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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*,

Plaintiffs,

and

SAN FRANCISCO CHAMBER OF COMMERCE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, GOLDEN GATE RESTAURANT ASSOCIATION, NATIONAL ROOFING CONTRACTORS ASSOCIATION, AMERICAN NURSERY & LANDSCAPE ASSOCIATION, INTERNATIONAL FRANCHISE ASSOCIATION, and UNITED FRESH PRODUCE ASSOCIATION,

Plaintiff-Intervenors

v.

MICHAEL CHERTOFF, *et al.*,

Defendants

CASE NO. C07-04472CRB

PLAINTIFF-INTERVENORS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR APPLICATION FOR PRELIMINARY INJUNCTION

Date: October 1, 2007
Time: 2:30 p.m.
Place: Courtroom 8, 19th Fl.

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Cases

Aeronautical Repair Station Ass'n, Inc. v. Fed. Aviation Admin., __ F.3d __, 2007 WL 2033228 (D.C. Cir. July 17, 2007) 13,17

Cement Kiln Recycling Coalition v. Environmental Protection Agency, 255 F.3d 855 (D.C. Cir. 2001) 17

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North Carolina Fisheries Ass'n, Inc. v. Daley, 16 F. Supp. 2d 647 (E. D. Va. 1997) 16

Patriot Contract Servs. v. United States, 388 F. Supp. 2d 1010 (N.D. Cal. 2005) 19

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71 Fed. Reg. 34281 (June 14, 2006)....................9,15
71 Fed. Reg. 34284 (June 14, 2006)....................8,14
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SUMMARY OF ARGUMENT

This case involves a challenge to a final rule issued by the Secretary of Homeland Security ("Secretary") on August 15, 2007, that under the guise of enforcing immigration laws, would subject American businesses to criminal liability and civil fines or discrimination suits and would subject millions of employees to termination for no good reason. The effects of this rule are particularly burdensome for small businesses or not-for-profit entities. The Final Rule expressly amends the definition of "knowing" in the regulations implementing the Immigration Reform and Control Act ("IRCA"). And, it imposes a requirement on employers that does not exist under current law. Under the Final Rule, employers who receive a Social Security "no-match" letter would be required to resolve the mismatch with the employee's assistance within ninety days or, failing that, the employer is faced with a Hobson's choice--whether to terminate all employees with unresolved mismatch letters or only those who appear to be foreign-born, in which case, the employer risks liability for discrimination under both federal and state law. The alternative, to do nothing, subjects the employer to the risk of criminal or civil prosecution. The record fails to provide a rational relationship between a Social Security mismatch and an employee's immigration status. Both the Government Accountability Office ("GAO") and the Social Security Administration ("SSA") have concluded that a mismatch cannot be used to ascertain an employee's immigration status. Equally critical is that before an employer is even afforded the opportunity to face the Hobson's choice, that employer must make significant expenditures of time, resources and capital to develop and implement systems to track and resolve Social Security mismatches within the tight time constraints of the new rule. The record fails to provide any assessment of whether these mismatches can be resolved within those time constraints. The compliance burden will be particularly great for small businesses. It will impede recruitment, reduce productivity and undermine goodwill for those companies, particularly those engaged in construction or seasonal work, where the size of the

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workforce changes quickly over time. Notwithstanding these obvious economic effects, the Secretary did not undertake a regulatory flexibility analysis as required by the Regulatory Flexibility Act ("RFA"), but instead simply certified that the Final Rule "would not have a significant economic impact on a substantial number of small entities." 72 Fed. Reg. 45623. The Secretary provided no factual basis for this conclusion as required by the RFA. That failure alone requires the entry of a preliminary injunction especially, where, as here, the law of this Circuit recognizes that loss of goodwill and interference with recruitment constitute irreparable harm for purposes of Rule 65 of the Federal Rules of Civil Procedure. For these reasons and the reasons set forth by Plaintiffs in their Motion and Memorandum of Points and Authorities in Support, Plaintiff-Intervenors request the entry of such a preliminary injunction.

INTRODUCTION

The Final Rule at issue in this litigation, the "Safe Harbor Procedures for Employers That Receive a No Match Letter," 72 Fed. Reg. 45611 (Aug. 15, 2007), was to become effective on September 14, 2007. SSA issues "no-match" letters in an effort to resolve discrepancies between an employee's name and his or her Social Security number ("SSN") in its database. SSA's database contains more than 255 million mismatched records. *See* Report of the GAO (July 11, 2006), GAO-06-814R at 8 (left column) (available at <http://www.gao.gov/new.items/d06814r.pdf> (last viewed September 11, 2007).("GAO Report"). According to both SSA and the Department of Homeland Security ("DHS"), these "no-matches" often result from benign causes, such as clerical errors, name changes due to marriage or divorce, use of multiple surnames, or other naming conventions, or any number of other reasons that have nothing to do with an employee's immigration status. The Secretary's Final Rule requires employers and employees to resolve these "no-match" letters in less than ninety-three days or risk criminal liability and civil fines (for employers) or termination (for

employees).[1] The Final Rule thus places jobs of employees legally working in the United States at risk without any factual basis. And, the Final Rule imposes obligations on businesses to reverify their employees' work authorization status even though under current law, employers need verify work-authorization status only upon the initial hire or upon the expiration of temporary work authorization licenses. Although the Final Rule affects virtually every business in the United States, the Secretary certified that its rule "would not have a significant economic impact on a substantial number of small entities." 72 Fed. Reg. 45623. Accordingly, the Secretary conducted no regulatory flexibility analysis under the RFA.

On August 28, 2007, the American Federation of Labor and Congress of Industrial Organizations, San Francisco Labor Council, San Francisco Building and Construction Trades Council, and Central Labor Council of Alameda County ("Plaintiffs") filed a complaint for declaratory and injunctive relief. Plaintiffs charged that the Final Rule is inconsistent with 8 U.S.C. § 1324a and therefore violates 5 U.S.C. § 706(2)(A) (First Claim), that the Final Rule is arbitrary and capricious agency action in violation of 5 U.S.C. § 706(2)(A) (Second Claim), that the Final Rule exceeds the statutory authority of DHS, U.S. Immigration and Customs Enforcement ("ICE") and SSA in violation of 5 U.S.C. § 706(2)(C) (Third, Fifth, Sixth and Seventh Claims), and that the Final Rule will deprive employers and employees of reasonable notice and due process in violation of 5 U.S.C. § 706(2)(C) and the Due Process Clause of the U.S. Constitution (Fourth Claim). Plaintiffs requested a temporary restraining order and a preliminary injunction pending a decision on the merits, enjoining the implementation of the Final Rule. On August 31, 2007, this Court granted the motion for a temporary restraining order.

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[1] The no-match letter must be resolved within ninety days; the Final Rule gives the employee three additional days to provide the employer with additional identification to support a new I-9 provided the identification does not use the mismatched Social Security number.

On September 7, 2007, San Francisco Chamber of Commerce, Chamber of Commerce of the United States of America, Golden Gate Restaurant Association, National Roofing Contractors Association, American Nursery & Landscape Association, International Franchise Association, and United Fresh Produce Association ("Plaintiff-Intervenors") filed a motion to intervene in this lawsuit and filed a Proposed Complaint-in-Intervention, adopting several of the claims already alleged by Plaintiffs and, in addition, seeking to vacate the Final Rule until the Secretary has completed the regulatory flexibility analysis required by law. Plaintiff-Intervenors now join in Plaintiffs' motion for preliminary injunction[2] and additionally request a preliminary injunction until such time as the Secretary and DHS comply with the Regulatory Flexibility Act.

STATEMENT OF FACTS

Plaintiff-Intervenors are all not-for-profit membership corporations that are considered to be small entities within the meaning of the Regulatory Flexibility Act.[3] *See* Complaint-in-Intervention, ¶¶ 6-12. Each is an employer and each has a significant number of members which are small businesses within the meaning of section 3 of the Small Business Act that do business in the Northern District of California. *Id.* In addition, Plaintiff-Intervenors San Francisco Chamber of Commerce ("San Francisco Chamber") and Golden Gate Restaurant Association ("GGRA") are organized under the laws of the State of California and headquartered in San Francisco. *Id.* at ¶¶ 6, 8. Many of Plaintiff-Intervenors' small business members would have received no-match letters from SSA in the event that the Final Rule at issue in this case was to become effective. Indeed, for many of these small business members, the likelihood of receiving such letters is extremely high.

