1) identify the species, (2) provide a “narrative justification” for listing, (3) discuss the range of the species, and (4) include a bibliography). Instead, the Service complains that Western Watersheds’ argument advocating a status review is based on “repeated exaggeration of the data found in the record,” and, the Service claims, the available evidence does “not actually address whether the pygmy rabbit is at risk.” *See* Brief in Support of Cross-Motion for Summary Judgment, pp. 13-15 (Docket No. 28) (“Response Brief”). The Service also contends that it was not required to examine the status of pygmy rabbit across “a significant portion of its range,” because, according to the Service, there has been no contraction in the occupied range of the rabbit. *See id.* pp. 16-18. Finally, the Service states that it is free to consult with hand-selected third parties in preparing a 90-Day finding. *See id.* pp. 18-19.

For the reasons discussed in detail below, the Service has misapplied the Endangered Species Act, and this Court should reverse the Service’s May 2005 listing decision. More specifically, this Court should not blindly defer to the Service’s decisionmaking, especially here where the Service has made counter-factual determinations or simply ignored inconvenient evidence in the Administrative Record. Plaintiffs’ listing petition and the record evidence demonstrates that vast areas of pygmy rabbit habitat have been destroyed or altered, and that pygmy rabbit populations have been eliminated from large areas of its former range.

Also, courts have unanimously rejected the Service's argument that it may carry out a "targeted information gathering campaign" in preparing a 90-Day finding, without allowing the petitioner or the public to respond to these comments. *See Colorado River Cutthroat Trout v. Kempthorne*, 448 F.Supp.2d 170 (D.D.C. 2006) (holding that the Service's "90-day review of the Petition in this case was contrary to law because [the Service] solicited information and opinions from limited outside sources"); *Center for Biological Diversity v. Morgenweck*, 351 F.Supp.2d 1137 (D. Colo. 2004) (same).

Accordingly, the Service violated the Endangered Species Act when it rejected the listing petition, and refused to conduct a detailed status review on the pygmy rabbit.

Finally, this Court should reject the arguments of Amici Curiae – and reject Amici's request to supplement its filings – that seek to superimpose the evidentiary standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), onto this Court's review under the APA and ESA. This argument lacks any legal support, is outside the scope of this case, and fails to respond to "issues in this matter raised in dispositive motions," as required by this Court. *See* Order dated July 7, 2006, p. 3 (Docket No. 20).

ARGUMENT

I. PYGMY RABBIT POPULATIONS AND HABITAT ARE IMPERILED.

In its Opening Brief, Western Watersheds pointed to explicit record evidence demonstrating that protecting the pygmy rabbit under the Endangered Species Act is warranted. *See* Opening Brief in Support of Motion for Summary Judgment, pp. 8-16 (Docket No. 25-2) ("Opening Brief"). Western Watersheds further established that the Service discounted this information without first identifying any countervailing information – in violation of the Service's own policy and past actions. *See id.*

In response, the Service has shifted position, and now claims that it actually “accepted the reliability of the data,” but maintains that this information still does not demonstrate that listing may be warranted because “th[e]se authorities do not actually address whether the pygmy rabbit is at risk.” *See* Response Brief, pp. 13-16. This Court should not credit the Service’s argument for two reasons.

First, this Court must review the adequacy of the Service’s stated justification in the 90-Day finding for refusing to conduct a detailed status review, and not some new argument the Service advances for the first time in litigation. *See I.C.C. v. Bd. of Locomotive Eng’rs*, 482 U.S. 270, 290 (1987), *quoting SEC v. Chenery Corp.*, 332 U.S. 194, 196 (stating that the “court must judge the propriety of [the agency's determination] solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action”).

In the 90-Day finding, the Service claimed that the data and information presented in the petition “**may not**” accurately reflect the species’ historic and current distribution because the data was not collected in a systematic, comprehensive manner. *See AR 4* (emphasis added). Although the Service provides no citations to any scientific evidence undermining the reliability or integrity of the information included in the listing petition – which included peer-reviewed, federal and state publications – the Service plainly dismissed this information in violation of its internal policies. *See* 69 Fed. Reg. 60,605, 60,606 (2004) (stating that the Service must “accept the petitioner’s sources and characterizations of the information unless we have specific information to the contrary”).

The Service next claims that the scientific authorities discussed in the listing petition “do not actually address whether the pygmy rabbit is at risk,” and Western Watersheds “repeatedly

exaggerate[es] the data found in the record.” *See* Response Brief, pp. 13-16. This argument is contrary to the scientific evidence in the Administrative Record and should not be credited.

