IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., ET AL., Plaintiffs, vs. UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., Defendants.	Civil Action No. 12-1158 (BAH)

FRED WEAVER ET AL., Plaintiffs, vs. FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, ET AL., Defendants.	Civil Action No. 14-0548 (BAH)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Consolidated Complaint for Declaratory and Injunctive Relief and Damages sets forth five separate causes of action in five separate counts supporting 15 individual requests for relief. Except for Count V dealing with the Fair Credit Reporting Act (FCRA), Defendants' (collectively referred to as FMCSA) Motion to Dismiss filed under Fed. R. Civ. P. 12(b)(1) and (12)(b)(6) does not address the separate counts of the complaint individually to demonstrate why

any of the specific counts fail to set forth a claim upon which relief can be granted. Instead, FMCSA confronts the Court with a hodge-podge of contentions that neither collectively nor individually support dismissal of any individual count of the Consolidated Complaint.

FMCSA's description of the legal framework for the case is incomplete and seriously flawed. First, FMCSA's description creates the impression that the Consolidated Complaint deals exclusively with the accuracy of PSP reports disseminated pursuant to 49 U.S.C. § 31150(a). The Consolidated Complaint more broadly addresses the inaccuracy and data correction problems with all of the data maintained in the MCMIS database. Counts I, III and IV are based upon accuracy standards imposed under 49 U.S.C. §§ 31106(a)(3)(F), 31106(a)(4)(A) and 31103(e)(1). Consolidated Complaint, ¶¶2, 3, 148, 149, 169, 170 and 179. Defendants' motion does not address these causes of action which are independent of the accuracy claims made under 49 U.S.C. § 31150(b)(1).

FMCSA contends that the PSP program was "implemented" through two System of Records Notices (SORN) published in the Federal Register in 2010 and 2012. Defs. Mem. at 4. FMCSA took this position before the D.C. Circuit in the *Weaver* case. There it contended that Plaintiffs should have filed a Hobbs Act appeal from these SORNs in 2010 and 2012 and were time barred from doing so now. The D.C. Circuit ignored this argument finding that there was no rule, regulation or final order before it upon which to base Hobbs Act jurisdiction under 28 U.S.C. § 2342(c). *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 147 (D.C. Cir. 2014). Implicit in the D.C. Circuit's finding is that these SORNs did not result in a rule, regulation or final order appealable under the Hobbs Act. The 2010 and 2012 SORNs published by FMCSA played no role in the "implementation" of the PSP program. We will return to this

subject later in Plaintiffs' analysis of Count IV dealing with the unlawful delegation of the Secretary's responsibility to assure accuracy.

FMCSA does not move to dismiss the claims of Plaintiff OOIDA, here acting in a representative capacity for its members and others upon whose behalf it seeks declaratory and injunctive relief.

II. ARGUMENT

A. The Consolidated Complaint Presents an Actual Case or Controversy for Resolution By the Court

FMCSA argues that Plaintiffs lack standing to prosecute their claims for wrongful dissemination of their safety records under the PSP program because the passage of time has caused those records to be dropped from currently disseminated PSP reports. Def. Mem. at 12-13. FMCSA also argues that Plaintiffs' PSP claims are moot. Def. Mem. at 14. It is not disputed that Article III requires that the case or controversy requirement must subsist through all stages of federal judicial proceedings. "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Citizens for Responsibility and Ethics in Washington v. Duncan*, 643 F. Supp. 2d 43, 47-48 (D.D.C. 2009)(internal quotation omitted).

1. Plaintiffs Kelley, Mower and Lohmeier Have Standing

FMCSA contends that Plaintiffs Kelley, Mowrer and Lohmeier lack ***standing*** to challenge PSP publication of alleged violations that took place in 2010 because, as of April 28, 2014 the date when the Amended Complaint was filed, those violations were more than three

years old and by then had been dropped from the drivers' current PSP report.[1] Def. Mem. at 12-13.

FMCSA asserts that "the 2012 Federal Register Notice [the SORN] 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." Def. Mem. at 4. Any suggestion that these five and three year limits on data disclosure constitute a binding rule or regulation must be rejected. Such time limitations on dissemination have never been the subject of any statute, rule or regulation. The D.C. Circuit has rejected the assertion that the 2010 and 2012 Federal Register notices [SORNs] constituted a binding rule or regulation subject to Hobbs Act review. The only other place where such time periods are mentioned is in FMCSA's DataQs User Guide which was not the product of notice and comment rulemaking. Consolidated Complaint at ¶50. Thus, the currently used three and five year limits on data dissemination under the PSP program are non-binding and may be changed at anytime. These informal time limitations provide no foundation for FMCSA's standing argument. Even if these three and five year time limitations had some legally binding effect, FMCSA's standing argument fails for other reasons.

Standing is determined "at the time the suit is initiated." *Natural Law Party of the U.S. v. Federal Election Commission*, 111 F. Supp. 2d 33, 41 (D.D.C. 2000). FMCSA does not dispute the fact that on July 13, 2012, the date the original complaint by Kelley, Mowrer and Lohmeier was filed, their then current PSP reports included the 2010 violations. The Consolidated Complaint filed on April 28, 2014 did not raise any additional causes of action that were not

[1] Defendants concede however, that at least one violation alleged to have been committed by Lohmeier took place on February 23, 2013 and continues to be included on his current PSP report. Def. Mem. at 13. Likewise, Defendants do not dispute that Moody has a violation that is less than three years old that continues to appear on his PSP report.

included within the original complaint. The Consolidated Complaint was filed to bring the claims of the original plaintiffs and those of Fred Weaver (that had been transferred from the D.C. Circuit) within one consolidated pleading. The date of the Consolidated Complaint does not signal the initiation of the litigation and has no bearing on the question of standing.

