

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

DATA MARKETING PARTNERSHIP, LP,	)	
et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 4:19-cv-00800-O
v.	)	
	)	
UNITED STATES DEPARTMENT OF	)	
LABOR, et al.,	)	
	)	
Defendants.	)	
	)	

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' AMENDED MOTION FOR LEAVE
TO FILE AND SERVE SUPPLEMENTAL COMPLAINT**

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INTRODUCTION

Plaintiffs seek to convert this Administrative Procedure Act (APA) case—for which post-remand summary judgment briefing has been complete for six months—into a new retaliation case that would require starting over with claims having nothing to do with the fully-briefed merits here. The same retaliation claims have been presented to two other courts without success, and the appropriate forum to finally resolve those claim is the U.S. District Court for the District of Puerto Rico, which is handling the ERISA civil enforcement action that Plaintiffs allege to be retaliatory. *See* Ex. 1, Complaint, *Su v. Suffolk Administrative Services, LLC, et al.*, No. 3:24-CV-01512 (D.P.R.) (referenced throughout as “DOL Compl.” or “ERISA enforcement action”).

Supplementation of the complaint should be denied because Plaintiffs’ new causes of action do not stem from their original claims, but instead raise distinct factual and legal issues intertwined with the merits of the ERISA enforcement action pending in the District of Puerto Rico. Plaintiffs erroneously believe there is a retaliatory motive behind the Department of Labor’s entire investigation of ERISA violations by a network of companies related to Plaintiffs, along with pre-filing settlement negotiations and the filing of the ERISA enforcement action. While the Department is prepared to show that its actions are well-founded, that showing should be made in the District of Puerto Rico. Nothing about these new claims concerns whether Plaintiffs’ partnership plans are or are not covered by ERISA.

The filing of the supplemental complaint would (i) cause undue delay in resolving Plaintiffs’ original complaint; (ii) prejudice Defendants by requiring defense of overlapping issues in two different courts; and (iii) permit claims that are futile because they do not state claims on which relief could be granted. Moreover, the Court should exercise its discretion to deny supplementation because granting such would not serve judicial economy. Alternatively, Defendants cross-move for transfer of these claims to the District of Puerto Rico under the first-

to-file rule and 28 U.S.C. § 1404(a) because convenience and the interests of justice would be better served by permitting a single court to address the merits of the ERISA enforcement action.

BACKGROUND

I. The Secretary’s Authority Under ERISA¹

“ERISA ‘has produced a complex and highly technical regulatory program.’” *Meredith v. Time Ins. Co.*, 980 F.2d 352, 357 (5th Cir. 1993) (quotation marks omitted).² The statute confers on the Secretary broad administrative powers, including “to supervise enforcement of ERISA, to guarantee uniform compliance with ERISA, to expose and deter plan asset mismanagement, to protect federal revenues, [and] to safeguard the enormous amount of assets and investments funded by ERISA plans.” *Herman v. S.C. Nat’l Bank*, 140 F.3d 1413, 1423 (11th Cir. 1998); *see Sec’y of Labor v. Fitzsimmons*, 805 F.2d 682, 689-94 (7th Cir. 1986) (en banc); 29 U.S.C. §§ 1132, 1135. The Secretary’s enforcement authority includes bringing an action in federal court to remedy fiduciary breaches and other violations of Title I of ERISA. *See* 29 U.S.C. §§ 1132-39; *see, e.g., Texas Life, Acc. Health & Hosp. Serv. Ins. Guar. Ass’n v. Gaylord Ent. Co.*, 105 F.3d 210, 214 (5th Cir. 1997) (“Only the Secretary of Labor, participants, beneficiaries or fiduciaries of plans may bring suit under [29 U.S.C.] § 1109.”); *Reich v. Lancaster*, 55 F.3d 1034 (5th Cir. 1995) (affirming district court’s judgment in favor of Secretary’s civil enforcement action).

II. Procedural History of the Advisory Opinion Litigation

In November 2018, LP Management Services, LLC (LPMS) submitted an advisory opinion request to the Department, which LPMS revised in February 2019. *See* Am. Compl. ¶¶ 70, 75, ECF No. 9. Alexander Renfro submitted the advisory opinion request on behalf of LPMS. *See* Am.

