UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RHEA LANA, INC. and RHEA LANA'S FRANCHISE SYSTEMS, INC., Plaintiffs, v. U.S. DEPARTMENT OF LABOR, Defendant.	Case No. 1:14-cv-00017-CRC Judge Christopher R. Cooper

DEFENDANT U.S. DEPARTMENT OF LABOR'S
MOTION TO DISMISS THE COMPLAINT
PURSUANT TO RULES 12(B)(1) AND 12(B)(6)

Defendant U.S. Department of Labor, by and through undersigned counsel, respectfully moves to dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the reasons explained in the accompanying memorandum of law, Plaintiffs have suffered no injury in fact, and thus lack both constitutional standing and a cause of action under the APA, which authorizes review only over "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

In the alternative, if this lawsuit is permitted to go forward, the Court should (1) dismiss the claims of Rhea Lana's Franchise Systems, Inc., and (2) dismiss Plaintiffs' request for injunctive relief barring the Department of Labor from engaging in agency action in the future. A proposed order accompanies this request.

Dated: April 29, 2014

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

RONALD C. MACHEN, JR.
U.S. Attorney for the District of Columbia

JUDRY L. SUBAR
Assistant Director, Federal Programs Branch

/s/ *Steven A. Myers*
Steven A. Myers (NY Bar No. 4823043)
Trial Attorney
Federal Programs Branch
U.S. Department of Justice, Civil Division
Telephone: (202) 305-8648
Fax: (202) 616-8460
Email: Steven.A.Myers@usdoj.gov

Mailing Address:
Post Office Box 883
Washington, DC 20044

Courier Address:
20 Massachusetts Ave., NW Rm. 6143
Washington, DC 20001

Counsel for Defendant

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DEFENDANT U.S. DEPARTMENT OF LABOR'S
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
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INTRODUCTION

Applying well-established law that prohibits for-profit businesses from circumventing the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, by classifying their employees as "volunteers," the Department of Labor's Wage and Hour Division ("WHD") told Plaintiff Rhea Lana, Inc., in August 2013 that it believed certain individuals performing services at its events were employees under the FLSA. Exercising its discretion, however, the Department of Labor declined to institute enforcement proceedings against Rhea Lana, notified Rhea Lana of that decision, and informed Rhea Lana's employees that they might be able to bring private actions on their own behalf if they wished to do so. As far as the Department of Labor was concerned, the matter was closed.

Notwithstanding the Department of Labor's explicit indication that it was not pursuing litigation, Rhea Lana has now sued the Department under the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, contending that WHD's opinion as to what the law provides in connection with Rhea Lana's business is arbitrary and capricious. Should this case ever reach the merits, the Department will explain why it is not: the clear language of the statute, the Department of Labor's regulations, and an uninterrupted series of judicial decisions provide that the FLSA covers even those employees of for-profit companies whom the companies classify as volunteers. *See, e.g.*, *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985) ("If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act.").

Before this Court reaches the merits, however, Plaintiffs must demonstrate that they have standing to bring this action, which requires proof of an "injury in fact" that is "fairly traceable to the challenged action of the defendant" and redressable by a favorable decision from this Court.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotation marks and alterations omitted). They must further demonstrate that they have a cause of action under the APA, which authorizes judicial review over "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. For agency action to be final, "[t]he agency must have made up its mind, ***and its decision must have 'inflict[ed] an actual, concrete injury' upon the party seeking judicial review***." *AT&T v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001) (quoting *Williamson Cnty. Regional Planning v. Hamilton Bank*, 473 U.S. 172, 193 (1985)) (alteration in original; emphasis added). Because WHD has determined no rights or obligations and imposed no legal consequences, it has not injured Plaintiffs, who therefore lack both standing and a cause of action. Accordingly, the Court should dismiss the Complaint for lack of subject matter jurisdiction, or, in the alternative, for failure to state a claim upon which relief may be granted.

Alternatively, even if this litigation does go forward, the Court should substantially narrow the claims at issue. Because the letters in question addressed only Rhea Lana, Inc., the Court should dismiss the claims of co-plaintiff Rhea Lana Franchise Systems, Inc., which does not have standing even if the Court finds that Rhea Lana, Inc., does. The Court should also dismiss the request for injunctive relief precluding the Department of Labor from engaging in future agency action, since no party has standing to seek an injunction preventing injury that is neither threatened nor imminent.

BACKGROUND

I. The Fair Labor Standards Act

"The Fair Labor Standards Act was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied men and women a fair day's pay for a fair-day's work." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (quoting Message of the President to

Congress, May 24, 1934). The Act guarantees covered employees a federal minimum wage, 29 U.S.C. § 206, as well as time-and-a-half overtime compensation, *id.* § 207. An employee is defined as "any individual employed by an employer." *Id.* § 203(e)(1). To "employ," in turn, is defined as "to suffer or permit to work." *Id.* § 203(g).

Among other enforcement mechanisms, the Act creates a cause of action for employees to sue for back wages, 29 U.S.C. § 216(b), for the Secretary of Labor to bring suit on employees' behalf, *id.* § 216(c), and for the Secretary of Labor to seek civil penalties against repeated and willful violators of the statute's minimum wage and overtime provisions, *id.* § 216(e)(2).

II. Rhea Lana, Inc.[1]

Plaintiff Rhea Lana, Inc. ("Rhea Lana") is a for-profit corporation based in Conway, Arkansas. Compl. ¶¶ 1, 36. Its primary business is organizing consignment sales for children's clothes, toys, and related items. *Id.* ¶ 12. Consignors provide the items for sale and determine the price. *Id.* ¶¶ 15-16. If an item sells, the consignor receives approximately seventy percent of the purchase price, and Rhea Lana keeps thirty percent as profit. *Id.* ¶ 25.

