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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THOMAS E. PEREZ, SECRETARY OF
LABOR, UNITED STATES
DEPARTMENT OF LABOR,

Plaintiff,

v.

GUARDIAN ROOFING, MATTHEW
SWANSON, LORI SWANSON, and
AARON SANTAS,

Defendants.

CASE NO. 3:15-cv-05623-RJB

ORDER ON PLAINTIFF'S MOTION
TO DISMISS DEFENDANT'S
AMENDED COUNTERCLAIM

THIS MATTER comes before the Court on Plaintiff United States Department of Labor's Motion to Dismiss Defendant's Amended Counterclaim. Dkt. 37. The motion is brought under the authority of Federal Rule of Civil Procedure 12(b)(1), challenging this Court's jurisdiction over the subject matter of the Amended Counterclaim. The Court has considered the motion, the Defendant Guardian Roofing's Response, DOL's Reply, DOL's Complaint, Guardian's Counterclaims, Guardian's Amended Counterclaim, and the remainder of the file herein. Dkts. 1, 30, 45, 47.

1 the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of
2 the sovereign.” *Quarty v. United States*, 170 F.3d 961, 972 (9th Cir. 1999)(quoting *Lane v.*
3 *Pena*, 518 U.S. 187, 192 (1996)). “The question [of] whether the United States has waived its
4 sovereign immunity . . . is . . . a question of subject matter jurisdiction,” *McCarthy v. United*
5 *States*, 850 F.2d 558, 560 (9th Cir. 1988), so if the United States has not waived its sovereign
6 immunity, the court lacks subject matter jurisdiction. The waiver of sovereign immunity at issue
7 in this case is 5 U.S.C. § 704 of the Administrative Procedure Act, which grants courts subject
8 matter jurisdiction to review “final agency action for which there is no other adequate remedy in
9 a court.”

10 **a. Final agency action.**

11 Identifying an “agency action” is “limited to the specific categories defined by the APA.”
12 *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004). By statute, agency action
13 “includes the whole or a part of an agency of an agency rule, order, license, *sanction*, relief, or
14 the equivalent or denial thereof.” 5 U.S.C. § 551(13) (emphasis added). The APA defines
15 “sanction” to include the following agency actions:

- 16 (A) prohibition, requirement, limitation, or other condition affecting a person’s freedom;
- 17 (B) withholding of relief;
- 18 (C) imposition of a penalty or fine;
- 19 (D) destruction, taking, seizure, or withholding of property;
- 20 (E) assessment of damages, reimbursement, restitution, compensation, costs, charges or
21 fees;
- 22 (F) requirement, revocation, or suspension of a license; or
- 23 (G) taking other compulsory or restrictive action. § 551(10).

24 Whether an agency action is “final” depends on whether at least two conditions are met: “[f]irst,
the action must mark the ‘consummation’ of the agency’s decision-making process . . . it must
not be of a merely tentative or interlocutory nature. And second, the action must be one by which
‘rights or obligations have been determined,’ or from which ‘legal consequences flow.’” *Western*

1 | *Radio Services Co., Inc. v. Glickman*, 123 F.3d 1189, 1196 (9th Cir. 1997), quoting *Bennett v.*
2 | *Spear*, 520 U.S. 154, 177-78 (1997).

3 | Guardian does not clearly identify DOL’s final agency action. Based on Guardian’s
4 | Response, it appears that Guardian alleges that the final agency action was the “filing of the
5 | enforcement action[, which] was the culmination of a multi-year investigation of Guardian’s
6 | wage practices.” Dkt. 45, at 9. Guardian offers no authority for the proposition that filing a
7 | complaint in the U.S. District Court constitutes a final agency action. On the contrary,
8 | considering the Complaint DOL filed in this case, DOL arguably relinquishes its agency
9 | authority to assess a monetary penalty to this Court and the trier of fact.