2. The Claims of Kelly, Mower and Lohmeier Are Not Moot

FMCSA next contends that the claims of Kelley, Mowrer and Lohmeier are ***moot*** because their claims are now older than three years and no longer appear on the individual's current PSP reports. Def. Mem. at 14. Notably, FMCSA does not argue that Lohmeier's claims related to his February 2013 violations are moot. These claims survive regardless of the disposition of the claims based in the 2010 violations. Of course, the currently used three year limitation on disclosure under the PSP program is not incorporated in any rule or regulation and may be changed at any time. Mootness should not be dependent on the whim of an agency.

There are a number of additional reasons why this argument fails. First, the Defendants protracted jurisdictional challenges have precluded timely review of the merits of Plaintiffs' claims. Litigation of complex legal challenges against a federal agency often takes time with final resolution coming well after the impact of the unlawful conduct has taken place. Such circumstances have given rise to a well known exception to the general rule on mootness:

> Yet an exception to this rule exists if a practice no longer affects the parties but is "capable of repetition, yet evading review." *FEC v. Wis. Right to Life*, 551 U.S. at 462, 127 S.Ct. 2652; *see Davis*, 554 U.S. at 735, 128 S.Ct. 2759 (noting that challenges to FEC decisions "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review").

La Botz v. Federal Election Commission, 889 F. Supp. 2d 51, 58 (D.D.C. 2012). Thus, if FMCSA's three year limitation is binding, that alone creates the very "repetition evading review" excepted from Article III mootness. FMCSA cannot be allowed to defer review by creating a

process which systematically defeats standing by eliminating the offending action before it can be brought before a court for review. This court should reject FMCSA's narrow view of injury in fact. Otherwise, FMCSA's position would be tantamount to shielding its conduct from judicial review. *Natural Law Party*, 111 F. Supp. 2d at 42.

The question of mootness has come up occasionally in situations involving electoral disputes that could not be resolved before the actual election had been concluded. *Natural Law Party*, supra; *LaBotz*, supra. In these situations the FEC has argued that the plaintiff's grievance could not be redressed because the election was over. That position has usually been rejected where: (1) the duration of the challenged action is too short to be fully litigated prior to its cessation; and (2) there is a reasonable expectation that the complaining party will be subject to the same offending action again. *LaBotz*, 889 F.Supp.2d at 59. A demonstration that others similarly situated might suffer a comparable harm in the future may also suffice to avoid a finding of mootness. *Id*.

This analysis applies perfectly to the facts of this case. The difficulty of completing this litigation in the face of FMCSA's jurisdictional challenges requiring this Court's stay of No.12-1158 (BAH) pending resolution of subject matter jurisdiction by the D.C. Circuit in No.14-0548 (BAH) satisfies the first condition. The fact that Plaintiffs Kelley, Mowrer and Lohmeier continue to operate their commercial motor vehicles, have their safety records maintained in the MCMIS database and have records of current violations published under the PSP program informs the Court that they may be subject to the same offending conduct on an ongoing basis. Of course, the fact that others similarly situated might suffer comparable harm also weighs importantly against a finding of mootness. Notably, FMCSA does not challenge the standing of OOIDA to seek declaratory and injunctive relief in a representative capacity. Thus the claims set

forth in the complaint survive whatever disposition the Court might make respecting mootness of Kelley, Mowrer and Lohmeier's PSP claims. There remains a live controversy and this Court is today fully capable of issuing an order that will redress the grievances raised by Plaintiffs Kelley, Mowrer and Lohmeier and other drivers for whom OOIDA acts in a representative capacity.

A careful reading of *Citizens for Responsibility and Ethics in Washington v. Duncan*, 643 F. Supp. 2d 43 (D.D.C. 2009), one of the principal cases relied upon by FMCSA, supports the Plaintiffs' position here. Def. Mem. at 14. In *Duncan*, the plaintiff challenged the conduct of a panel convened by the Secretary of Education under the Federal Advisory Committee Act (FACA) to evaluate Reading First grant proposals. Plaintiff contended that the panel failed to comply with the open meetings and disclosure provisions of FACA. 643 F. Supp. 2d at 45-46. DOE's Inspector General found that the panel (the "Old Panel") did not comply with statutory requirements. The "Old Panel" was terminated and replaced by a "New Panel" which was directed to comply with all of the Inspector General's recommendations. *Id*. at 47. After suit was filed, plaintiff demanded access to all of the documents related to the Old Panel's review of the grant proposal. *Id*.at 46. The district court was asked to decide two issues. First, whether plaintiff's claim for disclosure of documents became moot in view of DOE's detailed affidavits asserting that it had produced all relevant documents. Second, whether plaintiff's demand for declaratory and injunctive relief had become moot when DOE established a "New Panel." *Id*. at 47.

On the facts before it, the *Duncan* court determined that all documents had been disclosed and that the plaintiff's request for disclosure of documents had become moot. The court held that agency affidavits respecting disclosure enjoyed a presumption of good faith and

that plaintiff had not presented enough to overcome the detailed and non-conclusory affidavits submitted by the agency. *Id*. at 48-50.

With respect to the claims for declaratory and injunctive relief the court acknowledged that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case. *Id*. at 50, citing *United States v. W.T. Grant*, 345 U.S. 629, 632 (1953). Under such circumstances, to avoid mootness a plaintiff must demonstrate that under all circumstances there is a "substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." On the other hand, the defendant must "demonstrate that there is no reasonable expectation that the wrong will be repeated." *Id*. at 50 (citations and internal quotation marks omitted).

Using this standard, the facts in this case do not support a finding of mootness. Unlike the situation in *Duncan* where the underlying conduct was corrected and each of the reforms recommended by DOE's Inspector General were implemented, the PSP program here goes on. The Secretary has not recognized that he (not the states) is ultimately responsible for accuracy (Counts I, III and IV), that he has not issued any specific determination defining serious driver-related violations for disclosure under the PSP program. FMCSA continues to disseminate reports of violations not determined by the Secretary to be serious.

