UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GONZALES & GONZALES BONDS & INSURANCE AGENCY, INC., et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

Case No. 4:20-cv-08897-KAW

ORDER DENYING DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Re: Dkt. No. 39

On August 24, 2021, Defendants filed a motion to dismiss the first amended complaint on the grounds that Plaintiffs lack standing, the claims are not ripe, the venue is improper, and for failure to state a claim.

Upon review of the moving papers, the Court finds this matter suitable for resolution without oral argument pursuant to Civil Local Rule 7-1(b), and, for the reasons set forth below, DENIES Defendants' the motion to dismiss.

I. BACKGROUND

Plaintiffs are companies who post immigration bonds either as federally approved surety companies or on behalf of federally approved surety companies. (First Am. Compl., "FAC," Dkt. No. 36 ¶¶ 2, 20-24.) Surety bonds may be posted with Defendant Department of Homeland Security ("DHS") to guarantee that an individual will appear during their immigration removal proceedings. (FAC ¶ 2.) When an individual fails to appear, the surety owes a fixed amount of money to Defendant DHS as a result of the "breach" of the bond. (*See* Defs.' Mot., Dkt. No. 39 at 2.)

On July 31, 2020, Acting DHS Secretary Chad Wolf issued a Final Rule, which: (1)

requires sureties challenging a bond breach determination to administratively exhaust their claims by appealing to the Administrative Appeals Office ("AAO"), (2) imposes a $675 fee to appeal bond breach determinations, and (3) created new criteria for Defendant DHS to determine whether it will continue to accept immigration bonds from a particular surety. (FAC ¶¶ 1, 2, 11, 39.) These criteria include whenever: (1) DHS claims ten or more invoices issued to the surety on administratively final breach determinations are past due, (2) the surety owes at least $50,000 on past due invoices, or (3) the surety has a breach rate of at least 35% based on administratively final breach determinations and bond cancellations. (FAC ¶ 64.) Plaintiffs allege that the administrative process does not provide the surety with due process, because breach determinations are almost universally upheld, thereby depriving Plaintiffs of a meaningful opportunity to challenge a breach declaration. (FAC ¶ 15.) Since July 31, 2020, Plaintiffs have posted more than one thousand immigration bonds, and DHS has declared breaches in over 70 of those bonds. (FAC ¶ 14.) Of those 70 breaches, Plaintiffs allege that a significant number were wrongfully declared. *Id.* Plaintiffs, however, have not challenged the breach declarations, and have instead paid a substantial number of bonds declared breached, even when they believe the breach declaration lacks merit, because of the expense and futility of appealing a breach to the AAO. (FAC ¶ 16.)

On April 15, 2021, DHS Secretary Alejandro Mayorkas ratified the Final Rule. (Dkt. No. 31-1.) Plaintiffs allege that after-the-fact ratification cannot cure the issuance of a final rule promulgated by an unauthorized official. (FAC ¶¶ 37-38.)

On December 14, 2020, Plaintiffs filed the instant lawsuit, asserting that the Final Rule violated the Administrative Procedure Act ("APA") and the Fifth Amendment's equal protection guarantee. (Compl., Dkt. No. 1 ¶¶ 78-92.) Plaintiffs filed an amended complaint on August 3, 2021. (FAC, Dkt. No. 36.)

On August 24, 2021, Defendants filed a motion to dismiss. (Defs.' Mot.. Dkt. No. 39.) On September 14, 2021, Plaintiffs filed their opposition. (Pls.' Opp'n, Dkt. No. 41.) On September 24, 2021, Defendants filed their reply. (Defs.' Reply, Dkt. No. 42.)

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II. LEGAL STANDARD

A. Rule 12(b)(1)

A defendant may move to dismiss an action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). A motion to dismiss for lack of subject matter jurisdiction will be granted if the complaint on its face fails to allege facts sufficient to establish subject matter jurisdiction. *See Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). In considering a Rule 12(b)(1) motion, the Court "is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). Once a party has moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the opposing party bears the burden of establishing the court's jurisdiction. *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

B. Rule 12(b)(3)

A defendant may challenge venue under Federal Rule of Civil Procedure 12(b)(3). Upon such a challenge, the plaintiff bears the burden of establishing that venue is proper. *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979). When considering a Rule 12(b)(3) motion to dismiss, the pleadings need not be accepted as true, and the court "may consider facts outside of the pleadings." *Richardson v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir. 1998). If the court determines that venue is improper, it may dismiss the case, or, if it is in the interest of justice, transfer it to any district in which it properly could have been brought. 28 U.S.C. § 1406(a); *Dist. No. 1, Pac. Coast Dist. v. Alaska*, 682 F.2d 797, 799 (9th Cir. 1982).

