IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DATA MARKETING PARTNERSHIP, LP and LP MANAGEMENT SERVICES, LLC,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF LABOR, EUGENE SCALIA, *in his official capacity as Secretary of the United States Department of Labor,* and UNITED STATES OF AMERICA,

Defendants.

Case Number 4:19-cv-00800-O

PLAINTIFFS' AMENDED CONSOLIDATED REPLY BRIEF IN SUPPORT OF SUMMARY JUDGMENT AND INJUNCTION AS WELL AS OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Defendants' Combined Brief in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction, in Opposition to Motion for Summary Judgment, and in Support of Cross-Motion for Summary Judgment (Defendants' "Combined Brief") (ECF No. 28) fails to present any sustainable arguments against granting Plaintiffs' injunctive relief and summary judgment. The Combined Brief, and the AO Response as well, builds the foundation of its entire substantive argument out of a misplaced cornerstone that conflates the concepts of "working owners" and "employees", incorrectly arguing that a "working owner" also must be an "employee" in a common law sense to be a plan participant. As in their response to the Advisory Opinion ("AO") Request, the Defendants' Combined Brief ignores many key facts, misstates many others, and makes up "alternative facts" to fit their preferred narrative, rather than fulfilling their statutory obligation of applying the presented facts to existing law. Like the AO Response, the Combined Brief conflates key but distinct ERISA concepts, ignores Supreme Court precedent, and blatantly contradicts prior regulatory positions of the Department of Labor ("DOL"). Much of the Combined Brief is devoted to efforts to assert – erroneously – that this Court lacks jurisdiction on procedural grounds. Defendant's claims that the Advisory Opinion is not a final agency action are nothing more than a cynical effort to deprive this Honorable Court of its Constitutional grant of authority, and to circumvent the Court's review powers. In short, Defendants are not entitled to judgment as a matter of law, while Plaintiffs are so entitled as to the questions presented, and within the scope of inquiry to which the Parties agreed in the Scheduling Order.

II. FACTS AND CORRECTION OF MISSTATEMENTS OF FACT BY DOL

Defendants' approach to the facts in this case has been consistent from the start – ignore some facts presented by Plaintiffs; change others; and when necessary, simply invent their own.[1] Plaintiffs noted ten (10) major factual errors in the AO Response (App. 1-6) which contradicted or misstated the facts presented in the AO Request (App. 7-20), violating DOL's own ERISA Procedure 76-1. See, Plaintiff's Brief in Support of Motion for Summary Judgment, (ECF 24, pp. 37 - 39). The Combined Brief continues and doubles down on this regrettable pattern.

A. ACTUAL MATERIAL FACTS PRESENTED BY PLAINTIFFS IGNORED BY DOL

The Combined Brief ignores several material facts presented by Plaintiffs in the AO Request. (App. 7 – 20) A sample of these follow.

In the AO Request, LPMS clearly noted that the partners control and manage the capture, segregation, aggregation, and sale of their own data (activities commonly known as "data mining"), empowering the limited partners in a manner not otherwise available to them when they utilize services over the Internet. (App. 9.) Also, Partners contribute time and energies/services to the partnership by data mining, assisting in the partnership's primary business and revenue

[1] Defendants assert that the record available to the Court for review in this case "includes only Plaintiffs request, Plaintiffs original complaint, and the Advisory Opinion" and that any "additional facts asserted in Plaintiffs declarations and other attachments were not before the agency and cannot provide a basis for the Court decision." Consolidated Brief, p. 23. In FN 12, Defendants only object to consideration of "Tabs 4, 5, 6, 7, 14, and 15 of Plaintiffs' Appendix." *Id.*, FN 12. Thus, Defendants asserted no objection to including the Amended Complaint, Tab 3, (filed ***AFTER*** issuance of the AO Request). The Declaration of Randall Johnson (Tab 4), was filed in conjunction on February 3. Additionally, Defendants cite to the Johnson Declaration four times in support of their arguments. *See*, Consolidated Brief, pgs. 38, 41, 42, and 47. On February 13, Defendants agreed that the "case rests on issues of law, with no need for discovery to be conducted by either party." Joint Statement Regarding Proposed Schedule, p. 1 (ECF 18). The record at the time of this stipulation included the Johnson Declaration (ECF 11-2) filed February 3 and Defendants cite to it in their brief. As such, that declaration is well within the Court's purview to consider. The balance of the objectionable items in the Appendix are well within the judicial notice powers of the Court. *See* Fed. R. Evid. 201 (court has discretion to consider judicially noticed facts).

generating activity. (App. 14.) The time and energies/services contributed by the partners "comprise the sole means of revenue generation" by the partnership. (App. 14.) Finally, without this activity by the partners, the partnership "would not earn revenue or survive as an entity." (*Id.*)

Why are these facts material? The key question presented to DOL and before this Honorable Court is whether or not the limited partners (owners of the partnership) are "working owners" of the partnership and, thus, eligible to be "participants" in the plans. Both the Supreme Court and DOL (before its litigation-driven position in this case) agreed that this analysis hinges on whether a person with equity ownership of a business "renders services to a business," (App. 162). Put another way, the term "working owner" means "any individual who has an **equity ownership right of any nature** in a business enterprise and who is **actively engaged in providing services to that business**, as distinguished from a **'passive owner,'** who may own shares of a corporation … but is **not otherwise involved in the activities in which the business engages for profit**." (App. 181, fn 3). These ignored material facts establish that the partners actively provide services to the partnerships which creates the commodity or product to be sold in the market, the very business in which Plaintiffs engage for profit. In other words, these material facts ignored by DOL conclusively establish that Plaintiffs' partners are all actively engaged in providing services to the business. Without that active engagement, which consists of a partner intentionally data mining, DMP and other LPMS-managed limited partnerships would have nothing to sell. It is unclear how DOL can, ***in good faith***, ignore these material facts in its analysis of the "working owner" question.

B. MISREPRESENTED, DISTORTED AND IGNORED MATERIAL FACTS

A wise man once said the best way to show that a stick is crooked is to lay a straight stick alongside it. The table below does just this – laying the "straight stick" of the material facts

presented by Plaintiffs against the "crooked stick" of Defendants' mischaracterizations and inaccuracies in their Combined Brief.

DOL'S "CROOKED STICK"	LPMS' "STRAIGHT STICK"
"(describing the 'purported and sole service' as installing software to permit electronic tracking)." Combined Brief, p. 34.	Partners agree to contribute at least 500 hours of work per year through data mining. (App. 28, ¶35.) Partners decide how their mined data is used and sold to third-party marketing firms generating revenue in furtherance of the business of the partnership. (App. 9.)
Partners do not "work or provide any services" on behalf of the partnership. Combined Brief, p. 35.	The partners are required to provide 500 or more hours "of intentional activity on their computers and electronic devices, which is generated, aggregated, and organized into an electronic data set that, when combined with other limited partners' electronic data sets, creates a marketable commodity." App. 44, ¶ 93; *See also*, App. 28, ¶35. "[P]artners earning guaranteed payments must be providing services directly to the partnership in the form of hours of service contributed by the partner to the partnership". App. 17. Through data mining, partners commit time and service to revenue generating activity of the partnership. App. 9.
"Partners do not receive income for performing services." Combined Brief p. 34. "There is no basis to conclude the limited partners will derive any income from the partnership for the performance of services." *Id*.	Partners performing personal services for the partnership will receive income **resulting from revenue-generating activities** and such payments "will be reported as guaranteed payments and subject to employment taxes." App. 8 (text in bold omitted by DOL); App. 27, ¶ 31. Partners "earning guaranteed payments must be providing services directly to the partnership in the form of hours of service contributed by the partner to the partnership" App. 17.
"Allowing the partnership to 'track consumers' activities on the Internet' is instead similar to what consumers already permit 'numerous firms, such as internet browsers and social media companies' to do 'without claiming that the tracked consumers work for them.' [Cit.] And the limited partners activities, while comprising 500 hours of data,	Partners' time and energy accumulating data is the primary income generating activity of the partnership. App. 14. Partners will receive income in exchange for providing 500 or more hours of service annually in the form of intentional activity on their computers and electronic devices that creates electronic data sets that when combined with the data sets of other partners, creates a marketable commodity. App. 44, ¶ 93. Limited partners exercise control over their data and how it is used and receive income in exchange for that service compared to other data collection firms who collect consumer data without their consent, control or

DOL'S "CROOKED STICK"	LPMS' "STRAIGHT STICK"
do not appear to 'differ in any meaningful way form the personal activities … [they]would otherwise engage in while using their personal computers." Combined Brief p. 35.	input on how the data is used and without providing any remuneration. App. 9.
Partners do not earn income based on work performed for the partnership that is "***a material income-producing factor*** of the partnership." Combined Brief p. 38. (emphasis added)	Data mining partners are active, material participants in creating the primary commercial offering of the partnership. App. 28, ¶ 35. In addition to a misstatement of fact, this is also a flagrant misstatement of the law. DOL, in all its other pronouncements on "working owners" prior to the AO Response, merely required an owner be "actively engaged in providing services to that business" or an owner who "renders services to a business". See Advisory Opinion 99-04A, p. 4, FN 3 (App. 181) and *Yates* Amicus Brief, p. 2 (App. 162).[2]
No evidence that partners have an intent to join together and contribute money, labor or skills toward further the partnership's business purpose. Combined Brief, p. 38.	First, LPMS stated that partners "are individuals who have obtained a Limited Partnership Interest ('LPI') through the execution of a joinder agreement" with the limited partnership. AO Request, p. 2 (App. 8). Second, partners will receive income in exchange for providing 500 or more hours of service annually in the form of data mining from their computers and electronic devices that creates electronic data sets that, when combined with the data sets of other partners, creates a marketable commodity. App. 44, ¶ 93.
"Indeed, the limited partners make no contribution at all to join the partnership. … Thus, there is no 'intent to be partners' …" Consolidate Brief p. 38.	Partners contribute at least 500 hours of data mining per year which creates the very asset that the partnerships seek to sell in the market. App. 28, ¶ 35. A lack of cash contribution to the partnership is not legally relevant to a partner's standing as a legal owner of the partnership. Such arrangements are commonplace where one or more partners contribute "sweat equity" to a venture and others contribute monetary capital. "Sweat equity" contributors are no less legal partners than "monetary capital" contributors. Partners sign a joinder agreement which outlines their

[2] Ironically, DOL is using terms from the Internal Revenue Code while also claiming such terms are not applicable.

