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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
SOUTHERN DIVISION

GILBERT P. HYATT and AMERICAN ASSOCIATION FOR EQUITABLE TREATMENT, INC., Plaintiffs, v. OFFICE OF MANAGEMENT AND BUDGET and SHAUN DONOVAN, in his official capacity as Director of the Office of Management and Budget, Defendants.	Case No: 2:16-cv-01944-JAD-GWF **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS**

Defendants, the Office of Management and Budget and Shaun Donovan, in his official capacity as Director of the Office of Management and Budget (collectively "OMB"), submit this reply in support of their Motion to Dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Defs.' Mot. to Dismiss ("MTD"), ECF No. 19.

INTRODUCTION

In the Paperwork Reduction Act ("PRA"), Congress expressly precluded judicial review of all challenges to OMB decisions under the PRA not to act on collections of information contained in agency rules. *See* 44 U.S.C. § 3507(d)(6). That is precisely the challenge that Plaintiffs bring in this case; they accuse OMB of failing to act upon the PTO Rules that, according to Plaintiffs, contain collections of information subject to the PRA. By the plain text of § 3507(d)(6), Plaintiffs' claims are barred from judicial review and, for this reason among others, this action must be dismissed.

In an effort to avoid the preclusive effect of § 3507(d)(6), Plaintiffs respond with a strained interpretation of the statute that does not withstand scrutiny. Rather than confront the plain text of the provision, Plaintiffs graft onto it an array of qualifications and limitations that find no support in the statute or its legislative history. Though Plaintiffs resort to the ordinary presumption of review under the Administrative Procedure Act ("APA"), the APA itself contains an express exception to that presumption. Congress made abundantly clear that no APA action may be brought when "statutes preclude judicial review," 5 U.S.C. § 701(a)(1), and Congress was equally clear in § 3507(d)(6) of the PRA that judicial review is precluded here. These are not mere "boilerplate objections" as Plaintiffs would have the Court believe, *see* Pls.' Resp. in Opp'n to MTD ("Opp'n") 2:11-12, ECF No. 22, but are statutory limits on judicial review by which litigants and courts must abide.

If the Court agrees with OMB's interpretation of § 3507(d)(6), it has no need to reach OMB's additional arguments concerning final agency action, agency discretion, and adequate

alternative remedy.[1] However, should the Court find occasion to reach those issues, they supply additional reasons why Plaintiffs' Complaint should be dismissed for lack of subject matter jurisdiction. OMB's Motion to Dismiss should be granted.

ARGUMENT

I. PLAINTIFFS CANNOT OVERCOME § 3507(D)(6)'S EXPRESS PRECLUSION OF JUDICIAL REVIEW.

Section 3507(d)(6) of the PRA is straightforward: "The decision by [OMB] to approve or not act upon a collection of information contained in an agency rule shall not be subject to judicial review." 44 U.S.C. § 3507(d)(6). Based on the plain text of this provision, whether the judicial review bar applies may be determined by three simple inquiries, all of which are answered affirmatively here. *First*, was there a decision by OMB "to approve or not act upon" a collection of information? By Plaintiffs' own allegations, OMB decided not to act upon the PTO Rules. They squarely allege that the collections of information contained in the PTO Rules "have not been approved by OMB and assigned valid OMB Control Numbers." Compl. ¶ 4, ECF No. 1; *see also id.* ¶ 44 (same), ¶ 5 ("OMB has failed to scrutinize the collections of information contained within rules of general applicability promulgated by the PTO . . . ."), ¶ 72 (alleging that the collections of information in the PTO Rules "have never been reviewed for PRA compliance and approved or disapproved by [OMB]").

