IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LORI CHAVEZ-DEREMER, SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR, Plaintiff-Counterclaim Defendant, v. SUFFOLK ADMINISTRATIVE SERVICES, LLC; PROVIDENCE INSURANCE CO., I.I.; ALEXANDER RENFRO; WILLIAM BRYAN; ARJAN ZIEGER, Defendants-Counterclaim Plaintiffs.	Civil Action No. 3:24-CV-01512 (CVR)

MEMORANDUM IN SUPPORT OF THE SECRETARY'S MOTION TO DISMISS DEFENDANTS' ORIGINAL COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

Pursuant to Federal Rules of Civil Procedure 8, 12(b)(6), and 12(b)(1), Plaintiff Lori Chavez-DeRemer, U.S. Secretary of Labor ("Secretary") respectfully moves for dismissal of Defendants' Original Counterclaim for Declaratory and Injunctive Relief ("Counterclaim"), ECF No. 25. The Counterclaim consists of a litany of muddled claims and arguments predominantly focused on "[plans] that have as the single employer a limited partnership," or what Defendants call the "Partnership Plans." Countercl. ¶ 1. As the Complaint makes clear, the Secretary's claims are not based on Defendants' services to the Partnership Plans—nevertheless, Defendants contend that the Partnership Plans are the "real targets" of the Secretary's lawsuit and their Counterclaim "seek[s] declaratory and injunctive relief to prevent the [Secretary] from achieving [her] improper aims to dismantle the Partnership Plans[.]" Countercl. ¶¶ 1, 3. The Counterclaim weaves a confusing trail as it interchangeably rants about the Secretary's investigation of Defendants, a separate lawsuit filed against the Secretary regarding the Partnership Plans, and the Secretary's allegations in the instant action. The Counterclaim also mischaracterizes the Secretary's allegations—which focus *not* on the Partnership Plans (*see* Compl. ¶ 2 n.1), but instead on Defendants' breaches of their fiduciary duties under the Employee Retirement Income Security Act ("ERISA") that have harmed the Employer Plans[1] and their participants. The Court should summarily dismiss Defendants' Counterclaim for the reasons contained herein.

First, each of Defendants' Counts I through III violates the Federal Rules of Civil Procedure's requirement that a complaint include a "short and plain statement" showing the pleader is entitled to relief. These Counts each (i) fail to identify provisions of each law the

[1] For ease of the reader, this memorandum refers to the "Participating Plans" described in the Secretary's Complaint as the "Employer Plans," to distinguish them from the "Partnership Plans" referenced throughout the Counterclaim.

Secretary has allegedly violated; (ii) fail to include any specific actions (beyond conclusory allegations) of the Secretary that purportedly violate the law; and (iii) lack sufficient clarity to put the Secretary on notice of the alleged violations or the relief Defendants seek. All Counts are difficult to parse and are bolstered solely by conclusory assertions rather than plausible factual allegations, which warrants dismissal.

Next, Defendants fail to state any claim on which relief can be granted. Defendants' request for a declaratory judgment regarding the multiple employer welfare arrangement ("MEWA") status of the Employer Plans (Count I) is redundant, as the Court will already have to consider whether the Employer Plans constitute a MEWA to resolve the Secretary's claims. Defendants' Count II, for violation of the Administrative Procedure Act ("APA"), is similarly meritless. Not only do Defendants complain about activity committed to agency discretion, but they also fail to identify any final agency action that is reviewable under the APA. Finally, Defendants' Count III does not pinpoint any standards or obligations under ERISA that have been purportedly violated; instead, Defendants describe a hypothetical domino effect where the Secretary's investigation and lawsuit would eventually—and speculatively—lead to participants not being able to afford health insurance, which, even if true, would not violate ERISA. None of these Counts state a plausible claim for relief.

Lastly, Defendants' Counts I and III should be dismissed for failure to demonstrate a waiver of sovereign immunity by the Secretary. Defendants' Counterclaim focuses on the Partnership Plans, not the Employer Plans that are the subject of the Secretary's action. Because the Counterclaim arises out of a separate transaction or occurrence than the Secretary's Complaint, Defendants bear the burden of establishing that the Secretary waived sovereign immunity to be sued under the Declaratory Judgment Act and ERISA, which they fail to carry.

Defendants' entire Counterclaim is a transparent attempt to upend the Secretary's enforcement action on behalf of the Employer Plans by somehow linking it to a lengthy legal battle against the Secretary regarding the Partnership Plans serviced by the Defendants, *Data Marketing Partnership, L.P. v. U. S. Department of Labor*, No. 4:19-cv-00800-O (N.D. Tex.) ("*DMP* Litigation"). As Defendants' own Counterclaim admits, they present rehashed arguments against the Secretary's enforcement, which they have previously made in various courts and contexts—including in the District of Puerto Rico—without success. *See, e.g.*, Countercl. ¶ 124. The Court should not entertain Defendants' effort to litigate their implausible, ill-defined claims and should dismiss the Counterclaim.

I. BACKGROUND

A. Defendants and the Health Benefit Plans They Service

The Counterclaim describes two groups of health benefit plans—Employer Plans and Partnership Plans. The Employer Plans are health plans sponsored by "over 1900 [] employers," specifically employers that are not limited partnerships. Countercl. ¶ 3. The Employer Plans use Defendants Suffolk Administrative Services, LLC ("SAS") and Providence Insurance Company, I.I. ("PIC") as service providers. *Id.* The Employer Plans are the center of the Secretary's Complaint here, where her allegations relate only to services provided to the Employer Plans. *Id.* ¶¶ 10, 27. The Partnership Plans are health plans sponsored by a limited partnership that have "limited partners and common law employees" as participants. *Id.* ¶ 1. The Partnership Plans also use SAS and PIC as service providers. *Id.* The Partnership Plans "are the subject of litigation pending since 2019 in the U.S. District Court for the Northern [District of] Texas," the *DMP* Litigation. *Id.* ¶ 1.

