IGNACIA S. MORENO
Assistant Attorney General
PETER C. WHITFIELD (HI 8749)
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
peter.whitfield@usdoj.gov
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: 202.305.0430
Facsimile: 202.305.0506

Attorneys for Defendants

FEDERAL TRANSIT ADMINISTRATION; LESLIE ROGERS, in his official capacity as Federal Transit Administration Regional Administrator for Region IX; PETER M. ROGOFF, in his official capacity as Federal Transit Administration Administrator; UNITED STATES DEPARTMENT OF TRANSPORTATION; and RAY LAHOOD, in his official capacity as Secretary of Transportation

NOSSAMAN LLP
Robert D. Thornton (CA 72934)
Admitted *Pro Hac Vice*
rthornton@nossaman.com
18101 Von Karman Avenue, Suite 1800
Irvine, CA 92612
Telephone: 949.833.7800
Facsimile: 949.833.7878

EDWARD V.A. KUSSY (DC 982417)
Admitted *Pro Hac Vice*
ekussy@nossaman.com
1666 K. Street, NW, Suite 500
Washington, DC 20006
Telephone: 202.887.1400
Facsimile: 202.466.3215

[*caption continued*]

CARLSMITH BALL LLP
JOHN P. MANAUT (HI 3989)
jpm@carlsmith.com
LINDSAY N. MCANEELEY (HI 8810)
lmcaneeley@carlsmith.com
ASB Tower, Suite 2200
1001 Bishop Street
Honolulu, HI 96813
Telephone: 808.523.2500
Facsimile: 808.523.0842

ROBERT C. GODBEY (HI 4685)
Corporation Counsel
DON S. KITAOKA (HI 2967)
dkitaoka@honolulu.gov
GARY Y. TAKEUCHI (HI 3261)
gtakeuchi@honolulu.gov
Deputies Corporation Counsel
City and County of Honolulu
530 S. King Street, Room 110
Honolulu, HI 96813
Telephone: 808.768.5248/808.768.5240
Facsimile: 808.768.5105

Attorneys for Defendants

THE CITY AND COUNTY OF HONOLULU and
WAYNE YOSHIOKA, in his official capacity as
Director of the City and County of Honolulu
Department of Transportation Services

[*caption continued*]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

HONOLULUTRAFFIC.COM; CLIFF SLATER; BENJAMIN J. CAYETANO; WALTER HEEN; HAWAI‘I’S THOUSAND FRIENDS; THE SMALL BUSINESS HAWAI‘I ENTREPRENEURIAL EDUCATION FOUNDATION; RANDALL W. ROTH; and DR. MICHAEL UECHI, Plaintiffs, vs. FEDERAL TRANSIT ADMINISTRATION; LESLIE ROGERS, in his official capacity as Federal Transit Administration Regional Administrator; PETER M. ROGOFF, in his official capacity as Federal Transit Administration Administrator; UNITED STATES DEPARTMENT OF TRANSPORTATION; RAY LAHOOD, in his official capacity as Secretary of Transportation; THE CITY AND COUNTY OF HONOLULU; WAYNE YOSHIOKA, in his official capacity as Director of the City and County of Honolulu, Department of Transportation Services, Defendants.	CIVIL NO. 11-00307 AWT **REPLY IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS; SUPPLEMENTAL DECLARATION OF FAITH MIYAMOTO; CERTIFICATE OF COMPLIANCE; CERTIFICATE OF SERVICE**

REPLY IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

I. INTRODUCTION.

Plaintiffs challenge Defendant Federal Transit Administration's ("FTA") issuance of the Record of Decision for the Honolulu High-Capacity Transit Corridor Project ("Project") under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, Section 4(f) of the Department of Transportation Act ("Section 4(f)"), 49 U.S.C. § 303, and Section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.* Defendants' Motion for Partial Judgment on the Pleadings ("Motion") seeks dismissal of several of Plaintiffs' Section 4(f) claims because Plaintiffs failed to raise these claims during the lengthy administrative process leading to the approval of the Project.

In their Opposition, Plaintiffs failed to identify any comments they submitted with respect to the following Section 4(f) Sites: Merchant Street Historic District, DOT Harbors Division Building, the Pacific War Memorial Site, Makalapa Navy Housing District, Hawai'i Employers Council, or the Tamura building. Instead, Plaintiffs rely on generalized comments submitted about the remaining Section 4(f) Sites mentioned in their Complaint.

