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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

GOLDEN GATE BRIDGE, HIGHWAY AND TRANSPORTATION DISTRICT, Plaintiff, v. UNITED STATES DEPARTMENT OF LABOR, et al. Defendants.	Case No. 3:24-cv-04985-RS **NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** Date: January 30, 2025 Time: 1:30 p.m. Place: Courtroom 3, 17th Floor The Honorable Richard Seeborg, Chief Judge

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on January 30, 2025 at 1:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 3, 17th Floor, of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, before the Honorable Richard Seeborg, United States Chief District Judge, Defendants United States Department of Labor; Julie A. Su in her official capacity as Acting Secretary of Labor; Occupational Safety and Health Administration; and Douglas L. Parker in his official capacity as Assistant Secretary of Labor for Occupational Safety will, and hereby do, move for an order dismissing the First Amended Complaint of Plaintiff Golden Gate Bridge, Highway and Transportation District for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). This motion is based on this Notice; the Memorandum of Points and Authorities submitted herewith; the pleadings, records, and files in this case; other matters of which the Court takes judicial notice; and such other written or oral argument and additional evidence as may be presented at or before the time the Court takes this motion under submission.

RELIEF REQUESTED

Defendants seek an order dismissing the First Amended Complaint with prejudice for lack of subject matter jurisdiction.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Golden Gate Bridge transportation district conceded that it failed to allege Article III standing in its original complaint by filing an amended complaint instead of opposing Defendants' first motion to dismiss. But Plaintiff's First Amended Complaint fares no better. It is evident that Plaintiff's only real injuries result from its dealings with contractors to improve and maintain the bridge. Those injuries—such as alleged construction delays or litigation settlements—are not "fairly traceable" to the federal Defendants here, both because they depend on the independent actions of third parties, and because the federal Defendants do not even exercise enforcement authority over Plaintiff, who is actually regulated by the California Division of Occupational Safety and Health (Cal/OSHA). Because Plaintiff still has not alleged standing, the case must be dismissed.

Moreover, Plaintiff has not even tried to correct its other jurisdictional deficiency: the

interpretive letter that Plaintiff seeks to challenge was not a "final agency action" subject to judicial review. It was a letter directed to a third party that answered a question in the abstract about how OSHA interprets a safety standard concerning scaffolding loads. It was informal, of a kind that OSHA issues dozens of times a year, with no legal significance in and of itself. Indeed, there is a separate OSHA enforcement regime by which the agency issues citations with legal consequences to noncompliant employers—but that is not what happened here. Because the interpretive letter was merely an "informational document" without independent legal consequence, the Court cannot review it under the APA.

Plaintiff has now had two bites at the apple. It was put on notice of these jurisdictional problems, but it has failed to correct them. Any further amendment would be futile. For all of these reasons, the Complaint must be dismissed for lack of subject matter jurisdiction, with prejudice.

II. ISSUES TO BE DECIDED

1. Whether the First Amended Complaint must be dismissed for lack of subject matter jurisdiction because Plaintiff lacks Article III standing;

2. Whether the First Amended Complaint must be dismissed for lack of subject matter jurisdiction because the challenged agency action is not a final agency action subject to judicial review; and

3. Whether the First Amended Complaint should be dismissed with prejudice because any further amendment would be futile.

III. BACKGROUND

A. Statutory And Regulatory Framework.

1. The OSH Act.

After extensive investigation, Congress concluded in 1970 that "personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." 29 U.S.C. § 651(a). Accordingly, Congress enacted the Occupational Safety and Health Act (OSH Act) "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b).

To effectuate the Act's purpose, Congress authorized the Secretary of Labor to promulgate "occupational safety and health standards" following specified rulemaking procedures. *See* 29 U.S.C. § 655.[1] The OSH Act defines an occupational safety and health standard as a rule that "requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). Any party adversely affected by the promulgation of an occupational safety and health standard may, "at any time prior to the sixtieth day after such standard is promulgated[,]" challenge "the validity of such standard" in "the United States court of appeals for the circuit wherein such person resides or has his principal place of business." 29 U.S.C. § 655(f).

Employers must comply with the Secretary's standards, and—where it has enforcement authority—OSHA can issue "citations" to employers for noncompliance. *See* 29 U.S.C. §§ 654(a)(2), 658, 659. OSHA citations are subject to review before the Occupational Safety and Health Review Commission—an independent adjudicative forum established by the OSH Act. *See* 29 U.S.C. §§ 659(c), 661; *see also Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 147-48 (1991). Orders of the Review Commission are subject to judicial review in the federal courts of appeals. *See* 29 U.S.C. § 660.

