UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., *et al.* Plaintiffs, v. ANTHONY FOXX, *U.S. Sec'y of Transportation, et al.*, Defendants.	Civil Action Nos. 12-1158 14-548 (BAH) Judge Beryl A. Howell

MEMORANDUM OPINION AND ORDER

Pending before the Court is the motion filed by the defendants—the United States, the U.S. Department of Transportation and its Secretary, and the Federal Motor Carrier Safety Association ("FMCSA") and its Administrator (collectively, the "defendants")—to dismiss the plaintiffs' First Amended Complaint ("FAC"), ECF No. 35. The defendants contend that the plaintiffs, who are five professional truck drivers, named Brian E. Kelley, Robert Lohmeier, Klint L. Mowrer, J. Mark Moody, and Fred Weaver, Jr., and their trade association, the Owner-Operator Independent Drivers Association, Inc. (collectively, the "plaintiffs"), lack standing to pursue their claims under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 702, 704, 706, the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.*, and the Privacy Act, 5 U.S.C. § 552a, pursuant to Federal Rules of Civil Procedure 12(b)(1), and otherwise fail to state a claim upon which relief can be granted, requiring dismissal of the Complaint under 12(b)(6). Defs.' Mot. Dismiss at 1, ECF No. 37. The defendants' motion is DENIED for the reasons set forth below.

I. BACKGROUND

The procedural history of this matter and the substance of the plaintiffs' claims are generally set out by the D.C. Circuit in *Weaver v. FMCSA*, 744 F.3d 142, 142–44 (D.C. Cir. 2014). Thus, the Court begins its discussion of the instant motion with *Weaver*. *Weaver* was the second of the two actions now consolidated before this Court.[1] At issue in the consolidated suits are the individual plaintiffs' allegations concerning citations they received for violations of Federal Motor Carrier Safety Regulations ("FMCSRs"), as the FMCSRs are incorporated into State laws as a condition of the State receiving federal grant money from the Motor Carrier Safety Assistance Program (MCSAP). *Id.* at 144; *see also generally* FAC. The plaintiffs allege that those citations became part of inspection reports submitted by the States to the defendants and recorded in a database called the Motor Carrier Management Information System ("MCMIS"), which is maintained by the defendants. *See Weaver*, 744 F.3d at 143. Under the Pre-Employment Screening Program ("PES Program"), prospective employers may pay a fee to obtain certain information from the MCMIS, including "(1) commercial vehicle accident reports; (2) inspection reports that contain no driver-related safety violations; and (3) serious driver-related safety violation reports." FAC ¶¶ 29, 45. Each plaintiff claims that his citation was later dismissed without a finding of guilt, but those post-citation findings are not reflected in the MCMIS. *Weaver*, 744 F.3d at 144; *see generally* FAC. As a result, the plaintiffs claim that the defendants are violating statutory requirements that the defendants maintain accurate, relevant, timely, and complete records. *See Weaver*, 744 F.3d at 143; FAC ¶¶ 32–37.

[1] The two consolidated cases are *Owner-Operators Independent Drivers Association, Inc. v. Foxx*, Case No. 12-1158, originally filed in this Court, and *Weaver*, filed directly with the D.C. Circuit.

In *Weaver*, the D.C. Circuit held that it lacked original jurisdiction over the plaintiffs' claims under the Hobbs Act, 28 U.S.C. § 2342(3), and remanded the case to this Court. 744 F.3d at 148. The parties "disagree[d] energetically on the merits" before the D.C. Circuit, *id.* at 143, but the Court ultimately declined to reach the merits since there was no challenge to "a rule, regulation, or final order" over which it had original jurisdiction, within the meaning of the Hobbs Act, *id.* at 148. The plaintiffs defined the agency's "action" in *Weaver* as, *inter alia*, a failure to correct what the plaintiffs characterize as inaccurate information in the MCMIS database. *Id.* at 146–47. The D.C. Circuit expressly declined to rule on "the status of the [defendants'] activity," but since the Circuit was certain the defendants' inaction was not "a rule, regulation, or final order," it found that the District Court was the appropriate forum to address the matter in the first instance. *Id.* at 147–48.

Particularly relevant here is the *Weaver* Court's partial basis for its holding: namely, that "[i]t is the availability of a record for review and not the holding of a quasi judicial hearing which is now the jurisdictional touchstone" in reviewing agency action. *Id.* at 147 (quoting *Inv. Co. Inst. v. Bd. of Governors of the Fed. Reserve Sys.*, 551 F.2d 1270, 1277 (D.C. Cir. 1977)). The D.C. Circuit observed that the defendants had "not compiled a record with an eye toward judicial review—indeed, [they have] insisted that [they have] no role to play in the MCMIS process." *Id.* Although the D.C. Circuit recognized that "district courts generally cannot conduct de novo review of agency action, there is a narrow exception where the record is so bare that it prevents effective judicial review." *Id.* at 147–48 (internal quotation marks and citations omitted). Although stopping short of finding that the instant matter is such a case where the exception applies, the D.C. Circuit expressly opined that the exception is "a circumstance that might well prove true here." *Id.* at 148.