¹ For a more complete statement of ERISA’s legal framework, *see, e.g.,* Defs.’ Opp’n to Pls.’ Mot. for Summ. J. at 4-9, ECF No. 64.

² Hereinafter, internal citations, quotation marks, and alterations omitted unless otherwise noted.

Compl. Ex. A at 1, ECF No. 9-1. The advisory opinion request stated that LPMS was the general partner “of various Limited Partnerships and manage[s] the day-to-day affairs of these Partnerships.” Am. Compl. Ex. A at 1. LPMS sought an opinion regarding whether a plan sponsored by a limited partnership as described in its letter is an “employee welfare benefit plan” within the meaning of ERISA section 3(1), 29 U.S.C. § 1002(1); whether the limited partners in the plan are “participants” within the meaning of ERISA section 3(7); and whether the plan is governed by Title I of ERISA. *See id.* In January 2020, the Department issued its advisory opinion, concluding in light of LPMS’s factual representations that the partnerships’ health benefits plans administered by LPMS did not qualify as ERISA-covered plans. *See* EBSA Advisory Opinion 2020-01A, Am. Compl. Ex. B, ECF No. 9-2.

Plaintiffs served the complaint in this case in December 2019, *see* ECF Nos. 1, 4, and then filed an amended complaint in February 2020 to challenge the advisory opinion under the APA. The Court considered the parties’ cross-motions for summary judgment simultaneously with Plaintiffs’ preliminary injunction motion. *See* Scheduling Order, ECF No. 19. Because the Department’s advisory opinion was based solely on the factual representations set out in the opinion request, the Department did not conduct any fact-finding during the advisory opinion process, and the parties did not conduct discovery in this litigation. *See* ECF No. 19 (“There will be no discovery conducted by either party.”). In September 2020, the Court granted summary judgment to Plaintiffs, “set aside” the advisory opinion as “arbitrary and capricious under the APA and contrary to law under ERISA” and permanently enjoined the Department “from refusing to acknowledge the ERISA-status of the Plan or refusing to recognize the Limited Partners as working owners of DMP.” Mem. Op. & Order at 30, ECF No. 37.

In August 2022, the U.S. Court of Appeals for the Fifth Circuit “affirm[ed] the district court’s vacatur of the agency action” but “vacate[d] and remand[ed] the district court’s injunction for further consideration in light of this opinion.” *Data Marketing P’ship v. U.S. Dep’t of Labor*, 45 F.4th 846, 851 (5th Cir. 2022). The Fifth Circuit affirmed this Court’s conclusions that the advisory opinion was final agency action reviewable under the APA, *id.* at 853-55, and that the advisory opinion was arbitrary and capricious because the advisory opinion did not address two prior advisory opinions or a regulation that adopted a definition of “working owner.” *Id.* at 855-58. The Fifth Circuit, however, concluded that this Court “did not perform [the] analysis” required to interpret the terms “working owner” and “bona fide partner” as applied to the particular circumstances here. 45 F.4th at 858-59. The Fifth Circuit vacated this Court’s permanent injunction “without opining on whether such relief might be appropriate” because the injunction “turned on the interpretive questions” that this Court had not analyzed. *See id.* at 860. Instead, the Fifth Circuit gave this Court the opportunity “to address certain interpretive questions in the first instance” on remand, *id.* at 858, before any permanent injunction could issue.

After the Fifth Circuit’s mandate issued, the Department requested a remand to the agency, *see* ECF No. 48, which the Court denied in August 2023. *See* Opinion & Order, ECF No. 51. The Court then agreed with the parties that “the sole remaining issue is whether the Court should enter a permanent injunction as additional relief beyond the vacatur of the Department of Labor’s Advisory Opinion,” and set a “post-remand briefing schedule for summary judgment.” Order, Sept. 15, 2023, ECF No. 55. Plaintiffs’ summary judgment motion as to a permanent injunction has been fully briefed since June 21, 2024. *See* ECF Nos. 56, 64, 65. In the meantime, the parties had engaged in settlement discussions that were ultimately unsuccessful. *See* ECF Nos. 58, 60, 62.

