UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF MANUFACTURERS, Plaintiff, v. NATIONAL LABOR RELATIONS BOARD, *et al.*, Defendants.	)	Civil Action No. 11-1629 (ABJ)

MEMORANDUM OPINION AND ORDER

This matter is before the Court because several plaintiffs have attempted to shoehorn a challenge to the President's recent recess appointments into a pending APA case about the validity of a rule issued by the National Labor Relations Board ("NLRB" or "Board"). Plaintiffs National Right to Work Legal Defense and Education Foundation, Inc. ("NRTW"), Coalition for a Democratic Workplace, National Federation of Independent Business, Southeast Sealing, Inc. and Racquetball Centers, Inc. ("Plaintiffs") have moved for leave to supplement and/or further amend their complaints in order to request an Order from this Court declaring that the Board no longer has authority to implement or enforce the rule at issue in this case [Dkt. # 47].[1] But the rule was promulgated by a quorum of undisputedly duly authorized members well before the recess appointments were announced, and it is set to go into effect automatically on April 30,

1 The motion is titled "Motion of Certain Co-Plaintiffs for Leave to Supplement their Complaints and Objection to Substitution of Defendants" ("Pls.' Mot."), but the text of the motion characterizes the relief sought as both leave to supplement and leave to amend. Pls.' Mot. at 1.

2012. Plaintiffs filed their motion after the hearing on the merits in this case had already been held, and the dispositive motions had been taken under advisement. The Court declines this invitation to take up a political dispute that is not before it, and the motion will be denied.

STANDARD OF REVIEW

According to Fed. R. Civ. P. 15(a)(2), the Court should "freely give leave" to amend before trial, "when justice so requires." But a decision to grant leave to file an amended complaint is not automatic. The Court may assess the proposed new pleading to determine whether the amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962). And according to Fed. R. Civ. P. 15(d), on motion and reasonable notice, the court may "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." Motions to amend and motions to supplement are subject to the same standard. *See Wildearth Guardians v. Kampthorne*, 592 F. Supp. 2d 18, 23 (D.D.C. 2008), citing *Armstrong v. Bush*, 807 F. Supp. 816, 818–19 (D.D.C. 1992), *Glatt v. Chicago Park District*, 87 F.3d 190, 194 (7th Cir. 1996).

A court does not abuse its discretion if it denies leave to amend or supplement based on futility. *See, e.g.*, *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996) (agreeing with the district court that an amendment was futile when the facts alleged in the complaint "establish[ed] beyond doubt that the Government did not violate [plaintiff's] due process rights"); *Ross v. DynCorp*, 362 F. Supp. 2d 344, 364 n.11 (D.D.C. 2005) ("While a court is instructed by the Federal Rules of Civil Procedure to grant leave to amend a complaint 'freely,' it need not do so where the only result would be to waste time and judicial resources. Such is the case where the Court determines, in advance, that the claim that a plaintiff plans to add to his or her complaint must fail, as a matter of law . . . ."); *M.K. v. Tenet*, 216 F.R.D. 133, 137 (D.D.C.

2002) ("A court may deny a motion to amend the complaint as futile when the proposed complaint would not survive a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss."); *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 132 (2d Cir. 1993) (holding that leave to amend was properly denied on futility grounds since new pleading failed to allege any additional significant facts). *See also* 3 *Moore's Federal Practice*, § 15.15[3] (Matthew Bender 3d ed.) ("An amendment is futile if it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss.").

ANALYSIS

Defendants oppose the motion because it seeks to challenge recess appointments made after the rule challenged in this case was already promulgated, and after the effective date of the rule was extended twice by an undisputedly valid quorum of the Board. Def.s' Opp. to Mot. of Certain Co-Pls. for Leave to Supplement their Compls. ("Def.s' Opp.") [Dkt. # 52] at 5–7. The Court agrees that the validity of the recess appointments has absolutely no bearing on any of the issues that are ripe for decision in this case. *See Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 459 (D.C. Cir. 1967) (finding an order of the Civil Aeronautics Board valid where each of the members of the Board "was still a qualified member of the Board when its deliberative process was completed on this case," despite the fact that the chairman resigned between the time that the order was signed and the time it became effective). Defendants suggest that the amendment would be futile; since any injuries that plaintiffs might suffer as a result of this Board's by future enforcement of the rule are entirely speculative at this point, plaintiffs lack standing to raise claims based on them. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (to confer standing, the injury claimed must be "concrete and

particularized, . . . actual or imminent, [and] not conjectural or hypothetical.") (internal citations and quotation marks omitted).