On remand, *Weaver* was consolidated with *Owner-Operators Independent Drivers Association, Inc. v. Foxx* in this Court, Minute Order, Apr. 29, 2014, and the plaintiffs filed the FAC. Yet, despite nearly two years elapsing since the plaintiffs filed their initial Complaint, the defendants again moved to dismiss the FAC, rather than provide the Administrative Record the D.C. Circuit strongly suggested was necessary to resolve the instant matter. As noted, that motion is now pending.

II. LEGAL STANDARD

A. Dismissal Under Federal Rule Of Civil Procedure 12(b)(1)

"'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Indeed, federal courts are "forbidden . . . from acting beyond our authority," *NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008), and, therefore, have "an affirmative obligation 'to consider whether the constitutional and statutory authority exist for us to hear each dispute.'" *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Cir. 1996) (quoting *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 196 (D.C. Cir. 1992)). Absent subject matter jurisdiction over a case, the court must dismiss it. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506-07 (2006); FED. R. CIV. P. 12(h)(3). When considering a motion to dismiss under Rule 12(b)(1), the Court must accept as true all uncontroverted material factual allegations contained in the complaint and "construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged and upon such facts determine jurisdictional questions." *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (citations and internal quotation marks omitted).

B. Standing

Article III of the Constitution restricts the power of federal courts to hear only "Cases" and "Controversies." CONST. Art. III, § 2 cl. 1. "The doctrine of standing gives meaning to these constitutional limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (alterations in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Absent standing by the plaintiffs, the Court lacks subject matter jurisdiction to hear the claim and dismissal is mandatory. *See* FED. R. CIV. P. 12(h)(3). The Supreme Court has explained, "the irreducible constitutional minimum of standing contains three elements." *Lujan*, 504 U.S. at 560. First, the plaintiff must have suffered an "injury in fact," i.e., "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (citations and internal quotation marks omitted). "Second, there must be a causal connection between the injury and the conduct complained of," i.e., the injury alleged must be "fairly traceable to the challenged action of the defendant." *Id.* (citation omitted). Finally, it must be likely that the injury will be "redressed by a favorable decision." *Id.* at 561.

C. Dismissal Under Federal Rule Of Civil Procedure 12(b)(6)

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Wood v. Moss*, 134 S. Ct. 2056, 2067 (2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim is facially plausible when the plaintiff pleads factual content that is more than "'merely consistent with' a defendant's liability," but "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)); *see also Rudder v.*

Williams, 666 F.3d 790, 794 (D.C. Cir. 2012). In considering a motion to dismiss for failure to plead a claim on which relief can be granted, the court must consider the complaint in its entirety, accepting all factual allegations in the complaint as true, "even if doubtful in fact." *Twombly* at 555; *Sissel v. U.S. Dep't of Health and Human Servs.*, 760 F.3d 1, 4 (D.C. Cir. 2014) (in considering Rule 12(b)(6) motion, the "court assumes the truth of all well-pleaded factual allegations in the complaint and construes reasonable inferences from those allegations in the plaintiff's favor, but is not required to accept the plaintiff's legal conclusions as correct" (internal quotations and citations omitted)).

III. DISCUSSION

In actions brought under the APA, "the district judge sits as an appellate tribunal." *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009) (quoting *Am. Biosci., Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)). Indeed, the D.C. Circuit has noted that in an APA matter "'[t]he entire case on review is a question of law,' and the 'complaint, properly read, actually presents no factual allegations, but rather only arguments about the legal conclusion to be drawn about the agency action.'" *Id.* (quoting *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993)). Thus, the Court's review "is based on the agency record and limited to determining whether the agency acted arbitrarily or capriciously." *Id.*

The defendants make a colorable challenge to the plaintiffs' standing,[2] predicated on their interpretation of the statute requiring the defendants to maintain the MCMIS, 49 U.S.C. § 31106(a)(3)(F). The defendants contend that the only adverse impact suffered by the plaintiffs is

[2] The defendants also contend that, as to most of the plaintiffs, the matter has become moot and should therefore be dismissed. Defs.' Mem. Supp. Defs.' Mot. Dismiss ("Defs.' Mem.") at 14, ECF No. 38. Since "[t]he doctrines of standing and ripeness 'originate' from the same Article III limitation," there are times when "standing and ripeness issues . . . boil down to the same question." *Susan B. Anthony List*, 134 S. Ct. at 2341 n.5 (internal quotation marks omitted). The instant matter is such a case.