On November 1, 2024, Plaintiffs filed a motion for leave to file a supplemental complaint

raising their retaliatory investigation theories in this Court for the first time, which they amended on November 25, 2024. *See* ECF Nos. 66, 69. The Court granted Defendants an extension through December 20, 2024 to respond to Plaintiffs' amended motion. *See* ECF No. 71.

III. Procedural History of the Anjo Investigation and Civil Enforcement Action

On April 29, 2019, the Department opened an investigation into Anjo, LLC (Anjo), a holding company owned by Alexander Renfro. *See* Ex. 2 at 3, *Suffolk Admin. Servs., LLC v. U.S. Dep't of Labor (Suffolk)*, Case 3:21-cv-01031-DRD (D.P.R. Mar. 28, 2022) (*Suffolk* ECF No. 43); Ex. 3, *Suffolk Ans.* ¶ 52 (*Suffolk* ECF No. 24). At the time, Anjo was a partial owner of Suffolk Administrative Services (SAS) and an indirect partial owner of Providence Insurance Company (PIC). Over a two-year period, the Department had received complaints about health plans and products designed and serviced by PIC and SAS, and the Department began to suspect that the complaints might be related to the plans described in the advisory opinion request submitted by LPMS. Ex. 4, *Suffolk Compl.* ¶ 4 (*Suffolk* ECF No. 1); *Suffolk Ans.* ¶ 52. The complaints involved insurance coverage and alleged misrepresentations about the health benefits covered or improper denials of medical claims. *Suffolk Ans.* ¶ 52. Some of the complaints came to the Department as referrals from state insurance regulators, who (when investigating complaints the state received) were told that the plans were ERISA-covered and thus not within the state's purview. *See id.*

The Anjo investigation's initial purpose was to determine whether the health plans and products designed and serviced by SAS and PIC were covered by ERISA and, if so, whether any ERISA violations had occurred. *See id.* The Department learned through its investigation that SAS and PIC administered health plans belonging to both limited partnerships (such as DMP) and traditional employers unrelated to the partnerships. *See id.* ¶ 63. While the investigation was ongoing, the Department continued to receive complaints and state referrals regarding SAS and PIC plans and related entities, including ten referrals from state insurance regulators between May

2019 and July 2020, as well as one more individual complaint in October 2019. *Id.*

In January 2021, Anjo, SAS, PIC and another related entity, Providence Insurance Partners, LLC (PIP), sued the Department in the District of Puerto Rico, asking the court to stop the Department's investigation on the theory that it was retaliation for Plaintiffs' claims in this case, in violation of the First Amendment, Fifth Amendment, APA, and ERISA. *See* Ex. 2, *Suffolk* Opinion (Mar. 8, 2022). In March 2022, the District of Puerto Rico dismissed the First Amendment claims for lack of ripeness because the Anjo investigation was then ongoing, and court intervention would be premature. *See id.* at 15-17, 26-28; *see also* Ex. 5, *Suffolk* Opinion at 9-10 (Feb. 17, 2023) (*Suffolk* ECF No. 50) (denying Plaintiffs' Rule 59(e) motion).

While that case was pending, in August 2021, the Department filed a petition in the District of Puerto Rico to enforce an administrative subpoena against PIC due to its noncompliance with the ongoing investigation. *See* Ex. 6, Pet. To Enforce, *Walsh v. Providence Ins. Co., I.I. (Providence)*, Case 3:21-mc-00413-ADC (D.P.R.) (*Providence* ECF No. 1). In response, PIC asserted counterclaims based on the same retaliatory investigation theories. *See* Ex. 7, Answer & Countercl. at 3-30 (*Providence* ECF No. 4). The parties ultimately resolved the subpoena issue without judicial involvement. *See* Ex. 8, Jt. Stip. Of Dismissal (*Providence* ECF No. 21).

