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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, et al., Plaintiffs, SAN FRANCISCO CHAMBER OF COMMERCE, et al., Plaintiffs-Intervenors, and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, et al., Plaintiffs-Intervenors v. MICHAEL CHERTOFF, Secretary of Homeland Security, et al., Defendants.	Case No. 07-4472 CRB **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTIONS: (1) TO VACATE THE PRELIMINARY INJUNCTION AND (2) FOR SUMMARY JUDGMENT** Date: December 12, 2008 Time: 8:30 a.m. Place: Courtroom 8, 19th Floor Hon. Charles Breyer

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INTRODUCTION

On August 15, 2007 the Secretary of Homeland Security ("DHS" or "Secretary") adopted the "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter" rule, 8 C.F.R. § 274a.1, 72 Fed. Reg. 45611 (August 15, 2007) ("Safe Harbor Rule"). This Rule provides guidance for the benefit of both employers and employees by establishing a "safe harbor" procedure consisting of reasonable steps that an employer can take after receiving a "no-match" letter from the Social Security Administration ("SSA") advising them that the name and social security number presented by an employee and filed on a wage statement do not match the information in SSA's records.

Plaintiffs challenged that rule in this civil action and on October 10, 2007 the Court found that plaintiffs had demonstrated serious questions as to three of their challenges to the rule and entered a Preliminary Injunction enjoining its implementation. American Federation of Labor, et al. v. Chertoff, 552 F.Supp.2d 999 (N.D. Cal. 2007) ("AFL"); (D.E. 135; 137). The Secretary has elected to address the Court's concerns on these three points through a supplemental rulemaking proceeding that concluded with the issuance of a Supplemental Final Rule on October 28, 2008. See 73 Fed. Reg. 63843 (October 28, 2008).

First, in the preamble accompanying the Supplemental Final Rule, the Secretary has provided a detailed reasoned analysis for what the Court perceived as a change in policy as to the relevance of no-match letters to immigration law compliance. Second, the Supplemental Final Rule removes any statements purporting to interpret the anti-discrimination provisions of the immigration laws, the enforcement of which is delegated to the Department of Justice. In addition, the DHS insert that will be included in no-match letters sent to employers along with

SSA's no-match letters has been revised to refer to the guidance issued by the Department of Justice and eliminate any statements that might be construed as DHS's attempt to interpret the anti-discrimination provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324b(a)(1). Third, the Secretary has published a detailed Regulatory Flexibility Analysis, which was subject to public comment, discussing potential costs of the Rule to small entities.

Because the Supplemental Final Rule addresses and resolves the three grounds on which the Court entered its Preliminary Injunction against the Safe Harbor Rule, and because the Court has held plaintiffs did not raise any serious questions in any of their other challenges to the Rule, the Court should lift the preliminary injunction and enter summary judgment for defendants.

BACKGROUND

A. Statutory and Regulatory Background.

The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) ("IRCA"), subjects employers to civil and criminal sanctions for knowingly hiring or continuing to employ aliens who are not authorized to work in the United States. 8 U.S.C. § 1324a(a)(1)–(2). DHS, through its Immigration and Customs Enforcement component, is charged with enforcing the Act.

The knowledge element of the immigration laws has long been defined by regulation to include constructive knowledge "that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition." 72 Fed. Reg. at 45623; see 56 Fed. Reg. 41767-01 (August 23, 1991) (establishing a materially identical definition); 55 Fed. Reg. 25928 (June 25, 1990) (same); see also 72 Fed. Reg. at 45612 (discussing prior regulations and case law employing the same definition).

SSA maintains earnings information for individual workers in order to calculate properly the amount of Social Security benefits to which those workers may someday be entitled. See 42 U.S.C. § 405(c)(2)(A). When employers annually report wages for their workers, SSA credits those wages to the individual worker's account. SSA cannot credit those wages, however, if an employer submits a name and social security number ("SSN") for a worker that does not match the name and number in SSA's records. See 20 C.F.R. § 422.120(a). Such a "no-match" may result when an individual submits a false social security number to his employer. However, "no-matches" can also result from clerical and typographical errors or may reflect name changes that were not reported to SSA.

