

deadline to appeal the Court's denial of their motion to intervene in the Related Litigation, *see* Order, *Doe v. FEC*, 17-02694-ABJ (D.D.C. Jan. 31, 2018); Fed. R. App. Proc. 4(a)(1)(B) (providing 60 days to appeal judgment from final order in a matter in which the United States is a party). The FEC's requested extension would, if granted, delay its obligation to produce to Plaintiffs a certified list of the contents of the administrative record. *See* L.Cv.R. 7(n) (agency must produce record within thirty days of service of its answer). This would, in turn, delay resolution of the Related Litigation's impact on Plaintiffs' right to access to the full administrative record in this case until after the expiration of Plaintiffs' right to seek appellate relief in the Related Litigation. Without timely resolution of this issue, Plaintiffs may be forced to seek appeal in the Related Litigation solely to protect their rights to the record in this litigation, complicating both lawsuits and wasting judicial resources. Plaintiffs therefore seek clarification or a protective order now to ensure their rightful access to the full administrative record in this case.

Pursuant to Local Civil Rule 7(m), counsel for the Plaintiffs conferred with counsel for the FEC on this motion and the FEC plans to oppose this motion.

BACKGROUND

In this case, Plaintiffs challenge the FEC's action on an administrative matter arising from Plaintiffs' complaint against American Conservative Union ("ACU"), Now or Never PAC, James C. Thomas as treasurer for Now or Never PAC, and unknown respondents who were the source or sources of contributions to Now or Never PAC that were unlawfully reported as originating with ACU (the "Matter"). During its investigation of the Matter, the Commission identified three unknown respondents. The Commission entered a conciliation agreement with one such respondent, Government Integrity, LLC. The Commission also identified two other

entities, a trust and its trustee, but did not pursue enforcement against those entities.

In the Related Litigation, the trust and trustee, proceeding under the pseudonyms John Doe 2 and John Doe 1, respectively, have sought an injunction barring the Commission from publicly releasing the names of the trust and trustee in the course of the Commission's statutorily mandated practice of publishing its investigative file at the close of an investigation. *See* Complaint, *Doe v. FEC*, No. 17-cv-02694-ABJ (D.D.C. filed Dec. 15, 2017). That litigation is ongoing and there is currently no injunction against the public release of the names of the trust and trustee. Nonetheless, in the Related Litigation, the Commission agreed to redact the trust and trustee's names from the publicly released documents relating to the Matter until order of this Court, and the Court, in reliance on that agreement, found that the Doe Plaintiffs' motions for a temporary restraining order and preliminary injunction were moot. Minute Order, *Doe v. FEC*, No. 17-cv-02694-ABJ (D.D.C. Dec. 18, 2017). This representation notwithstanding, it appears the FEC did not—and lawfully could not—represent that it would act contrary to its legal obligations to produce the entire record to Plaintiffs in this or any other legal action.

ARGUMENT

In order to litigate Plaintiffs' claim that the Commission has acted contrary to law on their administrative complaint, it will be necessary for the Commission to provide to the Court and Plaintiffs the entirety of the record in the Matter before the Commission when it decided not to pursue enforcement against the unknown respondents. It is indisputable that materials before the Commission at the time of its decision included documents containing information identifying the Doe Plaintiffs. *See, e.g.*, Third General Counsel's Report, MUR 6920 (Sept. 15, 2017), <http://eqs.fec.gov/eqsdocsMUR/17044435484.pdf>. The Plaintiffs therefore have a legal right to an unredacted and complete copy of the administrative record containing that

information. *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (per curiam) (establishing that courts must have “neither more nor less information than did the agency when it made its decision”); *Stand Up for California! v. U.S. Dep’t of Interior*, 71 F. Supp. 3d 109, 117 (D.D.C. 2014) (administrative record consists of “all materials that were ‘before the agency at the time the decision was made’” (quoting *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1084, 1095 (D.C. Cir. 1996)); see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (review of agency action must be based on the “full administrative record that was before [the agency] at the time [it] made [its] decision”); *In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538, 550–51 (D.C. Cir. 1980) (Wald, J., concurring) (noting the FECA incorporates the standards of the APA to enable judicial review).