Consignors are not required to perform any work at Rhea Lana's sales. Compl. ¶ 18. The sales, however, still require staff to "undertake general tasks such as greeting shoppers, picking up fallen price tags, reorganizing items that shoppers have handled, and assisting shoppers as they carry items to their vehicles." *Id.* ¶ 19. To fill this staffing need, Rhea Lana invites what it calls "consignors/volunteers" to perform this work. *Id.* ¶ 22. As Rhea Lana admits, it "does not compensate consignors/volunteers." *Id.* ¶ 24. Instead, Rhea Lana incentivizes individuals to perform these tasks by offering them the opportunity "to shop before

[1] The remaining facts in this Background section are drawn from the Complaint (ECF No. 1 ("Compl.")), which the Department of Labor accepts as true for purposes of this motion.

the event opens to the general public." *Id.* ¶ 22. Those individuals are thus able to obtain "unique access to select products before other shoppers arrive." *Id.* ¶ 26.

In January 2013, WHD began an investigation of Rhea Lana's employment practices. Compl. ¶ 28. On May 20, 2013, WHD met with Rhea Lana, explained its view that the "volunteers" were employees under the FLSA, *id.* ¶ 29, and requested voluntary compliance, *id.* ¶ 30. Notwithstanding Rhea Lana's decision not to heed WHD's guidance, however, the Department of Labor declined to pursue the case further. On August 6, 2013, Robert Darling, WHD District Director, sent a letter to current and former employees of Rhea Lana. *Id.* ¶ 31. In relevant part, that letter indicated as follows:

> A recent investigation of the above named firm under the Fair Labor Standards Act (FLSA) indicates that you might not have been paid as required by law for the period 01/28/2011 to 01/27/2013[]. The FLSA requires employers to pay each employee covered by the Act no less than the federal minimum wage and overtime premium pay (at time and one-half the regular rate of pay) for all hours worked in excess of 40 hours in a single workweek. The law contains numerous exemptions from these basic standards.
>
> The Wage and Hour Division contacted the firm and explained the FLSA wage requirements, but the firm did not agree to make payments to you. Under the law, the Wage and Hour Division has the authority to supervise voluntary payment of back wages but cannot itself order such payment. ***The Department of Labor (Department) is authorized to file lawsuits against employers and request that a court order the payment of back wages; however, after reviewing all of the circumstances of this case, it has been decided and [sic] it is not suitable for litigation by the Department. Consequently, no further action will be taken to secure payment of additional money possibly owed to you.***
>
> The fact that we will take no further action on your behalf does not affect your private right under the FLSA to bring an independent suit to recover any back wages due. . . .

Id. Ex. 2 (emphasis added).

Nearly three weeks later, Darling sent a letter to Rhea Lana. *See* Compl. ¶ 32. Similarly to what the letter sent to employees said, this letter indicated that "[t]he investigation disclosed that your employees are subject to the requirements of the FLSA." *Id.* It continued:

> We would like to direct your attention to section 16(e) of the FLSA and Regulations, Part 578. As you will note, section 16(e) provides for the assessment of a civil money penalty for any repeated or willful violations of section 6 or 7, in an amount not to exceed $1,100 for each such violation. ***No penalty is being assessed as a result of this investigation.*** If at any time in the future your firm is found to have violated the monetary provisions of the FLSA, it will be subject to such penalties.

Id. (emphasis added).

Four days later, in response to a Congressional inquiry, WHD Deputy Administrator Laura Fortman explained that the workers were properly classified as employees under the FLSA. *See* Compl. Ex. 4. Summarizing the two Darling letters, she explained that "workers who considered themselves to be 'volunteers' and any consignors who also worked at the event (operating the cash register, providing security, and assisting in the sorting and sales of goods) were found to be employees." *Id.* Ex. 4 at 3.

III. Rhea Lana's Franchise Systems, Inc.

As described above, WHD's investigation focused on Rhea Lana, Inc., the business that employed the individuals whom WHD determined were employees. In contrast, the Complaint says little about co-plaintiff Rhea Lana's Franchise Systems, Inc. The Complaint reveals only that (1) "Plaintiff Rhea Lana's Franchise Systems, Inc. . . . is an Arkansas corporation with its principal place of business in Conway, Arkansas," Compl. ¶ 2; (2) "Rhea Lana's Franchise Systems offers franchise opportunities to enterprises that operate in substantial conformity with Rhea Lana's business model," *id.* ¶ 27; (3) "certain prospective franchisees have either declined to purchase franchises or have indicated that their purchase is contingent upon a successful resolution of DOL's consignor/volunteer classification," *id.* ¶ 40, and (4) "DOL's investigation forced Rhea Lana's Franchise Systems to redirect revenue to pay Plaintiffs' legal defense," *id.*

STANDARD OF REVIEW

Under Rule 12(b)(1), a plaintiff seeking to invoke the jurisdiction of a federal court bears the burden of establishing that the court has jurisdiction to hear his claims. *See U.S. Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). As relevant here, a plaintiff's lack of constitutional standing is "a defect in subject matter jurisdiction." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987). Because the elements necessary to establish jurisdiction are "not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof; *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561.

Under Rule 12(b)(6), a plaintiff must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Thus, a "pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" is insufficient to state a claim. *Id.* (quoting *Twombly*, 550 U.S. at 555). A claim under the Administrative Procedure Act is implausible, and must be dismissed, if it does not challenge final agency action. *See, e.g.*, *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 735 (D.C. Cir. 2003).

ARGUMENT

I. The Wage And Hour Division's Letters Do Not Actually Injure Plaintiffs, Who Accordingly Lack Both Standing And A Cause Of Action Under The APA.