In 1994, SSA began sending no-match letters to employers who submitted significant numbers of wage reports that could not be credited to workers' records. See 20 C.F.R. § 422.120(a). Typically, a no-match letter asked the employer to prepare a corrected employment form for each listed social security number, or, in the alternative, to ask the employee to contact SSA to correct the error. See, e.g., SSA's Model 2006 "No-Match" Letter for Tax Year 2005 (D.E. 7, Exh. D).

Over the years following the SSA's commencement of the no-match letter program, employers, labor organizations, and others uncertain as to the implications of no-match letters under the immigration laws have made repeated inquiries to DHS and its predecessor, the Immigration and Naturalization Service ("INS"). The agencies have responded by letter to such correspondence, explaining that receipt of a no-match letter would not "by itself" be thought to provide constructive knowledge of an unauthorized employee. Letter of Dec. 23, 1997 from INS General Counsel to Littler Mendelson on behalf of Employer (D.E. 7, Exh. I). The INS explained in that letter:

> Whether an employer has been put on notice of an unauthorized employment situation is . . . an individualized determination that depends on all the relevant facts, and there may be specific situations in which SSA notice of an SSN irregularity would either cause, or contribute to, such a determination.

Id.

In correspondence, the agency noted that a no-match letter alone did not impose an "affirmative duty" on the employer to reverify an employee's work authorization, Letter of Feb. 17, 1994 from Acting General Counsel to California Farm Bureau Federation (D.E. 7, Exh. J), but made clear that employers are expected to take steps "to reconcile the mismatch." Letter of Nov. 19, 1998 from INS General Counsel to Congressman Robert F. Smith (D.E. 7, Exh. H). The INS noted, moreover, that if an employee failed to resolve the discrepancy between the employer's records and SSA's records, "the employer [could] be considered by the INS to have violated the prohibition against knowingly continuing to employ an unauthorized alien if it does not take reasonable steps, such as reverification, to ensure that the employee is authorized to work." Id..

B. The DHS Safe-Harbor Rule.

DHS promulgated the Safe Harbor Rule to provide employers with much-needed guidance about the appropriate steps to take in response to a no-match letter. See 8 C.F.R. § 274a.1, 72 Fed. Reg. 45611 (Aug. 15, 2007). The Rule reiterates the agency's position from its previous correspondence that an employer's failure to take "reasonable steps" in response to a no-match letter may be a ground for concluding that the employer had constructive knowledge that an employee was not authorized for employment. The Rule makes clear that determining whether an employer had constructive knowledge requires examination of the "totality of relevant circumstances," and provides a non-exhaustive list of instances in which constructive

knowledge might properly be inferred. The Rule states:

> Examples of situations where the employer may, depending on the totality of relevant circumstances, have constructive knowledge that an employee is an unauthorized alien include, but are not limited to, situations where the employer:
> . . .
> (iii) Fails to take reasonable steps after receiving information indicating that the employee may be an alien who is not employment authorized, such as —
> . . .
> (B) Written notice to the employer from the Social Security Administration reporting earnings on a Form W-2 that employees' names and corresponding social security account numbers fail to match Social Security Administration records[.]

72 Fed. Reg. at 45623-24 (amending 8 C.F.R. § 274a.1).

Having noted that failure to take reasonable steps may be a basis for finding constructive knowledge, the rule provides "safe-harbor" procedures. The Rule explains that DHS will not use the receipt of a no-match letter as evidence of constructive knowledge if the employer: (1) checks its records and corrects any errors within 30 days of receiving a no-match letter; or (2) if that fails to resolve the no-match, instructs its employee to clear up the discrepancy with SSA within 90 days of the receipt of the letter; or (3) if that too is unsuccessful, completes an alternative employment authorization verification procedure.[1]/ 72 Fed. Reg. at 45613-14, 45624.

The Rule imposes no affirmative requirements on employers and emphasizes that the steps detailed in the Rule are not the only means for taking reasonable steps to resolve a no-match. Should an employer decline to follow the safe-harbor procedures but choose to respond

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[1]/ The rule explains that at this stage an employer will be considered to have taken a reasonable course if it verifies the employee's identity and work authorization through a modified version of the process required of new employees under 8 U.S.C. § 1324a – specifically, having the employee fill out a new Form I-9 Employment Eligibility Verification and verifying the information but without reliance on any documents that contain the disputed social security number. 72 Fed. Reg. at 45624.

to a no-match letter in other ways, the reasonableness of that response will be viewed under the "totality of relevant circumstances." 72 Fed. Reg. at 45614.

