EXHIBIT 9

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RE: *Gill v. DOJ, et al.*, No. 3:14-cv-03120 (N.D. Cal.)

Dear Counsel,

We are in receipt of your letter, dated August 30, 2015, in which Plaintiffs again request an expansion of the Administrative Record and in which Plaintiffs contend that they are entitled to jurisdictional discovery. The Court has already denied Plaintiffs' request to conduct jurisdictional discovery, Dkt. 72. With regard to the Administrative Record, Plaintiffs misapprehend the law.

I. The Administrative Record is Complete

"Supplementation of the administrative record 'decidedly is the exception not the rule.'" *California v. U.S. Dep't of Labor*, No. 13-02069, 2014 WL 1665290 at *3 (E.D. Cal. Apr. 24, 2014) (quoting *Motor Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1104 n.18 (D.C. Cir. 1979)). Supplementation is only permitted in the following "limited circumstances":

1. if admission is necessary to determine "whether the agency has considered all relevant factors and explained its decision,"
2. if "the agency has relied on documents not in the record,"
3. "when supplementing the record is necessary to explain technical terms or complex subject matter," or
4. "when plaintiffs make a showing of agency bad faith."

Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005) (quoting *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)).

No showing has been made that any of these circumstances exist as to the record that has been submitted regarding the definition of suspicious activity used in the Functional Standard. Plaintiffs argue instead that the Administrative Record must include every document considered in the development of the Functional Standard. We do not agree. Plaintiffs' claims solely challenge the permissibility of this "reasonably indicative" standard, and its conformance with 28 C.F.R Part 23. The Administrative Record need not contain information relating to other aspects of the Functional Standard.

While the Complaint makes reference to the Functional Standard, and challenges the collection, maintenance and dissemination of suspicious activity reports, the claims and relief sought all flow from and relate to the definition of suspicious activity. As the Court observed, "Plaintiffs contend that defendants Department of Justice ("DOJ") and the Program Manager-Information Sharing Environment ("PM-ISE") have issued protocols utilizing an overly broad standard to ***define*** the types of activities that should be deemed as having a potential nexus to terrorism." Dkt. 38 at 1 (emphasis added). The Administrative Record presented by the PM-ISE is thus appropriately limited to that definition.

To the extent Plaintiffs challenge the record that has been submitted regarding the definition of suspicious activity set forth in the Functional Standard, Plaintiffs bear the burden to rebut the presumption that the PM-ISE has submitted a complete record. *Wildearth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243, 1253 (D. Colo. 2010). To carry that burden, Plaintiffs must "show by clear evidence that the record fails to include documents or materials considered by [Defendants] in" adopting the definition of suspicious activity. *Id*. This requires Plaintiffs to "clearly set forth" (1) "when the documents were presented to the agency"; (2) "by whom"; and (3) under "what context." *Id*. at 1254. Requiring Plaintiffs to carry this burden ensures that the Court conducts its primary task of reviewing "the record the agency presents to the reviewing court." *Fla. Power & Light Co v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court [in an Administrative Procedure Act challenge] is to apply the appropriate [APA] standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."). Plaintiffs fail to make that showing.

Plaintiffs fail to provide any clear evidence that the materials referenced in your letter or appendix were presented to the PM-ISE in adopting the current definition of suspicious activity or the context in which they were presented. Indeed, Plaintiffs assert that only one of the categories of documents that Plaintiffs claim are missing from the Administrative Record—Category No. 14 in the appendix accompanying your letter ("Documents related to the NCTC-led interagency group definition of "suspicious activity")—relates to previous definitions of suspicious activity. But even this entry fails to clearly set forth what documents were presented to the agency in the development of such previous definitions (to the extent such definitions are relevant), by whom, and under what context. As the record makes clear, advocacy groups such as the ACLU have been intimately involved in developing the definition of suspicious activity in the Functional Standard. Your organization is thus well positioned to make this required showing and yet has failed to do so here.

Plaintiffs' insufficient showing here stands in stark contrast to the showing in *Natural Res. Def. Council, Inc. v. Train*, 519 F.2d 287, 292 (D.C. Cir. 1975), and *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 36-37 (N.D. Tex. 1981), referenced in your letter, where plaintiffs made this required showing. In *Train*, plaintiffs demonstrated by affidavit that several documents had been omitted from the record. 519 F.2d at 291. And in *Exxon Corp*., not an "iota of documentary 'evidence' [was] furnished" in support of the agency action challenged, and plaintiff was able to point to certain records considered in the agency decision that were omitted from the administrative record. 91 F.R.D. at 34. Neither case thus provides any support for supplementing the record here.

Nonetheless, in the interest of ensuring that the Administrative Record regarding the definition of suspicious activity in the Functional Standard is complete, and to ensure full compliance with the meet and confer ordered by the Court regarding that record, the PM-ISE has reviewed the categories of documents identified in the appendix attached to Plaintiffs' letter to determine if that record should be supplemented. Based upon that review, the PM-ISE has identified a limited universe of non-privileged documents (five pages) relating to a May 20, 2010 Privacy and Civil Liberties Advocacy Group Roundtable that were inadvertently omitted from the administrative record. These documents will be filed forthwith.

II. Deliberative Materials Are Immaterial To The Court's Review

Plaintiffs also continue to insist that the record must be supplemented to include deliberative materials, and that deliberative materials excluded from the record must be logged in a privilege log.

It is well established that deliberative material is not part of the administrative record. *See e.g*., *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44-45 (D.C. Cir. 1986) (*en banc*) (refusing to supplement the administrative record to consider transcripts of deliberative agency proceedings); *Norris & Hirshberg v. SEC*, 163 F.2d 689, 693 (D.C. Cir. 1947) ("internal memoranda made during the decisional process . . . are never included in a record"). "When a party challenges agency action as arbitrary and capricious the reasonableness of the agency's actions is judged in accordance with the stated reasons" set forth in the administrative record. *In re Subpoena Duces Tecum*, 156 F.3d 1279, 1279 (D.C. Cir. 1998). "Agency deliberations not part of the record are deemed immaterial" in an agency action challenged as arbitrary and capricious. *Id*. (citing *Camp v. Pitts*, 411 U.S. 138 (1973) and *United States v. Morgan*, 313 U.S. 409 (1941)). "That is because the actual subjective motivation of agency decisionmakers is immaterial as a matter of law – unless there is a showing of bad faith or improper behavior." *Id*. at 1279-1280. Because Plaintiffs allege neither bad faith nor improper behavior, Defendants acted in accordance with this law in excluding deliberative documents from the record.

And "[s]ince deliberative documents are not part of the administrative record, an agency that withholds these privileged documents is not required to produce a privilege log to describe the documents that have been withheld." *Nat'l Ass'n of Chain Drug Stores v. U.S. Dep't of Health & Human Servs.*, 631 F. Supp. 2d 23, 27 (D.D.C. 2009); *see also California v. U.S. Dep't of Labor*, No. 2:13-CV-02069-KJM, 2014 WL 1665290, at *13 (E.D. Cal. Apr. 24, 2014) ("[B]ecause internal agency deliberations are properly excluded from the administrative record, the agency need not provide a privilege log."). Contrary to what Plaintiffs assert, *Tafas v. Dudas*, 530 F. Supp. 2d 786,

800-01 (E.D. Va. 2008), does not set forth a contrary rule. Rather, the court there recognized that there is no need to claim privilege and serve a privilege log as to deliberative documents in an APA proceeding because such documents are not part of "the administrative record in the first place.'" *Id.* at 801 (quoting *Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 372 n.4 (D.D.C. 2007)).

Sincerely,

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