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[2] Plaintiff-Intervenors therefore adopt the Plaintiffs' legal arguments with respect to the overlapping claims and incorporate those arguments by reference as if they were set forth fully in this memorandum.

[3] Not for profit enterprises are small entities under the Regulatory Flexibility Act. *See* 5 U.S.C. § 601(4), (6).

1 This is the case for some of the Plaintiff-Intervenors in their own right as well. *See* Declaration of
2 Elizabeth Dickson ("Dickson Decl.") at ¶¶ 1, 4.

3 A. Social Security Administration "No Match" Letters

4 The Social Security Act of 1935 authorizes SSA to establish a record-keeping system to
5 manage the Social Security program. Congress also granted SSA authority to process tax
6 information for purposes of administering the Social Security program, as a specific exception to the
7 exclusive tax authority of the Internal Revenue Service ("IRS"). *See* 26 U.S.C. § 6103(*l*)(5); Social
8 Security Act, § 232, 42 U.S.C. § 432. Pursuant to that delegation of authority, the IRS and SSA
9 created a joint system for the processing of Forms W-2 called the Combined Annual Wage
10 Reporting System ("CAWR"). *See* 43 Fed. Reg. 60158 (Dec. 26, 1978) (codified at 26 C.F.R. §
11 31.6051).

12 Under the CAWR, employers annually report employee earnings using Forms W-2, and SSA
13 posts those earnings to individual employees' Social Security records so employees will receive
14 credit for those earnings when they apply for Social Security benefits--either retirement or disability.
15 SSA then forwards the Forms W-2 to the IRS.

16 If SSA cannot match the name and Social Security Number ("SSN") on a Form W-2 with
17 SSA's records, SSA places the earnings report in its Earnings Suspense File. *See* 20 C.F.R §
18 422.120. The earnings remain in the Earnings Suspense File until SSA can link them to a name and
19 SSN.

20 Every year, SSA receives millions of earnings reports that the SSA cannot match with its
21 records. The Earnings Suspense File is a huge database that contains more than 255 million
22 unmatched earnings records and that is growing at the rate of 8 to 11 million unmatched records per
23 year. GAO Report at 8. About four percent of annual Form W-2 earnings reports are placed in the
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SSA's Earnings Suspense File. *See* Testimony of Stewart A. Baker, Assistant Secretary for Policy, DHS, Before the Subcomm. on Oversight of the House Comm. on Ways and Means (Feb. 16, 2006).

SSA records are mismatched for many reasons unrelated to immigration status including: (a) clerical errors by either an employer or SSA in spelling an employee's name or recording the SSN, (b) SSA's issuance of duplicate SSNs or re-issuance of SSNs of deceased individuals, (c) employee name changes after marriage or divorce, (d) employees that use a less "foreign" sounding first name for work purposes, and (e) different naming conventions (such as the use of multiple surnames) that are commonplace in many parts of the world, particularly in some Latin American and Asian countries. The GAO Report on the SSA's Earnings Suspense File concluded that the file "[c]ontains information about many U.S. citizens as well as non-citizens" and that "the overall percentage of unauthorized workers is unknown." GAO Report at 8. When SSA ultimately has been able to resolve data discrepancies, GAO reported that "a significant number of earnings reports in the ESF still belong to U.S. citizens and work-authorized non-citizens." *Id.*

As part of its administration of the Social Security program, SSA periodically sends out letters, commonly known as "no-match" letters, informing employers that SSNs and employee names reported on Forms W-2 did not match SSA's records. *See* 20 C.F.R. § 422.120.

SSA no-match letters are purely advisory. SSA has no authority to sanction employers that fail to respond to no-match letters. SSA is not an immigration agency and does not know whether a particular SSN listed in a no-match letter relates to unauthorized work. SSA also is prohibited by tax privacy statutes from sharing the information in the Earnings Suspense File with the DHS. Until now, SSA's no-match letters explained to employers: "This letter does not imply that you or your employee intentionally gave the government wrong information" and "makes no statement regarding an employee's immigration status." <http://www.ssa.gov/legislation/nomatch2.htm> (last viewed Sept. 6, 2007).

Until now, the SSA has never included information from an immigration-enforcement agency with its no-match letters. *See* Complaint-in-Intervention, ¶ 28.

B. Employer Verification of Work Authorization and Employer Sanctions

The Immigration Reform and Control Act of 1986 ("IRCA") made it unlawful for employers to "to hire . . . for employment in the United States an alien *knowing* the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1)(A) (emphasis added). IRCA also separately made it unlawful for employers to hire without complying with an initial verification process established by Congress. *See* 8 U.S.C. § 1324a(a)(1)(B). That verification process requires the employee to present the employer with documents to show proof of identity and work authorization and requires the employer and employee to complete an I-9 verification form. *See* 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2. To satisfy the I-9 requirements, Plaintiff-Intervenors and their members require all prospective employees to provide documentation proving identity and demonstrating that the employee is authorized to work in the United States. Thus, prospective employees provide various documents including United States passports, alien registration cards (*i.e.*, Green Card), and Employee Authorization Documents issued by the DHS permitting the individual to work in the United States. *See* Complaint-in-Intervention at ¶ 30.

IRCA also makes it unlawful for an employer "to continue to employ an alien . . . *knowing* the alien is (or has become) an unauthorized alien with respect to such employment." 8 U.S.C. § 1324a(a)(2) (emphasis added). Employers that violate IRCA are subject to civil and criminal liability. *See* 8 U.S.C. § 1324a(e)(4)-(5), (f).

At the same time that Congress imposed employer sanctions, Congress also wanted to prevent employer discrimination based on national origin or citizenship status. IRCA therefore makes it illegal for employers to discriminate based on national origin or citizenship status, including by requesting "more or different documents than are required" for the initial I-9

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verification or "refusing to honor documents . . . that on their face reasonably appear to be genuine." 8 U.S.C. § 1324b(a)(1), (6).

Congress intentionally did not impose in IRCA any employment authorization verification for existing employees. Congress also chose not to impose ongoing re-verification requirements after the initial hire unless documents evidencing temporary work authorization are time limited.

C. The DHS Final Rule

Until now, neither DHS nor its predecessor immigration-enforcement agencies had taken the position that an employer's failure to make further inquiries into an SSA no-match letter meant that the employer had actual knowledge that it was employing an unauthorized worker. The Immigration and Naturalization Service had recognized that no-match discrepancies occur for many innocent reasons and therefore consistently advised employers in opinion letters that "[w]e would not consider notice of this discrepancy from SSA to an employer by itself to put the employer on notice that the employee is unauthorized to work." The most recent SSA letter on the materiality of a no-match letter states as follows: "This notice also specifically cautions employers that these letters . . . do not make any statement about an employee's immigration status[.]" <http://www.ssa.gov/legislation/nomatch2.htm> (last viewed Sept. 6, 2007).

On June 14, 2006, Defendant Chertoff issued a notice of proposed rulemaking soliciting public comments on his proposal to use the Social Security database, and, in particular, SSA no-match letters as vehicle for enforcing the immigration laws. *See* 71 Fed. Reg. 34281 (June 14, 2006). The preamble concluded, in part, as follows:

> The Secretary of Homeland Security, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and, by approving it, certifies that this rule would not have a significant economic impact on a substantial number of small entities. This rule would not affect small entities as that term is defined in 5 U.S.C. 601(6).

Id. at 34284. As result, the Secretary did not conduct a Regulatory Flexibility Act analysis.

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More than 5,000 comments were received by DHS during the 60-day comment period, including comments that disputed DHS' authority to adopt the rule, and DHS' assertion that the rule "would not affect small entities." 72 Fed. Reg. 45611. Plaintiff-Intervenors or coalitions of which they are members were among those that submitted comments objecting to the rule. The comment period closed on August 14, 2006.

