IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL, CENTER FOR BIOLOGICAL DIVERSITY, HUMAN SOCIETY INTERNATIONAL, and HUMAN SOCIETY OF THE UNITED STATES,

Plaintiffs,

v.

DAVID BERNHARDT, in his official capacity as Secretary of the Interior, DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, and AURELIA SKIPWITH, in her official capacity as Director of the U.S. Fish and Wildlife Service,

Defendants.

Case No. 18-cv-6903 (AJN)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(h)(3) AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: (212) 637-2663
E-mail: jennifer.jude@usdoj.gov

JENNIFER JUDE
Assistant United States Attorney
– Of Counsel –

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

Regulations

Defendants David Bernhardt, Secretary of the Interior (the "Secretary"); the U.S. Department of the Interior ("Interior"); the U.S. Fish and Wildlife Service ("FWS"); and Aurelia Skipwith, Director of FWS (collectively, "Defendants"),[1] respectfully submit this memorandum of law in support of their motion to dismiss pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure, and in opposition to the motion for summary judgment filed by Natural Resources Defense Council, Center for Biological Diversity, Humane Society International, and Humane Society of the United States (collectively, "Plaintiffs"), Dkt. No. 73.

PRELIMINARY STATEMENT

The International Wildlife Conservation Council (the "IWCC" or the "Council") ceased to exist on December 21, 2019, when its two-year charter expired. The Council will not meet or conduct any business again, it can no longer be renewed, and there no plan to establish another committee with a similar mission or scope in the future. Ultimately, the IWCC did not vote on or make any recommendations or otherwise provide any advice or work product to Defendants. Defendants did, however, disclose all records covered by Section 10(b) of the Federal Advisory Committee Act ("FACA") (with respect to both the full Council and its subcommittees). Because the Council no longer exists and did not make any recommendations, there is no meaningful relief the Court could grant in response to Plaintiffs' claims related to the Council's formation, composition, ethics provision, or meetings, all of which are moot. And because Defendants have already disclosed all Council and subcommittee records, Plaintiffs' claims seeking records disclosure too are moot. As there is no longer a live case or controversy, this

[1] Aurelia Skipwith has been automatically substituted as a defendant for former federal officials sued in their official capacities pursuant to Federal Rule of Civil Procedure 25(d).

case should be dismissed for lack of subject matter jurisdiction under Rule 12(h)(3) of the Federal Rules of Civil Procedure.

BACKGROUND

I. Factual Background

Interior announced the establishment of the IWCC on November 8, 2017, via a notice in the Federal Register. DOI_0001.[2] The IWCC was formally established on December 21, 2017, with the filing of its charter. DOI_0022. According to the charter, the IWCC would meet "approximately two times annually," and would terminate after two years unless it was renewed, DOI_0023, as required by FACA. *See* 5 U.S.C. App. II § 14(a)(2)(A) (advisory committee authority expires after two years unless the committee is "renewed . . . by appropriate action prior to the end of such period."); 41 C.F.R. § 101-6.1015(a) ("appropriate action" to renew a committee includes publication of a notice of renewal in the Federal Register). The IWCC's charter provides that "subcommittees may be formed to compile information or conduct research. However, such subcommittees must act only under the direction of the [Designated Federal Officer] and must report their recommendations to the full Council for consideration. Subcommittees must not provide advice or work products directly to the Agency." DOI_0025.

During its existence, the IWCC held a total of five meetings—on March 16, 2018, June 19, 2018, September 26-27, 2018, March 14-15, 2019, and October 16-17, 2019. DOI_0327, DOI_0520, DOI_0830, DOI_2136, DOI_2763 (agendas); Declaration of Eric Alvarez ("Alvarez Decl.") ¶ 8. Each of these meetings was announced in advance by notice in the Federal Register and was open to and attended by members of the public. *See* DOI_0325, DOI_0517, DOI_0828, DOI_2132, DOI_2761. FWS has posted the agendas and minutes and/or transcripts for each of

[2] Citations to "DOI___" refer to pages of the certified administrative record. Dkt. No. 69.

these meetings, as well as all other documents created by or provided to the IWCC on the Council's website.[3] *See* Alvarez Decl. ¶¶ 5-8; DOI_0325-2981.

