IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., *et al.*, **Plaintiffs,** **v.** **ANTHONY FOXX, United States Secretary of Transportation, *et al.*,** **Defendants.**	)	**Case No. 1:12-cv-1158-BAH**
WEAVER., *et al.*, **Plaintiffs,** **v.** **FED. MOTOR CARRIER SAFETY ADMIN., *et al.*,** **Defendants.**	)	**Case No. 1:14-cv-0548-BAH** **Consolidated with** **Case No. 1:12-cv-1158-BAH**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Plaintiffs in this case—five individuals and the Owner-Operator Independent Drivers Association, Inc. ("OOIDA")—allege that state officials in various states refused to remove violations associated with citations issued to plaintiffs from a Federal Motor Carrier Safety Administration ("FMCSA") database. The FMCSA is the administration within the Department of Transportation ("DOT") charged with maintaining "the highest degree of safety in motor carrier transportation." 49 U.S.C. § 113(b). To further this goal, FMCSA has promulgated (and updates) the Federal Motor Carrier Safety Regulations (FMCSR). *See, e.g.*, 49 U.S.C. §§ 31136,

31142; 49 C.F.R. §§ 350-99. The FMCSR are primarily enforced at the roadside by individual states, which, in return for federal grants, adopt the FMCSR and enforce them (or equivalent state standards) under state law. *See* 49 U.S.C. § 31102; 49 C.F.R. § 350. *See also Nat'l Tank Truck Carriers, Inc. v. Fed. Highway Admin.*, 170 F.3d 203, 205 (D.C. Cir. 1999) (noting that "the individual states are the primary enforcers of the highway safety regulations at roadside inspections").

Plaintiffs challenge the inclusion of violations related to state-law citations incurred at roadside inspections in pre-employment screening reports given to prospective employers. But their challenges to this regulatory scheme must fail. Three of the plaintiffs—Kelley, Mowrer and Lohmeier—challenge the inclusion of citations on their record, even though, under the agency's procedures laid out in Federal Register Notices, the citations are no longer included in their pre-employment screening records. Accordingly, they have no standing to bring suit, and the Court lacks subject-matter jurisdiction to review their claims. The Court also lacks jurisdiction over Count V of plaintiffs' complaint, seeking monetary damages under the Fair Credit Reporting Act ("FCRA"), because Congress did not expressly waive sovereign immunity to such a suit. Further, one of the plaintiffs—Moody—has failed to administratively challenge his citation, so his claim should be dismissed for failure to exhaust his administrative remedies. The remainder of the claims largely seek review under the Administrative Procedure Act ("APA"), but plaintiffs fail to identify a final agency action for this Court to review; certainly Moody, who has not engaged in any administrative process, cannot identify a final agency action for review.

Because this Court lacks jurisdiction to review some of the claims, and the remainder lack merit as a matter of law, the Court should dismiss the Amended Complaint in its entirety.

BACKGROUND

I. Legal Framework

The FMCSA operates and maintains a database—the Motor Carrier Management Information System ("MCMIS")—which contains information relating to the safety records of commercial truck drivers and motor carriers including crash, inspection and compliance review and enforcement information. Amended Complaint ("Compl.") [ECF No. 35] ¶¶ 1, 26-27. The Motor Carrier Safety Assistance Program ("MCSAP") provides federal grants to states to secure their assistance in promoting highway safety for commercial motor vehicles. 49 U.S.C. §§ 31100, 31102, *et seq.*; 49 C.F.R. § 350.101. States participating in the MCSAP must adopt the FMCSR and enforce them, which includes roadside inspection of commercial motor vehicles and drivers to assess compliance with the motor carrier safety rules, *see* 49 C.F.R. § 350.201, as well as establishing "a program to ensure that accurate, complete and timely motor carrier safety data are collected and reported, and ensure the State's participation in a national motor carrier safety data correction system prescribed by FMCSA." 49 C.F.R. § 350.201(s).

Under a program called the Pre-Employment Screening Program ("PSP"), persons conducting pre-employment screening services for the motor carrier industry have electronic access to the following reports in the MCMIS: (1) commercial motor vehicle accident reports; (2) inspection reports that contain no driver-related safety violations; and (3) serious driver-related safety violation inspection reports.[1] 49 U.S.C. § 31150(a)(1)-(3). While Section 31150 states that the Secretary "shall" provide this information for pre-employment screening, nothing

[1] Section 31150(d) defines "serious driver-related safety violation as "a violation by an operator of a commercial motor vehicle that the Secretary determines will result in the operator being prohibited from continuing to operate a commercial motor vehicle until the violation is corrected."

in Section 31150 limits the Secretary to providing only this information. *See id.*

Before providing access to the MCMIS, the Secretary of DOT must ensure that: (1) any information that is released through the PSP will be in accordance with the Fair Credit Reporting Act and other applicable federal law; (2) the person seeking the information will not conduct a screening without the operator-applicant's written consent; and (3) any released information will not be released to another person or entity other than the motor carrier requesting the screening services or the operator-applicant, unless expressly authorized or required by law. 49 U.S.C. § 31150(b)(1)-(3). The Secretary must also provide a procedure for the operator-applicant to timely correct inaccurate information in the MCMIS. 49 U.S.C. § 31150(b)(4). The statute makes clear that the use of the PSP system is not mandatory and is limited to pre-employment screening purposes. 49 U.S.C. § 31150(c).

The PSP system was initially implemented through a Federal Register Notice issued in March 2010, 75 Fed. Reg. 10,554-02, 2010 WL 752157 (March 8, 2010) ("2010 Federal Register Notice"), and later modified in a Federal Register Notice published on July 19, 2012, 77 Fed. Reg. 42,548, 42,551, 2012 WL 2920621 (July 19, 2012) ("2012 Federal Register Notice"). The 2012 Federal Register Notice describes the PSP as:

> a screening tool that allows motor carriers and individual drivers to purchase driving records from the FMCSA MCMIS system. A record purchased through PSP contains the most recent five years of crash data and the most recent three years of roadside inspection data, including serious safety violations for an individual driver. The record displays a snapshot in time, based on the most recent MCMIS data extract loaded into the PSP system.

