

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHAMBER OF COMMERCE OF THE
UNITED STATE OF AMERICA, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, et al.,

Defendants.

Case No. [20-cv-07331-JSW](#)

**ORDER PERMITTING
SUPPLEMENTATION OF
COMPLAINT AND EXTENDING
DEADLINE TO SUBMIT JOINT CASE
MANAGEMENT CONFERENCE
STATEMENT**

Re: Dkt. No. 80

This matter comes before the Court on consideration of a dispute about whether Plaintiffs should be permitted to file what is styled as an Amended Complaint, which challenges two rules issued by Defendants on January 8 and January 14, 2021. For the reasons set forth in this Order, the Court concludes Plaintiffs shall be permitted to do so.

BACKGROUND

On October 19, 2020, Plaintiffs filed their Complaint, in which they asserted claims under the Administrative Procedure Act (“APA”) and asked the Court to set aside two interim final rules promulgated by the Department of Labor (“DOL”) and by the Department of Homeland Security (“DHS”): *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 63,872 (Oct. 8, 2020) (“DOL IFR”); *Strengthening the H-1B Nonimmigrant Visa Classification Program*, 85 Fed. Reg. 63,918 (Oct. 8, 2020) (“DHS IFR”) (collectively, the “Interim Final Rules”). Plaintiffs alleged the Defendants violated the APA’s notice and comment procedures and also alleged the Interim Final Rules were arbitrary and capricious.

The Plaintiffs moved for a preliminary injunction and for partial summary judgment on the

1 claims that asserted Defendants violated the APA’s notice and comment procedures. The parties
2 subsequently stipulated to advance the trial on the merits of those claims pursuant to Federal Rule
3 of Civil Procedure 65(a)(2) and stipulated to stay the Defendants’ obligation to respond to the
4 remaining claims. (Dkt. No. 51.) The notice and comment claims required the Court to consider
5 whether “good cause” existed to excuse the APA’s normal notice and comment period, and both
6 DHS and DOL relied on the COVID-19 pandemic to support its position that good cause existed.
7 The parties also agreed the Court could rely solely on the Interim Final Rules and materials cited
8 therein as the administrative record.

9 On December 1, 2020, the Court granted Plaintiffs’ motion and denied Defendants’ cross-
10 motion, set aside the rules, and entered partial judgment on those claims pursuant to Federal Rule
11 of Civil Procedure 54(b). *See Chamber of Commerce v. U.S. Dep’t of Homeland Sec.*, -- F. Supp.
12 3d --, 2020 WL 7043877 (N.D. Cal. Dec. 1, 2020). Defendants did not appeal that decision.

13 After the Court issued its Order setting aside the Interim Final Rules, DHS promulgated
14 what the parties agree is a new and different final rule that impacts the H-1B visa program:
15 *Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject-H-1B*
16 *Petitions*, 86 Fed. Reg. 1,676 (Jan. 8, 2021) (the “DHS Lottery Rule”). Although the DHS Lottery
17 Rule was scheduled to take effect on March 9, 2021, its effective date has been extended to
18 December 31, 2021.

19 In addition, the DOL acted on comments it received relating to the DOL IFR, made some
20 amendments, and issued a final rule, *Strengthening Wage Protections for the Temporary and*
21 *Permanent Employment of Certain Aliens in the United States*, 86 Fed. Reg. 3,608 (Jan. 14, 2021)
22 (the “DOL Final Rule”). The DOL Final Rule was scheduled to take effect on March 15, 2021,
23 but its effective date has been extended to November 14, 2022. *See Strengthening Wage*
24 *Protections for the Temporary and Permanent Employment of Certain Immigrants and Non-*
25 *Immigrants in the United States: Proposed Delay of Effective and Transition Dates*, 86 Fed. Reg.
26 15,154 (Mar. 22, 2021).

27 On January 19, 2021, the Court approved a further stipulation to extend time to respond to
28 the Complaint and set a case management conference for April 2, 2021, which was later continued

1 to April 23, 2021. (Dkt. Nos. 77-78.)

2 On March 19, 2021, Plaintiff filed an Amended Complaint and a notice of filing relating to
3 that document. Plaintiffs now challenge the DOL Final Rule on the basis that it is arbitrary and
4 capricious and otherwise contrary to law (Count I). They also challenge the DHS Lottery Rule on
5 the basis that it is arbitrary and capricious and otherwise contrary to law. Plaintiffs' challenge to
6 the DHS Lottery Rule includes an argument that it is void because it was promulgated by Chad
7 Wolf, who Plaintiffs allege was not lawfully serving as Acting Secretary of DHS at the time
8 (Counts II and III).