B. FMCSA's Duty to Assure the Accuracy of MCMIS Data Extends Beyond Dissemination of PSP Reports

There are additional reasons why the passage of three years does not moot the driver claims. FMCSA's standing and mootness arguments focus exclusively on obligations arising under the PSP program. 49 U.S.C. § 31150(b)(1), (4). The Consolidated Complaint is not, however, so limited. The accuracy claims in Counts I, III and IV are also based upon accuracy standards applicable generally to FMCSA's maintenance of records in the MCMIS database.

See 49 U.S.C. §§ 31106(a)(3)(F), 31106(a)(4)(A), and 31106(e)(1) and Consolidated Complaint,¶¶ 2, 3, 148, 149, 168, 170 and 179. Thus, even if the Court were to hold that the dissemination of records under the PSP program is a moot claim, other claims respecting the accuracy of data currently maintained within the MCMIS database are not. Under the statutes relied upon by the Plaintiffs' however, Defendants have a duty to assure accuracy of all the data it collects, maintains, and uses "across all information systems." 49 U.S.C. § 31106(a)(3)(F) [Complaint ¶ 3]. As the Defendants' Memorandum admits, "[t]he Administrator declined to remove the violations from the MCMIS database." As long as the administrator has determined to keep those violations in the MCMIS database, then FMCSA's duty to assure accuracy persists and injury to the Plaintiffs persists.

Accepting inaccurate records into the MCMIS database encourages federal and state officials to make improper decisions that negatively affect the Plaintiffs. As FMCSA states in its Memorandum: "FMCSA operates and maintains a database [MCMIS] which contains information relating to the safety records of commercial truck drivers and motor carriers…." Def. Mem. at 3. In 1991, Congress specifically granted DOT the authority to establish an information system to collect and use the state data. *See* Section 4003 of the Intermodal Surface Transportation Efficiency Act of 1991, ("ISTEA") Pub. L. No. 102–240 (1991) (first codified at 49 U.S.C. § 2306, and recodified and amended 49 U.S.C. § 31106). ISTEA authorized the Secretary to create an "information system which will serve as a clearinghouse and depository of information pertaining to State registration and licensing of commercial motor vehicles and the safety fitness of the registrants of such vehicles." *Id*. at Section 407(a)(2). The Act also requires the Secretary to establish standards to ensure "the availability and reliability of the information to the States and the Secretary." *Id.* at Section 407(a)(4). Long before the PSP program, the

Secretary has used inspection data to assign safety ratings to motor carriers and to identify motor carriers deserving of greater enforcement scrutiny. *See* 49 C.F.R. Parts 385 and 386. The Administrator continues to maintain federal and state access to inspection reports in the MCMIS database for such enforcement purposes that are independent from the PSP program.

In a recent Federal Register publication, FMCSA described how violations from roadside inspections are reported to FMCSA and then are accessible to state and federal users for a myriad of uses:

> States enter roadside inspection and violation data into SafetyNet, a database management system that allows entry, access, analysis, and reporting of data from driver/vehicle inspections, crashes, compliance reviews, assignments, and complaints. It is operated at State safety agencies and Federal Divisions and interfaces with roadside inspection software, SAFER, MCMIS, and State systems. The MCMIS data are then used in other FMCSA data systems, including the Pre-employment Screening Program (PSP) and the Safety Measurement System (SMS).

Motor Carrier Management Information System (MCMIS) Changes to Improve Uniformity in the Treatment of Inspection Violation Data, 78 Fed. Reg. 72146 (December 2, 2013). A list and descriptions of the many databases other than the PSP program that use MCMIS inspection data can be found at http://www.fmcsa.dot.gov/mission/information-systems/information-systems (specifically those systems that reference "MCMIS" or "inspections").

FMCSA's uses for this data are expanding: "The FMCSA is developing a data and technology-focused plan that will use data-driven systems and transformative research that focuses on risk, as well as new technologies that best support all programs and accelerate the impact of safety programs." http://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/FMCSA_SP-Highlights_2012-2016.pdf

Specifically, with regard to the data collected about drivers, FMCSA has plans to create driver safety fitness determinations (SFDs) based, in part, on driver inspection data. The purpose

of SFD will be to identify the most unsafe drivers, "intervene" with them, and if so identified, remove them from service. See The Driver Fitness Report to Congress, June 2013, found at http://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Driver-Fitness-Report-June-2013-508.pdf (last accessed on June 9, 2014).

Because FMCSA intends to continue to maintain the Plaintiffs' inspection data in its MCMIS database for use in many enforcement programs, the Defendants are not relieved of their statutory duty to assure the accuracy of that data even where that data is no longer reported on a drivers' PSP Report.

C. Publication of Driver-Related Violations Not Determined by the Secretary to be Serious is Not in Accordance With Law

Count II of the Consolidated Complaint claims that FMCSA's publication of alleged driver-related violations not determined by the Secretary to be serious within the meaning of 49 U.S.C. § 31150(d) is not in accordance with law and in excess of statutory authority. Consolidated Complaint, ¶ 150-158. FMCSA argues that the affirmative grant of authority to disclose serious driver-related violations does not foreclose disclosure of other violations as well. Def. Mem. at 25. But the Privacy Act places limitations on disclosures and forecloses the exercise of any residual disclosure authority beyond that which is specifically authorized by statute.

49 U.S.C. § 31150(a)(1) and (3) authorize the Secretary to provide persons providing pre-employment screening for the motor carrier industry with electronic access to commercial motor vehicle accident reports and serious driver-related safety violation inspection reports. Section 31150(c) informs us that disclosures under subsection (a) "*shall be designed* to assist the motor carrier industry in assessing an individual operator's *crash and serious safety violation* inspection history as a pre-employment condition." Subsection (d) provides a definition of a

"serious driver-related violation" to include only violations that the Secretary determines will result in the operator being prohibited from continuing to operate the commercial motor vehicle until the violation is corrected. Section 31150 contains *no specific authorization* to make available anything other than serious driver-related inspections reports or crash reports.