Plaintiffs also cite several extremely general comments regarding potential impacts of the Project. These comments do not satisfy the requirement that a person challenging an agency's action "must 'structure their participation [in the

administrative process] so that it . . . alerts the agency to the [parties] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 533 (1978)). Given the site specific requirements of Section 4(f), Plaintiffs' comments were insufficient. Plaintiffs' have therefore waived their Section 4(f) claims regarding these Section 4(f) Sites.

Additionally, Defendants seek to dismiss the claims of Plaintiffs Benjamin Cayetano, Walter Heen, Randall Roth, and the Small Business Hawai'i Entrepreneurial Education Foundation (collectively, "Certain Plaintiffs") because they entirely failed to participate in the administrative process. Plaintiffs essentially concede that Certain Plaintiffs failed to participate in the administrative process. Plaintiffs' Opposition cites Paragraph 15 of their Complaint as support for the assertion that Certain Plaintiffs "actively participated in public processes related to approval of the Project," but they have failed to present any comments submitted by these Plaintiffs. (Opp'n at 2.) They argue that Certain Plaintiffs are nevertheless entitled to bring their claims. Under *Public Citizen*, however, Certain Plaintiffs have waived their claims, as they failed to participate in the public review process; allowing Certain Plaintiffs to proceed would defeat the entire purpose underlying the public review process.

Plaintiffs claim Defendants' Motion is premature. (Opp'n at 13.) They argue that, without the existence of the administrative record, they cannot properly defend against Defendants claims. (*Id.*) Defendants referenced all known comments that Plaintiffs made during the comment periods of the public review process.[1] Presumably, Plaintiffs are familiar with any comments they submitted and are able to bring any additional comments to the Court's attention. That they failed to do so indicates such "additional" comments do not exist.

II. ARGUMENT.

A. Defendants' Motion is Proper.

1. *The Court Is Not Bound to Accept Threadbare or Conclusory Statements As True.*

Plaintiffs argue Defendants' Motion is "impermissibly premised" on the assumption that certain allegations in Plaintiffs' Complaint are not true, and that the Court must accept as true their allegation that all Plaintiffs participated in the public review process for the Project and that all have exhausted available administrative remedies.[2] (Opp'n at 9-10.)

---

[1] Plaintiffs identified comments made by Michelle Matson, although none of Ms. Matson's comments identified her as a member of Honolulutraffic.com. In fact, Plaintiffs' Exhibit "G" to the Declaration of Matthew Adams in Support of Plaintiffs' Opposition indicates that Ms. Matson's interest was a "family" one "in a historic property deeded to the state, in trust . . . ." (Adams Decl., Ex. G at ¶ 3.)

[2] Because Plaintiffs' six additional allegations do not address comments related to the Section 4(f) Sites or participation by Certain Plaintiffs, they are immaterial for the purposes of Defendants' Motion.

It is well established that "the tenet that a court must accept all material allegations is inapplicable to legal conclusions." *E.g.*, *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (the Court is "not bound to accept as true a legal conclusion couched as a factual allegation"). A complaint is insufficient "if it tenders 'naked assertions' devoid of further factual enhancement.'" *Ashcroft*, 129 S.Ct. at 1949. Plaintiffs' allegation is precisely such a "naked assertion." Plaintiffs offer no facts supporting their claimed exhaustion of administrative remedies related to the Section 4(f) Sites, and they do not specify any exhaustion by Certain Plaintiffs.

The entirety of Defendants' Motion is directed at the insufficiency of Plaintiffs' assertion. Plaintiffs have the audacity to contend that Defendants' Motion "never directly addresses" the material allegations in the Complaint. (Opp'n at 9.) Plaintiffs' contention is without merit.

2. *Because Plaintiffs' Complaint Has Incorporated by Reference the Draft EIS and Final EIS, Judicial Notice of these Documents is Appropriate.*

Plaintiffs concede that "their Complaint incorporates by reference" portions of the Draft EIS and Final EIS, but assert the Court cannot take judicial notice of the documents in their entirety. (Opp'n at 11.) Plaintiffs provide no authority to support this assertion. This absence of authority is not surprising, however, as the caselaw directly controverts Plaintiffs' assertion. *E.g., Knievel v. ESPN*, 393 F.3d

at 1076 (holding that courts may take judicial notice of "documents whose contents are alleged in a complaint and whose authenticity no party questions" (emphasis added)); *Fecht v. Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (affirming consideration of "full text of the Company's corporate disclosure documents and the securities analysts' reports" even though only portions were pleaded in the complaint (emphasis added)). Thus, the Court may take judicial notice of the entire Draft EIS and Final EIS.

