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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; BAY AREA COUNCIL; NATIONAL RETAIL FEDERATION; AMERICAN ASSOCIATION OF INTERNATIONAL HEALTHCARE RECRUITMENT; PRESIDENTS' ALLIANCE ON HIGHER EDUCATION AND IMMIGRATION; CALIFORNIA INSTITUTE OF TECHNOLOGY; CORNELL UNIVERSITY; THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY; UNIVERSITY OF SOUTHERN CALIFORNIA; UNIVERSITY OF ROCHESTER; UNIVERSITY OF UTAH; and ARUP LABORATORIES,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF LABOR; ALEJANDRO MAYORKAS, in his official capacity as Acting Secretary of Homeland Security; and AL STEWART, in his official capacity as Secretary of Labor,

Defendants.

Case No. 4:20-CV-7331-JSW

REPLY IN SUPPORT OF PLAINTIFFS' NOTICE OF FILING AMENDED COMPLAINT AS OF RIGHT OR, IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE

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Defendants have no objection to amending the complaint in this case so as to challenge the Final DOL Rule, which substantially raises the four wage levels that must be paid to H-1B employees in an attempt "to price out of the U.S. labor market many H-1B visa holders and employment-based immigrants." FAC, Dkt. 79, ¶ 107 (quotation marks omitted). But Defendants do object to the inclusion of a challenge to another rule (the DHS Lottery Rule), that uses the four wage levels set by the Final DOL Rule to prioritize which applicants will receive H-1B visas, so that only the highest paid applicants will be selected.

The Court should reject Defendants' position for three reasons: *First*, Plaintiffs retain the right to amend their complaint under Rule 15(a)(1)(B) without requiring the Court's leave—indeed, Defendants barely address our arguments on this score. *Second*, Defendants' assertion that the two rules are "completely unrelated" (Opp., Dkt. 87, at 1) is demonstrably false. And *third*, Defendants are wrong that addressing these two rules together would somehow "necessitate a bifurcation of the case" (*id.*), disserving judicial economy.

1. To begin, Plaintiffs retain the right to amend their complaint "as a matter of course" under Rule 15(a)(1)(B), because Defendants have filed neither "a responsive pleading"—that is, an answer—nor "a motion under Rule 12(b), (e), or (f)." Fed. R. Civ. P. 15(a)(1)(B); *see* Notice, Dkt. 80, at 2-4. Indeed, because of the Court's stay order, no litigation whatsoever has taken place with respect to the arbitrary-and-capricious counts in the original complaint. *Cf. Swanigan v. City of Chicago*, 775 F.3d 953, 963 (7th Cir. 2015) (plaintiff retained right to amend complaint as a matter of course in case that had long been stayed, notwithstanding that the same plaintiff's second case against the same defendants, consolidated with the first, had proceeded through trial to final judgment).

Defendants' sole response is to assert that the amendment issue "is analyzed under Rule 15(d) . . . rather than under the provisions in Rule 15(a) . . . since [Plaintiffs'] new complaint relies on events that occurred after the original complaint was filed." Opp. 4. But their only citation

for this conclusory statement says simply that Rule 15(d) "*permits* supplemental amendments to cover events happening after suit." *Griffin v. Cty. Sc. Bd. of Prince Edward Cty.*, 377 U.S. 218, 227 (1964) (emphasis added); *see* Opp. 4 (quoting *Griffin*). *Griffin* certainly does not say that Rule 15(d) provides the *exclusive* means to incorporate after-occurring events into a new complaint when the time for amendment as a matter of course under Rule 15(a)(1) has not expired. Nor have Defendants offered any other support for that latter proposition.

Defendants' argument is contrary to the plain text of Rule 15(a), which contains no limitation to matters occurring prior to the filing of the original complaint. *See* Fed. R. Civ. P. 15(a)(1) ("A party may amend its pleading once as a matter of course within" the applicable deadlines). When a party has a right to file an amended complaint as a matter of course pursuant to Rule 15(a)(1)(A), the party *may* include events occurring after the filing of the original complaint—and Defendants offer no reason whatever to conclude otherwise. Indeed, Defendants' position would mean that plaintiffs would always have to seek leave of court to allege events occurring after they filed their complaint, *even if* the amendment was filed within 21 days of the original complaint, or *even if* there had not yet been any other activity in the case. *Cf.* Fed. R. Civ. P. 15(a)(1)(A) (permitting amendment as a matter of course "within . . . 21 days after serving" the complaint). Those absurd results confirm that Defendants' position, which would routinely result in needless motions practice, cannot be squared with the text or structure of Rule 15.

In total, Plaintiffs appropriately filed the amended complaint as a matter of course. The Court thus need not consider whether leave to amend or supplement the complaint is warranted.