the defendants' provision of records showing the plaintiffs' citations, without information that the citations were subsequently dismissed, to the plaintiffs' potential employers under the PES Program. *See* Defs.' Mem. Supp. Defs.' Mot. Dismiss ("Defs.' Mem.") at 12, ECF No. 38. Were the plaintiffs' claims solely related to the PES Program, the defendants' argument might even prevail, at least for those plaintiffs whose citations are more than three years old and, therefore, no longer accessible to employers under the PES Program. *See id.* Yet, the plaintiffs' claims are *not* solely related to the PES Program. Rather, as the D.C. Circuit noted, the plaintiffs allege that the defendants' failure "to meet its statutory obligation to ensure the accuracy of the MCMIS data," *Weaver*, 744 F.3d at 146, is a failure that the plaintiffs allege harms them independently of the PES Program, *see, e.g.*, FAC ¶ 115 ("Mr. Mowrer has been adversely affected or aggrieved by *the failure of the FMCSA to delete from its MCMIS database the reference to the citation as a 'violation' of statute or regulation.*" (emphasis added)).

The major issue to be decided in this matter, therefore, is not whether the defendants are providing inaccurate information about the plaintiffs under the PES Program, but rather whether the defendants are maintaining inaccurate information *in the MCMIS*. On this issue, the defendants' challenge to the plaintiffs' standing is inextricably intertwined with the defendants' interpretation of the statute. Though the defendants' interpretation may ultimately prove correct and the defendants have done all that they are required to do by statute in providing a mechanism to challenge certain information in the MCMIS, the Court lacks any way to determine if that interpretation is reasonable or arbitrary on the record before it. *See* 5 U.S.C. § 706.

Although it is "the court's duty to refrain from merits rulings until assured of jurisdiction," *Airlines for America v. TSA*, Case No. 14-1143, slip op. at 4 (D.C. Cir. Mar. 10, 2015), the plaintiffs' injury is dependent upon the disputed interpretation of the requirements of

49 U.S.C. § 31106(a)(3)(F). Thus, the fundamental problem with the defendants' motion in this matter is the lack of an administrative record for the Court to review. The plaintiffs allege that the defendants' maintenance in the MCMIS of "objectively false and inaccurate" data has caused the plaintiffs to be "adversely affected or aggrieved," FAC ¶¶ 85–86; 98–99; 114–15; 124–25; 137–38, and the plaintiffs' interpret 49 U.S.C. § 31106(a)(3)(F), the Privacy Act, and the FCRA as requiring the defendants to remove from MCMIS reports of "violations" when those violations are successfully challenged in a court of competent jurisdiction, *see generally* FAC. In some cases, the standing "injury is inferable from generally applicable . . . principles," *Airlines for America*, slip op. at 4, but in this matter it is not "self-evident," *id.*, whether or not the plaintiffs are injured.

The plaintiffs' interpretation is colorable and alleges an injury in fact caused by the defendants' action in maintaining an inaccurate database despite statutory requirements to the contrary. If the plaintiffs' view of the relevant statutes is correct, they most likely have standing to bring their claim and have stated a claim upon which relief can be granted; conversely, if the defendants' view is correct, the plaintiffs may have no claim at all. Absent any form of administrative record, the Court is simply unable to review the agency's interpretation to see which party has the better of this argument. *Cf. Airlines for America* at 4 (noting some cases may "require no evidence outside the administrative record" to determine the presence or absence of an injury). Consequently, the Court must deny the defendants' motion to dismiss without prejudice, pending review of an administrative record.[3]

[3] As for the defendants' contention that the FCRA does not contain a waiver of sovereign immunity, Defs.' Mem. at 15, the Seventh Circuit recently addressed the question squarely and held that the FCRA does indeed contain an express waiver of sovereign immunity. *See Bormes v. United States*, 759 F.3d 793, 795 (7th Cir. 2014). Since the FCRA defines a "person" to include "any . . . government or governmental subdivision or agency," 15 U.S.C. § 1681a(b), and holds any "person" liable for "willfully fail[ing] to comply with any requirement" of the FCRA, 15 U.S.C. § 1681n(a), the Seventh Circuit held that the United States had waived its sovereign immunity, since it is a "government" within the meaning of the FCRA, *Bormes*, 759 F.3d at 795. The D.C. Circuit has not ruled on this

Therefore, upon consideration of the defendants' Motion to Dismiss, ECF No. 37, the related legal memoranda in support and in opposition, and the entire record herein, for the reasons set forth above, it is hereby

ORDERED that the defendants' Motion is DENIED; and it is further

ORDERED that the parties submit jointly a schedule to control further proceedings in this matter by March 24, 2015.

SO ORDERED.

Date: March 10, 2015

Digitally signed by Judge Beryl A. Howell
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BERYL A. HOWELL
United States District Judge

precise question, but the Court finds the reasoning in *Bormes* persuasive and adopts it here. Consequently, the Court has subject matter jurisdiction over the plaintiffs' FCRA claim to the extent that the plaintiffs otherwise have standing.