

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**CLEAN AIR COUNCIL,
et al.,**

Plaintiffs,

v.

**UNITED STATES OF AMERICA,
et al.,**

Defendants.

Case No. 2:17-cv-04977-PD

**THE UNITED STATES' MOTION TO STRIKE AND OPPOSITION
TO REQUEST FOR A STATUS CONFERENCE**

The United States hereby moves to strike Plaintiffs' Notice of Supplemental Authority. ECF No. 41. The United States also opposes Plaintiffs' request for a status conference (ECF No. 41) as improper given that the United States' motion to dismiss is pending. ECF Nos. 18 & 31. The bases for this motion are more fully set forth in the accompanying Memorandum of Law.

Respectfully submitted this 18th day of December, 2018.

JEAN E. WILLIAMS
Deputy Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

/S/ Marissa Piropato

MARISSA A. PIROPATO
Trial Attorney, Massachusetts Bar No. 651630
SEAN C. DUFFY
Trial Attorney, New York Bar No. 4103131

U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Tel | (202) 305-0470
Fax | (203) 305-0506

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**CLEAN AIR COUNCIL,
et al.,**

Plaintiffs,

v.

**UNITED STATES OF AMERICA,
et al.,**

Defendants.

Case No. 2:17-cv-04977-PD

The United States moves to strike Plaintiffs' purported Notice of Supplemental Authority (ECF No. 41) because it does not actually identify supplemental legal authority. Fed. R. Civ. P. 12(f). Instead, it sets out occurrences and events relating to climate change that happened after the date of Plaintiffs' Complaint, and it attempts to bolster arguments in Plaintiffs' opposition brief to the United States' Motion to Dismiss. As such, it is wholly improper. Plaintiffs may not file a supplemental pleading or supplemental brief without leave of court. Nor may Plaintiffs avoid seeking leave of the Court by filing such a document under

the pretense of a “notice of supplemental authority.” Finally, to the extent that Plaintiffs request a “status conference.” (ECF No. 41), such a request is improper while the United States’ Motion to Dismiss is pending. (ECF Nos. 18 & 31).

BACKGROUND

On December 5, Plaintiffs filed a Notice of Supplemental Authority accompanied by a request for a status conference. The December 5 Notice cites no precedent or legal authority but rather references the United States’ Global Change Research Program’s Volume II, Fourth National Climate Assessment (“Climate Assessment”), and the President’s purported response to the Climate Assessment. Notice, ECF No. 41 at 2-3. The December 5 Notice also cites news articles characterizing the Climate Assessment as well as the United States’ purported position at the 2018 G20 Summit. *Id.* at 3-4. Finally, the December 5 Notice requests a status conference “at the Court’s earliest convenience” and that the Court set a trial date during the status conference. *Id.*

ARGUMENT

This Court should strike Plaintiffs’ December 5 Notice on two grounds: (1) it is a supplemental pleading and Plaintiffs did not move for leave to file such a pleading as required by Rule 15(d) of the Federal Rules of Civil Procedure; and (2) the Notice improperly and belatedly sets forth arguments to bolster Plaintiffs’ fully-briefed opposition brief to the United States’ motion to dismiss.

First, Plaintiffs may not supplement their complaint without leave of court. Rule 15 governs amendments and supplementation of pleadings. Fed. R. Civ. P. 15. A District Court may permit a party to file 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); *see also Crosby v. Piazza*, 465 F. App'x 168, 174 (3d Cir. 2012). However, Rule 15(d) provides that a party may only do so “[o]n motion and reasonable notice. . . .” Fed. R. Civ. P. 15(d) (emphasis added).

Because Plaintiffs’ Notice sets forth events and occurrences that occurred after the date of Plaintiffs’ complaint—namely, the release of the Climate Assessment, and the publication of particular news articles and studies—it constitutes a supplemental pleading under Rule 15(d). The purpose of the Notice is not to alert the Court to new legal authority; it is to provide the Court with additional “facts” that Plaintiffs allege support their claims. *See Hankin Family P’ship v. Upper Merion Twp.*, No. CIV.A. 01-1622, 2012 WL 43599, at *9 (E.D. Pa. Jan. 6, 2012) (“Rule 15(d) applies when a party seeks to file a supplemental pleading to include facts that occurred after the filing of the initial complaint.”). As Plaintiffs did not request leave to file a supplemental pleading, it fails to conform with Fed. R. Civ. P. 15(d), and the Court should strike it. *See Derrick v. Wetzel*, No. 14-165, 2017 U.S. Dist. LEXIS 75175, at *5 (W.D. Pa. May 16, 2017);

Wallace v. Fed. Emps. of United States Dist. Court, 2008 U.S. Dist. LEXIS 34426, at *18 (E.D. Pa. Apr. 23, 2008).