Plaintiffs also complain that even though they "have independent access to electronic versions of both EISs," Defendants "should not be allowed to rely on any portion of their Exhibit A or Exhibit B" because Plaintiffs were not provided hard copies of these materials. Plaintiffs argue that without hard copies, they could not "fully evaluate Defendants' citations to those materials." This is a red herring. Plaintiffs concede they have "access to electronic versions of both EISs." (Opp'n at 11.) Electronic versions of the accompanying appendices were also readily available to Plaintiffs. (Supplemental Declaration of Faith Miyamoto at ¶¶ 4-6.) These publicly available electronic versions are identical to what was provided to the Court. (*Id*. at ¶¶ 4-5.) Thus, the facts belie Plaintiffs' argument. Plaintiffs were fully able to evaluate Defendants' citations. Nevertheless, Defendants provided Plaintiffs complete copies of Exhibits "A" and "B" on September 27,

2011. Amended Certificate of Service Re Exhibits "A" and "B", filed on September 27, 2011.

3. ***Incorporation by Reference and Judicial Notice are Appropriate Means of Establishing an Absence of Evidence.***

The documents incorporated by reference into the Complaint affirmatively demonstrate that, with the exception of Ke'ehi Lagoon Beach Park, Plaintiffs failed to raise any of their Section 4(f) issues during the administrative process. Unable to refute that fact, Plaintiffs attempt to sidestep the issue by recasting the argument. Specifically, Plaintiffs assert that documents incorporated by reference are not an appropriate means of establishing an "absence of evidence" in an administrative record case. (Opp'n at 11.) Plaintiffs provide no authority to support of their argument.

Documents that demonstrate the absence of a material fact, such as the failure to exhaust administrative remedies, may be the proper subject of judicial notice. *E.g., Marcelus v. Corr. Corp. of Am./Corr. Treatment Facility*, 540 F. Supp. 2d 231, 235 n.5 (D.D.C. 2008) (noting that the court could consider plaintiff's administrative complaint in addressing defendant's motion to dismiss for failure to exhaust administrative remedies "although plaintiff did not attach his EEOC Charge to his complaint"); *Cordero v. AT&T*, 73 F. Supp. 2d 177, 185-190 (D.P.R. 1999) (taking judicial notice of EEOC filing in order to find a failure to exhaust administrative remedies); *Kolodiy v. United States*, No. 11-C-239, 2011

U.S. Dist. LEXIS 88770, at *9 (E.D. Wis. Aug. 9, 2011) (taking judicial notice of plaintiff's failure to file an administrative tort claim); *Feistel v. United States Postal Service*, No. 08-C-75, 2008 U.S. Dist. LEXIS 121259, at *4 (E.D. Wis. May 12, 2008) (taking judicial notice of plaintiff's failure to timely exhaust administrative remedies). Plaintiffs cite no authority that precludes the application of this well established practice in administrative record cases. Contrary to Plaintiffs' assertion, the Federal Rules of Evidence expressly authorize a court to take judicial notice "at any stage of the proceeding." Fed. R. Evid. 201(f). Try as they might, Plaintiffs simply cannot rely on a distinction created out of whole cloth. "Whether the action is before the court for decision on a record made before the agency or on the record made at a trial *de novo*, indisputable facts . . . may be judicially noticed by the court when such notice is requested by a party and is otherwise appropriate." *Win-Tex Prods. v. United States*, 17 Ct. Int'l Trade 786, 789 (1993).

Plaintiffs mischaracterize caselaw to support their contention that Defendants have impermissibly asked the Court to take judicial notice of the contents of the documents. In ruling on a motion for judgment on the pleadings, the Court is prohibited from taking judicial notice of the truth of the statements contained in the document. *See, e.g.*, *J.W. v. Fresno United Sch. Dist.*, 626 F.3d 431, 440 (9th Cir. 2010) ("[a]lthough the existence of a document may be

judicially noticeable, the truth of statements contained in the document . . . are not subject to judicial notice if those matters are reasonably disputable.") (interpreting California law) (emphasis added). Defendants, however, do not ask that the Court take judicial notice of the truth of any statement in any document submitted. Defendants request judicial notice of the documents only to establish the absence of any comments by Plaintiffs raising Section 4(f) violations with regard to the specific 13 Section 4(f) Sites, and the absence of any evidence that Certain Plaintiffs participated in the public comment and review process.