9 In their notice, Plaintiffs argue that Rule 15(a)(1)(b) applies and that they do not require
10 leave of court to make these amendments. However, in the event this Court concludes otherwise,
11 "in an abundance of caution" they also move for leave to amend or supplement the complaint
12 under Federal Rules of Civil Procedure 15(a)(2) and 15(d) ("Rule 15"). Defendants do not oppose
13 the request to include a claim that challenges the DOL Final Rule. Thus, the only dispute is
14 whether Plaintiffs may raise the challenge to the DHS Lottery Rule in this case.

15 ANALYSIS

16 A. The Court Concludes Rule 15(d) Governs.

17 The parties dispute whether Rule 15(a) or 15(d) governs Plaintiffs' changes to the original
18 complaint. Plaintiffs argue they may proceed under Rule 15(a)(1)(B), which permits a party to
19 amend a complaint, a "pleading ... to which a responsive pleading is required" once, as a matter of
20 course, "21 days after service of a responsive pleading or 21 days after service of a motion under
21 Rule 12(b), (e), or (f), whichever is earlier." Plaintiffs argue they can amend as a matter of course
22 because Defendants have not answered and because a motion for summary judgment does not
23 qualify as one of the motions listed in Rule 15(a)(1)(B). Defendants, in turn, argue Plaintiffs must
24 proceed under Rule 15(d), which will require leave of court.

25 In general, Rule 15(a) amendments "relate to matters that occurred prior to the filing of the
26 original pleading[.]" *Frederick v. Cal. Dep't of Corrections and Rehab.*, 08-cv-02222-MMC,
27 2012 WL 2077305, at *2 (N.D. Ca. June 8, 2012) (quoting 6A Charles Alan Wright, Arthur R.
28 Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1504 (3d. ed.1998)). In contrast,

1 Rule 15(d) “permit[s] a party to serve a supplemental pleading setting out any transaction,
2 occurrence, or event that happened after the date of the pleading to be supplemented.” Rule 15(d)
3 “is a tool of judicial economy and convenience.” *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir.
4 1988). Like Rule 15(a), “its use is favored.” *Id.* However, unlike Rule 15(a)(1)(B), leave of court
5 is required. Fed. R. Civ. P. 15(d) (noting that supplementation permitted “[o]n motion and
6 reasonable notice”).

7 In some instances, a party may seek to supplement a pleading with a claim that did not
8 exist at the time a plaintiff filed the original complaint, as is the case with Plaintiffs’ challenge to
9 the DHS Lottery Rule. *Compare Cabrera v. City of Huntington Park*, 159 F.3d 374, 382 & n.11
10 (9th Cir. 1998) (allowing supplementation to include a claim for relief that accrued after complaint
11 was filed, where case had not reached a final resolution and court retained jurisdiction over the
12 matter) and *San Luis & Delta-Mendota Water Auth. v. U.S. Dep’t of Interior*, 236 F.R.D. 491,
13 495-502 (E.D. Cal. 2006) (allowing supplementation with new claims), with *Planned Parenthood*
14 *of S. Ariz. v. Neely*, 130 F.3d 400, 402-03 (9th Cir. 1997) (“*Neely*”) (finding supplementation not
15 proper where plaintiff challenged “different statute than the one that had been successfully
16 challenged in original suit” and where final judgment rendered and court did not retain
17 jurisdiction).

18 As Plaintiffs note, this case is in an unusual procedural posture. Although the Court has
19 not addressed all of Plaintiffs’ original claims, Plaintiffs stipulated to consolidate the trial on the
20 merits of the notice and comment claims with their motion for a preliminary injunction, which a
21 the time might have obviated the need to resolve the question of whether the Interim Final Rules
22 also were arbitrary and capricious. *See* Fed. R. Civ. P. 65(a)(2). The Court’s ruling did indeed
23 provide Plaintiffs with a favorable ruling on the notice and comment claims; rulings that
24 Defendants did not challenge. In most cases, that would have ended the matter. Due to events on
25 the ground, it did not.