DOL'S "CROOKED STICK"	LPMS' "STRAIGHT STICK"
	limited partnership interest and is evidence of their intent to become limited partners in the partnership. App. 27, ¶31.
The fact that partners sign in before creating and transmitting data is a new fact introduced in Plaintiffs' Motion for Summary Judgment. Combined Brief p. 41.	The fact that the partnership electronically tracks the time partners data min online was clearly articulated throughout LPMS' AO Request. App. pp. 7-20.
Partners do not receive income for performing services for or as partners of the partnership Combined Brief p. 41.	Partners ***will*** receive income distributions once the partnership begins to generate enough data to sell to third parties. App. 8. Partners "earning guaranteed payments must be providing services directly to the partnership in the form of hours of service contributed by the partner to the partnership" App. 17.
"It is entirely speculative whether these partners will ever receive any payments from the partnership." Combined Brief, p. 41.	No such fact was included in the AO Request. This specious claim is entirely speculative by DOL and irrelevant to ERISA's application. Unprofitable companies offer ERISA group health plans throughout America. If profitability were a standard for determining applicability of ERISA to working owners, then working owners at Uber, Snapchat, and Spotify (none of which have earned a profit yet) are ineligible to participate in those companies' ERISA plans and those companies should be advised to obtain insurance licenses for their transaction of commercial insurance.
"Moreover, it is not obvious that distributions from the sale of aggregate data could reasonably be considered 'income' for the partners' own generation of data." Combined Brief, p. 41.	No such fact was included in the AO Request. Is DOL implying that once guaranteed payments are made to partners those payments are tax free? Was this an outcome from DOL's "consultation" with the IRS?
Partners "do not have 'any assigned 'work' location' and do not 'notify the partnership that they are commencing work.'" Combined Brief, p. 42	The partnership tracks the limited partners' activity on the Internet and is thereby informed of when the partners are online and how much time they spend in furtherance of the business of the partnership. (App. 9.) While the Combined Brief was filed before the height of the COVID-19 pandemic, this absurd "fact" demonstrates that Defendants clearly have a bias against innovation and modernization reflective of Plaintiffs' business model.

DOL'S "CROOKED STICK"	LPMS' "STRAIGHT STICK"
	Plaintiffs' partners are much like the nearly 300,000,000 Americans now staying home under "shelter-in-place" orders, the employed of which must work from home. They can work remotely while their data is collected for use by the partnership – the software partners install on their devices "provide[s] access of such data to LP" enabling the partnership to keep track of the number of hours spent by each partner. (App. 9.) Is DOL going to cancel all ERISA plans for those 300,000,000 Americans who now have no "assigned work location" or because they do not tell their employers when they are commencing work? If not, how is this applicable to Plaintiffs' partners but not those Americans? In the two weeks ending March 21 and 28, 9,900,000 Americans (with more sadly joining their ranks every day) are out of work and looking for work they can do from home without losing access to health coverage. Plaintiffs' business model could literally save lives by generating income for these Americans and allowing access to affordable health care at a time of economic anxiety for millions. However, this solution is only possible if DOL is made to comprehend the modern value of personal data and the very real services provided to the partnerships by Plaintiffs' partners.

At a minimum, this side-by-side comparison shows that, at best, DOL acted in an arbitrary and capricious manner to arrive at its AO Response. DOL's legal arguments fare no better.

III. REPLY TO SUMMARY JUDGMENT ISSUES

A. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THIS ACTION.

Defendants claim that this Court should dismiss this case for lack of subject matter jurisdiction, summarizing its position in the first paragraph of its Combined Brief as follows:

> [DOL's Advisory Opinion] is not binding on Plaintiffs, did not direct Plaintiffs to take any specific action; it is thus not final agency action reviewable under either ERISA or the Administrative Procedure Act (APA). This case should be dismissed for lack of subject matter jurisdiction.

Combined Brief at 1. This statement does not accurately reflect the relevant legal standard that the court should apply in this case, as Plaintiffs will set forth below. As Defendants well know, if Plaintiffs' health coverage structure is not valid under ERISA and is therefore not entitled to preemption of state insurance laws, then Plaintiffs face exposure to scores of potentially ruinous state enforcement actions. ERISA group health plan sponsors, including Plaintiffs, do not typically hold state insurance licenses, because ERISA's preemption provision exempts them from requirements to do so. With the AO Response's binding determination that ERISA does not apply to the Plans, DMP and similarly situated LPMS-managed partnership plan sponsors are subject to state enforcement actions for not having proper insurance licensure. Defendants created this untenable situation by ignoring for over a year Plaintiffs' properly-made Advisory Opinion request (after quietly encouraging Plaintiffs to proceed with their business plans), yet now ask the Court to reward them for creating the problem in the first place.

Agency advisory opinions are final agency actions under the APA where they "constitute[] final and authoritative statements of position by the agencies to which Congress ha[s] entrusted the full task of administering and interpreting the underlying statutes." *Am. Federation of Gov't Employees, AFL-CIO v. O'Connor*, 747 F.2d 748, 753 n.10 (D.C. Cir. 1984) (citing *Nat'l Conservative Political Action Comm. v. FEC*, 626 F.2d 953 (D.C. Cir. 1980) (per curiam); *Nat'l Automatic Laundry & Cleaning Council v. Schultz*, 443 F.2d 689, 143 U.S. App. D.C. 274 (D.C. Cir. 1971)). See also, *Unity 08 v. Federal Election Commission*, 596 F.3d 861 (D.C. Cir. 2010). As Defendants have admitted, the "Secretary of Labor has primary authority to interpret and enforce the provisions of Title I of ERISA. 29 U.S.C. §§ 1132(a)(2) and (a)(5), 1135; *see Sec of Labor v. Fitzsimmons*, 805 F.2d 682, 689-94 (7th Cir. 1986) (en banc)." Combined Brief, p. 3.

At the conclusion of the process DOL prescribed in ERISA Proc. 76-1, the AO Response unequivocally determined that Plaintiffs' plans are "not ERISA plans at all." (App. 6). Despite reaching this conclusion, DOL now claims the AO Response is not the "consummation of the Departments decsionmaking process" because DOL "has neither determined any facts after an investigation nor taken an enforcement action." Combined Brief, p. 10 (emphasis added). This logic creates a conundrum reminiscent of Joseph Heller's Catch-22. If ERISA does not apply, DOL has no authority to investigate the Plaintiffs' plans to consummate whatever decisionmaking process is allegedly incomplete. According to DOL's logic, DOL cannot consummate its decisionmaking process because DOL itself has determined it has no jurisdiction to complete the needed investigation. If that were the case, then DOL would be forever immune from judicial review of its actions in this and future similar cases where it asserts ERISA does not apply. Of course, that cannot be the case.

If DOL's circular logic holds, has DOL made a judicial admission that states cannot rely on the AO Response? Should a state pursuing action against Plaintiffs first defer to DOL to consummate its decisionmaking process about plans over which it unequivocally declared it has no jurisdiction? Does this judicial admission apply to all of DOL's prior and future AOs?

Not only do Defendants concoct an illogical Catch-22, they also contradict their own arguments in support of upholding the AO Response. In the Combined Brief, Defendants argue that Plaintiffs' "primarily object to the Advisory Opinion's conclusion that the partners 'do not work for or through the partnership,' [Cit.], and do not 'perform any service on [the partnership's] behalf.' [Cit.]." Combined Brief, p. 39. In the very next sentence, Defendants admit that these statements in the AO Response "are legal conclusions based on the totality of the circumstances." Id. With this simple statement, Defendants admit they most certainly "consummated" their

"decisionmaking process" with the issuance of the AO Response. It is not logically possible for DOL to have come to "legal conclusions based on the totality of the circumstances" without having fully evaluated the totality of those circumstances.

Finally, Defendants' argument fails a reasonableness test, because despite having been given over a year to do so, DOL made absolutely no effort to perform the investigation and/or enforcement actions to which it now claims to be entitled prior to judicial review of its actions. From the time of the AO submission until it issued its negative opinion – 442 days – and continuing through to the present, DOL posed no questions whatsoever to Plaintiffs regarding the facts presented, their business model or practices. Had it done so, DOL might have gathered facts that would have avoided the numerous objective errors and misstatements in its AO Response, many of which are detailed below. It is now clear that DOL asked no questions because it was not interested in answers, having already determined its own. If DOL is given the "second chance" it now asks of the Court, there is no possibility it will reach a different conclusion. It has already stated its irrevocable position.

DOL's AO Response in this case was as final as final could be, and as adverse as adverse could be. The AO Response sets forth DOL's definitive decision about the status of Plaintiffs' health coverage plans after full application of the processes established in ERISA Proc. 76-1 to make those very determinations. DOL's decision was the most definitive decision that DOL could render – namely, that Plaintiffs' plans are not subject to ERISA. Even though Plaintiffs' plans are traditional ERISA plans in form and execution, DOL's AO Response states unambiguously that ERISA does not apply to Plaintiffs' plans. Instead, the AO Response states that these plans are subject to the complex matrix of state regulatory schemes that exist outside of ERISA. This final

decision by DOL has substantial legal consequences for Plaintiffs, their plans, and perhaps most importantly, the tens of thousands of participants in Plaintiffs' plans.

DOL devotes substantial arguments to this Honorable Court's alleged lack of subject matter jurisdiction. Given the critical importance of this issue, Plaintiffs will give corresponding weight to the clear factual and legal basis supporting this Court's subject matter jurisdiction.

1. By Its Own Terms, the AO Response is Final and Has Legal Consequences.

One needs to look no further than the AO Response itself to conclude that DOL – the entity charged with interpreting and applying ERISA – intended that the AO Response would be DOL's final determination on this issue and that legal consequences would flow from that final determination. DOL summarizes its conclusion as follows:

> Based on your representations, in DOL's view, the limited partners as described in your request are not employees or bona fide partners of the limited partnerships, they do not work for or through the partnership; and they do not receive income for performing services for or as partners of the partnership. **In sum, you have provided *no facts* that would support a conclusion that the *limited partners are meaningfully employed by the partnership or perform any services on its behalf*. . . . Accordingly, in DOL's view, the limited partners are not participants in a single-employer group health plan or in an ERISA plan at all.** [Footnote omitted.]

(App. 7-8) (emphasis added). By these words, DOL concludes that the plans put forth by Plaintiffs are not ERISA plans at all. DOL goes on to decide that plan participants are neither employees, nor are they limited partners in the limited partnerships in which they have interests. (App. 5)

DOL makes final assessments throughout the AO Response. For example, DOL states definitively that contrary to Plaintiffs' argument, "the presence of a single employee participant is sufficient to extend ERISA coverage to all the limited partners, without any stated limit … **cannot be squared with ERISA's text**." (App. 3) (emphasis added). Invoking ERISA's title, DOL concludes that, "[t]he arrangements proposed by LP Management **meet none of these criteria**,

inasmuch as the partnership is not the limited partners' employer, and the partners are neither employees nor employers with respect to the partnership." (*Id.*) (emphasis added). In rejecting another of Plaintiffs' arguments, DOL concludes, "[t]he text of the regulation will not support your expansive claim of ERISA coverage." (App. 4). DOL also went out of its way to declare the finality of its AO Response stating that LPMS cannot withdraw from the advisory opinion process set forth in 76-1 because the AO Response had been issued. (App. 2, fn 2.)