B. Defendants' Motion is Not Premature Absent an Administrative Record.

Plaintiffs assert that claims under NEPA, Section 4(f), and NHPA must be resolved on the basis of the administrative record. (Opp'n at 13.) The only authorities cited by Plaintiffs stand for the unremarkable proposition that environmental cases are generally limited to administrative record review. The mere fact that a case requires an administrative record does not preclude judgment based on documents that conclusively demonstrate Plaintiffs' failure to raise claims during the administrative proceedings.

Defendants identified all known comments submitted by Plaintiffs during the comment periods of the administrative process. If Plaintiffs believe that any Plaintiff submitted comments not identified by Defendants, Plaintiffs could easily identify such comments (as they had with Michelle Matson's letters, and

HonoluluTraffic.com's December 2009 letter to the Advisory Council for Historic Preservation and November 4, 2009 letter to Leslie Rogers) -- if such comments exist. Plaintiffs' failure to do so speaks volumes.

Despite Plaintiffs' inflammatory assertions, Defendants have neither misled Plaintiffs, nor the Court, in bringing their Motion. Defendants have relied on documents readily available to all parties to show the absence of comments by Plaintiffs regarding specific Section 4(f) Sites and that Certain Plaintiffs wholly failed to participate in the public review process.

C. **Plaintiffs Have Waived Section 4(f) Claims for Those Sites About Which They Failed to Raise Site Specific Claims.**

1. ***Plaintiffs Were Required to Submit Site Specific Comments During the Environmental Review Process.***

To preserve one's claims, a party challenging an agency's action pursuant to NEPA "must 'structure their participation so that it . . . alerts the agency to the [parties] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Pub. Citizen*, 541 U.S. at 764 (citing *Vermont Yankee*, 435 U.S. at 533). Despite this clear standard, Plaintiffs claim that general allegations of "impacts" or "effects" to certain Section 4(f) Sites are sufficient. (*See* Opp'n at 16-21.)

Plaintiffs' assertion that there is no authority requiring that the public make site specific comments on an EIS's Section 4(f) review (Opp'n at 22) is directly at

odds with the language of the statute and its implementing regulations, which clearly envision site specific evaluation. *See* 49 U.S.C. § 303(c). Congress' reference to "any land from a park . . ." or "an historic site . . . ." evidences an intent that each Section 4(f) use is subject to a separate evaluation under the statute. *Id.* (emphases added). Plaintiffs concede as much, but make an unsupported distinction that Section 4(f)'s site specific requirement applies only to the reviewing agency, and not to comments directed toward that evaluation. (Opp'n at 22, fn.9.)

Plaintiffs' distinction undermines the importance of the public review process. The purpose of this process is "to ensure that the 'larger audience' can provide input as necessary to the agency making the relevant decisions." *Pub. Citizen*, 541 U.S. at 768 (internal citations omitted). In keeping with the purpose of the public review process, Plaintiffs were obligated to raise concerns with the evaluation of specific Section 4(f) Sites so that the FTA and the City could address those concerns during the administrative process.

Rather than raising any specific violations for the 13 Section 4(f) Sites, Plaintiffs engaged in classic "hide the ball" tactics by making generalized, cryptic comments regarding Section 4(f), only to later claim in litigation that the agencies ignored their comments. "[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure

reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'" *Vermont Yankee*, 435 U.S. at 553-54. It defeats the purpose of the public review process to allow Plaintiffs to assert claims regarding the 13 Section 4(f) Sites in litigation when they failed to articulate these claims during the lengthy administrative process.

2. *Plaintiffs' Comments, Taken as a Whole, Fail to Sufficiently Raise Section 4(f) Concerns.*

Plaintiffs claim that comments made by Honolulutraffic.com, Michelle Matson, and Hawai'i's Thousand Friends adequately raised their Section 4(f) issues. (Opp'n at 16-21.) Plaintiffs concede that they made no site specific comments regarding several Section 4(f) Sites because these comments do not refer to Merchant Street Historic District, DOT Harbors Division Building, the Pacific War Memorial Site, Makalapa Navy Housing District, Hawai'i Employers Council, or the Tamura building. While Plaintiffs' comments referenced potential "impacts" and "effects" that the Project may have on the remaining Section 4(f) resources, as discussed below, these cryptic comments did not alert the FTA and the City to any claimed violations of Section 4(f).