Second, Plaintiffs' Notice explicitly attempts to bolster their fully-briefed opposition to the United States' Motion to Dismiss. *See* December 5 Notice, ECF No. 41 at 4 (advocating for immediate action to enjoin the United States, and to set a trial date, in light of "continued violation of Plaintiffs' due process rights"). Plaintiffs therefore incorrectly captioned their filing as a "Notice" when in fact it is a new brief making new arguments based on alleged new facts. *See Atkins v. Capri Training Ctr., Inc.*, No. 2:13-CV-06820 SDW, 2014 WL 4930906, at *10 (D.N.J. Oct. 1, 2014) ("[A] Notice of Supplemental Authority should not advance new arguments that were absent from the movant's complaint."). Plaintiffs' supplemental filing is therefore inconsistent with the Local Rules and this Court's Standing Order, which collectively set forth when briefs must be filed and how many pages they may be without leave of court. *See, e.g.*, L.R. 7.1; Standing Order VI (A) (limiting briefs to 25 pages); VI (B) (limiting the time for sur-replies to 7-days after the filing of reply brief). Because Plaintiffs did not seek leave of this Court to file a sur-reply brief out of time, the Notice is untimely and should be struck. *See Davis v. Corizon Health, Inc.*, No. 14-1490, 2015 WL 518263, *10 n.1 (E.D. Pa. Feb. 9, 2015) (admonishing plaintiffs' counsel "about filing replies without leave" and refusing to consider "surreply or supplemental briefing" on

motion to dismiss where plaintiff did not seek leave to file); *Guffey v. A.W. Chesterton Co.*, 2012 WL 5395035 (E.D. Pa. Aug. 28, 2012) (refusing to consider untimely supplemental brief filed without leave of court).¹

Finally, Plaintiffs' request for a status conference is also improper. The United States' motion to dismiss is pending. ECF Nos. 18 & 31. Until the Court assures itself of its jurisdiction, Plaintiffs' request for a status conference and a trial date is improper. To the extent that Plaintiffs believe oral argument would be useful for the pending motion to dismiss, they should request a motion hearing, not a court conference. The United States, however, believes that such a hearing is only appropriate if it would assist the Court. In all events, Plaintiffs' request for a status conference—and that a trial date be set at the conference—shows that their Notice is an improper attempt to present new facts and new arguments to the Court.

¹ This is the third time Plaintiffs have improperly filed such a notice. On October 16, 2018 and November 21, 2018, Plaintiffs filed two "Notice[s] of Supplemental Authority" that suffer the same defects outlined in this brief. ECF Nos. 39 & 41. The United States does not seek to strike those two notices here because Rule 12(f)(2) of the Federal Rules of Civil Procedure requires that any motion to strike be made within 21 days of service of the pleading. The Court, however, may strike the earlier two Notices "on its own," regardless of whether it interprets them as improper supplemental complaints or unauthorized sur-replies. F. R. Civ. P. 12(f)(1).

CONCLUSION

For the foregoing reasons, the United States asks this Court to strike Plaintiffs' Notice of Supplemental Authority and Request for Status Conference (ECF No. 41). Plaintiffs should not be allowed to supplement their briefs and pleadings without leave of the Court, as required by the Federal and local rules, by misleadingly styling such document as a "Notice of Supplemental Authority." Finally, the United States respectfully requests that the Court deny Plaintiffs' request for a status conference.

Respectfully submitted this 18th day of December, 2018.

JEAN E. WILLIAMS
Deputy Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

/S/ Marissa Piropato
MARISSA A. PIROPATO
Trial Attorney, Massachusetts Bar No. 651630
SEAN C. DUFFY
Trial Attorney, New York Bar No. 4103131

U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Tel | (202) 305-0470
Fax | (203) 305-0506

CERTIFICATE OF SERVICE

I, Marissa Piropato, hereby certify that, on December 18, 2018, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

Dated: December 18, 2018 /s/*Marissa Piropato*
Marissa Piropato