Shortly after Congress left for recess without enacting immigration reform legislation urged by DHS, the agency issued its final rule. *See* 72 Fed. Reg. 45611 (Aug. 15, 2007). The DHS Final Rule was to become legally effective on September 14, 2007.

The DHS Final Rule will amend the definition of "knowing" in 8 C.F.R. § 274a.1(*l*)(1), the regulatory subsection that defines the term "knowing" for purposes of IRCA. The amended regulation will list, as an example of an employer that has "constructive knowledge" that an employee is an "unauthorized alien," an employer that receives a SSA no-match letter and then "fails to take reasonable steps." The first part of the amended regulation will provide:

> (*l*)(1) The term knowing includes having actual or constructive knowledge. . . . Examples of situations where the employer may, depending upon the totality of the relevant circumstances, have constructive knowledge that an employee is an unauthorized alien include, but are not limited to, situations where the employer:
>
> . . . .
>
> (iii) Fails to take reasonable steps after receiving information indicating that the employee may be an alien who is not employment authorized, such as -
>
> . . . .
>
> (B) Written notice to the employer from the Social Security Administration reporting earnings on a Form W-2 that employees' names and corresponding social security account numbers fail to match Social Security Administration records . . . .

Having created a threat of IRCA liability for employers receiving SSA no-match letters, the DHS Final Rule then offers employers a "safe harbor." An employer receiving a SSA no-match letter "will be considered by DHS to have taken reasonable steps - and receipt of the written notice

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will therefore not be used as evidence of constructive knowledge - if the employer" takes the actions specified by DHS. These are "the only combination of steps that will guarantee that DHS will not use the employer's receipt of the notices from SSA . . . as evidence of constructive knowledge that an employee is an unauthorized alien." 72 Fed. Reg. at 45618.

To qualify for the DHS "safe harbor," an employer that determines the SSA no-match was not the result of its own clerical error (which must be done in 30 days) must instruct the employee who claims that the name and SSN are correct to resolve the discrepancy with SSA within 90 days of receipt of the no-match letter. If the employee is unable to resolve the discrepancy with SSA within 90 days, the employer cannot continue to employ the individual unless the individual can complete within three days a new employment eligibility verification, on a new I-9 form, using only documents that contain photo identification and no documents that contain the disputed SSN, even if the employee still insists the SSN is correct. If employees insist that their names and SSNs on their identification documents are correct but have not resolved the discrepancy with SSA by the deadline, or cannot produce the required additional proscribed identification, the employer would have to fire them in order to be afforded the "safe harbor."

D. Implementation of the DHS Final Rule by DHS and SSA

On September 4, 2007, DHS and SSA intended to begin sending employers no-match letters that will be accompanied by a letter from DHS and ICE (hereinafter the "DHS/ICE Guidance Letter"). SSA expected to mail these letters to approximately 140,000 employers around the country, affecting approximately 8.7 million employees. *See* Complaint-in-Intervention at ¶ 50. SSA's mailings were to continue after November 9, 2007, to hundreds of thousands of other employers. *Id.* This Court's Temporary Restraining Order of August 31, 2007, temporarily precluded the issuance of those joint SSA-DHS letters. The DHS/ICE Guidance Letter states that it will "provide guidance on how to respond to the enclosed letter from the Social Security

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Administration (SSA) . . . in a manner that is consistent with your obligations under United States Immigration Laws."

The DHS/ICE Guidance Letter contains questions and answers, which begin with the following:

> Q: Can I simply disregard the letter from SSA?
>
> A: No. You have received official notification of a problem that may have significant legal consequences for your employees. If you elect to disregard the notice you have received and it is determined that some employees listed in the enclosed letter were not authorized to work, the Department of Homeland Security (DHS) could determine that you have violated the law by knowingly continuing to employ unauthorized persons. This could lead to civil and criminal sanctions.

After threatening employers with civil and criminal liability, the DHS/ICE Guidance Letter then asks: "Q: What should I do?" and responds that "You should" follow the steps set out in the DHS Final Rule.

The DHS/ICE Guidance Letter assures employers that, if they follow those procedures for every no-match, they will not be liable for discrimination if they terminate employees:

> Q: Will I be liable for discrimination charges brought by the United States if I terminate the employee after I follow the steps outlined above?
>
> A: No. . . ."

The DHS/ICE Guidance Letter conveniently ignores those Civil Rights laws administered by other federal agencies, by the States, or by private interests, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., and California anti-discrimination laws, all of which would be potentially implicated were an employer to terminate employees solely because of the Final Rule or because of the Final Rule as implemented by the Guidance Letter.

SSA has revised its no-match letters so that they direct employers to follow the instructions in the accompanying DHS/ICE Guidance Letter.

E. Effect of Implementation of the New DHS Final Rule

Implementation of the DHS Final Rule following the expiration of this Court's TRO will immediately impose new obligations in violation of law on every employer governed by IRCA.

Irrespective of how the DHS Final Rule is characterized, the economic impact associated with implementing DHS' Final Rule is substantial, immediate, and irreparable. Those costs involve hiring, training and overtime for those in human resources (*see* Dickson Decl. at ¶¶ 5,7, lost productivity for those employees named in no-match letters (*id.* at 8), loss of goodwill (*id.*), and increased unemployment insurance premiums in the event that the employees who are unable to resolve a no-match within the requisite period are terminated (*id.* at ¶ 13). The economic impact of DHS' rule is particularly severe for seasonal businesses who face unique hiring demands during a short season. *See* Declaration of Robert J. Dolibois ("Dolibois Decl.") at ¶¶ 3-4,7. This harm cannot be recovered. Moreover, based on Plaintiff-Intervenors' experience, it is highly unlikely that SSA will be able to resolve the more than 8 million no-matches within the time contemplated by the Final Rule. Dickson Decl. at ¶ 12; Declaration of Robert Craig Silvertooth ("Silvertooth Decl.") at ¶ 7. This situation further exacerbates the imminent and irreparable harm to Plaintiff-Intervenors and their members caused by the Final Rule if it were to go into effect.

ARGUMENT

I. LEGAL STANDARDS

A. Preliminary Injunction

The Ninth Circuit recently described the tests for entitlement to a preliminary injunction:

> Under the traditional test, a plaintiff must show: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). The alternative test requires that a plaintiff demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. These two formulations represent two points on a sliding scale in which

> the required degree of irreparable harm increases as the probability of success decreases. They are not separate tests but rather outer reaches of a single continuum.

Taylor v. Westly, 488 F.3d 1197, 1200 (9th Cir. 2007), *quoting Save our Sonoran, Inc. v. Flowers,* 408 F.3d 1113 (9th Cir. 2005). As set forth below, Plaintiff-Intervenors have demonstrated a need for, and entitlement to, injunctive relief. In contrast, under DHS' theory, it would suffer no harm if an injunction is entered since it believes that the Final Rule does not change anything.

B. Regulatory Flexibility Act

Small entities are entitled to judicial review of an agency's Regulatory Flexibility Act analysis or an agency's certification that no such analysis is required. *See* 5 U.S.C. § 611. DHS receives no deference for its interpretation of its obligations under the RFA. *See Aeronautical Repair Station v. FAA*, __ F.3d __, 2007 WL 203228, slip op. at 26 (D.C. Cir. July 17, 2007).

C. Administrative Procedure Act

This suit challenges the statutory authority of DHS to issue the Final Rule. In *Chevron I* challenges, such as this, the agency is entitled to no deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). Nor is the agency entitled to deference with respect to the factual predicates underlying its Final Rules which arise under the Social Security Act because that is not a statute DHS administers. *See id.* at 843.

II. PLAINTIFF-INTERVENORS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

Plaintiff-Intervenors are substantially likely to succeed on the merits of their claims because the promulgation of the DHS Final Rule violates the RFA's requirement that either an analysis of the economic impact of the Final Rule be conducted prior to promulgation or a certification, based on facts, be made that there is no substantial economic impact of the rule on a significant number of small entities. The DHS Final Rule also violates the APA, as well as IRCA, 8 U.S.C. § 1324a, because it expands civil and criminal liability for employers and a system for re-verification of

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employees' work authorization status that is inconsistent with the statute and Congress's intent, and therefore a violation of 5 U.S.C. § 706(2)(A). Finally, the DHS Final Rule is arbitrary and capricious and therefore a violation of 5 U.S.C. § 706(2)(A) because it presumes that a mismatched SSN indicates a employee's immigration status when SSA has expressly stated that this is not so in the vast majority of cases.