77 Fed. Reg. at 42,549. The PSP system is used by potential employers to check the driving record of a job applicant as a voluntary part of the hiring process. *See id.*; *see also* 49 U.S.C. § 31150(c).

The 2010 Federal Register Notice provided a means for contesting the content of MCMIS

records: an operator-applicant could contact the PSP or MCMIS System Manager, or log on to the DataQs website. 75 Fed. Reg. 10,555. The DataQs website allows operator-applicants to challenge data maintained by FMCSA on, among other things, "crashes, inspections, registration, operating authority, safety audits and enforcement actions." 77 Fed. Reg. 42,511. When an operator-applicant submits a challenge through DataQs, the concerns are automatically forwarded to the appropriate Federal or State office for processing and resolution. *Id*. The 2012 Federal Register Notice makes clear that FMCSA may not act to correct entries made by state officials or otherwise sit in review of state dispositions of challenges to entries made in the system, providing:

> Any challenges to data provided by State agencies must be resolved by the appropriate State agency. Additionally, FMCSA is not authorized to direct a State to change or alter MCMIS data for violations or inspections originating within a particular State(s). Once a State office makes a determination on the validity of a challenge, FMCSA considers that decision as the final resolution of the challenge. FMCSA cannot change State records without State consent. The system also allows filers to monitor the status of each filing.

Id. Consequently, according to the FMCSA "User Guide and Manual: Best Practices for State Agency Users" ("FMCSA User Guide") for its DataQs system, "the State agency is responsible for reviewing and resolving all Request for Data Review ("RDR") or disputes pertaining to the collection and reporting of State-reported safety data into MCMIS."[2] FMCSA User Guide §1.1 at 15; Compl. at ¶ 52.

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[2] On June 5, 2014, a new FMCSA Federal Register Notice will be published in the Federal Register. It is currently publically available at: http://www.ofr.gov/(S(dd4zek2rid43gpisykbjdhg2))/inspection.aspx#spec_F. Under the 2014 Federal Register Notice, the MCMIS database will be modified so that, if an operator-applicant files an RDR challenging an inspection report containing a violation that was adjudicated in his favor, the DataQs system will include an acknowledgement of the adjudication. *Id*. at 5-6. This Federal Register Notice is effective as of August 23, 2014, a date based on the time needed for state implementation of compatible technological systems to record and transmit the adjudication data. *Id*. at 4.

II. Individual Plaintiffs

A. Brian E. Kelley

Plaintiff Brian E. Kelley is a commercial truck driver who was stopped in Texas and inspected by a Texas law enforcement officer on December 7, 2010. Compl.[3] at ¶ 56. The Texas law enforcement officer issued Kelley a citation alleging that he had violated a Texas criminal statute for "driving a commercial motor vehicle with a detectable amount of alcohol." *Id*. at ¶ 59. The State of Texas transmitted the inspection report to the MCMIS database. *Id*. at ¶ 60. Kelley contested the citation in the Walker County, Texas Justice Court, and on February 3, 2011, on a motion by the district attorney, the court dismissed all charges against Kelley. *Id*. at ¶ 62. Kelley requested in writing that the Texas Motor Carrier Bureau remove the report from the MCMIS database, but the Motor Carrier Bureau declined to do so. *Id*. at 63. Kelley challenged the reports' inclusion in the MCMIS database by filing an RDR through FMCSA's DataQs system. *Id*. at 64. Upon receiving Kelley's RDR, FMCSA referred the challenge to Rodney Baumgartner, who had been designated by Texas to respond to DataQs challenges. *Id*.at 65. Mr. Baumgartner denied Kelley's challenge. *Id*. Because more than three years have passed since Kelley's December 7, 2010 citation, his PSP record would no longer contain any record of the citation. *See* 77 Fed. Reg. at 42,549 ("A record purchased through PSP contains . . . the most recent three years of roadside inspection data.").

B. Robert Lohmeier

Plaintiff Robert Lohmeier is a commercial truck driver who was inspected by an Arizona law enforcement officer on or about May 19, 2010, and issued a citation for failing to wear a

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[3] The facts of this case as set forth in this Memorandum on the basis of the allegations of the Complaint are assumed to be true for purposes of the present Motion.

seatbelt and for violations of the Hours of Service regulations. *Compl*. at ¶ 71. The Arizona law enforcement officer transmitted the inspection report to MCMIS. *Id*. at ¶ 76. On October 14, 2010, the Winslow Justice City Court in Navajo County, Arizona, dismissed the charges against Lohmeier after he contested them. *Id*. at ¶ 77. On or about May 25, 2011, OOIDA filed an RDR through FMCSA's DataQs system on behalf of Lohmeier challenging the continued presence in MCMIS of the violations that were the subject of the May 19, 2010 citations, which had been dismissed. *Id*. at ¶ 79. FMCSA forwarded Lohmeier's challenge to the Arizona Department of Public Safety ("DPS"). *Id*. at ¶ 80. Arizona DPS denied Lohmeier's challenge stating that "this [inspection] was done properly." *Id*. at ¶ 81. Because more than three years have passed since Lohmeier's October 14, 2010 citation, his PSP record would no longer contain any record of the October 14, 2010 citation. *See* 77 Fed. Reg. at 42,549.

