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9 UNITED STATES DISTRICT COURT

10 DISTRICT OF ARIZONA

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12 Arizona Court Security Officers
 Association, Inc., Frank Lagano,
 13 and all other similarly situated
 employees and former employees of
 AKAL Security, Inc.,

14 Plaintiffs,

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16 v.

17 United States Department of Labor,
 Elaine L. Chao,

18 Defendants.

CIV-08-00699-PHX-NVW

**DEFENDANTS' MEMORANDUM
 OF POINTS AND AUTHORITIES IN
 SUPPORT OF MOTION TO
 DISMISS**

INTRODUCTION

21 According to the allegations of plaintiffs' ten page complaint, plaintiff Arizona Court
 22 Security Officers Association, Inc. ("AZCSOA") is an Arizona corporation and labor union
 23 which serves as the exclusive bargaining representative for all Arizona employees of AKAL, a
 24 New Mexico corporation. Plaintiff Frank Lagano is the president of AZCSOA and an employee
 25 of AKAL. AKAL provides court security offices for various federal district courts within the
 26 State of Arizona pursuant to a contract with the United States Marshals Service. *See* 28 U.S.C.
 27 § 604(a)(22). The individual plaintiffs are or were court security officers employed by AKAL
 28 in Arizona under the contract.

1 AKAL, as a successor contractor in 2001, assumed an existing collective bargaining
2 agreement (“CBA”) between a predecessor contractor and a predecessor labor union when it
3 took over the existing contract between the Marshals Service and United International
4 Investigative Services (“UIIS”). A new CBA was then entered into with the Arizona court
5 security officers’ then union, Arizona Local of FOPSCO. That new CBA, however, provided
6 for health and welfare benefits at a per hour rate lower than the rate paid under the previous
7 CBA. According to plaintiffs, the prior CBA was a valid contract, a material term of which
8 required that the Arizona court security officer plaintiffs be paid health and welfare benefits at
9 a higher rate than AKAL has been paying.

10 Plaintiffs caused a complaint to be filed with the Department of Labor, alleging that
11 AKAL was underpaying health and welfare benefits in violation of the McNamara-O’Hara
12 Service Contract Act of 1965, as amended, 42 U.S.C. §§ 351 *et seq.*(hereinafter “SCA”) and the
13 Department’s regulations thereunder at 29 C.F.R. Part 4. Complaint ¶¶ 20-21. Although DOL’s
14 assigned investigator determined that plaintiffs’ administrative complaint was substantiated and
15 recommended further DOL action on the complaint (Complaint, ¶¶ 27-28), upon review, the
16 investigator’s recommendations were not adopted by the Department. Subsequently, plaintiffs
17 filed a 29 C.F.R. § 4.11 Request for Determination with the Department’s Administrator of the
18 Wage and Hour Division. Complaint ¶ 33. As of the filing of their complaint, plaintiffs had
19 received no response to their request to the Wage and Hour Division. ¹ Complaint, ¶ 34.

20 For relief, plaintiffs seek an order of mandamus against defendants requiring them to take
21 “every necessary action to retroactively include the health & welfare benefit rate of \$2.69 per
22 the UIIS 1999 CBA in Contracts MS-011-D-002 and MS-005-D-002.” Complaint, p. 9.

23 Plaintiffs premise this Court’s “jurisdiction over this matter pursuant to 28 U.S.C.
24 § 1361”. Complaint, ¶ 6.

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27 ¹ Post-complaint, the Wage and Hour Division did respond by letter dated May 20, 2008,
28 concluding therein that no SCA violation was found and that the request for a Section 4.11
determination was untimely.