Second, was the OMB decision made with regard to a "collection of information"? Again, Plaintiffs' own pleadings allege that the PTO Rules contain collections of information. *See* Compl. ¶¶ 39-44. (As noted in its opening brief, OMB if necessary will dispute that allegation,

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[1] In their response, Plaintiffs concede that AAET has "suffered no direct injury." Opp'n at 23:25 (quoting *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 798 (9th Cir. 2001). Instead, AAET proceeds solely on a theory of associational standing, and hinges its claim entirely on the § 3517 request submitted by Plaintiff Hyatt (not AAET) and the pendency of Mr. Hyatt's (not AAET's) numerous patent applications. But associational standing may be found lacking when the "the substantive claim [or] the remedy sought necessitates the participation of [an] individual member." *Ocean Advocates v. U.S. Army Corps of Engr's*, 402 F.3d 846, 861 (9th Cir. 2005). Thus, if this Court finds that judicial review is not precluded by § 3507(d)(6), whether AAET is a party may become relevant because its presence would, if Plaintiffs prevail, unduly impact the scope of relief. *See* Compl. at 17, Prayer ¶ F (improperly requesting sweeping relief on behalf of all "persons" who are subject to the PTO Rules).

see MTD at 8:14-23, but for purposes of this Motion to Dismiss, the Court should credit Plaintiffs' (incorrect) assumption that Rules 111, 115, and 116 contain "collections of information.")

Third, is the collection of information "contained in an agency rule"? Again, the answer is yes—the alleged collections of information are contained in PTO Rules 111, 115, and 116 that underwent notice-and-comment rulemaking. OMB noted as much in its opening brief, *see* MTD 6, 11 & n.2, and Plaintiffs themselves alleged the same in their Complaint, Compl. ¶¶ 43, 44 (citing the "collections of information contained in PTO Rules 111, 115, and 116").

Those three questions answered in the affirmative, § 3507(d)(6) unquestionably applies and, consequently, bars judicial review of Plaintiffs' claims. *See Tozzi v. EPA*, 148 F. Supp. 2d 35, 47 (D.D.C. 2001) (concluding that "the PRA's explicit statutory bar prohibiting judicial review of OMB's ICR approval [and non-action] decisions renders this matter not judicially reviewable"). Evidently aware that their claims cannot survive the plain text of this provision, Plaintiffs in their response brief advance a series of mistaken interpretations of the PRA to try to avoid dismissal. As shown below, none of these arguments succeeds.

A. Section 3507(d)(5) does not limit the judicial review bar of § 3507(d)(6).

Plaintiffs suggest (at 16) that a neighboring subsection, 44 U.S.C. § 3507(d)(5) was designed to impose *sub silentio* a durational limit on § 3507(d)(6)'s judicial review bar. They argue, based on a contorted reading of subsection (d)(5), that review is precluded by § 3507(d)(6) only when "OMB approves or takes no action on any collections of information contained in the final rule *immediately following* its promulgation." Opp'n 16:18-20 (emphasis added). There is no basis to draw that conclusion. Section 3507(d)(5) provides that subsection (d) "shall apply only when an agency publishes a notice of proposed rulemaking and requests public comments." The provision says nothing, however, that would purport to limit the duration of § 3507(d)(6)'s judicial review preclusion, even though Congress proved itself capable of placing a time limit on OMB inaction elsewhere in the same subsection. *See* 44 U.S.C. § 3507(d)(3) ("If the Director has received notice and *failed to comment* on an agency rule *within 60 days after* the notice of proposed rulemaking, the Director may not disapprove any collection of information specifically contained in an agency rule." (emphases added)).

Plaintiffs' attempt to read a time limit into subsection (d)(6) would also vitiate the effect of the judicial review bar entirely. If an individual could simply wait a certain (unspecified) period of time after the agency's final rule has been in place and then petition OMB to act on the purported collection of information in the final rule, then, under Plaintiffs' interpretation, the § 3507(d)(6) bar would not apply. In other words, a patient litigant could simply wait for Congress's express preclusion of judicial review to lapse, a result not supported by the statute.[2]

As Plaintiffs themselves appear to recognize, Congress did not intend the bar on judicial review to be simply one of duration. Rather, "a party may not directly challenge . . . OMB action. Instead, the party may obtain judicial review of the final rule . . . by directly challenging the final rule itself." Opp'n 16:20-22. But Plaintiffs here do not directly challenge the PTO Rules—they challenge only OMB's failure to act on a purported collection of information. That is precisely the type of challenge that Congress foreclosed in § 3507(d)(6).