On or about February 14, 2013, at an inspection conducted by a Wisconsin law enforcement officer, Lohmeier was issued two citations, for: (1) five allegedly false driver log entries; and (2) not being "medically certified" to qualify for a commercial driver's license. Compl. at ¶¶ 87-88. The Wisconsin law enforcement officer transmitted the inspection report to the MCMIS database. *Id*. at ¶ 89. Lohmeier contested the citations before the Circuit Court for Manitowoc County, Wisconsin, on September 27, 2013, and on October 9, 2013, the Court dismissed the charges against Lohmeier with prejudice. *Id*. at ¶¶ 90-91. On or about October 31, 2013, Lohmeier's carrier filed an RDR through FMCSA's DataQs system on behalf of Lohmeier challenging the continued presence in MCMIS of the February 14, 2013 violations. *Id*. at ¶ 92. FMCSA forwarded the challenge to the Wisconsin state authorities, who denied the challenge on or about November 1, 2013. *Id.* at ¶¶ 93-94.

C. Klint L. Mowrer

Plaintiff Klint L. Mowrer is a commercial truck driver, who was inspected by a Maryland law enforcement officer, Inspector Hendrick, on or about March 22, 2010. *Id*. at ¶ 100. Hendrick issued Mowrer a citation for a violation of the Maryland Criminal Code for "fail[ing] to comply with local law; rear drag link has more than 1/8" play by hand pressure." *Id*. at ¶ 103. Inspector Hendrick's inspection report was submitted to FMCSA's MCMIS database. *Id*. at ¶ 104. Mowrer contested the citation in the District Court of Maryland for Garrett County, pleading "not guilty" at his trial. *Id*. at ¶ 106. At the conclusion of the trial, the Court entered a verdict of "not guilty" and dismissed the charge against Mowrer. *Id*. at ¶ 107. Mowrer filed a DataQs challenge to the report in the MCMIS, which FMCSA forwarded to the State of Maryland. *Id.* at ¶ 109. Roni Moyer, on behalf of the State of Maryland, responded: "At the time of the inspection the Officer still found the violation(s) to be present. The violations will not be removed." *Id*. at ¶ 110. Because more than three years have passed since Mowrer's March 22, 2010 citation, his PSP record would no longer contain any record of the citation. *See* 77 Fed. Reg. at 42,549.

D. J. Mark Moody

On or about June 6, 2012, Plaintiff J. Mark Moody was inspected by an Iowa law enforcement officer. Compl. at ¶ 116. The Iowa law enforcement officer issued Moody two citations for: (1) record of duty status not current; and (2) operating a cmv while ill – drivers' admission. *Id*. at ¶ 118. The State of Iowa transmitted the inspection report to the MCMIS database. *Id*. at ¶ 119. Moody contested the citation in the District Court of Iowa in and for Jasper County. On or about September 18, 2012, on Moody's motion to vacate judgment, the court dismissed the charges against Moody. *Id*. at ¶ 120. There is no allegation in the Amended Complaint that Moody filed an RDR to challenge the MCMIS entry related to the June 6, 2012

citations, or that he submitted a request to the MCMIS System Manager or any other official at the DOT to remove the citations. *See generally* Compl.

E. Fred Weaver, Jr.

Plaintiff Fred Weaver, Jr., is a commercial truck driver who was stopped and inspected by a Montana law enforcement officer on or about June 29, 2011. *Id*. at ¶ 126. The Montana officer issued Weaver a citation for violating a Montana criminal statute by "fail[ing] to obey direction to be weighed." *Id*. at ¶ 127. The Montana law enforcement officer transmitted the inspection report to the MCMIS database. *Id.* at ¶ 128. Weaver contested the citation in Montana court and it was dismissed without prejudice. *Id*. at ¶¶ 129-30. With the assistance of OOIDA, Weaver initiated a challenge to the citation's entry in the MCMIS database by filing an RDR through FMCSA's DataQs system. *Id*. at ¶ 131. FMCSA referred the challenge to the person designated by Montana to respond; Col. Daniel Moore rejected Weaver's challenge. *Id*. at ¶ 132. There is no allegation in the Amended Complaint that Weaver submitted a request to the MCMIS System Manager or any other DOT official to remove the citation. *See generally* Compl.

III. OOIDA's Request to the FMCSA Administrator on Behalf of Plaintiffs Kelley, Lohmeier and Mowrer

On or about July 8, 2011, OOIDA President Jim Johnston wrote to FMCSA Administrator Anne S. Ferro, requesting that the inspection reports challenged by OOIDA members Kelley, Lohmeier and Mowrer "be removed from all FMCSA databases." *Id*. at ¶ 139. He wrote another letter to FMCSA Administrator Ferro regarding Kelley, Lohmeier and Mowrer on November 18, 2011. *Id*. at ¶ 140. Administrator Ferro responded with a letter dated February 17, 2012, in which she stated that she forwarded the DataQs challenges "to the FMCSA Division Administrators in the respective states for review." *Id*. at ¶ 141. In a letter dated May 29, 2012,

Administrator Ferro wrote that the FMCSA Division Administrators from Maryland, Arizona and Texas reviewed the respective challenges and, in each case, they concurred with the State's decision. The Administrator declined to remove the violations from the MCMIS database.

Notably, because three years have passed since the citations challenged in this letter occurred, none of them would currently be included in a PSP record for any of the plaintiffs. *See* 77 Fed. Reg. at 42,549.