In conjunction with its promulgation of the Rule, DHS created a guidance letter for SSA to insert into its no-match mailings ("the insert"). In a question-and-answer format, the insert provides employers with basic information about the new Safe Harbor Rule. See D.E. 7, Exh. C.[2]/

C. Procedural Background

Plaintiffs AFL-CIO, et al. filed this action on August 29, 2007. The AFL-CIO plaintiffs amended their complaint on September 11, 2007 (D.E. 54). Subsequently, two other groups of plaintiffs joined in the action.[3]/ The District Court entered a Temporary Restraining Order enjoining implementation of the Safe Harbor Rule on August 31, 2007 (D.E. 21).

After full briefing and argument, the District Court, on October 10, 2007, granted plaintiffs' motions for preliminary injunction, enjoining implementation the Safe Harbor Rule. AFL, supra, 552 F.Supp.2d at 1015. This ruling was based on the Court's finding that the balance of hardships tipped in favor of the plaintiffs and on the Court's holding that the plaintiffs had raised serious questions as to: (1) whether DHS had changed its position on the legal

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[2]/ Defendants filed the Administrative Record of the Safe Harbor Rulemaking with the Court on October 1, 2007. (D.E. 128 and 129). Defendants are filing a Supplemental Administrative Record ("Supp. A.R."), containing the administrative record of the supplemental rulemaking proceeding just concluded.

[3]/ Plaintiffs San Francisco Chamber of Commerce, et al. ("Chamber"), moved to intervene on September 7, 2007 (D.E. 34), defendants did not oppose and the Court granted intervention on September 11, 2007 (D.E. 44). The Chamber plaintiffs' initial complaint was filed on September 11, 2007 (D.E. 45) and an Amended Complaint was filed on October 19, 2007 (D.E. 138). Plaintiffs United Food and Commercial Workers Local 5, et al., ("United") moved to intervene on September 12, 2007 (D.E. 59), defendants did not oppose and the Court granted intervention on September 13, 2007 (D.E. 66). The United plaintiffs' initial complaint was filed on September 14, 2007 (D.E. 70) and an Amended Complaint was filed on September 26, 2007 (D.E. 121).

significance of no-match letters, without adequate explanation, id. at 1010; (2) whether DHS had exceeded its authority, and encroached on the authority of the Department of Justice, by interpreting IRCA's anti-discrimination provisions, id. at 1011; and (3) whether DHS violated the Regulatory Flexibility Act ("RFA") when it determined that it was not required to conduct a regulatory flexibility analysis, id. at 1013.

On November 23, 2007, DHS filed an unopposed motion to stay district court proceedings pending new rulemaking, (D.E. 142), explaining that its primary goal was to achieve the most expeditious implementation of a safe harbor rule. Accordingly, the government explained that it would seek to address the problems identified in the District Court's order through additional rulemaking. The government noted that, although the rulemaking, if successful, might ultimately obviate the need for appellate review, it would also proceed with an appeal to the Ninth Circuit. See Letter of Dec. 4, 2007 from Thomas H. Dupree, Jr. to the District Court (D.E. 148).[4]/ After a status hearing on December 14, 2007, the District Court granted the stay to allow the agency to proceed with supplemental rulemaking to address the three issues identified in the Court's opinion (D.E. 149). The Court has vacated scheduled Status Conferences on four occasions (see D.E. 153, 155, 157 and 159) to permit the supplemental rulemaking proceedings to continue.

DHS published a supplemental notice of proposed rulemaking on March 26, 2008 to address the specific issues raised by the Court. 73 Fed. Reg. 15944. In that notice, DHS provided a detailed review of the history of DHS (and previously INS) guidance on the significance of no-match letters and provided additional reasoned analysis justifying the policy

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[4]/ In order to remove any uncertainty as to whether this Court has jurisdiction to entertain the government's motions, defendants are, simultaneously with the filing of these motions, moving to withdraw their appeal of the Court's Preliminary Injunction ruling.

set forth in the new rule. DHS also confirmed that the authority to interpret the anti-discrimination provisions of the INA rests with the Department of Justice, not DHS, id. at 15950-51, and provided an Initial Regulatory Flexibility Analysis, see 5 U.S.C. § 603, for public comment, id. at 15951, 52-54. DHS received approximately 2950 comments before the close of the public comment period on April 25, 2008. 73 Fed. Reg. at 63844.