Defendant SAS provides "vendor services" to the Partnership and Employer Plans, including "intellectual property, benefits expertise, ministerial administrative services, . . . and the compliance support necessary to third parties who operate employee welfare benefit plans." *See* Countercl. ¶¶ 8, 60, 70. Defendant PIC is a Puerto Rico-licensed insurer that provides reinsurance to the sponsors of the Partnership Plans and Employer Plans. *See id.* ¶¶ 9, 34.

B. The Department of Labor's Advisory Opinion and the *DMP* Litigation

On November 8, 2018, Defendant Alexander Renfro, as legal counsel for LP Management Services, LLC ("LPMS"), sent the Department of Labor ("Department") a request for an advisory opinion regarding whether a plan sponsored by a limited partnership (as described in the request) was an employee welfare benefit plan under ERISA. Countercl. ¶¶ 81–85, and Ex. A, ECF No. 25-1; *see also DMP* Litigation, ECF No. 9 ¶¶ 2, 70. The advisory opinion request described a "novel" hypothetical partnership that is different from the classic partnership model where individual partners offer services to the public, like a law firm or a physician's group. *See* Countercl. ¶ 85. The hypothetical partnership's business is "the capture, segregation, aggregation, and sale to third-party marketing firms of electronic data generated by [limited partners][.]" Countercl. Ex. A at 2. The limited partners install software on their personal phones that tracks their use of electronic data, which the partnership sells. *Id.* LPMS requested the Department's opinion on whether health benefits offered to limited partners who joined such a hypothetical partnership were covered under ERISA. *Id.* at 1.

In January 2020,[2] the Department issued an Advisory Opinion concluding that the health benefits administered by the partnership described in the advisory opinion request were not

[2] While the Counterclaim states the Advisory Opinion was issued February 3, 2020, the actual Advisory Opinion (Counterclaim Ex. B) is dated January 24, 2020.

ERISA-covered plans for lack of an employment relationship. Countercl. ¶ 100, and Ex. B, ECF No. 25-2. Data Marketing Partnership ("DMP") and LPMS filed suit challenging the Advisory Opinion under the APA.[3] *DMP* Litigation, ECF No. 9; *see generally Data Marketing P'ship, LP v. U. S.s Dep't of Labor*, 490 F. Supp. 3d 1048 (N.D. Tex. 2020). DMP is one of the "novel" partnerships described in the advisory opinion request and LPMS is the general partner to DMP. Countercl. ¶ 1, and Ex. A. In September 2020, the district court granted summary judgment to DMP and LPMS and vacated the Advisory Opinion as "arbitrary and capricious under the APA and contrary to law under ERISA," and enjoined the Department "from refusing to acknowledge the ERISA-status of the Plan[.]" *Data Marketing P'ship*, 490 F. Supp. 3d at 1064, 1069; *see also* Countercl. Ex. C, ECF No. 25-3. The Department appealed and, on August 17, 2022, the Fifth Circuit affirmed "the district court's vacatur of the [Advisory Opinion]," reasoning that the Department had failed to consider its prior pronouncements about "working owners" under ERISA, which is how LPMS and DMP had categorized the limited partners. *Data Marketing P'ship, LP v. U. S. Dep't of Labor*, 45 F.4th 846, 851, 860 (5th Cir. 2022). The Fifth Circuit then set forth the legal principles relevant to a determination of "working owner" and "bona fide partner" status under ERISA (which are inquiries relevant to ERISA coverage of the hypothetical partnership plans) and, in light of those principles, the court "vacate[d] and remand[ed] the district court's injunction for further consideration." *Id.* at 851; *see also* Countercl. Ex. D, ECF No. 25-4.[4] On remand, the *DMP* parties submitted briefing on summary judgment for whether a

[3] Many of the allegations in Defendants' Counterclaim relate to the events leading up to the issuance of the Department's Advisory Opinion and echo allegations in the *DMP* complaint. *Compare* Countercl. ¶¶ 81–114 *with* Am. Compl. ¶¶ 66–86, 92–93, *DMP* Litigation, ECF No. 9. These allegations appear irrelevant to the counts in Defendants' Counterclaim.

[4] Defendants' assertion in their Counterclaim that "[a]t least four authorities show that the Partnership Plans are single employer employee welfare plans…subject to ERISA," Counterclaim ¶ 172, is disingenuous. The district court injunction they reference (mandating that

partnership plan (as described in the advisory opinion request) is an ERISA-governed plan. The Northern District of Texas issued a decision on April 8, 2025 denying both the *DMP* Plaintiffs' motion for summary judgment and motion for leave to file a supplemental complaint (which substantially mirrored this Counterclaim). *DMP* Litigation, ECF No. 75 (decision attached as Ex. A). The district court noted that its remand was limited to "two interpretative questions" (whether the limited partners qualified as working owners and bona fide partners) and that on the current record it lacked sufficient facts to decide those questions. Ex. A at 4–5. The court ordered the parties to confer and file a status report by May 5th with the parties' view on the best way to develop the relevant facts for the court. *Id.* at 7.

The hypothetical plan structure at issue in the *DMP* Litigation is presumably what Defendants refer to as the "Partnership Plans" in their Counterclaim. *See* Countercl. ¶ 1. In the *DMP* Litigation, the Secretary argued that a hypothetical benefits plan sponsored by a partnership where limited partners need only download an app and use the internet (as described in the advisory opinion request) may not constitute an employee welfare benefit plan under ERISA for lack of an employment relationship. Indeed, ERISA applies only to plans sponsored by employers for their employees. *See, e.g.*, *Howard Jarvis Taxpayers Ass'n v. Cal. Secure Choice Ret. Sav. Program*, 997 F.3d 848, 859–60 (9th Cir. 2021). Should the *DMP* court conclude after factual development that the partnerships do not create an employment

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the Partnership Plans be treated as ERISA plans) was *vacated* by the Fifth Circuit nearly three years ago, and just now the same district court held that it lacked sufficient facts to determine whether the limited partners were working owners or bona fide partners to subject the plan to ERISA coverage. *Compare* Countercl. ¶ 172 *with Data Marketing P'ship*, 45 F.4th at 860 *and* Ex. A at 4–5. Additionally, neither "ERISA," the opinion in *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1 (2004), nor the Department's 1999 Advisory Opinion have ever stated that the Partnership Plans (as described in the advisory opinion request) are single-employer employee welfare benefit plans, contrary to Defendants' representation.

relationship, then the limited partnership plan described in the advisory opinion request would not be governed by ERISA and the Department would lack jurisdiction to regulate it.