2. Even if amendment as a matter of course were not appropriate, leave to amend or supplement is amply justified here. Defendants acknowledge that "[l]eave should be 'freely given,'" and do not suggest the presence of "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party," or any of the other traditional reasons for denying amendment or supplementation. Opp. 4 (quoting *San Luis & Delta-Mendota Water Auth. v. U.S. Dep't of Interior*, 236 F.R.D. 491, 496 (E.D. Cal. 2006)); *see also, e.g.*, *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1102 (9th Cir. 2018) (Rule 15's leave-of-court provision "is to be applied with extreme liberality."). Rather, their primary contention is that the Final DOL Rule and

DHS Lottery Rule are so completely unrelated that the challenge to the Lottery Rule lacks even "*some* relation to the claim set forth in the original pleading," as required under Rule 15(d). Opp. 5 (emphasis added) (quoting *Keith v. Volpe*, 858 F.2d 467, 474 (9th Cir. 1988)); *see id.* at 5 (asserting that "*there is no linkage* between the Lottery Rule" and the DOL Rule, apart from "the fact that both . . . concern the H-1B visa program.") (emphasis added).

With respect, it is difficult to take this position seriously. *See* Notice 5-7. By design, the DHS Lottery Rule is inextricably linked to the DOL Rule. To start with, we pointed out that the Lottery Rule cross-references the interim DOL Rule no fewer than 36 times, and it makes reference to *this case* in a further eight places. *See id.* at 6 (collecting citations). DHS's own conduct belies Defendants' contention that these Rules are "completely unrelated." Opp. 1. On its face, the DHS Lottery Rule makes plain that it bears at least "*some* relation" to the DOL Rule and, for their part, Defendants do not even respond to these points.

The rules must be linked because—as the government admits—one rule changes the inputs (that is, the wage levels) that the other rule uses to determine who receives a visa. *See* Opp. 5. And when the inputs change, the outputs change too. *Cf. id.* at 6 (suggesting that "the [lottery] system's reasonableness can be adjudicated independent of the inputs generated by another agency's rule"). Since the H-1B wage levels directly impact the practical results caused by the Lottery Rule, the DOL Wage Rule is an integral consideration as to whether the DHS Lottery Rule is arbitrary and capricious.[1] It makes no sense for two different courts to evaluate the reasonableness

[1] For example, under the current wage levels, Level IV encompasses everyone slated to make a salary equal to at least the 67th percentile of wages in the relevant occupation; the Final DOL Rule raises that to the 90th percentile and above. *See* FAC ¶ 72. Because the Lottery Rule provides that *no one* from a lower wage level gets a visa unless *everyone* at the higher wage levels has already gotten one, the result of the Lottery Rule under current wage levels could well be a lottery among the applicants in Level IV (who could alone outnumber the available visas), while if the Final DOL Rule's levels were used, every one of the smaller pool of Level IV applicants would receive a visa, and the rest would be allocated randomly among Level III applicants. The point is that the real-world output of the Lottery Rule—and thus, one measure of its arbitrariness—depends entirely upon which wage levels are fed into the algorithm.

Of course, it is also Plaintiffs' position that the Lottery Rule is independently unlawful no matter where the wage levels are set—and regardless of the reasonableness of its outputs—since it is contrary to the express text of the INA and was promulgated without authority. *See, e.g.*, FAC ¶¶ 81-84, 114-122.

of each of these two obviously interlinked rules in isolation, when the existence of one rule drastically changes the real-world impacts of the other. Indeed, if one rule were to be set aside, that may bear materially on the arbitrary-and-capricious analysis as to the other rule.

The government points to the fact that the Lottery Rule disclaims reliance on the earlier interim DOL Rule by noting that it had been set aside by this Court by the time the Lottery Rule was promulgated. *See* Opp. 5. But as we already explained (*see* Notice 6), that disclaimer only raises another linkage between the two rules for purposes of this litigation, now that DOL has re-promulgated the rule in final form—and it is yet another reason to set aside the Lottery Rule as arbitrary and capricious.

To explain: Many commentators lodging objections to the proposed DHS Lottery Rule stated that it was arbitrary and capricious, at least in part, *because of* the DOL Wage Rule. DHS responded by saying that *this Court's* order issued *in this lawsuit* obviated that concern. For example, in one passage, DHS summarized one series of comments it received:

> *Comments*: A couple of commenters, including a trade association, said that, in many cases, the proposed rule would require employers to pay their H–1Bs more than the actual market wages for U.S. citizens holding comparable positions. An individual commenter argued that prioritizing wages conflicts with the current DOL Prevailing Wage system, which ensures that H–1B holders do not depress the wages of U.S. workers. A company said that artificially raising the amount of money an employer must devote to paying H–1B workers would result in the company employing fewer workers overall, including U.S. workers. The commenter's reasoning was that, as a salary-focused ''arms race'' begins, employers would rely less and less on labor and more on technology and other means to avoid the unsustainable wage levels. Another commenter said the proposal would create the issue of wage discrimination against U.S. employees because an employer would have to offer a higher level of pay to H–1B applicants than to citizens for the same position.

Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions, 86 Fed. Reg. 1,676, 1,691 (Jan. 8, 2021) (Lottery Rule). DHS's answer to this concern is revealing; DHS explained that this Court's order nullified those objections.

> *Response*: To the extent that these comments refer to wages required as a result of the DOL IFR, DHS notes that, on December 1, 2020, the U.S. District Court for the Northern District of California issued an order in Chamber of Commerce, et al. v. DHS, et al., No. 20–cv–7331, setting aside the Interim Final Rule Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States, 85 FR 63872 (Oct. 8, 2020), which took effect on October 8, 2020, and implemented reforms to the prevailing wage methodology

> for the Permanent Employment Certification, H–1B, H–1B1, and E–3 visa programs.

Id. at 1,691-1,692. This same argument was made repeatedly by DHS. Notice 6; *see* Lottery Rule, 86 Fed. Reg. at 1,688 ("As for the concern about offering prevailing wages above the 95th percentile, DHS notes that the DOL IFR was set aside and no longer is being implemented."); *id*. at 1,698, 1,703 n.106, 1,709, 1,710, 1,711.

The two rules are thus obviously linked. Indeed, if DHS knew on January 8, 2021, when it issued the Lottery Rule that, eight days later, DOL was going to reissue the Wage Rule in final form, then DHS's reasoning is disingenuous—and thus a basis to conclude that its action was arbitrary and capricious.[2] In any event, our point is straightforward: DHS justified the Lottery Rule on the basis of the fact that, at the time it was issued, there was no DOL Wage Rule drastically hiking wage rates. Now, of course, there is just such a rule. The DOL Wage Rule therefore bears immediately and directly on the DHS Lottery Rule.

In all, the relevant standard here—whether there is "*some* relation" between the DHS Lottery Rule and the DOL Wage Rule—is beyond satisfied.

3. Finally, the government bizarrely contends that incorporating Plaintiffs' challenge to the Lottery Rule into this lawsuit would somehow disserve judicial economy, since, in its view, that "will necessitate a bifurcation of the case as each separate challenge . . . proceeds on a separate schedule." Opp. 1; *see also id.* at 6-7. Plaintiffs fail to understand why any bifurcation or separate scheduling would be necessary: Both sets of APA claims—which will likely proceed without discovery beyond the administrative record—can simply be litigated in the normal course and resolved on summary judgment prior to the Lottery Rule's December 2021 effective date. *See, e.g.*, *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769-770 (9th Cir. 1985) (APA cases generally resolved on summary judgment, since "there are no disputed facts"). The fact that the DOL Rule has been delayed even longer is of no import, especially given that, as the government explains,

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[2] DOL's action was not a surprise even to the public. In the wake of this Court's and other courts' rulings invalidating the interim DOL Rule, commentators openly suggested that DOL would attempt to promulgate a final version of the DOL Rule prior to the change of administrations. *See, e.g.*, Stuart Anderson, *Final Trump Immigration Push Expected To Restrict H-1B Visas*, Forbes (Dec. 14, 2020), https://perma.cc/BK9Q-X9N6.

the administrative record as to that Rule must be prepared and submitted to another court by next week in any event. *See* Opp. 6 (April 12 deadline for production of the record for the Final DOL Rule). With the administrative record for the Final DOL Rule thus already in hand, both challenges will simply proceed on the schedule dictated by the administrative record and effective date of the Lottery Rule.

In sum, Plaintiffs anticipate that these interrelated rules will be adjudicated in a single set of summary judgment briefs, with the Court able to assess the relationship between them. Whatever result the Court may reach, it will have consistency; if the Court's decision as to one Rule bears on the other, the Court may properly take that into account. By contrast, Defendants apparently would require Plaintiffs to file a new lawsuit, necessitating a new complaint about the same essential H-1B framework, a wholly separate set of summary judgment briefs, and continued coordination between those cases to ensure consistent and coherent results. That, in short, is a recipe to substantially enlarge the work required of the Court and the litigants. Judicial economy is served, not hindered, by considering Plaintiffs' challenges to these two related rules together.

CONCLUSION

The Court should accept Plaintiffs' amended complaint as a matter of course under Rule 15(a)(1). In the alternative, it should grant leave to amend under Rule 15(a)(2) or to supplement under Rule 15(d).

Respectfully submitted,

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DATED: April 9, 2021 By: */s/ Paul W. Hughes*

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