Western Watersheds has shown that leading authorities on pygmy rabbit have grave concerns about the continued viability of rabbit populations across its historic range, and expressly discuss the risk to the continued survival of the pygmy rabbit. *See* Opening Brief, pp. 8-12. *See also* AR 1868-1927 (listing petition).

The Service’s own leading biologist on the pygmy rabbit concluded that the petition presented substantial information that listing may be warranted, before her superiors overruled her expert conclusions. *See* AR 1259-96 & 1324. The Service seeks to evade this fact by claiming that the Service is free to change its mind, and relies on *Southwest Center for Biological Diversity v. U.S Bureau of Reclamation*, 143 F.3d 515 (9th Cir. 1998) (holding that the Service’s Section 7 consultation did not violate ESA). *See* Response Brief, pp. 14-15. The Service misapprehends Western Watersheds’ argument, and *Southwest Center* does not advance its cause.

Western Watersheds is not arguing that the Service was required by law to adopt the findings of its own expert pygmy rabbit biologist. Instead, Western Watersheds avers that the fact that two of the Service’s own biologists – including the Service’s nationwide lead biologist on the pygmy rabbit, *see* AR 2511 – concluded that the listing petition was “well written,” *see* AR 1324, and presented “substantial information indicating that listing may be warranted” is important to assist this Court in evaluating whether the listing petition presented enough information to meet the ESA’s “reasonable person” standard. *See* 50 C.F.R. § 424.14. *See also* Opening Brief, pp. 5-8 (discussing standard for 90-Day finding); AR 1246-47.

Moreover, the Service has previously relied on much less information to support a positive 90-day finding. *See, e.g.*, 63 Fed. Reg. 63657, 63658-9 (November 16, 1998) (positive 90-day finding on Redband trout, which stated that “[a]lthough exact historic distribution [of Redband trout] is unclear, the petitioners cite references that declines have occurred”). In fact, at this early stage of the listing process, the Service must rely on the evidence presented in the listing petition, and cannot rely on the asserted lack of comprehensive data to foreclose a complete status review – indeed, the very point of preparing a full status review is to collect and analyze the “best available scientific and commercial information” in determining whether protecting a species under the Endangered Species Act is warranted. *See* 16 U.S.C. § 1533. *See also Southwest Center for Biological Diversity v. Babbitt*, 215 F.3d 58 (D.C. Cir. 2000) (stating that “[e]ven if the available scientific and commercial data were quite inconclusive, [the Secretary] may – indeed must – still rely on it at that stage”).

The Service responds by manipulating this information and claiming that it applies only to one field office in Idaho, *see* Response Brief, p. 15 (claiming information only pertains to Shoshone Field Office), and then ignoring the rest of the data cited by Western Watersheds. A review of Western Watersheds’ opening brief reveals that the Service simply ignored Western Watersheds’ discussion of the remaining habitat and populations in Idaho (Pocatello, Idaho Falls, Burley, Owhyee and Jarbidge field offices), Utah, Oregon, Wyoming, Montana and Nevada. *See* Opening Brief, pp. 9-11. BLM cannot meet its ESA obligations in this manner. *See Southwest Center for Biological Diversity v. Norton*, 2002 WL 1733618, at *8 (D.D.C. 2002) (stating that the ESA “prevents [the Service] from manipulating its analysis by unreasonably relying on certain sources to the exclusion of others”); *Southwest Center for Biological Diversity v. Babbitt*, 926 F. Supp. 920, 927 (D. Ariz. 1996) (ignoring data violates the ESA).

The scientific evidence in the listing petition presented sufficient information indicating that protecting the pygmy rabbit under the Endangered Species Act may be warranted, and, thus, the Service was required to issue a positive 90-Day finding and undertake a comprehensive status review. In failing to do so, the Service has violated the ESA. Accordingly, this Court should reverse and remand the 90-Day finding, and require the Service to prepare a status review.

II. PYGMY RABBIT HABITAT AND RANGE HAS CONTRACTED.

The Service next seeks to excuse its failure to consider whether pygmy rabbit was threatened or endangered across a “significant portion of its range” because, according to the Service, the listing petition did not prove that “the area in which [it] is expected to survive is much smaller than its historical range.” Response Brief, p. 17, *citing Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001). The Service is wrong as a matter of law and fact.