C. The Secretary's Investigation of Defendants and Ensuing Settlement Discussions

The Counterclaim includes allegations about the Secretary's investigation of SAS and PIC that led to her Complaint in this case (the "SAS/PIC Investigation," referred to by Defendants as the "Anjo Investigation," where Anjo is a holding company that directly owns part of SAS and indirectly owns part of PIC). Countercl. ¶ 22. As part of the SAS/PIC Investigation, which began in 2019, the Department "request[ed] information and issu[ed] subpoenas" to SAS, PIC, and "key entities doing business with SAS and PIC, including the Employer Plans." *Id.* As summarized in both the Complaint and Counterclaim, Defendants are service providers to the Employer Plans. Compl. ¶¶ 2 n.1, 12–20; Countercl. ¶¶ 60, 69–70, 74. These Employer Plans collect contributions and send them to a third party administrator, which pools the contributions of multiple plans together in a claims account. Compl. ¶¶ 27, 38, 41. The funds in the claims account pay for health claims of the employee participants. *Id.* ¶ 41.

On July 21, 2022, the Secretary sent a letter to the Defendants summarizing the findings of her investigation and the basis of the Secretary's prospective ERISA claims. Countercl. ¶ 134, and Ex. O, ECF No. 25-15. The letter sparked initial negotiations between the parties. Countercl. ¶ 135. On June 8, 2023, the Secretary sent a demand letter outlining estimated plan losses at $60.3 million, and a proposal to settle for $40 million,[5] among other terms. Countercl. Ex. P at 3, ECF No. 25-16. Based on the Secretary's demand, the parties executed tolling agreements to allow for time to continue settlement discussions. Countercl. ¶ 137.

[5] Contrary to the Counterclaim's description of the Secretary's demand as $60 million, the Secretary's letter (Counterclaim Exhibit P) proposes a monetary settlement of $40 million. *Compare* Countercl. ¶ 23, *with* Countercl. Ex. P at 2.

While negotiations regarding the Secretary's investigation were ongoing, DMP and LPMS sent a letter on January 11, 2024 to the Department's counsel in the *DMP* Litigation "to explore the possibility of settlement discussions," stating that "[a] broad, permanent, nationwide injunction against the Department was never their goal[.]" Countercl. ¶ 139, and Ex. Q, ECF No. 25-17. On February 8, 2024, the Department responded with a request "to have a broader conversation" including the *DMP* Litigation and the SAS/PIC Investigation. Countercl. ¶¶ 140–41, and Ex. R, ECF No. 25-18. Thereafter, the parties to both the *DMP* Litigation and the SAS/PIC Investigation engaged in global negotiations that included the proposed dismissal of the *DMP* Litigation and a reduced monetary demand of $5.5 million from Defendants to settle the SAS/PIC Investigation. Countercl. ¶¶ 141–46, 149, and Ex. S, ECF No. 25-19. Ultimately, DMP and LPMS did not agree to dismiss the *DMP* Litigation, and the "global" negotiations failed. Countercl. ¶ 151. Afterwards, the Department resumed negotiations with Defendants alone in an attempt to resolve the SAS/PIC Investigation, but the discussions were unsuccessful and the Secretary filed the instant Complaint. Countercl. ¶ 151, and Ex. U, ECF No. 25-21.

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 8

Federal Rule of Civil Procedure 8 requires that a complaint or counterclaim contain a "short and plain statement of the claim showing that the pleader is entitled to relief," and "[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(a)(2), (d); *see also Douglas v. Hirshon*, 63 F.4th 49, 55 (1st Cir. 2023) (surviving a motion to dismiss requires that a complaint "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation omitted)); *InvestmentSignals, LLC v. Irrisoft, Inc.*, No. 10-cv-600-SM, 2011 WL 3320525, at *1 (D.N.H.

Aug. 1, 2011) (noting that Rule 8 applies to counterclaims). Rule 8 requires that a plaintiff "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation omitted). This is more than "an unadorned, the-defendant-unlawfully-harmed-me accusation," and the "Court is not bound to accept as true naked assertion[s] devoid of further factual enhancement." *Castillo-Berreiro v. State Ins. Fund Corp. of Commonwealth of Puerto Rico*, No. 09-2279CCC, 2010 WL 2900400, at *1 (D.P.R. July 20, 2010) (quoting *Twombly* and *Iqbal*). A complaint may be dismissed for noncompliance with Rule 8 when it is "so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised." *Sayied v. White*, 89 F. App'x 284 (1st Cir. 2004) (quotation omitted). A claim that fails to identify what provision of law is violated does not meet the pleading requirements of Rule 8 and may be dismissed. *See Santiago Collazo v. Franqui Acosta*, 721 F. Supp. 385, 392 (D.P.R. 1989) (dismissing claims where the provisions of law were not enumerated and the pleader failed to show the applicability of that law).

B. Federal Rule of Civil Procedure 12(b)(6)

When considering a motion to dismiss under Rule 12(b)(6), the First Circuit describes a two-step test for the sufficiency of a claim or counterclaim: "Step one: isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements." *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012) (citing *Twombly* and *Iqbal*); *see also Bautista Cayman Asset Co. v. Reliance Mfg.*, No. 16-1418 (FAB), 2017 WL 243362, at *2 (D.P.R. Jan. 20, 2017) (applying Rule 12(b)(6) to a counterclaim). "Step two: take the complaint's well-pled (*i.e.*, non-conclusory, non-speculative) facts as true, drawing all reasonable inferences in the pleader's favor, and see if they plausibly narrate a claim for relief." *Schatz*, 669 F.3d at 55.