FMCSA's argument that nothing precludes the Secretary from releasing reports of non-serious violations asks the court to examine the PSP statute in a vacuum. FMCSA's authority to disclose a driver's personal data is constrained by the Privacy Act. The Privacy Act restricts FMCSA's use of personal data only to those uses specifically authorized by law. 5 U.S.C. § 552a(b)(1). Under 49 U.S.C. § 31150(a), (c) and (d), FMCSA is only authorized to disclose serious driver-related safety violations identified as such by the Secretary. FMCSA's more expansive interpretation of section 31150(a) is foreclosed by the Privacy Act.

"[I]n order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary ... to regulate the collection, maintenance, use, and dissemination of information by such agencies." *Doe v. Chao,* 540 U.S. 614, 618 (2004) (quoting Privacy Act of 1974, § 2(a)(5), 88 Stat. 1896). The Privacy Act allows the Government to maintain records "about an individual" only to the extent the records are "relevant and necessary to accomplish" a purpose authorized by law. 5 U.S.C. § 552a(e)(1). *Nat'l Aeronautics & Space Admin. v. Nelson,*__U.S.__, 131 S.Ct. 746, 762 (2011) (quoting 5 U.S.C. § 552a(e)(1)). The Act gives "forceful recognition" to an individual's interest in maintaining the "confidentiality of sensitive information ... in his personnel files." *Id.*, citing *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 318, n.16 (1999). Under these Privacy Act limitations, the Secretary only has authority to disclose to employers personal data identified by and for the purpose described in the PSP statute. 49 U.S.C. § 31150(a). That PSP authorization does not extend to

disclosure of non-serious driver-related safety violation inspection reports. Section 31150(c) directs that reports be designed to provide access to "crash reports and serious safety violation inspection history." Reports of other enforcement events are not necessary to accomplish the purposes of the law.

Congress has never granted the USDOT broad, unrestricted authority to collect and use state enforcement data concerning motor carriers and drivers. Congress did not specifically give USDOT the authority to establish an information system to collect and use the state inspection data until 1991. *See* Section 4003 of the Intermodal Surface Transportation Efficiency Act of 1991, ("ISTEA") Pub. L. No. 102–240 (1991) (currently codified at 49 U.S.C. § 31106). ISTEA authorized the Secretary to create an "information system which will serve as a clearinghouse and depository of information pertaining to State registration and licensing of commercial motor vehicles and the safety fitness of the registrants of such vehicles." *Id*. at Section 407(a)(2). The Act also requires the Secretary to establish standards to ensure "the availability and reliability of the information to the states and the Secretary." *Id.* at Section 407(a)(4). That statute gave no authority to disseminate data to the public.

While the collection of inspection reports from the states includes personally identifiable information about individual drivers, the Secretary's use of that inspection data, until 49 U.S.C. § 31150 was enacted, had only been to assign safety ratings to motor carriers, not drivers, and identify motor carriers deserving of greater enforcement scrutiny. *See* 49 C.F.R. Parts 385 and 386. At no time did the Secretary have any duty, power, or function to use that information to perform any safety enforcement-related activity related to individual drivers, and FMCSA can cite to no such authority. Under the Privacy Act, the Secretary may maintain personal records "about an individual" only to the extent the records are "relevant and necessary to accomplish" a

purpose authorized by law. 5 U.S.C. § 552a(e)(1). FMCSA does not cite to any statute giving the Secretary general authority to disclose any personal information collected about drivers for any purpose.

It was not until 2005 that Congress gave the Secretary the power, function or duty to create a system for disseminating information concerning individuals under the PSP system. 49 U.S.C. § 31150(a). That statute unambiguously authorizes only the dissemination to potential employers of accident reports and serious driver-related safety violation inspection reports. 49 U.S.C. § 31150 (a). Congress has spoken authoritatively on this question. FMCSA points to no statutory authority that overcomes limitations imposed by Congress in subsections 31150(a) and (c). But even if FMCSA were not so restricted by this statute, FMCSA cites to no other governmental interest that is served by its dissemination of unauthorized and inaccurate data on PSP reports. Nor does FMCSA attempt to argue that any governmental interest in disseminating such PSP reports outweighs the Plaintiffs' interests in enforcing their statutory rights to the accuracy of their data. FMCSA points to no evidence that the actions or decisions by motor carrier employers to use PSP reports with "non-serious" and inaccurate driver-related violations leads to a safer pool of drivers and improves highway safety. The Plaintiffs' claims should be permitted to proceed.

D. FMCSA's Delegation to the States of Its Statutory Responsibility for Data Accuracy and Correction is Not in Accordance with Law

Count IV of the Consolidated Complaint lays out with some particularity the Secretary's statutory responsibility to ensure the accuracy of data in the MCMIS database as well as the accuracy of data disseminated to potential employers under the PSP program. Consolidated Complaint, ¶¶ 170-179. FMCSA's Motion to Dismiss does not attempt to address the substance of those allegations. Rather, it provides nothing more than bland assertions, without supporting

authority, that the agreement of the states participating in MCSAP to cooperate in safety enforcement permits this transfer of statutory responsibility. Def. Mem. at 24. A closer look, however, identifies serious flaws in this analysis.

1. Statutory Responsibility

The responsibility to maintain the accuracy of data within the MCMIS database, and the PSP reports drawn from that data, is imposed upon the Secretary by statute. 49 U.S.C. §§ 31106(a)(2) and (3). Section 31106(a)(3) prescribes in part:

> The Secretary shall develop and maintain under this section data analysis capacity and programs that provide the means to –
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> ****
>
> **(F)** ensure, to the maximum extent practical, all the data is complete, timely, and accurate across all information systems and initiatives;
>
> **(G)** establish and implement a national motor carrier safety data correction system;

49 U.S.C. § 31106(a)(4)(A) contemplates the involvement of states as a source of MCMIS data, but the Secretary is responsible for establishing standards to ensure that data is accurate: "[T]he Secretary shall prescribe technical and operational standards to ensure – (A) uniform, timely, and accurate information collection and reporting by the States and other entities…."

