IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

USA FARM LABOR, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:23-cv-96
	)	
JULIE SU, in her official capacity as Acting Secretary of Labor, *et al.*,	)	
	)	
Defendants.	)	

Defendants' Opposition to Plaintiffs' Motion to Complete the Record

INTRODUCTION

The purpose of the consultation requirement of Rule 7.1(b) is to narrow the issues that must be presented to the court by motion. Not all issues can be narrowed and thus detailed consultation is not always required. But where, as here, there are issues that could be resolved, consultation is the rule.

Plaintiffs did not consult before filing their motion to complete the record and for that reason their motion should be summarily denied. Defendants produced the administrative record to them on October 30, 2023, via a secure download link. But at no time between October 30 and their filing of their motion on January 10, 2024, did Plaintiffs raise their issues with the Defendants. Many of the issues in their motion amount to technological issues with the documents in the record and can be remedied. Other questions posed regarding file names can be answered. Defendants

plan to correct many of the issues raised by Plaintiffs by the February 1, 2024 deadline requested by Plaintiffs in their motion *and would have done so months ago had Plaintiffs alerted them to the issues*. Instead, Plaintiffs waited until the Court's deadline to file a motion seeking to complete the record. Such tactics are, at best, yet another effort to delay the district court litigation pending the Fourth Circuit's decision.

Plaintiffs also request generalized categories of documents to support policy statements contained in the Final Rule. Defendants produced the record and intend to refile and re-serve the Certified Administrative Record by February 1, 2024, as requested in Plaintiffs' motion, with technical corrections to address technological issues that may have prevented Plaintiffs from accessing everything included in the record already provided to them. There is no more information to add. The agency's designation is entitled to a presumption of regularity, and generalized complaints that there may be additional documents out there do not suffice to overcome that presumption.

Plaintiffs' motion should be denied. It should be summarily denied for failing to meet and confer, and it should be denied on the merits because Plaintiffs fail to show that the information they seek exists.

APPLICABLE LAW

Local Rule 7.1(b) provides:

Requirement of Consultation. Civil motions must show that counsel have conferred and attempted in good faith to resolve areas of disagreement or describe the timely attempts of the movant to confer with opposing counsel. A motion that fails to show that the parties have properly conferred or attempted to confer may be summarily denied. Consultation is not required for: (1) dispositive motions; (2) motions where the moving party is represented and the non-moving party is unrepresented; or (3) motions for an extension of time to file a responsive pleading to a complaint, counterclaim, crossclaim, or any other initial petition for relief.

The court may summarily deny a motion that fails to show the parties properly conferred or attempted to confer. *See Branch v. Jefferson Capital Sys., LLC,* No. 3:23CV527-GCM, 2023 U.S. Dist. LEXIS 208762, at *2 (W.D.N.C. Nov. 21, 2023). On the merits, an administrative record may be 'supplemented' in one of two ways—either by (1) including evidence that should have been properly a part of the administrative record but was excluded by the agency, or (2) adding extrajudicial evidence that was not initially before the agency but the party believes should nonetheless be included in the administrative record." *WildEarth Guardians v. Salazar*, 670 F. Supp. 2d 1, 5 n. 4 (D.D.C. 2009). An agency is "'entitled to a strong presumption of regularity that it properly designated the administrative record,' and therefore supplementation of the record is 'the exception not the rule.'" *South Carolina Coastal Conservation League v. Ross*, 431 F.Supp.3d 719, 723 (D.S.C 2020), *quoting Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Sec.*, 2017 WL

3189446 at *12. This presumption can only be overcome if a plaintiff both provides "non-speculative grounds for the belief that the documents were considered by the agency and not included in the record" and identify the materials allegedly omitted from the record with sufficient specificity, as opposed to merely proffering broad categories of documents and data that are 'likely' to exist as a result of other documents that are included in the administrative record." *Id.*

ARGUMENT

Plaintiffs' motion for completion of the record should be summarily denied because the motion does not state that the parties conferred and attempted in good faith to resolve areas of disagreement. *See* ECF 64. Plaintiffs' motion fails to show precisely what Local Rule 7.1(b) requires. Nor is this failure a mere technicality. Not only did Plaintiffs fail to include this information in their motion, but they also failed to consult with Defendants regarding this motion, much less make any good faith attempt to resolve the issues raised in it. Rather, Plaintiffs' counsel sent a pro forma email the day the motion was due stating they would be filing a motion to complete the record and a second motion to supplement. As to the motion to complete the record, they stated:

> We intend to file two motions today. First, a motion to complete the administrative record. This motion identifies deficiencies in the administrative record, places where the Final Rule refers to considerations made by DOL for which there is no evidence in the record.

Ex. 1. Thus, Plaintiffs did no more than announce their intention to file the motion later that day and asked for Defendants' attorney for "your position on these motions." *Id*. As framed, Plaintiffs' email suggested there was no room for negotiation and substantive consultation would be fruitless, and the undersigned counsel opposed. Had that in fact been the case, that would have been the end of the matter. *See Raycap Asset Holdings LTD v. Gora LLC*, No. 3:20-CV-00363-KDB-DCK, 2023 U.S. Dist. LEXIS 83122, at *6 (W.D.N.C. May 11, 2023) ("At the hearing on Defendants' Motion for Summary Judgment, Defense counsel stated on the record that Defendants would oppose a motion to amend the complaint at this stage. This statement rendered any consultation likely futile."). In fact, the motion contains numerous technical points and misunderstandings by the Plaintiffs that can be resolved without court intervention.