Furthermore, as plaintiffs themselves have insisted throughout this litigation, the Board is not the body that exercises enforcement authority under the NLRA anyway. *See* Mem. of Points and Authorities in Support of Pls' Mot. for Summ. J. ("Pl.'s Mem.") [Dkt. # 20] at 9–12. Enforcement is initiated by a regional director, exercising authority delegated by the Acting General Counsel under 29 U.S.C. § 153(d). ("[The General Counsel] shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . , and in respect of the prosecution of such complaints before the Board . . . ."). The regional director will investigate any charges filed by individuals who allege that an employer has failed to post the notices. If the regional director determines that the charge has merit, he may file an administrative complaint. Only then would the Board get involved – by adjudicating the claims described in the complaint. *See* 29 CFR § 104.212. So the question of whether the new Board members can lawfully adjudicate an action that may be brought by a representative of the General Counsel in the future is not ripe. Neither the Court nor the parties know if and when the General Counsel will initiate enforcement actions pursuant to the rule, and we do not know whether the Board will be comprised of recess appointees at that time. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotation marks omitted).

The Court also questions whether the fact that the individual members of the Board have changed has any significance at all to the posture of this case. Plaintiffs have named the Board members as defendants in their official capacities only, and they have also named the Board as a

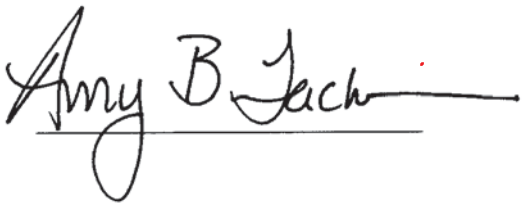
defendant. In other contexts, the D.C. Circuit has held that a claim against government officials in their official capacities essentially merges with their claim against the government entity they represent. *See Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995) ("Because Long cannot be held liable in his personal capacity, [but only as the agent of his government employer,] however, Gary's claim against him essentially merges with her claim against WMATA[, the government employer]"); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) ("[B]ecause the suit against Cannon could proceed only in his official capacity, it operated as a suit against Salt Lake County itself . . . and the County was timely named as a defendant.") (internal citations omitted). In this case, the claim is essentially a claim against the Board, and the officials are sued only as agents of the Board. So whether the names of the agents change is immaterial to the outcome of the case because it is operating as a suit against the Board.

Finally, the rules contemplate that amendment will be freely permitted before trial, but in this case, what trial there is going to be has already taken place. Plaintiffs initially filed a motion for a preliminary injunction ("PI") because of the strict timeline imposed by the impending effective date of the rule, but the effective date has been postponed, allowing the merits of the case to be fully adjudicated, and rendering the PI motion moot. *See* Minute Order October 5, 2011. The Court has already held a hearing on the merits, and the claims have been taken under advisement. Adding an entirely new issue to this case, which would require full briefing and oral argument, would cause undue delay in resolving the merits of the original claims, and be prejudicial to defendants who have already postponed the effective date of the rule twice. *See Hall v. CIA*, 437 F.3d 94, 101 (D.C. Cir. 2006) ("Delay and prejudice are precisely the matters to be addressed in considering whether to grant motions for supplemental pleadings . . . ."). This is

particularly true given the Court's finding that resolution of the new claim is not essential, or even relevant, to resolving the merits of the original claims.

CONCLUSION

Because the Court finds that plaintiffs' proposed supplement would be futile and would cause undue delay and prejudice, it is ORDERED that the Motion of Certain Co-Plaintiffs for Leave to Supplement their Complaints and Objection to Substitution of Defendants [Dkt. # 47] is DENIED.



AMY BERMAN JACKSON
United States District Judge

DATE: March 2, 2012