A. Defendants Violated the Regulatory Flexibility Act

DHS failed to conduct a proper regulatory flexibility analysis of its Final Rule as required by the RFA. Plaintiff-Intervenors and a significant portion of their members are small entities within the meaning of the RFA. There is no dispute that the RFA applies here. *See* 71 Fed. Reg. at 34284; 72 Fed. Reg. at 45623. Congress enacted the RFA to require agencies to consider the potential impact of their regulations on small businesses, including small entities such as Plaintiff-Intervenors in this case. *See* Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, § 2 (1980). The RFA thus requires agencies to "solicit and consider flexible regulatory proposals and . . . explain the rationale for their actions to assure that such proposals are given serious consideration." *Id.* at § 2(b). An agency may avoid performing a regulatory flexibility analysis only if the head of the agency certifies that the rule will not have "a significant economic impact on a substantial number of small entities" and provides a factual basis for that certification. 5 U.S.C. § 605(b);[4] *N.W. Mining Ass'n v. Babbitt*, 5 F. Supp. 2d 9, 15-16 (D.D.C. 1998).

In this case, the Secretary did not consider the potential impact of the DHS Final Rule on small businesses. The Secretary did not solicit and consider flexible regulatory proposals or undertake any effort to give serious consideration to any alternative proposals. The Secretary did not

[4] Section 605(b) states: "If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification."

1 assess the economic impact of the provision on small entities, or explain the factual, policy and legal
2 rationale for the Final Rule. Although the Final Rule shifts the cost of investigation and resolution
3 of no-matches to employers, the Secretary did not assess the cost of that compliance on small
4 businesses, or whether ninety days was sufficient for a small business to resolve inconsistencies.
5 The Secretary did not undertake any effort to determine whether the cost of compliance is linear, *ie.*,
6 $1,000 per no-match letter, or exponential (or some other non-linear function), *i.e.*, increasing at a
7 different rate as the numbers increase. The Secretary made no effort to determine the cost to small
8 businesses of terminated employees, or the cost to the public as the pool of unemployed workers
9 increases or the amount of unemployment benefits increases. Nor did the Secretary consider the
10 impact of increases in unemployment insurance premiums on small businesses in the event a small
11 business were forced to terminate an employee on account of a no-match letter. Similarly, the
12 Secretary did not assess the costs of rehiring or replacing terminated employees or the potential
13 disruption to small businesses caused by compliance with the Final Rule. Instead, the Secretary
14 simply announced in the notice of proposed rulemaking that the rule would not have a significant
15 economic impact on a substantial number of small entities. *See* 71 Fed. Reg. 34281. And, although
16 commenters disputed the impact of the rule on small businesses, in the Final Rule, the Secretary
17 summarily dismissed these comments as "speculative" or misplaced based on the belief that "[t]he
18 rule does not mandate any new burdens on the employer and does not impose any new or additional
19 costs on the employer, but merely adds specific examples and description of a 'safe-harbor'
20 procedure to an existing DHS regulation for purposes of enforcing the immigration laws and
21 providing guidance to employers." 72 Fed. Reg. at 45623.
22
23 The Secretary's certification is insufficient as a matter of fact and law. First, no one can
24 assess the Secretary's certification. The Secretary does not identify what he considered to be a small
25 business or entity. He does not define what he considered to be a "significant economic impact."
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These deficiencies alone are sufficient to require remand to the Secretary. *See* 65 Fed. Reg. 80029-80045 (Dec. 20, 2000) (where the Department of Labor was forced to reconsider its certification under the RFA for these reasons and after withdrawing the certification, provided a sixteen- page economic analysis in the Federal Register on the effect of its new rules on small businesses).

Second, the Secretary confuses fact and law. The RFA requires that a certification state the "factual basis" on which it rests. 5 U.S.C. § 605(b). The Secretary's assertion that the DHS Final Rule imposes no additional legal obligations on employers is not a fact, but a conclusion of law. This is not a trivial distinction because the RFA does not turn on whether a regulation imposes new obligations on small businesses. Rather, it turns on the overall impact the regulation will have on small entities. *See North Carolina Fisheries Ass'n, Inc. v. Daley*, 16 F. Supp. 2d 647 (E.D. Va. 1997). In *Daley*, the government certified that its proposed rule (a new fishing quota for summer flounder) would not have any economic impact on a significant number of small entities. As its factual basis, the Secretary stated that the new fishing quota was no different than the previous quota. The court held that this statement "does not provide a factual basis. There is no explanation why the fact that the quotas are the same means there will be no impact." *Id.* at 652. The court therefore found that the certification violated the RFA. *Id.* Even if it imposes no new "requirements," the DHS Final Rule is aimed at modifying or changing employers' behavior. Under these circumstances, whether or not it imposes "new requirements," a regulatory flexibility analysis is required. There is nothing in the RFA that relieves an agency of its obligation to conduct such an analysis merely because the agency believes its regulation does not change existing requirements on small businesses.

Second, even if the Secretary's justification were a "factual" basis, the Secretary's statement is inaccurate. The DHS Final Rule does change the law in a number of ways and for a number of reasons. First, the Secretary expressly states that this "final rule amends the definition of 'knowing'

1 in 8 C.F.R. 274a.1(*l*)(1) in the portion relating to 'constructive knowledge.'" 72 Fed. Reg. at 45612.
2 Under current law, an SSA no-match letter has no probative value with respect to an employee's
3 immigration status. The SSA notice to employers specifically "cautions employers that these [no-
4 match] letters [] do not make any statement about an employee's immigration status[.]"
5 <http://www.ssa.gov/legislation/nomatch2.htm> (last viewed September 6, 2007). Not only does the
6 Final Rule expressly state that the receipt of an SSA no-match letter may have probative value with
7 respect to employees' immigration status, it expressly states the criteria under which it will have
8 such probative value and the criteria under which it will not have probative value. The fact that this
9 Final Rule was issued as a substantive rule under 5 U.S.C. § 553 underscores its substantive effect.
10 *See also* 72 Fed. Reg. at 45623 (certifying that DHS considers this rule a "significant regulatory
11 action" under Executive Order No. 12,866 because it raises "novel policy issues."). If the DHS Final
12 Rule were merely a vanilla restatement of existing law or simply provided guidance to bureaucrats, it
13 would neither have raised novel policy questions nor have been published as a substantive rule.
14
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16 DHS' section entitled "economic impact" does not rescue its conduct for purposes of the
17 RFA. *See Aeronautical Repair Station Ass'n, Inc. v. Fed. Aviation Admin.*, *supra*, slip op. at 14
18 (rejecting FAA's argument that its final economic evaluation of the effects of a rule on the industry
19 and responding to comments was sufficient to comply with the RFA because it did not consider
20 significant alternatives or explain why each alternative which affected small entities was rejected).
21 The Secretary's unadorned and unexplained statement is in marked contrast to the analyses
22 undertaken by other agencies and upheld by the courts of appeals as sufficient to satisfy the agency's
23 certification obligations under the RFA. *See e.g.*, *Cement Kiln Recycling Coalition v. Environmental*
24 *Protection Agency*, 255 F.3d 855 (D.C. Cir. 2001) (where the D.C. Circuit upheld EPA's
25 certification because in seeking to determine whether its regulations would have "significant
26 economic impact" on a "substantial number of small entities," the agency examined the entities that
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would be directly affected by its rules and the compliance costs would exceed one percent of annual sales for only two entities); *Ranchers Cattlemen Action Legal Fund v. U.S. Dep't of Agriculture*, 415 F.3d 1078, 1101-02 (9th Cir. 2005) (where the Ninth Circuit found that the agency satisfied its obligations under the RFA by conducting a detailed economic assessment of the impact of its proposed rule on small business, considering alternatives and explaining why those alternative were rejected), *Environmental Defense Ctr., Inc. v. Environmental Protection Agency*, 344 F.3d 832, 879 (9th Cir. 2003) (where the court found EPA reasonably certified and conducted the economic analyses sought by the petitioners when it convened a "Small Business Advocacy Review Panel" before publishing its notice of proposed rule, and adopted and explained the provisions that had been designed to minimize the impact on small entities); *Grand Canyon Air Tour Coalition v. Fed. Aviation Admin.*, 154 F.3d 455, 470-71 (D.C. Cir. 1998) (where RFA analysis deemed adequate because the agency did a lengthy analysis of the economic impact of its proposed rule on small businesses, responded to comments by the Small Business Administration and others, and considered at least seven alternatives to the rule).