After considering the full record of the safe harbor rulemaking, including the rulemaking record from 2007, legal arguments and evidence presented to the Court in this action, as well as the comments received on the supplemental notice of proposed rulemaking, DHS completed action on the supplemental rulemaking and published the Supplemental Final Rule on October 28, 2007. See 73 Fed. Reg. 63843 (October 28, 2008); (Attachment A), hereto, reaffirming the Safe Harbor Rule as previously issued on August 15, 2007. The preamble issued with the Supplemental Final Rule revised the preamble to the initial rule to address each of the concerns raised by this Court in its preliminary injunction ruling. The Supplemental Final Rule is accompanied by a Final Regulatory Flexibility Analysis, analyzing possible costs of the Rule to small entities. See 73 Fed. Reg. at 63844.

DHS has also revised the guidance insert for SSA to include in its no-match letters by removing the statements contained in the initial version in which DHS appeared to interpret the anti-discrimination provisions of the immigration laws. See Supp. A.R. at 3803; (Attachment B, hereto). The revised DHS guidance insert also makes clear that the rule provides a safe harbor to employers rather than imposing a mandate. This DHS insert will accompany the next round of SSA no-match letters sent to employers.

ARGUMENT

I. Standard of Review

A. Standard Of Review For a Challenge to a Rule Under The APA

The Administrative Procedure Act provides that agency action may be set aside only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if the action fails to meet statutory, procedural, or constitutional requirements. 5 U.S.C. § 706(2). Under these deferential standards, the agency's decision is entitled to a presumption of regularity and must be upheld if rationally based. Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

To determine whether agency action is arbitrary or capricious, a court must consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989), or the absence of "a rational connection between the facts found and the choice made," Motor Vehicles Mfrs. Ass'n, supra. See also Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 105 (1983). Regulations are presumed to be valid, and therefore review is deferential to the agency. Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 841 (9th Cir. 2003). A court is not empowered to substitute its judgment for that of the agency. Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, 273 F.3d 1229, 1236 (9th Cir. 2001). See also Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 914 (9th Cir. 1995), cert. denied, 516 U.S. 931 (1995); Friends of the Clearwater v. Dombeck, 222 F.3d 552, 556 (9th Cir. 2000). Moreover, an agency has broader latitude to amend positions taken in informal advice letters than in formal regulations. See Resident Councils v. Leavitt, 500 F.3d 1025, 1037 (9th Cir. 2007).

Typically, APA review cases are resolved on a motion (or cross motions) for summary judgment, based upon the administrative record of the agency action. Marshall County Health Care Authority v. Shalala, 988 F.2d 1221, 1225 (D.C. Cir. 1993); McCall v. Andrus, 628 F.2d 1185, 1189-90 (9th Cir. 1980). This is because "[t]he district court sits as an appellate tribunal, not as a court authorized to determine in a trial-type proceeding whether...." the agency's actions were lawful under § 706. Marshall County Health Care Authority, supra, 988 F.2d at 1225. Therefore, the court does not make findings of fact, but rather analyzes the facts as they appear in the record to determine if they support the agency decision. Marathon Oil Co. v. United States, 807 F.2d 759, 767 (9th Cir. 1986), cert. denied, 480 U.S. 940 (1987). Hence there is no need for a separate statement of undisputed, material facts.[5]/

Agencies are always free to elect to correct flaws in a rulemaking through further administrative proceedings. As the D.C. Circuit has noted, "there is no principle of administrative law that restricts an agency from reopening proceedings to take new evidence after the grounds upon which it relied are determined by a reviewing court to be invalid." PPG Industries v. United States, 52 F.3d 363, 366 (D.C. Cir. 1995). See also Center for Science in the Public Interest v. Regan, 727 F.2d 1161, 1164 (D.C. Cir. 1984) ("it is not improper for an agency to engage in new rulemaking to supersede defective rulemaking"); Heartland Regional Medical Center v. Leavitt, 415 F.3d 24, 29-30 (D.C. Cir. 2005) ("the usual rule is that, with or without vacatur, an agency that cures a problem identified by a court is free to reinstate the original result on remand.").

DHS recognized this principle in its Supplemental Final Rule, noting that "[t]he

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[5]/ Local Rule 16-5 is consistent with this authority in recognizing that record review cases such as this are resolved through cross-motions for summary judgment based on the administrative record filed with the Court by the government.