The fundamental threshold problem with this lawsuit is that the two Darling letters neither impose legal consequences upon Plaintiffs nor alter the regulatory regime to which they are subject. For that reason, Plaintiffs lack both constitutional standing to bring this lawsuit, because they have not suffered an injury in fact, and a cause of action under the Administrative Procedure Act, because the letters are not final agency action.

A. The Absence Of Actual Injury Is Fatal To Plaintiffs' Standing To Bring This Suit.

It is axiomatic that the subject matter jurisdiction of Article III courts extends only to "cases" and "controversies." U.S. Const. art. III, sec. 2; *accord, e.g., Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 475 (D.C. Cir. 2009). Accordingly, plaintiffs must show they have standing to bring their claims as a "predicate to any exercise of [this Court's] jurisdiction." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996).

"The 'irreducible constitutional minimum' of standing contains three elements: (1) injury-in-fact, (2) causation, and (3) redressability." *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1207 (D.C. Cir. 2013) (quoting *Lujan*, 504 U.S. at 560-61). To satisfy the injury-in-fact requirement, "[a] plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89 (1973). The "actual injury" must be "concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). In other words, the injury must be "distinct and palpable" and "actual or imminent," not "conjectural" or "hypothetical." *Id.* (citations omitted).

As explained in more detail in Subsection B, the two Darling letters do not impose any legal obligations upon Plaintiffs or modify the legal regime to which they are subject; for that reason, they are not final agency action under the APA. Because the Court must begin its analysis by ensuring that it has jurisdiction to decide the case, however, *see Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94-95 (1998), the Department of Labor begins by observing that the same facts underlying the lack of final agency action also demonstrate lack of actual injury, and thus of standing and subject matter jurisdiction. *See, e.g., Food & Water Watch v. EPA*, --- F. Supp. 2d ----, No. 12-1639, 2013 WL 6513826, at *13 (D.D.C. Dec. 13, 2013) ("The same problems that plague the plaintiffs' standing arguments also undermine their argument that the Bay TMDL document's reference to offsets and trading constitutes final agency action: such references do not impose any binding or legal obligations on any actor."). Thus, while the absence of final agency action under the APA is not itself a jurisdictional problem, *see, e.g.*, *Marcum v. Salazar*, 694 F.3d 123, 128 (D.C. Cir. 2012), in this case the underlying lack of injury results in both the absence of Article III standing and the absence of final agency action.

B. The Absence Of Actual Injury Is Fatal To Plaintiffs' Claims Of Final Agency Action.

The Administrative Procedure Act provides a cause of action for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Absent final agency action, there is no cause of action under the APA. *See Reliable Automatic Sprinkler*, 324 F.3d at 731 ("If there was no final agency action here, there is no doubt that [Plaintiffs] would lack a cause of action under the APA."); *Bark v. U.S. Forest Serv.*, --- F. Supp. 2d ----, No. 12-1505, 2014 WL 1289446, at *5 (D.D.C. Mar. 28, 2014) ("[W]here there is no final agency action, a plaintiff simply has no cause of action under the APA.").

Agency action is final when two separate conditions are satisfied: "[f]irst, the action must mark the 'consummation' of the agency's decisionmaking 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 will flow.'" *Ctr. For Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

It is the second prong of the *Bennett* finality test that is dispositive of Plaintiffs' claims here.[2] Although the Department of Labor reached the consummation of its decisionmaking process, its decision was that it would not impose or seek to impose any legal consequences upon Rhea Lana. The hypothetical possibility of future enforcement does not create final agency action now.

1. An Agency's Description Of What The Law Requires Does Not Create Final Agency Action, Even When Directed At A Particular Party.

The letters at issue in this case informed their recipients of what the FLSA requires and how, in WHD's view, Rhea Lana's circumstances fit into the legal regime. For final agency action to exist, however, "[t]he agency must have made up its mind, and its decision must have 'inflict[ed] an actual, concrete injury' upon the party seeking judicial review." *AT&T*, 270 F.3d at 975 (quoting *Williamson*, 473 U.S. at 193) (alteration in original). In other words, "[a]gency action is considered final to the extent that it ***imposes an obligation, denies a right, or fixes***

[2] The Complaint sufficiently pleads that the first condition is satisfied, alleging that "DOL's determination in the Darling letter marks the consummation of its decision-making process" and "is not subject to further consideration or possible modification or any other agency review." Compl. ¶¶ 49-50. Because finality requires the satisfaction of two independent conditions, however, the consummation of the agency's decisionmaking is necessary, but itself insufficient, to create final agency action. *See, e.g.*, *FTC v. Standard Oil Co.*, 449 U.S. 232, 243 (1980) ("Socal and the Court of Appeals have mistaken exhaustion for finality," as "the Commission's refusal to reconsider . . . does not render the complaint a 'definitive' action."); *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 426 (D.C. Cir. 2004) (Roberts, J.) (while the EPA's determination was "not subject to change," the "dual requirements for 'final agency action'" were not satisfied). And it is the very nature of the decision that the Department of Labor has reached that underscores how nonfinal the agency action being challenged here actually is: the Department decided not to proceed with an enforcement proceeding that would fix Plaintiffs' rights or obligations.

some legal relationship." *Reliable Automatic Sprinkler*, 324 F.3d at 731 (emphasis added); *accord, e.g.*, *Purepac Pharma Co. v. Thompson*, 238 F. Supp. 2d 191, 202 (D.D.C. 2002) ("FDA does not appear to have imposed any actual legal obligation on Purepac, nor does it conclusively determine any of the company's rights or duties regarding its generic applications. These, however, are the necessary tokens of final agency action.").