As demonstrated in Western Watersheds’ opening brief, the historic range of the pygmy rabbit is well-known and documented. *See* Opening Brief, pp. 8-9. *See also* Plaintiffs’ Separate Statement of Undisputed Material Facts, ¶ 5 (Docket No. 25-3) (“Sep. Stmt.”). Pygmy rabbit were once a “fairly abundant” feature of the Great Basin and Intermountain Region, and historically spanned over 100 million acres of the American West. *See id.* The Service has even previously acknowledged the historic range of pygmy rabbit. *See AR 7584.*

In establishing the current range of pygmy rabbit, the listing petition relied on a host of peer-reviewed and agency publications. For example, the listing petition identified a recent Bureau of Land Management report, which discussed the rangewide contraction of rabbit habitat and range. *See AR 6345-75.* This BLM study reports:

Current, known pygmy rabbit populations are thought to be limited to a few localities (Map 8). During the past few years, intensive surveys have been

conducted throughout this species range Based on these surveys, this species is only known to be found in portions of 17 counties within its former range.”

AR 6365-7. This report also provided a map (i.e., Map 8) of the current range of pygmy rabbit, which reflected a nearly 90% range contraction versus historic range. *Compare AR 6365 & 6366.* In addition to this report, the listing petition presented site-specific information on range contraction in Washington, *AR 1868-70*; Montana, *AR 1870-74*; Idaho, *AR 1874-94*; Wyoming, *AR 1894-1900*; Utah, *AR 1900-04*; Nevada, *AR 1904-1911*; California, *AR 1911-15*; and Oregon, *AR 1915-22*. In fact, the listing petition gathered all available information on pygmy rabbits across its historic range. *See id.* *See also AR 1784* (stating that the “petitioners have done an outstanding job of reviewing all available literature and unpublished reports relating to the pygmy rabbit. It appears that they have uncovered everything that has ever been reported on the species”).

In other words, the listing petition employed a two-step process in determining the current status and trend of pygmy rabbit populations and habitats. First, the petition identified the “historic range” of the species, which is not in dispute. *See AR 1868 and citations above.* Then, the petition gathered all available information on rabbits within its historic range, to assist in identifying its current range. *See AR 1869-1927.*

The Service seeks to discount this record evidence by claiming that Western Watersheds relied exclusively on a “map comparison” in seeking to demonstrate a reduction in range. *See Response Brief*, pp. 17-18. This claim is flat wrong, and even a cursory review of the listing petition shows that the petition spends nearly 60 pages discussing the current range of the rabbit and the other specific information on range contraction. *See AR 1869-1927.*

The Service also claims that it “did not find any major areas in which the rabbit is no longer viable but once was”; thus, according to the Service, it was not required to consider

whether pygmy rabbit is threatened or endangered across “a significant portion of its range.” *See* Response Brief, p. 18, *citing Defenders*, 258 F.3d at 1145. If anything, this statement reflects the Service’s pre-ordained decision to reject preparing a status review on the pygmy rabbit, and is not due to any lack of information in the listing petition.

In fact, the listing petition demonstrated that there are vast areas of historic rabbit habitat that no longer have viable populations and habitat. *See* Opening Brief, pp. 8-16. *See also, e.g., AR 1868-1927* (listing petition); *AR 7314-15* (discussing “large scale habitat loss” across “most of the F[ield] O[ffices in Idaho], which has “greatly reduced pygmy rabbit habitat over millions of acres”); *7305-07*; *7271* (recognizing “extirpation of historic populations” within Idaho); *2243* (stating that “any remaining pygmy rabbit populations [in Idaho] are at risk of extirpation”); *2835* (stating that pygmy rabbit numbers have “drastically declined” in the past decade, even in protected areas); *9732* (concluding that “strong evidence” indicates that “pygmy rabbit populations have experienced serious decline[s in Utah]”); *6198* (finding “marked declines” in population and range in Oregon); and Sep. Stmt., ¶¶ 7-18. Accordingly, if the Service failed to find areas where the pygmy rabbit is no longer viable it is because it failed to review the listing petition and associated information.

Like in *Defenders of Wildlife*, the Service was required to consider whether the vast area in which the pygmy rabbit is no longer viable represents a “significant portion of its range.” *See* 258 F.3d at 1145. In failing to do so, the Service has run afoul of controlling caselaw, and its May 2005 decision should be reversed.

III. THE SERVICE UNLAWFULLY EXPANDED REVIEW.

In its opening brief, Western Watersheds established that during a 90-day finding, the Service is prohibited from soliciting comments and information from third parties – including

state wildlife agencies – and relying on this information in reviewing a listing petition. *See* Opening Brief, p. 18-19, *citing Colorado River Cutthroat Trout v. Kempthorne*, 448 F.Supp.2d 170 (D.D.C. 2006), and *Center for Biological Diversity v. Morgenweck*, 351 F.Supp.2d 1137 (D. Colo. 2004).

