MCDERMOTT WILL & EMERY LLP
Paul W. Hughes (*pro hac vice*)
phughes@mwe.com
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000

William G. Gaede, III (136184)
wgaede@mwe.com
415 Mission Street, Suite 5600
San Francisco, CA 94105
(650) 815-7400

Attorneys for Plaintiffs

[Additional Counsel Listed on Signature Page]

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

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

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

Pursuant to Federal Rule of Civil Procedure 15(a)(1), Plaintiffs hereby notify the Court of their filing of an amended complaint as a matter of course. Recognizing that the procedural posture of this case is somewhat unusual, however, Plaintiffs request in the alternative that the Court grant them leave to file an amended or supplemental complaint pursuant to Rule 15(a)(2) and 15(d), should the Court determine that amendment as a matter of course under Rules 15(a)(1) is not available. Defendants oppose our position in part; Defendants do not object to the amendment as it relates to the Department of Labor Wage Rule, but do oppose the amendment because Plaintiffs further challenge the related Department of Homeland Security Lottery Rule.

BACKGROUND

This case is an Administrative Procedure Act (APA) challenge to related regulatory actions addressing high-skilled, work-based immigration undertaken by the previous presidential administration in the closing months of its tenure in office. In the original complaint, Plaintiffs challenged two interim final rules promulgated by the Department of Labor (DOL) and the Department of Homeland Security (DHS), both of which changed the structure surrounding high-skilled, work-based H-1B visas in ways that made it more difficult for U.S. firms to employ foreign nationals: The DOL Rule[1] substantially increased the "prevailing wage" that must be paid to H-1B nonimmigrants and employment-based immigrants, thereby pricing out many foreign workers; the DHS Rule[2] altered the regulatory definition of "specialty occupation," restricting the positions that qualify for an H-1B visa.

Both the DOL Rule and the DHS Rule were promulgated without notice and comment, in purported reliance on the APA's good-cause exception. Plaintiffs therefore challenged the rules both on the grounds that the APA's good-cause standard was not satisfied (Counts I and II of the original complaint), and, separately, on the grounds that the substance of the rules was arbitrary,

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[1] *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 63,872 (Oct. 8, 2020).

[2] *Strengthening the H-1B Nonimmigrant Visa Classification Program*, 85 Fed. Reg. 63,918 (Oct. 8, 2020).

capricious, and contrary to law (Counts III and IV). *See* Compl., Dkt. 1, ¶¶ 181-204. Plaintiffs moved for a preliminary injunction and partial summary judgment on the two notice-and-comment counts (*see* Dkt. 31), and the Court advanced the trial on the merits of those counts pursuant to Rule 65(a)(2) (*see* Dkt. 51). That order also stayed Defendants' obligation to respond to the substantive arbitrary-and-capricious counts. Dkt. 51 at 5. The Court ultimately ruled in Plaintiffs' favor on Counts I and II (*see* Dkt. 73), and issued a Rule 54(b) partial final judgment as to those counts (*see* Dkt. 74). Following that ruling, the Court further extended Defendants' deadline to respond to Counts III and IV of the original complaint (*see* Dkt. 77), and Defendants have not yet responded.

After the Court set aside the interim final rules, the administration took additional agency actions. First, DOL acted on the comments it had received on the interim DOL Rule and reissued the regulation as a final rule, with some amendments (the Final DOL Rule).[3] Second, DHS promulgated another final rule, which establishes a new selection system for H-1B visa applications. This rule (the Lottery Rule) is built on the wage levels set by the Final DOL Rule, and it would result in a scheme in which higher-earning noncitizens are awarded visas preferentially.[4] Plaintiffs' First Amended Complaint (FAC), filed alongside this Notice, challenges these two agency actions.

ARGUMENT

A. Plaintiffs are entitled to amend their complaint as a matter of course under Rule 15(a)(1).

To begin, Plaintiffs may file the FAC without leave from the Court (or consent from the government), because the government has not yet responded to Counts III and IV of the original complaint. Federal Rule of Civil Procedure 15 provides:

> A party may amend its pleading once as a matter of course within:
>
> (A) 21 days after serving it, or

[3] *See Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 86 Fed. Reg. 3,608 (Jan. 14, 2021) (Final DOL Rule).

[4] *See Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions*, 86 Fed. Reg. 1,676 (Jan. 8, 2021) (Lottery Rule).

> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

Fed. R. Civ. P. 15(a)(1).

By its plain terms, Subsection (B) permits amendment as a matter of course here, because the government has yet to file either "a responsive pleading"—that is, an answer—or "a motion under Rule 12(b), (e), or (f)." Fed. R. Civ. P. 15(a)(1)(B); *see* Fed. R. Civ. P. 7(a) (defining "pleading[]" to include only complaints, answers, and court-ordered replies to answers). To the contrary, the government's deadline to respond to the complaint—via answer or Rule 12 motion—has been extended, by court-approved stipulation of the parties, to March 22, 2021. *See* Dkt. 77.

