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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO-OAKLAND DIVISION

19 WILEY GILL; JAMES PRIGOFF; TARIQ
20 RAZAK; KHALID IBRAHIM; and AARON
CONKLIN,

21 Plaintiffs,

22 v.

23 DEPARTMENT OF JUSTICE, LORETTA
LYNCH, in her official capacity as the
24 Attorney General of the United States;
PROGRAM MANAGER – INFORMATION
25 SHARING ENVIRONMENT;
KSHEMENDRA PAUL, in his official
26 capacity as the Program Manager of the
Information Environment,

27 Defendants.
28

Case No. 3:14-cv-03120 (RS)

**NOTICE OF MOTION AND MOTION
FOR LEAVE TO FILE
SUPPLEMENTAL COMPLAINT;
AND MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT**

Hearing Date: October 8, 2015
Time: 1:30 p.m.
Judge: Hon. Richard Seeborg
Courtroom: 3, 17th Floor
Date of Filing: July 10, 2014
Trial Date: None Set

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**NOTICE OF MOTION AND MOTION FOR LEAVE TO
FILE SUPPLEMENTAL COMPLAINT**

TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on October 8, 2015 at 1:30 p.m., or as soon thereafter as the parties may be heard, Plaintiffs Wiley Gill, James Prigoff, Tariq Razak, Khalid Ibrahim, and Aaron Conklin will bring for hearing a motion pursuant to Federal Rule of Civil Procedure 15(d) seeking leave to file a supplemental complaint, adding allegations pertaining to facts arising after the original complaint was filed. The hearing will take place before the Honorable Richard Seeborg, in Courtroom 3, 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102. This motion is based on this notice, the attached memorandum of points and authorities, the attached proposed supplemental complaint, all pleadings and papers filed in this action, and such oral argument and evidence as may be presented at the hearing on the motion.

Dated: September 1, 2015

Respectfully submitted,

By: _____ /s/ Linda Lye

Attorneys for Plaintiffs WILEY GILL, JAMES PRIGOFF, TARIQ RAZAK, KHALED IBRAHIM, AND AARON CONKLIN

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6A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* (3d ed. 2015)
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case is a challenge to the vague and broad standards issued by Defendants for the collection, maintenance, and dissemination of so-called “suspicious activity reports” or SARs. After the filing of the complaint, Defendant Program Manager for the Information Sharing Environment (“ISE Program Manager”) issued a new version of the standard for suspicious activity reporting. This new version is substantially similar to its predecessor and permits federal, state, local, and tribal law enforcement entities to collect and share SARs, even in the absence of reasonable suspicion of criminal activity. Additionally, like its predecessor, it was issued without public notice and comment. Plaintiffs bring this motion to ensure that the complaint reflects this new version and to eliminate any ambiguity as to the Court’s ability to grant complete equitable relief should Plaintiffs prevail. Plaintiffs’ proposed amendment is exceedingly narrow, and would not delay the case nor prejudice the Defendants. Defendants have already included Functional Standard 1.5.5 in the Administrative Record. Defendants do not oppose this motion.

II. ARGUMENT

A. Plaintiffs Should Be Granted Leave to Supplement the Complaint to Identify the Current Version of Defendant ISE Program Manager’s Functional Standard

Supplementation under Rule 15(d) is plainly warranted here. “[T]he 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). While an amendment “relates to matters that occurred prior to the filing of the original pleading,” a supplemental complaint “deal[s] with events subsequent to the pleading to be altered.” 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1504 (3d ed. 2015). Rule 15(d) is “a useful device, enabling a court to award complete relief, or more nearly complete relief, in one action, and to avoid the cost, delay and waste of separate actions which must be separately tried and prosecuted.” *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988) (quoting *New*

1 *Amsterdam Casualty Co. v. Waller*, 323 F.2d 20–28 (4th Cir. 1963), *cert. denied*, 376 U.S. 963
2 (1964)). “Its use is therefore favored.” *Keith*, 858 F.2d at 473. “An application for leave to file a
3 supplemental pleading is addressed to the discretion of the court and should be freely granted
4 when doing so will promote the economic and speedy disposition of the entire controversy
5 between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the
6 rights of any of the other parties to the action.” *Wright & Miller, supra*, § 1504.