Plaintiffs' cited comments very generally identify Walker Park, Irwin Park, Mother Waldron Park, U.S. Naval Base Pearl Harbor National Historic Landmark,

Pier 10/11, and Aloha Tower. Plaintiffs' comments, however, failed to raise any specific issues that notified the FTA and the City of particular Section 4(f) issues at these sites.

Plaintiffs argue that, taken as a whole, the evidence cited in their Opposition provided Defendants with notice of their Section 4(f) concerns. (Opp'n at 21.) This is patently false. The FTA evaluated the impacts of the Project on Section 4(f) Sites, whether the Project will use any of the Section 4(f) Sites, the extent of any impact on the sites, and potential measures to minimize impacts to each Section 4(f) Site. Plaintiffs submitted no comments regarding the FTA's conclusion that the Project will not constitute a constructive use under Section 4(f) of Walker Park, Irwin Park, Mother Waldron Park, Queen Street Park, United States Naval Base Pearl Harbor National Historic Landmark, Merchant Street Historic District, DOT Harbors Division Building, Pier 10/11, and Aloha Tower. (Motion at 27.)

Plaintiffs also failed to comment on the FTA's determination that the Project's use will be "*de minimis*" or "no use" with respect to the Pacific War Memorial Site, Makalapa Navy Housing Historic District, Hawai‘i Employers Council, and the Tamura building. (*Id*.)

Finally, Plaintiffs failed to submit comments regarding the determination that the Project will not constitute a direct use of the Merchant Street Historic District. (*Id.* at 27-28.)

Plaintiffs' comments make general reference to Section 4(f) issues and identify potential "impacts" and "effects" at certain Section 4(f) Sites. Plaintiffs cite to Honolulutraffic.com's comments that the Project, compared to other alternatives, "would 'require more acquisitions and affect more potentially historic structures.'" (Opp'n at 16.) Plaintiffs also cite Michelle Matson's testimony that there were "public concerns" that the Project would have "adverse impacts . . . specific to the historic sites" and that the Project "cannot be allowed to overshadow and overpower these significant historic sites." (Opp'n at 19.) These general, cryptic comments do not come close to satisfying the notice requirements specified in *Public Citizen*.

Plaintiffs argue they are not required to raise Section 4(f) issues using "precise legal formulations." (Opp'n at 16.) While the law does not require "magic words," it does require that "[c]laims . . . be raised with sufficient clarity to allow the decision maker to understand and rule on the issue raised . . . ." *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002); *see also Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (2006) (finding "general comments" too attenuated to maintain a cause of action).

Plaintiffs' general comments regarding Section 4(f) are exactly the kind of attenuated comments found inadequate in *Great Basin*. *See* 456 F.3d at 967. There, plaintiffs made comments that "in no way suggest[ed] an argument that the Bureau failed to protect federally reserved water rights under an eighty-year-old Executive order." *Id.* Because the connection between the claimed violation and the concerns raised was "too attenuated," the Ninth Circuit held that plaintiff's claims were not administratively exhausted. *Id.*

In sharp contrast to Plaintiffs' general comments, in *Rittenhouse*, the Ninth Circuit found that plaintiffs had exhausted their available administrative remedies where they submitted numerous comments on the agency's environmental documents. *See* 305 F.3d at 965-66. The Court noted that although the comments did not specifically cite to the regulation at issue, "it would be unreasonable to require that the Conservation Groups incant the magic words 'monitor' and 'population trends' in order to leave the courtroom door open to a challenge citing the requirements of [the regulation]." *Id.* at 966. The Ninth Circuit specifically noted, however, that the comments had been adequately framed to alert the agency of violations of the regulation. *Id.*

Plaintiffs' comments wholly failed to alert the FTA to potential violations in its Section 4(f) analysis. Their cryptic comments about potential "impacts" or "effects" were insufficient to provide the FTA with such notice.