IV. Procedural Background

Plaintiffs Kelley, Lohmeier, Mowrer, Moody and OOIDA filed a complaint against defendants seeking relief under the APA and the FCRA based on the same factual allegations described above on July 13, 2012. *See* ECF No. 1. Defendants moved to dismiss arguing that the case was properly before the District of Columbia Circuit Court of Appeals under the Hobbs Act. *See* ECF No. 8. On May 10, 2013, plaintiff Weaver filed a petition for review of his DataQs denial under the Hobbs Act, 28 U.S.C. §§ 2242(3) & 2244, in the United States Court of Appeals for the District of Columbia Circuit. *See Weaver, et al., v. FMCSA, et al.*, No. 13-1172, (May 10, 2013 D.C. Cir.); ECF No. 18-1. On September 25, 2013, this Court stayed the current case pending the D.C. Circuit's decision in jurisdiction in *Weaver*. *See* ECF No. 25. On February 28, 2014, the D.C. Circuit remanded *Weaver*, finding it lacked jurisdiction under the Hobbs Act, and that the case was properly before this Court. *See Weaver v. Fed. Motor Carrier Safety Admin*., 744 F.3d 142, 147 (D.C. Cir. 2014). The parties filed a joint status report on April 7, 2014 requesting that the stay be lifted in this case and setting out a schedule for further proceedings. *See* ECF No. 31. On April 29, 2014, the Court consolidated the remanded *Weaver* case with the instant action, on plaintiffs' unopposed motion, and filed plaintiffs' Amended Complaint. *See* ECF Nos. 34-35.

STANDARD OF REVIEW

Plaintiff's Amended Complaint should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction and under Rule 12(b)(6) for failure to state a claim. In a motion to dismiss under Rule 12(b)(1), the moving party may raise facial or factual challenges to the court's subject matter jurisdiction. *See Erby v. US*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006). The standard for a facial challenge mirrors that of Rule 12(b)(6) – in evaluating its subject matter jurisdiction, a court construes the allegations in a light most favorable to the non-moving party. *See Agrocomplect AD v. Republic of Iraq*, 524 F. Supp. 2d 16, 21 (D.D.C. 2007); *Flynn v. Ohio Bldg. Restoration, Inc.*, 260 F. Supp. 2d 156, 162 (D.D.C. 2003). In contrast, for a factual challenge, the allegations in the complaint are not controlling, and they may be supplemented with evidence outside of the pleadings to enable a court to determine whether it has jurisdiction. *See Erby*, 424 F. Supp. 2d at 182-83; *see also Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 38 (D.C. Cir. 2000) (reversing a district court that assumed the truth of a complaint's allegations in factual jurisdictional challenge).

In ruling on a Rule 12(b)(6) motion for failure to state a claim upon which relief may be granted, courts are to presume the truth of all factual allegations in the complaint but need not and should not accept "'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)) (brackets in original). Courts are also "not bound to accept as true a legal conclusion couched as a factual allegation." *Id*. (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A court may consider "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint," as well as "documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by

the defendant in a motion to dismiss." *Ward v. D.C. Dep't of Youth Rehab. Servs.*, 768 F. Supp. 2d 117, 119 (D.D.C. 2011) (internal quotations and citations omitted).

ARGUMENT

I. The Court lacks subject matter jurisdiction to consider the claims arising from citations no longer included in plaintiffs' PSP records.

Plaintiffs Kelley, Mowrer and Lohmeier lack standing to challenge the denial of their DataQs challenges from 2010—those challenges that were addressed by FMCSA Administrator Ferro in her 2012 letter—because a PSP record for any of these plaintiffs would include no record of their inspection-related citations from more than three years ago. Plaintiffs have not alleged an injury in fact with respect to challenges arising from the 2010 citations, so the Court lacks subject-matter jurisdiction to review these claims.

A. Plaintiffs Kelley, Mowrer and Lohmeier cannot allege a redressable injury with respect to the 2010 violations that no longer appear on their PSP records.

Article III's limitation on judicial power requires, at a minimum, that a plaintiff demonstrate that he has suffered an actual or threatened injury to establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Specifically, a plaintiff must demonstrate that: 1) he has "suffered an injury in fact — an invasion of a legally protected interest which is" both "concrete and particularized," as well as "actual or imminent," and "not [merely] conjectural or hypothetical"; 2) that the injury is "fairly traceable to the challenged action of the defendant"; and, 3) that the injury is "likely" to be "redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 560-61. Moreover, a plaintiff bears the burden of establishing standing, and "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185, 190 (2000)). When pursuing a claim for prospective injunctive relief, a plaintiff must establish standing based on an "injury or threat of

injury" that is "both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) (internal quotation marks and citations omitted).

The 2012 Federal Register Notice provides that "[a] record purchased through PSP contains the most recent five years of crash data and the most recent three years of roadside inspection data, including serious safety violations for an individual driver." 77 Fed. Reg. 42,549. Accordingly, at the time of the filing of the Amended Complaint, a PSP inquiry for plaintiffs Kelley, Mowrer or Lohmeier would contain no record of the violations incurred in 2010 that they challenged in OOIDA's letter to Administrator Ferro. The allegations in the complaint contain no violations for plaintiffs Kelley and Mowrer that would appear on a PSP report provided to a prospective employer. Lohmeier's claim, as alleged, can only survive with respect to his February 14, 2013 citations. A PSP report on Lohmeier would only contain, at most, a record of his 2013 violations, and would contain no record of his 2010 violations. *See* 77 Fed. Reg. 42,549.

No allegation in the Amended Complaint supports a finding that plaintiffs are injured by the non-inclusion of certain violations on their records. A plaintiff's "[s]tanding is determined at the time the complaint is filed." *Natural Law Party of the United States of Am. v. Fed. Elec. Comm'n*, 111 F. Supp. 2d 33, 40 (D.D.C. 2000). Thus, plaintiffs cannot establish standing to seek relief on the basis of Kelley and Mowrer's claims, and Lohmeier's claim arising from his 2010 violations, because, at the time the Amended Complaint was filed, none of the citations giving rise to these claims have been, or could be, included on a PSP report disseminated to a prospective employer. For this reason alone, the Court should dismiss Kelley and Mowrer's claims, and Lohmeier's claims arising from his 2010 citation, for lack of subject matter jurisdiction.

B. The Court lacks jurisdiction over Kelley, Mowrer and Lohmeier's claims because the Court cannot redress any injury by granting the relief they seek.