1 Plaintiffs Have Not Identified A Waiver of the United States’ Sovereign Immunity.

2 At the outset, some basic principles of federal court jurisdiction are necessary. First,
3 federal courts are courts of limited jurisdiction, possessing only that power granted to them by
4 the Constitution and Congress. *In re Hunter*, 66 F.3d 1002, 1005 (9th Cir. 1995). Second, given
5 that limitation, federal courts are presumed to lack jurisdiction unless the contrary affirmatively
6 appears from the record. *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.*,
7 256 F.3d 879, 882 (9th Cir. 2001). Third, plaintiffs, as the parties invoking this Court’s
8 jurisdiction, have the burden of establishing the Court’s subject matter jurisdiction.² *Kokkonen*
9 *v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1995); *Thompson v. McCombe*, 99 F.3d 352, 353
10 (9th Cir. 1996). To establish this Court’s jurisdiction, plaintiffs must demonstrate a waiver of the
11 United States’ sovereign immunity.³ *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (sovereign
12 immunity is jurisdictional).

13 The sole jurisdictional basis proffered by plaintiffs for this Court’s exercise of jurisdiction
14 to grant their requested relief against defendants is 28 U.S.C. § 1361, the Mandamus and Venue
15 Act of 1968. Simply stated, Section 1361 does not waive the United States’ sovereign immunity.
16 *Pit River Home And Agricultural Cooperative Ass’n v. United States*, 30 F.3d 1088, 1098 n.5
17 (9th Cir. 1994); *Smith v. Grimm*, 534 F.2d 1346, 1352 n.9 (9th Cir. 1976).

18 Because plaintiffs’ proffer of their statutory basis for this Court’s exercise of subject
19 matter jurisdiction to entertain their claims for relief against the defendants fails to establish a
20 waiver of the defendants’ sovereign immunity from suit, this action as to the Department of
21 Labor and its Secretary cannot proceed; “the only function remaining to the court is that of
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24 ² Jurisdiction is the first consideration in all cases. *Mansfield, Coldwater & Lake*
25 *Michigan Ry v. Swan*, 111 U.S. 379 (1884).

26 ³ Plaintiffs have sued the United States Department of Labor and its Secretary. As an
27 agency of the United States, the sovereign immunity bar to actions against the United States
28 applies to actions against the Department of Labor and its Secretary acting in her official
capacity. *Hodge v. Dalton*, 107 F.3d 705, 707 (9th Cir. 1997); *Gerritsen v. Consulado General*
De Mexico, 989 F.2d 340, 343 (9th Cir. 1993); *Singer v. Schweiker*, 694 F.2d 616, 617 (9th Cir.
1982).

1 announcing the fact and dismissing the case.”⁴ *Environmental Protection Information Center,*
2 *Inc. v. Pacific Lumber Co.*, 257 F.3d 1071, 1077 (9th Cir. 2001) (quoting *Steel Co. v. Citizens for*
3 *a Better Env’t*, 523 U.S. 83, 94 (1998)).

4 Plaintiffs’ Claims Do Not Support Issuance of Writ of Mandamus⁵

5 As the Ninth Circuit has explained, the remedy of mandamus is appropriate only if “(1)
6 the plaintiff’s claim is clear and certain; (2) the defendant official’s duty to act is ministerial, and
7 so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available.”
8 *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994) (internal quotations omitted). In this case,
9 the second requirement is dispositive: the Secretary may not be compelled by mandamus to
10 reach a determination favorable to the plaintiff. Even if the Department had agreed with its
11 investigator that AKAL was in violation of the Act, the Secretary has no clearly defined or
12 specific duty under the SCA to enforce violations of the 4(c) predecessor contract requirement.