Based on its investigation, the Department determined that SAS and PIC, as well as the individuals who indirectly owned them—Renfro, Arjan Zieger, and William Bryan—had violated ERISA with regard to the traditional employer plans serviced by SAS and PIC. Before filing suit, the Department provided notice of its intent to sue in a July 21, 2022 letter, *see* Pls.' Ex. G, ECF No. 69-2, and entered a series of tolling agreements that postponed the filing of the suit while settlement negotiations continued, concluding with an email dated October 31, 2024. *See* Pls.' Ex. O, ECF No. 69-2. The Department unsuccessfully sought a global settlement of all pending claims

between itself on the one side and, Plaintiffs, and Plaintiff's plan vendors (SAS, PIC, and their principals) on the other. The Department filed an ERISA civil enforcement action to remedy these violations in the District of Puerto Rico on November 5, 2024. *See* Ex. 1, DOL Compl.

In its ERISA enforcement action, the Department alleges that (i) SAS and the individual defendants engaged in fiduciary breaches and self-dealing by collecting exorbitant fees for themselves and PIC, without disclosure to the plan clients, *id.* ¶¶ 64-74; (ii) SAS caused the plans to pay excessive fees to marketers and enrollers for the plans, *id.* ¶¶ 75-79; (iii) PIC and the individual defendants knowingly participated in SAS's violations since SAS determined the fees that PIC, its affiliate, received, *id.* ¶¶ 80-85; and (iv) SAS engaged in reporting violations by failing to file reports required of multiple employer welfare arrangements (MEWAs), *id.* ¶¶ 86-87. The Department seeks restoration of the plans' losses, recovery of unjust profits, and other equitable relief. *Id.* ¶¶ 88-100. The ERISA enforcement action seeks restoration of losses by more than 1,900 traditional employer plans that participate in this MEWA, *see id.* ¶ 9; the Department's claims relate only to SAS and PIC's conduct with regard to their administration of and collection of fees from those traditional employer plans; it does not base any asserted losses or seek any recovery regarding DMP's or any limited partnership's plans serviced by SAS and PIC. *Id.* ¶ 2 n.1. The Department's lawsuit is currently pending in the District of Puerto Rico.

LEGAL STANDARD

Rule 15(d) provides that "[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). "[T]he Court *may* permit the filing of a supplemental pleading, but need not do so." *Dizon v. Vectrus Sys. Corp.*, No. 7:22-CV-00040-O-BP, 2023 WL 3727704, at *1 (N.D. Tex. Apr. 27, 2023) (citing *Burns v. Exxon Corp.*, 158 F.3d 336, 343 (5th Cir. 1998)), *report and rec. adopted*, 2023 WL

3737037 (N.D. Tex. May 30, 2023), *appeal dismissed*, No. 23-10734, 2023 WL 9226940 (5th Cir. Oct. 23, 2023), *cert. denied*, No. 23-6450, 2024 WL 4426713 (U.S. Oct. 7, 2024).

“Judicial decisions to grant or deny Rule 15(d) motions to supplement pleadings are generally based on the same factors of fairness courts weigh when considering motions to amend pleadings under Rule 15(a).” *Tomasella v. Div. of Child Support*, No. 3:20-CV-476-S-BH, 2021 WL 3710659, at *2 (N.D. Tex. Aug. 20, 2021). These factors include considerations of “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] the futility of amendment.” *Tomasella*, 2021 WL 3710659, at *2 (quoting *Schiller v. Phys. Res. Grp. Inc.*, 342 F.3d 563, 566 (5th Cir. 2003)).

“Leave to supplement should not be granted where a plaintiff attempts to present ‘new and different cause[s] of action.’” *DeLeon v. Salinas*, No. 1:10-CV-303, 2016 WL 11795864, at *6 (S.D. Tex. Feb. 12, 2016) (ultimately quoting *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 226 (1964)). The supplemental allegations must “stem from the original cause of action.” *Mangwiro v. Napolitano*, 939 F. Supp. 2d 639, 647-48 (N.D. Tex. 2013), *aff’d* 554 F. App’x 255 (5th Cir. 2014), (citing *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1194 (5th Cir. 1982), *vacated on other grounds by* 460 U.S. 1007 (1983)).

ARGUMENT

I. Plaintiffs’ Motion Should Be Denied Because It Would Not Serve Judicial Economy to Litigate Plaintiffs’ Retaliation Theories In This Nearly-Completed Lawsuit, and Instead Would Cause Undue Delay, Prejudice Defendants, and Be Futile.

