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THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

MARK BAKER,

Plaintiff,

v.

UNITED STATES FOOD AND DRUG ADMINISTRATION, *et al.*,

Defendants.

No. 2:24-cv-02558-DC-SCR

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S PETITION FOR WRIT OF MANDATE

INTRODUCTION

Plaintiff's Complaint asserts two claims under 5 U.S.C. § 706(1) of the Administrative Procedure Act ("APA"). Compl., ECF No. 1 ¶¶ 67, 69, 70-73. Specifically, he seeks to compel the U.S. Food and Drug Administration ("FDA") and National Highway Traffic Safety Administration to liaise about headlamps that use light emitting diodes ("LED"), and to compel FDA to reconstitute a committee that he alleges was unlawfully dissolved. *Id.* Defendants filed a dispositive motion to dismiss both claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). *See* ECF No. 9 ("MTD"). Defendants' motion argues that subject matter jurisdiction is absent because the Complaint does not plausibly allege facts that support Plaintiff's standing, MTD at 7–13, and that, even if Plaintiff had standing, his claims would still fail as a matter of law, MTD at 13–19. If Defendants' motion is granted on either of these two grounds, the Complaint would be subject to dismissal in its entirety.

While Defendants' motion to dismiss remains pending,[1] Plaintiff has now filed a motion[2] for an order directing Defendants to "comply with Rule 26(f) and automatically provide all discovery information for this case." ECF No. 11 ("Mot."). Plaintiff's motion should be denied because, for the reasons discussed below, permitting discovery now—in a case arising under the APA—would be improper, unnecessary, and a waste of resources. Alternatively, the Court may, in its discretion, elect to deny Plaintiff's motion without prejudice so that he may revisit this issue after production of the administrative record—per the timeline set forth in the Court's local rules—if either of his claims survive Defendants' motion to dismiss.

[1] Plaintiff opposed Defendants' motion to dismiss, ECF No. 10, and Defendants' reply is due on January 14, 2025, *see* ECF No. 8 (scheduling order).

[2] Plaintiff's motion is captioned as a "Petition for Writ of Mandate." Construing Plaintiff's filing liberally, *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc), it appears to be a motion to compel generalized discovery. To the extent Plaintiff intends to seek a writ of mandamus under 28 U.S.C. § 1361, an "extraordinary remedy," Plaintiff would face an even more onerous burden to show that (1) Plaintiff's "claim is clear and certain," (2) the action sought is "nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt," and (3) "no other adequate remedy is available." *Kildare v. Saenz*, 325 F.3d 1078, 1084 (9th Cir. 2003). For the reasons described herein, Plaintiff cannot meet that standard, so even if Plaintiff's motion is construed as a petition for writ of mandamus rather than a motion to compel discovery, it should still be denied.

DISCUSSION

The Federal Rules of Civil Procedure, the local rules, and cases interpreting the APA all recognize that discovery in an APA case is generally inappropriate, and particularly so at this stage of litigation. Plaintiff seeks information under Federal Rule of Civil Procedure 26(f). Mot. ¶¶ 1, 22. However, while that rule states that the parties should confer regarding several topics, including discovery, it also states that its requirements do not apply "in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)." Fed. R. Civ. P. 26(f)(1). And Rule 26(a)(1)(B), in turn, states that an action "for review on an administrative record" is "exempt from initial disclosure." Fed. R. Civ. P. 26(a)(1)(B)(i). This is true here because Plaintiff's claims arise under the APA, and the "focal point" for review of an APA claim is "the administrative record already in existence, not some new record made initially in the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam)). Therefore, Rule 26(f) explicitly does not apply to this case. Indeed, because APA review is focused on the administrative record, it makes sense that the "standard discovery tools of civil litigation" generally "do not apply" in such cases. *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 312 (S.D.N.Y. 2012); *see also Blue Mountains Biodiversity Project v. Jeffries*, 99 F.4th 438, 452 (9th Cir. 2024) ("In APA agency review cases, private parties may not introduce new facts, and discovery is ordinarily not available."); *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) ("Discovery typically is not available in APA cases."); *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) ("[A]gency actions are to be judged on the agency record alone, without discovery.").