7 Plaintiffs in this action seek to challenge, *inter alia*, the standard for suspicious activity
8 reporting issued by Defendant ISE Program Manager. Plaintiffs contend that the ISE Program
9 Manager’s standard violates the Administrative Procedure Act because (1) it authorizes the
10 reporting of suspicious activity even in the absence of reasonable suspicion of criminal activity
11 and is therefore arbitrary and capricious and not in accordance with law, in particular, a duly
12 promulgated federal regulation, 28 C.F.R. Part 23, that requires reasonable suspicion; and (2) it
13 was issued without notice and comment. Plaintiffs filed the complaint in this action in July 2014;
14 the version of the ISE Program Manager’s standard then in effect was known as Functional
15 Standard 1.5. *See* Compl. at ¶ 44 (ECF No. 1). In February 2015, after Plaintiffs filed the
16 complaint, Defendant ISE Program Manager issued an updated version of the standard, known as
17 Functional Standard 1.5.5. *See* Admin Record, Document 41 (ECF No. 52-2 at 7, ECF No. 53-15
18 at 1-7). Plaintiffs seek leave to supplement the complaint to add discrete and narrow allegations
19 identifying the current version of the Functional Standard. *See, e.g.*, Proposed Suppl. Compl. at
20 ¶¶ 16, 44.¹ Because Functional Standard 1.5.5, exactly like its predecessor, authorizes the
21 reporting of suspicious activity even in the absence of reasonable suspicion and was issued
22 without notice and comment, the proposed supplemental complaint contains causes of action
23 identical to those in the original complaint and adds no new causes of action. Proposed Supp.
24 Compl. at ¶¶ 44-45, 52, 153-68.

25
26 _____
27 ¹ For the Court’s convenience, a proposed supplemental complaint (without appendices)
identifying the new allegations in “track changes” is attached as Exhibit 1 to the accompanying
declaration of Linda Lye. The proposed supplemental complaint (with appendices) is attached as
Exhibit 2 to the Lye declaration.

1 Plaintiffs' proposed supplemental complaint is exactly the type of pleading that Rule
2 15(d) contemplates. It sets forth an occurrence "that happened after the date of the pleading to be
3 supplemented," Fed. R. Civ. P. 15(d), in particular, ISE Program Manager's issuance of a new
4 version of the Functional Standard.

5 In addition, supplementing the pleading as proposed would ensure the court is able "to
6 award complete relief," *Keith*, 858 F.2d at 473 (quoting *New Amsterdam*, 323 F.2d at 28–29), and
7 would "promote the economic and speedy disposition of the entire controversy between the
8 parties." *Wright & Miller, supra*, § 1504. Identifying Functional Standard 1.5.5 in a
9 supplemental complaint would eliminate any ambiguity as to the court's equitable power, should
10 it find for Plaintiffs on the merits, to issue declaratory and injunctive relief as to the current
11 standard for suspicious activity reporting. An injunction and declaratory relief pertaining
12 exclusively to a superseded standard would, by contrast, provide Plaintiffs with incomplete relief
13 and necessitate further litigation over the applicability of such an injunction and declaratory relief
14 to the current standard.

15 Nor will the proposed supplemental complaint "cause undue delay or trial inconvenience"
16 or "prejudice the rights of any of the other parties to the action." *Id.* At the Case Management
17 Conference on March 12, 2015, the Court ordered Defendants to produce an administrative record
18 as to Defendant ISE Program Manager's Functional Standard. *See* Minute Order (ECF No. 41).
19 Defendants have now filed an administrative record for ISE Program Manager's Functional
20 Standard that includes Functional Standard 1.5.5 and documents considered by the agency in its
21 issuance. *See* Admin Record (ECF Nos. 52, 53). Because Defendants have already prepared a
22 record that includes documents considered in the formulation of Functional Standard 1.5.5, they
23 have clearly contemplated that the Court would review Functional Standard 1.5.5. Under these
24 circumstances, the filing of the supplemental complaint would not cause Defendants prejudice.
25 Nor would the proposed supplementation cause delay because the parties have not commenced
26 discovery, in light of their dispute over the propriety of discovery in this action. *See* Joint Case
27 Management Statements (ECF Nos. 36 at ¶ 8, 40 at ¶ 8, 59 at ¶ 8). Plaintiffs should therefore be

1 granted leave to supplement the complaint to identify the current version of ISE Program
 2 Manager's standard for suspicious activity reporting.

3 Prior to filing this motion, Plaintiffs provided Defendants with the proposed supplemental
 4 complaint. Defendants have indicated that they have no objection to the filing of the
 5 supplemental complaint, but reserve their right to present legal arguments to the allegations and
 6 claims presented in the proposed supplemental complaint in their motion for summary judgment.

7 *See* Lye Decl. at ¶ 3.

8 **II. CONCLUSION**

9 For the foregoing reasons, Plaintiffs respectfully request that the Court grant them leave to
 10 file their proposed supplemental complaint.

11 Dated: September 1, 2015

Respectfully submitted,

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 13 By: _____ */s/ Linda Lye*

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