Executive's amendment to regulations in litigation is a natural evolution in the process of governance," and quoted the D.C. Circuit:

> It is both logical and precedented that an agency can engage in new rulemaking to correct a prior rule which a court has found defective. Where an injunction is based on an interpretation of a prior regulation, the agency need not seek modification of that injunction before it initiates new rulemaking to change the regulation. (citations omitted).

73 Fed. Reg. at 63846, quoting NAACP, Jefferson County Branch v. Donovan, 737 F.2d 67, 72 (D.C. Cir. 1984).

Where subsequent rulemaking proceedings have conclusively resolved a particular issue in a case, that issue becomes moot and can be dismissed from the case. See e.g. Ctr. for Bio. Diversity v. Marina Point Dev. Co., 535 F.3d 1026, 1035-36 (9th Cir. 2008) (holding claim to be moot where claim concerned violation of Endangered Species Act involving bald eagles but the U.S. Fish and Wildlife Service removed bald eagles from the endangered species list after claim was filed); W. Radio Servs. Co. v. Glickman, 113 F.3d 966, 974 (9th Cir. 1997) (holding moot plaintiff's challenge to agency postponing issuance of telecommunication permits until establishment of a fee structure because agency subsequently issued fee structure).

B. Standard on a Motion to Vacate an Injunction

"'[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam), quoting 11A C. Wright, A Miller & M. Kane, Federal Practice and Procedure § 2948, pp. 129-130 (2d ed. 1995) (emphasis in original). The Ninth Circuit has described two sets of criteria for preliminary injunctive relief:

> The traditional equitable criteria for granting preliminary injunctive relief are (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4)

> advancement of the public interest . . . . Alternatively, a court may issue a preliminary injunction if the moving party demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.

Johnson v. Cal. State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995) (emphasis in original) (citations and internal quotation marks omitted). Crucially, no matter how great the plaintiff's showing of irreparable harm, "it must be shown as an irreducible minimum that there is a fair chance of success on the merits." Martin v. Int'l Olympic Comm., 740 F.2d 670, 675 (9th Cir. 1984).

The district court always has the "'power to modify or to overturn an interlocutory order or decision while it remains interlocutory.'" Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1124 (9th Cir. 2005) quoting Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 809 (9th Cir.1963). This power includes the dissolution of preliminary injunctions. Id. The court's wide discretion to modify the injunction is predicated upon any change in circumstances or new facts. A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1098 (9th Cir. 2002) citing System Fed'n No. 91 Ry. Emp. Dep't v. Wright, 364 U.S. 642, 647-48 (1961); see also Taylor v. Westly, 525 F.3d 1288, 1289 (9th Cir. 2008) (per curiam) (affirming dissolution of preliminary injunction where the State eliminated the statutory and administrative procedure that had been determined to be unconstitutional).

Finally, a court can grant summary judgment to a party and, based upon that ruling on the merits, dissolve a preliminary injunction previously issued by the court against the prevailing party. See e.g. Unified Dealer Group v. Tosco Corp., 16 F.Supp.2d 1137, 1145 (N.D. Cal. 1998).

II. Defendants' Supplemental Final Rule Has Addressed and Resolved the Concerns with the Safe Harbor Rule Identified In The Court's October 10, 2007 Preliminary Injunction Ruling

A. The Supplemental Final Rule Contains a Detailed "Reasoned Analysis" for the DHS Policy Embodied in the Safe Harbor Rule

This Court found that, in adopting the Safe Harbor Rule, DHS changed its approach to the weight it intended to give no-match letters in enforcement proceedings. Specifically, the Court found that "DHS's new position is that an employer who receives a no-match letter can, without any other evidence of illegality, be held liable under the continuing employment provision." AFL, supra, 552 F.Supp. 2d at 1010. In order to address the Court's concerns, the Supplemental Final Rule provides a comprehensive analysis of the significance of no-match letters to immigration law enforcement, including the new information that informed DHS's decision to adopt the Rule, precisely the sort of "reasoned analysis" required when an agency changes its position on a question.

DHS (and INS) have, for many years, informally provided guidance to employers on the government's view of the relevance of no-match letters to immigration enforcement actions, as well as recommending steps employers should take when receiving no-match letters. See, e.g. D.E. 7 Exh. H, I, J. With the issuance of the Safe Harbor Rule, DHS has elected to clarify, formalize and arguably change that guidance by creating the new safe harbor available to employers who receive no-match letters.