A. Plaintiffs’ Proposed Supplemental Complaint Raises “New and Different” Causes of Action That Do Not Stem From the Original Cause of Action.

The Court should deny Plaintiffs’ motion to file a supplemental complaint at this late stage because the proposed claims do not stem from the original cause of action. *See Mangwiro*, 939 F.

Supp. 2d at 647-48 (“A supplemental pleading may bring in new claims when the subsequent allegations stem from the original cause of action.”); *see also DeLeon*, 2016 WL 11795864, at *6 (“Leave to supplement should not be granted where a plaintiff attempts to present ‘new and different cause[s] of action.’” (ultimately quoting *Griffin*, 377 U.S. at 226)).

Plaintiffs’ retaliatory litigation theories are entirely distinct from the original claims involving the Department’s advisory opinion. In *Welsh*, a court in this district denied supplementation because the “[p]laintiff’s new claims arose out of separate transactions and occurrences, include allegations of different injuries, and involve distinct questions of fact and law” and accordingly “[t]he supplemental allegations are not relevant to his original claims, and Plaintiff could bring a separate lawsuit to pursue the new claims.” *Welsh v. Lamb Cnty.*, No. 5:20-CV-00024-H, 2021 WL 4350595, at *15 (N.D. Tex. Sept. 24, 2021), *aff’d in part, rev’d in part and remanded on other grounds*, No. 22-10124, 2023 WL 3918995 (5th Cir. June 9, 2023). That precisely describes Plaintiffs’ proposed supplemental claims, which involve the Department’s investigation of entities that are not parties to this case, a civil enforcement action against those non-parties in the District of Puerto Rico, and settlement negotiations that have nothing to do with the merits of this case. Accordingly, the claims present “new and different cause(s) of action” for which supplementation here is not warranted. *See id.*, 2021 WL 4350595, at *15.

Plaintiffs argue that their retaliation claims “stem from” the original claims solely on the ground that the Department was allegedly seeking to “avoid the injunctive relief sought” in this case or “moot the injunctive relief by shutting down the plans.” Pls.’ Am. Mot. at 5-6, ECF No. 69.³ Yet they cite no authority for that proposition. It is not enough for the new claims to be

³ The Department’s ERISA enforcement action does not seek to “shut down” any plans. Instead, it seeks to recover losses on behalf of participating ERISA plans. *See supra* Background § III.

“factually related” where the “new allegations do not stem from their original claims.” *Mangwiro v. Napolitano*, 939 F. Supp. 2d 639, 648 (N.D. Tex. 2013) (denying supplementation where new claim raised distinct legal theory for new petition). For example, the Sixth Circuit upheld denial of a motion to supplement where the original complaint concerned an allegedly retaliatory denial of a promotion and the proposed supplemental complaint concerned discipline for violations of company policy that were discovered during the first proceeding. *See Hoffman v. Solis*, 636 F.3d 262, 272 (6th Cir. 2011) (holding that the new adverse action arose “under a different set of facts and occurrences than the matter in litigation” even though “the two matters are related”). Similarly, Plaintiffs cannot justify bringing their new retaliation claims here merely because, as Plaintiffs allege (but Defendants do not concede), this suit triggered the supposed retaliation. *Cf. Rogers v. Kwarteng*, No. 2:18-CV-421, 2019 WL 1675953, at *2 (S.D. Tex. Apr. 16, 2019) (denying motion to supplement complaint where “new and different cause of action” concerned claims that “arose after the filing of his amended complaint and out of separate transactions and occurrences as compared to his [pending claims]”); *Walker v. Rheams*, No. 20-260, 2021 WL 11592625, at *2 (M.D. La. Sept. 10, 2021) (denying supplementation where “[t]he proposed new claim regarding access to the courts is wholly different from the claim presently before the Court, which consists only of deliberate indifference”); *DeLeon*, 2016 WL 11795864, at *6 (denying supplementation for various reasons including that it raised “a claim distinct from the alleged giving of advice by private persons on which the litigation [has] been based”).