B. The specific OMB actions that Plaintiffs challenge are subject to § 3507(d)(6).

Contrary to Plaintiffs' argument (at 17-20), the applicability of § 3507(d)(6) does not turn on the formal labeling of the action taken by OMB. Instead, the provision on its face bars review of any "decision by [OMB] to . . . not act upon a collection of information contained in an agency rule." 44 U.S.C. § 3507(d)(6). Congress did not specify a particular form such a decision must take or, as Plaintiffs argue, indicate that certain types of OMB decisions would be exempt from the provision. In an effort to avoid § 3507(d)(6)'s plain language, Plaintiffs are left to argue that Congress somehow silently carved out from the judicial review bar the two types of OMB actions they happen to challenge. That argument is incorrect.

In both the 2013 Notice of Action and the response to Plaintiff Hyatt's § 3517(b) request, OMB neither approved nor disapproved PTO Rules 111, 115, and 116 as collections of information subject to the PRA. In other words, OMB made a decision to "not act upon" the PTO Rules. Because those Rules are purported collections of information contained in an agency rule,

[2] In effect, Plaintiffs try to do that in this action. Dissatisfied with OMB's decision not to act upon PTO's alleged collections of information when they were initially promulgated—a decision that is reflected in OMB's 2013 Notice of Action and § 3517(b)(2) response—Plaintiffs ask the Court to revisit OMB's decision. Such a claim is precluded by § 3507(d)(6).

Plaintiffs' challenge to that decision by OMB is barred. 44 U.S.C. § 3507(d)(6). Plaintiffs seek to evade that conclusion by shifting the focus from OMB's decision not to act to the formal nature of the OMB actions they happen to challenge.

First, Plaintiffs contend that the 2013 Notice of Action is not subject to § 3507(d)(6) because it was supposedly issued under either subsection (c) or (h) of § 3507, though they curiously fail to identify which one. Opp'n 18:1 (claiming it "not important" which of these two subsections applies). It cannot be subsection (h), however, since that subsection applies only when "an agency decides to seek extension of [OMB's] approval granted for a *currently approved* collection of information." 44 U.S.C. § 3507(h)(1) (emphasis added). As Plaintiffs concede—indeed, as they strenuously assert, *see* Compl. ¶¶ 4, 44 (alleging that "[t]he collections of information in Rules 111, 115, and 116 have not been approved by OMB")—the PTO Rules have never been approved by OMB as collections of information.[3]

Subsection (c), which applies to "any proposed collection of information *not contained* in a proposed rule," also could not have applied here. 44 U.S.C. § 3507(c)(1) (emphasis added). As Plaintiffs acknowledge, the alleged collections in the PTO Rules *were* contained in proposed PTO rules and, at present, *are* contained in agency rules. Opp'n 17:14-15 (noting that the PTO Rules were promulgated "years earlier" via notice in the Federal Register).

Plaintiffs also contend, in the face of the statutory text, that "Congress expressly limited the reach of Subsection (d)'s provisions." *Id.* at 18:19-20. They incorrectly argue, citing subsection (d)(1), that the judicial review bar is "expressly limited to collections that, at the outset of the OMB review process, are 'contained in a proposed rule,' not an existing rule." *Id.* at 18:8-9. Yet § 3507(d)(6) does not contain the supposed "express limit[ation]" that Plaintiffs say it

[3] PTO did submit to OMB a number of approved collections of information for renewal in January 2013, on which OMB acted in the 2013 Notice of Action. Although PTO initially referenced Rules 111, 115, and 116, referring to them as "Amendments and Responses," in the January submission, *see* Compl., Att. 5 at 3, it revised that submission in July to omit the PTO Rules. *See* U.S. PTO, Supporting Statement, Patent Processing (Updating) (July 22, 2013), https://www.reginfo.gov/public/do/DownloadDocument?objectID=37511202. Regardless, the PTO Rules, which were not submitted for OMB review in PTO's final submission, were never "currently approved collections of information" and therefore were not subject to § 3507(h).