Section 31106(e) covers dissemination of information from this MCMIS database:

> The Secretary shall develop a policy on making information available from the information systems authorized by this section and section 31309. The policy shall be consistent with existing Federal information laws, including regulations, and shall provide for review and correction of such information in a timely manner.

Federal information laws include the Fair Credit Reporting Act and the Privacy Act. When Congress enacted the PSP program it specified once again that dissemination of MCMIS records

in PSP reports would be subject to the Fair Credit Reporting Act and the Privacy Act. 49 U.S.C. § 31150(b) provides:

> **Conditions on providing access.**--Before providing a person access to the Motor Carrier Management Information System under subsection (a), the Secretary shall--
> (1) Ensure that any information that is released to such person will be in accordance with the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.) and all other applicable Federal Law;
> ***
> (4) Provide a procedure for the operator-applicant to correct inaccurate information in the System in a timely manner

Thus, the responsibility for data accuracy and correction of data falls squarely upon the Secretary.

2. FMCSA Has Abdicated its Responsibility for Data Accuracy and Data Correction.

FMCSA has unlawfully delegated its statutory responsibilities for the accuracy and correction of data in its MCMIS database. FMCSA's policy to delegate responsibility for the accuracy of data to the states is unequivocal. On April 14, 2010, FMCSA published a Privacy Impact Assessment on the PSP program in which it made the following statement:

> FMCSA is not authorized to correct state-level violation information. Challenges to state-level violation information are automatically directed to the applicable state for processing and resolution. 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).

Department of Transportation, Federal Motor Carrier Safety Administration (FMCSA) Privacy Impact Assessment, Pre-Employment Screening Program (PSP) at 4, April 14, 2010. JA#139. [2]

[2] The Joint Appendix filed in the Weaver case when it was before the D.C. Circuit has been transferred and may now be found in the records of this Court.

Consistent with this statement, the FMCSA "DataQs User Guide and Manual," dated January 2011, states:

> "2.32. Who Makes the Final Decision on an RDR [Request for Data Review]?": "FMCSA considers the State's determination of the validity of an RDR as the final decision on the RDR. FMCSA will not unilaterally change State records without State consent."

JA# 89. FMCSA cites no authority to support its policy to delegate all final data correction decisions to the states. It offers no explanation of how this delegation can be reconciled with the Secretary's ultimate responsibility to ensure accuracy.

3. FMCSA has the Legal Responsibility and the Contractual Authority To Demand Accurate Data from the States.

FMCSA is flatly incorrect when it states that it does not have the authority to change state data in FMCSA databases. By statute and its own rules implementing the MCSAP program, FMCSA obligates the states to submit accurate data to it and it has the authority to cut off funding to those states who do not comply.

Under 49 U.S.C. § 31102(b) (the MCSAP statute), the Secretary "shall prescribe procedures for a State to submit a plan under which the State agrees to assume responsibility for improving motor carrier safety… and the Secretary shall approve the plan if the Secretary decides it is adequate to perform the objectives of this section and the plan…[including] (Q) that the State has established and a program to ensure that—(i) accurate, complete, and timely motor carrier safety data is collected and reported to the Secretary and (ii) the State will participate in a national motor carrier safety data correction system prescribed by the Secretary. 49 U.S.C. §§ 31102(b)(2)(Q)(i) and (ii).

Under FMCSA rules implementing MCSAP, two of the twenty-five conditions that a state must meet to receive MCSAP funds are: 1) participation in "SAFETYNET" [the

submission of inspection data], and 2) establishment of "… a program to ensure 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. § 350.20 (n) and (s). A state must submit a certification to FMCSA of its compliance with these requirements. 49 C.F.R. § 350.211(11). If the Secretary finds that a state does not comply with MCSAP requirements, the Secretary can make a finding of non-conformity, resulting in "immediate cessation of Federal funding..." 49 C.F.R. § 350.215. Contrary to its statements in the DataQ's User Guide and Manual and the PSP's Privacy impact statement, FMCSA requires states to submit accurate data and participate in a data correction program, and it has regulatory and contractual authority to enforce those requirements. FMCSA has the statutory duty and contractual power to insist that states provide accurate information about drivers to its databases and to correct such data when wrong. There is no legal basis for FMCSA's statements to the contrary.

FMCSA contends that it has neither the authority to reverse state enforcement or construction of their own laws nor power to revise state enforcement actions. This contention simply misses the point. If FMCSA becomes aware that specific records submitted by state enforcement agencies do not satisfy federal standards for accuracy, it can fix the problem directly by purging the data from the MCMIS database and by simply refusing to disseminate that data through the PSP program. Whether FMCSA can persuade state agencies to correct their own records is simply beside the point. FMCSA may not shirk its responsibility to ensure accuracy by attempting to shift that responsibility to the states.

4. The 2010 and 2012 SORNs had no Impact on the Secretary's Statutory Responsibility for accuracy.

The SORNs were issued by FMCSA pursuant to the agency's notice obligations under the Privacy Act of 1974, 5 U.S.C. § 552a(e)(4). This provision requires that each agency that maintains a system of records shall "publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records." A review of the Notices indicates that their contents mirror the requirements for such notices under 5 U.S.C. § 552a(e)(4)(A)-(I). Because these notices did not create any rule, regulation or final order under the Hobbs Act, they did not create any administrative remedies or limit the rights of any interested party. Those notices served to point to existing administrative remedies that may have been promulgated elsewhere. In *Louis v. U.S. Dept. of Labor*, 419 F.3d 970, 975 (9th Cir. 2005) the Ninth Circuit held that the Department of Labor did not engage in substantive rulemaking, such as exempting records systems from access, when it published in the Federal Register a "Notice: Privacy Act of 1974; Publication in Full of All Notices of Systems of Records Including Several New Systems." The court, noting that "[e]verything about the title and introductory paragraphs of the notice indicates that the Department is simply complying with subsection (e)(4) of the Privacy Act [and] [n]othing in those sections indicates that the agency proposes to exempt systems from access." *Id.* The Ninth Circuit reasoned that "[t]his omission allows potentially controversial subject matter - exemption of entire systems of records from public disclosure laws – to go unnoticed buried deep in a non-controversial publication generally describing existing systems and their contents." *Id.* at 975-76. The court concluded that interested members of the public would **not** be able to read the notice and "understand its essential attributes," and that a member of the public "would likely read the first few pages of this document and conclude that this was a simple disclosure made by the Department pursuant

to (e)(4), not a proposed rule exempting certain records from disclosure." *Id.* at 976. Accord *McLouth Steel Products Corp. v. Thomas,* 838 F.2d 1317 (D.C. Cir. 1988).