Plaintiffs' concerns with technical and other details of the Administrative Record are precisely the kinds of issues that can be addressed and likely resolved through the meet and confer process, and indeed, could have been addressed months ago. Plaintiffs' issues include:

- They did not view receipt of a secure download link to the record to be proper service;
- They could not locate the certification of Brian Pasternak within the downloaded record files;
- Spreadsheets produced in native form were missing references or formulae;
- Plaintiffs could not identify certain other files within the record.

See Mot. at 13-18.

As an initial matter, most if not all of Plaintiffs' complaints do not meet the threshold to declare the record unsound. For example, certifications are not required (though it was produced). *See Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Sec.*, Civil Action No. ELH-16-1015, 2017 U.S. Dist. LEXIS 117545, at *25 (D. Md. July 27, 2017). And so long as the agency's path can be determined, the exclusion of some documents that may provide additional context for the agency's decision but which are unnecessary to understand it is not fatal. *See Chestnut v. Jaddou,* Civil Action No. 3:21-0497-MGL, 2022 U.S. Dist. LEXIS 162107, at *8 (D.S.C. Sep. 7, 2022).

But more importantly, if Plaintiffs' counsel had raised any of these issues with the undersigned counsel *at any point in time*, the parties could have *easily* resolved the issues. These are not the types of issues that should delay a litigation. But by failing to raise them with Defendants' counsel at any time in November, December, or before filing their motion in January, Plaintiff have done just that—they've introduced unnecessary delay into a litigation that they had claimed was so urgent that they needed both a preliminary injunction and a temporary restraining order. ECF 12 & 46. Accordingly, because of Plaintiffs' failure to consult, or even to attempt to consult, concerning the matters raised in their motion, the motion should be summarily denied. L.R. 7.1(b); *see also Branch*, 2023 U.S. Dist. LEXIS 208762, at *2 ("Plaintiff's Motion does not include any representation that Plaintiff contacted

or attempted to contact defense counsel regarding the Motion to Strike. Accordingly, the Motion is improper and will be dismissed as such.").

Turning to the merits of Plaintiffs' motion, an agency is "'entitled to a strong presumption of regularity that it properly designated the administrative record,' and therefore supplementation of the record is 'the exception not the rule.'" *South Carolina Coastal Conservation League*, 431 F.Supp.3d at 723 (D.S.C 2020), *quoting Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Sec.*, 2017 WL 3189446 at *12. Plaintiffs here fail to overcome that presumption. They have neither provided "non-speculative grounds for the belief that … documents were considered by the agency and not included in the record" nor identified materials allegedly omitted from the record with any specificity. *See id*. Plaintiffs merely proffered broad categories of documents and data they presume are likely to exist based on documents included in the administrative record. *See id.*

Many of Plaintiffs' complaints amount to technological issues with the documents provided. Defendants are working to remedy them as quickly as possible. Defendants hope to have it completed by February 1, 2024, as requested in Plaintiffs' motion. Once complete, Defendants will re-file the Certified Administrative Record and re-serve it on Plaintiffs, on disk, via U.S. Mail, to avoid arguments that the download link was insufficient.

Plaintiffs' counsel also claims that the administrative record was not filed with the Court. Mot. at 5. Defendants did in fact file the record with the Court after the

hearing on December 11, 2023, and a Notice of Conventional Filing was filed. ECF 59. Defendants understand that the clerk's office is in possession of the thumb drive containing the administrative record and that any indications to the contrary made to Plaintiffs' counsel were simply a mistake.

Along a similar vein, Plaintiffs claim they cannot find certain historical program data. Mot. at 17-18. That information, however, is publicly available via links contained in the Index to the Certified Administrative Record. Specifically, the historical program data for Exhibit 3 at 88 Fed. Reg. 12797 may be accessed via the links provided in Index Nos. 43 and 95-103. We recognize those links may not have worked for Plaintiffs, and the refiled Certified Administrative Record will include revised links for accessing that information.

Finally,[1] Plaintiffs assert the record is incomplete because they cannot find documents in the record supporting certain policy judgments of the agency. Br. at 10-14. That argument belongs in a motion for summary judgment. The Final Rule explains DOL's policy decisions and judgments. The record is complete as to the policy judgments raised in Plaintiffs' motion and Defendants have nothing more to provide on any such judgments.

[1] Plaintiffs also make merits arguments throughout in their motion, which Defendants will not respond to here. Motions for Summary Judgment are the appropriate place for arguments about the merits of the Final Rule, not a motion to complete the record.

CONCLUSION

All the issues Plaintiffs raise in their motion could have been resolved, or at least substantially narrowed, by meeting, conferring, and attempting in good faith to resolve them, without a motion to the Court. Plaintiffs preferred to delay and seek redress from this Court in the first instance. Defendants will address the technical issues raised by Plaintiffs with respect to the documents produced by February1, 2024. Defendants urge the Court to deny Plaintiffs motion in its entirety both because Plaintiffs failed to meet and confer and because the motion lacks merit. The case schedule should not be delayed further.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2024, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

By: */s/ Alexandra McTague*
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