does; instead it applies broadly in the circumstances discussed above, *i.e.*, whenever a collection of information is "contained in an agency rule." 44 U.S.C. § 3507(d)(6). Plaintiffs also misread subsection (d)(1). They claim that subsection (d)(1) qualifies subsection (d)(6), but the "contained in a proposed rule" language they seize upon qualifies only the succeeding two subparagraphs in subsection (d)(1) itself, *see id.* § 3507(d)(1)(A)-(B). Those two subparagraphs specify the procedural steps that an agency must, and that OMB may, take when the agency proposes a collection of information in a proposed rule. Put differently, the qualifying language Plaintiffs highlight does not modify the entirety of subsection (d), but only the subparagraphs of subsection (d)(1) itself.

Plaintiffs' interpretation of subsection (d)(1)'s "contained in a proposed rule" language as modifying the entirety of subsection (d) also lacks coherence when viewed against neighboring provisions of the subsection that specify steps to be taken at procedural stages other than a proposed rulemaking. *See id.* § 3507(d)(2) (requiring an agency to explain public comments "[w]hen a final rule is published in the Federal Register"); *id.* § 3507(d)(4)(C)-(D) (permitting OMB to disapprove a collection of information "contained in a final rule"). In the 2013 Notice of Action, OMB made a decision "to . . . not act upon" the PTO Rules, and Plaintiffs' attempt to cast that decision beyond the reach of § 3507(d)(6) fails.[4]

Second, Plaintiffs argue that § 3507(d)(6)'s judicial review bar does not apply to OMB's response to Plaintiff Hyatt's § 3517(b) request. As OMB showed in its opening brief, *see* MTD 18:7-9, and as Plaintiffs do not dispute, Plaintiff Hyatt asked OMB to determine that the PTO

[4] Plaintiffs are also incorrect to argue that Defendants' interpretation of § 3507(d)(6) would convert OMB to a "rubberstamp" for certain collections of information. Citing § 3507(d)(4)(C), they claim that "OMB's hands would be tied when considering extensions of approvals . . . or collections that were never put up for PRA approval at the time of promulgation." Opp'n 19:11-13. As to the first category, if a previously approved collection is submitted for renewal, OMB reviews it in the ordinary course pursuant to § 3507(h), which may result in disapproval, *see* 44 U.S.C. § 3507(h)(2). As for the second category, the PRA regulations expressly allow for OMB review of "a collection of information contained in a published current rule that was not required to be submitted for OMB review under the [PRA] at the time the collection of information was made part of the rule, but which collection of information is now subject to the Act." 5 C.F.R. § 1320.12(b)(1). Plaintiffs' suggestion that OMB would be precluded from disapproving the collection in either situation is unfounded. In any event, neither of these categories describes the process undergone by the PTO Rules.

Rules were collections of information, and OMB denied that request. That is, OMB decided "to not act upon" the alleged collections of information contained in the PTO Rules, and Plaintiffs' challenge to that decision is therefore barred by § 3507(d)(6). Plaintiffs proffer no persuasive reason why Congress would so plainly disallow judicial review through one provision of the PRA (§ 3507(d)(6)), while permitting a litigant to obtain the very same review through another statutory mechanism (§ 3517(b)). Finally, by claiming (at 20) that judicial review is "otherwise available" under § 3507, Plaintiffs miss the point of § 3507(d)(6); although judicial review of some types of PRA decisions may be available, the decisions that Plaintiffs challenge have been expressly barred from review by Congress.

C. Relevant precedent is at odds with Plaintiffs' reading of § 3507(d)(6).

Although Plaintiffs cite no cases adopting their novel interpretation of § 3507(d)(6), Defendants' interpretation is in line with applicable precedent. In *Tozzi v. EPA*, the district court considered a challenge to OMB's approval of an EPA collection of information that was contained in an agency rule. 148 F. Supp. 2d at 40, 42-43. The court held that it could not consider the request given the "explicit statutory command" of § 3507(d)(6), which it characterized as "nothing less than an explicit statement of clear Congressional intent that, under the PRA, OMB . . . approval decisions are *unequivocally* not subject to judicial review." *Id.* at 48 (emphasis added). Those observations apply with equal force to an OMB decision not to act upon collections of information contained in an agency rule.