In this case, the agency published a Notice in 2012 under the Privacy Act in which the summary failed to disclose the agency's decision to substantively limit the ability of drivers to challenge violation data through FMCSA's DataQs system where the data originated with a state agency. *See* 77 Fed. Reg. at 42548. On the very last page, under the section "Contesting Records Procedure," the Notice states: "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 that state. Once a State office makes a determination on the validity of a challenge, FMCSA considers that decision as the final resolution of the challenge." 77 Fed. Reg. at 42551.

Under the holdings of *Louis* and *McLouth*, FMCSA's failure to alert interested parties of its delegation policy in the summary of the 2012 Notice rendered the Notice ineffective on this issue. As in *Louis* and *McLouth*, interested members of the public "would likely read the first few pages of this document and conclude that this was a simple disclosure made by the Department pursuant to (e)(4)," not a proposed rule permitting FMCSA to delegate its decision-making obligations to the states. As such, this Court should find that FMCSA's 2012 Notice does not preclude Plaintiffs from pursuing their unlawful delegation claims.

E. Defendants' Failure to Act is Reviewable Under the Administrative Procedures Act

FMCSA contends that Plaintiffs' APA claims do not involve final agency action for this Court to review. Def. Mem. at 2. FMCSA points out that the disposition of Plaintiff Drivers' DataQs challenges by the states does not qualify as final agency action under the APA. *Id.* at 21-

23. "Such non-action by federal officials cannot constitute final agency action or any basis for APA review." *Id*. at 22.

FMCSA's position cannot withstand serious scrutiny. The APA defines "agency action" as follows:

> 5 U.S.C. § 551
> (13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or ***failure to act***; (Emphasis added)

Thus, agency action for the purpose of judicial review includes, "failure to act." The D.C. Circuit confirmed the application of this principle in this very case. *Weaver v. FMCSA*, 744 F.3d 142, 146-47 (D.C. Cir. 2014)("Inaction, of course can qualify as a form of agency action. See 5 U.S.C. §551(13), 706(1)").

The availability of judicial review under the APA for failure to act was discussed at some length in *Lujan v. Nat'l. Wildlife Fed'n*, 497 U.S. 871, 882 (1990). In *Lujan* the Supreme Court declined to grant APA review to the Bureau of Land Management's implementation of broad rules of general applicability noting that "flaws in the entire 'program'…cannot be laid before the courts for wholesale correction under the APA." 497 U.S. at 893. "Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." *Id* at 894. In a later case the Supreme Court explained that review under the APA is limited "to avoid judicial entanglements in abstract policy disagreements…." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004).

The Consolidated Complaint here does not seek judicial intervention because FMCSA is performing its statutory responsibilities badly. Plaintiffs seek judicial intervention because

FMCSA refuses to perform its statutory responsibilities at all. Plaintiffs' claims do not involve abstract policy disagreements. They deal with agency action that is "not in accordance with law" and that is having a direct, immediate and concrete impact on Plaintiff drivers:

1. The Secretary has failed to identify serious driver-related violations eligible for dissemination under the PSP program. 49 U.S.C. § 31150(d). Count II

2. The Secretary has failed to prevent widespread dissemination of driver-related inspection reports identifying violations not determined by him to constitute serious driver-related violations. *Id*. Count II

3. The Secretary has failed to establish practices and procedures to ensure that release of information under the PSP program is in accordance with the FCRA and Privacy Act. 49 U.S.C. § 31150(b)(1), (4).

4. FMCSA has failed to perform his statutory obligations to assure accuracy of data and has failed to undertake any independent investigation, assessment or evaluation with respect to state disposition of driver DataQs challenges. 49 U.S.C. §§ 31106(a)(3)(F), 31106(a)(4)(A), 31150(b)(i), (4).

5. The Secretary has failed to establish standards to ensure that data received into the MCMIS database is accurate. 49 U.S.C. § 31106(a)(4)(A).

6. The Secretary has failed to prescribe technical and operational standards to ensure accurate information collection and reporting by the States to the MCMIS database. *Id*.

These failures implicate statutory duties which the Secretary and FMCSA can be ordered to perform. Compare *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1282 (D.C. Cir. 2005) (APA review granted when concrete action applying the regulation to the claimant's situation harms or threatens to harm him) with *Lauderhill Hous. Auth. v. Donovan*, 818 F.Supp. 2d 185, 195 (D.D.C. 2011) (APA review withheld where there was no statutory duty that agency could be ordered to perform).

Here, FMCSA has completely abdicated to states receiving MCSAP grants its statutory responsibility for ensuring accuracy of MCSAP data. The Secretary has failed to issue a specific determination of what constitutes "serious driver-related violations" under 49 U.S.C. § 31150(d)

and FMCSA has authorized dissemination of all inspection reports including reports that could not possibly satisfy the definition of serious even if the Secretary had made a determination. Count II. This conduct has had and will continue to have a concrete impact on Plaintiff drivers and others similarly situated. It is precisely the kind of specific conduct with concrete effects that the APA was designed to redness.