However, the OSH Act also permits states to establish their own occupational safety and health program and administer that program statewide in lieu of Federal OSHA. *See* 29 U.S.C. § 667(b). To do so, states must submit "State Plans" demonstrating, among other things, that their own workplace safety and health standards "are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated" by Federal OSHA. *Id.* § 667(c)(2). Once the State Plan has been approved by Federal OSHA, and subject to exceptions not applicable here, Federal OSHA no longer has enforcement authority over workplace safety and health matters covered by the State Plan. *See id.* § 667(e). Although Federal OSHA itself does not have jurisdiction over state and local government employers, *see id.* § 652(5), all State Plans are required to cover state and local government employers. *Id.* § 667(c)(6). California has had a State Plan since

[1] The Secretary of Labor has delegated OSH Act authority to an Assistant Secretary who heads OSHA. *See, e.g.*, 85 Fed. Reg. 58393 (Sept. 18, 2020).

1973, such that a California state agency—Cal/OSHA—exercises jurisdiction over all state and local government employers and most private sector employers within the state. *See* OSHA, California State Plan, https://www.osha.gov/stateplans/ca (last accessed Dec. 6, 2024); *see also* Cal/OSHA, https://www.dir.ca.gov/dosh/ (last accessed Dec. 6, 2024).[2]

Separate from the formal citation process, Federal OSHA routinely responds to questions from the public about how standards apply in particular situations by publishing "Standard Interpretations" on its website. *See* Standard Interpretations, https://www.osha.gov/laws-regs/standardinterpretations/publicationdate (last accessed Dec. 6, 2024). As OSHA's website makes clear:

> OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. Each letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information.

Id. OSHA's website contains hundreds of such letters dating back to 1972. *See id.* In recent years, OSHA has published between approximately one to three dozen letters each year. *See id.*

2. The Scaffolding Standard and OSHA's Interpretation Letters.

In 1996, pursuant to the OSH Act, OSHA issued the Scaffolding Standard at issue here: "each scaffold and scaffold component shall be capable of supporting, without failure, its own weight and at least 4 times the maximum intended load applied or transmitted to it." 29 C.F.R. § 1926.451(a)(1); *see also* First Amended Complaint ("FAC") ¶¶ 2, 28-30. The "maximum intended load" is defined by the 1996 standard as "the total load of all persons, equipment, tools, materials, transmitted loads, and other loads reasonably anticipated to be applied to a scaffold or scaffold component at any one time." 29 C.F.R. § 1926.450(b); *see also* FAC ¶ 29. OSHA promulgated the Scaffolding Standard following a formal notice-and-comment rulemaking process. *See* FAC ¶¶ 17-30; *see also* 61 Fed. Reg. 46026 (Aug. 30, 1996).

[2] Defendants request that the Court take judicial notice of the websites referenced in this Motion under Federal Rule of Evidence 201.

In 2011, OSHA's Directorate of Construction received a letter from a member of the public named Steve Karasik, who identified himself as the Chief Engineer of the contracting firm PERI Formwork Systems, Inc. in Elkridge, Maryland. *See* FAC ¶ 31; *see also* Standard Interpretation Letter (Dec. 6, 2013; rev. Apr. 24, 2020), *available at* https://www.osha.gov/laws-regs/standardinterpretations/2013-12-06. Mr. Karasik had posed the question: "For scaffolds used in construction work, how is the weight of the scaffold taken into consideration in determining whether the 4 to 1 factor required by 29 CFR 1926.451(a)(1) is satisfied? How do the scaffolding requirements for general industry work differ from construction?" FAC ¶ 33; *see also* Standard Interpretation Letter.

In 2013, James G. Maddux, Director of OSHA's Directorate of Construction, responded to Mr. Karasik's questions by issuing the Standard Interpretation Letter at issue here. *See* FAC ¶ 31; Standard Interpretation Letter. The Standard Interpretation Letter explained that "Under section 1926.451(a)(1), each component of a scaffold system must be able to support at least 4 times the maximum intended load on that component, in addition to the weight of the component." FAC ¶ 34; Standard Interpretation Letter.