It follows from this definition of final agency action that an agency's description of the law, absent legal consequence, is not final agency action. *See, e.g.*, *Ctr. For Auto Safety*, 452 F.3d at 808 ("There is no doubt that the guidelines reflect NHTSA's views on the legality of regional recalls. But this does not change the character of the guidelines from a policy statement to a binding rule."). As is particularly relevant here, this principle applies even when the agency is evaluating a specific party's compliance with the law. *See, e.g.*, *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 941, 944-45 (D.C. Cir. 2012) (warning letters sent by FDA "to several of the appellant manufacturers, advising that the agency considered their candles to be adulterated and misbranded medical devices" are not final agency action); *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (Roberts, J.) ("We have held that we lacked authority to review claims where 'an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party.'" (quoting *AT&T*, 270 F.3d at 975)); *Ariz. Mining Ass'n v. Jackson*, 708 F. Supp. 2d 33, 42 (D.D.C. 2010) (similar).

The D.C. Circuit's decision in *AT&T* is particularly instructive. It involved a "Letter of Determination" issued by the Equal Employment Opportunity Commission "stating that in its view AT&T had unlawfully discriminated against" employees. *AT&T*, 270 F.3d at 974. The EEOC also "sent letters to AT&T urging it to conciliate with the two women and informing the Company that if conciliation failed, then the Commission would refer the matter to its legal

department." *Id.* at 974-75. The D.C. Circuit nonetheless found no final agency action, rejecting the argument that "the Commission takes final agency action when it embraces one view of the law and rejects another." *Id.* at 975. "The Commission has not inflicted any injury upon AT&T by expressing its view of the law — a view that has force only to the extent the agency can persuade a court to the same conclusion." *Id.* at 976. As in other cases rejecting a finding of final agency action, here it is dispositive that WHD has neither issued an order that legally binds Rhea Lana nor requested such an order from a court. *See Reliable Automatic Sprinkler*, 324 F.3d at 732 ("No legal consequences flow from the agency's conduct to date, for there has been no order compelling Reliable to do anything.").

Plaintiffs nevertheless allege that they "must incur the substantial costs of complying with DOL's determination or violate DOL's directive and risk adverse consequences, such as an enforcement proceeding for back wages, liquidated damages, and/or civil penalties." Compl. ¶ 45. Under precedent construing the APA's final agency action requirement, however, such consequences (which amount simply to facing the consequences that anyone faces when choosing not to comply with the law as understood by the relevant regulatory authority) do not create final agency action. *See, e.g.*, *Reliable Automatic Sprinkler*, 324 F.3d at 732 ("To be sure, there may be practical consequences, namely the choice Reliable faces between voluntary compliance with the agency's request for corrective action and the prospect of having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement. But the request for voluntary compliance clearly has no legally binding effect."); *Ctr. For Auto Safety*, 452 F.3d at 811 ("[*D*]*e facto* compliance is not enough to establish that the guidelines have had *legal* consequences."). Ultimately, "if the practical effect of the agency action is not ***a certain change in the legal obligations of a party***, the action is non-final for the purpose of

judicial review." *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) (emphasis added).

2. The Hypothetical Possibility Of Future Enforcement Does Not Create Final Agency Action.

Because the Department of Labor elected not to pursue litigation concerning Rhea Lana's previous FLSA violations, Rhea Lana could face legal consequences under the FLSA only if (1) it is sued in the future by the Department of Labor for different violations, or (2) its employees elect to bring actions of their own. The Complaint pleads no facts suggesting that either contingency will occur, and the speculative possibility of such future action does not create final agency action now. *See, e.g., DRG Funding Corp. v. Sec'y of Housing & Urban Dev.*, 76 F.3d 1212, 1214 (D.C. Cir. 1996) (no final agency action where order "'does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action'" (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939))); *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 173 F. Supp. 2d 41, 48 (D.D.C. 2001) ("[Before] the CPSC can compel any action from Reliable, the company will have the opportunity to challenge the agency's findings in an administrative hearing, with a right of appeal. The rather distant prospect of injury to Reliable does not justify judicial intervention at this unusually early stage." (citation omitted)), *aff'd*, 324 F.3d 726 (D.C. Cir. 2003). Instead, if Plaintiffs are sued under the FLSA in the future, they will be able to defend themselves at that time. *See, e.g.*, *Reliable Automatic Sprinkler*, 324 F.3d at 732 ("If the Government brings an enforcement proceeding, such parties may defend themselves on the ground that the agency lacks jurisdiction, but they may not preemptively challenge the Government's jurisdiction before the Government has taken any action to enforce the law against them."); *Georator Corp. v. EEOC*, 592 F.2d 765, 768 (4th Cir. 1979) (similar).

Courts consistently reach this result even where the agency has filed an administrative complaint, holding that "the filing of an administrative complaint does not constitute final agency action." *Reliable Automatic Sprinkler*, 324 F.3d at 732; *accord, e.g.*, *FTC v. Standard Oil Co.*, 449 U.S. 232, 243 (1980); *Atlantic Richfield Co. v. U.S. Dep't of Energy*, 769 F.2d 771, 787 (D.C. Cir. 1984). In this case, however, the Department of Labor not only is "not bound to sue" Plaintiffs, *AT&T*, 270 F.3d at 976, but also explicitly declined to do so. It would turn the law on its head to hold that a company has suffered "an actual, concrete injury," *id.* at 975 (internal quotation marks omitted), after it is expressly told that it is not under threat of enforcement, when a company against which enforcement proceedings have commenced is not deemed to have suffered such an injury. *Cf. Reliable Automatic Sprinkler*, 173 F. Supp. 2d at 46 ("If an administrative complaint is not a 'definitive statement' of the agency's position, a decision to investigate cannot be elevated into a final agency action." (citation omitted)), *aff'd*, 324 F.3d 726 (D.C. Cir. 2003).