Further, the Court cannot grant any meaningful relief to these plaintiffs, because any PSP report would contain no record of their challenged violations. Accordingly, Kelley, Mowrer and Lohmeier's claims—arising from his 2010 violations—do not satisfy the requirement that their alleged injury would be redressed by granting the relief they seek. In fact, it is well-established law that "[w]hen the injury dissipates, 'a case has lost its character as a present, live controversy of the kind that must exist if [the court is] to avoid advisory opinions on abstract questions of law.'" *Citizens for Responsibility & Ethics in Washington v. Duncan*, 643 F. Supp. 2d 43, 47 (D.D.C. 2009) (quoting *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982)). Accordingly, Kelley, Mowrer and Lohmeier's claims arising from citations that no longer appear on their PSP records are moot, and the Court lacks jurisdiction to consider them.[4] *See id.* Put another way, plaintiffs' claims based on the 2010 violations are moot because plaintiffs no longer have a personal stake in the outcome of this case. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980). Regardless of how this case is resolved, their PSP reports will contain no record of the 2010 violations in accordance with the dictates of the 2012 Federal Register Notice. It is well established that "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Id*. Plaintiffs Mowrer and Kelley—and Lohmeier, with respect to his 2010 violation—no longer have any personal interest in the outcome of this litigation, so the Court lacks jurisdiction to consider their claims.

[4] Weaver's citation occurred on June 29, 2011, *see* Compl. at ¶ 126, so on or about June 29, 2014—less than a month after the date on which this motion was filed—Weaver's claims will be moot as well. After June 29, 2014, Weaver would not be able to meet Article III's case or controversy requirement for this Court's jurisdiction in light of the three-year limit on PSP records discussed above. For the reasons explained above, the Court should dismiss his claim if it decides this case after June 29, 2014.

II. The United States has not waived sovereign immunity to suit under the FCRA, so the Court lacks subject matter jurisdiction over Count V of the Amended Complaint

Plaintiffs cannot establish this Court's subject matter jurisdiction over Count V of the Amended Complaint—which seeks monetary damages against defendants under the FCRA—because the FCRA contains no express waiver of sovereign immunity. *See FDIC v. Meyer*, 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994) (noting that "[s]overeign immunity is jurisdictional in nature"). It is well-established that the United States may not be sued unless Congress has expressly waived its sovereign immunity. *See, e.g., United States v. Mitchell*, 445 U.S. 535, 538 (1980) ("It is elementary that the United States, as sovereign, is immune from suit save as it consents to be sued." (internal quotations omitted)). A waiver of sovereign immunity cannot be implied but "must be unequivocally expressed." *United States v. Nordic Village, Inc.*, 503 U.S 30, 33-34 (1992). Any ambiguity in the statutory language is to be construed in favor of immunity, and "[a]mbiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Fed. Aviation Admin. v. Cooper*, -- U.S. --, 132 S. Ct. 1441, 1448 (2012). As all other courts but one to consider this question have held, the language of the FCRA does not unequivocally express consent by the United States to be sued for money damages. *See Stellick v. U.S. Dep't of Educ.*, No. 11-cv0730, 2013 WL 673856, at *5 (D. Minn. Feb. 25, 2013) (dismissing for lack of jurisdiction finding that "nothing in the FCRA waives the sovereign immunity" of the federal defendant); *Taylor v. United States*, No. CV-09-2393-PHX-DGC, 2011 WL 1843286 at *5 (D. Ariz. May 16, 2011) (same); *Gilbert v. U.S. Dep't of Educ.*, No. 08-cv-6080, 2010 WL 3582945, at *4 (W.D. Ark. Sept. 7, 2010) (dismissing for lack of jurisdiction on the finding that the FCRA "does not contain an unequivocal and express waiver of sovereign immunity"); *Bormes v. United States*, 638 F. Supp. 2d 958, 961–62 (N.D.Ill.2009), *vacated on other grounds by* 626 F.3d 574 (Fed.Cir.2010),

vacated sub nom. United States v. Bormes, ––U.S. ––––, 133 S.Ct. 12, 184 L.Ed.2d 317 (2012); *Ralph v. U.S. Air Force MGIB*, No. 06–CV–02211–ZLW–KLM, 2007 WL 3232593, at *2–3 (D.Colo. Oct.31, 2007); *Kenney v. Barnhart*, No. SACV 05–426–MAN, 2006 WL 2092607, at *9 (C.D.Cal. July 26, 2006); *but see Talley v. U.S. Dep't of Agric.*, No. 07 C 0705, 2007 WL 2028537 (N.D. Ill. July 12, 2007), *aff'd Talley v. U.S. Dep't of Agric.*, 595 F.3d 754 (7th Cir. 2010), *vacated*, June 10, 2010. [5]

The FCRA imposes liability on "any person" who willfully fails to comply with its provisions. 15 U.S.C. § 1681n(a). The statute defines a "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental

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[5] In *Talley*, the district court compared the FCRA to the Truth in Lending Act and found that, while the latter contained an express preservation of the United States' sovereign immunity—despite defining "person" as any "government or governmental subdivision or agency"—the FCRA did not, so the United States had waived its sovereign immunity under the FCRA. 2007 WL 2028537 at *2. The Seventh Circuit discussed this argument in dicta, but found that government counsel conceded at oral argument that all substantive requirements that the FCRA imposes on any person apply to the United States and its agencies, but argued that the FCRA contained no waiver of sovereign immunity for monetary damages. *Talley*, 595 F.3d at 758. The Court then found that the Tucker Act's general waiver of sovereign immunity for damages in any civil action against the United States may apply. *Id*. at 759. However, the Seventh Circuit vacated this opinion on June 10, 2010. The district court entered an order containing findings of fact and conclusions of law finding that the Department of Agriculture violated the FCRA and was liable for damages in the amount of $10,000; this opinion contained no discussion of jurisdiction. *See Talley v. U.S. Dep't of Agric.*, No. 07-C-0705, 2009 WL 303134 (N.D. Ill. Feb. 4, 2009), *aff'd by an equally divided court Talley v. U.S. Dep't of Agric.*, No. 09-2131, 2010 WL 5887796 (7th Cir. Oct. 1, 2010) (affirmed without opinion). The district court did not consider any of the reasoning below, and its pronouncement that the statute failed to contain an express preservation of sovereign immunity is not supported by the well-settled proposition that any ambiguity in the language of the statute should be construed in favor of immunity. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983) ("Waivers of immunity must be 'construed strictly in favor of the sovereign,' . . . and not 'enlarge[d] . . . beyond what the language requires.'") Further, the Seventh Circuit came to no conclusion regarding whether the FCRA contains a waiver of sovereign immunity, and in any event, it vacated its opinion after a rehearing en banc. The question of whether the FCRA contains a waiver of sovereign immunity is currently pending before the Seventh Circuit in *United States v. Bormes*, on remand from the Supreme Court. *See United States v. Bormes*, ––U.S. ––––, 133 S.Ct. 12, 184 L.Ed.2d 317 (2012)

subdivision or agency, or other entity." *Id*. at § 1681a(b). The term "government or governmental subdivision or agency" does not unambiguously refer to the United States. *See Gilbert*, 2010 WL 3582945, at *4 ("[p]laintiff's argument that the FCRA waives sovereign immunity by including in the definition of 'persons,' the terms 'government or governmental subdivision' is unconvincing.") To the extent the Court finds the term "person" ambiguous, that ambiguity should be interpreted in favor of immunity. *See Cooper*, 132 S. Ct. at 1448. However, the vague reference to "government" is not ambiguous; the statute does not *explicitly* refer to the United States. By contrast, other federal statutes explicitly refer to the United States in their waivers of sovereign immunity. *See, e.g.*, 28 U.S.C. § 1346(b)(1) (The Federal Tort Claims Act authorizes "claims against the Unites States, for money damages . . ."); *see also Stellick*, 2013 WL 673856 at *4. In fact, in a different section of the statute regarding disclosures to the FBI for counterintelligence purposes, the FCRA expressly provides that "[a]ny agency or department of the United States obtaining or disclosing any consumer reports . . . in violation of this section is liable to the consumer to whom such consumer reports . . . relate." 15 U.S.C. § 1681u(i). Such an express waiver of sovereign immunity is not present in Section 1681n.

Notably, the remedial provisions of the FCRA applied not to "person[s]," but to consumer-reporting agencies, at the time it was enacted; it was not until 1996 that the remedial provisions were broadened to apply to all "person[s]." *See* Pub. L. No. 104-208, § 2414(a), 110 Stat. 3009, 3446 (1996); *see also Stellick*, 2013 WL 673856 at *4 ("As far as the Court is aware, no agency of the federal government was acting as a consumer-reporting agency in 1970, and thus no federal agency could have been held liable under the FCRA" at the time it was enacted.) If the FCRA, then, is intended to apply to consumer-reporting agencies, there is no allegation here that the federal defendants are consumer-reporting agencies. "It seems entirely possible—

perhaps even likely—that it simply never occurred to Congress that the [federal defendants] could be held liable under the FCRA." *Id.*

Within the FCRA, moreover, are provisions permitting courts to impose punitive damages on "[a]ny person" who wilfully violates the FCRA, *see* 15 U.S.C. § 1681n(a)(2), and criminal liability on any "[a]ny person" who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses, *see* 15 U.S.C. § 1681q. "[I]t is unlikely that Congress intended to waive sovereign immunity as to punitive damages throughout the FCRA, [and] it is unlikelier still that Congress intended to expose governmental entities to criminal penalties." *Stellick*, 2013 WL 673856 at *4. However, the sections of the FCRA that impose punitive damages and criminal penalties refer to "any person," just as the section cited by plaintiffs' in this case does. In fact, plaintiffs seek damages under Section 1681n(a)(1)(A), which authorizes actual damages against the same "person" against whom Section 1681n(a)(2) authorizes punitive damages. But Congress "only infrequently authorizes the recovery of punitive damages against the United States," and rather, "often preserves sovereign immunity as to punitive damages even when it broadly and explicitly waives sovereign immunity as to actual damages." *Id*. For all of these reasons, plaintiffs can point to no express waiver of sovereign immunity in the FCRA, and the Court lacks jurisdiction to review Count V of the Complaint.

III. Moody has failed to exhaust administrative remedies on his claim

As a preliminary matter, almost two years have elapsed since the June 6, 2012 inspection at which Plaintiff Moody was issued citations for violations—and the September 18, 2012 state court dismissal of the citations—that were included in the MCMIS database, and yet, based on the allegations in the Amended Complaint, Moody has failed to file an RDR challenge with

DataQs to the inclusion of these violations in the database.[6] Until he does so, his claim should be dismissed. Where relief is available from an administrative agency, a plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; until that recourse is exhausted, suit is premature and must be dismissed. *See Myers v. Bethlehem Shipbuilding Corp*., 303 U.S. 41, 50-51 (1938); *Heckler v. Ringer*, 466 U.S. 602, 617, 619, and n. 12 (1984). Even where exhaustion is not required by statute or regulation, courts have long employed the doctrine of prudential exhaustion to hold that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Bethlehem Shipbuilding*, 303 U.S. at 50-51. *Accord Avocados Plus v. Veneman*, 370, F.3d 1243, 1243 (D.C. Cir. 2004). Indeed, "the existence of an administrative remedy automatically triggers a non-jurisdictional exhaustion inquiry." *Avocados Plus*, 370 F.3d at 1248.