C. Rule 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss based on the failure to state a claim upon which relief may be granted. A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

In considering such a motion, a court must "accept as true all of the factual allegations contained in the complaint," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (citation

omitted), and may dismiss the case or a claim "only where there is no cognizable legal theory" or there is an absence of "sufficient factual matter to state a facially plausible claim to relief." *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Navarro*, 250 F.3d at 732) (internal quotation marks omitted).

A claim is plausible on its face when a plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). In other words, the facts alleged must demonstrate "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Threadbare recitals of the elements of a cause of action" and "conclusory statements" are inadequate. *Iqbal*, 556 U.S. at 678; *see also Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996) ("[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim."). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully . . . When a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (internal citations omitted).

Generally, if the court grants a motion to dismiss, it should grant leave to amend even if no request to amend is made "unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citations omitted).

III. DISCUSSION

Defendants move to dismiss on four separate grounds: lack of standing, ripeness, improper venue, and failure to state a claim. (Defs.' Mot. at 2.)

A. Whether Plaintiffs Lack Standing

Article III standing requires the demonstration of three elements: (1) the plaintiff suffered an "injury in fact" that is concrete and particularized and actual or imminent, not conjectural or

hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Absent this showing, the action must be dismissed. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109-10 (1998).

"[T]he Constitution mandates that prior to [a court's] exercise of jurisdiction there exist a constitutional 'case or controversy,' that the issues presented are 'definite and concrete, not hypothetical or abstract.'" *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (quoting *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945)). To determine if jurisdiction is satisfied, the court "consider[s] whether the plaintiffs face a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement,' or whether the alleged injury is too 'imaginary' or 'speculative' to support jurisdiction." *Id.* (quoting *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). "[N]either the mere existence of a proscriptive statute nor a generalized threat of prosecution," however, "satisfies the 'case or controversy' requirement." *Id.* To determine there is a genuine threat of prosecution, the courts "look to whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." *Id.* It is not enough to simply allege the provisions of the Final Rule; "the mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996).

Here, Plaintiffs allege that the debarment provisions are based on breach determinations, which Plaintiffs are not appealing because they believe that the administrative process is expensive and futile because they will ultimately have to pay for the breach regardless of the merits. (*See* Pls.' Opp'n at 5; FAC ¶¶ 14-16.) To the extent that Defendants argue that Plaintiffs have to allege that one of them has appealed a breached bond, the Court finds that deterrence is enough to satisfy the injury in fact requirement. The Court is similarly unpersuaded that Plaintiffs have failed to show redressability, because deterrence is sufficient. (*See* Defs.' Mot. at 14.)

Accordingly, Plaintiffs have established standing because they have adequately alleged an injury in fact.

B. Ripeness

Defendants also move to dismiss the operative complaint on the grounds that it is not ripe. (Defs.' Mot. at 15.) "Standing and ripeness under Article III are closely related." *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1123 (9th Cir. 2009). "For a suit to be ripe within the meaning of Article III, it must present concrete legal issues, presented in actual cases, not abstractions." *Id.* (quoting *United Pub. Workers v. Mitchell*, 300 U.S. 75, 89 (1947)). "But whereas 'standing is primarily concerned with who is a proper party to litigate a particular matter, ripeness addressees when that litigation may occur.'" *Id.* (quoting *Lee v. Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997)). The constitutional ripeness inquiry generally "coincides squarely with standing's injury in fact prong." *Sacks v. Off. of Foreign Assets Control*, 466 F.3d 764, 773 (9th Cir. 2006) (quoting *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc)). Thus, where the court determines that the plaintiff's "stake in the legal issues is concrete rather than abstract," constitutional ripeness is satisfied. *Colwell*, 558 F.3d at 1123. As discussed above, Plaintiffs have adequately alleged an injury in fact, such that the constitutional ripeness requirement is satisfied. *See id.; see also* discussion, *supra*, PART III.A.

Defendants, however, argue that Plaintiffs cannot satisfy the prudential ripeness requirement, because none of the plaintiffs have filed an administrative appeal under the Final Rule of any breach determination. (Defs.' Mot. at 15.) The Court disagrees.

In evaluating the prudential aspects of ripeness, courts must be "guided by two overarching considerations: 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Thomas*, 220 F.3d at 1141 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *Hodgers–Durgin v. De La Vina*, 199 F.3d 1037, 1040–41 (9th Cir.1999) (en banc); *San Diego Cty. Gun Rts. Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996)). Here, there is a concrete factual situation, because there is a designated administrative appeals process once a bond is deemed breached by DHS. Furthermore, Plaintiffs clearly allege that the appeals process is rigged and that they will suffer harm by the debarment provisions,

which are based on the number of breach determinations. (*See* FAC ¶ 16.) Thus, prudential ripeness is also satisfied.

Accordingly, the claims are ripe for adjudication.