The Secretary's conclusion that its Final Rule will have no economic impact on a significant number of small entities is note supported by the record. Here, DHS did not examine the obvious risks, potential costs and effects of compliance with its Final Rule.

B. Defendants Violated the Administrative Procedure Act

Plaintiff-Intervenors have alleged that the DHS Final Rule is inconsistent with the Administrative Procedure Act in two respects. First, the Final Rule is not authorized by IRCA. Second, the assumption underlying the Final Rule, namely that a no-match is probative of immigration status is not supported by the record and is inconsistent with statements of the SSA, the agency charged with administering the Social Security program. Rather than repeat the arguments

that Plaintiffs have made in their Memorandum in Support of Motion for Preliminary Injunction, Plaintiff-Intervenors adopt those arguments as if they were set forth in this brief.

III. PLAINTIFF-INTERVENORS AND THEIR MEMBERS WILL SUFFER IMMEDIATE AND IRREPARABLE HARM SHOULD THE FINAL RULE BE IMPLEMENTED

The DHS Final Rule will irreparably harm small businesses both with respect to their RFA and APA claims and large businesses with respect to their APA claims. The normal rule in this Court is that if a party cannot be made whole through money damages when the claim is resolved on the merits, then the economic harm qualifies as "irreparable harm." *See Patriot Contract Servs. v. United States*, 388 F. Supp. 2d 1010, 1026 (N.D. Cal. 2005); *Napa Valley Publishing Co. v. City of Calistoga*, 255 F. Supp. 2d 1176, 1181 (N.D. Cal. 2002) (holding that "[t]he issue with respect to irreparable injury is whether, if the preliminary injunction is denied, the plaintiff can be made whole should it prove victorious at trial . . . . ").

Many Plaintiff-Intervenors will receive no-match letters in their capacity as employers. *See* Dickson Decl. at ¶ 4. Many of Plaintiff-Intervenors' members also will receive no-match letters. *Id.* Plaintiff-Intervenors' members have received these letters in the past. *See id.* at ¶ 1; Silvertooth Decl. at ¶ 6. To accommodate the Final Rule, both large and small businesses will have to develop new human resource systems to resolve mismatches within the tight time constraints set out in the Final Rule. *See* Dickson Decl. at ¶7; Declaration of Robert J. Dolibois ("Dolibois Decl.") at ¶ 5; Silvertooth Decl. at ¶ 9. This activity necessarily diverts resources and adversely affects productivity and undermines goodwill. Dickson Dec. at ¶ 8; Dolibois Dec. at ¶ 5; Silvertooth Decl. at ¶¶ 8,9. These costs are not recoverable, Dickson Decl. at ¶ 15, and if, as Plaintiff-Intervenors believe, the Final Rule is invalid, the costs are not true compliance costs. This is not speculative harm as many member companies, both large and small, already have developed procedures that would be implemented if the Final Rule goes into effect. *See* Dickson Decl. at ¶¶ 7, 9. Since many

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1 members will receive no-match letters and since many of those members will terminate employees
2 who are unable to resolve the mismatch within the time period, the effects on productivity and the
3 loss of goodwill will be significant and will be especially profound for small businesses. *Id.* at ¶ 8;
4 Silvertooth Decl. at ¶¶ 8-10; Dolibois Decl. at ¶ 5. This type of economic disutility constitutes
5 irreparable harm. This Circuit has long recognized "that intangible injuries such as damage to
6 ongoing recruitment efforts and goodwill, qualify as irreparable harm." *Rent-A-Center, Inc. v.*
7 *Canyon Tele. & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (citing *Regents of Univ. of*
8 *Cal. v. Am. Broadcasting Cos.*, 747 F.2d 511, 519-520 (9th Cir, 1984)).
9
10 Second, even if employees are able to resolve the mismatch within ninety-three days, the
11 Final Rule still imposes non-recoverable costs that are associated with the accelerated resolution
12 process for no-match letters. Employees will have to take time off during the ninety-day window to
13 resolve mismatches. When this ninety-day window falls within a company's peak season (*e.g.*
14 Christmas for retailers; tax season for accountants and tax preparers, summer months for roofers,
15 harvest season for produce companies, or planting season for nurseries and landscapers), the loss of
16 employee time is particularly profound and imposes additional, non-recoverable costs and burdens
17 on both the company and its other employees as well as undermining goodwill. This impact cannot
18 be recovered at a later date. That is, by definition, irreparable harm. *See Rent-A-Center, Inc.*, 747
19 F.2d at 519-20.
20
21 Third, as noted, where mismatches cannot be resolved within the ninety-three day period, an
22 employer must confront a dilemma. The employer can chose among one of three alternatives, none
23 of which is acceptable economically. The employer can terminate those employees with unresolved
24 mismatches who appear to be foreign-born, but retain those employees who appear to be native. If
25 the employer guesses wrong and some or all of the foreign-looking employees are in fact authorized
26 to work in the United States, the employer would be subject to suit under Title VII of the Civil
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Rights Act of 1964. On the other hand, the employer can act uniformly and terminate all employees with unresolved mismatches even those that it knows are U.S. citizens or otherwise authorized to work in the United States. This is an economically disastrous option especially for small businesses and in certain industries, such as construction, will have a disparate impact on Hispanic employees. The third option is to do nothing and risk criminal or civil enforcement actions. This option too carries unacceptable ramifications.

These are not speculative options. One member of the U.S. Chamber already has expressly instructed its managers that if no-match letters cannot be resolved within the ninety-three day window, "you must terminate the employee." Dickson Decl. at ¶ 9. That company has further instructed that such an employee may not be rehired at a later date unless he or she provides new identification or work authorization. *Id.* These employees will be fired even though they may be lawful residents of the United States. To view termination of employees as anything other than irreparable injury both to the employer and employee is "callous." *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1046 (9th Cir. 2007). The fact that the Final Rule places employers between a rock and a hard place-either terminate employees who are unable to resolve mismatch letters or risk criminal prosecution or employment discrimination suits--alone constitutes irreparable harm under the law of this circuit. *See Cheema v. Thompson,* 67 F.3d 883 (9th Cir. 1995) (forcing a plaintiff to chose between obeying religious tenets or school rules constitutes irreparable harm).

Finally, for certain sectors, the impact of this Final Rule is particularly burdensome and its effects will be felt immediately. Seasonal employers must be able to quickly hire large numbers of employees for work during a concentrated period of time. For example, the nursery growers who service orchards in this District will be hiring employees for their peak season which lasts only a few weeks during the fall. *See* Dolibois Decl. at ¶ 3. Those employers must have systems in place to track no-match letters. Employees in seasonal work move from employer to employer tracking the

different crops. Therefore, if an employer wishes to rehire that employee during its next peak season, it will have a system that tracks employees who have been the subject of a no-match letter even though they were not employed by that employer when the no-match letter was received. That is the only way to avoid hiring employees "known" to be subject to a SSA mismatch letter. *See* Dolibois Decl. at ¶ 6. This would damage these employers' ongoing recruiting efforts and would undermine the goodwill associated with these companies. *See id.* at ¶ 7. As noted, these types of injuries qualify as irreparable harm. *See Rent-A-Center, Inc.*, 944 F.2d at 603.

The effects also will be felt immediately by employers in the construction industry. These employers have a disproportionate number of Hispanic employees who are authorized to work in the United States. Silvertooth Decl. at ¶ 5. Name-matching problems with SSA are common among this population. *Id.* at ¶ 6. As a result, these employers consistently receive no-match letters but unlike many employers, those engaged in the construction business do not have a typical office with support staff that is equipped to respond to these letters within the ninety-day window. *See* Silvertooth Decl. at ¶ 7. Therefore, the DHS Rule places unreasonable economic burdens on this sector.