When "Congress has not clearly required exhaustion, sound judicial discretion governs" whether or not exhaustion should be required. *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992) ("The exhaustion doctrine also acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court."). Because Congress does not mandate exhaustion through filing a DataQs challenge, Moody's failure to do so is not a jurisdictional bar; however, "as a jurisprudential doctrine, failure to exhaust precludes judicial review if the purposes of exhaustion and the particular administrative scheme support such a bar." *Wilbur v. Central Intelligence Agency*, 355 F.3d 675, 677 (D.C. Cir. 2004).

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[6] The scope of Moody's attempt to seek review is clear from the Amended Complaint, which contains no allegation that Moody filed an RDR with DataQs, *ee* Compl. at ¶¶ 116-25, which stands in contrast to plaintiffs' DataQs challenges, which refers only to the "DataQs challenges filed by Plaintiffs Kelley, Lohmeier, Mowrer and Weaver." *Id*. at ¶ 146.

The Court therefore must "balance[e] the interest of the [plaintiff] in retaining prompt access to a federal judicial forum against the countervailing institutional interests favoring exhaustion." *Avocados Plus*, 370, F.3d at 1247. The D.C. Circuit further explained that "non-jurisdictional exhaustion serves three functions: giving agencies the opportunity to correct their own errors, affording parties and courts the benefit of agencies' expertise, [and] compiling a record adequate for judicial review." *Id*. Here, Moody cannot argue that he has an interest in retaining prompt or immediate access to a federal judicial forum when he has not attempted to challenge his violations by filing an RDR—something he could have done at any point while his case was pending in federal court—in the almost two years since the state court dismissed his citations. Moreover, he has provided no explanation for his inaction. As such, he cannot demonstrate diligence in exhausting his administrative remedies. *See Citizens for Responsibility and Ethics in Washington v. Dep't of Interior*, 503 F. Supp. 2d 88, 99 (D.D.C. 2007).

Further, the *Avocado Plus* factors weigh in favor of defendants. The State of Iowa has had no opportunity to review Moody's violations and the circumstances under which the court vacated a judgment in order to determine whether the violations are properly included in the MCMIS database. The State of Iowa, moreover, has greater expertise regarding its own laws and enforcement procedures than a federal court in the District of Columbia. Finally, compiling an adequate administrative record for Moody's claims would be much more problematic than such compilation regarding the other individual plaintiffs through no fault of defendants'. For some of the other plaintiffs who filed RDRs—at least as alleged in the Amended Complaint—the states responded with explanations for their decisions, bolstering the accuracy of the inspection report. *See* Compl. at ¶¶ 81, 110. The State of Iowa has had no opportunity to create such a record. For these reasons, the Court should dismiss Moody's claim.

IV. Plaintiffs have failed to state a claim for relief under the APA

Plaintiffs' Amended Complaint seeks relief on five counts, four of which rely exclusively upon the APA's waiver of sovereign immunity; but, these four APA claims are barred by a threshold requirement of 5 U.S.C. § 704 – namely, state agencies' resolutions of plaintiffs' DataQs challenges do not qualify as final agency action under the APA.

The APA permits judicial review of "final agency action for which there is no other adequate remedy." 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154 (1997). Under the APA, a court must "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), in excess of statutory authority, 5 U.S.C. § 706(2)(C), or "without observance of procedure required by law," 5 U.S.C. § 706(2)(D). The Amended Complaint is devoid of facts that would constitute an APA claim.

The sort of "agency action" complained of in an APA case must be "final agency action." 5 U.S.C. § 704. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 61-62 (2004) ("SUWA"), and "agency action" is defined in 5 U.S.C. § 551(13) to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court held that two conditions must be satisfied for a plaintiff to make the threshold showing of final agency action: First, the action must mark the "consummation" of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. Second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow." *Id*. at 177–78. Further, "final agency action" must have been taken by an "agency" which is defined for purposes of APA review as an agency of the federal government. 5 U.S.C. § 551(1).

To the extent the Amended Complaint alleges anything that plaintiffs might wish to characterize as final agency action[7], Weaver's claims or Lohmeier's claim arising from his 2013 citation would not qualify. The resolution of plaintiffs' DataQs challenges does not constitute final agency action, because they were automatically referred to the states that issued the citations and adjudicated by those states, by operation of the DataQs system. Aside from OOIDA's 2011 letters to FCMSA Administrator Ferro—regarding claims over which this Court lacks subject matter jurisdiction as discussed *supra* Part I—plaintiffs never allege that they requested that the named defendants take any action with respect to their citations.[8] That a Montana State official refused Weaver's request to modify Montana's June 2011 inspection report in response to Weaver's DataQs challenge does not qualify as "final agency action" on the part of defendants, as alleged in the Amended Complaint. *See* 5 U.S.C. § 551(1). Such non-action by federal officials cannot constitute final agency action or any basis for APA review.

Weaver does not allege that FMCSA played any role in the denial of his DataQs challenge, aside from referring it to the State of Montana. *See* Compl. at ¶¶ 132-33. In fact, the Amended Complaint affirmatively alleges the opposite in saying that "FMCSA did not exercise any judgment of its own regarding the merits of Weaver's DataQs challenge," *id*. at ¶ 133, nor

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[7] As discussed above, Moody has sought no administrative review and can point to no final agency action in this case. Notably, plaintiffs only identify two instances as "final agency action" by allegation in the Amended Complaint: (1) the letter from FMCSA Administrator Ferro regarding Kelley, Mowrer and Lohmeier's 2010 citations, the claims resulting from which this Court lacks subject matter jurisdiction to review, *see* discussion *supra* Part I; and (2) the March 19, 2013 resolution of Weaver's DataQs challenge. *See* Compl. at ¶¶ 137, 143. *Compare* Compl. at ¶¶ 71-99, 116-125, discussing Moody's claim and Lohmeier's 2013 claim, neither of which contains an allegation identifying a "final agency action."