While Plaintiffs allege without explanation that “[i]f SAS and PIC stop doing business . . . the Partnership Plans would cease” because “no other vendor . . . provides the [same] services,” *see* Proposed Supp. Compl. ¶ 22, there is no reason to think that the plans could not find servicers separate from this interlocking network of companies.

B. Plaintiffs' Proposed Supplemental Complaint Would Cause Undue Delay and Undue Prejudice.

Plaintiffs' motion should also be denied because requiring Defendants to litigate the supplemental complaint in this forum would cause "undue delay" and "undue prejudice" to Defendants. *Tomasella*, 2021 WL 3710659, at *2.

First, this lawsuit was filed more than five years ago, and post-appeal summary judgment briefing has been completed for six months. *See* ECF No. 65. Plaintiffs should not be permitted to upend this case at this late stage. "[W]hen leave to amend is sought after a summary judgment motion has been filed, courts routinely decline to permit the moving party to amend." *Mauer v. Wal-Mart Stores, Inc.*, No. 3:16-CV-2085-BN, 2017 WL 6406619, at *2 (N.D. Tex. Dec. 15, 2017); *Richard v. Zabojnik*, No. 3:19-CV-01568-X, 2020 WL 5094820, at *4 (N.D. Tex. Aug. 28, 2020) ("Ordinarily, this Court takes a dim view of amending pleadings after summary judgment motions are on file."). Courts have found "undue prejudice" where amending would "further delay the disposition of the claims," *Story v. Azaiez*, No. 1:22-CV-00448, 2024 WL 4692031, at *3 (W.D. Tex. June 25, 2024), or where "the nature of the case would be significantly altered." *DeMoore v. Int'l Paper Co.*, No. 3:97-CV-1751, 1998 WL 460281, at *3 (N.D. Tex. July 30, 1998).

Second, the Department should not be required to litigate the merits of its ERISA enforcement action in two different forums, to be decided by two different courts. *See, e.g., KF Indus., Inc. v. Technical Control Sys., Inc.*, 89 F. App'x 881, 885 (5th Cir. 2004) (denying new counterclaims where judicial efficiency would be accomplished by raising those counterclaims in separate forum with related litigation). Plaintiffs' proposed claims rest on the merits of the Department's ERISA litigation against SAS, PIC, and their principals, which the Department is already prosecuting in the District of Puerto Rico. Permitting Plaintiffs to supplement their pleadings here would unduly prejudice Defendants by requiring duplicative effort and risking

inconsistent judicial rulings. In *Waddleton*, the Fifth Circuit emphasized that, “[w]hen ruling on a motion for leave to amend, the court should consider judicial economy and whether the amendments would lead to expeditious disposition of the merits of the litigation[,] ... whether the amendment adds substance to the original allegations, and whether it is germane to the original cause of action.” *See Waddleton v. Rodriguez*, 750 F. App’x 248, 257–58 (5th Cir. 2018) (denying leave to amend to add a denial-of-access-to-courts claim); *Cummings v. Stewart*, No. 21-0146, 2021 WL 11085720, at *2 (W.D. La. June 11, 2021) (applying *Waddleton* to deny Rule 15(d) motion). Because Rule 15(d)’s goal is “to make pleadings a means to achieve an orderly and fair administration of justice,” *Griffin*, 377 U.S. at 227, supplementation should be denied.

C. Plaintiffs’ Proposed Supplemental Complaint Would Be Futile.

Plaintiffs’ motion should also be denied because their new claims are futile. Supplementation would be futile if “the amended complaint would fail to state a claim upon which relief could be granted.” *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 873 (5th Cir. 2000). All four proposed counts are fatally flawed, providing additional reasons to deny this motion.