The Safe Harbor Rule was the product of DHS experience with no-match letters in many different immigration-related contexts, and the gradual development of DHS expertise in recognizing the conclusions that can be drawn from the issuance of no-match letters to employers and employers' responses to those letters. The Safe Harbor Rule articulates DHS's current

position that "employers that fail to perform reasonable due diligence upon receipt of SSA no-match letters or DHS suspect document notices risk being found to have constructive knowledge of the illegal work status of employees whose names of SSNs are listed." 73 Fed. Reg. at 63847; see also id. at 63849. DHS's position on the relevance of no-match letters is based in large measure on "growing evidence and consensus within and outside the government that SSN no-matches are a legitimate indicator of possible illegal work by unauthorized aliens." 73 Fed. Reg. at 63847.[6]/ The extent of the use of false SSNs by illegal workers has become increasingly evident to DHS through many sources, including civil and criminal immigration enforcement proceedings. 73 Fed. Reg. at 63848, fn. 2. In addition, DHS has extensive evidence from numerous sources, including comments submitted in the course of this rulemaking, that "many employers are aware that a substantial portion of their workforce is unauthorized," 73 Fed. Reg. at 63845, and that employers understand that an employee's appearance on a no-match letter may indicate that the individual is unauthorized to work, 73 Fed. Reg. at 63848. Indeed, one recent study of the problem, that concluded that "most workers with unmatched SSNs are undocumented immigrants." 73 Fed. Reg. at 63845, citing C. Mehta, N. Theodore & M. Hincapie, Social Security Administration's No-Match Letter Program: Implications for Immigration Enforcement and Worker's Rights (2003). The Supplemental Final Rule also addresses and rejects the arguments by some commentators that SSA records are so flawed and

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[6]/ DHS cited evidence from a report of the SSA Office of Inspector General, who concluded that "the magnitude of incorrect wage reporting is indicative of SSN misuse." 73 Fed. Reg. 63847, citing, Office of the Inspector General, Social Security Administration, Social Security Number Misuse in the Service, Restaurant, and Agriculture Industries, Report A–08–05–25–23, at 2–3 (April 2005). DHS also noted that its view was "overwhelmingly affirmed by those who submitted comments" on the proposed Safe Harbor Rule in 2006. 73 Fed. Reg. at 63848, citing comments of employer groups.

unreliable as to deserve little if any weight in immigration enforcement. 73 Fed. Reg. at 63484.[7]/

Based upon this extensive evidence, much of it of recent vintage, and DHS's extensive enforcement expertise, DHS has now found that "there is a substantial connection between social security no-match letters and lack of work authorization" by illegal aliens. 73 Fed. Reg. at 63845. That conclusion was implicit in DHS's prior correspondence on this question, but with the Safe Harbor Rule, DHS explicitly adopted this position in an agency regulation.

Consequently, the Supplemental Final Rule enunciates four principles that form the basis of DHS's view of the relevance of no-match letters to the enforcement of the immigration laws:

> DHS's consistent, if informal, view of SSA no-match letters has been that (1) SSA no match letters do not, by themselves, establish that an employee is unauthorized, (2) there are both innocent and non-innocent reasons for no-match letters, but (3) an employer may not safely ignore SSA no-match letters, and (4) an employer must be aware of and comply with the anti-discrimination provisions of the INA.

73 Fed.Reg. at 63847. The Supplemental Final Rule also enumerated "the most significant reasons" for the Secretary's decision to promulgate the Safe Harbor Rule. These were:

> (1) the need to resolve ambiguity and confusion among employers regarding their obligations under the INA following receipt of an SSA no-match letter; (2) the growing evidence and consensus within and outside government that SSN no-matches are a legitimate indicator of possible illegal work by unauthorized aliens; (3) DHS's view that SSA's criteria for sending employee no-match letters effectively focuses those letters on employers that have potentially significant problems with their employees' work authorization; and (4) the established legal principle that employers may be found to have knowingly employed unauthorized alien workers in violation of INA section 274A based on a constructive knowledge theory.

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[7]/ DHS notes, for example, that "SSA has developed a series of computerized error checking routines to resolve certain common errors that result in unmatched name and SSN." 73 Fed. Reg. at 63848 (22).

73 Fed. Reg. 63847, citing 73 F.R. 15949 – 50.[8]/

Ultimately, DHS reaffirms its conclusion that the Safe Harbor Rule represents a reasonable approach to the use of no-match letters in immigration law enforcement.