"Plausible, of course, means more than merely possible, and gauging a pleaded situation's plausibility is a 'context-specific' job that compels [the court] 'to draw on' [its] 'judicial experience and common sense." *Id.* (quoting *Iqbal*, 129 S. Ct. at 1949, 50). One reason a claim might be implausible is where there is an "obvious alternative explanation" for the challenged conduct, such that the reviewing court cannot plausibly "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949, 51.

C. Federal Rule of Civil Procedure 12(b)(1)

Federal courts are "of limited jurisdiction, limited to deciding certain cases and controversies[.]" *Belsito Commc'ns, Inc. v. Decker*, 845 F.3d 13, 21 (1st Cir. 2016). Pursuant to Rule 12(b)(1), a defendant may move to dismiss an action for lack of subject matter jurisdiction. *Velez-Acevedo v. Centro de Cancer de la Universidad de Puerto Rico*, No. 19-1560 (SCC), 2021 WL 2785496, at *2 (D.P.R. July 2, 2021). "A sovereign immunity challenge may be brought under Rule 12(b)(1)." *Id.*

III. ARGUMENT

Defendants' Counterclaim frames the SAS/PIC Investigation and Complaint here as a plot to dismantle their businesses and the plans they service. That is not correct. The purpose of the Secretary's enforcement action is to remedy ERISA violations related to the services Defendants provide to the Employer Plans, as detailed in the Complaint. Ultimately, Defendants' claims are poorly defined, poorly supported, and factually and legally implausible. For the reasons below, this Court should dismiss all three counts of Defendants' Counterclaim.

A. Defendants' Count I Should Be Dismissed

Defendants' Count I requests that the Court issue a declaratory judgment pursuant to 28 U.S.C. § 2201 that "PIC and SAS are not a MEWA." Countercl. ¶ 169. This Count should be

dismissed for failure to state a claim for declaratory relief, for violation of Rule 8, and because the Court must determine whether the Employer Plans are a MEWA when addressing the Secretary's claims, rendering Defendants' request redundant.

1. Defendants Fail to State a Claim for a Declaratory Judgment that PIC and SAS Are Not a MEWA

Under the Declaratory Judgment Act, a district court, "upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration . . ." 28 U.S.C. § 2201. Here, Defendants request a declaration regarding "whether PIC and SAS constitute a MEWA under ERISA." Countercl. ¶¶ 166–69.

ERISA defines a multiple employer welfare arrangement, or MEWA, in relevant part, as "an employee welfare benefit plan, or any other arrangement [], which is established or maintained for the purpose of offering or providing [welfare benefits] to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries . . ." 29 U.S.C. § 1002(40). Courts agree that an arrangement where multiple health plans established by different employers use pooled funds to pay for their employees' health benefits can constitute a MEWA. *See, e.g.*, *Nat'l Bus. Ass'n ex rel Nat'l Ben. Adm'rs, Inc. v. Morgan*, 770 F. Supp. 1169, 1171, 1174–75 (W.D. Ky. 1991); *Acosta v. Riverstone Cap., LLC*, No. 19-778-MWF (MAAx), 2019 WL 2620725, at *1, *4–5 (C.D. Cal. May 1, 2019) (an arrangement of 112 self-funded plans was administered as a MEWA); *Chao v. Crouse*, 346 F. Supp. 2d 975, 983 (S.D. Ind. 2004) (employers created their own self-funded plans within a MEWA); *Pointer v. State*, No. 03-02-00548-CV, 2003 WL 21241261, at *3 (Tex. App. 2003) (a group of 400 single employer plans pooling funds in an account was a MEWA).[6]

[6] Though legal conclusions are not considered for purposes of assessing a motion to dismiss under Rule 12(b)(6), the assertion in the Counterclaim that a "MEWA is generally considered to be one plan under ERISA" is belied by this case law.

Defendants support their request for a declaratory judgment by arguing that "[a]n actual controversy exists . . . as to whether PIC and SAS constitute a MEWA under ERISA," but the Secretary does not assert that SAS and PIC are *themselves* a MEWA. *Compare* Countercl. ¶¶ 7, 11, 167 ("Defendants, however, are not employee welfare plans, nor are they sponsors of employee welfare plans, [nor] arrangements established or maintained for the purpose of providing welfare benefits."), *with* Compl. ¶¶ 2, 12, 13, 14, 16, 18, 20, 21, 23, 29 (consistently alleging that the Defendants operate multiple health plans that together comprise a MEWA). The Complaint asserts that SAS and the individual Defendants are fiduciaries to the Providence MEWA and PIC is a party-in-interest to the MEWA, *not* that Defendants themselves are a MEWA. Compl. ¶¶ 12–20. In fact, the Secretary's allegations are consistent with Defendants' assertion that they are "vendors who provide services to employee welfare plans . . . including the Employer Plans[.]" Countercl. ¶ 7. Thus, to the extent Defendants' Count I is premised on the Secretary alleging that Defendants "constitute" a MEWA, Defendants' claim rests on a fabricated controversy and should be dismissed. *Id.* ¶ 168.

Defendants make additional conclusory assertions that fail to state a plausible claim with respect to the Employer Plans' MEWA status. First, their assertion that a MEWA cannot exist merely because there are over 1,900 Employer Plans is incorrect, because a MEWA can be composed of multiple health plans operated by the same service provider. *See* Countercl. ¶¶ 5–11; *see also Acosta*, 2019 WL 2620725, at *1. Defendants further contend that "a MEWA cannot be composed of separate employee welfare plans which can be separated by plan type," but they fail to define "plan type" or explain how "plan type" is related to a determination of MEWA status. To the extent Defendants claim the Providence MEWA cannot be a MEWA because it is composed of both Partnership and Employer Plans, *see* Counterclaim ¶ 168, this argument makes

little sense because the crux of the MEWA structure is that funds from different employers—whether corporations or partnerships—are commingled to pay claims of employees. 29 U.S.C. § 1002(40); *see Pointer*, 2003 WL 21241261, at *3. As alleged in the Complaint, the Employer Plans follow this structure—they send contributions that fund a claims account, which in turn pays health claims of plan participants. Compl. ¶¶ 2, 27. By including only naked assertions that "Defendants are not and cannot be a MEWA," Counterclaim ¶ 11, Count I of Defendants' Counterclaim does not properly state a claim and should be dismissed.