Nor is it relevant that the August 26, 2013, Darling letter indicates that Rhea Lana could be subject to civil penalties for repeated or willful violations, *see* 29 U.S.C. § 216(e)(2), if it violates the FLSA in the future. *See* Compl. ¶ 43. Plaintiffs' theory is apparently that ***if*** Rhea Lana continues to violate the FLSA, and ***if*** the Department of Labor brings a civil penalty action, and ***if*** the Department persuades a court that Rhea Lana has violated the FLSA, the Department ***might*** introduce this letter as evidence that it had previously violated the FLSA, or that it should have been aware of its FLSA obligations.

This remarkably speculative argument overlooks the fact that Rhea Lana would have the opportunity to defend itself if it were accused of being a willful or repeated violator. *See, e.g.*, *DRG*, 76 F.3d at 1214; *Reliable Automatic Sprinkler*, 324 F.3d at 732; *Ariz. Mining*, 708 F. Supp.

2d at 43 ("And if the EPA ultimately decided to initiate an enforcement action, Phelps Dodge Bagdad would certainly have the opportunity to present its arguments to the agency."). If the Department of Labor ever accuses Rhea Lana of being a repeated violator of the FLSA, the Department would need to prove both (1) that "the employer has previously violated section 6 or 7 of the Act," ***and*** (2) that "the employer has previously received notice, through a responsible official of the Wage and Hour Division or otherwise authoritatively, that the employer allegedly was in violation of the provisions of the Act." 29 C.F.R. § 578.3(b)(1). In other words, Rhea Lana would be free to argue that although it received notice of a previous violation, it did not actually "previously violate" the Act. No harm befalls Rhea Lana by requiring that it wait to challenge whether WHD's letter is correct until such time as the letter has actual legal consequences. *See, e.g., Royster-Clark Agribus., Inc. v. Johnson*, 391 F. Supp. 2d 21, 28 (D.D.C. 2005) ("In order to compel action or impose penalties, EPA would have to pursue further enforcement action, at which time plaintiffs would have an opportunity to raise the defenses that they have raised here." (citations omitted)).

Likewise, if the Department of Labor were to accuse Rhea Lana of being a "willful" violator, the Department would need to demonstrate that "the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act." 29 C.F.R. § 578.3(c)(1); *see also McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 135 (1988) (violations are willful where "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute," not where employer has a "good-faith but incorrect assumption that a pay plan complied with the FLSA"). The regulations further note that "[a]ll of the facts and circumstances surrounding the violation shall be taken into

account in determining whether a violation was willful." 29 C.F.R. § 578.3(c)(1).[3] Ultimately, whether a future violation (if committed, investigated, charged, and proven) is or is not willful is a question for the court presiding over that potential litigation; this Court need not issue an "advisory opinion on any question of willfulness which may later arise," *Taylor-Callahan-Coleman Cntys. Dist. Adult Probation Dep't v. Dole*, 948 F.2d 953, 959 (5th Cir. 1991), to dismiss the complaint for lack of final agency action.

The Seventh Circuit's decision in *Western Illinois Home Health Care, Inc. v. Herman*, 150 F.3d 659 (7th Cir. 1998), which held that a Department of Labor letter indicating that two companies were joint employers under the FLSA was final agency action, does not counsel a different result. As a court in this District has noted, that decision appears to expand the boundaries of final agency action beyond the limits set by the Supreme Court and the D.C. Circuit. *See Reliable Automatic Sprinkler*, 173 F. Supp. 2d at 45 n.4 ("To the extent that [*Western Illinois Home Health Care Inc. v.*] *Herman* provides a more permissive standard for final agency action than *Standard Oil*, it is not good law."), *aff'd*, 324 F.3d 726 (D.C. Cir. 2003).[4] The better reasoned appellate authority is *Taylor-Callahan*, which (as noted above)

[3] While the regulations provide that "an employer's conduct shall be deemed knowing, among other situations, if the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful," 29 C.F.R. § 578.3(c)(2), many courts have permitted defendants to contend that receipt of a WHD letter does not irrefutably demonstrate that subsequent FLSA violations are willful. *See, e.g., Taylor-Callahan-Coleman Cntys. Dist. Adult Probation Dep't v. Dole*, 948 F.2d 953, 959 (5th Cir. 1991) ("The District also asserts that if it ceases to pay overtime to its probation officers and an enforcement action ensues which it defends without success, the violation would be construed as willful because it is aware of the DOL's position regarding the District's probation officers. Our holding that the opinion letters are not final agency action which binds the District provides a substantial answer to these concerns."); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 680 (1st Cir. 1998) (noting "room for legitimate disagreement between a party and the Wage and Hour Division"); *De Luna-Guerrero v. N.C. Grower's Ass'n.*, 370 F. Supp. 2d 386, 390 (E.D.N.C. 2005).

[4] Even if *Western Illinois Home Health Care Inc. v. Herman* were correctly decided and good law in this Circuit, it is distinguishable. The letter sent to the company in question expressly stated that the Department of Labor would consider "a follow-up investigation at some later date to determine whether your client is complying with the Act." 150 F.3d at 661. The court relied upon that fact in reaching its decision, characterizing the Department as having "threatened a follow-up investigation to confirm that WIHHC and WIMHS were aggregating hours." *Id.* at 663. And unlike the letter sent to Rhea Lana, the letter in *Western Illinois* conveyed the Department's "enforcement position" and informed the company that, if it failed to comply, "it does so at its own peril." *Id.* at 661.

rejects the argument that a letter is transformed into final agency action simply because it could be used to support the argument that subsequent violations of the statute are willful. *See Taylor-Callahan*, 948 F.2d at 956 ("Although the District contends that the DOL will forgo enforcement only if the District remains in compliance with FLSA, no such threat has been made by DOL. It has only . . . stated it would advise the probation officers involved that they may act as individuals. ***The . . . advice is not final agency action contemplated by the APA.***" (emphasis added)).

