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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION (LOS ANGELES)**

ANDREW MASON DVASH-
BANKS and E.J. D.-B.,

Plaintiffs,

v.

THE UNITED STATES
DEPARTMENT OF STATE,
and THE HONORABLE
MICHAEL R. POMPEO,
Secretary of State,

Defendants.

Case No. 2:18-cv-00523-JFW-JCx

**EX PARTE NOTICE OF MOTION
AND UNOPPOSED MOTION
UNDER FRCP 15(a) FOR LEAVE
TO REMOVE PLAINTIFFS'
EQUAL PROTECTION CLAIM
VIA AMENDMENT OF THE
COMPLAINT**

Judge: Hon. John F. Walter

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE of Plaintiffs' unopposed motion under Federal Rule of Civil Procedure 15 for leave to file a First Amended Complaint for the purpose of removing without prejudice their Equal Protection claim (Count II of the operative Complaint). A copy of the proposed First Amended Complaint, along with a redline version identifying the proposed changes from the initial Complaint, are attached for the Court's review. (*See* Exhibits A and B, respectively, to the Declaration of Alexa M. Lawson-Remer (hereinafter "Lawson-Remer Declaration")). The proposed First Amended Complaint retains the remaining three causes of action as alleged against Defendants in the initial Complaint (specifically, Plaintiffs' claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702; 8 U.S.C. § 1503 ("Section 1503"); and the Due Process clause of the Fifth Amendment). The parties met and conferred on December 21, 2018 and January 2 and January 3, 2019 and are available for a hearing if the Court so requires; but otherwise intend to submit the matter to the Court on the papers.

This motion will be based on this Notice of Motion and Motion, the annexed Memorandum of Points and Authorities, the Lawson-Remer Declaration and exhibits thereto, Plaintiff's First Amended Complaint, the [Proposed] Order filed herewith, and on any additional material presented during the hearing on this motion (if any).

This motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on December 21, 2018 and January 2 and January 3, 2019. During this conference, Defendants' counsel stated that they do not oppose a motion that allows Plaintiffs to amend the Complaint to remove Plaintiffs' equal protection claim.

Dated: January 4, 2019

Respectfully submitted,

By: /s/ Alexa M. Lawson-Remer

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CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7-3

Plaintiffs' counsel certifies that, prior to filing the instant motion, the parties, through counsel, met and conferred on December 21, 2018 and January 2 and January 3, 2019 regarding the contents of the instant motion and the concurrently-filed Joint Stipulation to Modify Scheduling Order Under Rule 16(b), and exchanged drafts of each.

Dated: January 4, 2019

Respectfully submitted,

By: /s/ Alexa M. Lawson-Remer

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Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs Andrew Mason Dvash-Banks (“Andrew”) and his son E.J.D.-B. (“E.J.”; together, “Plaintiffs”), respectfully submit this memorandum of points and authorities in support of their unopposed motion for an order granting Plaintiffs leave to file a First Amended Complaint for the purpose of removing without prejudice their Equal Protection claim (Count II of the operative Complaint) in the above-captioned action (the “Action”).

I. INTRODUCTION

This Action challenges the State Department’s determination not to recognize E.J. as a U.S. citizen at birth. E.J. and his twin brother, A.J.D.-B. (“A.J.”) were born in Canada to Andrew, a U.S. citizen, and his husband, Elad Dvash-Banks (“Elad”), an Israeli citizen, while they were married. The State Department recognizes A.J.’s U.S. citizenship but denies that E.J. is a U.S. citizen.

On January 22, 2018, Andrew and E.J. filed the Complaint in this Action, alleging that under the Immigration and Nationality Act (“INA”), “[a]t birth, both [E.J.] and [A.J.] qualified for United States citizenship pursuant to Section 301(g).” The Complaint alleges four causes of action: (1) violation of due process under the Fifth Amendment (Count I); (2) violation of equal protection under the Fifth Amendment (Count II); (3) violation of Section 706(2)(A) of the Administrative Procedure Act (the “APA”) (Count III); and (4) declaratory judgment pursuant to Section 1503 of the INA that E.J. is a U.S. citizen at birth (Count IV).

Defendants answered the Complaint on July 16, 2018, and the parties submitted their Joint Rule 26(f) Report on August 20, 2018. Thereafter, the Court issued a Scheduling and Case Management Order (“Scheduling Order”) on August 21, 2018, setting out the deadlines in the case. The deadline for amending the pleadings was set at sixty days from the date of the Scheduling Order, or October 20, 2018. The current deadline for moving for summary judgment (as stipulated to

1 by the parties on December 21, 2018 and ordered by the Court on December 26,
 2 2018) is January 7, 2019; the parties each intend to cross-move for summary
 3 judgment on multiple claims.

4 In connection with those contemplated motions, the parties met and
 5 conferred multiple times and, among other things, explored ways to try to
 6 streamline the Action by reducing issues and claims for the Court's consideration
 7 and adjudication. As part of that effort, the parties agreed, subject to the Court's
 8 approval, to eliminate the need for the Court to address Plaintiffs' equal protection
 9 claim. Accordingly, Plaintiffs now seek an order permitting them to amend the
 10 Complaint to remove their equal protection claim (Count II of the operative
 11 Complaint) under Federal Rules of Civil Procedure 15(a) in advance of the January
 12 7, 2019 deadline for filing motions for summary judgment.¹ Plaintiffs are seeking
 13 this order *ex parte* in an effort to obtain the order before the deadline for filing
 14 summary judgment motions. Counsel for Defendants was informed that the instant
 15 motion would be made *ex parte* and consented to the filing.²

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 21 ¹ The requested relief would have the effect of a dismissal without prejudice of
 22 Plaintiffs' equal protection claim. Inasmuch as amendment of the pleadings
 23 pursuant to Rule 15, rather than dismissal under Rule 41, is the proper procedure
 24 for removing individual claims, Plaintiffs seek to accomplish that result by means
 25 of this motion. *See Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683,
 26 687-88 (9th Cir. 2005) ("Rule 41, or at least Rule 41(a), governs dismissals of
 27 entire actions, not of individual claims [W]ithdrawals of individual claims
 28 against a given defendant are governed by Fed.R.Civ.P. 15, which addresses
 amendments to pleadings.").