This is no benign regulation necessitating only revisions to paperwork or systems. It is a pernicious regulation that affects every employer and employee in this country. It requires employers that wish to avoid discrimination litigation to terminate all employees who are unable to resolve SSA mismatch letters within ninety-three days even though the government knows that the overwhelming majority of the mismatches involve lawful employees or employees who are U.S. citizens.[5] *See* 72 Fed. Reg. at 45613 (advising employers that if no-matches cannot be resolved, the

[5] As a legal matter, the presumption imposed by the DHS Final Rule, that a mismatch is evidence of unlawful employment status, is itself invalid where, as here, that presumption has been proven to be untrue in the run of cases. A rule based on such a presumption is arbitrary and capricious. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93 (2002).

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1 employer must terminate the employee or face the risk of criminal or civil prosecution); *see also*
2 <http://www.ssa.gov/legislation/FINAL%20TY2006%20EDCOR%20Code%20V%2008202007.ht
3 m SSA> (last viewed Sept. 10, 2007) (instructing employers that all employees must be treated
4 uniformly). What is particularly callous is that DHS never even considered these effects.

5 **IV. DEFENDANTS WILL IN NO WAY BE HARMED BY THE ISSUANCE OF THE**
6 **INJUNCTIVE RELIEF REQUESTED**

7 Defendants would not be harmed by a preliminary injunction should this Court grant the
8 relief requested. If their statements in defense of the Final Rule are accepted at face value, they
9 cannot be harmed by a preliminary injunction because, according to them, the Final Rule changes
10 nothing.

11
12 **V. THE EQUITABLE RELIEF REQUESTED IS IN THE PUBLIC INTEREST**

13 The issuance of equitable relief is clearly in the public interest. The implementation of the
14 Final Rule subjects millions of employees to termination. The Secretary already has represented that
15 the Final Rule poses "novel policy issues." 72 Fed. Reg. 45623. It is in the public interest to have
16 an independent arbiter resolve this important and "novel" issues before they are implemented.
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VI. CONCLUSION

For the foregoing reasons, the Preliminary Injunction should issue as requested.

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*,

Plaintiffs,

and

SAN FRANCISCO CHAMBER OF COMMERCE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, GOLDEN GATE RESTAURANT ASSOCIATION, NATIONAL ROOFING CONTRACTORS ASSOCIATION, AMERICAN NURSERY & LANDSCAPE ASSOCIATION, INTERNATIONAL FRANCHISE ASSOCIATION, and UNITED FRESH PRODUCE ASSOCIATION,

Plaintiff-Intervenors

v.

MICHAEL CHERTOFF, *et al.*,

Defendants

CASE NO. 3:07-cv-04472-CRB

DECLARATION OF ELIZABETH C. DICKSON

1 I, Elizabeth C. Dickson, declare as follows:

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3 1) I am the Chair of the Subcommittee on Immigration for the Chamber of Commerce of the United
4 States of America ("U.S. Chamber"), a Plaintiff-Intervenor in this case, established as a not-for-
5 profit corporation under Internal Revenue Code, § 501(c). The U.S. Chamber has approximately
6 500 employees. I am also the Manager of Immigration Services for a Company that is a member
7 of the U.S. Chamber and that has received No-Match Letters in the past.
8
9 2) I chair the U.S. Chamber's thirty (30) plus member Subcommittee on Immigration that
10 determines the U.S. Chamber's position and sets strategy on issues including immigration reform,
11 visa and border policy.
12 3) The U.S. Chamber is a small entity as that term is used in the Regulatory Flexibility Act.
13 Approximately 300,000 of the U.S. Chamber's member businesses also are small entities within
14 the meaning of the Regulatory Flexibility Act.
15
16 4) The U.S. Chamber has had an opportunity to assess some of the effects of the DHS Final Rule
17 which is the subject of this litigation both on itself as an employer and on its small business
18 members. I understand that many small entities, including those that are members of the U.S.
19 Chamber, are highly likely to receive a so-called "no match" letter from the Social Security
20 Administration.[1] The economic burden associated with the implementation and effects of the
21 DHS Final Rule are significant, especially for a substantial number of small employers. These
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23

24 [1] This is based on the DHS' and Social Security Administration's statement that 4.0% of the
25 SSA database contained unresolved mismatches and it further assumes a uniform distribution of
those mismatched Social Security numbers across the population. See Testimony of Stewart A.
26 Baker, Assistant Secretary for Policy, DHS, Before the Subcomm. on Oversight of the House Comm.
on Ways and Means (Feb. 16, 2006). It also assumes that the Social Security Administration will
27 only send a no-match letter to an employer with ten or more mismatched Social Security numbers
and the number of mismatches represents more than 0.5 percent of the total Forms W-2 in the employer's
28 submitted wage report.

burdens are direct and immediate and will have an adverse impact on the productivity of small businesses.

5) For example, to accommodate the DHS Final Rule, employers, both large and small, will have to develop new human resource systems to resolve mismatches within the tight time constraints set out in the rule. The overwhelming majority of businesses currently resolve SSN mismatches by asking the employee to resolve it. In our experience, it frequently takes employees many attempts and months to complete that process. In my experience, the Social Security offices in some states may take even longer to resolve mismatches. Now, employers and employees have been able to do this at their leisure. Even then, it is not a quick or easy process. In many cases, employees, especially where the mismatch is due to marriage and name-change, have to obtain copies of their birth and marriage certificates, fill out an application for a corrected Social Security card and submit that application and documentation along with proof of identity (*e.g.*, passport or U.S. driver's license) to the local office of the Social Security Administration. This is necessarily a slow process. Aside from the time commitment involved in obtaining the required documentation, the employee can only visit the local Social Security Administration office during business hours. Although employees are permitted to mail that application and documentation, in most instances, because original documentation is required and that documentation (such as driver's licenses or passports) cannot easily be out of the control of the employee, a personal visit or two is required. Moreover, SSA's ability to respond to requests to reissue Social Security cards varies state by state. The SSA offices in some states are very slow, particularly states with large populations. Other states' SSA offices are able to quickly resolve these issues. In some states, such as Virginia, before employees can effectuate name changes or correct typographical errors in their birth certificates, they must apply to the local circuit court which must then issue a new record. Only then can the employee go to the local SSA office to

resolve any mismatch. This process can delay resolution of any mismatch by more than one month.

6) Under the DHS Final Rule, employers will have to use a totally different system. Rather than having an employee resolve the mismatch at the employee's own pace, that resolution will have to be accomplished within ninety days. This necessarily will have a significant impact on a substantial number of small entities.

7) First, human resources departments will have to put systems into place designed to resolve mismatches with the employee's cooperation within the ninety-day window. This will entail in some cases, hiring human resource specialists, education, training and legal counsel both in-house and from outside consultants and attorneys. Large companies have the resources, systems, and training capabilities to drive compliance throughout the organization. At my company, we developed and were planning to conduct a series of web-based tutorials for all those in our Human Resources Department so that they could better understand their obligations under the Final Rule. This took considerable time and effort. The overwhelming majority of small businesses do not currently have such systems in place because there is no time limit on the resolution of any mismatch. These systems will likely vary from employer to employer, but they will have one thing in common, they will take time and money to develop and implement. The notion that the Final Rule imposes no economic burden on an employer or employee is far-fetched.