During the IWCC's first meeting in March 2018, the Council established three subcommittees: Policy, Conservation, and Enforcement/Trafficking. DOI_0515-16. The Council established a fourth subcommittee, Communications, during its second meeting in June 2018. DOI_0659. The four subcommittees met in connection with the meetings of the full IWCC, beginning with the Council's June 2018 meeting. Alvarez Decl. ¶ 9. Minutes were not taken for every subcommittee meeting but all existing minutes have been posted to the Council's website. *See* Alvarez Decl. ¶¶ 5-8; DOI_1899-915, 2978-81. All other records created by or provided to any subcommittee have either been posted to the Council's website or disclosed in connection with this filing. *See* Alvarez Decl. ¶¶ 6(b), 6(e), 7; Declaration of Douglas Hobbs ("Hobbs Decl.") ¶¶ 5-6, 8.

On December 21, 2019, two years after the date it was established, the IWCC ceased to exist because it had not been renewed. Alvarez Decl. ¶ 12. The Council cannot be renewed in the future because its authority has already expired. *See* 5 U.S.C. App. II § 14(a)(2)(A). Nor do Defendants have any plan to re-establish the IWCC or another advisory committee with a similar scope or mission in the future. Alvarez Decl. ¶ 12. Ultimately, neither the IWCC nor any of its subcommittees offered any advice or recommendation on any topic to Defendants. *Id.* ¶ 10; *see also* Hobbs Decl. ¶¶ 4-9.

[3] U.S. Fish & Wildlife Service, International Wildlife Conservation Council, https://www.fws.gov/iwcc/ (last visited February 6, 2020).

II. Procedural History

On August 1, 2018, Plaintiff's commenced this action by filing a four-count complaint alleging violations of FACA.[4] *See* Dkt. No. 1 ¶¶ 99-112. Count One alleges that Defendants failed to make certain required findings in establishing the IWCC. *Id.* ¶¶ 99-102. Count Two alleges that Defendants have not provided the required level of public access to meetings and records. *Id.* ¶¶ 103-05. Count Three alleges that the IWCC is not fairly balanced in its functions and viewpoints. *Id.* ¶¶ 106-09. Count Four alleges that Defendants have not taken sufficient steps to prevent the IWCC from being inappropriately influenced by special interests. *Id.* ¶¶ 110-12.

In response, Defendants filed a motion to dismiss the complaint, Dkt. No. 40, which the Court granted in part and denied in part on September 23, 2019, Dkt. No. 60. Specifically, the Court held that Plaintiffs had standing for their claims, that Counts 3 and 4 were justiciable, and that Plaintiffs had sufficiently pleaded Counts 1 and 2, except that they failed to state a claim that Defendants violated FACA by disseminating some Council documents during, rather than before, Council meetings. *Id.* at 20-21. Notably, the Court held that FACA's requirements applied to the IWCC's subcommittees in addition to the full Council. *Id.* at 21-22. On December 3, 2019, in preparation for the parties' cross-motions, Defendants filed the administrative record. Dkt. No. 69.

In their memorandum in support of their motion for summary judgment, Plaintiffs argue that the IWCC violated several of FACA's provisions and ask the Court to grant summary judgment in their favor on each their remaining claims. Memorandum of Law in Support of

[4] Because FACA does not provide a private right of action, Plaintiffs' claims were brought pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

Plaintiffs' Motion for Summary Judgment ("Pl. Mem."), Dkt. No. 74. As relief for these alleged violations, Plaintiffs ask the Court to "declare that Defendants have violated FACA Sections 5, 9, and 10, FACA's implementing regulations, and the Department Manual"; "order Defendants to open subcommittee and working group records for inspection, and to provide Plaintiffs with access to the internal Council materials they would have received if they were appropriately represented on the Council"; give Defendants "discovery and fact finding necessary to ascertain the full scope of the subcommittees' activities, including any recommendations they rendered directly to the Secretary of the Interior"; and "enjoin Defendants from relying on any IWCC recommendations or work product in future agency actions." *Id.* at 18-19.

ARGUMENT

I. Legal Standards

Under Rule 12(h)(3), "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." On a motion to dismiss under Rule 12(h)(3), the same standards apply as to a motion to dismiss pursuant to Rule 12(b)(1). *Cruz v. AAA Carting & Rubbish Removal, Inc.*, 116 F. Supp. 3d 232, 239 (S.D.N.Y. 2015). "A case is properly dismissed for lack of subject matter jurisdiction . . . when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (citing Fed. R. Civ. P. 12(b)(1)). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id.* "[W]here jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits." *LeBlanc v. Cleveland*, 198 F.3d 353, 356 (2d Cir. 1999).