> For example, on a multi-level scaffold, each bottom leg must be able to support its own weight and four times the load reasonably anticipated to be imposed on that leg. Part of the load imposed on a bottom leg will arise from the weight of the part of the scaffold that the bottom leg supports. Part will arise from the weight of persons, equipment, tools, and materials on the scaffold, and part will arise from other sources, such as wind.

FAC ¶ 35; Standard Interpretation Letter.

In 2020, OSHA published a revised version of the Standard Interpretation Letter. *See* FAC ¶ 38; Standard Interpretation Letter. OSHA explained when it released the revised letter that "The letter issued on 12/6/2013 had raised some confusion in the scaffold industry regarding what loadings were included in the maximum intended load and the application of 4 to 1 factor to the maximum intended load as required by 29 CFR 1926.451(a)(1)." Standard Interpretation Letter. "This letter has been modified to clarify these requirements for scaffolds as intended in the standard. This revision of the letter does not add any burdens or additional requirements that the standard did not intend, and reflects current OSHA regulations and policies." *Id.* The online version of the revised letter struck through prior text that OSHA removed, and identified new text in bold. *See* Standard Interpretation Letter.

The 2020 version of the Standard Interpretation Letter provided the following amended response to Mr. Karasik's question: "Under section 1926.451(a)(1), each component of a scaffold system must be able to support its own weight (the weight of the component itself, in addition to the portion of the scaffold's weight that is transmitted to that component), and at least 4 times the maximum intended load transmitted to that component." FAC ¶ 42; *see also* Standard Interpretation Letter.

> For example, on a multi-level scaffold, each bottom leg must be able to support the scaffold weight transmitted to that component, including the component weight itself, and four times the portion of the maximum intended load reasonably anticipated to be imposed on that leg, which include the maximum intended load transmitted to that component and the maximum intended load directly applied to that component. (Note that the maximum intended load, as defined under section 1926.450, does not include the weight of the scaffold.) Part of the maximum intended load will arise from the weight of persons, equipment, tools, and materials on the scaffold, and part will arise from other sources, such as wind.

Standard Interpretation Letter.

However, as part of its State Plan, Cal/OSHA has promulgated its own standard regarding scaffolding weight. The state standard provides, "Each scaffold shall be designed and constructed using a dead load safety factor that will ensure the scaffold supports, without failure, its own weight and 4 times the maximum intended working (live) load applied or transmitted to it." 8 Cal. Code Reg. § 1637(b)(2). The standard goes on to specify various "maximum intended working loads" for different types of scaffolds. *Id.* § 1637(b)(2)(A)-(E). Because Plaintiff is a public sector employer in the state of California, it is subject to Cal/OSHA's enforcement authority, including the requirement to comply with Cal/OSHA's scaffolding standard, not Federal OSHA's scaffolding standard.

B. Procedural History.

Plaintiff is the Golden Gate Bridge, Highway and Transportation District, "a public agency existing under the laws of California" that "owns, operates, and maintains the Golden Gate Bridge." FAC ¶ 7. Plaintiff alleges that, in 2020, it sent a letter to OSHA's Directorate of Construction, asking them to withdraw the 2020 version of the Standard Interpretation Letter. *Id.* ¶ 48. Plaintiff alleges that "OSHA declined to withdraw the letter." *Id.*

Plaintiff filed this lawsuit on August 9, 2024. *See* Dkt. No. 1. After Defendants moved to dismiss on the grounds that (1) Plaintiff lacked Article III standing, and (2) the Standard Interpretation Letter was not a reviewable "final agency action," *see* Dkt. No. 16, Plaintiff filed the FAC, adding

allegations that it has been injured by its disagreements with its contractors and related delays, *see* FAC ¶¶ 49-58, 75, 86. Plaintiff invokes this Court's jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 500 *et seq*. *See id.* ¶ 12. Plaintiff brings two claims: (1) for a declaration that the 2020 version of the Standard Interpretation Letter is unlawful and should be set aside because OSHA did not issue it following notice-and-comment rulemaking, *see id.* ¶¶ 59-75; and (2) for a declaration that the 2020 version of the Standard Interpretation Letter is arbitrary and capricious and therefore invalid, because OSHA allegedly failed to consider or explain certain issues related to its interpretation, *see id.* ¶¶ 76-86.