The fact that Plaintiff challenges agency *inaction*—i.e., he seeks to "compel agency action unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1)—does not alter this analysis. The administrative record is the focus of an APA case regardless of "whether a court is reviewing agency action or inaction." *Biodiversity Legal Found. v. Norton*, 180 F. Supp. 2d 7, 10 (D.D.C. 2001); *see also* 5 U.S.C. § 706 (stating that any "review" under that section is based upon "the whole record or those parts of it cited by a party"). Indeed, "nowhere does the text" of 5 U.S.C. § 706 "even hint at extra-record review occurring as a matter of course when agency action is alleged to be 'unlawfully withheld

or unreasonably delayed.'" *Dallas Safari Club v. Bernhardt*, 518 F. Supp. 3d 535, 539 (D.D.C. 2021); *see also Stout v. U.S. Forest Serv.*, 869 F. Supp. 2d 1271, 1276 (D. Or. 2012) (noting that "the court's review of" a claim under § 706(1) "is also limited to the administrative record").

This Court's local rules reflect these principles and further show that discovery in an APA case is generally improper, especially at this stage in the litigation. Specifically, Local Rule 261, which governs most cases involving review of an administrative record, directs Defendants to "file the certified administrative record" after "45 days" have elapsed since "the filing of an Answer to the complaint." E.D. Cal. L.R. 261(a). This means that the defendant agency in an APA case would ordinarily not file an administrative record unless and until (1) any pre-answer motion to dismiss under Federal Rule of Civil Procedure 12 is resolved in Plaintiff's favor, and (2) the defendant is therefore required to file an answer concerning any claims that survive the motion to dismiss.[3] Moreover, Local Rule 261 notably does *not* include any deadlines related to discovery, further evincing that discovery is generally unavailable in an APA case. *See id.* The sequence of events set forth in Local Rule 261 also makes practical sense, because if a case might be resolved through a motion to dismiss, producing a record or engaging in discovery disputes would be an inefficient use of resources.

Moreover, consistent with principles this Court has articulated even outside the APA context, Defendants should not be required to produce a record *or* respond to discovery requests before the Court resolves their motion to dismiss, especially when the motion challenges the Court's jurisdiction over the case in the first instance. *See Comm. for Immigrant Rts. of Sonoma Cnty. v. Cnty. of Sonoma*, No. CV 08-4220 PJH, 2009 WL 10692620, at *2 (N.D. Cal. Apr. 20, 2009) ("when a threshold subject matter jurisdictional question is raised by a motion to dismiss, a district court should use its discretion to defer discovery of issues unrelated to jurisdiction until it resolves the pending jurisdictional issue first"). Discovery is also inappropriate during the pendency of a motion to dismiss for failure to state a claim under Rule 12(b)(6), since the "purpose" of that rule is to "enable defendants to challenge the legal

[3] To the extent that Plaintiff's motion is construed as a request that Defendants immediately provide "the Court . . . with a copy of the administrative record," Mot. at 8, that request should be denied as premature under the local rules. Granting that request would also be unnecessary and a waste of resources for the reasons laid out in this opposition.

sufficiency of complaints without subjecting themselves to discovery." *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). Therefore, before "forcing the parties to undergo the expense of discovery," this Court should "determine whether there is any reasonable likelihood that plaintiffs can construct a claim" that will survive a motion to dismiss in the first place. *Id.*

For these and similar reasons, "[d]istrict courts in the Ninth Circuit," including this district, "often apply a two-pronged test to decide whether to stay discovery" when a dispositive motion is pending. *Spearman v. I Play, Inc.*, 2:17-cv-1563, 2018 WL 1382349, *1 (E.D. Cal. Mar. 19, 2018) (citation and quotation marks omitted). "The first prong requires that the pending motion be potentially dispositive of the entire case, or at least dispositive on the issue at which discovery is aimed." *Id.* "The second prong requires the court to determine whether the pending, potentially dispositive motion can be decided absent additional discovery." *Id.* If those criteria are met, plaintiffs "will not be prejudiced by a modest delay in proceeding with discovery." *Stravrianoudakis v. U.S. Dep't of Fish & Wildlife*, No. 1:18-cv-1505, 2019 WL 9667685, at *3 (E.D. Cal. Dec. 20, 2019) (quotation omitted). By contrast, "proceeding with discovery [would] result in unnecessary motion practice, litigation costs, and a waste of judicial resources." *Id.*