8) Second, in order for employees to resolve mismatches, they will now have to take time off during the ninety-day window. This will adversely affect productivity especially for small businesses, where every employee counts. For businesses with seasonal variations, compliance will produce a particularly significant and costly hardship. Moreover, it will have a more focused adverse impact on those businesses with a higher percentage of women employees

1 between ages 18 and 35, because a large percentage of mismatches are due to name changes
2 associated with marriage. The loss of productivity will necessary affect Plaintiff-Intervenors'
3 members' goodwill which, once tarnished, cannot be recovered.
4 9) Third, where a mismatch cannot be resolved in the ninety-day window and the employee can
5 provide no additional documentation to meet the employment eligibility verification requirement
6 for the new I-9 form, the employer then has to face the dilemma of termination, criminal liability
7 or fine, or a possible discrimination suit. Assume that an employer has ten employees who have
8 been unable to resolve their mismatches within the requisite ninety-day period. Further assume
9 that six of those employees appear to be U.S.-born, but the remaining four look foreign. If the
10 employer terminates the four who appear to be foreign-born, but not the six who appear to be
11 U.S.-born, and it turns out that the employer guessed wrong, it is likely that the employer would
12 be sued under Title VII of the Civil Rights Act for race or national origin discrimination.
13 Employers who wish to avoid the risk of such suits would have little choice but to terminate all
14 ten employees or terminate none and face possible criminal liability or civil fines. This is no idle
15 speculation. One of our member companies has already developed a policy, which would be
16 implemented should the Final Rule go into effect, that instructs its managers that if a no-match
17 letter cannot be resolved within the ninety-three day window, "you must terminate the
18 employee." This policy would apply to United States citizens and anyone who is authorized to
19 work in the United States. The company's policy further instructs its managers that an employee
20 may not be rehired at a later date unless he or she provides new identification or work
21 authorization. These three alternatives would engender significant, adverse economic harm and
22 the likelihood that one of them would occur is 100 percent because they are mutually exclusive.
23 10) The economic burden of the Final Rule is further heightened by inconsistencies in the advice
24 provided in the DHS guidance letter for complying with the Final Rule. At one point, DHS
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advises employers that continuing to employ an employee where the mismatch cannot be resolved within the ninety-day period and for whom no additional documentation is available, subjects that employer to "the risk of [liability] for violating the law." In the next paragraph, however, DHS advises employers that if they terminate an employee based solely on a mismatch letter, the employer may "violate the law." This confusion alone is costly especially to small businesses who will have to hire counsel to guide them through this legal thicket.

11) We understand from our members that some businesses will seek to utilize subcontractors to reduce the likelihood of receiving a mismatch letter. This will have a dramatic impact especially on a significant number of small entities.

12) In our experience, these costs and economic burdens will be substantial, however, even these substantial impact assumes that the Social Security Administration would be able to process the abnormally large number of no-matches within the time constraints contemplated by the DHS Final Rule. We do not think that is likely. In our view, the DHS Final Rule will have the same effect on the Social Security Administration that post-September 11, 2001 changes to immigration rules that took effect in January 2007, had on the State Department's processing of passport applications. There, an increase of 5,000,000 passport applications from 2006 to 2007, caused a massive backlog in passport application processing times which was abated only by hiring hundreds of new adjudicators, temporary transfers of employees to passport centers and the opening of a new facility to handle the applications. The passport backlog caused inconvenience only; the backlog caused by this rule will likely cause people to lose their jobs. Indeed, many employees who receive letters may attempt to obtain a passport to meet the new I-9 employment eligibility requirements. The State Department has reported that the waiting period for a standard passport application is now six to eight weeks and three weeks for expedited service, which requires the payment of a substantial fee. *See*

<http://www.cnn.com/2007/TRAVEL/09/07/us.passports.ap/indix.html> (last viewed September 10, 2007).

13) Terminating employees who are authorized to work in the United States carries substantial economic burdens. An employer has to first hire additional employees to replace terminated employees. The hiring and training process and loss of experienced workforce carries cost, none of which was examined by DHS. Termination also will drive up employer's unemployment insurance premiums across all sectors. This too is an economic impact that DHS failed to address in its rulemaking. The overall effect of the rule on productivity, we believe, would be significant for all businesses, but particularly for small businesses. The fact that no effort was made by DHS to identify, let alone assess, the impact of its Final Rule is unfortunate.

14) The economic and human resource costs associated with the DHS Final Rule are already occurring in anticipation of the regulation and would be even more severe upon its effective date and, in our view, would cause irreparable injury to our members.

15) The economic and human resource burdens and loss of goodwill noted above are not recoverable costs and will not be recoverable by the U.S. Chamber or its members. This is not a situation in which these costs or harms can be recovered as damages or otherwise. Thus the Final Rule will have a significant, non-recoverable economic impact on a substantial number of small entities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed September 11, 2007

Elizabeth C. Dickson

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*,	
Plaintiffs,	
and	
SAN FRANCISCO CHAMBER OF COMMERCE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, GOLDEN GATE RESTAURANT ASSOCIATION, NATIONAL ROOFING CONTRACTORS ASSOCIATION, AMERICAN NURSERY & LANDSCAPE ASSOCIATION, INTERNATIONAL FRANCHISE ASSOCIATION, and UNITED FRESH PRODUCE ASSOCIATION,	CASE NO. 3:07-cv-04472-CRB **DECLARATION OF ROBERT J. DOLIBOIS**
Plaintiff-Intervenors	
v.	
MICHAEL CHERTOFF, *et al.*,	
Defendants	

I, Robert J. Dolibois, declare under penalty of perjury as follows:

1. I am Executive Vice President of the American Nursery & Landscape Association ("ANLA"), a not-for-profit membership corporation headquartered in Washington, D.C. and a Plaintiff-Intervenor in *AFL-CIO, et al. v. Chertoff, et al.*, No. C07-4472 CRB (N.D. Cal.). ANLA has approximately 2,000 members, 98% of which are small businesses; many of those members have received no-match letters in the past and fully expect to receive them in the future. ANLA is a small organization within the meaning of the Regulatory Flexibility Act and most of its members are small businesses within the meaning of section 3 of the Small Business Act.

2. The Final Rule has a significant and immediate adverse impact on ANLA and its members. ANLA's members operate in three sectors: production (nursery agriculture), retail, and services (landscaping). The businesses of ANLA's member companies are highly seasonal and during peak seasons, companies must hire adequate and qualified numbers of employees. Because of the seasonal nature of these businesses, a company's employment rolls can increase from ten employees to eighty or more employees during peak season. The DHS Final Rule will impede the ability of ANLA's members to recruit employees authorized to work in the United States.

3. For ANLA's nursery grower members in the Northern District of California, the peak planting season for nurseries servicing orchards occurs over only a few weeks in the late fall. The peak harvest season for deciduous fruit and nut tree nursery stock is from December to February. The implementation of the Final Rule therefore will have an immediate impact on those member companies. These peak seasons are highly labor intensive.

4. The implementation of the DHS Final Rule will impose additional and significant burdens on ANLA's member companies at a time when the burdens on them already are enhanced. Peak hiring times put ANLA's member companies under extreme duress. Complying with the DHS

Final Rule during these peak times will require larger members, many of which are still small businesses within the meaning of the Regulatory Flexibility Act, to dedicate human resource staff to resolving and/or tracking mismatches, which given the foreign names of many of their employees, will be substantial.

5. Many of ANLA's members are not large companies, however, and those small companies (also small businesses under the Regulatory Flexibility Act definition) have no dedicated human resource staff and will have to acquire technology and software to manage their responses to no-match letters, and to hire and train employees to resolve mismatches. The economic cost of this compliance and diversion of employees to accomplish it is substantial, and adversely affects the ability of ANLA's members to meet delivery deadlines, thus injuring these companies' goodwill.

6. Many companies in other sectors might be able to shift some of this responsibility to their employees. That will not be the case with ANLA's members. Specifically, by the time ANLA's members receive a no-match letter, it is likely that the seasonal peak is over and the employee is no longer working for the ANLA member. However, that employee typically is rehired during the next seasonal peak. Therefore ANLA's members must implement a tracking system that allows them to resolve no-match letters with little or no employee assistance prior to the next hiring season to avoid hiring employees "known" to be subject to an SSA mismatch. This is likely not feasible.

7. These seasonal workers are critical to the operation of ANLA's member businesses. The DHS Rule jeopardizes our members' ability to hire seasonal workers when they are needed the most. The DHS Rule therefore will have a direct, immediate and irreparable economic impact on ANLA's members and on ANLA.

I declare under penalty of perjury that the foregoing is true and correct.