IV. LEGAL STANDARD

A. Rule 12(b)(1)

Dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(1) if the district court lacks subject matter jurisdiction over the claim. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Limits on federal jurisdiction must be neither disregarded nor evaded. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). As courts of limited jurisdiction, federal courts are "presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.3d 1221, 1225 (9th Cir. 1989). Federal subject matter jurisdiction must exist at the time the action is commenced. *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir 1988), *cert. denied*, 488 U.S. 1006 (1989).

V. ARGUMENT

The Court lacks subject matter jurisdiction over this matter for two reasons: (1) Plaintiff lacks Article III standing; and (2) the letter of interpretation was not "final agency action" subject to judicial review. Both are independent reasons why the FAC must be dismissed. And because any further amendment would be futile, the dismissal should be with prejudice.

A. Plaintiff Lacks Article III Standing.

A plaintiff who seeks to invoke federal jurisdiction bears the burden of establishing "the irreducible constitutional minimum" of standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Standing to sue "is part of the common understanding of what it takes to make a justiciable case." *Steel*

Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998) (citation omitted). Courts "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (quotation and citations omitted).

To satisfy the traditional elements of standing, the plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo*, 578 U.S. at 338 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "[T]he 'fairly traceable' leg of standing is no less essential to the 'irreducible constitutional minimum' of standing than the injury leg." *Daniel v. National Park Serv.*, 891 F.3d 762, 767 (9th Cir. 2018).

The "fairly traceable" element requires a "causal connection between the injury and the conduct complained of," such that the injury is "not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (cleaned up); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976) ("It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications.").

In short, where the alleged injury is "'manifestly the product of the independent action of a third party,'" it is not "fairly traceable" to the defendant, and therefore the plaintiff lacks standing and the case must be dismissed. *Pritkin v. Dep't of Energy*, 254 F.3d 791, 798 (9th Cir. 2001) (quoting *Duquesne Light Co. v. EPA*, 166 F.3d 609 (3d Cir.1999), and holding that plaintiff lacked standing where a third-party's failure to implement a medical monitoring program was not caused by the DOE's failure to fund the program); *see also, e.g.*, *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1019 (9th Cir. 2021) ("[A]ny increase in immigration that may result from the AC21 Rule would be a product of independent, third-party decisionmaking and not fairly traceable to the AC21 Rule itself."); *Daniel*, 891 F.3d at 767 (injury was not fairly traceable where plaintiff "alleged no link between the receipt and the identity theft"); *WildEarth Guardians v. Dep't of Justice*, 752 F. App'x 421, 423 (9th Cir. 2018) ("WildEarth's contention that eliminating the *McKittrick* policy would decrease wolf killings requires speculation about how a series of independent entities would respond to the change. This is insufficient to support standing under Article III.").

Article III's standing requirements apply with full force to plaintiffs challenging agency action under the Administrative Procedure Act. *See, e.g.*, *Lujan*, 504 U.S. at 559 (plaintiffs lacked standing in APA case); *Safer Chems., Healthy Families v. EPA*, 943 F.3d 397, 410-11 (9th Cir. 2019). At the pleading stage, the plaintiff must "clearly . . . allege facts demonstrating" each element of the standing inquiry. *Spokeo*, 578 U.S. at 338.

Here, Plaintiff alleges four ways it has supposedly been injured by the 2020 Standard Interpretation Letter. *See* FAC ¶¶ 54-58. But none of these injuries are "fairly traceable" to Defendants' conduct, and so none of them support Article III standing.

First, Plaintiff alleges that its contractor for a suicide-prevention net, "Shimmick/Danny's Joint Venture," "reli[ed] on" the 2020 Standard Interpretation Letter to "delay[] finalizing the scaffolding systems design for the Project," and that "[t]his has delayed the timely completion of the Project, resulting in additional costs." FAC ¶ 54. But this is an allegation that Plaintiff was injured by its contractor's alleged delays, not by OSHA's publication of the Standard Interpretation Letter. Plaintiff's bare allegation that its contractor "relied on" the 2020 Letter does not change the fact that the alleged delays resulted from the actions of the contractor, not Defendants. *See Pritkin*, 254 F.3d at 798.

Second, Plaintiff alleges that it and its contractor disputed whether the factor of four applied to all loads, and "to resolve the dispute with Shimmick and avoid the increased risk of liability and increased danger to worker safety, the District had to bear the cost for Shimmick to design the scaffolding systems to the proper factor of safety of four." FAC ¶ 55. In other words, Plaintiff voluntarily agreed to pay certain amounts to Shimmick to avoid litigation risk and delays. That decision by Plaintiff is not fairly traceable to Defendants. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) ("Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing").