[8] Even if this Court had jurisdiction over the claims arising from the violations that were the subject of the 2011 letter, the letter is still not final agency action, because the challenge was ultimately considered by the respective states, and FMCSA has no power to overturn a state decision.

does it allege that FMCSA took any action with respect to the actions of the Montana official. This non-action by FMCSA was in accordance with the 2012 Federal Register Notice. *See* 77 Fed. Reg. 42,548, 42,551. The same is true of Lohmeier's claims arising from his 2013 citation. Lohmeier alleges that "FMCSA forwarded the challenge to the Wisconsin state authorities," who "denied Lohmeier's challenge." Compl. at ¶¶ 93-94. Like Weaver, Lohmeier alleges that "FMCSA undertook no investigation of its own regarding the merits of Lohmeier's DataQs challenge. FMCSA did not exercise any judgment of its own regarding the merits of Lohmeier's DataQs challenge." Compl. at ¶ 95. So, like Weaver, Lohmeier can point to no final agency action it challenges in the Amended Complaint.[9]

Plaintiffs may argue that defendants act by providing access to the MCMIS database; however, it is not access to the database that allegedly injures plaintiffs. Plaintiffs alleged injuries are caused by the state's alleged submission of the inspection reports to the MCMIS database and the state actors' alleged denial of plaintiffs' DataQs challenges. *See* Compl. at ¶¶ 93, 94, 119, 132. As noted above, under the FMCSR and the 2010 and 2012 Federal Register Notices, the states submit inspection reports to the MCMIS database, and DataQs challenges are automatically referred to the states by the DataQs system. *See* 77 Fed. Reg. 42,511. As such, the actions that give rise to plaintiffs' alleged injuries were all taken by state actors, and the APA applies only to actions taken by federal government agencies. *See* 5 U.S.C. § 551(1); *see also Pennyfeather v. Tessler*, 431 F.3d 54, 56 at n.1 (2d Cir. 2005).

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[9] To the extent plaintiffs purport to argue that FMCSA's failure to investigate the merits of their challenges and failure to exercise any judgment regarding the merits of their claim is challenged, this argument fails. In fact, the 2012 Federal Register Notice makes clear that FMCSA may not act to correct entries made by state officials or otherwise sit in review of state dispositions of challenges to entries made in the system. *See* 77 Fed. Reg. 42,511.

Plaintiffs' attempt to get around this pre-requisite to review by arguing that the defendants have unlawfully delegated these actions to the states fails as a matter of law. The FCMSA did not violate any "duty" owed to plaintiffs in allowing the state officers to be the final word on the state inspection records at issue in this case. As explained above, the Motor Carrier Safety Assistance Program ("MCSAP") is based on a cooperative regulatory scheme involving both federal and state input to the FCMSA MCMIS database. *See* 49 U.S.C. § 31102(b)(1) ("The goal of the Motor Carrier Safety Assistance Program is to ensure that the Secretary, States, local government agencies, and other political jurisdictions work in partnership to establish programs to improve motor carrier, commercial motor vehicle, and driver safety to support a safe and efficient surface transportation system."). Congress has thus expressly provided that the Secretary establish procedures under which "the State agrees to assume responsibility for improving motor carrier safety and to adopt and enforce regulations, standards, and orders of the Government on commercial motor vehicle safety, hazardous materials transportation safety, or compatible State regulations, standards and orders." 49 U.S.C. § 31102(b)(2).

The PSP system enacted by Congress draws upon this cooperative arrangement to make accident reports and violation inspection data and inspection reports available to prospective employers for employment applicants, who give their written consent for the employer to access the database. State officials enter information into this MCMIS database because truckers and trucking companies are subject to state law, which is enforced by state officers. Such a cooperative venture between states and the federal government does not involve any "delegation" of federal powers or responsibility. State officials are full partners with the federal government.

Certainly, there is nothing in the statutory scheme that purports to bar the Secretary's

approach. Section 31150(b)(4) provides only that in implementing the PSP system, the Secretary shall "provide a procedure for the operator-applicant to correct inaccurate information in the System in a timely manner." This requirement is fully "consistent" with the Privacy Act, and the FFCRA provisions on which plaintiffs rely. *See* Compl. at ¶ 148. The Secretary has complied with this requirement, by setting forth such procedures in the 2010 and 2012 Federal Register Notices. Specifically, those "procedures" allow individuals to contest entries by contacting "the System Manager," a federal official. 77 Fed. Reg. at 42551. Operator-applicants "may also submit a data challenge to FMCSA's online system to record challenges to FMCSA data, DataQs," *see id.*, as some of the plaintiffs did in this case. As the 2012 Notice explains, "[t]hrough this system, data concerns are automatically forwarded to the appropriate Federal or State office for processing and resolution." *Id*. These provisions fully comply with the statutory requirement, imposed by Section 31150(b)(4), to "provide a procedure for the operator-applicant to correct inaccurate information."

Further, to the extent plaintiffs attempt to frame defendants' agency action as unlawfully providing access to inspection reports that do not contain "serious driver-related safety violations," this argument is incorrect. First, while Section 31150(a)(3) states that the Secretary "shall provide" . . . electronic access" to "[s]erious driver-related safety violation inspection reports" for purposes of pre-employment screening, there is nothing in the statute that *precludes* the Secretary from *also* providing access to non-serious driver safety violation inspection reports in PSP reports in the exercise of the Secretary's discretion. The statute is simply silent with respect to such additional matters. As noted, the Secretary elected, in the 2010 Notice, to provide access for the "most recent five years' of crash data and the most recent three years' inspection reports." 75 Fed. Reg. at 10555. The 2012 Notice retains this approach. 77 Fed. Reg. 42550.

The Secretary's provision of the most recent three years' inspection reports is therefore done in accordance with federal law.

CONCLUSION

Therefore, for the reasons set forth above, the Amended Complaint should be dismissed for lack of jurisdiction and failure to state a claim.

Dated: June 2, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Julie S. Saltman
JULIE S. SALTMAN