3. Plaintiffs Rely Upon Case Law That Does Not Apply Because The Wage And Hour Division's Letters Neither Imposed Legal Obligations Upon Plaintiffs Nor Modified The Legal Regime Generally.

In asserting that WHD's letters constitute final agency action, the Complaint cites two decisions of the U.S. Supreme Court: *Sackett v. EPA*, 132 S. Ct. 1367 (2012), and *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), *abrogated on other grounds by Califano v. Saunders*, 430 U.S. 99 (1977). *See* Compl. ¶ 45. Each decision is easily distinguished from the situation presented in this case: unlike in *Sackett*, WHD has not issued an order that legally binds Rhea Lana, and unlike in *Abbott Labs*, WHD has not changed the legal regime to which Rhea Lana is subject.

a) *Sackett* Does Not Apply Because WHD's Letters Have Not Imposed Any Legal Obligations Upon Plaintiffs.

In *Sackett*, the EPA issued an "administrative compliance order" under Section 309 of the Clean Water Act that required the Sacketts, owners of a residential property in Idaho, "immediately to restore the property pursuant to an EPA work plan." *Sackett*, 132 S. Ct. at 1369. Rather than comply with the EPA order, the Sacketts sought to challenge the order under the Administrative Procedure Act. In finding that the order was final agency action, the Supreme Court relied upon the fact that "[b]y reason of the order, the Sacketts have the ***legal obligation*** to 'restore' their property according to an agency-approved Restoration Work Plan, and must give

the EPA access to their property and records and to documentation related to the conditions at the Site." *Id.* at 1371 (internal quotation marks omitted; emphasis added). Indeed, the Sacketts were sufficiently injured by the compliance order that they felt compelled to seek an injunction against its enforcement, not (as Plaintiffs do here) against hypothetical future proceedings. *Compare* Rhea Lana Compl. Relief Requested ¶ B (seeking a "temporary and preliminary injunction prohibiting DOL from ***initiating*** any investigations, audits, enforcements, or other agency proceedings" (emphasis added)) *with* Plfs.' Ex Parte Application for TRO & Order to Show Cause Re: Prelim. Inj., *Sackett v. U.S. E.P.A.*, No. 08-185, ECF. No. 4, at 2 (D. Idaho Apr. 29, 2008) (seeking an injunction barring the EPA from "***enforcing*** or in any way giving legal effect to any part of the compliance order" (emphasis added)).

In this case, WHD's correspondence "was purely informational in nature; it imposed no obligations and denied no relief. Compelling no one to do anything, the letter had no binding effect whatsoever — not on the agency and not on the regulated community." *Indep. Equip. Dealers Ass'n*, 372 F.3d at 427. Rhea Lana's liability "remains exactly as it was before" the issuance of the letter. *Nat'l Ass'n of Homebuilders*, 415 F.3d at 16. Because the letters simply advised Rhea Lana of WHD's view of the law, they do not create final agency action under *Sackett*. *See National Ass'n of Homebuilders v. E.P.A.*, 956 F. Supp. 2d 198, 212 (D.D.C. 2013) (distinguishing *Sackett* on the grounds that "agency actions that merely warn regulated entities are not considered to be final agency actions").

b) *Abbott Labs* Does Not Apply Because WHD Has Not Modified The Legal Regime To Which Plaintiffs Are Subject.

Abbott Labs involved a challenge to regulations that "have the status of law and violations of them carry heavy criminal and civil sanctions." *Abbott Labs.*, 387 U.S. at 152. As the Supreme Court explained, where "a regulation requires an immediate and significant change

in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act . . . must be permitted." *Id.* at 153. The key distinction between this case and *Abbott Labs*, however, is that the Darling letters do not require "an immediate and significant change" in Plaintiffs' business; they simply restated longstanding WHD statutory interpretation. As explained below, the Department of Labor has said for half a century that employers may not escape the requirements of the Fair Labor Standards Act by classifying their employees as volunteers.

The FLSA defines an employee as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). To "employ," in turn, is defined as "to suffer or permit to work." *Id.* § 203(g). As the Supreme Court has noted, "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945). Given the breadth of these definitions, the test of employment under the FLSA is one of economic reality. *See Tony & Susan Alamo Found.*, 471 U.S. at 301; *see also Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28, 33 (1961). Accordingly, there exist only very limited situations in which persons performing services do not become employees under the FLSA, the most significant and pertinent of which are discussed below.

First, the statute makes clear that "[t]he term 'employee' does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency." 29 U.S.C. § 203(e)(4)(A). Examples of such volunteer service include "helping out in a sheltered workshop or providing personal services to the sick or the elderly in hospitals or nursing homes; assisting in a school library or cafeteria; or driving a school bus to carry a football team or band on a trip." 29 C.F.R. § 553.104(b). ***Second***, WHD has also recognized that individuals may volunteer for "religious, charitable and

similar nonprofit organizations" in certain capacities and provided that there is no expectation of compensation. Wage and Hour Division, Field Operations Handbook § 10b03(c), *available at* http://www.dol.gov/whd/FOH/FOH_Ch10.pdf (attached to Compl. Ex. 4).[5] ***Third***, certain individuals performing services at for-profit companies may be classified as trainees or interns, provided that a six-part test focused on the vocational or educational benefit to the trainee or intern is satisfied. *See id.* § 10b11; U.S. Dep't of Labor, Wage and Hour Division, Fact Sheet # 71: Internship Programs Under The Fair Labor Standards Act, *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.htm; *see also Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).