10 | Alternatively, it appears that Guardian alleges that the final agency action was DOL’s
11 | “administrative findings and demands for correction [that placed Guardian] in the untenable
12 | position of accepting liability . . . or . . . defending against an enforcement action.” Dkt. 45, at 11.
13 | This argument lacks specificity. Nonetheless, when examining the Amended Counterclaim in
14 | light of this argument, the undersigned cannot identify specific allegations of administrative
15 | demands and findings sufficient to constitute an agency action under Section 551. The Amended
16 | Counterclaim describes DOL’s extended administrative investigation and the parties’ failed
17 | negotiations. Dkt. 30, at ¶¶12, 21, 22. While the Amended Counterclaim alleges that DOL
18 | “demanded payment” for unpaid wages and threatened litigation, *id.*, at ¶22, it is also alleged that
19 | in a letter from DOL to Guardian, DOL “*estimated* that Guardian Roofing owed its employees
20 | \$843,161.24.” *Id.*, at ¶18 (emphasis added). Estimating an amount owed is tentative, not final.
21 | DOL could have assessed a monetary penalty itself (29 C.F.R. § 578.3), requiring DOL to issue
22 | and serve written notice (§ 580.3) that could be appealed to an Administrative Law Judge and an
23 |
24 |

1 Administrative Review Board (§§ 580.5, 580.6, 580.18). Guardian does not allege such an
2 agency action occurred.

3 Rather than executing a final agency action itself, such as assessing a monetary penalty,
4 DOL apparently elected to give the Court and the trier of fact the responsibility to decide
5 whether Guardian violated FLSA, which is DOL's prerogative. At least as alleged in the
6 Amended Counterclaim, DOL did not engage in final agency action.

7 **b. Adequate remedy.**

8 Guardian argues that without the Amended Counterclaim, Guardian lacks an adequate
9 remedy to obtain a declaratory judgment that DOL's actions were "arbitrary, capricious, an
10 abuse of discretion, or contrary to law." Dkt. 45, at 13. Guardian also opines that if forced to
11 defend itself without its counterclaim, Guardian will have no control over the scope of DOL's
12 action, "which can be limited or voluntarily withdrawn as the case proceeds to trial." *Id.*, relying
13 on *Herman v. Excel Corp.*, 37 F.Supp.2d 1117, FN 6 (C.D.Ill.1999).

14 Guardian's arguments are unpersuasive. Although allowing Guardian to pursue its
15 Amended Counterclaim could change the tenor and parties' strategies for trial, denying the
16 Amended Counterclaim from proceeding does not deny Guardian an adequate remedy, because
17 the results will be the same as if the counterclaim had proceeded. Assuming Guardian prevailed
18 on its Amended Counterclaim and obtained a declaratory judgment that DOL acted arbitrarily
19 and capriciously, the results would be no different than if Guardian prevailed in defending
20 against DOL's claims and the Court found that DOL lacked substantial evidence. *Pac. Legal*
21 *Found. v. Dep't of Transp.*, 593 F.2d 1338, 1343, FN35 (D.C. Cir. 1979). In both cases, Guardian
22 has the opportunity to present evidence and make arguments concerning DOL's investigation
23 and enforcement action. And in both cases, Guardian will have the opportunity to argue that
24

1 DOL lacked substantial evidence, entitling Guardian to EAJA costs and fees. The outcome is the
2 same for Guardian under either scenario. Guardian has an adequate remedy.

3 Because Guardian has not sufficiently alleged a final agency action by DOL and
4 Guardian has an adequate remedy in its defenses and opportunity to present an EAJA claim, the
5 Amended Counterclaim should be dismissed for lack of subject matter jurisdiction. *Ukiah Valley*
6 *Medical Center v. F.T.C.*, 911 F.2d 261, 264, 266 (9th Cir. 1990).

7 ORDER

8 THEREFORE, the Defendant's Motion to Dismiss Plaintiff's Amended Counterclaim
9 (Dkt. 37) is GRANTED. The Amended Counterclaim is dismissed.

10 IT IS SO ORDERED.

11 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
12 to any party appearing *pro se* at said party's last known address.

13 Dated this 5th day of May, 2016.

14 

15 ROBERT J. BRYAN
16 United States District Judge