In their response, Plaintiffs read into the *Tozzi* opinion a distinction that, to the extent it exists at all, is immaterial. Plaintiffs state that in *Tozzi*, the plaintiff did not dispute whether the "substantive requirements" of the PRA had been met. Opp'n 19:24-25. Even assuming it matters, for purposes of a PRA claim, whether the plaintiff alleges a substantive, as opposed to a procedural, violation of the PRA, section 3507(d)(6) itself draws no such distinction and precludes judicial review of OMB decisions not to act regardless of the nature of the plaintiff's challenge. Nowhere did the opinion in *Tozzi* suggest that its conclusion hinged on (what Plaintiffs here claim was) the "procedural" nature of the plaintiff's challenge.

In *Tozzi*, the court rebuffed the plaintiffs' efforts to evade § 3507(d)(6), explaining that "no amount of statutory parsing or backdoor foray invoking the private suit provision of the APA can overcome such statutory clarity and command." 148 F. Supp. 2d at 48. Plaintiffs here adopt a similar strategy, with no more successful results. Their efforts to distinguish *Tozzi* fall short, and the conclusion in that case that the court lacked jurisdiction over a challenge to OMB's decision is persuasive precedent for the same outcome here.

II. THE PRA'S PUBLIC PROTECTION PROVISION IS FURTHER EVIDENCE OF CONGRESSIONAL INTENT TO PRECLUDE JUDICIAL REVIEW.

OMB argued in its opening brief that the PRA's public protection provision, 44 U.S.C. § 3512, is additional evidence of congressional intent to preclude judicial review of Plaintiffs' claims through § 3507(d)(6). MTD 14-17. In their response, Plaintiffs ignore OMB's primary argument and never dispute that Congress provided one dedicated mechanism in § 3512 to allow members of the public, like Plaintiffs, to object to improper paperwork burdens. The public protection provision allows "any adversely affected person to raise PRA violations without limitation, so long as the administrative or judicial process in connection with a particular license or with a particular application continues." *Saco River Cellular v. FCC*, 133 F.3d 25, 30 (D.C. Cir. 1998). This mechanism was Congress's intended remedy for unauthorized collections of information, not standalone APA challenges seeking to force OMB action on those collections. The relief available through § 3512 is yet additional evidence that Congress intended in § 3507(d)(6) to preclude challenges to OMB inaction on purported collections of information.[5]

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[5] In their response, Plaintiffs train their focus on OMB's adequate alternative remedy argument, which it presented in a footnote and on which it need not prevail to compel dismissal of Plaintiffs' Complaint. But Plaintiffs' argument here is based on a mischaracterization that § 3512 "provides [them] no recourse"; its purpose is in fact just the opposite, to "empower[] members of the public to defend themselves against unapproved collections of information which are subject to the Act. H.R. REP. 104-37, 54, *reprinted in* 1995 U.S.C.C.A.N. 164, 217. In claiming that § 3512 is a nullity, Plaintiffs attempt to rearrange their asserted injury, arguing that § 3512 can only provide relief from the burdens imposed by PTO, and not "from any OMB action." Opp'n at 12:8. But Plaintiffs' asserted injury is the alleged burden from the PTO Rules, and not any independent action of OMB. *See* Compl. ¶ 60 (alleging that OMB's actions "allow[] PTO to subject applicants to [the PTO] Rules' burdens without prior OMB review and approval"). Moreover, Plaintiffs in their Complaint conceded that § 3512 would allow them "to obtain review of OMB's determination," and they should not now be permitted to retreat from that position. *Id.*

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III. THERE IS NO OMB FINAL AGENCY ACTION SUBJECT TO JUDICIAL REVIEW AND OMB'S RESPONSE TO PLAINTIFF HYATT'S § 3517(B) REQUEST IS COMMITTED TO AGENCY DISCRETION.