DOL considered all the facts that it needed in connection with its decision, including those it made up out of whole cloth as noted *infra*. For example, DOL noted that "[t]he regulation also states that whether an individual is a bona fide partner is determined based on **all the relevant facts and circumstances**, including whether the individual performs services on behalf of the partnership". [Citation omitted and emphasis added.] (App. 5). In the very next sentence – having considered "all the relevant facts and circumstances" – DOL concluded "[t]he limited partners here are not 'bona fide partners' within the meaning of ERISA section 732" because, according to DOL's archaic concepts of services, "they do not work or perform services for the partnership; they have only a nominal (at best) ownership in the partnership; and they do not earn income based on work performed for or through the partnership that is a material income-producing factor for the partnership." (*Id.*) DOL went on to conclude as a legal matter that, "[t]o treat them as employee participants in an ERISA-covered plan would effectively read the employment-based limitations on ERISA coverage out of the statute." (*Id.*) In yet another definitive conclusion, based on all of the relevant facts and circumstances, DOL determined that "…the proposed LP Management health benefit programs **would not be single-employer group plans or ERISA plans at all.**" (App. 6) DOL went on to state that to have adopted Plaintiffs' position "…would effectively eliminate ERISA's important statutory distinction between offering and maintaining employment-

based ERISA covered plans, on the one hand, and the mere marketing of insurance and benefits to individuals outside the employment context, on the other." *Id*. In footnote 6, following the preceding sentence, DOL stated, "**[i]n light of [its] conclusion that the programs are not ERISA-covered plans, the programs would be subject to broad state insurance regulation**…" (App. 6, fn 6) (emphasis added).

Not only did DOL reach legal conclusions, the fundamental reasoning used by DOL to establish those conclusions precludes any ability to later determine otherwise. In the Combined Brief, DOL noted that they could always change their mind on further review. See Combined Brief p. 11. This seems intended to allow for the possibility that the facts in the AO Request may have been misstated or fabricated (in other words, hypothetical), which might grant DOL the ability to change its mind. However, as noted *infra*, DOL, per their own guidelines, does not issue, and would not have issued in this case, Advisory Opinions based on hypotheticals. In other words, the facts cannot change, and DOL stated their view of the law applicable to those facts.[3] To claim an investigation of Plaintiffs could change the outcome is disingenuous, particularly where DOL firmly shut the door on its own authority to conduct such an investigation. DOL interpreted the relevant facts and circumstances and made a definitive decision to reject Plaintiffs' proffered plans. DOL stated its decision clearly in the AO Response and went so far as to elucidate the legal consequences of that decision. In and of itself, that should be enough to decide this issue. However, Defendants have raised various objections to Plaintiffs' position to which Plaintiff must respond.

[3] Plaintiffs' legal challenge of the AO Response is an inherent rebuttal to the absurd suggestion that LPMS either misstated or fabricated facts. If that were the case, Plaintiffs would have ignored the AO Response (and introspected why they sought it in the first place), as ERISA Proc. 76-1, §10 states that AOs are binding "only to the extent that the request fully and accurately contains all the material facts."

2. ERISA's Advisory Opinion Procedure as Applied to This Case.

For an agency action to be reviewed by a court pursuant to the Administrative Procedure Act ("APA"), there must be a final agency action. For there to be a "final agency action", the agency action: a) must be the "consummation" of the agency's decisionmaking process; and b) must be an action from which rights and obligations have been determined, or from which legal consequences will flow. *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997). Further proof of these conditions' demonstration in the present case stems from ERISA Proc. 76-1, which is the procedure that governs advisory opinions.

ERISA Proc. 76-1 contemplates that DOL will "answer inquiries of individuals and organizations, whenever appropriate, and in the sound administration of [ERISA], as to their status under [ERISA], and as to the effects of their acts or transactions." ERISA Proc. 76-1 §2. DOL can issue two types of responses – information letters and advisory opinions. An information letter merely calls attention to a well-established interpretation or principle of ERISA, without applying it to a specific factual situation. ERISA Proc. 76-1 §3.01. An advisory opinion ("AO"), on the other hand, "interprets and applies [ERISA] to a specific factual situation." ERISA Proc.76-1 §3.02. An advisory opinion would be inappropriate in connection with a hypothetical situation, and agency decisions based on hypothetical fact scenarios are not final. *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 639 (6th Cir. 2004).

DOL has discretion whether or not to issue AOs. ERISA Proc.76-1 §5.02. The relevant procedure also dictates that AOs are not appropriate in any the following four scenarios: (1) when alternative courses of proposed transactions are proposed; **(2) with respect to hypothetical situations;** (3) where all parties involved are not sufficiently identified and described; or **(4) where material facts or details of the transaction are omitted.** ERISA Proc. 76-1 §5.01. In this case, as evidenced by the fact that DOL issued an AO, and based on DOL's own words, none of these

conditions were present when DOL issued the AO Response. Presumably, DOL would not issue an AO which blatantly contradicts its own procedure when that procedure in no way mandates that DOL issue an AO simply because it has been requested (however, if DOL is admitting to such misapplication of its authority, Plaintiffs are prepared to challenge it). Ergo, in this case, DOL's AO Response constitutes a "final agency action" because DOL clearly considered what it deemed to be a complete set of facts and circumstances, consummated its decisionmaking process, and issued the AO Response which determined the rights (or purported lack thereof) of the plan and its participants under ERISA.

It is significant to note the difference between the effect of an information letter and the effect of an AO. An information letter "is informational only ***and is not binding*** on the department with regard to any particular factual situation." ERISA Proc. 76-1 §11 (emphasis added). An AO has a much different effect. An AO explicitly reflects DOL's application of "one or more sections of [ERISA], regulations promulgated under [ERISA], interpretive bulletins, or exemptions" to a specific set of material representations and facts. ERISA Proc. 76-1, §10. Once DOL has issued the AO, "the parties described in the request for [an advisory] opinion ***may rely on*** the [advisory] opinion[.]" ERISA Proc. 76-1, § 10 (emphasis added).[4]

In this case, Plaintiffs exercise their right to rely on the AO Response as reflecting the determination of DOL, thus necessitating the judicial review Plaintiffs seek, as there is no administrative appeal in ERISA Proc. 76-1. LPMS presented the facts and circumstances to DOL. While Plaintiffs and Defendants disagree as to the appropriateness of DOL's interpretation of those facts and circumstances, one conclusion is indisputable—DOL considered the facts and

[4] In fact, LPMS has actually relied upon the binding nature of the AO Response by ceasing enrollment into its partnerships since the issuance of the AO Response. See, Declaration of Randall Johnson, ¶ 25 (App. 58).

circumstances presented in the AO Request, found those facts and circumstances to be real and sufficient to support the issuance of an AO, and then issued an AO adverse to Plaintiffs' interests. More specifically, in its AO Response, DOL made specific factual findings that have very tangible, dire legal, economic, and personal consequences for Plaintiffs and for the plan participants.

3. DOL Previously Conceded Jurisdiction of APA Challenge Under Companion ERISA Proc. 75-1

When examining a similar challenge to an analogous ERISA procedure, both DOL and a federal Court in Texas supported a finding of subject matter jurisdiction. Before DOL issued ERISA Proc. 76-1, which took effect on August 27, 1976, DOL issued ERISA Proc. 75-1, which took effect on April 28, 1975, to establish procedures that addressed prohibited transaction exemption requests.[5] Importantly, DOL's prohibited transaction exemption procedure provided the basis for ERISA Proc. 76-1.

A detailed review comparing the substantive similarities of ERISA Proc. 75-1 and ERISA Proc. 76-1 demonstrates that the two procedures set forth a very similar adjudication process and yield equivalent determinations by DOL in the form of binding declaratory orders issued to applicants. First, both ERISA Proc. 75-1 and ERISA Proc. 76-1 explicitly state that each procedure, "consist[s] of rules of agency procedure and practice." See ERISA Proc. 75-1, Introduction and ERISA Proc. 76–1, §13. Second, both procedures represent a ruling by DOL. *See* ERISA Proc. 75-1, Introduction and ERISA Proc. 76-1, §1. Third, any determinations provided to applicants seeking advisory opinions or exemptions are strictly limited to the facts represented by such applicants. *See* ERISA Proc. 75-1, §9.03 and ERISA Proc. 76-1, §10. Fourth, the parties may rely on determinations made by DOL pursuant to the procedures. *See* ERISA Proc. 75-1, §9 and

[5] ERISA Procedure 75-1, 40 F.R. 18471-73, §5(.01) (April 28, 1975). In addition, as a point of reference, ERISA was effective September 2, 1974.

ERISA Proc. 76-1, §10. Finally, both ERISA Proc. 75-1 and 76-1 (when an advisory opinion is issued) provide for a final disposition of a matter (which is not in the form of rulemaking) because neither provide a right of administrative appeal. *See also* 5 U.S.C. § 551 (6).

In *Huff v. Donovan*, No. H-82-1369, 1983 BL 473, 4 EBC 1334 (S.D. Tex. Apr. 07, 1983), there was no question that the final disposition of the exemption request in issue was a final order for purposes of 5 U.S.C. § 704 and 29 U.S.C. § 1132(k).[6] Dr. Huff and his wife participated in and were trustees of two tax qualified plans maintained by the doctor's business, Richmond Eye Associates, P. A. ("Richmond"). *Id.*, p*1. In addition to the doctor and his wife, thirteen other individuals who were presumably current and former employees of Richmond also participated in the plans. *Id.* After engaging in a series of prohibited transactions with both plans, Dr. Huff applied to DOL for a prohibited transaction exemption pursuant to ERISA Proc. 75-1. *Id.*, pp. *2-*3. DOL denied Dr. Huff's exemption request, *Id.*, p. *4, and Dr. Huff sued DOL in the Federal District Court for the Southern District of Texas challenging the denial. *Id.* Nowhere in the court's order, which was drafted by DOL at the express direction of the court, is there any indication whatsoever that DOL disputed subject matter jurisdiction because the denied exemption reviewed under ERISA Proc. 75-1 failed to be a final order for purposes of 5 U.C.S. § 704, or 29 U.S.C. § 1132(k). In fact, it was quite the opposite. Paragraph 1 of the conclusions of law set forth in the *Huff* opinion plainly states, "[t]he court has jurisdiction of this action pursuant to 502 of ERISA, 29 U.S.C. § 1132(k), and 5 U.S.C. § 704..." *Id.*, p. *4.

There are no substantive differences between the procedural terms established by DOL in ERISA Proc. 75–1 and ERISA Proc. 76–1. Both procedures yield a binding, non-appealable "final

[6] A true and correct copy of the order in Huff is attached hereto and incorporated herein as Exhibit A.

agency action" with respect to applicants. The finding of jurisdiction in *Huff* pursuant to 29 U.S.C. § 1132(k) and 5 U.S.C. § 704 applies equally to Plaintiffs' challenge of the AO Response. The AO Response issued by DOL is exactly this type of final agency action. Given that both the *Huff* Court and DOL endorsed subject matter jurisdiction concerning the exemption request arising under ERISA Proc. 75-1, this Court should also find that it has subject matter jurisdiction of DOL's AO Response in this case under 29 U.S.C. § 1132(k) and 5 U.S.C. § 704.

4. The AO Response Was a Final Agency Action Subject to Review Under the APA.

Under the APA, a court may only review "final agency actions." For there to be a "final agency action," an agency action: a) must be the "consummation" of the agency's decisionmaking process; and b) must be an action from which rights and obligations have been determined or from which legal consequences will flow. *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997). Plaintiffs satisfy both prongs of this test, granting the court subject matter jurisdiction and making judicial review appropriate.