3. ***Plaintiffs Cannot Refine Their Legal Arguments Where They Failed to Sufficiently Raise Section 4(f) Concerns.***

Plaintiffs argue that the exhaustion doctrine does not prohibit them from bringing "further-refined" versions of the arguments they made at the administrative level. (Opp'n at 23.) Plaintiffs' Section 4(f) claims are not "refined." They are newly manufactured. Allowing "refined" arguments is only appropriate if the party sufficiently raised the issue during the administrative process to apprise the agency of its concerns. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 888-90 (9th Cir. 2002) (plaintiffs exhausted their administrative remedies where they presented a "less refined legal argument" at the administrative level, "[b]ecause plaintiffs raised the issue of Forest Plan amendment procedures sufficiently for the agency to review these procedures and to conclude that the Forest Service complied with NFMA . . . .").

Because Plaintiffs did not sufficiently raise Section 4(f) violations for these Section 4(f) Sites during the environmental review process, Plaintiffs cannot now "refine" their arguments.

4. ***Plaintiffs' Assertion That Defendants Had Actual Notice of Their Section 4(f) Claims is of No Merit.***

The Supreme Court's decision in *Public Citizen* carved out a narrow exception to its requirement that a plaintiff participate in the administrative process to preserve its claims for judicial review. The Court noted that the agency bears

the "ultimate responsibility" for complying with the law, and thus exhaustion is not required where environmental documents contain flaws "so obvious that there is no need for a commentator to point them out." *Pub. Citizen*, 541 U.S. at 765.

Plaintiffs cite two Ninth Circuit cases for the proposition that the Supreme Court's "so obvious" standard applies where an agency has "independent knowledge" of plaintiffs' concerns. As an initial matter, Plaintiffs cite no evidence that the FTA or the City had any independent knowledge of potential Section 4(f) violations. Additionally, the cases cited by Plaintiffs are readily distinguishable.

In *'Ilio'ulaokalani Coalition v. Rumsfeld*, the Ninth Circuit allowed plaintiffs' claims despite their failure to participate in the administrative process. 464 F.3d 1083, 1092 (9th Cir. 2006). The Court, citing the narrow exception under *Public Citizen*, noted that the record contained ample evidence that the Army had independent knowledge that it had failed to adequately evaluate alternatives to the proposed action. *Id.* Given the Army's independent knowledge of this fundamental flaw in the EIS, the plaintiffs were allowed to maintain their claims. *Id.*

Plaintiffs' citation to *Barnes v. United States Department of Transportation* is similarly misplaced. There, the Ninth Circuit held that plaintiffs had not waived their claims related to indirect effects of the potential construction of an airport runway, despite failing to adequately raise them, because the Federal Aviation

Administration ("FAA") had independent knowledge of those concerns. *See* 2011 U.S. App. LEXIS 17752, *19 (9th Cir. 2011). The Court specifically pointed to evidence in the record that demonstrated the FAA was aware of potential indirect effects that it had failed to evaluate. *Id.* The exception to participation under *Public Citizen* was therefore proper. *Id.*

The FTA and the City's environmental documents did not contain flaws "so obvious" that they could be challenged even though violations for specific Section 4(f) Sites were never raised by Plaintiffs during the public review process. Defendants conducted the requisite environmental review. They disclosed information about all Section 4(f) Sites the Project could potentially impact. Moreover, Defendants discussed how they would address any impacts. Rather than pointing to fundamental flaws in Defendants' environmental review process and materials, Plaintiffs take issue with the manner in which potential impacts are addressed. They do not assert a complete failure to address Section 4(f) Sites, nor do they allege flaws in the Section 4(f) review that are "so obvious" that they need not have been raised during the comment period.

5. *Plaintiffs' Claimed Misrepresentation of Their Section 4(f) Claims is Irrelevant.*

Defendants' Motion is limited to specific Section 4(f) Sites listed in the Complaint for which Plaintiffs' failed to submit any specific comments. Plaintiffs assert that these are not the only Section 4(f) Sites affected by the Project, and that

they are not the only sites on which their claims are based. (Opp'n at 23.) These concerns are irrelevant. Defendants are not required to seek a judgment with respect to all of Plaintiffs' Section 4(f) claims. (*See* Motion at 19.)

D. Certain Plaintiffs are Barred From Asserting Claims Because They Failed To Participate in the Administrative Process.

While conceding that Certain Plaintiffs wholly failed to participate in the public comment and review process for the Project, Plaintiffs argue that *Public Citizen* does not require dismissal of their claims because there is no "broad rule" requiring participation in agency proceedings prior to seeking judicial review. (Opp'n at 29.) Plaintiffs' argument is meritless.