Otherwise, consistent with the FLSA's broad definitions and its economic realities analysis for determining employment, it has long been understood that the FLSA precludes individuals from volunteering their services to for-profit employers. *See* U.S. Dep't of Labor, Office of the Assistant Secretary for Policy, eLaws – Fair Labor Standards Act Advisor: Volunteers, *available at* http://www.dol.gov/elaws/esa/flsa/docs/volunteers.asp ("***Under the FLSA, employees may not volunteer services to for-profit private sector employers***." (emphasis added)); *see also Tony & Susan Alamo Found.*, 471 U.S. at 302. The Complaint itself attaches WHD correspondence making plain that this has been the Department's understanding since 1995, *see* Compl. Ex. 5, and indeed this has been the Department's view for nearly a half

[5] The Wage and Hour Division has also "[o]n a rare occasion" stated that individuals may volunteer their services performing charitable activities for patients at for-profit hospitals, provided that "the hospital does not derive any immediate economic advantage from the activities of the volunteers and there is no expectation of compensation." *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 1995 DOLWH LEXIS 48 at *1 (Sept. 11, 1995) (attached to Compl. Ex. 5). Such activities must be "of a charitable nature, such as running errands, sitting with patients so that a family may have a break, and going to funerals." *Id.* at *2. "We consider these activities to have humanitarian and, for some, religious implications . . . ." *Id.* "On the other hand, individuals may not donate their services to hospices to do activities such as general office or administrative work that are not charitable in nature." *Id.* at *2-3.

century, *see, e.g.*, U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 1966 DOLWH LEXIS 53 (May 16, 1966).[6]

Thus, the letters sent to Plaintiffs — which simply reference the Department of Labor's longstanding view of the law — "do nothing to change the legal landscape"; they are "absolutely nothing new." *Food & Water Watch*, 2013 WL 6513826, at *14; *see also Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d at 428 ("By *restating* EPA's established interpretation of the certificate of conformity regulation, the EPA Letter [did not] tread . . . new ground. It left the world just as it found it, and thus cannot be fairly described as implementing, interpreting, or prescribing law or policy."). Because the letters do not modify the Department of Labor's regulatory policy, *Abbott Labs* does not apply here.

II. Even If The Wage And Hour Division's Letters Injured Rhea Lana, Inc., They Did Not Injure Rhea Lana Franchise Systems, Inc., Which Accordingly Lacks Standing.

The letters that Plaintiffs challenge in this lawsuit concerned Rhea Lana, Inc., exclusively. *See* Compl. Ex. 2 ("Subject: Rhea Lana, Inc. d/b/a Rhea Lana's"); *id.* Ex. 3 ("Subject: FLSA-Minimum Wage/Overtime Violations of Rhea Lana, Inc. dba Rhea Lana's and Rhea Lana an individual"). That makes sense, since the Complaint indicates that "consignors may volunteer at ***Rhea Lana's*** events," Compl. ¶ 18 (emphasis added),[7] whereas "Rhea Lana's Franchise Systems offers franchise opportunities to enterprises that operate in substantial conformity with Rhea Lana's business model," *id.* ¶ 27. Because Rhea Lana's Franchise

[6] The prohibition on volunteering services to for-profit employers is widely understood. *See, e.g.*, Katherine S. Newman, *The Great Recession & The Pressure on Workplace Rights*, 88 Chi.-Kent. L. Rev. 529, 537 n.27 (2013) ("Under the FLSA, employees may not volunteer services to for-profit private sector employers."); Kay H. Hodge, *Fair Labor Standards Act and Federal Wage and Hour Issues*, SV037 ALI-CLE 921 (2014) ("All work for private sector, for-profit employers must be paid. Individuals may not volunteer to work for such entities."); Philip J. Gordon et al., *Overtime Provisions of the Fair Labor Standards Act & Massachusetts State Law*, in Massachusetts Employment Law, Vol. II, ch. 13 (2013) (similar); Steven L. Schwarzberg et al., *Employment Law for Law Firms: Do The Shoemaker's Children Need New Shoes?*, Fla. Bar. J., July/Aug. 2009 (similar); Proskauer Rose LLP, *Interns, Volunteers, and Employees: Are You in Compliance?*, June 6, 2011, *available at* http://www.lexology.com/library/detail.aspx?g=195e8cde-e45b-4746-8e33-09e95ecb526a (similar).

[7] The Complaint specifically defines "Rhea Lana's" to refer to "Plaintiff Rhea Lana, Inc." *See* Compl. ¶ 1.

Systems is a spectator to any proceedings involving Rhea Lana, Inc., it lacks standing to pursue this lawsuit.

Article III standing requires a Plaintiff to demonstrate proof of injury, causation, and redressability. *See, e.g.*, *Lujan*, 504 U.S. at 560-61. According to the Complaint, Rhea Lana's Franchise Systems, Inc., has suffered the requisite injury because (1) "certain prospective franchisees have either declined to purchase franchises or have indicated that their purchase is contingent upon a successful resolution of DOL's consignor/volunteer classification," Compl. ¶ 40, and (2) "DOL's investigation forced Rhea Lana's Franchise Systems to redirect revenue to pay Plaintiffs' legal defense," *id.*

Neither allegation is sufficient. With respect to the first allegation, whether potential franchisees elect to purchase franchises is entirely their choice; any findings made by WHD with respect to the employment practices of Rhea Lana, Inc., have only an indirect effect upon that decision. As the D.C. Circuit has explained, "[w]hen a plaintiff's asserted injury arises from the Government's regulation of a third party that is not before the court, it becomes 'substantially more difficult' to establish standing." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004) (quoting *Lujan*, 504 U.S. at 562). "Because the necessary elements of causation and redressability in such a case hinge on the independent choices of the regulated third party, 'it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.'" *Id.* (quoting *Lujan*, 504 U.S. at 562). "In other words, mere 'unadorned speculation' as to the existence of a relationship between the challenged government action and the third-party conduct 'will not suffice to invoke the federal judicial power.'" *Id.* (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 44 (1976)). As in *National Wrestling Coaches*, here the