26 Plaintiffs now seek to introduce claims based on events that occurred subsequent to the
27 filing of their original complaint and events that occurred after the Court issued its ruling on the
28 notice and comment claims. While there may be some instances when amendments as a matter of

1 course will be proper when a party seeks include matters that occur subsequent to filing a lawsuit,
2 the Court finds that in these circumstances, it is appropriate to evaluate Plaintiffs' request under
3 Rule 15(d). Therefore, it turns to the question of whether it should permit Plaintiffs to include
4 supplement their complaint by including the challenge to the DHS Lottery Rule.¹

5 **B. The Court Grants the Request to Supplement with the DHS Lottery Rule.**

6 In order to determine whether to grant Plaintiffs' request to supplement the complaint by
7 including a challenge to the DHS rules, the Court considers the factors that would be considered in
8 connection with a motion for leave to amend: (1) undue delay; (2) bad faith; (3) futility; and (4)
9 prejudice. The Court also considers whether supplementation serves the interests of judicial
10 economy, "the goal of Rule 15(d)." *Neely*, 130 F.3d at 402; *see also San Luis & Delta-Mendota*
11 *Water Auth.*, 236 F.R.D. at 497 (setting forth factors to consider, including whether final judgment
12 entered and whether court retained jurisdiction or required a future affirmative duty of defendant).

13 Although Plaintiffs did not act immediately, they did file the Amended Complaint and the
14 notice relating to that filing within two months after DHS issued the Lottery Rule. The Court
15 concludes Plaintiffs did not unduly delay in seeking leave to supplement the complaint.
16 Defendants do not argue that it would be futile to pursue the claim, that Plaintiffs are acting in bad
17 faith, or that they (Defendants) would be prejudiced by including the claim in this case. In
18 addition, although Defendants did not appeal the Court's ruling on summary judgment, the Court
19 never entered a final judgment on all claims and did not lose jurisdiction over the matter.
20 Therefore, the concerns raised in *Neely* are not present here. *Cf. Cabrera*, 159 F.3d at 382 n.11.

21 Defendants argue that the DHS Lottery Rule does not have a sufficient connection to the
22 DOL Rule to make it efficient for the Court to consider both rules in one case. Defendants also
23 argue that including a challenge to the DHS Lottery Rule does not serve Rule 15(d)'s goal of
24 judicial economy and efficiency. Defendants argue this is so because (1) the Court will be

25 _____
26 ¹ The Court has considered *Swanigan v. City of Chicago*, which Plaintiffs cite on reply to
27 support their argument that Rule 15(a) governs. 775 F.3d 953, 963 (7th Cir. 2015). However, in
28 addition to the fact that it is not binding, the Court also finds it distinguishable. Although the two
lawsuits arose out of the same incident, the case in which the plaintiff sought leave to amend had
been stayed entirely. *Id.* In contrast, Plaintiffs here chose to proceed to a trial on the merits on
claims that, as noted, were dispositive of their challenges to the Interim Final Rules.

1 required to consider two separate administrative records, which are in different stages of
2 preparation; and (2) the Court would be required to bifurcate the issues given the delayed
3 implementation of the DOL Final Rule.

4 Plaintiffs, in turn, set forth their reasons as to why there is at least “some relationship”
5 between the DOL Final Rule and the DHS Lottery Rule, including the argument that the timing of
6 the issuance of the two rules suggest that DHS’s assertion that it was not relying on the DOL
7 Interim Rule was disingenuous. In Plaintiffs’ words, “DHS justified the Lottery Rule on the basis
8 of the fact that, at the time it was issued, there was no DOL Wage Rule drastically hiking wage
9 rates. Now, of course there is just such a rule.” (Reply at 5:9-12.) Plaintiffs also argue that the
10 Court should be able to resolve all issues in one motion prior to the DHS Lottery Rule’s effective
11 date in December 2021.

12 Having carefully considered the parties’ positions, and given that Rule 15(d) motions are
13 generally favored, the Court concludes Plaintiffs have demonstrated that they should be permitted
14 to supplement their complaint to include the challenge to the DHS Lottery Rule.

15 Accordingly, the Court accepts the Amended Complaint as drafted, and Defendants shall
16 answer or otherwise respond to the Amended Complaint within the time required under the
17 Federal Rules of Civil Procedure. This matter remains on calendar for a case management
18 conference on April 23, 2021. However, to permit the parties additional time to meet and confer
19 in light of this Order, the Court extends the deadline to file the joint case management conference
20 statement to April 19, 2021.

21 **IT IS SO ORDERED.**

22 Dated: April 15, 2021

23 
24 JEFFREY S. WHITE
25 United States District Judge

26
27
28