Third, Plaintiff alleges that the 2020 Standard Interpretation Letter "delayed the installation of scaffolding required to remove and replace the Golden Gate Bridge's existing maintenance travelers with new platforms," such that "the District was forced to hire a third-party engineering firm with specialized expertise in alternate access methods to perform the mandatory inspections, costing $9 million over four years" and "the District's ability to conduct routine inspections and maintenance in a

timely manner" were "disrupt[ed]." FAC ¶¶ 56-57. But Plaintiff does not include any facts explaining how the Letter supposedly "delayed" the installation of these replacement platforms, such as why Plaintiff could not simply require its (unidentified third-party) contractor to use the amount and type of scaffolding that Plaintiff believed was required. Again, Plaintiff's claimed injury from the "maintenance travelers" appears to relate to either delays by or disputes with its private contractors, but those alleged problems flow from Plaintiff's dealings with its contractors, not OSHA's action. *See Whitewater Draw*, 5 F.4th at 1019; *Pritkin*, 254 F.3d at 798.

Fourth and finally, Plaintiff "anticipates increased costs in future federal-aid projects involving scaffolding," because supposed "delays" resulting from the 2020 Standard Interpretation Letter are "resulting in escalated labor and material costs." But this is far too speculative to be a cognizable injury; Plaintiff does not identify any "future federal-aid projects" that have been affected by any "delays." *See, e.g.*, *Clapper*, 568 U.S. at 414 ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors."); *Whitewater Draw*, 5 F.4th at 1014-19 ("We may not find standing based on the Plaintiffs' cumulative speculation about their injuries in fact."). Nor does Plaintiff explain how any such alleged "anticipated delays" in the future—much less "escalated labor and material costs"—could be attributable to a Standard Interpretation Letter published four years ago.

Crucially, Plaintiff's alleged injuries also are not fairly traceable to Federal OSHA because Federal OSHA *does not have jurisdiction over Plaintiff*. As Defendants have now repeatedly explained, Federal OSHA does not have jurisdiction over "any State or political subdivision of a State," 29 U.S.C. § 652(5), such as Plaintiff here, *see* FAC ¶ 7. And in any event, California has assumed responsibility for occupational safety and health within its own boundaries by enacting a State Plan. Accordingly, it would be Cal/OSHA—not Federal OSHA—that would regulate Plaintiff's occupational safety practices. And Cal/OSHA has indeed promulgated a standard governing scaffolding weight in California. *See* 8 Cal. Code Reg. § 1637. Remarkably, Plaintiff simply ignores this dispositive issue in its amended pleading, *see generally* FAC, even though Defendants briefed it at length in the first Motion to Dismiss, *see* Dkt. No. 16 at 3, 6, 8, 14 n.3.

Relatedly, Plaintiff vaguely alleges that it is required to follow federal requirements for unidentified "federal-aid projects." FAC ¶¶ 49, 58. Plaintiff does not identify any actual provision of any agreement or authority relating to those unspecified projects that would render Federal OSHA's standards applicable, given that Plaintiff is expressly outside Federal OSHA's statutory enforcement authority, *see* 29 U.S.C. § 652(5), and is subject to California's State Plan. Nor does Plaintiff allege that any agencies administering any of Plaintiff's federal grants have suggested that Plaintiff would be in violation of any grant requirements by following the 2020 Standard Interpretation Letter. *See generally* FAC. Indeed, it would be strange for another agency to question OSHA's interpretation of its own requirements—especially in a situation like this, where Federal OSHA does not even have enforcement authority in the first place.

Finally, even if any of Plaintiff's newly alleged injuries were fairly traceable to Defendants—and they are not—Plaintiff has not demonstrated that any of these injuries could be redressed by this litigation. Plaintiff complains of its contractors' past delays, and alleged cost increases that resulted therefrom. *See* FAC ¶¶ 54-58. But those delays have cost increases have already happened, and Plaintiff's requested declaratory relief cannot plausibly turn back that clock. Plaintiff therefore also lacks standing because it cannot satisfy the redressability element. *See Pritkin*, 254 F.3d at 799-801.

