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. 20-cv-08897-KAW

ORDER GRANTING MOTION TO DISMISS

Re: Dkt. No. 24

On December 14, 2020, Plaintiffs filed the instant suit, challenging a final rule imposing additional requirements on immigration bond sureties ("Final Rule"). (Compl. ¶ 1, Dkt. No. 1.) Pending before the Court is Defendants' motion to dismiss for lack of standing and improper venue. (Defs.' Mot. to Dismiss, Dkt. No. 24.) The Court previously deemed the matter suitable for disposition without a hearing and vacated the hearing. (Dkt. No. 32.) Having considered the parties' filings and the relevant legal authorities, the Court GRANTS Defendants' 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. (Compl. ¶¶ 2, 16-20.) Surety bonds may be posted with Defendant Department of Homeland Security ("DHS") to guarantee that an individual will appear during their immigration removal proceedings. (Compl. ¶ 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. to Dismiss at 2.)

On July 31, 2020, Defendant DHS 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. (Compl. ¶¶ 2, 4, 26, 51.) 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. (Compl. ¶ 51.)

On December 14, 2020, Plaintiffs filed the instant suit, asserting that the Final Rule violated the Administrative Procedure Act ("APA") and the Fifth Amendment's equal protection guarantee. (Comp. ¶¶ 78-92.) On March 30, 2021, Defendants filed a motion to dismiss on the grounds that Plaintiffs lack standing, that the case is not ripe, and that venue is improper. (Defs.' Mot. to Dismiss at 3.) On April 26, 2021, Plaintiffs filed their opposition. (Pls.' Opp'n, Dkt. No. 29.) On May 6, 2021, Defendants filed their reply. (Defs.' Reply, Dkt. No. 31.)

II. LEGAL STANDARD

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).

III. DISCUSSION

A. 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).

The Court finds that Plaintiffs have not established standing because Plaintiffs have not adequately alleged an injury in fact. "[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' only allegations regarding their potential injury are that they are "engaged in the business of posting immigration bonds on behalf of federally approved surety companies with DHS for, among other things, the release of aliens from detention pending a determination of the alien's immigration status," and that "they have been and will be injured by the Final Rule's operation." (Compl. ¶¶ 13, 16-20.) In their opposition, Plaintiffs assert that they will be required

to file a $675 administrative appeal for every immigration bond that Defendant DHS determines to be breached. (Pls.' Opp'n at 10.) In their complaint, however, Plaintiffs do not make any specific allegations that their bonds have ever been found to be breached, or that the breaches were wrongfully determined. Without such information, it is not clear that Plaintiffs would ever have the opportunity or grounds to appeal a breach determination, and thus incur the injury of paying the $675 fee to appeal. While it is possible that Plaintiffs may be injured by the Final Rule, a "*possible* future injury" is not enough; the threatened injury "must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (original emphasis).

Likewise, Plaintiffs argue that the debarment provisions of the Final Rule are based on the breach determinations, which cannot be properly appealed under the Final Rule. (Pls.' Opp'n at 5.) As Plaintiffs' injury due to the debarment provisions are based on their alleged inability to appeal breach determinations, specific allegations demonstrating that Plaintiffs will need to appeal a breach determination are necessary. Absent such allegations, Plaintiffs' injury is speculative.

Accordingly, the Court finds that Plaintiffs have failed to sufficiently allege an injury that satisfies Article III's standing requirement. Because Plaintiffs have failed to allege injury in fact, Plaintiffs have also failed to allege ripeness. (*See* Pl.'s Opp'n at 7 ("Plaintiffs' claims are ripe for the same reasons they have standing."); *Coons v. Lew*, 762 F.3d 891, 897 (9th Cir. 2014) ("The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong.").)

B. Venue

In the alternative, Defendants argue that venue is improper in this district. 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."

Because the Court finds that there is no constitutional standing, and thus no jurisdiction over the case, the Court need not determine if venue was proper. The Court observes, however,

that it appears Plaintiff Gonzales & Gonzales ("G&G") is a California corporation located in California, and that Defendant DHS previously filed suit against Plaintiff G&G in this district in August 2009. (*See* Compl. ¶ 16; *United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, Case No. 09-cv-4029-EMC (asserting venue under 28 U.S.C. § 1391(b)(1) ("a judicial district in which any defendant resides").) Thus, it is not clear to the Court that venue is improper.

IV. CONCLUSION

For the reasons stated above, the Court finds that Plaintiffs have not adequately alleged standing or ripeness, and that the Court therefore lacks jurisdiction over the case. Amendment, however, does not appear to be futile, as Plaintiffs state that they can amend the complaint to include the number of bonds posted and deemed breached since the Final Rule was issued. (Pls.' Opp'n at 5.) Accordingly, the Court GRANTS Defendants' motion to dismiss without prejudice. Plaintiffs shall file an amended complaint within **21 days** of the date of this order.

IT IS SO ORDERED.

Dated: July 13, 2021

Kandis Westmore

KANDIS A. WESTMORE
United States Magistrate Judge

United States District Court
Northern District of California