Unity 08 v. Federal Election Commission, 596 F.3d 861 (D.C. Cir. 2010) is instructive on this jurisdictional question of whether the AO Response qualifies as a "final agency action" under the APA. In *Unity 08*, the Federal Election Commission raised virtually identical defenses to a challenge to one of its advisory opinions. The FEC argued its advisory opinion was not subject to APA challenge as it was not a final agency action. *Unity 08*, 596 F.3d at 864. Unlike the DOL here, the FEC acknowledged that the advisory opinion it issued marked the conclusion of its advisory opinion process. *Id.* However, the FEC argued that there was "lack of finality because a negative advisory opinion makes no final determination of any rights or obligations [and does not] change[] any legal relationships." *Id.* In rejecting all of the FEC's arguments concerning "final agency action," the D.C. Circuit held that the "fact that the advisory opinion procedure is complete

and deprives the plaintiff of a legal right … which it would enjoy if it had obtained a favorable resolution in the advisory opinion process 'denies a right with consequences sufficient to warrant review.' *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 589 n.8, 142 U.S. App. D.C. 74 (D.C. Cir. 1971)." *Id.* at 865. Here, the AO Response clearly deprives Plaintiffs and their plan participant partners of a legal right which they "would enjoy if [they] had obtained a favorable resolution" – namely ERISA preemption necessary for the legal implementation of the plan. Were DOL to admit the obvious – that the clear language of its advisory opinion procedure makes the issuance of the AO Response the conclusion of its advisory opinion process – then the reasoning of *Unity 08* would foreclose any further discussion of jurisdiction.

a) The AO Response was the consummation of DOL's decision-making process.

Once DOL issued its AO Response, there was nothing more for DOL to do. In fact, as Defendants argue, issuing the AO Response did not commit the agency to any particular course of action (*citing Luminant Generation Co. v. EPA*, 757 F.3d 439, 442 (5th Cir. 2014)), and DOL did not have to take any further action at all. The reason for this is simple—the ERISA Proc. 76-1 process was complete.

Notwithstanding that fact, Defendants cite a variety of cases for the proposition that the AO Response was merely "tentative or interim action." Combined Brief, at 10-11. Defendants do not identify "the next step", because no "next step" exists, which should end the inquiry immediately on the question of whether the AO Response was the consummation of DOL's decision-making process. Nonetheless, Plaintiffs will address the key case cited by Defendants, *Am. Airlines, Inc. v. Herman*, 176 F.3d 283 (5th Cir. 1999).

In 1989, the Office of Federal Contract Compliance Programs ("OFCCP") conducted a random compliance review to evaluate American's compliance with §503 of the Rehabilitation

Act of 1973, 29 U.S.C. § 793 (1988), specifically to determine whether American was meeting its affirmative action obligations relating to the hiring and advancement in employment of qualified disabled individuals. *Id.* at 284; 29 U.S.C. § 793(a), Pub. L. No.93-112, 87 Stat. 355, 393 (1973). The OFCCP issued a Notice of Violations against American. *Id.* at 285. While none of the allegedly affected individuals filed a complaint against American, the OFCCP did file an administrative complaint in 1994. *Id.* By all accounts, these proceedings were complicated and protracted. American moved for summary judgment. *Id.* The Administrative Law Judge ("ALJ") granted that motion in part and denied the motion in part. *Id.* Pursuant to the administrative appeals process in place, both parties appealed to the then-highest DOL official, the Assistant Secretary for Employment Standards. *Id.* In 1995, the Assistant Secretary ruled in favor of the OFCCP and remanded to the ALJ for further proceedings. *Id.* at 285-286.

Separate and apart from the administrative proceedings, and in late 1994, American had filed a case in federal district court challenging the OFCCP's authority to bring the administrative action detailed above. *Id.* at 286. The district court ruled in favor of American on all relevant issues in 1997 and DOL appealed. *Id.* On appeal, DOL argued that the district court had erred in denying DOL's motion for summary judgment, which had been based on American's failure to exhaust administrative remedies, because there had been no administrative hearing and no final adjudication of liability or remedy by the ALJ. *Id.* at 286-287. In other words, just as in this case, DOL argued in *Herman* that there was no "final agency action."

As the *Herman* court makes plain, an agency has not consummated its decision-making process so long as that process is on-going. *Id.* at 287. As the *Herman* court notes, "… a nonfinal agency order [is] one that 'does not itself adversely affect the complainant but only affects his rights adversely on the contingency of future administrative action.' *Id.* at 288, *quoting Rochester*

Tel. Corp. v. United States, 307 U.S. 125, 130, 83 L. Ed. 1147, 59 S. Ct. 754 (1939)." The *Herman* court went to apply this principle as follows:

> The Assistant Secretary's order [which remanded the case to the ALJ] did not complete the administrative proceedings, nor was it meant to do so. … **Agency orders which remand to an administrative law judge for further proceedings are not final orders subject to judicial review.** [Citation omitted.] … we conclude that the Assistant Secretary's disposition was tentative or otherwise interlocutory in nature. Therefore, the decision is not a final agency action because it did not "mark the 'consummation' of the agency's decision making process." *See Spear*, 520 U.S. at 177-78.

Id. at 289 (emphasis added). Significantly, the existence of an administrative process was determinative in the *Herman* court's analysis.

In this case, DOL's administrative process is complete. DOL declared in its AO response that it had done all that it intended to do in connection with the AO Request, and that further regulatory action would be the responsibility of state departments of insurance. DOL obtained and considered all the information it needed from LPMS and issued the AO Response. Defendants have not alleged that Plaintiffs have failed to exhaust their administrative remedies, because no administrative remedies are available to Plaintiffs to challenge the AO Response. In sum, nothing remains for DOL to do, as it has consummated the advisory opinion process. Plaintiffs have therefore satisfied the first of the two prongs of the "final agency action" test.

b) The AO Response was an action by which rights and obligations were determined, or from which legal consequences flow.

The AO Response undoubtedly determines legal rights and obligations related to Plaintiffs' plans and legal consequences unquestionably flow from that decision. In this case, DOL has made the most fundamental determination that DOL can make in an ERISA case – whether or not the proffered plans are single-employer healthcare plans subject to ERISA. The answer to this question wholly defines what law will apply to the administration of the plans at issue, as ERISA preempts,

"any and all State laws insofar as they may now or hereafter relate to any [single employer] employee benefit plan." 29 U.S.C. §1144(a). The point of ERISA preemption is to avoid plans being regulated by both federal and state law and to create a national, uniform administration of employee benefit plans. *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, 399 F.3d 692, 698 (6th Cir. 2005). By deciding that Plaintiffs' plans are not ERISA-covered plans, DOL has taken away the legal foundation for the plans and has fundamentally changed the protections afforded the plan participants. Rather than maintaining DOL's regulation of Plaintiffs' proffered plans – for which regulation these plans were designed – the AO Response immediately causes these plans to be subject to criminal and civil penalties from lack of an insurance license, as the plans are now, without remedy from the Court, exclusively within the purview of state regulators, as opposed to DOL's purview. As the regulation of employee welfare benefit plans are "exclusively a federal concern" (*Alessi v. Raybestos-Manhattan, Inc.*, Inc., 451 U.S. 504, 523 (1981)), any action by DOL that would subject a plan to potentially conflicting state regulations (as opposed to the uniform application of ERISA) has fundamental legal consequences. *See New York Conference of Blue Cross & Blue Shield Plans, et al, v. Travelers Ins. Co., et al*, 514 U.S. 645 (1995).

Defendants also rely on *United States Army Corps of Eng'rs v. Hawkes Co*., 136 S.Ct.1807 (2016) for the proposition that the issuance of the AO Response did not create a "safe harbor" for Plaintiffs, which Defendants go on to state means that the AO Response would not hinder DOL's ability to "exercise Defendants' plenary authority to enforce ERISA requirements on the Plaintiffs". Combined Brief at 13. The *Hawkes* case is instructive, but its lesson is the opposite of what Defendants claim.

In *Hawkes*, the Court evaluated jurisdictional claims at issue in a Clean Water Act ("CWA") case. In the underlying case, the key substantive question was whether certain waters were "waters of the United States" for purpose of the CWA. In such a case, the Corps first determines whether it has jurisdiction, issuing jurisdictional determinations ("JDs") answering that question. An "approved JD" is issued if there definitely are, or are not, waters of the United States on a property, according to the Corps. Approved JDs may be appealed and are binding on both the Corps and the Environmental Protection Agency. *Hawkes*, 136 S. Ct. At 1812.

In 2010, the Hawkes Co. applied for a permit from the Corps to mine peat particularly suitable for use in golf greens from areas owned by the company. In 2012, the Corps issued an approved JD, finding that the Corps had jurisdiction because the area at issue included "waters of the United States". The Hawkes Co. appealed to the Corps' Division Commander in the region, who remanded the approved JD for further factfinding. On remand, the Corps reaffirmed its original conclusion. *Hawkes*, 136 S. Ct. at 1813. Hawkes Co. sought judicial review in the district court. The district court found that the approved JD was not a "final agency action" and dismissed the case. The Eighth Circuit reversed. *Id*.

The Supreme Court applied the standard set forth in *Bennett v. Spear*, supra. The Corps conceded that the first prong of the test had been met, namely that the Corps decision-making process had been consummated. It is instructive that the Court went on to note that the Corps had the ability to revisit its approved JD based on "new information." Additionally, the Court observed that the Corps' ability to revisit the decision "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal. [Citations omitted.]" *Hawkes*, 136 S. Ct. at 1814.

The *Hawkes* Court then turned to the second prong of the jurisdictional test, namely the question of whether the approved JD gave rise to "direct and appreciable legal consequences." *Id.* The Court started by observing that there could be no doubt that a "negative" approved JD – namely one that holds that waters are *not* subject to the jurisdiction of the Corps – bound the Corps from taking any action against the entity seeking the JD for five years, and thus, unquestionably, had legal consequences. *Id.* The Court observed that "a negative JD both narrows the field of potential plaintiffs and limits the potential liability a landowner faces for discharging pollutants without a permit. Each of those effects is a 'legal consequence[] satisfying the second Bennett prong. [Citations omitted]." *Id.*

The Court then found that "affirmative JDs have legal consequences as well: They represent the denial of the safe harbor that negative JDs afford." *Id.* The Court concluded that "legal consequences" flowed from an affirmative JD also, finding that:

> [W]hile no administrative or criminal proceeding can be brought for failure to conform to the approved JD itself, that final agency determination not only deprives respondents of a five-year safe harbor under the Act, **but warns that if they discharge [pollutants onto their property without obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties.**

Hawkes, 136 S. Ct. at 1815 (emphasis added).

The Court went further, rejecting the Corps' argument that Hawkes Co. had two alternative remedies to immediate judicial review – namely, to discharge fill materials without a permit thereby risking an EPA enforcement action, or to apply for a permit and seek judicial review if not satisfied with the outcome of that process. *Id*. The Court found both "alternatives" to be inadequate, noting the Court's long-held view that "parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.' *Abbott*, 387 U.S., at 153, 87 S. Ct. 1507, 18 L. Ed. 681." *Id*. Finally, the Court held that

the Hawkes Co. "need not assume such risks while waiting for EPA to 'drop the hammer' in order to have their day in court. [Citation omitted]."