2. Defendants' Count I Violates Rule 8

Defendants' Count I is further subject to dismissal because its allegations regarding the MEWA lack sufficient clarity to put the Secretary or the Court on notice of what relief they request, in violation of Rule 8. First, the Counterclaim fails to identify which entities should be addressed in the declaratory judgment. The Counterclaim contains various allegations that (i) the Providence MEWA described in the Secretary's Complaint is not a MEWA, Countercl. ¶ 5; (ii) one (or several) of the Partnership Plans are not a MEWA, *id.* ¶ 167; or (iii) that SAS and PIC are not a MEWA, *id.* ¶ 7. The lack of clarity in Count I warrants dismissal because the Secretary cannot reliably discern what Defendants seek in a declaratory judgment. *See Rivera Crespo v. Gonzalez-Cruz*, Civ. No. 13-1004(CVR), 2015 WL 1022202, at *2-3 (D.P.R. Mar. 9, 2015) (confusing, unintelligible allegations violate Rule 8 and dismissal is appropriate on that basis alone).

Second, as discussed *supra*, Defendants' claims are too vague to satisfy Rule 8's pleading standard. For example, Defendants contend that a MEWA cannot consist of plans that can be separated by plan type, but they do not define plan type. And as also discussed above, Defendants manufacture a controversy between the parties as to whether SAS or PIC are a MEWA—it is not clear whether they truly believe that the Secretary alleges that the *parties* are a

MEWA, or if they purposely create a straw man argument because they cannot credibly argue that the arrangement does not fit the legal definition of a MEWA. This results in confusing, unintelligible allegations that cannot be untangled to understand the relief sought. Accordingly, Count I should be dismissed as a violation of the fair notice pleading standards.

3. The Court Should Exercise Its Discretion to Dismiss Defendants' Count I in the Interest of Judicial Efficiency

As best as the Secretary can tell, the relief Defendants seek under Count I is a declaratory judgment that "PIC and SAS are not a MEWA," which implicates a legal question that the Court will have to decide when it rules on the Secretary's claims. In furtherance of judicial efficiency, the Court should decline to issue a declaratory judgment and dismiss Defendants' Count I.

"In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *DeNovellis v. Shalala*, 124 F.3d 298, 313 (1st Cir. 1997) (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995)). The district court has "broad discretion[]" as to whether it will dismiss a declaratory action. *Id*. Guiding this discretion is a court's consideration of whether the question in controversy will be settled in a different proceeding. *Id.*; *see also Wilton*, 515 U.S. at 288 ("If a district court, in the sound exercise of its judgment, determines after a complaint is filed that a declaratory judgment will serve no useful purpose, it cannot be incumbent upon that court to proceed to the merits before staying or dismissing the action.").

Here, the Secretary has already filed a lawsuit alleging that the Employer Plans constitute a MEWA and that SAS, as the MEWA's operator, has failed to meet reporting obligations required under ERISA, such as filing an M-1 Form. Compl. ¶ 28. Defendants answered those allegations by admitting SAS did not file any M-1 Forms and denying the MEWA status of the Employer Plans. Original Answer of Defs. Suffolk Administrative Services, LLC and Providence

Insurance Co., I.I. ¶ 87, ECF No. 21. The parties will thus proceed to discovery on the facts supporting the Secretary's description of the Providence MEWA, and the Court will necessarily opine on whether the Employer Plans constitute a MEWA in order to render judgment on the Secretary's Count V. Accordingly, the principles of judicial efficiency weigh against entertaining Defendants' request for a declaratory judgment where the relevant facts and law regarding MEWA status will already be addressed in adjudicating the Secretary's claims.

B. Defendants' Count II Should Be Dismissed

Defendants' Count II is a claim under the APA, arguing that the Secretary is trying to dismantle and discredit the Partnership Plans and that the Secretary's action and "threats" to sue violate the APA. Count II, however, fails to state a claim and should be dismissed.

1. Threshold Requirements Under the APA for Judicial Review

The APA does not apply to actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This arises where "statutes are drawn in such broad terms that in a given case there is no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), and "a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quotation marks omitted). Such situations often involve "a complicated balancing of . . . factors which are peculiarly within [the agency's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Where the APA does provide for judicial review, that review is limited to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The APA's judicial review provision "is not so all-encompassing as to authorize… judicial review over everything done by an administrative agency." *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 800–01 (9th Cir. 2013) (quotation marks omitted). "Agency action" is defined as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or

failure to act." 5 U.S.C. § 551(13). The agency action must also be final to be reviewable, which means it satisfies two conditions. *Harper v. Werfel*, 118 F.4th 100, 116 (1st Cir. 2024). First, it "must mark the 'consummation' of the agency's decisionmaking process." *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.*

2. Defendants Fail to Plead Any Reviewable Agency Action

Defendants' Count II suffers from multiple fatal flaws—it (i) fails to provide fair notice of the basis for their APA claim, (ii) challenges decisions committed to agency discretion, and (iii) complains about actions that are not final agency action subject to judicial review. Accordingly, Count II is meritless and should be dismissed.

To begin, Defendants' Count II does not provide "fair notice" of the basis for their APA claim, as they interchangeably allude to the SAS/PIC Investigation, the Secretary's Complaint in this case, and negotiations to settle the Secretary's claims. Countercl. ¶¶ 170–185; s*ee Twombly*, 550 U.S. at 555. It is also not clear whether the challenged actions relate to the Partnership Plans, the Employer Plans, or both. *See* Countercl. ¶¶ 172, 173, 179. Such a pleading cannot stand under Rule 8. *See Gonzalez-Camacho v. Banco Popular de Puerto Rico*, 318 F. Supp. 3d 461, 504 (D.P.R. 2018), *aff'd in part, dismissed in part*, No. 17-1973, 2020 WL 5543934 (1st Cir. July 21, 2020) ("Finally, Plaintiffs 'kitchen type' [sic] approach […] has created lack of compliance with Rule 8(a) also causing dismissal.").