Even if Plaintiffs could overcome the judicial review bar imposed by § 3507(d)(6), their claims would nevertheless fail. Plaintiffs do not challenge any final agency action by OMB that is subject to APA review, *see* 5 U.S.C. § 704, and the nature of OMB's response to Plaintiff Hyatt's § 3517(b) request is in any event committed to agency discretion by law and hence unreviewable for that reason as well, *see id.* § 701(a)(2).

A. There is no OMB final agency action subject to judicial review.[6]

Plaintiffs contend that OMB's response to the § 3517(b) request constitutes final agency action because it denies Plaintiff Hyatt his purported right to refuse to comply with the PTO Rules

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¶ 62 (citing § 3512 and alleging that "no *other* provision allows Mr. Hyatt or other applicants to obtain review of OMB's determination" (emphasis added)).

Further, though Plaintiffs may believe that patent proceedings can be "lengthy and burdensome," Opp'n 13:14, that belief does not nullify the protection afforded by § 3512. And Plaintiffs' suggestion that they might "guess wrong" about the applicability of the PRA to the PTO Rules oddly suggests that they harbor doubts about the viability of their own claims in this lawsuit. Plaintiffs fail to explain why asserting a § 3512 defense in the PTO proceedings poses an unacceptable risk, particularly when Plaintiffs might mitigate that risk by submitting the information under protest, while registering their § 3512 objection. *See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 150 (D.C. Cir. 2001). The Ninth Circuit has held that a defensive remedy is adequate, even if the party asserting the defense is exposed to some risk in the interim. *See Jerry T. O'Brien, Inc. v. SEC*, 704 F.2d 1065, 1066-67 (9th Cir. 1983), *rev'd on other grounds*, 467 U.S. 735 (1984).

Finally, Plaintiffs' complaint that relief under § 3512 "falls far short" of the relief they believe they might obtain through APA litigation, Opp'n 14:1, is hard to square with their acknowledgment that a successful assertion of public protection would "serve[] as a defense in that action," *id.* at 14:7. In any event, the § 3512 remedy "need not provide relief identical to relief under the APA, so long as it offers relief of the 'same genre,'" *Garcia v. Vilsack*, 563 F.3d 519, 522-23 (D.C. Cir. 2009) (citation omitted)); *see also Council of & for the Blind of Delaware Cty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1532-33 (D.C. Cir. 1983) (finding alternate remedy "adequate" even where plaintiff's desired remedy would be "more *effective*").

[6] In moving to dismiss, OMB limited its final agency action argument to the § 3517(b) response because Plaintiffs in their Complaint specifically focused on that action as judicially reviewable final agency action notwithstanding the § 3507(d)(6) preclusion on review. *See* Compl. ¶¶ 58-68. Should the Court find need to reach this argument, however, the logic rendering OMB's § 3517(b) response non-final applies with equal, if not greater, force to its 2013 Notice of Action, which resulted from the PRA's interagency process. As with the § 3517(b) response, the Notice neither affects Plaintiff Hyatt's rights nor requires him to do (or not do) anything.

and nevertheless be immune from punishment for failure to comply. Opp'n 11:24-26. But Plaintiff Hyatt remains free to invoke his statutory right under the PRA not to comply with the PTO Rules; OMB's response to his request does nothing to affect that right. As shown above, the PRA's public protection provision affords Plaintiff Hyatt (and anyone else) the right to seek relief from allegedly improper paperwork burdens. 44 U.S.C. § 3512. Plaintiffs need no permission from OMB or any other agency in order to pursue protection under that provision.

Plaintiffs' position on final agency action also cannot be squared with the text of § 3517(b) or its legislative history. Nothing in either source suggests that Congress intended to grant requesters dissatisfied with OMB responses a direct path to federal court. Instead, the available evidence indicates that Congress intended for challenges to allegedly unlawful collections of information to flow through the existing public protection provision, at either the administrative level or, if necessary, in federal court. *See* H.R. REP. 104-37, 54.