F. Plaintiff Moody has a Cause of Action Under the APA

According to the Consolidated Complaint, on or about June 6, 2012, Moody was issued two citations by Iowa inspecting officer. Consolidated Complaint at ¶¶116-118. The State of Iowa transmitted the inspection report to the MCMIS database which reported the June 6, 2012 citations issued to Moody as "violations" of law. *Id.* at ¶119. Moody contested the citations in the District Court of Iowa in and for Jasper County. *Id.* On or about September 18, 2012, in response to Moody's motion to vacate the judgment, the court dismissed the charges against Moody and dismissed the citations. *Id.*

Defendants claim that Plaintiff Moody has no cause of action because Moody did not file a RDR challenge with DataQs to contest the inclusion of his overturned citation. Def. Mem. at 18. According to Defendants, the Court should dismiss Moody's claim because Moody failed to exhaust his administrative remedies. *Id.*

In analyzing Defendants' argument, it is important to consider the nature of Moody's claim under the APA. As the D.C. Circuit stated in the *Weaver* case, Moody has a cause of action under the APA because "FMCSA violated a statutory duty by failing . . . . to make a correction to which Weaver says he is statutorily entitled. Inaction, of course, can qualify as a form of agency action." *Weaver*, 744 F.3d at 146-47 (citing 5 U.S.C. §§ 551(13), 706(1)). Indeed, Defendants are required under 49 U.S.C. § 31150(b)(1) to ensure that "any information

that is released . . . . will be in accordance with the Fair Credit Reporting Act . . . . and all other Federal law." The statute does not predicate Defendants' obligations upon the exhaustion of any administrative remedies.

It is well-settled that "[u]nder the APA, administrative exhaustion is required when it is mandated by statute or agency rule." *Conservation Force v. Salazar*, 919 F. Supp. 2d 85, 89 (D.D.C. 2013) (citing *Darby v. Cisneros*, 509 U.S. 137, 146 (1993)(the APA "limit[s] the administrative remedies to that which the statute or the rule clearly mandates."). In *Darby*, the Supreme Court noted that an agency action is "final" and "subject to judicial review" when "an aggrieved party has exhausted all administrative remedies **expressly provided by statute or agency rule**." *Id.* (emphasis added). In this case, there is no statute or agency rule that expressly provides for the exhaustion of administrative remedies. As a result, there is no jurisdictional requirement requiring Moody to file a DataQs challenge prior to filing suit.

Defendants concede that there was no statutory or regulatory requirement that Moody file a DataQs challenge before filing suit. See Def. Mem. at 19. Instead, Defendants argue that the Court should use its "judicial discretion" and dismiss Moody's because of his failure to file a DataQs challenge purportedly deprived FMCSA the "opportunity to correct their own errors" and because "[t]he 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." Def. Mem. at 20.

Defendants' arguments fall short for two reasons. First, as alleged by Plaintiffs and admitted by Defendants, FMCSA has expressly disclaimed any ability to change the DataQs determination made by a state. As a result, even if Moody had filed a DataQs challenge,

FMCSA would not have taken any action to remove the overturned violation from the MCMIS database.

Second, there was no reason for Moody to file a DataQs challenge in order to seek a review from Iowa state authorities. The District Court of Iowa in and for Jasper County dismissed the citations issued to Moody. The dismissal by the court is a public record and available to Iowa authorities. Just as the Iowa authorities transmitted the initial inspection report to the MCMIS database, Iowa authorities could and should have transmitted the Iowa court's dismissal of the citations to the MCMIS database. Thus, there was no necessity for Moody to challenge a violation before the Iowa authorities when those same authorities knew or should have known that an Iowa court had dismissed the violations.

G. This Court Has Jurisdiction Over Plaintiffs' Claims Under The Fair Credit Reporting Act

The Plaintiffs alleged in Count V of their Consolidated Complaint (ECF No. 35) that Defendants violated the Fair Credit Reporting Act. In their motion to dismiss, Defendants argue that the Court lacks subject matter jurisdiction over Plaintiffs' claims under the Fair Credit Reporting Act ("FCRA") because "the FCRA contains no express waiver of sovereign immunity." Def. Mem. at 15. There is today a lively and as yet unresolved debate as to whether the language of the FCRA by itself constitutes a waiver of sovereign immunity. We believe and show below that those urging waiver have the stronger argument on this issue. It is not, however, necessary for the Court to take sides on this question because in 2005 Congress specifically assigned the Secretary liability under the FCRA in cases arising under the PSC program. The waiver of sovereign immunity here rests upon the language of the FCRA ***and*** the language of 49 U.S.C. § 31150(b)(1).

As a threshold matter, Plaintiffs' FCRA claim is based on the factual assertion that FMCSA is a "consumer reporting agency" under the FCRA, 15 U.S.C. § 1681a(a)(f). Consolidated Complaint at ¶ 182. Defendants fail to dispute this factual allegation and instead claim that "there is no allegation here that the federal defendants are consumer-reporting agencies." Def. Mem. at 17. Defendants' assertion is without merit as Plaintiffs have clearly pleaded that FMCSA is, in fact, a consumer reporting agency.

The Supreme Court held in *F.A.A. v. Cooper*, ___ U.S. ___, 132 S. Ct. 1441, 1448 (2012), that "a waiver of sovereign immunity must be 'unequivocally expressed" in statutory text." However, the Court held that while "this cannon of interpretation requires an unmistakable statutory expression of congressional intent to waive the Government's immunity, Congress need not state its intent in any particular way. We have never required that Congress to use magic words." Rather, the Court continued that "we have observed that the sovereign immunity cannon 'is a tool for interpreting the law' and that it does not 'displac[e] the other traditional tools of statutory construction." *Id.* (quoting *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 589 (2008). "What we thus require is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretative tools." *Cooper*, 132 S. Ct. at 1448.

In this case, the "traditional tools of statutory" construction support a finding that Congress expressly waived sovereign immunity in the FCRA. 15 U.S.C. § 1681a(a)(f) defines "consumer reporting agency" to mean "<u>any</u> <u>person</u> which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of

furnishing consumer reports[3] to third parties . . . ." (emphasis added). Section 1681a(b) then defines the term "person" broadly to include "any" government or governmental subdivision or agency.