Ordinarily, summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As here, when "a party seeks review of agency action under the APA, the 'entire case on review is a question of law,' such that '[j]udicial review of agency action is often accomplished by filing cross-motions for summary judgment.'" *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 372 (S.D.N.Y. 2012) (citation omitted); *see Zevallos v. Obama*, 10 F. Supp. 3d 111, 117 (D.D.C. 2014) (quoting *Kadi v. Geithner*, 42 F. Supp. 3d 1, 9 (D.D.C. 2012)), *aff'd*, 793 F.3d 106 (D.C. Cir. 2015) ("[S]ummary judgment [] serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review."); *see also id.* (noting the court's "limited role" "in reviewing the administrative record" and explaining that "[w]hen assessing a summary judgment motion in an APA case, 'the district judge sits as an appellate tribunal'") (citation omitted). A court's review of an agency's action under the APA is generally limited to the administrative record compiled by the agency.[5] *See* 5 U.S.C. § 706; *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam).

II. This Action Should Be Dismissed For Lack of Subject Matter Jurisdiction Because All of Plaintiffs' Claims Are Moot

Under Article III of the Constitution, federal courts are limited to "the adjudication of actual, ongoing controversies between litigants." *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). As recognized by the Second Circuit, "[m]ootness is a jurisdictional matter" relating to Article III's mandate that "federal courts hear only 'cases' or 'controversies.'" *Blackwater v. Safnauer*, 866 F.2d 548, 550 (2d Cir. 1989) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401

[5] The Alvarez Declaration is provided in support of Defendants' Rule 12(h)(3) motion, and is not intended as a supplement to the administrative record.

(1975)). Federal courts cannot "give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). Therefore, a claim should be dismissed as moot when, as a result of changed circumstances, "the parties have no 'legally cognizable interest' or practical 'personal stake' in the dispute, and the court is therefore incapable of granting a judgment that will affect the legal rights as between the parties." *ABN Amro Verzekeringen BV v. Geologistics Americas, Inc.*, 485 F.3d 85, 94 (2d Cir. 2007). The requirement of a live case or controversy exists throughout the litigation and "[i]f events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot." *McBryde v. Comm. to Review*, 264 F.3d 52, 55 (D.C. Cir. 2001).

In cases addressing mootness in the FACA context, courts have distinguished between "claims for document disclosure pursuant to section 10(b), which survive the termination of a FACA advisory committee," and "claims based on FACA's other procedural requirements[, which] are mooted when the relevant advisory committee ceases to exist." *Ctr. for Biological Diversity v. Tidwell*, 239 F. Supp. 3d 213, 223 (D.D.C. 2017); *see Freedom Watch, Inc. v. Obama*, 859 F.Supp.2d 169, 174 (D.D.C. 2012). Here, Plaintiffs have brought both records-related claims under Section 10(b) and non-records claims under other provisions of FACA. Each of these categories of claims are moot, but for different reasons, as discussed below.

1. Plaintiffs' Non-Records Claims Are Moot Because the IWCC Has Dissolved and Made No Recommendations

Plaintiffs bring several FACA claims unrelated to Section 10(b)'s recordkeeping requirements. Specifically, they allege that the IWCC was unlawfully established in violation of Section 9, Pl. Mem. at 11-14, was not fairly balanced in its membership in violation of Section 5(b)(2), *id.* at 14-15, lacked appropriate safeguards against influence by special interests in

violation of Section 5(b)(3), *id.* at 15-17, and held non-public meetings in violation of Section 10(a), *id.* at 18. Plaintiffs ask the Court for a declaratory judgment that Defendants violated these provisions of FACA; for "discovery and fact finding . . . to ascertain the full scope of the subcommittees' activities, including any recommendations they rendered directly to the Secretary"; and for an injunction prohibiting Defendants from relying on any IWCC recommendations or work product (commonly known as a "use injunction"). *Id.* at 18-19. These claims are moot, however, because the IWCC no longer exists.

FACA claims, other than those related to recordkeeping under Section 10(b), "are mooted when the relevant advisory committee ceases to exist." *Tidwell*, 239 F. Supp. 3d at 223; *see Freedom Watch*, 859 F. Supp. 2d at 171, 174 (D.D.C. 2012) (FACA claims related to committee's composition and meetings moot because committee no longer exists); *Citizens for Responsibility & Ethics in Wash. v. Duncan*, 643 F. Supp. 2d 43, 51 (D.D.C. 2009) (dissolution of committee moots claims alleging violation of FACA's open meetings and charter rules). Where a committee has been disbanded, "there will simply be no continuing case or controversy for judicial resolution. Nor will there be any basis for injunctive or other equitable relief. The case will in fact be moot, and defendants will be legally entitled to dismissal." *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 879 F. Supp. 103, 106 (D.D.C. 1994); *see also Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1309 (W.D. Wash. 1994) ("[O]nce a committee has served its purpose, courts generally have not invalidated the agency action even if there were earlier FACA violations."), *aff'd*, 80 F.3d 1401 (9th Cir. 1996).