In response, the Service seeks to distinguish these cases, and argues that it did not run afoul of the ESA because it only “sent a general inquiry to insure that its files would be as complete as possible.” *See* Response Brief, pp. 18-19. But, the Courts in *Kempthorne* and *Morgenweck* rejected this precise “targeted information gathering campaign” as violating the ESA, and, thus, the Service efforts to distinguish *Kempthorne* and *Morgenweck* are unpersuasive. *See Kempthorne*, 448 F.Supp.2d at 177.

In truth, this case is materially indistinguishable from *Kempthorne* and *Morgenweck*. In *Kempthorne*, the Service solicited information from various state wildlife agencies concerning the current status of a species of trout within their respective jurisdictions. *See id.* at 174. In this case, the Service similarly sought information from state wildlife agencies in Wyoming, Montana, Utah, Idaho, Nevada, California, and Oregon, *see AR 1598-1611*. Unlike in *Kempthorne*, the Service’s information gathering campaign in this case also extended to scores of tribal governments, *see AR 1552-97*, as well as hand-selected recipients on a private listserv. *See AR 1746*.

The Service’s “targeted information gathering campaign” in this case is even more surprising in light of the fact that the Service has routinely recognized that its 90-day review is constrained to the “petitions and the supporting documents as well as other information in [its] files,” as opposed to selective information from other sources. *See* 69 Fed. Reg. 16944, 16945 (March 31, 2004) (positive initial petition finding on Preble’s meadow jumping mouse delisting

petition); 69 Fed. Reg. 39395, 39400 (June 30, 2004) ("We have reviewed the petition [on the New England cottontail], the literature cited in the petition, and other literature and information available in our files"); 69 Fed. Reg. 58115, 58116 (Sept. 29, 2004) (in finding on gray squirrel petition, FWS reviewed petition, attachments and "information available in our files at the time of the petition finding"). In these findings, FWS acknowledged its limited scope of review in preparing a 90-Day finding, and did not selectively solicit comments from certain states or parties as it did in this case.

Notably, on October 12, 2004, FWS made a positive 90-day finding on a petition to delist the Ute Ladies-Tresses Orchid. There, FWS explicitly acknowledged the limited review that takes place to complete a 90-Day finding, highlighting that significant issues are to be resolved in the status review:

Our review for the purpose of a so-called 90-day finding . . . is limited to a determination of whether the information in the petition meets the 'substantial information' threshold. We do not conduct additional research at this point, nor do we subject the petition to rigorous critical review. Rather, as the Act and regulations contemplate, at the 90-day finding, we accept the petitioner's sources and characterizations of the information unless we have specific information to the contrary.

69 Fed. Reg. 60605, 60606 (October 12, 2004).

As a result of the district court's decision in *Morgenweck*, the Service often now includes the following statement in its 90-day findings, in which it recognizes the limited scope of review:

Our finding considers whether the petition states a reasonable case for listing on its face. Thus, our finding expresses no view as to the ultimate issue of whether the species should be listed. We reach a conclusion on that issue only after a more thorough review of the species' status. In that review, which will take approximately 9 more months, we will perform a rigorous, critical analysis of the best available scientific and commercial information, not just the information in the petition.

70 Fed. Reg. 5401 (February 2, 2005) (positive 90-day finding on Gentry indigo bush) (emphasis added); *see also* 70 Fed. Reg. 5123 (February 1, 2005) (same statement in positive 90-day finding on two spiders); 69 Fed. Reg. 77158, 77159 (December 27, 2004) (same statement in

negative 90-day finding on three species of fish). These recent decisions demonstrate that the Service is aware of its limited scope of review for a 90-Day finding, yet cast this limitation aside in soliciting information from hand-selected third parties in this case. This Court should follow the analysis in *Kemphorne and Morgenweck* and find that the Service violated the ESA here.

Finally, the Service argues that its solicitation of third-party opinions and information was “essentially equivalent to a trip to the library” to gather information, and, thus, did not run afoul of the ESA. *See* Response Brief, p. 19. The Service is mistaken. The ESA expressly requires that the Service make a 90-Day finding based on “whether the petition presents substantial scientific and commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A). In other words, under the terms of the ESA, the Service is limited to reviewing the information presented in the petition.

In its Response Brief, the Service relies on an agency policy entitled Petition Management Guidance (“PMG”), to justify its expansive reading of these statutory requirements to allow the Service to consider “not only information submitted with the petition, but also other information available in its files.” *See* Response Brief, pp. 3-4. The Service’s reliance on the PMG is misplaced, however, since the Service has been permanently enjoined from applying the PMG nationwide. *See American Lands Alliance v. Norton*, No. 00-2339, 2004 U.S. Dist. LEXIS 27533 (June 2, 2004), *appeal dismissed*, No. 03-5201, 2004 U.S.App. LEXIS 15243 (D.C. Cir. July 21, 2004). *See also Kemphorne*, 448 F.Supp.2d at 177.