13 The SCA authorizes the Secretary of Labor to enforce the payment of prevailing wages
14 and fringe benefits against government contractors. *See* 41 U.S.C. § 353(a). However, that
15 enforcement may not be required by mandamus. The Supreme Court “has recognized on several
16 occasions over many years that an agency’s decision not to prosecute or enforce, whether
17 through civil or criminal process, is a decision generally committed to an agency’s absolute
18 discretion.” *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (citations omitted) (case brought by
19 prison inmates to compel the Food and Drug Administration to take enforcement action with
20 respect to the drugs used in lethal injections to carry out the death penalty). As the Court stated:

21 [A]n agency decision not to enforce often involves a complicated
22 balancing of a number of factors which are peculiarly within its
23 expertise. Thus, the agency must not only assess whether a
violation has occurred, but whether agency resources are best spent

24 ⁴ Given plaintiffs’ burden to establish this Court’s jurisdiction as to their claims against
25 the Department of Labor and its Secretary, and because plaintiffs are the master of the
26 jurisdictional bases they proffer in their complaint, this Court’s jurisdiction may not be sustained
27 on any theory that plaintiffs have not advanced. *Balser v. Dep’t of Justice, Office of the United*
States Trustee, 327 F.3d 903, 908 (9th Cir. 2003); *Easton v. Crossland Mort. Corp.*, 114 F.3d
979, 982 (9th Cir. 1997).

28 ⁵ Even if the Court had jurisdiction, the complaint would fail under Rule 12(b)(6),
Fed. R. Civ. P.

1 on this violation or another, whether the agency is likely to succeed
2 if it acts, whether the particular enforcement action requested best
3 fits the agency's overall policies, and, indeed, whether the agency
4 has enough resources to undertake the action at all. An agency
5 generally cannot act against each technical violation of the statute
6 it is charged with enforcing. The agency is far better equipped than
7 the courts to deal with the many variables involved in the proper
8 ordering of its priorities.

9 *Id.*

10 Of course, agency discretion can be limited. "[T]here may well exist statutory or
11 regulatory standards delimiting the scope or manner in which such discretion can be exercised.
12 In these situations, mandamus will lie when the standards have been ignored or violated."
13 *Barton v. Reich*, 13 F.3d 1370, 1376 (1994) (finding that any duty the Secretary had to
14 investigate an alleged underpayment beyond the two-year limit employed by the Administrator
15 was discretionary, not ministerial). As the Ninth Circuit concluded, however, nothing in the
16 SCA "imposes a duty on the Secretary of Labor to investigate every claim of alleged
17 underpayment which is made by an employee, or to take an employer to task every time a
18 violation is found." *Id.* at 1375; *see Daniels v. Dole*, 746 F. Supp. 160, 168 (D.D.C. 1990),
19 *aff'd*, 946 F.2d 1564 (D.C. Cir. 1991) (mem.) (finding that the Secretary does not have "a clearly
20 defined or specific duty under the SCA to ...institute enforcement proceedings in every case");
21 *accord District Lodge No. 166, International Association of Machinists And Aerospace Workers*
22 *v. TWA Services, Inc.*, 731 F.2d 711, 717-18 (11th Cir. 1984). Furthermore, the applicable
23 Department of Labor regulation reinforces the discretionary nature of SCA enforcement actions.
24 It provides only that "[e]nforcement proceedings under the Service Contract Act...*may* be
25 instituted by the Associate Solicitor for Fair Labor Standards or a Regional Solicitor..."
26 29 C.F.R. 6.15(a) (emphasis added).⁶

26 ⁶ Given that the Secretary had no duty to investigate Plaintiff's claim or to institute
27 enforcement proceedings against AKAL, it follows that the Secretary had no duty to follow the
28 recommendation of the initial investigator. There is nothing in the Act or the Secretary's
regulations prohibiting the Department from reviewing the investigator's report and
recommendations and reaching a different conclusion.

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Conclusion

Because the jurisdictional basis cited by plaintiffs in their complaint for this Court to entertain their claims for relief against the Department of Labor and its Secretary does not waive movants' sovereign immunity from suit, this action should be dismissed for lack of jurisdiction.

Respectfully submitted this 21st day of July, 2008.

DIANE J. HUMETEWA
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District of Arizona

s/Richard G. Patrick

RICHARD G. PATRICK
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

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I hereby certify that on July 21, 2008, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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