1. First Amendment Claims (Counts I and II)

Plaintiffs’ First Amendment claims are futile for three reasons. First, Counts I and II wrongly seek to impose liability under 42 U.S.C. § 1983 on a federal agency and official capacity federal official. *See* Proposed Supp. Compl. ¶ 29 (claiming relief under this provision); *id.* Counts I, II; *id.* Prayer for Relief ¶ A. It is well established that “a federal agency is [] excluded from the scope of section 1983 liability.” *Hoffman v. U.S. Dept. of Housing and Urban Dev.*, 519 F.2d 1160, 1165 (5th Cir. 1975). So, too, for federal officials in their official capacity. *See Broadway v. Block*, 694 F.2d 979, 981 (5th Cir. 1982) (“The individual defendants in this suit are federal officials, acting under color of federal law rather than state law, and are not subject to suit under § 1983.”); *Zhang v. Allen*, No. 3:22-CV-02904-S, 2023 WL 9850877, at *2 (N.D. Tex. Nov. 7, 2023), *report*

and rec. adopted, 2024 WL 847021 (N.D. Tex. Feb. 27, 2024); *see also Egbert v. Boule*, 596 U.S. 482, 498-99 (2022) (“[T]here is no *Bivens* action for First Amendment retaliation.”).

Second, Plaintiffs’ First Amendment retaliatory *investigation* theory is futile, regardless of how it is styled, because such claims are not recognized by the Fifth Circuit. *See Colson v. Grohman*, 174 F.3d 498, 512 (5th Cir. 1999) (holding that “criticism, an investigation (or an attempt to start one), and false accusations” are “all harms that ... are not actionable under our First Amendment retaliation jurisprudence”); *Villarreal v. City of Laredo, Texas*, 94 F.4th 374, 398 (5th Cir. 2024) (“Nor does [plaintiff] have an actionable retaliatory investigation claim, because this court does not recognize such a claim.”), *judgment vacated on other grounds sub nom. Villarreal v. Alaniz*, No. 23-1155, 2024 WL 4486343 (U.S. Oct. 15, 2024).

Third, Plaintiffs’ remaining First Amendment retaliation theories—threatening litigation, pre-filing settlement negotiations, and filing a civil enforcement action—are also futile, regardless of how they are styled. “To prevail on a First Amendment retaliation claim, a plaintiff must show that he was engaged in constitutionally protected activity, the [agency’s] actions injured him, and the [agency’s] adverse actions were substantially motivated against Plaintiff’s exercise of constitutionally protected conduct.” *Degenhardt v. Bintliff*, 117 F.4th 747, 758 (5th Cir. 2024) (citation omitted). Threatened litigation is not an adverse action. *See, e.g., Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 182 (6th Cir. 2004) (“Mere threats ... are generally not sufficient to satisfy the adverse action requirement.”). And, a retaliation claim “is only available when non-retaliatory grounds are in fact insufficient to provoke the adverse consequences.” *Degenhardt*, 117 F.4th at 758. “It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must cause the injury.” *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019). It must be a “‘but-for’ cause, meaning that the adverse action against the plaintiff would not have

been taken absent the retaliatory motive.” *Id.* at 399.

Here, the futility of Plaintiffs’ retaliation theory is evident from their failure to plausibly allege but-for causation. Their allegations concern the filing of an ERISA enforcement action against SAS, PIC, and their principals in the District of Puerto Rico, as well as a pre-filing notice of violations and ensuing settlement negotiations. Plaintiffs’ entire theory depends on the assertion that the Department made “unsupported allegations of wrongdoing against the Anjo Targets” and included “exorbitant unwarranted monetary demands” in the civil enforcement action and pre-suit settlement negotiations. *See* Proposed Supp. Compl. ¶¶ 114, 122. However, the Department has developed its allegations in its ERISA enforcement action after an extensive investigation, *see supra* Background § III, and will fully litigate its claims in that lawsuit. Plaintiffs cannot show that the Department knowingly filed a meritless ERISA enforcement action nor that the act of the filing “would not have been taken” absent an allegedly retaliatory motive. *Nieves*, 587 U.S. at 399.