C. Whether Venue is Proper

Alternatively, Defendants argue that venue is improper in this district. (Defs.' Mot. at 16-17.) Under 28 U.S.C. § 1391(e)(1), a civil action brought against the United States or its agencies and employees may be brought in any judicial district in which: "(A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred . . . , or (C) the plaintiff resides if no real property is involved in the action."

In opposition, Plaintiffs argue that they have posted bonds in this district that were breached, which renders venue proper even if material events, including the actual breach, occurred elsewhere. (Pls.' Opp'n at 10 (citing *Richmond Techs., Inc. v. Aumtech Bus. Solutions*, No. 11-cv-02460-LHK, 2011 WL 2607158, at *10 (N.D. Cal., July 1, 2011) (venue proper if "substantial part" of the underlying events took place in the district)). In the operative complaint, Plaintiffs allege that, since July 31, 2020, they have posted over a thousand immigration bonds. (FAC ¶ 14.) Of those bonds, over 70 were declared to be breached by DHS, and a "significant number of those immigration bonds were wrongfully declared breaches. *Id.* Surely the posting of the bond is a "substantial part" of the underlying events, because posting of the bond is a prerequisite to a declaration of breach. Simply put, no breach could occur absent posting of the immigration bond.

Thus, the Court finds that venue is proper, and denies the motion to dismiss pursuant to Rule 12(b)(3).

D. Whether Count I fails to state a claim

Finally, Defendant move to dismiss the first cause of action to set aside the Final Rule on the grounds that Chad Wolf was not validly appointed as Secretary of Homeland Security and lacked authority to issue the Final Rule. (FAC ¶¶ 91-96.) Defendants argue that Secretary Mayorkas's ratification of the Final Rule cures any alleged defects in the rule arising from Chad Wolf's service as Acting Secretary of DHS. (Defs.' Mot. at 20.) The Court disagrees.

Defendants cite to *Consumer Financial Protection Bureau v. Gordon*, 819 F.3d 1179, 1190-92 (9th Cir. 2016), in support of their argument. (Defs.' Mot. at 20.) That case is readily distinguishable, because it did not involve the Federal Vacancies Reform Act ("FVRA"), and, therefore, did not address the FVRA's "unequivocal langua[g]e prohibiting ratification." *Behring Reg'l Ctr. LLC v. Wolf*, No. 20-CV-09263-JSC, 2021 WL 2554051, at *8 (N.D. Cal. June 22, 2021). The Court also notes that *Consumer Financial Protection* involves the issuance of a final rule from an individual who was later validly appointed to the position. *Consumer Fin. Prot. Bureau*, 819 F.3d at 1191. Mr. Wolf was never confirmed by the Senate, and so was never lawfully DHS Secretary.

The Court is persuaded by *Behring*, in which the district court found that the invalid appointment of Kevin McAleenan invalidated the final rule issued, and that the after-the-fact ratification by Secretary Mayorkas could not cure the defect. *Behring*, 2021 WL 2554051, at *8. The court explained that "[t]he government's argument is foreclosed by the FVRA's plain and unambiguous language: 'An action that has no force or effect under paragraph (1) may not be ratified.'" *Id.* (quoting 5 U.S.C. § 3348(d)(2); also citing 5 U.S.C. § 551(5) ("actions" include "rule making")). Secretary Kirstjen Nielson's failure to properly amend the order of succession[1], rendered the succession of Mr. McAleenan, and later Mr. Wolf, to Acting Secretary invalid. *Behring*, 2021 WL 2554051, at *7. Thus, Mr. Wolf was not lawfully serving as Acting Secretary at the time the Final Order was issued, and the later ratification of Secretary Mayorkas does not cure the defect in issuing the Final Rule, because the ratification itself violates the FVRA. 5 U.S.C. § 3348(d)(2).

To the extent that Defendants argue that the Immigration and Nationality Act ("INA") provides the Secretary with the authority to promulgate and issue final rules independent of the FVRA, that argument is unavailing. (*See* Defs.' Mot. at 23.) Indeed, *Behring* concerned a

[1] Secretary Nielson was the last Senate-confirmed DHS Secretary prior to Mr. Wolf. *Behring*, 2021 WL 2554051, at *2. Prior to her resignation, she amended the Order of Succession for Homeland Security Secretary, but she made a mistake and amended the wrong order of succession. *Id.* In sum, rather than amending the order of succession following the Secretary's death, resignation, or inability to perform, she amended the order concerning who is temporarily in charge when the Secretary is unavailable during a disaster or catastrophic emergency. *Id.*

program established by the INA. *Behring*, 2021 WL 2554051, at *3. Thus, Plaintiffs adequately plead a cause of action for violation of the APA.

Accordingly, Defendants' motion to dismiss the first cause of action is denied.

IV. CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss is DENIED. Defendants shall file an answer within 14 days of this order.

IT IS SO ORDERED.

Dated: October 19, 2021

KANDIS A. WESTMORE
United States Magistrate Judge