The government's litigation of Counts I and II did not trigger the deadlines for amendment under Rule 15. The government filed a cross-motion for partial summary judgment as to those two claims (*see* Dkt. 54), but "motions for summary judgment" are not "responsive pleadings for purposes of Rule 15." *USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Constr. Trades Council*, 721 F. Supp. 239, 242 (N.D. Cal. 1989) (concluding that, where defendants had filed a motion for summary judgment but no answer, "plaintiffs are permitted to file an amended complaint against these two defendants as a matter of course."); *accord, e.g.*, *In re Agent Orange Prod. Liab. Litig.*, 517 F.3d 76, 103-104 (2d Cir. 2008) ("Nor does a summary judgment motion made before responding to plaintiff's complaint have any effect on a party's ability to amend [as a matter of course].") (quoting 6 Charles Alan Wright et al., *Federal Practice & Procedure* § 1483, at 586 (2d ed. 1990)) (alteration incorporated).[5] The government's partial summary judgment motion thus did not trigger the 21-day deadline of Rule 15(a)(1)(B).

[5] These cases were decided before the 2009 amendments to Rule 15 that added Rule 12 motions—but not summary judgment motions—as an alternative to a responsive pleading as a trigger for the amendment deadline. Nothing about that amendment affects these cases' reasoning—which is that a motion for summary judgment is not "a responsive pleading" (Fed. R. Civ. P. 15(a)(1)(B))—and courts continue to so hold under the current Rule. *See, e.g.*, *Baker v. D.C. Pub. Sch.*, 720 F. Supp. 2d 77, 81 (D.D.C. 2010) ("Motions . . . for summary judgment do not qualify as responsive pleadings for the purposes of Rule 15.").

In short, because the government has not yet commenced litigation on the remainder of the Counts in the original complaint by filing either a responsive pleading or a Rule 12 motion, Plaintiffs retain their right to amend their complaint "as a matter of course" (Fed. R. Civ. P. 15(a)(1)), and they have exercised that right here by filing the FAC.

B. In the alternative, there is good cause for leave to amend or supplement under Rules 15(a)(2) and 15(d).

In an abundance of caution, Plaintiffs move in the alternative for leave to amend or supplement their complaint under Rules 15(a)(2) and 15(d).

Rule 15(a)(2) provides that when amendment as a matter of course is not available, "the court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). This rule "is to be applied with extreme liberality" (*Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1102 (9th Cir. 2018)), and a Rule 15 motion thus "should be granted unless amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates undue delay." (*Yakima Indian Nation v. State of Wash. Dep't of Revenue*, 176 F.3d 1241, 1246 (9th Cir. 1999) (quotation marks omitted)).

Similarly, Rule 15(d) provides that "the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). This rule "provides a mechanism for parties to file additional causes of action based on facts that didn't exist when the original complaint was filed." *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 874 (9th Cir. 2010). And, like Rule 15(a), courts "liberally construe Rule 15(d) absent a showing of prejudice to the defendant," in keeping with the rule's purpose of "avoid[ing] the cost, delay and waste of separate actions which must be separately tried and prosecuted." *Keith v. Volpe*, 858 F.2d 467, 473, 475 (9th Cir. 1988); *see also, e.g.*, *Lyon v. U.S. Immigration & Customs Enforcement*, 308 F.R.D. 203, 214 (N.D. Cal. 2015) ("Supplementation is generally favored," and "[t]he legal standard for granting or denying a motion to supplement under Rule 15(d) is the same as for amending one under 15(a).").

No prejudice, bad faith, or undue delay is present here. Plaintiffs simply seek to challenge the final version of the interim DOL Rule they successfully set aside with their original complaint, along with another new rule that similarly targets the H-1B visa program. Indeed, Defendants have not even responded to the original complaint, and so cannot be prejudiced by the substitution of an updated complaint. *Cf., e.g.*, *Smith v. City & Cty. of Honolulu*, 887 F.3d 944, 951-952 (9th Cir. 2018) ("A defendant suffers prejudice if a plaintiff is allowed to proceed with a new theory of recovery *after close of discovery*.") (emphasis added). For the same reason, no undue delay will result from amendment or supplementation.