Indeed, this was the outcome in the only Second Circuit case on point, which Plaintiffs did not cite in their brief. In that case, *National Nutritional Foods Association v. Califano*, after the Food and Drug Administration convened a committee of physicians to advise it on the safety

of protein supplements, a trade association sued, alleging that the committee had not complied with various provisions of FACA, including several those at issue here—Sections 5(b)(2), 5(b)(3), and 10(a)(2). 603 F.2d 327, 334 (2d Cir. 1979). The Second Circuit affirmed the district court's decision that neither an injunction nor a declaratory order was warranted in light of the agency's decision not to reconvene the committee in the future. *Id.* at 336.

The result should be the same here. Because the IWCC no longer exists and will not be meeting again, Alvarez Decl. ¶ 12, Plaintiffs' claims about the Council's formation, the composition of its membership, its procedures with respect to special interests, and its meetings (and those of its subcommittees) are moot. The Court cannot grant any meaningful relief to Plaintiffs, such as ordering that Plaintiffs' representative be given a seat on the Council or ordering the IWCC to institute new procedures, now that the IWCC has dissolved. Indeed, Plaintiffs' request in their complaint for the Court to "enjoin the IWCC and any of its subdivisions from meeting," Dkt. No. 1 at 33, cannot be granted because this result has already come to pass.

Plaintiffs' request for a use injunction—an order prohibiting Defendants from relying on any IWCC recommendations or work product in the future—is also moot. Because the IWCC did not make any recommendations nor create any work product on which Defendants could rely, Alvarez Decl. ¶ 10, there is nothing to enjoin Defendants from doing. Additionally, as numerous courts have recognized, "a use injunction should be the remedy of last resort." *Natural Res. Def. Council v. Pena*, 147 F.3d 1012, 1025 (D.C. Cir. 1998); *see Cargill, Inc. v. United States*, 173 F.3d 323, 342 (5th Cir. 1999). Whether this extreme remedy is appropriate is based on whether it would serve FACA's "principal purposes of public accountability, and avoidance of wasteful expenditures" under the circumstances of each particular case. *Cargill*,

173 F.3d at 342; *see also Akzo-Nobel, Inc. v. United States*, No. 00-30834, 2001 WL 34772206, at *3 ("Injunctive relief is meant to serve a remedial purpose, not a punitive one."). Here, where there have been no recommendations, an injunction would serve no purpose at all.

Further, any declaratory judgment by this Court as to whether any aspect of the IWCC violated FACA is not permitted because it would be purely advisory. *See Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013) ("[I]ssuance of a declaratory judgment deeming past conduct illegal is . . . not permissible as it would be merely advisory."); *Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n*, 680 F.2d 810, 814-15 (D.C. Cir. 1982) ("NRDC seeks a declaration from this court that the initial promulgation of the rule was unlawful, an advisory opinion which federal courts cannot provide."); *Tidwell*, 239 F. Supp. 3d at 226 ("Generally, if a case is moot, a request for declaratory judgment will not resuscitate the lawsuit, unless an exception to the mootness doctrine applies."); *Ass'n of Am. Physicians*, 879 F. Supp. at 106 ("Plaintiffs' suggestion that a declaratory judgment might be appropriate even if the working group has been terminated and all appropriate working group documents have been publicly released is also rejected.").

As such, Plaintiffs no longer have any cognizable interest in their non-records claims and the Court no longer possesses subject matter jurisdiction over those claims.

2. Plaintiffs' Records Claim Is Moot Because All Council Records Have Been Disclosed

As to Plaintiff's Section 10(b) claim, it too is moot. Under Section 10(b), "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection . . . ." 5 U.S.C. § 10(b). Where all such records have already been disclosed, a claim under Section 10(b) is moot. *Duncan*, 643 F. Supp. 2d at 48-50

(dismissing Section 10(b) claim where agency provided declaration attesting that it had already produced all committee records); *Califano*, 457 F. Supp. 275, 281 (S.D.N.Y. 1978), *aff'd* 603 F.2d 327 (2d Cir. 1979) ("Thus, the FDA having made available all existing relevant and material documents and all documents upon which it relied, Count II of plaintiffs' compliant has indeed become moot."); *see Tidwell*, 239 F. Supp. 3d at 228-29 (Section 10(b) claim moot after all materials covered by that section are disclosed); *Assoc. of Am. Physicians*, 879 F. Supp. at 108-09 ("[B]efore the court can find that this case is in fact moot, defendants will have to produce [all] documents" subject to Section 10(b)); *see also Cummock v. Gore*, 180 F.3d 282, 290 (D.C. Cir. 1999) (plaintiff's "injury is redressable by the relief she seeks—namely, access to documents to which she is entitled under FACA").