Robert J. Dolibois

Executed September 11, 2007

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*, Plaintiffs, and SAN FRANCISCO CHAMBER OF COMMERCE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, GOLDEN GATE RESTAURANT ASSOCIATION, NATIONAL ROOFING CONTRACTORS ASSOCIATION, AMERICAN NURSERY & LANDSCAPE ASSOCIATION, INTERNATIONAL FRANCHISE ASSOCIATION, and UNITED FRESH PRODUCE ASSOCIATION, Plaintiff-Intervenors v. MICHAEL CHERTOFF, *et al.*, Defendants	CASE NO. 3:07-cv-04472-CRB **DECLARATION OF ROBERT CRAIG SILVERTOOTH**

GREENBERG TRAURIG LLP

I, Robert Craig Silvertooth, declare under penalty of perjury as follows:

1. I am the Director of Federal Affairs of the National Roofing Contractors Association ("NRCA"), a Plaintiff-Intervenor in this case, established as a not-for-profit corporation under Internal Revenue Code, § 501(c). NRCA has approximately 70 employees.
2. In my professional capacity, I am responsible for monitoring, developing and advocating policy positions on various federal regulations and legislation. My issue specialization has focused on policy relating to immigration, labor, tax, energy, environmental regulation, labor, federal procurement, health care, and civil litigation reform. I co-chair the Essential Worker Immigration Coalition as well as the Construction Organizations for Sensible Taxation coalition. I am a trustee for the Associated Specialty Contractors, an active member of the Alliance to Save Energy, and currently serve on the U.S. Chamber of Commerce's Labor Relations Committee.
3. NRCA is a small entity as that term is used in the Regulatory Flexibility Act. More than 95 percent of NRCA's member businesses also are small entities within the meaning of the Regulatory Flexibility Act.
4. NRCA has had an opportunity to assess some of the effects of the DHS Final Rule which is the subject of this litigation both on itself as an employer and on its small business members. The costs associated with the implementation and effects of the Department of Homeland Security ("DHS") Final Rule are significant, especially for a substantial number of small employers in the construction industry and are not recoverable. These effects are direct and immediate and will have an adverse impact on the productivity of small businesses.
5. Of immediate concern to NRCA is the sample population of construction workers that could be the subject of a "no match" letter. Employment in the construction industry grew by 559,000 workers in 2006, and Hispanic workers, mostly foreign born, were responsible for

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nearly two-thirds (66.5%) of the increase in industry employment. About 60 percent of that increase, or 335,000, went to foreign-born Hispanics. And most of these foreign-born Hispanic workers are recent arrivals, having arrived in the U.S. since 2000. In fact, the number of recent arrivals employed in the construction industry rose by 255,000 in 2006, representing 45.6 percent of the total increase in industry employment last year. In total, the construction industry employed 2.9 million Hispanic workers in 2006.

6. The demographic composition of the construction workforce, coupled with a SSA database that is notoriously inaccurate, is of deep concern to NRCA. The construction industry absorbed 40.6 percent of the total growth in U.S. employment of foreign-born Hispanics between 2005 and 2006. Frequently, "no match" notices result from name changes and clerical errors, such as transposed numbers or other honest mistakes. For the construction industry, and specifically the roofing sector, the mismatch problem is exceptionally severe as workers who identify themselves as being Latino or Hispanic represent fully one-quarter of the construction workforce. Name-matching problems with SSA are common among this community due to multiple surnames of individuals, rather than the traditional first-middle-last name pattern of most native-born Americans. According to a July 11, 2006, Government Accountability Office ("GAO") report, the SSA database contains incomplete and outdated data. NRCA is deeply concerned with the prospect of terminating employees who are legitimately authorized to work, but who have been unable to obtain a resolution within the allotted 90-day period due to corrupt data. It is particularly troubling, given that the GAO has confirmed that the database, which DHS suggests should be used to determine work eligibility, is rife with inaccurate data.

7. Given the inaccurate SSA database, and the likelihood construction will receive a disproportionate percentage of "no match" letters issued, NRCA believes the proposed

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1 timeframe of 90 days to resolve a discrepancy is impractical and economically disruptive.
2 The 90-day period is not a viable timeframe in which to rectify data problems simply due to
3 the problems attendant to erroneous and incomplete records in the SSA system. DHS has
4 provided no credible assurance that the 90-day time period is an adequate amount of time in
5 the current enforcement environment, let alone in a new era in which DHS ramps up efforts
6 to identify the estimated 12 million undocumented immigrants in the U.S. economy. There is
7 every reason to believe SSA's resources and infrastructure will be stretched beyond capacity
8 if DHS moves forward with this proposal, and regrettably, honest employers and lawfully-
9 employed workers will be harmed in the process. Both large and small employers will be
10 severely challenged to meet this standard. Large employers may receive several "no-match"
11 letters simultaneously – each containing multiple names, magnifying the difficulty of
12 resolving all of the discrepancies within the prescribed timeframe. Regarding smaller firms,
13 they often do not have a full-time administrative staff to address these issues. Small business
14 owners often have to run the business, oversee bookkeeping, supervise its employees and
15 perform administrative duties. The construction industry would be particularly hard hit by
16 this requirement, as most firms are small and operate outside of a conventional office
17 environment. Employers in the construction industry spend the bulk of their time at job sites,
18 not an office; they are frequently not even near a computer, let alone hard copies of their
19 employment records. For these reasons, the 90-day period is unreasonable and will be
20 unduly burdensome for employers.
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24 8. Further, the average construction company is a small business, with a lean administrative
25 staff and the bulk of its workforce (including management) outside of the home office. The
26 typical NRCA member hires approximately 35 employees and can ill afford shocks to the
27 size of its labor force, whereas a larger firm possesses a stronger capacity for absorbing such
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disruptions. This is especially true in construction. Our industry operates under unique demands such as weather restrictions, performance and bonding requirements in contracts, and strict timetables for delivery of the construction product and service. Absorbing labor shortages in the middle of projects is potentially disastrous for small construction companies, as failure to meet timetables can result in non-payment by the building owner or general contractor. Further, worker shortages disproportionately impact smaller construction companies because it jeopardizes their ability to bid for future contracts.

9. Under the DHS Final Rule, employers will need to implement costly new human resources procedures and/or absorb new costs associated with legal and consultancy services. Human resources departments will have to put systems into place designed to resolve mismatches with the employee's cooperation within the 90-day timeframe. Such systems will necessitate education, training and legal counsel both in-house and from outside consultants/attorneys. As the overwhelming majority of NRCA members do not currently have such systems in place, these new costs will be assumed and will alter cash-flow in a negative fashion.

10. An unfortunate, yet certain, consequence of the DHS proposal is that if an employer receives a "no-match" letter, many employees will simply be fired. Given the complexity of the proposed rule, many employers will choose to endure the economic disruption associated with losing a valued employee, rather than risk legal liability by attempting to remedy the "no-match" notice. Out of caution, panic and confusion surrounding the intricacies of the rule, and unfortunately ethnic profiling as well, many employers will select the safe legal route by shedding the potential legal liability associated with workers who are the subject of "no-match" notices. Once again, the integrity of the SSA database comes into play, as U.S. citizens and legally-authorized immigrants will undoubtedly face termination.

Unquestionably, wrongful terminations are not DHS' intent, but DHS should bear in mind its culpability in such terminations should it proceed with the rule.

11. The economic and human resource costs associated with the DHS Final Rule are already occurring in anticipation of the regulation and would be even more severe upon its effective date and, in our view, would cause immediate and irreparable injury to NRCA and its members.

I declare under penalty of perjury that the foregoing is true and correct.

Executed September 11, 2007

R. Craig Silvertooth

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1
ATTESTATION CLAUSE

2 I, Karen Rosenthal, am the ECF User whose ID and password are being used to file this
3 **PLAINTIFF-INTERVENTORS' MEMORANDUM OF POINTS AND AUTHORITIES IN**
4 **SUPPORT OF THEIR APPLICATION FOR A PRELIMINARY INJUNCTION.**

5 In compliance with General Order 45, X.B., I hereby attest that Robert P. Charrow has
6 concurred in this filing.
7
8 Date: September 11, 2007 GREENBERG TRAURIG LLP
9
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11 By: /s/ Karen Rosenthal
12 Karen Rosenthal
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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted below:

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