Though short, the *Hawkes* opinion provides excellent reference points for this Honorable Court. Despite what DOL argues in this case, the fact that DOL may "change its mind" later does not make its AO Response any less final. Had DOL concluded that Plaintiffs' proffered plans were covered by ERISA, then Plaintiffs could have proceeded with the comfort of knowing that they could rely on that determination, and states most certainly would not seek to regulate the plans beyond the level of regulation normally consequent to a determination that a plan is covered by ERISA (which in and of itself is a legal consequence). As it is, Plaintiffs do not have that protection – they are now subject to substantial risk, perhaps even existential risk, because the DOL's AO Response automatically opens Plaintiffs and the plans to legal peril that did not exist prior to the AO Response. The AO Response's conclusion that state law applies to plans that have no insurance license under state law creates immediate subjugation of the Plaintiffs to criminal and civil penalties, precisely the same danger facing Hawkes Co. Defendants seem to urge that Plaintiffs should go about their business and let the chips fall where they may, irrespective of the legal risk and cost associated with being on the wrong side of the law. To borrow a phrase, Defendants urge that Plaintiffs should just wait for the states to "drop the hammer". Such reasoning is contrary to *Hawkes*, contrary to other controlling precedent, and frankly contrary to logic.

B. DEFENDANTS' RELY ON CATCH-22 LOGIC DESPITE THE OBVIOUS – PLAINTIFFS' STANDING UNDER § 1132(K) IS CLEAR

In another attempt to create a Catch-22 to avoid judicial scrutiny of its actions, Defendants argue that simply because DOL has determined that Plaintiffs' plans are not covered by ERISA at all, Plaintiffs now have no standing under 29 U.S.C. § 1132(k) to pursue their claims. In sum, Defendants argue "Section 1132(k), in addition to strictly limiting who can bring suit against the

Secretary,[7] permits only three limited types of judicial review. *See* 29 U.S.C. § 1132(k)." Combined Brief, p. 15. In footnote seven from that sentence, Defendants flesh out the basis of their absurd Catch-22 constructed to deny standing to Plaintiffs. Defendants note that "ERISA only permits such suits by 'an administrator, fiduciary, participant, or beneficiary of an employee benefit plan.' [Cit.]" *Id.*, p. 15, fn 7.

While Plaintiffs have no quarrel with this ERISA truism, it is preposterous that Defendants would then argue that the "Department concludes that, because ERISA does not apply to the limited partners' plan, Plaintiffs do not have standing as an 'administrator [or] fiduciary' to bring an action against the Secretary under § 1132(k)." *Id.* In other words, since the DOL has concluded that ERISA does not apply to the Plaintiffs' plans, then Plaintiffs have no standing to challenge that determination. This same final and binding conclusion is contained in the very same AO Response which Defendants argue *ad nauseum* (and equally incorrectly) is an incomplete, non-binding, non-final agency action that is, itself, not subject to judicial review because it is so incomplete, non-binding and non-final.[7]

Defendants' assertion that "participants" do not have standing is also baseless. The Plan covers working owners as well as common law employees and as such is an ERISA plan. The suit was brought by the fiduciary of the Plan challenging the AO Response. The fiduciary has statutory standing as an unambiguously enumerated party under 29 U.S.C. § 1132(k). *See Franchise Tax Bd. of California v. Constr. Laborers Vacation Trust for Southern California*, 463 U.S. 1, 25, 103

[7] Plaintiffs have thoroughly debunked Defendants' arguments concerning the status of the AO Response as a "final agency action" in Section III. A. 4. of this Brief and refers this Honorable Court to those arguments equally applicable to this standing argument of Defendants. Also, Plaintiffs refer this Honorable Court to pages 14 – 15 and 40 – 41 its Brief in Support of Motion for Summary Judgment (ECF 27) for a thorough debunking of Defendants other § 1132(k) arguments.

S. Ct. 2841, 2854, 77 L. Ed. 2d 420, 428 (1983) ("ERISA contains provisions creating a series of express causes of action in favor of … ***fiduciaries*** of ERISA-covered plans…. 29 U. S. C. § 1132(a). … The phrasing of [§ 1132(a)] is instructive. Section [1132(a)] specifies which persons – … ***fiduciaries*** … – may bring actions for particular kinds of relief." (emphasis added)).

Defendants' citation to *Coleman v. Champion Int Corp./Champion Forest Prod.*, 992 F.2d 530 (5th Cir. 1993) is wholly unhelpful because it, like *Franchise Tax Board*, simply states that only enumerated parties like fiduciaries may sue under ERISA. Section 1132(k) explicitly provides standing to fiduciaries like LPMS and DMP to sue the Secretary of Labor as an enumerated party under ERISA. *Cf Ocean Breeze Festival Park, Inc. v. Reich*, 853 F. Supp. 906, 911 (E.D. Va. 1994), aff'd *Va. Beach Policemen's Benevolent Ass'n v. Reich*, 96 F.3d 1440, 20 EBC 1836 (4th Cir. 1996)).

Further, Defendants offer nothing to rebut Section 1132(k) jurisdiction but for simple statements which do not coincide with the statutory language and reference to case law of other agencies that happen to have reached the decision Defendants here seek. However, even Defendants admit the AO Response is binding on them, despite a feeble attempt to minimize it. Combined Brief, p. 18 ("This at most makes an Advisory Opinion 'binding on the [D]epartment' in a limited way."). Being bound to an AO is a yes or no question. Applicability and truth are not spectrums. Section 1132(k) unambiguously grants standing to Plaintiffs to seek judicial review of the arbitrary and capricious conduct of Defendants.

C. STANDARD OF REVIEW – AO RESPONSE ENTITLED TO NO DEFERENCE WHATSOEVER

Regarding this Court's review of the merits, DOL agrees with Plaintiffs that its interpretation set forth in the AO Response are not entitled to either *Chevron* or *Auer* deference.[8] *See* Combined Brief, p. 24 and FN 13. Regardless of what standard of deference, if any, the AO Response should receive, its patently arbitrary and capricious treatment of the facts and law makes it clear that whether the deference framework of *Chevron*, *Auer* or *Skidmore* is applied, the AO Response fails and is entitled to no deference or persuasion in this Honorable Court's review of it. Indeed, DOL's suggestion that their AO Response is entitled to any deference while simultaneously claiming that the AO Response was "tentative" and purportedly did not find facts lays bare their hypocrisy and bad faith engagement with Plaintiffs throughout their interaction on this matter. The procedural prize of deference is ill-awarded to an agency undeterred by arguing both sides of the same coin. By its claim that mere issuance of its AO Response, published long after Plaintiffs filed this case against them, is sufficient to deny Plaintiffs standing under §1132(k), (see Combined Brief, p. 15, fn 7), DOL admits to using the AO Response as a mechanism to achieve procedural advantages in this case. Such abuse of the permitted terms through which an AO can be issued should be grounds for rejection of the AO Response or at minimum a denial of deference to its content. An agency action taken for advantage in litigation can have no effect. As the Supreme Court has noted, "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 213 (1988).

[8] As an initial matter, Defendants are attempting to have their cake and eat it too. On the one hand, they argue that the AO Response is of no force and effect, and, on the other hand, they argue that this Honorable Court should give the AO Response *Skidmore* deference. While litigants often argue alternative theories, it is extraordinary that Defendants are arguing that either the AO Response means nothing, or it is unassailable. It cannot be both.

D. DOL'S INCORRECT ANALYSIS CONTRADICTS ITS OWN REGULATIONS AND PRIOR POSITIONS.

Perhaps Defendants most egregious mistake in their Combined Brief – and, indeed, in the AO Response – is that they conflate the concepts of "working owners" and "employees," incorrectly arguing that a "working owner" also must be an "employee" in a common law sense in order to qualify as an ERISA plan participant. In so doing, Defendants ignore the plain language of ERISA as well the determinative case law. Among many other examples of tortured, conclusion-driven logic, Defendants' analysis of *Yates v. Hendon*, 541 U.S. 1 (2004) is particularly troubling, in that it is directly and squarely at odds with the interpretation Defendants made of *Yates* less than one year ago, in their appeal of the D.C. District Court's ruling in *New York v. U.S. Dep't of Labor*, 363 F. Supp.3d (D.D.C. 2019). Defendants' arguments in their Combined Brief are also in stark conflict with other public acts DOL made following Yates, which will be addressed. Additionally, DOL engages in misleading characterizations of its own regulations as well as Internal Revenue Code regulations, requiring correction here. The underlying theme of these reversals is one of self-serving arguments designed to achieve a desired result in litigation, as opposed to the consistent stewardship of the law that their Congressional mandate and, in this case, justice demands.

1. ERISA's Terms are Unambiguous and Determined According to Long-Standing Precedent

ERISA unambiguously permits partners in a partnership to qualify as "participants" in ERISA plans. First, while "participants" are defined by being "employees," this term is clearly not used in its traditional or common law sense, as numerous applications and treatments by ERISA's text, Courts, and the DOL itself have opined. For instance, as vigorously pursued by DOL and discussed *infra*, members of an association may qualify as "participants" of an association-sponsored plan despite a lack of traditional common law employment attributes to the relationship

between member and association. Thus, the meaning behind the term "employee" and thus "participant" is more flexible and not limited to a traditional common law review. While perhaps not artfully drafted, as noted in *Darden*, *Yates*, and Advisory Opinion 99-04A, these same sources note that the terms are not ambiguous. The exercise of determining whether the partners in this case qualify as "participants" thus relies on the aforementioned precedent and the legal process by which this precedent is applied.

Except in the present case, the Supreme Court, Plaintiffs, and Defendants have been aligned in their outlining of this process: issues surrounding common law employees or independent contractors qualifying as "participants" are analyzed pursuant to *Darden*, and issues surrounding equity owners qualifying as "participants" are analyzed under *Yates*. See, *Yates,* 541 U.S. at 12. Only DOL's attempt to minimize the work performed by partners in this case inspired their change of course in interpreting *Yates*, arguing solely[9] in this case that *Yates* is only the second step of analysis after satisfaction of a common law employment review pursuant to *Darden*, as "*Yates* did not adopt a definition of 'working owner' or negate the relevance of common law considerations to distinguish the term from non-working owners." DOL Brief, p. 29.

2. DOL Advocated the Definition of "Working Owner" Set Out by Plaintiffs in DOL's *Yates* Amicus Brief and the Supreme Court Affirmed this View

While Plaintiffs and Defendants do not agree about much, they agree about one thing: the definition of "working owner". In its advocacy in the *Yates* case, DOL took the correct position in its amicus brief:

> "…resort to common-law principles (even for guidance) ***is not appropriate in resolving whether working owners may be participants in ERISA plans because the text of ERISA itself resolves that question.*** Even if the Court were to consult the

[9] Plaintiffs hesitate to use the word "currently" here as DOL is simultaneously advocating lack of *Darden* or common law analysis in a case in a different Federal Court noted *infra*.

> common law, however, it should also consider the purposes of ERISA, just as the EEOC and the Court considered the purposes of the ADA in *Clackamas*. Because the purposes of ERISA differ from those underlying the ADA and other anti-discrimination statutes, ***a test that focuses on the extent of the business's control over the working owner is not appropriate to resolve the ERISA coverage question***.