Nor is there any reason for the Court to refrain from assessing the legality of the new H-1B Lottery Rule alongside that of the Final DOL Rule. A supplemental pleading under Rule 15(d) may add new causes of action so long as they have "*some relation* to the claim set forth in the original pleading"; the new claims need not arise from the same transaction or occurrence. *Keith*, 858 F.2d at 474 (quoting 3 *Moore's Federal Practice* ¶ 15.16[3] (1985)) (emphasis added). Amended pleadings under Rule 15(a) do not have even that limitation. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) ("Th[e] liberality in granting leave to amend is not dependent on whether the amendment will add causes of action or parties.").[6] Here, the APA challenges to the Lottery Rule and the Final DOL Rule presented in the FAC share multiple common questions of law and fact both with each other and with the original arbitrary-and-capricious claims, including but not limited to:

- Whether Plaintiffs suffer a legally cognizable injury from regulatory changes that will make it more difficult to hire skilled noncitizens on H-1B visas, particularly at the lower end of the wage spectrum targeted by both the Lottery Rule and the Final DOL Rule;
- Whether and to what extent the overall economy benefits from the contribution of skilled noncitizen workers, such that both DHS and DOL acted arbitrarily and ca-

[6] Of course, amending the complaint to add a challenge to the Lottery Rule does not add any parties, as DHS and the DHS Secretary were already named as defendants in the original complaint.

priciously by failing to adequately take these benefits into account in imposing additional restrictions on H-1B noncitizen employment;

- Whether the wage levels set by the Final DOL Rule are arbitrary and capricious: Because the Lottery Rule incorporates those wage levels as its metric for ranking the earnings of H-1B visa applicants, if the wage levels are set at arbitrary and capricious levels, the Lottery Rule's reliance on them is arbitrary and capricious as well.

Indeed, the two rules are, by design, inextricably linked. Both substantially increase wage rates for H-1B workers, all with the intent of destroying the program. The DHS Lottery Rule specifically identifies that applicants will be ranked "beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I." Lottery Rule, 86 Fed. Reg. at 1,677. And the Lottery Rule cross-references the "DOL IFR"—its term for the original interim DOL Rule—no less than 36 times. *See generally id.* To take one example, commenters to the Lottery Rule indicated that implementing it—in combination with the increased wage levels caused by the interim DOL Rule—would create particular harms. DHS responded with the contention that "DHS notes that the DOL IFR was set aside and no longer is being implemented as of the publication of this final rule." *Id*. at 1,688; *see also id.* at 1,691-1,692 (similar); *id*. at 1,697 (similar); *id*. at 1,702-1,703 (similar); *id*. at 1,709-1,710 (similar). While that statement was technically true, DHS failed to acknowledge the *final* DOL wage rule, issued just days later. Thus, the Final DOL Rule at issue in this case is itself a direct basis to conclude that the Lottery Rule is arbitrary and capricious—and further that DHS failed to meaningfully respond to the comments submitted. What is more, the Lottery Rule rests on the assertion that "the majority of H–1B cap-subject petitions have been filed for positions certified at the two lowest wage levels: I and II." *Id*. at 1,697. But the purpose of the DOL Rule is to address that issue via a different mechanism, making these rules necessarily linked.

There can be no serious doubt on this point: In at least eight different places, the Lottery Rule specifically discusses *this Court's order* in this very case. *See*, *e.g.*, Lottery Rule, 86 Fed. Reg. at 1,688 n.46, 1,691, 1,698, 1,703, 1,703 n.106, 1,709, 1,710, 1,711. Given that DHS

thought it important to reference this litigation eight times in the course of issuing its new regulation, the issues already present in this case necessarily overlap with DHS's new Lottery Rule.

Finally, assessing the two rules together will substantially serve judicial economy. *See, e.g.*, *Keith*, 858 F.2d at 473 ("Rule 15(d) . . . is a tool of judicial economy and convenience. Its use is therefore favored."); *Lyon*, 308 F.R.D. at 214 ("[T]he goal of Rule 15(d) . . . is to promote judicial efficiency."). The Court is already intimately and recently familiar with both the statutory and regulatory structure governing H-1B visas, and the prior administration's attempts to hinder American companies' ability to access skilled foreign talent through that program. *See Chamber of Commerce of U.S. v. DHS*, __ F. Supp. 3d ___, 2020 WL 7043877 (N.D. Cal. Dec. 1, 2020) (White, J.) (surveying legal structure surrounding H-1B visas and associated prevailing wage levels in depth). It would serve no useful purpose to require Plaintiffs' challenge to the Lottery Rule to be litigated separately.

CONCLUSION

The Court should accept Plaintiffs' amended complaint as a matter of course under Rule 15(a)(1). In the alternative, if the Court determines that amendment as a matter of course is not available, it should grant leave to amend under Rule 15(a)(2) or to supplement under Rule 15(d).

Respectfully submitted,

MCDERMOTT WILL & EMERY LLP

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By: */s/ Paul W. Hughes*

Paul W. Hughes (*pro hac vice*)
phughes@mwe.com
Sarah P. Hogarth (*pro hac vice to be filed*)
Andrew A. Lyons-Berg (*pro hac vice to be filed*)
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000

William G. Gaede, III (136184)
wgaede@mwe.com
415 Mission Street, Suite 5600
San Francisco, CA 94105
(650) 815-7400

Attorneys for Plaintiffs

U.S. CHAMBER LITIGATION CENTER
Daryl Joseffer (*pro hac vice to be filed*)
1615 H Street NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America