Plaintiffs' other arguments in support of final agency action are inherently circular. They contend that OMB's response affects Plaintiff Hyatt's rights because OMB's response denied him his (self-asserted) right to a proper determination of his rights under the PRA. Opp'n 11:26-27. Plaintiffs also argue that Plaintiff Hyatt's rights are affected because OMB's response denies him his (again, self-asserted) right to have OMB "take appropriate remedial action to enforce the PRA." *Id.* at 11:27-28. In effect, Plaintiffs simply take issue with the substance of OMB's response, but fail to identify any legal consequence of that response. To the extent Plaintiff Hyatt believes his rights are affected, it is the PTO Rules that impose the obligation, not OMB's response to his § 3517(b) request. *See Gallo Cattle Co. v. USDA*, 159 F.3d 1194, 1199 (9th Cir. 1998) (finding no final agency action when the plaintiff's obligation arose "pursuant to the Dairy Promotion Program and the regulations promulgated thereunder" and not "from the judicial officer's denial of interim relief"). OMB's response "imposes no obligation on [Plaintiffs] at all," *id.*, and is not final agency action subject to review under the APA.

B. OMB's response is committed to agency discretion by law.

In addition to the § 3507(d)(6) judicial review bar and a lack of final agency action, Plaintiffs' challenge to OMB's § 3517(b) response cannot proceed for yet another independent

reason: the nature of that response is committed to agency discretion by law, *see* 5 U.S.C. § 701(a)(2) (APA does not apply when "agency action is committed to agency discretion by law"). In § 3517(b)(2), Congress conferred discretion on OMB to determine, when it responds to a requester, (1) whether any remedial action is "necessary"; and, if so, (2) what remedial action is "appropriate." *See* 44 U.S.C. § 3517(b)(2). The text of the provision defines neither of these terms and does not otherwise indicate the circumstances in which remedial action is "necessary" or what type of action would be "appropriate" if a remedy is found necessary. *See Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003) (statute permitting the FAA Administrator to revoke an aircraft inspector's designation "at any time for any reason the Administrator considers appropriate" was committed to agency discretion); *see also United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940) (even before the enactment of the APA, "[i]t has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review"). There is accordingly "no meaningful standard against which to judge [OMB's] exercise of discretion." *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989 (9th Cir. 2015) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

Plaintiffs contend that the PRA itself supplies the relevant standard in § 3507(a) of the statute. *See* 44 U.S.C. § 3507(a) (enumerating circumstances in which "[a]n agency shall not conduct or sponsor the collection of information"). But § 3517(b) bears no mention of § 3507(a) or, for that matter, any other provision of the PRA, referring instead solely to OMB's option, "if necessary," to take "appropriate remedial action." If the matter were as clear as Plaintiffs suppose, Congress could readily have provided a reference to § 3507(a) within the text of § 3517(b)(2).

Moreover, it is far from "apparent," as Plaintiffs contend (at 22), that Congress intended as the "appropriate" remedy in all cases for OMB to prohibit the agency from implementing the collection of information at issue. If anything, such a mandatory across-the-board solution would be a drastic response in relation to the more narrow issue under OMB consideration in a proper § 3517 request, *i.e.*, whether an individual "person shall maintain, provide, or disclose the

information to or for the agency." 44 U.S.C. § 3517(b). If Congress intended such a one-size-fits-all remedy for proper § 3517(b) request, it could and would have so specified. Instead, it left to the OMB Director, in consultation with the agency, the discretion to shape the appropriate remedy, if any, in OMB's response. *See* H.R. REP. 104-37, 55 ("The Director is also to coordinate the response with the agency responsible for the collection of information.").

CONCLUSION

For the foregoing reasons and for the reasons set forth in OMB's Motion to Dismiss, the motion should be granted and Plaintiffs' Complaint should be dismissed with prejudice.

Dated: January 6, 2017.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that the foregoing document was served this date on all parties via the Court's Electronic Case Filing system.

Dated this 6th day of January 2017.

/s/ M. Andrew Zee
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