DOL Amicus, p. 4, n. 6 (emphasis added) (App. 172). Compared to the DOL's position in this case that *Yates* did not "negate the relevance of common law considerations," the difference could not be more glaring. One might wonder whether DOL's new position is simply a reflection of a position taken by the Supreme Court in contrast to their previously-stated position. However, as is obvious from reading the central holding of *Yates*, the Supreme Court agreed with that prior view, recognizing that ERISA itself sets forth unambiguously who is a "working owner" (which unassailably includes partners). *Yates,* p. 12. ("ERISA's text contains multiple indications that Congress intended working owners to qualify as plan participants. Because these indications combine to provide 'specific guidance,' *ibid.*, there is no cause in this case to resort to common law."). The majority could not have been clearer: with respect to working owners, common law analysis about who is an "employee" is not relevant. DOL's about-turn cannot then be explained by reference to the *Yates* decision.

Further review of *Yates* shows that DOL's argument for its position here is based on an obviously false premise. Defendants state – with no substantiation – that "Plaintiffs' claims here do not present a clear-cut case of working owners like medical doctors who own their practices or the law firm partners addressed by the Fifth Circuit in *House*." Combined Brief at 27. As if the determination were not made in *Yates* already, Defendants go on to posit that, "it is essential to determine the circumstances under which an owner can be considered a 'working owner' and thus an employee for purposes of participating in an ERISA plan." Combined Brief at p. 38. Defendants

then state that the court should consider "some of the same sources considered in *Yates*" as well as the common law factors considered in *Darden*. *Id.*

Defendants are wrong. The *Yates* majority did not go through the *Darden* analysis or consider common law factors at all in determining that Dr. Yates was a "working owner." All that the Court actually said about Dr. Yates was that he "…was the sole shareholder and president…" of the practice. *Yates*, p. 6. Defendants cite the footnote to Justice Thomas' concurring opinion in *Yates*, arguing that even though the *Yates* majority did not specify working owner common law employment conditions, it implied that such employment conditions DOL required of the partners as set forth in its AO Response were, despite being unstated, somehow considered to be met by the *Yates* majority and are, in fact, required of all potential working owners. Combined Brief, p. 27. In reality, however, Justice Thomas' concurring opinion does not support this premise, observing "members of this class [working owners] are now considered categorically to fall under ERISA's definition of 'employee'". *Yates*, pp. 25, n.*. Just as Justice Thomas noted, the *Yates* majority was singularly focused on ERISA's terms because it was those unambiguous terms that fully and finally resolved the controversy at hand. *Id.* Moreover, the *Yates* majority explicitly held that the *Darden* common law test concerning employee qualifications to participate in an ERISA-covered plan simply did not apply. *Yates*, p. 12, n. 3 (distinguishing *Darden*).

DOL may argue that elsewhere in their brief, and potentially in *Yates* itself, *Darden* is inherently relied upon as DOL has outlined in its position in the present case. To that end, one might consider support in the following quote:

> The precise question in *Darden* was different from the question presented here. The question in *Darden* was whether someone who provides services to a business in exchange for remuneration is precluded from being a "participant" in an ERISA plan because he is an independent contractor. **Here, the question is whether someone who provides services to a business in exchange for remuneration is precluded from being a "participant" because he is the business's owner**.

> In this case, unlike in *Clackamas*, **there is no need to proceed to the second step of the *Darden* analysis and to develop a test based on common-law distinctions between master and servant**. The question is resolved at the first step of the analysis because, unlike the ADA, ERISA is not silent on the coverage of working owners … **the text of ERISA**, and the longstanding Internal Revenue Code provisions that provided the backdrop for its enactment, establish that **Congress intended that *working owners of all types* may be *participants* in ERISA plans**.

DOL Amicus Brief, p. 4 (emphasis added.) (App. 166). DOL outlines a two-step process for *Darden*, which first relies on remuneration in exchange for services, and then relies on a common law review. Any relation to the DOL's current position fails, however, on two points. First, the first step in this process was distinguished by the *Yates* majority in their citation of I.R.C. § 401(c) to determine whether services in exchange for remuneration occurs, a more appropriate and specific application with respect to business owners. Second, and more strongly, the DOL's current position is not an endorsement of this first step of the two-step process being applied, but of the second step being applied prior to an analysis pursuant to *Yates*. DOL in the present case favors review of common law standards, and to the extent they discuss services in exchange for remuneration, DOL either conflates this first step with a common law standard or attempts to inexplicably dismiss the real remuneration that partners receive in exchange for their services under IRC § 401(c).

Consistent with the DOL's amicus brief, the *Yates* Court stated the following:

> This case presents a question on which federal courts have divided: ***Does the working owner of a business (here, the sole shareholder and president of a professional corporation) qualify as a "participant"*** in a pension plan covered by [ERISA]. ***The answer, we hold, is yes:*** If the plan covers one or more employees other than the business owner and his or her spouse, the working owner may participate on equal terms with other plan participants. Such a working owner, in common with other employees, qualifies for the protections ERISA affords plan participants and is governed by the rights and remedies ERISA specifies. In so ruling, we reject the position, taken by the lower courts in this case, that a business owner may rank only as an "employer" and not also as an "employee" for purposes of ERISA-sheltered plan participation.

Yates, p. 6. (Emphasis added.) Once again, a common law analysis is rejected in favor of the DOL's own proposal that working owners be assessed separately from the process outlined in *Darden*. DOL are hoist with their own petard, as their *Yates* arguments square completely with the substantive issues facing the court in this case. Without so much as a word of explanation for its abandonment of its position from the *Yates* Amicus Brief, DOL would have this Court address the question of whether "working owners" can be participants by solely looking at *Darden's* common law employee analysis. This analysis was explicitly rejected by the DOL in its Amicus Brief, a view the Supreme Court affirmed in the case itself.

3. DOL's Post Hoc Litigation Driven Position on "Working Owners" Contradicts its Ruling in Advisory Opinion 99-04A, which the Supreme Court Adopted in *Yates*.

Stating the term "working owner" does not appear in ERISA, DOL argues that ERISA requires that working owners must also be employees, presumably defined subject to traditional common law standards. Combined Brief, p. 30. Defendants' own words once again contradict Defendants' current position. First, DOL coined the term "working owner" in its seminal determination in Advisory Opinion 99-04A as a "term of art" derived from the plan's terms which were the subject of its ruling. In that advisory opinion, the DOL found:

> You represent that the trustees of the NEBF currently interpret its plan documents to permit "working owners" [(3)] to be treated as employees eligible to participate in the NEBF and therefore to become participants in the NEBF. **The eligible "working owners" include any "owner that earns wages or self-employment income from a company,"** including sole proprietors of unincorporated businesses.
>
> [(3.)] By the term "working owner," ***you apparently mean any individual who has an equity ownership right of any nature in a business enterprise and who is actively engaged in providing services to that business***, as ***distinguished from a "passive owner,"*** who may own shares in a corporation, for example, but is ***not***

> ***otherwise involved in the activities in which the business engages for profit***.

Advisory Opinion 99-04A (emphasis added; footnote omitted) (App. 181). More to the point, DOL called out the *Darden* holding in Advisory Opinion 99-04A and promptly distinguished it from circumstances involving working owners as DOL therein defined them. *Id.*, n 6. (App. 181). ("We follow here the Court's [statutory interpretation] analysis in Darden, although with a different result, inasmuch as we find ample guidance in ERISA as to Congress' specific intent to treat 'working owners' as 'participants.'" (context added in brackets)). DOL's position distinguishing *Darden* by finding clear intent from Congress to treat working owners as participants is consistent with what the Supreme Court later held in *Yates* and consistent with Plaintiffs' position in the instant case. DOL saw no reason to engage in a common law employment analysis vis-à-vis *Darden*, instead advocating a separate standard based on a finding of equity ownership and active engagement in the provision of services (App. 181). Such active engagement was further defined through negation, as DOL notes that active engagement is not a lack of involvement in a business' profit-seeking activities. *Id*. DOL relied on this term as defined in AO 99-04A thereafter, including but not limited to in its Amicus Brief in *Yates*.

Equally clear to DOL's rejection of common law employment standards in its original definition of "working owner" is the Supreme Court's complete adoption of the term, without any conditions, in *Yates*. By applying the novel term as DOL defined it and without distinction otherwise, the Supreme Court also adopted the meaning of "working owner" set forth by DOL in footnote 3 of Advisory Opinion 99-0A.

Only after the fact and in this case does DOL argue that the *Darden* "employee" test is somehow embedded in the definition of a working owner, despite no such prior reference in either the original coining of the term by DOL or its subsequent use by the Supreme Court. That footnote

3 was allowed to stand without any conditions or modifications by the Supreme Court is indisputable by the lack of rejection of the definition coupled with the frequent use of the term without additional distinction. Thus, the original definition must stand, and DOL should be made to remain consistent and recognize that "working owners" are treated as employees because they have an equity interest in the business and they provide services to the business in exchange for guaranteed payments, not due to additional common law employment standards otherwise totally ignored by both the original definition and its adoption in *Yates*. DOL's present attempt to distinguish the term relies on the single mundane phrase: "They [working owners] continue to work as electricians…." (App. 179) Apparently Defendants proffer this as a reflection of active engagement, not an expansive addition to the original definition. (*Id.*) Of course, working owners work and that work may take many forms, from electrical services to data generator, aggregator, and miner – however, this simple conclusion does not command or imply a common law employment review.

Beyond the whole adoption of "working owner" as outlined by DOL in AO 99-04A, an additional standard was in fact added to the finding of a working owner in *Yates*. However, that standard is the remuneration of self-employment income under IRC § 401(c) in exchange for services, not a common law employment review as DOL now claims (or even the first of the two-step *Darden* process proposed by DOL in their Amicus Brief, as noted in the previous section). *Yates,* 541 U.S. at 14. In support of the Supreme Court's inclusion of this addition, ERISA does in fact make numerous explicit references to 26 U.S.C. § 401(c), which is entitled "Definitions and rules relating to self-employed individuals and owner-employers." The *Yates* majority recognized the incorporation of IRC § 401(c) by reference into ERISA, and key provisions that are explicitly restated therein.

DOL's alternative argument that 26 U.S.C. § 401(c) is otherwise limited to the specific ERISA provisions that cite 26 U.S.C. § 401(c) is thus meritless. The Court in *Yates* cited those ERISA provisions for illustrative purposes only, *Yates*, p. 13 ("Exemptions of this order would be unnecessary if working owners could not qualify as participants in ERISA-protected plans in the first place."), and concluded after its review of those ERISA terms that "[i]n sum, because the statute's text is adequately informative, we need not look outside ERISA itself to conclude with security that Congress intended working owners to qualify as plan participants." *Id.* p. 16. Spinning examples provided for clarity into an argument claiming partners must satisfy common law employment standards to be considered working owners and qualified participants in an ERISA plan is a desperate reach.

The Supreme Court summarized its overall assessment of ERISA with respect to working owners by holding that as drafted, Congress could have only intended for "working owners to qualify as participants." *Id.,* p. 16. To be clear, there is one definition of participant in ERISA and it is set forth in Title I. As such, this meaning of participant applies each and every time the term "participant" is used. Therefore, the Supreme Court was as broad in its holding that working owners qualify as participants as ERISA allows. This broad conclusion is clearly not a selective application of 26 U.S.C. § 401(c) relevant to only discrete provisions of ERISA as claimed by DOL. In fact, other than Advisory Opinion 99-04A, the only definition attributed to working owners in the *Yates* opinion is 26 U.S.C. § 401(c). All the while, the Supreme Court and DOL agree that *Darden's* common law employment test is inapplicable, not because some otherwise unstated standard of employment has been analyzed and approved, but because both DOL and the Supreme Court agreed that *Darden* simply did not apply to the definition of a working owner. *Id.*, p. 17. ("We note finally that a 1999 Department of Labor advisory opinion accords with our

comprehension of Title I's definition and coverage provisions." (emphasis added)). Even though DOL, solely for the purpose of this case, desires space to interject common law employment conditions, no such room is available between the meaning of working owner and 26 U.S.C. § 401(c).