"Any government" necessarily includes "*every government,*" including the United States government. However, Defendants argue that because the FCRA did not say "*federal* government or governmental subdivision or agency" or "*United States* government or governmental subdivision or agency," that this statutory definition did not constitute an express waiver of sovereign immunity. Def. Mem. at 16-17. Quite apart from the fact that rules of construction require a reading that "any" in fact means "any"[4] and that remedial statutes are to be interpreted broadly, there is the further problem that if the Defendants' interpretation was correct, it would mean that no government could ever be liable under § 1681n of the FCRA, since § 1681a(b) does not identify, name or describe *any* specific government, whether it be the federal government or any state or local government. Taken to its logical conclusion, Defendants' argument would mean that Congress intended the phrase "any government" to mean "no government," an absurd result.

Defendants rely on several unreported district court opinions that support their position that the FCRA does not waive sovereign immunity. However, the one court of appeals decision that expressly considered the issue roundly rejected many of the arguments set forth by Defendants in the instant case. In *Talley v. U.S. Dep't. of Agric.*, 595 F.3d 754 (7th Cir. 2010)

[3] Per 15 U.S.C. § 1681a(d)(1), "The term 'consumer report' means any… communication of any information by a consumer reporting agency bearing on a consumer's… character, general reputation, personal characteristics, or mode of living which is… expected be used… in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for… employment purposes…."

[4] *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980) (describing "any" as "expansive language [that] offers no indication whatsoever that Congress intended" to limit a statute's reach).

(rehearing *en banc* granted, opinion vacated), the court addressed the same argument that Defendants make here; i.e. that "federal agencies are not 'persons' for the purpose of the Fair Credit Reporting Act, because § 1681a(b), though admirably clear, was enacted before the amendment extending § 1681n and § 1681*o* to all persons." *Id.* at 758. The Seventh Circuit rejected this argument, reasoning that "[g]iving the sequence of enactment the effect of making the Act inapplicable to the national (and state) governments would mean, however, that 'government or governmental subdivision or agency' in § 1681a(b) had no legal effect, unless, every time Congress amends the Act, either the statute or its legislative history contains an express declaration that the original definition of 'person' applies to the Act's amended as well as its original version." *Id.* The court held that "[b]ecause Congress need not add 'we really mean it!' to make statutes effectual, and because courts don't interpret statutes to blot out whole phrases, that line of argument has poor prospects." *Id.* (citing *Swain v. Pressley*, 430 U.S. 372, 378-79 (1977)) and *Harrison*, 446 U.S. 578, 592 ("it would be a strange cannon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute."). The Court should give meaning to the plain language of the statute as enacted by Congress; i.e. that "any government" includes the federal government.

In this case, however, whether Congress expressly waived sovereign immunity in the language the FCRA is not dispositive of Plaintiffs' claims. Plaintiffs premise their FCRA claim upon the plain language of 49 U.S.C. § 31150(b)(1), which was enacted by Congress in 2005 and, on its face, holds the Secretary of Transportation directly responsible for PSP-related violations of the FCRA. This section states that "[b]efore providing a person access to the Motor Carrier Management Information System . . . . the Secretary shall ensure that any information

that is released to such person will be in accordance with the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and all other applicable Federal law." Congress, in enacting section 31150, amended and modified the FCRA by unambiguously holding the Secretary of Transportation liable for violating the Act. As such, Congress has expressly waived sovereign immunity with regard to Plaintiffs' FCRA claim.

III. CONCLUSION

Plaintiffs have set forth good causes of action under Count I and III alleging that FMCSA violates federal standards of accuracy by maintaining records of allegations respecting driver conduct as "violations" before the driver had his day in court and after he had been cleared of charges by a court of competent jurisdiction. FMCSA's recent notice in the Federal Register tacitly admits its failure to meet federal standards of accuracy and the need to take corrective action. FMCSA: Interpretive Rule and Statement of Policy, 79 Fed. Reg. 32491 (June 5, 2014). This "Statement of Policy" is a curious distraction that comes too little, too late. FMCSA unilaterally proposes to correct the problem going forward, but contends that the protection of driver rights to the accuracy of previously accumulated records is too costly leaving potentially thousands of records uncorrected. 79 Fed. Reg. at 32494-1-2. The methodology proposed for assuring accuracy going forward is also problematic. Plaintiffs are entitled to have this Court adjudicate their accuracy claims and enter an order providing appropriate remedial relief. Defendants can argue the merits of their new policy statement at that time.

Plaintiffs are entitled under Count II to offer evidence of their claim that FMCSA is disseminating reports under its PSP program of a wide range of violations not determined by the Secretary to be "serious driver-related violations" under 49 U.S.C. § 31150(d). Evidence of the

scope and scale of FMCSA's inappropriate disclosures should be presented to the Court so that it will be in a position to fashion an appropriate remedial order.

Count IV alleges that FMCSA may not shift its statutory responsibility to ensure that records maintained in the MCMIS database and disseminated to potential employers satisfy federal standards of accuracy. This responsibility may be established as a pure question of law. Plaintiff's are entitled to make a record of FMCSA's abdication of this responsibility, a fact plainly established in FMCSA's 2010 Privacy Impact Assessment (JA# 139) the DataQ User Guide and Manual (JA# 57 - ¶2, 18, 2.32) and FMCSA's 2012 SORN. 77 Fed. Reg. 42548, 42551-3 (July 19, 2012). These references are to the Joint Appendix filed in the Weaver litigation and then transferred to this court. The circumstances surrounding this abdication did not arise within any proceeding where a formal administrative record was made. The Plaintiffs will ask the Court to impose a remedial order establishing the proper allocation of responsibilities for data accuracy between FMCSA and the states receiving grants the MCSAP program.

Finally, an examination of the text of the FCRA ***and*** Section 31150 (b)(1) show that Congress has indeed waived sovereign immunity for actions filed under the PSP program.

Respectfully submitted,

DATE: June 16, 2014

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