Further, irrespective of the continued viability of the PMG, the Service’s efforts here to collect additional information and opinions from hand-selected third parties go beyond its own stated definition of information “available” in its files. *See* Response Brief, pp. 3-4. According to the Service, “[f]or purposes of the 90-day finding, the Service will define as ‘available’

information contained in the petition, information in Service files, or information that is contained in readily available reference sources.” *See AR 2127-28*. The Service’s own definition of “available” thus precludes information gathered as a result of the Service’s targeted information campaign to obtain data from hand-selected third parties to dispute the information contained in the petition. Accordingly, the Service has even run afoul of its own expanded interpretation of the proper scope of review here.

IV. AMICI’S ARGUMENTS ARE MERITLESS

Amici Curiae Idaho Farm Bureau Federation and Pacific Legal Foundation urge this Court to superimpose the evidentiary standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), onto this Court’s review under the APA and ESA. This Court should reject this invitation to rewrite the ESA for three reasons.

First, *Daubert* construed the Federal Rules of Evidence, which are inapplicable in administrative law cases reviewed on the basis of an administrative record and under the APA standard of review. Under the Federal Rules of Evidence, federal judges assume a gatekeeper role by screening expert evidence to ensure that it meets reliability and relevance standards and to shield juries from evidence that fails to meet those standards. In administrative cases, it is the federal agencies that screen and assess the weight of scientific evidence, not federal judges.

Second, the APA provides its own standard of review that has been construed to limit courts to ferreting out irrational decisionmaking, where, for example, the agency disregards relevant evidence, acts contrary to the evidence in the record, or violates its governing statute. In *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983), the Supreme Court has announced the appropriate standards, and this Circuit has applied them in reviewing ESA decisions. *See, e.g., Pacific Coast Fed. of Fishermen’s Ass’n v. NMFS*, 265 F.3d

1028, 1034 (9th Cir. 2001); *see also Stewart v. Potts*, 996 F. Supp. 668, 678 n.8 (S.D. Tex. 1998) (*Daubert* inapplicable to APA arbitrary and capricious review). And this Court has applied the APA review standard in scrutinizing ESA listing determinations. *See Western Watersheds Project v. Foss*, 2005 WL 2002473 (D. Id. 2005); *Western Watersheds Project v. Foss*, 2006 WL 2868846 (D. Id. 2006).

Third, the ESA has its own standard governing scientific evidence. Under the ESA, the Service “shall make determinations . . . solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). The Ninth Circuit has explained that the ESA’s best available science mandate gives “the benefit of the doubt to the species.” *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988). The ESA’s best available science mandate compels the Service to use the best available science, even if it is imperfect and still evolving. The Ninth Circuit has instructed that “incomplete information . . . does not excuse the failure to comply with the statutory requirement . . . of using the best information available.” *Id.* ESA listing decisions must be based on “the scientific information presently available” and “preventive action to protect species [must] be taken sooner rather than later.” *See Defenders of Wildlife*, 958 F. Supp. 670, 680 (D.D.C. 1997). The Service cannot disregard the science that is available today in the hope that better, more definitive science will emerge in the coming years. *See American Wildlands v. Norton*, 193 F. Supp.2d 244, 251 (D.D.C. 2002) (the best available science mandate requires protection before conclusive evidence that the species is headed for extinction); *Defenders of Wildlife v. Babbitt*, 958 F. Supp. at 679 (“The [ESA] contains no requirement that the evidence be conclusive in order for a species to be listed”).

Thus, it would be wholly inappropriate for the Court to borrow the *Daubert* standard preferred by the Idaho Farm Bureau Federation and Pacific Legal Foundation, and graft this standard onto the ESA and APA.

CONCLUSION

For the foregoing reasons, this Court should grant Western Watersheds' motion for summary judgment; deny the Service's cross-motion for summary judgment; reverse and remand the Service's May 2005 decision; find that the listing petition satisfies the requirements of ESA Section 4(b)(3); and order the Service to proceed promptly with a status review.

Dated this 20th day of December 2006.

Respectfully Submitted,

/s/

Todd C. Tucci

Attorney for Plaintiff

NOTICE OF ELECTRONIC SERVICE

I hereby certify that on this 20th day of December, 2006, I caused true and correct copies of the foregoing PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, AND RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT to be served via CM/ECF upon the following counsel of record in this matter:

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