4. Following *Yates*, DOL has repeatedly advocated Plaintiffs' Position in Public Acts

On June 21, 2018 DOL published a new rule in the Federal Register related to Association Health Plans ("AHPs"). 83 Fed. Reg. 120, 28912, *et seq.*, codified at 29 C.F.R. § 2510.[10] Under the new rule, DOL permits employers to join with other employers to offer health plans for employees under certain circumstances provided they share a "commonality of interest." These employers can potentially have nothing more in common than geography or industry, and DOL will consider them covered by ERISA. As noted by DOL:

> [The President's] Executive Order specifically directed the Secretary [of Labor] to consider expanding the conditions that satisfy the commonality of interest requirements under existing DOL advisory opinions interpreting the definition of an "employer" under ERISA section 3(5) and also to consider ways to promote AHP formation on the basis of common geography or industry.

Id. The combination of these employers based on the mere fact that they share nothing more than a similar geographic location demonstrates the expansive nature of the required "commonality of interests". The stated policy of DOL that a "commonality of interests" is required in order to, "distinguish bona fide groups or associations of employers that provide coverage to their

[10] DOL is currently appealing an adverse district court ruling and has taken Plaintiffs' exact position on "working owners" in its appellate briefs. See *State of New York, et al. v. U.S. Department of Labor, et al.*, No. 19-5125, (D.C. Cir. appeal docketed Aug. 8, 2019). Additionally, DOL has adopted a companion regulation for AHP retirement plans which also dovetails with Plaintiffs' view of "working owners." 84 Fed. Reg. 37508 (*see* Sections A.3. and B.5.). Under ERISA, there is no functional difference between retirement plans and health benefit plans for purposes of the "working owner" analysis.

employees and families of their employees from arrangements that more closely resemble State-regulated private insurance…" *Id.* at 28913.

Indeed, DOL insists that geography standard under the new rule supports the proposition that the associated employers have "a sufficient nexus to employers and employees in the AHP to distinguish it from mere commercial health insurance issuer that lacks the requisite connection to the employment-based relationships that ERISA regulates." *Id.* at 28916. Put differently, an undefined, elastic concept of geographic proximity creates, "the requisite connection to the employment-based relationship," between a self-employed person running a steak house in Ft. Worth and a completely unaffiliated (but for the AHP) franchisee of a vegan bistro in Austin. Even more elastic than this example, the newly adopted AHP regulations allow local chambers of commerce to sponsor single-employer ERISA plans for its employer members whose only "commonality of interest" is membership in the same chamber of commerce. In those cases, a butcher's employees (and working owners) could be participants in the same plan as a PETA chapter's employees solely because they are members of the same chamber of commerce.

Notwithstanding this stepover hurdle method to find an employment-based nexus, DOL somehow cannot locate one with respect to the Plaintiffs' working owners in the case at bar. Indeed, DOL pays short shrift to the value of the work performed by the working owners contributing to their partnership. Instead, DOL claims to have "reasonably concluded that allowing one's electronic data to be tracked, collected, and marketed is not 'work' or 'performing any services.' Opinion, Pls.' App. 002." Combined Brief, p. 46. But DOL's conclusion is anything but reasonable, especially in light of the AHP regulation. Without the active engagement of partners data mining on their computers and devices, there is no product for DMP to market. While DOL may, in this case, wish to remain in antiquated understandings of "work" and "services," the

economic value of personal data generated from internet use is undisputed. As of 2018, the acquisition of such data was a $19 Billion market. (App. 223) The data mining of Plaintiffs' partners may not be factory work making widgets as the DOL would prefer to define work, but many in the private sector see great value in the electronic data created and transmitted to DMP solely through the efforts of its partners. That is certainly a more direct "employee-like behavior" than living in the same state or having employers that are members of the same chamber of commerce.

The DOL noted that final AHP rule was to be limited to self-employed individuals "genuinely engaged in a trade or business." 83 Fed. Reg. at 28932. DOL partly accomplished this by creating an hours threshold of "on average 20 hours per week or at least 80 hours per month" that working owners needed to contribute "personal services to the working owner's … business." 83 Fed. Reg. at 28964.[11] They also noted that these could be accumulated by "aggregat[ing] hours driven using different ride assignment technology platforms," like Uber and Lyft. 83 Fed. Reg. at 28932. Notably, DOL did not create a common law employment standard of any type in this definition of "working owner." Nor did DOL create a business profitability standard, an earnings standard, a dependence on business revenue standard, an office environment standard, a "clock in and clock out" standard, a "report to any assigned 'work' location" standard, a "notify the partnership" of work commencement standard, a "possess any particular work-related skills" standard (we presume the DOL does not consider driving to require any more "work-related skills"

[11] Interestingly, while DOL denigrates each partners' ownership interest as "only a nominal (at best) ownership interest in the partnership" in the AO Response, DOL's AHP regulation definition of working owner includes any "individual … ***who has an ownership right of any nature*** in a … business, … including a partner." 83 Fed. Reg. at 28964 (emphasis added). Clearly, the amount of an individual's ownership interest in the business matters only when the DOL does not want to recognize an individual as a "working owner" eligible to be a participant in an ERISA benefit plan. Once again, DOL's arbitrary and capricious treatment of Plaintiffs is writ large.

than using an electronic device), or any other of the litany of common law master-servant criteria that DOL arbitrarily applied to LPMS in the AO Response. DOL provides no explanation for this arbitrary difference in treatment of how it determines who is a "working owner."

5. DOL Mischaracterizes Its Own Regulations regarding Partners and Self-Employed Individuals Subject to ERISA Title 7 and IRC Regulations

DOL also attempts to leverage a dubious argument into a reason to misapply ERISA 732(d) [29 U.S.C. § 1191a(d)] in support of imposing employment conditions on Plaintiffs and their partners. 732(d) was enacted as part of HIPAA to extend the protections of Title 7 of ERISA to partners who participated in ***partner-only*** group health plans because such partners were outright barred from being qualified ERISA participants. 29 U.S.C. § 1191a(d)(1). *See also* 29 C.F.R. § 2510. 3-3 (b)-(c). Given the meaning and application of 29 C.F.R. § 2510. 3-3(b) and (c), to achieve this objective, Congress included 732(d) in Title 7 to override DOL's regulatory bar. In 732(d), however, Congress went further by also separately categorizing self-employed individuals that participated alongside employees of the business. This additional provision is clarifying here because partners, who are themselves self-employed individuals, need not rely on the partner-only provisions of 732(d) when such partners, as self-employed individuals, in fact, participated with employees of the partnership. Therefore, for Title 7 purposes, 732(d) presents two wholly separate paths to coverage.

The two distinct paths are evident based on a simple review of the statutory terms. 732(d) addresses the terms "partner" and "partnership" in three places. Each of those subsections apply to partner-only group health plans. See 732(d)(1), (2), and (3)(A) [29 U.S.C. § 1191a(d)(1), (2), and (3)(A)]. Essential to the analysis of Defendants' misuse of 732(d) in this case is that all of these three provisions address ***partner-only*** group health plans. None of Plaintiffs' plans are ***partner-only*** group health plans.

Subsection 732(d)(3)(B) does not solely address partner-only plans. Instead, as an entirely separate matter, it unequivocally provides that self-employed individuals (who may be partners or sole proprietors) ***who participate alongside employees*** in a group health plan are deemed to be "participants" without imposition of any other conditions. In effect, 732(d)(3)(B) codifies the second example in 29 C.F.R. § 2510.3-3(b) for purposes of Title 7 of ERISA. This is crucial and outcome determinative.

If anything, DOL's regulations at 29 C.F.R. § 2590.732(d)(3) are even clearer on this point stating:

> Participants of group health plans. —
> In the case of a group health plan, the term **participant also includes any individual described in paragraph (d)(3)(i) *or* (ii)** of this section …
> (i) In connection with a group health plan maintained by a partnership, the individual is a partner in relation to the partnership.
> (ii) In connection with a group health plan maintained by a self-employed individual **(under which one or more employees are participants)**, the individual is the self-employed individual.

(Emphasis added).

Because the AO Request states that the Plan covers common law employees, with respect to 732(d), and for that matter the balance of ERISA, the partners are deemed to be participants in the Plan which is covered by ERISA. Therefore, DOL's argument that "bona fide" partner status is the sole prerequisite that must be satisfied by the partners to be qualified as ERISA participants wholly misinterprets § 732(d) and more specifically misapplies 29 C.F.R. § 2590.732(d)(2). See Combined Brief, p. 6. The bona fide partner conditions only apply to partners participating in a ***partner only*** group health plan, and none of the plans at issue in this case are partner only plans. See also, 29 C.F.R. § 2510. 3-3(b).

In furtherance of its misguided arguments concerning 732(d), DOL asserts its equally misguided interpretation of the term "earned income" as used in 26 U.S.C. § 401(c), which focuses

on the reference therein to the term "personal services."[12] Combined Brief, p. 32. In support of its interpretation, DOL first cites to 26 C.F.R. 1.401-10 for support. DOL's reliance on these Treasury Regulations, however, only introduces more issues it must rationalize. First, the cited regulations became effective March 14, 2019, so were not available to DOL when it issued Advisory Opinion 99-04A and similarly was not available to the Supreme Court in the *Yates* opinion of 2004. Thus, those regulations could have had no bearing on those opinions.

Second, what DOL gleaned from those regulations contradicts its arguments in the AO Response. Citing *Miller v. Comm'r of Internal Revenue*, 81 T.C.M. (CCH) 1258, 2001 WL 233963, at *17 (T.C. 2001), DOL provides the following quote: "[W]e have upheld the requirement that personal services be actually performed in order to yield earned income." Whatever interpretation DOL may attempt to offer, it cannot be disputed that Plaintiffs' partners actually perform services for the partnership. Therefore, this "actually performed" criterion is satisfied. Throughout Section C of the AO Request (App. 16 – 18), LPMS describes both the services the partners will actually perform on behalf of the partnership and also explains how those services will yield "guaranteed payments" made to the partners "as that term is used in 26 USC 707(c) and 26 USC 1402(a)(13)..." (App. 18).