> DHS has consistently stated that an SSA no-match letter, standing alone, does not conclusively establish that any employee identified in the letter is an unauthorized alien. Nor does an employer's receipt of, and response to, an SSA no-match letter always prove that the employer had constructive knowledge that any listed employees were unauthorized to work in the United States. Rather, this rulemaking announces DHS's view that a no-match letter, and an employer's response to it, may be used as evidence, evaluated in light of "the totality of the circumstances," of an employer's constructive knowledge.

73 Fed. Reg. at 63851-52. This position, even if viewed as a departure from prior informal DHS statements, is supported by a "reasoned analysis for the change," Motor Vehicle Mfgs. Ass'n., supra, 463 U.S. at 42, and hence the Safe Harbor Rule is not arbitrary and capricious or otherwise in violation of the APA.

B. The Supplemental Final Rule Removes Any Reference to the Anti-Discrimination Provisions of the IRCA

In the preamble accompanying the final rule published on August 15, 2007, DHS stated that:

> employers who follow the safe harbor procedures set forth in this rule uniformly and without regard to perceived national origin or citizenship status as required by the provisions of 274B(a)(6) of the INA will not be found to have engaged in unlawful discrimination.

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[8]/ DHS recognized that its pre-existing regulations on constructive knowledge, 8 C.F.R. § 274a.1(l), standing alone, were not sufficient to address the problem of employer uncertainty, as they "provided no detailed guidance" to employers on how to respond to no-match letters, 73 Fed. Reg. at 63846, and certainly "do not substantially deter employers from retaining or hiring undocumented immigrants." Id at 63845, quoting Mehta, et al., supra; see A.R. at 314. DHS explicitly recognized that "many law-abiding employers are unsure of their obligations under current immigration law after they receive a no-match letter." 73 Fed. Reg. at 63845.

72 Fed. Reg. at 45613-14. The DHS insert to accompany SSA's no-match letters contained a similar statement. However, the text of the Safe Harbor Rule itself did not address this question.

Enforcement of the anti-discrimination provisions of the IRCA is the responsibility of the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("Special Counsel") within DOJ. In its October 10, 2007 Order, the Court concluded that this statement by DHS appears to constitute an official determination as to employer liability under IRCA's anti-discrimination provisions. Consequently, the Court concluded that "[t]here is therefore a serious question whether DHS has impermissibly exceeded its authority and encroached on the authority of the Special Counsel by interpreting IRCA's anti-discrimination provisions to preclude enforcement where employers follow the safe-harbor framework." AFL, supra, 552 F.Supp. 2d at 1011.

In the Supplemental Final Rule, DHS expressly recognized the jurisdiction of DOJ over enforcement of the anti-discrimination provisions of IRCA and affirmed that "DHS does not have the authority to obligate the DOJ or its Office of Special Counsel . . ." 73 Fed. Reg. at 68849. To address the Court's concerns on this point, "DHS rescinds the statements in the preamble of the August 2007 Final Rule discussing the potential for anti-discrimination liability faced by employers that follow the safe harbor procedures set forth in the August 2007 Final Rule." 73 Fed. Reg. at 63849. DHS has also made a conforming change to the insert to accompany SSA's no-match letters, referring employers to the guidance issued by the Department of Justice and eliminating any statements that could be construed as an attempt by DHS to interpret the anti-discrimination provisions of the INA. See Supp. A.R. at 3803. Thus, the clarification of this point in the preamble of the Supplemental Final Rule fully addresses this Court's concerns, rendering this issue moot.

C. DHS Has Performed a Regulatory Flexibility Analysis of the Safe Harbor Rule

The third and final basis for entry of the preliminary injunction was the failure of DHS to perform an analysis of the Safe Harbor Rule under the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. ("RFA"). DHS did not perform a regulatory flexibility analysis because the Secretary certified that the rule will not "have a significant economic impact on a substantial number of small entities," pursuant to 5 U.S.C. § 605(b). The Court concluded that while the rule does not mandate compliance, the practical effect of noncompliance will be to "subject employers to the threat of civil and criminal liability," AFL, supra, 552 F.Supp. 2d at 1013, and therefore "there are serious questions whether DHS violated the RFA by refusing to conduct a final flexibility analysis," id.