Plaintiffs’ right to a complete record in this litigation is not limited by the FEC’s representations in the Related Litigation. While Plaintiffs submitted an amicus brief in the Related Litigation explaining that the Doe Plaintiffs are not entitled to a gag order barring discussion of their identities in association with a reportable contribution, Plaintiffs were nonetheless not parties to the Related Litigation. Accordingly, their rights to access to the full administrative record in this case were not and could not have been adjudicated in the Related Litigation. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) (“It is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process.”); *Frederick County Fruit Growers Ass’n, Inc. v. Martin*, 968 F.2d 1265, 1270 (D.C. Cir. 1991)

(noting that a “judgment rendered by a federal court” even on the basis of a stipulation agreement between the parties does not bind a non-party).

Therefore, notwithstanding any representations the FEC made in the Related Litigation, and notwithstanding any order issued in that litigation, Plaintiffs remain entitled to the full administrative record in the matter below without redaction of information identifying any person, including the Doe Plaintiffs. Plaintiffs consequently request an order from this Court declaring their right to the full administrative record, without limitation, notwithstanding the Related Litigation.

In the alternative, in order to at least ensure Plaintiffs’ access to material necessary to protect their rights and to litigate this matter fully, Plaintiffs respectfully request entry of the attached proposed protective order. The Protective Order ensures Plaintiffs have access to the full administrative record and their use under seal in this litigation of any confidential materials, until the Court fully adjudicates the Related Litigation, while maintaining the status quo in the Related Litigation by precluding public disclosure of information identifying the Doe Plaintiffs.

Similar protective orders have been entered and dissolved in enforcement review cases brought pursuant to 52 U.S.C. § 30109(a)(8). *See, e.g., CREW v. FEC*, No. 14-1419 (D.D.C. Dec. 12, 2016) (Docket No. 63); *Alliance for Democracy v. FEC*, No. 02-527 (D.D.C. Oct. 18, 2002) (order granting motion for entry of a protective order in part); *Democratic Senatorial Campaign Comm. v. FEC*, No. 95-0349 (D.D.C. May 26, 1995) (order setting forth procedures for handling confidential material under protective order); *Common Cause v. FEC*, No. 87-2224 (D.D.C. Oct. 2, 1987) (order setting forth instructions for filing documents under seal pertaining to FEC Matter Under Review 2282); *Furgatch v. FEC*, No. 87-0798 (D.D.C. June 25, 1987)

(order directing plaintiff's counsel not to disclose documents or information released by defendant).

Moreover, release of the full administrative record subject to a protective order would not prejudice the Doe Plaintiffs, whose identities are already disclosed in documents filed under seal with this Court. Further, the sole issue in dispute in the Related Litigation is the public disclosure of their identities, *see* Compl. ¶ 4, *Doe v. FEC*, 16-cv-02694-ABJ (filed Dec. 15, 2017) (requesting injunction prohibiting “the Commission from publicly releasing [the Doe Plaintiffs’] names”), and the FEC agreed only to redact the Doe Plaintiffs’ identities from materials they intend to “publish,” *see* Minute Order, *Doe v. FEC*, 16-cv-02694-ABJ (D.D.C. Dec. 18, 2017). Accordingly, nothing in the Related Litigation prohibits the production of the full administrative record to Plaintiffs, including information identifying the Doe Plaintiffs, subject to a protective order which prohibits publication of that information until the Court resolves the related litigation.

Without either a declaration as to its rights to the full administrative record below, including to information identifying all the unknown respondents identified by the FEC below (including the Doe Plaintiffs), or at a minimum a protective order ensuring Plaintiffs have access to such a record while protecting the status quo in the Related Litigation, Plaintiffs face irreparable injury. The issue is ripe now, because without swift clarification, Plaintiffs would be forced to forgo resolution of the issue of the scope of the record in this matter until its rights to seek appellate review of the judgment denying their motion to intervene in the Related Litigation expired. The FEC has represented to Plaintiffs that, absent clarification from the Court, it intends to use the existence of the Related Litigation or any judgment stemming therefrom to deny Plaintiffs access to the full administrative record below, leaving Plaintiffs with no adequate

avenue to challenge that denial if their right to seek review of the Related Litigation expires.

Without the relief requested here, Plaintiffs will therefore be compelled to seek appellate review of the Related Litigation, complicating that litigation and potentially wasting judicial resources.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court clarify their right to the entire administrative record below, including to information identifying the Doe Plaintiffs, or, in the alternative, request the Court enter the attached protective order.

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Respectfully submitted,

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