While DOL has elected to support its arguments with those cherry-picked Treasury Regulations, other relevant terms set forth those same regulations plainly contradict DOL's positions and support Plaintiffs' positions. Sub-section (c)(2)(i) provides, "[t]he computation of

[12] Much like its bizarre creation of non-existent legal standards in the AO Response, DOL attaches meaning to the concept of "passive services." This concept, however, does not exist in the Internal Revenue Code. While a charitable interpretation of the term may invoke the treatment of passive owners in 26 USC 469, the DOL rejected reference to that provision in the same brief. Thus, this court should ignore the reference, confusing the reader and calling into question the self-serving nature of DOL's positioning in this case.

net earnings from self-employment shall be made in accordance with the provisions of section 1402(a) and the regulations they are under..." By comparison, the AO Request mirrors this language in the Treasury Regulations. Sub-section (b)(1) provides "[f]or purposes of section 401, a self-employed individual who receives earned income from an employer during a taxable year of such employer … shall be considered an employee of such employer for such taxable year." Section (b)(3)(i) provides "[t]he term 'employee', for purposes of section 401, does not include a self-employed individual when the term 'common-law' employee is used **or when the context otherwise requires that the term 'employee' does not include a self-employed individual**." (Emphasis added.) With respect to Section (b)(3)(i) it is important to note that DOL's insistence on imposing employment conditions on the partners on its face contradicts what the Treasury Department tries to achieve in 26 CFR 1.401-10. This self-serving misinterpretation is yet another reason why DOL must not be allowed to make determinations as done in the AO Response based on unauthorized actions concerning the Internal Revenue Code. Moreover, this is precisely why the Supreme Court's holding in *Yates* as articulated by Plaintiffs is consistent with the holding itself and dispositive in favor of the Plaintiffs.

E. PLAINTIFFS' "WORKING OWNERS" EXHIBIT "EMPLOYEE-LIKE BEHAVIOR" EVEN IF THAT STANDARD WERE TO EXIST AND WERE TO BE APPLICABLE

Defendants claim that Plaintiffs' working owner partners cannot participate in a plan governed by ERISA unless they satisfy some unidentified degree of "employee-like behavior." If this arbitrary standard unsupported by the statute was not troubling enough, Defendants also do not even attempt to define or delimit their ad hoc terminology while assigning themselves sole purview in its finding. Plaintiffs might be inclined to feign surprise by Defendants' brazen flouting of the principles of statutory interpretation and regulatory authority, but this abuse is emblematic of DOL's ever-shifting, ever-elusive rationale for arriving at its self-serving legal conclusions.

Indeed, when the DOL is not contradicting long held legal maxims, it simply contradicts itself. *See, e.g.*, the discussion of the newly adopted AHP regulations in Section VI (D), above.

DOL insists that allowing "the partnership to 'track consumers [sic]' activities on the Internet' is instead similar to what consumers already permit 'numerous firms, such as internet browsers and social media companies' to do 'without claiming that the tracked consumers work for them.'" *Id.* Critically, DOL misses the mark and again contradicts its own similar guidance from related contexts. While internet browsers certainly track some data, such tracking is limited to that particular platform, and, perhaps most importantly, revenue derived from such tracking *is not shared with the user.* Ever. Indeed, consider the economic impact to Facebook or Google if a law akin to California's "gig economy law" (AB5) suddenly required them to "hire" their user base as "employees" in order to sell the data mined by their users. But that is not the case, and this lack of compensating users is one reason why DOL's flimsy analogy falls short.

Plan participants in this case have taken control of the data generated by their active use of computers and devices. Internet browsers certainly track usage data, and they retain all revenue derived from such tracking. Internet moguls have been compared to the robber barons of the 19th century, and with good reason. But even John D. Rockefeller and the Standard Oil Company paid for the land from which they extracted oil. The internet platforms that extract, aggregate, and then sell our internet usage data do not pay us for that data. Plaintiffs have developed a business model by which individuals can take control of their internet data usage assets. DOL's position fundamentally denies that taking control of those assets is possible or appropriate, which is antithetical to the entrepreneurial spirit and outside their regulatory purview.

Here, Plaintiffs' working owners submit their mined data across devices, platforms and applications to their partnership – data generation far beyond DOL's unsubstantiated assertion that

the software is no different than numerous "internet browsers and social media companies." Such browsers and companies may be entirely distinct or even in direct competition with one another. Plaintiffs' proprietary software allows partners to mine their electronic data whether going to a site that monetizes contact or not and allows for user data inputs by the partners that is also transmitted to and aggregated by the partnerships. These working owners engage in a valuable and bona fide service for the partnership by mining this data and transmitting it to the partnership's cloud based "data bank." This is akin to a DOL analogy regarding self-employed ride-sharing working owners in the AHP rule. However, unlike the AHP rule where ride-sharing working owners would be credited with hours of service even if they are sleeping in their idling car, Plaintiffs' partners must be actively engaged with their computers or devices to mine data transmitted to the partnership.

Plaintiffs have similarly created an hours threshold for its working owner partners, but DOL scoffed at the services provided saying, "'the limited partners' activities, while comprising 500 hours of data, do not appear to 'differ[] in any meaningful way from the personal activities . . . [they] would otherwise engage in while using their personal devices." Doc. 28, p. 36. But, DOL does not and, indeed, cannot, explain why performing work that one is already inclined to do somehow defeats an otherwise valid working owner status. Indeed, a self-employed ride sharing driver may be located in Dallas and desire to travel to Fort Worth. If the driver turns on his ridesharing technology platform and picks up a paying passenger going from his location in Dallas to his desired location in Fort Worth, does the DOL consider the time spent as "personal" and decline to apply them to the AHP requirement? Of course not. Because notwithstanding whether the driver was going to be driving the distance anyway, the fact that the driver carried out the business task of driving and accrued a small amount of revenue means they were services performed on behalf of the business. The case is exactly the same for Plaintiffs' working partners.

F. INJUNCTIVE RELIEF IS APPROPRIATE AND NECESSARY

In addressing Plaintiffs' request for injunctive relief in the Combined Brief, Defendants blithely assert, "Plaintiffs have failed to identify a concrete and imminent action for which injunctive relief is necessary." Combined Brief, p. 43. Plaintiffs have repeatedly argued the inescapable fact that by issuing the arbitrary and capricious AO Response, DOL has opened Plaintiffs and all LPMS-managed partnerships to criminal and civil liability. In addition to the legal arguments set forth in Plaintiffs' Initial TRO Motion concerning the immediate and continuing harm that Plaintiffs have endured, and continue to endure, as a result of DOL's January 24, 2020 AO Response, Plaintiffs have encountered new problems following the AO Response that further threaten to derail Plaintiffs' business and potentially cause over 50,000 hard-working American citizens to lose their health care coverage.

On March 6, 2020, an LPMS-managed partnership, Data Partnership Group LP ("DPG"), received a notice letter from the Regulatory Investigations Unit of the State of Washington's Office of the Insurance Commissioner ("Washington State Insurance Commissioner") indicating that it had opened an investigation against DPG "for allegedly offering fraudulent ERISA minimum essential coverage ("MEG") (sic) health benefit products …." (A copy of the Washington State Insurance Commissioner's March 6, 2020 Notice Letter is attached hereto as Exhibit A). The notice letter then requests that DPG provide written responses to eight questions and provide copies of six categories of documents all concerning DPG's business model and its health insurance plan. *Id.* at pp. 1-2. Given the March 6, 2020 deadline for DPG to respond to the Washington State Insurance Commissioner's notice letter, on March 11, 2020, the undersigned counsel contacted the Commissioner's lead investigator requesting a suspension of the investigation pending this Court's final ruling on Plaintiff's Motion for Summary Judgment. It was refused.

Given this recent state-level investigation of the business operations and health insurance plans of Plaintiffs' affiliates following DOL's legally flawed AO Opinion, Plaintiffs are justifiably concerned that they, and their affiliates, will likely continue to receive these same types of notices of investigation from Offices of Insurance in the various other states in which they operate. This looming threat of additional state-level insurance investigations is clearly real, and the consequences of such investigations could be severe. Such investigations could disrupt and potentially end Plaintiffs' and their affiliate companies' business operations, which would cause over 50,000 hardworking Americans to immediately lose their health care coverage. In light of the current public health crisis caused by the uncontrolled spread of the COVID-19 virus, and in respect of the terrible damage caused and continuing to be wrought by this pandemic, American citizens need to maintain their health care insurance coverage now more than ever. Also, with now close to 10,000,000 Americans losing their jobs and group health coverage, access to alternative plans is more important than ever for those without a good option beyond relying on the Affordable Care Act and their unemployment benefits.

Moreover, as discussed above, ERISA preempts, "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. §1144(a). The point of ERISA preemption is to avoid plans being regulated by both federal and state law and to create a national, uniform administration of employee benefit plans. *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, 399 F.3d 692, 698 (6th Cir. 2005). By deciding that Plaintiffs' plans are not ERISA-covered plans, DOL has taken away ERISA preemption under which the plans were designed and has fundamentally changed the protections afforded the plan participants. Rather than maintaining DOL's regulation of Plaintiffs' proffered plans, the AO Response immediately causes these plans to come exclusively within the purview of state regulators, as

opposed to DOL's purview. As the regulation of employee welfare benefit plans are "exclusively a federal concern" (*Alessi v. Raybestos-Manhattan, Inc.*, Inc., 451 U.S. 504, 523 (1981)), any action by DOL that would subject a plan to potentially conflicting state regulations (as opposed to the uniform application of ERISA) has fundamental legal consequences. *See New York Conference of Blue Cross & Blue Shield Plans, et al, v. Travelers Ins. Co., et al*, 514 U.S. 645 (1995).

Here, if this Court grants Plaintiffs' Motion for Summary Judgment, the currently pending state-level insurance investigation as well as any other potential state-level insurance investigations would immediately become legally and factually moot because ERISA preempts, "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. §1144(a). Given the very real and looming threat to Plaintiffs' group health care plan of having other state-level insurance investigations opened against them while Plaintiffs hold no insurance licenses, this Court should immediately issue an order granting Plaintiff's request for a temporary restraining order and preliminary injunction, which would effectively preempt any and all state-level insurance investigations to the extent that they conflict with this Court's forthcoming ruling the cross motions for summary judgment.

An order granting a preliminary injunction would preserve the status quo pending this Court's ruling on the cross motions for summary judgment, which is a classic, just application of a preliminary injunction. At present, due solely to DOL's issuance of the AO Response, a state regulatory agency or court can issue orders and directives disrupting the status quo of this case to Plaintiffs for lack of holding an insurance license. Furthermore, a preliminary injunction will save the states, other courts, and Plaintiffs a considerable amount of time, money, and resources pursuing and responding to state-level insurance investigations and orders; it would prevent Plaintiffs' and their affiliates' businesses from suffering serious and likely irreparable financial

and reputational harm; and it would prevent more than 50,000 hard-working American citizens from losing their health care coverage in the midst of a public health pandemic.

Plaintiffs therefore respectfully request that this Court immediately grant their request for a temporary restraining order and preliminary injunction to prevent Defendants from taking any action regarding DOL's January 24, 2020 AO Response, and to discourage other state offices of insurance from initiating an investigation or order regarding Plaintiffs' or their affiliates' business model or their health care insurance programs pending this Court's ruling on Plaintiffs' Motion for Summary Judgment.

IV. CONCLUSION

For all of the forgoing reasons, this Honorable Court should **GRANT** Plaintiffs' motions and **DENY** Defendants' motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing *Plaintiffs' Amended Consolidated Reply Brief in Support of Summary Judgment and Injunction As Well As Opposition To Defendants' Cross Motion for Summary Judgment* was made, this 7th day of April, 2020, by the Court's Case Management/Electronic Files system upon the attorneys for the parties.

Respectfully submitted this 7th day of April, 2020.

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