DHS has elected to perform a regulatory flexibility analysis in order to address the Court's concerns. The "Final Regulatory Flexibility Analysis" contained in the Supplemental Final Rule, as supplemented by the "Final Small Entity Impact Analysis," published with the Supplemental Final Rule, Supp. A.R. at 3666-3802, provides a detailed and comprehensive analysis of the possible economic impact of the Safe Harbor Rule on small entities, in full satisfaction of the RFA's requirements.

The RFA requires that both the Initial Regulatory Flexibility Analysis and the Final Regulatory Flexibility Analysis contain five components. The five components required for the final analysis are:

(1) "a succinct statement of the need for, and objectives of, the rule;"

(2) "a summary of the significant issues raised by the public comments," as well as the agency's assessment of those comments and any changes made as a result;

(3) "an estimate of the number of small entities to which the rule will apply;"

(4) "a description of the projected reporting, record keeping and other compliance requirements of the rule" as well as an estimate of the small entities that will be affected by these requirements;

(5) "a description of the steps the agency has taken to minimize" impacts on small entities as well as the reasons for selecting the alternative adopted and rejecting the other significant alternatives.

5 U.S.C. § 604(a)(1) – (5). See also 5 U.S.C. § 603(b) (similar requirements for Initial Regulatory Flexibility Analysis).

Both the preamble of the Supplemental Final Rule as well as the "Small Entity Impact Analysis" itself, address each of these five categories of information and analysis. See 73 Fed. Reg. at 63861– 63866; Supp. A.R. 3666-3802. The Small Entity Impact Analysis contains estimates of all areas where a small entity could reasonably be expected to incur direct costs due to the rulemaking. Cost areas analyzed include increased human resources costs, turnover and replacement cost of authorized employees, lost productivity, and even an estimate of the costs of printing and postage. The analysis also contains several Appendixes that explain how the calculations were derived, making the computations as transparent and reproducible as possible.

The Ninth Circuit has held that "[t]he RFA imposes no substantive requirements on an agency; rather its requirements are 'purely procedural' in nature." Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric., 415 F.3d 1078, 1101 (9th Cir. 2005), quoting United States Cellular Corp. v. FCC, 254 F.3d 78, 88 (D.C. Cir. 2001). To satisfy the RFA, an agency must demonstrate a "reasonable, good-faith effort" to fulfill its requirements, id., and it needs not evaluate every alternative solution, but only the significant ones. Id. at 1102 (internal citations omitted).

Because the RFA is purely procedural in nature, it does not provide plaintiffs grounds to attack an agency's choice among regulatory alternatives, including an agency's "failure" to

choose an alternative preferred by plaintiffs. See National Coalition for Marine Conservation, 231 F. Supp. 2d. 119, 143 (D.D.C. 2002) (stating that "the RFA does not give plaintiff the authority to determine which alternative best meets the agency's goals."). Again, this Circuit has affirmed that "the analyses required by the RFA are essentially procedural hurdles; after consideration of the relevant impacts and alternatives, an administrative agency remains free to regulate as it sees fit." Environmental Defense Center v. EPA, 344 F.3d 832, 879 (9th Cir. 2003). Other circuits have also recognized that the RFA's requirements are purely procedural. See e.g. Aeronautical Repair Station Ass'n v. FAA, 494 F.3d 161 169 (D.C. Cir. 2007) ("If the FAA properly follows the procedure [under the RFA] in its rulemaking . . . it discharges its responsibility in this regard."); Little Bay Lobster Co. v. Evans, 352 F.3d 462, 471 (1st Cir. 2003) (holding that the RFA creates only procedural obligations upon an agency "simply to make a reasonable good faith effort to address comments and alternatives"); Alenco Commc'ns, Inc. v. FCC, 201 F.3d 608, 625 (5th Cir. 2000) ("The RFA is a procedural rather than substantive agency mandate."). DHS has undeniably made a good faith effort to comply with the procedural obligations under the RFA, and indeed has produced an exceptionally detailed and comprehensive analysis. This issue too has become moot.

CONCLUSION

Wherefore, as the Supplemental Final Rule has addressed the Court's three grounds for preliminarily enjoining the Safe Harbor Rule, the Court should grant defendants' motions and:

(1) vacate the Preliminary Injunction; and (2) enter Summary Judgment for defendants on plaintiffs' challenges to the Safe Harbor Rule.

DATED: November 6, 2008

Respectfully submitted,

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