Nonetheless, whichever of these actions underlie Defendants' Count II, none pass muster as reviewable under the APA. First, to the extent Defendants challenge the SAS/PIC Investigation, such decisions are committed to agency discretion. It has long been recognized that the APA precludes judicial review of "agency refusals to institute investigative or enforcement proceedings." *Heckler*, 470 U.S. at 838; *S. Ry. Co. v. Seaboard Allied Milling Corp.*,

442 U.S. 444, 461 (1979); *Mass. Pub. Interest Research Grp., Inc. v. Nuclear Regulatory Comm'n*, 852 F.2d 9, 14 (1st Cir. 1988). The same logic applies to an agency's decision to open an investigation. In *Gentile v. Securities and Exchange Commission*, 974 F.3d 311 (3d Cir. 2020), the Third Circuit applied *Heckler* to a Securities and Exchange Commission decision to initiate an investigation, concluding that "a decision to investigate involves a complicated balancing of several factors peculiarly within the agency's expertise, including the allocation of scarce resources," and the APA precluded judicial review where Congress had not "articulated specific standards governing a decision to initiate an investigation under the Exchange Act." *Id.* at 319. Further, the court also concluded that the agency's "allegedly retributive motive" did not alter the unreviewability of the investigation because the APA "shields the entirety of an agency action that is committed to agency discretion by law." *Id*. at 319–20.

Along with being committed to agency discretion, conducting an investigation pursuant to an agency's authority is not reviewable final agency action. The First Circuit has clearly explained that "investigatory measures are not final agency action" for failure to mark the "consummation" of the agency's decision-making process. *Harper*, 118 F.4th at 116–17 (collecting cases); *see also Conservation Law Found., Inc. v. Jackson*, 964 F. Supp. 2d 152, 167 (D. Mass. 2013) ("[I]nvestigation prior to any enforcement action is quintessentially non-final as a form of agency action." (quotation omitted)). Defendants previously challenged the SAS/PIC Investigation in this Court prior to the filing of the enforcement action, and this Court properly dismissed Defendants' APA claim because the investigation was not final agency action. *Suffolk Admin. Servs., LLC v. U.S Dep't of Labor*, No. 3:21-cv-01031-DRD, ECF No. 43 at 23–24 (D.P.R. 2022) (attached as Ex. B). Further, to the extent that Defendants are challenging any settlement negotiations with the Secretary during the investigation, such discussions are similarly

an interim step that is not final agency action subject to review. *See Nimmrich & Prahm Reederei Gmbh & Co. KG MS Sonja v. United States*, 925 F. Supp. 2d 850, 854–55 (S.D. Tex. 2012) ("[I]t cannot be said on this record that the parties' impasse in their negotiations marks the 'consummation' of the Coast Guard's decision making process[.]"); *Robishaw Eng'g, Inc. v. U.S.*, 891 F. Supp. 1134, 1150–51 (E.D. Va. 1995) (statements during settlement negotiations are not final agency action).

Neither is the Secretary's decision to bring an enforcement action a reviewable "final agency action" under the APA. *City of Oakland v. Holder*, 901 F. Supp. 2d 1188, 1195 (N.D. Cal. 2013), *aff'd*, *City of Oakland v. Lynch*, 798 F.3d 1159 (9th Cir. 2015). As the *Holder* court explained, an agency's decision to file a civil action does not meet the definition of agency action because "it is not a rule, order, license, sanction, form of relief, or failure to act." *Id.* at 1195. Furthermore, an agency's filing of a civil complaint does not meet the *Bennett* criteria for finality, as simply filing a complaint does not determine any rights or obligations or result in consequences. *Id.* The *Holder* court could not locate any authority holding that filing a civil complaint qualified as final agency action under the APA, and it was unwilling to expand the definition of "final agency action" to allow every civil or criminal suit filed by the United States government to be subject to separate judicial review. *Id.* at 1196.

Accordingly, Count II should be dismissed, as the Secretary's investigation, negotiations, and enforcement action regarding either the Employer Plans or Partnership Plans are not subject to judicial review under the APA.

3. Defendants Have Not Pled Any Violation of the APA

Even if the Secretary's decisions to investigate, negotiate, or bring an enforcement action were reviewable under the APA, Defendants have still failed to state a claim under APA sections 706(2)(A), (B), (C), and (D). The standard for review under the APA is "narrow" and requires

courts to ensure that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Defendants plead no facts that the SAS/PIC Investigation, settlement negotiations, or filing of a civil enforcement action are either (i) arbitrary and capricious; (ii) contrary to their constitutional right, power, privilege or immunity; (iii) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (iv) without observance of procedure required by law. 5 U.S.C. § 706(2)(A)–(D).

Frankly, Defendants' allegations undercut their claim that the Secretary has violated the APA. With respect to the SAS/PIC Investigation, Defendants allege that the Secretary investigated Defendants for over five years, from 2019 through 2024 (Countercl. ¶¶ 22, 23, 149–51), the Secretary gathered information using at least ten subpoenas to SAS, PIC, and other "key entities" (*Id.* ¶¶ 22, 105), and the Secretary gave notice to SAS and PIC "as to the substance of its [] Investigation and alleged violations of ERISA" (*Id.* ¶ 134, and Ex. O).[7] Defendants' Counterclaim also explains how, for more than two years, the Secretary attempted to negotiate a resolution of Defendants' alleged violations of ERISA (Countercl. ¶¶ 138–52), engaged in several rounds of proposals and responses on potential settlement terms (*Id*. ¶¶ 136, 141, and Exs. P, S, U), and filed the Complaint only after negotiations broke down (*Id.* ¶ 151). None of these actions are arbitrary and capricious, retaliatory, or otherwise a violation of law.

[7] The Counterclaim also references state investigations of SAS and PIC, but such activities are clearly not "agency action" by the Secretary. Countercl. ¶¶ 125, 127–32. To the extent Defendants attempt to connect state investigations with the SAS/PIC Investigation, ERISA permits coordination by the Secretary and states. *See* 29 U.S.C. § 1134(d) (communications between Secretary and state authorities), § 1136(c) (Secretary may delegate authority to states), and § 1144(b)(6)(A) (Secretary and states may have concurrent jurisdiction over MEWAs).