² Defendants in this Action are represented by Lisa Zeidner Marcus and Vinita B.
 Andrapalliyal of the United States Department of Justice, mailing address P.O.
 Box 883, Washington DC 20044. Their e-mail addresses are
 lisa.marcus@usdoj.gov and Vinita.B.Andrapalliyal@usdoj.gov, respectively.
 Defense counsel's contact telephone number is (202) 305-0845.

II. ARGUMENT

A. Legal Standard

Under Fed. R. Civ. P. 15(a), parties are permitted to amend their pleadings with “the opposing party’s written consent” or with leave of court.³ “[L]eave [to amend] shall be freely given when justice so requires.” *Lisker v. City of Los Angeles*, 2011 WL 3420665, at *1 (C.D. Cal. Aug. 4, 2011) (quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-09 (9th Cir. 1992)). In deciding whether to grant leave to amend, “courts are cautioned to apply the policy of free amendment of pleadings with extreme liberality.” *Id.* (quoting *SAES Getters S.P.A. v. Aeronex, Inc.*, 219 F. Supp. 2d 1081, 1086 (S.D. Cal. 2002)). Generally, “amendment of pleadings is to be permitted unless the opposing party makes a showing of undue delay, bad faith, undue prejudice, or futility of amendment on the part of the moving party.” *Id.* (quoting *Aeronex*, 219 F. Supp. 2d at 1086-87).

B. Defendants have consented to Plaintiffs’ amendment of the Complaint, thus amendment is appropriate.

Defendants consented in writing to Plaintiffs’ proposed amendment of the Complaint. (See Joint Stipulation to Modify Scheduling Order Under Rule 16(b) at p. 2, filed concurrently with the instant motion). Even if Defendants had

³ Fed. R. Civ. P. 15(a) governs the amendment of pleadings. However, “once the court files a pretrial scheduling order establishing a timetable for amending the pleadings, Rule 16 [also] applies.” *Lisker v. City of Los Angeles*, 2011 WL 3420665, at *1 (C.D. Cal. Aug. 4, 2011). Fed. R. Civ. P. 16(b) allows for modification of a scheduling order upon a showing of “good cause.” Rule 16(b)’s “‘good cause’ standard primarily considers the diligence of the party seeking the amendment Relief may be granted if the court finds that the movant has not unduly delayed the action and that the opponent will not be prejudiced by the modification.” *Lisker*, 2011 WL 3420665, at *1. Once the “party seeking the amendment demonstrates good cause under Rule 16, then th[at] party must demonstrate that amendment is proper under Rule 15.” *Id.* The parties jointly stipulated, subject to the Court’s approval, to modifying the deadline for amending the pleadings in the Court’s Scheduling Order (Dkt. No. 52) on January 4, 2019 and have filed that stipulation concurrently with this motion.

1 not so consented, amendment is appropriate under Rule 15(a) for the following
2 reasons. *First*, Plaintiffs diligently notified Defendants of their intention to remove
3 their equal protection claim before the January 7, 2019 deadline for filing summary
4 judgment motions in an effort to assist the parties and the Court in streamlining
5 this action. *Second*, allowing Plaintiffs to amend the Complaint would not unduly
6 delay the action. To the contrary, it would narrow the issues for the Court to
7 resolve and thus conserve the Court's and the parties' resources. *Third*,
8 Defendants would not be prejudiced by Plaintiffs' proposed amendment, which
9 would reduce the scope of the action and the number of claims for the parties and
10 the Court to address. Because Plaintiffs are seeking to remove a cause of action
11 from the Complaint, there is no risk that Defendants would have to "undertake[] . .
12 . an entirely new course of defense." *Lisker*, 2011 WL 3420665, at *2 (Defendants
13 "fail[ed] to articulate how the *absence* of certain claims w[ould] undermine their
14 already existing defenses against the remaining claims"). Moreover, because
15 Plaintiffs could achieve the same result by removing the equal protection cause of
16 action at the pretrial conference, there is "little point in precluding Plaintiff[s] from
17 dropping claims [they] no longer wish[] to pursue." *Id.* ("Defendants cannot force
18 Plaintiff to pursue at trial every cause of action pleaded in the complaint. This is
19 made explicit in the Central District's pretrial procedures Plaintiff could wait
20 until the pretrial conference and announce that he has abandoned the [] claims in
21 question"). *Fourth*, because Plaintiffs are seeking to remove rather than add a
22 cause of action, there is no concern that amendment would be futile. *Fifth*, there
23 has been no suggestion—nor could any be made—that Plaintiffs' request to amend
24 is not made in good faith.

25 III. CONCLUSION

26 For the foregoing reasons, Plaintiffs Andrew and E.J. respectfully
27 request that the Court grant this motion and thereby grant them leave to file an
28 amended complaint deleting without prejudice their equal protection cause of

1 action.

2 Dated: January 4, 2019

Respectfully submitted,

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4 By: /s/ Alexa M. Lawson-Remer

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