In short, Plaintiff's only alleged injuries are the result of its negotiations with third-party contractors, not Federal OSHA—an agency that does not even have jurisdiction over Plaintiff. Plaintiff therefore lacks standing and the case must be dismissed. *See Whitewater Draw*, 5 F.4th at 1019; *Pritkin*, 254 F.3d at 798.

B. The Letter of Interpretation Is Not a Final Agency Action.

APA review is also unavailable here because neither the Department of Labor nor OSHA has taken any "final agency action." The APA only allows judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Two conditions must be met for there to be a final agency action: (1) "the action must mark the consummation of the agency's decisionmaking process -- it must not be of a merely tentative or interlocutory nature," and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016) (quoting *Bennett v. Spear*, 520 U.S.

154, 177-78 (1997)). "The general rule is that administrative orders are not final and reviewable 'unless and until they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.'" *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990) (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)).

The Ninth Circuit recently addressed the "final agency action" standard in *Advanced Integrative Medical Science Institute, PLLC v. Garland*, 24 F.4th 1249 (9th Cir. 2022) ("*AIMSI*"). There, the Drug Enforcement Administration had responded to a question from the public about the administration of certain drugs by "identifying the available exemptions in the [Controlled Substances Act] and indicating that the [Right to Try Act] did not create any additional exemptions." *Id.* at 1252. In considering whether the DEA's letter qualified as "final agency action," the Ninth Circuit explained that "courts differentiate between an informational document that merely provides the agency's interpretation of a statute, and a decision that determines how a statute or regulation applies to facts for enforcement purposes." *Id.* at 1258 (citation omitted). "An agency's informational document, in which 'an agency merely expresses its view of what the law requires of a party,' is not a final agency action." *Id.* As prior examples of mere informational documents, the court identified "a letter written by the EPA, stating it planned to apply the Ocean Pollution Reduction Act to the City's future application for renewal of its wastewater discharge permit," and "an agency's informational manual on compliance with the National Environmental Policy Act." *Id.* (citing *City of San Diego v. Whitman*, 242 F.3d 1097 (9th Cir. 2001), & *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997 (9th Cir. 2021)).

"By contrast, a decision document that marks the conclusion of an agency's decisionmaking process and has legal consequences for the regulated party is a final agency action." *AIMSI*, 24 F.4th at 1259. The court cited examples of "a determination issued by the Army Corps of Engineers giving its definitive view on whether a particular piece of property contained wetlands," and "a series of enforcement orders" by the National Park Service "stating it had jurisdiction over the Golden Gate National Recreation Area (GGNRA), and announcing its intention 'to enforce the prohibition on commercial fishing' in those waters," after which, "'critically, the Park Service then put its declared position into action when its uniformed officers and California wardens (allegedly acting at the federal government's direction) took to the waters to order herring fishermen to stop fishing in the GGNRA.'"

Id. at 1259-60 (citing *Hawkes*, 578 U.S. 590, & *S.F. Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564 (9th Cir. 2019)).

"In short, in considering whether an agency's informational document is a final agency action, [courts] take a 'pragmatic approach.'" *AIMSI*, 24 F.4th at 1260. "If the informational document is more analogous to the 'the type of workaday advice letter that agencies prepare countless times per year in dealing with the regulated community,' and is little more than a restatement of statute and regulations in a response to a 'request for assistance,' it is not the consummation of a decisionmaking process or an order from which 'legal consequences will flow.'" *Id.* (citations omitted). "By contrast, if the informational document 'is issued after extensive factfinding,' or after a public hearing, or after 'a series of formal written notices,' and thus indicates the agency's determination that a regulated party disobeys the order at its peril of incurring criminal penalties or sanctions, it satisfies the *Bennett* conditions and is a final agency action." *Id.* (citations omitted).

Here, the Standard Interpretation Letter is merely an "informational document" that does not rise to the level of a reviewable "final agency action." First, it is the type of workaday letter that OSHA prepares dozens of times per year in response to requests for assistance from the public. Indeed, OSHA initially issued the letter in 2013 in response to a question from a specific individual, *see* FAC ¶ 31, and revised it in 2020 in response to "confusion in the scaffold industry," Standard Interpretation Letter (explaining reason for 2020 update). By its own terms, the letter largely restates the Scaffolding Standard itself. *See* Standard Interpretation Letter. OSHA has published dozens of such letters on its website in recent years, and hundreds of them going back to 1972. *See* Standard Interpretations, https://www.osha.gov/laws-regs/standardinterpretations/publicationdate.