To the contrary, the obvious alternative explanation for the Secretary's actions is that she was pursuing her lawful investigative authority under 29 U.S.C. § 1134 and conducting a thorough investigation. Upon a determination of ERISA violations, the Secretary made a good faith attempt at resolving the claims in a way that would protect the Employer Plans and their participants. Defendants admit that, as of July 21, 2022, the parties were in "active settlement negotiations" (Countercl. ¶ 135, and Ex. O), and those negotiations, though at times "very slow," continued into 2024 as the Secretary delayed filing any enforcement action (*Id.* ¶ 137). The Counterclaim describes how the *DMP* Plaintiffs first proposed settling the *DMP* Litigation,[8] which prompted the Secretary's suggestion for global settlement discussions, to which Defendants, DMP, and LPMS agreed. *Id.* ¶¶ 139–41, and Exs. Q and R. With the potential for settling the *DMP* Litigation, the Secretary accordingly lowered her monetary demand of the Defendants (Countercl. ¶ 141), and, when DMP and LPMS refused to dismiss the *DMP* Litigation, the Secretary accordingly withdrew her lower monetary offer (*Id.* ¶¶ 143, 146). While Defendants claim that such demands were "extortive," increasing a monetary demand after a proposed benefit is taken off the table is not extortion—it is a basic principle of negotiations. Only when the parties were unable to reach resolution did the Secretary file for enforcement pursuant to 29 U.S.C. § 1132(a)(2) and (a)(5). The Secretary's actions as alleged in the Counterclaim are thus commensurate with her statutory authority and do not support an APA violation. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) ("An inference

[8] Contrary to Defendants' suggestion that the Secretary linked the *DMP* Litigation with this action, the *DMP* Plaintiffs suggested settling the *DMP* Litigation, not the Secretary. Only after the *DMP* Plaintiffs suggested settlement did the Secretary propose a resolution of both the SAS/PIC Investigation and the *DMP* Litigation due to the connection among the parties. Countercl. ¶ 24.

pressed by the plaintiff is not plausible if the facts he points to are precisely the result one would expect from lawful conduct in which the defendant is known to have engaged.").

Because Defendants fail to plead any reviewable final agency action and the alleged actions, even if reviewable, do not violate the APA, Count II should be dismissed.

C. Defendants' Count III Should Be Dismissed

Defendants' Count III asserts that "[t]he DOL is acting contrary to the purpose of ERISA in its concerted efforts to discredit or dismantle the Partnership Plans," Counterclaim ¶ 188, that Defendants will "suffer irreparable harm" in the absence of an injunction preventing the Department from continuing to violate ERISA, *id.* ¶ 189, and that this injunction would be in the public interest because it would protect the health benefits of more than 30,000 participants in the Partnership Plans and the Employer Plans, *id.* ¶ 190. For all the reasons below, Defendants' ERISA claim is meritless.

1. Defendants' Count III Violates Rule 8

As is the case with Counts I and II, Defendants' Count III falls far short of meeting Rule 8's requirement of providing fair notice of the substance of their claim. Defendants fail to specify which of the more than 100 provisions of ERISA the Secretary has purportedly violated, instead stating conclusively that "the DOL is acting contrary to the purpose of ERISA[.]" Countercl. ¶ 188; *see Yumukoglu v. Provident Life & Accident Ins. Co*, 131 F. Supp. 2d 1215, 1227 (D.N.M. 2001) (finding a plaintiff failed to comply with Rule 8 by not specifying the provision of the New Mexico Unfair Insurance Practices Act defendant violated); *Santiago Collazo*, 721 F. Supp. at 392. What action Defendants seek to enjoin is similarly unclear, since they vaguely request "[a]n injunction preventing the DOL from continuing to violate ERISA." Countercl. ¶ 190; *see Iqbal*, 129 S. Ct. at 1949 (requiring more "than an unadorned, the-defendant-unlawfully-harmed-me accusation").

Count III fails to put the Secretary on notice of what actions she has taken that purportedly violate any part of ERISA and should be dismissed.

2. Defendants' Count III Fails to State a Claim

Along with violating the requirements of Rule 8, Defendants' Count III is implausible on the merits. ERISA exists "to protect . . . the interests of participants in employee benefit plans. . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). The Secretary plays an important role in enforcing ERISA on behalf of participants in benefit plans across the country, particularly as one of the persons authorized to bring an action to remedy a violation of ERISA. 29 U.S.C. § 1132. ERISA explicitly confers investigative authority on the Secretary to determine whether any person has or is about to violate ERISA. 29 U.S.C. § 1134(a).

Given these purposes of ERISA and the Secretary's authority under the statute, Defendants' claim that the Secretary has violated ERISA is implausible because the Secretary's investigation, negotiations, and filing of the Complaint are entirely consistent with her statutory responsibility of ensuring adherence to ERISA's fiduciary standards. The Secretary's action brings claims for relief on behalf of the Employer Plans and attempts to restore contributions lost to excessive fees through Defendants' actions. Compl. ¶¶ 88-100. Defendants' argument that the Secretary is violating ERISA because her civil action against plan service providers may result in benefit plans shutting down is nonsensical. To argue so is akin to saying that the Securities and Exchange Commission violates the Securities Exchange Act when it prosecutes companies for fraud because the prosecution may cause the companies' stock to plummet.