The holding in *Public Citizen* makes clear that a plaintiff waives those arguments it fails to raise during the NEPA review process. 541 U.S. at 764. Indeed, the Supreme Court required that parties challenging an agency's compliance with NEPA "structure their participation so that it alerts the agency to the parties' position and contentions . . . ." *Id.* (internal quotations omitted).

Public Citizen's requirement that participation in the administrative process must be structured so that an agency can give meaningful consideration to the party's ideas and concerns necessitates some form of participation. It would be ironic if the rule was structured so plaintiffs who did not participate at all in the public process under NEPA were better off than those who had participated to some extent. Plaintiffs' approach would create an advantage for parties who sit out

of the proceedings completely and eviscerate the requirements imposed on plaintiffs by *Public Citizen* and *Vermont Yankee.*

Certain Plaintiffs' claims do not fall within the narrow exception to *Public Citizen*'s participation requirement. A plaintiff will be excused from participating in the administrative process only where an EIS contains flaws "so obvious" that commentators need not point them out. *Pub. Citizen*, 541 U.S. at 765. The Ninth Circuit has interpreted the "so obvious" standard to apply to situations where the agency has independent knowledge of an EIS's flawed analyses. *'Ilio'ulaokalani Coal.*, 464 F.3d at 1092. The Ninth Circuit has not interpreted *Public Citizen*'s exception to apply to those situations in which a plaintiff merely disagrees with the ultimate conclusions reached by the agency preparing the EIS. Because Certain Plaintiffs' claims take issue with the manner in which potential impacts are addressed, and not fundamental flaws in the Draft EIS or Final EIS, the limited exception for "independent knowledge" is inapplicable to allow Certain Plaintiffs' claims.

Relying on *Portland General Electric v. Bonneville Power Administration*, 501 F.3d 1009, 1023-24 (9th Cir. 2007), Plaintiffs also claim that Certain Plaintiffs need not have participated in the public review process because their claims are based on issues raised by others. (Opp'n at 26). That case, however, is readily distinguishable. Petitioners in *Portland General Electric* participated in the

administrative process; they merely failed to raise specific issues that were raised by other parties. *See id.* at 1024, fn.13. *Portland General Electric* does not allow a party to seek judicial review when it failed entirely to appear during the administrative process.

Plaintiffs cite several out of circuit cases for their contention that there is no absolute requirement that parties participate in agency proceedings prior to seeking judicial review. Precedent from outside of the Ninth Circuit is not binding, and the Court may not rely on such authority in the face of contrary Ninth Circuit precedent. *See Biro v. United States*, 24 F.3d 1140, 1141-42 (9th Cir. 1994) (declining to follow the majority of circuits, despite finding the rationale persuasive, in light of conflicting Ninth Circuit precedent); *see also United States v. Autery*, 555 F.3d 864, 870 (9th Cir. 2009) (noting other circuits' decisions are not binding). While other circuits may have broader exceptions to the holding in *Public Citizen*, the Ninth Circuit has limited the exception to situations where flaws in an EIS are "so obvious" that need not be raised.

III. CONCLUSION.

For the foregoing reasons, Defendants request that the Court grant their Motion for Partial Judgment on the Pleadings in full.

DATED: October 11, 2011.

/s/ Peter Whitfield
IGNACIA MORENO
PETER WHITFIELD

Attorneys for Defendants
FEDERAL TRANSIT ADMINISTRATION; LESLIE ROGERS, in his official capacity as Federal Transit Administration Regional Administrator for Region IX; PETER M. ROGOFF, in his official capacity as Federal Transit Administration Administrator; UNITED STATES DEPARTMENT OF TRANSPORTATION; RAY LAHOOD, in his official capacity as Secretary of Transportation

/s/ John P. Manaut
ROBERT D. THORNTON
EDWARD V. A. KUSSY
JOHN P. MANAUT
LINDSAY N. MCANEELEY
ROBERT C. GODBEY
DON S. KITAOKA
GARY Y. TAKEUICHI

Attorneys for Defendants
CITY AND COUNTY OF HONOLULU and WAYNE Y. YOSHIOKA, in his official capacity as Director of the City and County of Honolulu Department of Transportation Services