Second, the Standard Interpretation Letter does not itself lead to legal consequences for the person who requested the information, for Plaintiff, or for anyone else. Indeed, the OSHA website on which the letter is published explains that "OSHA requirements are set by statute, standards and regulations," and that OSHA's "interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations." Standard Interpretation Letter. The letter does not purport to be the culmination of any formal factfinding process; it was not issued after a public hearing; and it does not itself threaten any penalties for

noncompliance. *See id.*; *see also* FAC ¶ 73 ("In promulgating the 2020 Revised Interpretation Letter, OSHA did not give the public prior notice or an opportunity through comment to participate in the rule's formulation."). To the contrary, if any employer is cited for violating the Scaffolding Standard, the administrative process laid out in the OSH Act will determine whether that employer complied with the Scaffolding Standard itself, not whether the employer complied with the Standard Interpretation Letter. *See* 29 U.S.C. § 658(a).[3]

All indicia point to the fact that the Standard Interpretation Letter is merely an informational document, not final agency action. *See AIMSI*, 24 F.4th at 1259 (no final agency action when "in a later enforcement action, the regulated party would face liability only for noncompliance with the underlying statutory commands, not for disagreement with the agency's determination.") (citation and internal quotation marks omitted); *see also Whitewater Draw*, 5 F.4th at 1008 (agency's informational manual on statutory compliance was not a final agency action). The Court therefore lacks jurisdiction here. *See AIMSI*, 24 F.4th at 1252.[4]

C. The FAC Should Be Dismissed With Prejudice.

The jurisdictional deficiencies described above make clear that the FAC should be dismissed with prejudice. Rule 15(a) of the Federal Rules of Civil Procedure states that, after a prior amendment, a party may amend its complaint only with the opposing party's written consent or the court's leave. *See* Fed. R. Civ. P. 15(a)(2). "Five factors are taken into account to assess the propriety of a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004) (citation omitted); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). However, "[f]utility alone can justify the denial of a motion to amend." *Johnson*, 356 F.3d at 1077 (cleaned up). Amending a pleading is futile "where the amended complaint would also be subject to dismissal."

[3] As explained in the Background above, the employer could appeal any citation to the Review Commission, and thereafter to the Court of Appeals. *See* 29 U.S.C. §§ 659(c), 660. But again, Plaintiff does not allege it is being threatened with citation here, *see generally* FAC, and in any event enforcement authority over Plaintiff lies with Cal/OSHA, not Federal OSHA.

[4] Even if the Standard Interpretation Letter were deemed a modification of the standard, jurisdiction to hear challenges to standards lies in the courts of appeals, not the district courts. 29 U.S.C. § 655(f); *Chamber of Com. of U.S. v. U.S. Dep't of Lab.*, 174 F.3d 206, 211 (D.C. Cir. 1999).

Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1298 (9th Cir. 1998) (citing *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991)).

Plaintiff has already amended its Complaint once, and any further amendment would be futile. It is clear that Plaintiff has not been injured in any way that is fairly traceable to Defendants (who, again, do not have jurisdiction over Plaintiff). And it is also clear, as a matter of law, that the Standard Interpretation Letter is not "final agency action" subject to judicial review. Plaintiff has already twice had the chance to allege facts that would overcome these problems, but it has been unable to. Further amendment would only consume additional resources of the parties and the Court; it would not result in any relief to Plaintiff.

The Court should therefore dismiss the FAC with prejudice.

VI. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court dismiss the FAC with prejudice for lack of subject matter jurisdiction.

DATED: December 6, 2024

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

GOLDEN GATE BRIDGE, HIGHWAY AND TRANSPORTATION DISTRICT, Plaintiff, v. UNITED STATES DEPARTMENT OF LABOR, et al. Defendants.	Case No. 3:24-cv-04985-RS **[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT WITH PREJUDICE** Date: January 30, 2025 Time: 1:30 p.m. Place: Courtroom 3, 17th Floor The Honorable Richard Seeborg, Chief Judge

Having considered the papers submitted and any arguments of the parties, and good cause appearing therefor, it is hereby ordered that Defendants' Motion to Dismiss Plaintiff's First Amended Complaint is GRANTED, and Plaintiff's First Amended Complaint is hereby DISMISSED WITH PREJUDICE.

DATED:

HON. RICHARD SEEBORG
CHIEF UNITED STATES DISTRICT JUDGE