That two-part test is satisfied here. Defendants have filed a motion to dismiss that would dispose of the entire case on either of two independent grounds: lack of subject matter jurisdiction or failure to state a claim. Moreover, because that motion is focused on the legal sufficiency of Plaintiff's complaint, discovery is not needed to decide it. For example, while Plaintiff contends that Defendants should have provided the Court with information related to his contention "that LED headlights are not misaligned," that they "are excessively bright," and that "automakers have deceitfully circumvented the headlamp validation process by cheating," Mot. at 4, that information would not bear on whether Plaintiff's allegations have established his standing, *see* MTD 7-12, or whether Plaintiff's Complaint states a claim on which relief could be granted, *see* MTD 13-19. Moreover, Defendants' argument that Plaintiff failed to state a claim presents a legal argument, not a factual one. *See, e.g.*, MTD at 14 (observing that "judicial review of agency inaction is limited 'to situations where an agency has ignored a specific legislative command'") (citing *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th

Cir. 2010)). Because Defendants' motion is potentially dispositive of all issues in this case, and because discovery is not needed to resolve it, a stay of discovery pending resolution of Defendants' motion would therefore be entirely appropriate even if this case did *not* arise under the APA. The fact that this case does arise under the APA—where the "standard discovery tools of civil litigation" generally "do not apply," *Comprehensive Cmty. Dev. Corp.*, 890 F. Supp. 2d at 312—makes it doubly appropriate to deny any discovery at this stage.

Though the Court should deny Plaintiff's motion, it may nonetheless elect to do so without prejudice so that Plaintiff may re-file it at the appropriate time if either of his claims survive Defendants' motion to dismiss. In that event, Defendants would ordinarily file an Answer to any remaining claims in Plaintiff's Complaint, and the local rules would require Defendants to file a certified administrative record within 45 days of that answer. E.D. Cal. L.R. 261(a). If after reviewing the administrative record Plaintiff believes that it is incomplete or inadequate in some material respect, Plaintiff may then file a motion to that effect. This timing makes sense because "until there is a complete administrative record unique to a particular case, the Court is not in a position to evaluate" a motion for extra-record discovery. *Chayapathy v. Renaud*, 2021 WL 1561407, at *2 (N.D. Tex. Apr. 21, 2021). Thus, extra-record discovery should only be considered "*after* the government produces the administrative record." *Id.* (quoting *Ramos v. Wolf*, 975 F.3d 872, 901 (9th Cir. 2020)).

Even at that stage, however, Plaintiff would bear a "heavy burden" in pursuing extra-record discovery. *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). Plaintiff would need to "show that the additional materials sought are necessary to adequately review the [agency]'s decision." *Id.* Then, Plaintiff must show that the extra-record documents satisfy one of the "narrow exceptions to th[e] general rule" that "courts reviewing an agency decision are limited to the administrative record." *Lands Council v. Powell*, 395 F.3d 1019, 1029–30 (9th Cir. 2005). Plaintiff cannot meet one of those "limited exceptions"—which "operate to identify and plug holes in the administrative record," *id.*— before Defendants have even produced a record in the first instance.

It nevertheless bears noting that the allegations in Plaintiff's instant motion would not suffice to show the kind of "bad faith" that might justify discovery in an APA case. *Lands Council*, 395 F.3d at

1030. For example, Plaintiff alleges that Defendants have acted in "bad faith" because they did not provide the Court with certain documents as part of their motion to dismiss. *See* Mot. ¶¶ 9, 10, 12, 14, 15. But as described above, Defendants currently have no obligation to produce the administrative record or discovery, and Defendants' motion was directed at whether Plaintiff's allegations establish his standing, and whether his § 706(1) claims are viable as a matter of law. Plaintiff also asserts that Defendants acted in bad faith by arguing that Plaintiff's interpretation of 21 U.S.C. § 360kk(f)(1) was incorrect. Mot. ¶ 16. But a disagreement about statutory interpretation is a core element of litigation, not evidence of a party's bad faith.[4]

CONCLUSION

For the foregoing reasons, Plaintiff's motion should be denied.

DATED: December 23, 2024

Respectfully Submitted,

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[4] Moreover, to the extent Plaintiff's instant motion presents substantive arguments in response to Defendants' motion to dismiss, Defendants will address those argument in its forthcoming reply in support of that motion.

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CERTIFICATE OF SERVICE

I hereby certify that this document, which was filed through the CM/ECF system, will be sent via e-mail on December 23, 2024 to Plaintiff Mark Baker's email address at mbaker@softlights. This document will also be sent by U.S. mail to Mr. Baker's address on file with the Court:

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December 23, 2024

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