Complaint offers "nothing to substantiate their assertion that a decision from the court," *id.* at 939, would lead third parties to modify their behavior to the benefit of Rhea Lana Franchise Systems, Inc. And while Rhea Lana's Franchise Systems, Inc., asserts economic and reputational harm, such harm is an insufficient basis for final agency action. *See Reliable Automatic Sprinkler*, 173 F. Supp. 2d at 48 ("Reliable also alleges potential reputational harm and a resulting loss of business, arising from a possible negative reaction to any press release that the CPSC might issue if it initiates an administrative proceeding. The Court is not insensitive to these concerns, but they provide an insufficient basis upon which to exercise jurisdiction." (citation omitted)), *aff'd*, 324 F.3d 726 (D.C. Cir. 2003).

As for the argument that Rhea Lana's Franchise Systems, Inc. was "forced" to "redirect revenue to pay Plaintiffs' legal defense," Compl. ¶ 40, the Complaint is silent on how an investigation of one corporation — Rhea Lana, Inc. — forced a separate legal entity to pay its legal fees. If the owners of Rhea Lana's Franchise Systems, Inc., voluntarily pierced the corporate veil to redirect funds to another corporation that they own, such a self-inflicted wound cannot create standing. *See, e.g.*, *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 178 (D.C. Cir. 2012) (self-inflicted injury does not give rise to Article III standing); *B'Hood of Locomotive Eng'rs & Trainmen v. Surface Transp. Bd.*, 457 F.3d 24, 28 (D.C. Cir. 2006) ("This injury was not in any meaningful way 'caused' by the Board; rather, it was entirely self-inflicted and therefore insufficient to confer standing upon the Union."); *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989) (self-inflicted injury does not support standing if "it is so completely due to the complainant's own fault as to break the causal chain" (internal quotation marks and alteration omitted)); *Taylor v. FDIC*, 132 F.3d 753, 767 (D.C. Cir. 1997) (no standing for plaintiffs who claim constructive discharge based upon voluntary resignations).

III. Plaintiffs Lack Standing To Request An Injunction Barring Future Enforcement Actions.

Even if the Court disagrees with the analysis set out above, and even if Plaintiffs ultimately prevail on the merits, Plaintiffs still cannot obtain all the relief that they seek. Specifically, Plaintiffs request a "permanent injunction prohibiting DOL from initiating any investigations, audits, enforcements, or other agency proceedings against Plaintiffs based on DOL's policy prohibiting volunteerism at for-profit organizations." Compl. Relief Requested ¶ C. Because Plaintiffs only complain of past injury and because there is no indication that they are under current threat of enforcement, Plaintiffs lack standing to seek a future injunction.

Where a plaintiff seeks an injunction to prevent an injury that has not yet occurred, basic principles of constitutional standing "requir[e] that the allegations of future injury be particular and concrete." *Steel Co.*, 523 U.S. at 109. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, . . . if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974); *see also Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983) (no constitutional case or controversy absent "real and immediate threat" of future unlawful conduct). Here, the Complaint pleads no facts whatsoever indicating that Plaintiffs are under any threat of future enforcement. For that reason, Plaintiffs lack standing to seek an injunction barring such future enforcement.

In addition to the problems of constitutional standing, it is not even clear that the APA itself authorizes the injunction that Plaintiffs seek as a matter of statutory text. Under the APA, "the person claiming a right to sue must identify some 'agency action' that affects him in the specified fashion; it is judicial review 'thereof' to which he is entitled." *Lujan v. Nat'l Wildlife Found.*, 497 U.S. 871, 882 (1990). Thus, "while the APA authorizes a court to enjoin a specific final agency decision it finds arbitrary, capricious or contrary to law, the APA does not afford a

vehicle for enjoining possible future agency actions." *Fla. Med. Ass'n v. Dep't of Health, Educ., & Welfare*, 947 F. Supp. 2d 1325, 1354 (M.D. Fla. 2013); *see also, e.g., Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 46 n.1 (D.C. Cir. 2013) ("But any [APA preliminary] injunction would need to be limited only to vacating the unlawful action, not precluding future agency decisionmaking."). Whether the issue is framed in terms of constitutional standing or statutory interpretation, Plaintiffs cannot seek an order barring the Department of Labor from engaging in enforcement proceedings that it has not commenced and is not contemplating.

CONCLUSION

The Wage and Hour Division's August 2013 letters did not inflict "an actual, concrete injury," *AT&T*, 270 F.3d at 975, upon Plaintiffs, and thus the Complaint should be dismissed in its entirety. In the alternative, (1) the claims made on behalf of Rhea Lana's Franchise Systems, Inc., should be dismissed because that plaintiff lacks standing, putting its claims outside the jurisdiction of this Court, and (2) Plaintiffs' request that this Court enjoin possible future government action seeks relief that is not available and thus should also be dismissed.

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Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

RONALD C. MACHEN, JR.
U.S. Attorney for the District of Columbia

JUDRY L. SUBAR
Assistant Director, Federal Programs Branch

/s/ *Steven A. Myers*
Steven A. Myers (NY Bar No. 4823043)
Trial Attorney
Federal Programs Branch
U.S. Department of Justice, Civil Division

Telephone: (202) 305-8648
Fax: (202) 616-8460
Email: Steven.A.Myers@usdoj.gov

Mailing Address:
Post Office Box 883
Washington, DC 20044

Courier Address:
20 Massachusetts Ave., NW Rm. 6143
Washington, DC 20001

Counsel for Defendant