As best the Secretary can discern, Defendants' claimed ERISA violation in Count III is that the Secretary's actions jeopardize the Partnership Plans, which may or may not be ERISA

plans. *See Data Marketing P'ship*, 45 F.4th at 860; Ex. A at 6–7. Defendants' theoretical chain of events leading to the alleged demise of benefit plans fails the First Circuit's test of "plausible" versus "merely possible." *Schatz*, 669 F.3d at 55. Initially, Defendants provide no support to show that SAS and PIC face a threat of "financial ruin" resulting from the Secretary's actions. *See* Countercl. ¶¶ 28–30, 188–90. As Defendants admit, the Secretary's investigation started six years ago, but they continue to operate. *Id.* ¶ 22. Defendants also make the speculative claim that no other vendors provide the same services as SAS and PIC, such that the fate of the Partnership Plans are singularly tied to theirs. *Id.* ¶ 29. Defendants conclude that once the Partnership Plans stop operating, 30,000 individuals will "los[e] access to affordable health plan benefits." *Id.* ¶ 30. Yet SAS and PIC do not allege, nor could they possibly know, that any or all of the purported 30,000 individuals receiving benefits through the Partnership Plans could not afford to procure health insurance through other plans or the health insurance marketplace. As the First Circuit instructs, under Rule 12(b)(6), "[p]lausible, of course, means something more than merely possible." *Schatz*, 669 F.3d at 55. Defendants' allegations, which essentially predict a chain of catastrophes resulting from the Secretary's lawsuit, fall far short of plausibility.

In sum, Defendants' Count III is supported by neither the text and purpose of ERISA, nor by Defendants' vague and conclusory allegations. The Court should dismiss this claim.

D. The Secretary Has Not Consented to Be Sued Under the Declaratory Judgment Act or ERISA

Lastly, Defendants' Counts I and III are further subject to dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction because Defendants have not established that the Secretary has waived sovereign immunity to be sued under the Declaratory Judgment Act or ERISA. "[T]he United States, as sovereign, 'is immune from suit, save as it consents to be sued[.]'" *United States v. Dalm*, 494 U.S. 596, 608 (1990) (quoting *United States v. Testan*, 424

U.S. 392 (1976)). Any waiver of sovereign immunity "must be unequivocally expressed." *Skwira v. United States*, 344 F.3d 64, 73 (1st Cir. 2003) (quotation omitted). A plaintiff bears the "burden of proving [that] sovereign immunity has been waived." *Mahon v. United States*, 742 F.3d 11, 14 (1st Cir. 2014). Without waiver, a court lacks jurisdiction to hear claims against the United States. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003).

Where the United States initiates a lawsuit, it only waives sovereign immunity to the extent needed to rule on those claims, including any compulsory counterclaims, i.e., those arising out of the same transaction or occurrence which is the subject matter of the government's suit. *See Texas v. Caremark, Inc.*, 584 F.3d 655, 659 (5th Cir. 2009); *see also* Fed. R. Civ. P. 13(a). The United States does not waive sovereign immunity as to permissive counterclaims, which are claims that do not meet the "same transaction or occurrence test." *Caremark, Inc.*, 584 F.3d at 659; Fed. R. Civ. P. 13(d) ("These rules do not expand the right to assert a counterclaim . . . against the United States or a United States officer or agency.").

Because the Counterclaim arises from a different transaction or occurrence than the Secretary's Complaint, the Secretary has not waived sovereign immunity for Counts I and III. Defendants' Counterclaim focuses primarily on the Partnership Plans (*see, e.g.*, Countercl. ¶¶ 1–3, 11, 17, 18–21, 26–30, 41, 60–68, 70–102, 115–19, 125, 152, 168–69, 172–73, 179, 185, 188–90), states that the DOL is "retaliat[ing]" against and "dismantling" the Partnership Plans (*id.* ¶¶ 172, 186-90), and requests a declaratory judgment as to the Partnership Plans (*id.* ¶¶ 166-69). In contrast, the Complaint *solely* focuses on Defendants' actions related to their Employer Plan clients. Compl. ¶ 2 n.1. The Counterclaim's allegations surrounding the Partnership Plans amount to a new lawsuit against the Secretary. Further, the Court need not rule on Defendants' Counterclaim in order to adjudicate the Secretary's claims, so sovereign immunity is not waived.

Defendants make the conclusory statement that the "United States has waived its sovereign immunity in this action pursuant to 5 U.S.C. § 702, 28 U.S.C. § 2201, and 29 U.S.C. § 1132(k)." Countercl. ¶ 39. [9] However, neither ERISA nor the Declaratory Judgment Act provide a waiver of sovereign immunity allowing Defendants to sue the Secretary of Labor. *Shanbaum v. United States*, 32 F.3d 180, 182 (5th Cir. 1994) ("Although [29 U.S.C. § 1132] gives plan participants the right to bring civil actions to redress violations of ERISA, this section does not provide a waiver of sovereign immunity which would permit the suit to be brought against the United States.");[10] *Muirhead v. Mecham*, 427 F.3d 14,17 n.1 (1st Cir. 2005) ("Although the instant action is also premised on the Declaratory Judgment Act, [] that statute plainly does not operate as an express waiver of sovereign immunity."). Furthermore, under 29 U.S.C. § 1132(k), only an "administrator, fiduciary, participant, or beneficiary of an employee benefit plan" may file suit regarding certain agency actions; Defendants have not alleged that they are in this permissible category of litigants. Defendants fail to establish the Secretary's consent to be sued; thus, the Court should dismiss the Counterclaim.

IV. CONCLUSION

For the reasons discussed above, the Secretary respectfully requests that the Court grant the Secretary's motion and dismiss the Counterclaim with prejudice.

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[9] Regarding Defendants' APA claim, a United States agency waives sovereign immunity under the APA only to the extent that the challenged action is not committed to agency discretion and is "final agency action" as defined by the statute. The Counterclaim meets neither requirement.

[10] Multiple district courts agree that ERISA does not provide a waiver of sovereign immunity. *See, e.g.*, *Payne v. Pentegra Ret. Servs.*, No. 1:14-cv-00309-TWP_MJD, 2015 WL 898467, at *6 (S.D. Ind. Mar. 3, 2015); *Palmatier v. Lockheed Martin Corp.*, No. 1:13-cv-133, 2014 WL 1466489, at *6 (N.D.N.Y. Apr. 15, 2014); *Middleton v. United States*, No. 6:13-cv-00002, 2013 WL 1898146, at *2 (W.D. Va. May 7, 2013); *Berwind Corp. v. Apfel*, 94 F. Supp. 2d 597, 613 (E.D. Pa. 2000); *Hartje v. FTC*, No. 3-94-1288, 1995 WL 779156, at *2 (D. Minn. Dec. 4, 1995).

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