Here, because Defendants have already disclosed all IWCC records covered by Section 10(b)—as to both the full Council and all of its subgroups,[6] Alvarez Decl. ¶¶ 5-8; Hobbs Decl. ¶¶ 4-9—there is no remaining relief that could be awarded to redress Plaintiffs' alleged injuries. Accordingly, Plaintiffs' Section 10(b) claim too is moot.

[6] In its order on Defendants' motion to dismiss, the Court held that FACA's requirements applied to the IWCC's subcommittees by operation of provision of Interior's manual, which at the time (it has since been rescinded) extended FACA's requirements to subcommittees. Dkt. No. 60 at 21-22. In its analysis, the Court noted that "the only case of which it is aware that has directly addressed this issue directly reached the same conclusion, citing a January 2019 opinion by the U.S. District Court for the District of Montana, *W. Org. of Res. Councils v. Bernhardt* ("*WORC*"), 362 F. Supp. 3d 900, 914 (D. Mont. 2019). Dkt. No. 60 at 22. As Plaintiffs noted in their brief, however, the *WORC* court subsequently "revisited its holding and determined that the [Interior] Manual *did not* bind Defendants." *See* Pl. Mem. at 18 (citing *W. Org. of Res. Councils v. Bernhardt*, 412 F. Supp. 3d 1227, 1237 (D. Mont. 2019)). Defendants respectfully maintain that Interior's manual does not contain binding authority for the reasons stated in their memoranda in support of their motion to dismiss, *see* Dkt. No. 41 at 33-34, Dkt. No. 52 at 13 n.10, and for the reasons discussed in the more recent *WORC* decision, including that "the fact that Chapter 2 of the Manual has since been unilaterally rescinded by [Interior] without notice and comment, distinguishes it from a binding regulation." *WORC*, 412 F. Supp. 3d at 1237 (internal citations omitted).

3. No Exception to the Mootness Doctrine Applies Here

Finally, neither of the recognized exceptions to mootness apply in this case. It is true that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation and internal quotation marks omitted). However, Defendants did not "voluntarily cease" any practice. Rather, the IWCC terminated automatically after two years as provided for in FACA and in the Council's charter. Accordingly, the voluntary cessation doctrine is inapt.

Moreover, this doctrine does not apply where "(1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Chocho v. Shanahan*, 308 F. Supp. 3d 772, 774 (S.D.N.Y. 2018) (quoting *MHANY Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016)). The IWCC cannot be renewed, and its dissolution prior to making any recommendations to Defendants has completely eradicated the effects of the FACA violations that Plaintiffs allege. *See Tidwell*, 239 F. Supp. 3d at 225 (finding no reasonable expectation of recurrence of alleged FACA violations); *Duncan*, 643 F. Supp. 2d at 51 (same).

The mootness exception for disputes "capable of repetition, but evading review" also does not apply here. "That exception applies only in exceptional situations, where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (brackets and internal quotation marks omitted). The "reasonable expectation of repetition must

be more than a mere physical or theoretical possibility." *Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 86 (2d Cir. 2005).

This case satisfies neither of this exception's conditions. It is not reasonable to expect that Defendants will reconstitute the IWCC or near-identical committee such that Plaintiffs will be subject to the same alleged injuries again. To do so would require Defendants to restart the advisory committee formation process from the very beginning, and undergo the notice and comment process again. And if Defendants were to establish a similar committee in the future, Plaintiffs could bring another case premised on the facts of that particular committee in the appropriate federal court. Further, the typical duration of a federal advisory committee is not too short to allow a FACA challenge to be fully litigated prior to expiration such that a challenged would "evade review." *See Spencer v. Kenma*, 523 U.S. 1, 17-18 (1998).

In sum, because the IWCC no longer exists, it made no recommendations, all documents covered by Section 10(b) have been disclosed, and no exception to the mootness doctrine applies, the Court no longer has subject matter jurisdiction over this matter and it should be dismissed pursuant to Federal Rule of Civil Procedure 12(h)(3).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion to dismiss and deny Plaintiffs' motion for summary judgment.

Dated: February 7, 2020

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York

By: */s/ Jennifer Jude*
JENNIFER JUDE
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2663
Email: jennifer.jude@usdoj.gov