Indeed, this Court should follow several other courts in concluding that a First Amendment retaliatory civil enforcement action theory must fail if there was probable cause to file the civil lawsuit. It is well established that probable cause is fatal to retaliatory prosecution or retaliatory arrest theories. *See Nieves*, 587 U.S. at 400-401 (“[P]laintiffs in retaliatory prosecution cases [must] show more than the subjective animus of an officer and a subsequent injury; plaintiffs must also prove as a threshold matter that the decision to press charges was objectively unreasonable because it was not supported by probable cause.”); *see also Degenhardt*, 117 F.4th at 760 (“To defeat a retaliatory seizure claim, the officer must, at the very least, have had a lawful justification to seize the property.”). Similar logic applies to civil enforcement cases. Analyzing the application of *Nieves* to a civil lawsuit instead of a criminal prosecution, the Eleventh Circuit concluded that “the presence of probable cause will generally defeat a § 1983 First Amendment retaliation claim

based on a civil lawsuit as a matter of law.” *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1304 (11th Cir. 2019) (noting the importance of “principles that define a government’s access to the court to file lawsuits to remedy wrongs on behalf of its citizens”); *see also Meadows v. Enyeart*, 627 F. App’x 496, 505 (6th Cir. 2015) (“[T]he proper analysis at the burden-shifting stage of this regulatory-enforcement case would focus on whether the Defendants had probable cause to bring an administrative proceeding against Berry Meadows.”); *Williams v. City of Carl Junction, Missouri*, 480 F.3d 871, 877 (8th Cir. 2007) (“Because [plaintiff] has failed to show that the police and code-enforcement officers lacked probable cause to issue [24 civil and criminal] citations, he cannot establish a necessary element of his retaliatory-prosecution claim.”).⁴

Here, Plaintiffs have failed to plead any non-conclusory facts showing that the Department lacked probable cause to file the ERISA enforcement action. *See Bell Ad. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007) (requiring plaintiffs to plead “enough facts to state a claim to relief that is plausible on its face,” and the “[f]actual allegations must be enough to raise a right to relief above the speculative level”). The Eleventh Circuit held that “[P]robable cause to initiate [a civil lawsuit] requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication.” *DeMartini*, 942 F.3d at 1300–01 (quoting *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 62–63 (1993)). Indeed, Plaintiffs plead *no* facts demonstrating that the ERISA enforcement action includes *any* “unwarranted” allegations, nor do they show that the estimated \$40 million in self-dealing fiduciary violations was “exorbitant.” *See* Proposed Supp. Compl. ¶¶ 114, 122. Therefore, they have also failed to plead facts that could

⁴ This approach is also supported by Fifth Circuit caselaw regarding retaliatory litigation brought on statutory grounds. *Cf. Bryant v. Mil. Dep’t of Mississippi*, 597 F.3d 678, 690 (5th Cir. 2010) (holding that a “retaliatory litigation” claim under 42 U.S.C. § 1985(1) could proceed only if plaintiff carried the burden to show that the lawsuits were “objectively baseless,” i.e., sham lawsuits in which “no reasonable litigant could realistically expect success on the merits”).

support but-for causation. *Cf. Avdeef v. Royal Bank of Scotland, PLC*, No. 4:13-CV-967-O, 2014 WL 4055369, at *8 (N.D. Tex. Aug. 15, 2014), *aff'd*, 616 F. App'x 665 (5th Cir. 2015), (granting motion to dismiss where plaintiff only “pled vague, conclusory, and unsubstantiated allegations of a conspiracy between the Defendants” and “failed to give specific facts supporting such conspiracy nor has he detailed how the various Defendants were involved in such conspiracy”); *Moody v. Lloyds*, No. 4:14-CV-241-O, 2014 WL 11515598, at *2 (N.D. Tex. Aug. 19, 2014) (granting motion to dismiss because complaint “amounts to a series [of] conclusory statements and legal conclusions that are insufficient to support a plausible claim,” such as not “provid[ing] facts to show how the investigation may have been unreasonable”).

2. Circumvention of Judicial Authority Claim (Count III)

Plaintiffs likewise cannot prevail on their claim that the Department has “circumvent[ed] this Court’s authority to provide [injunctive] relief,” Proposed Supp. Compl. ¶ 130, by investigating companies related to Plaintiffs for potential ERISA violations, negotiating pre-suit settlement of those claims, and filing an ERISA enforcement action in the District of Puerto Rico.

Plaintiffs identify no court order that the Department allegedly violated. Indeed, the ERISA enforcement action exclusively concerns failures by SAS, PIC, and their principals to comply with ERISA requirements in their interactions with traditional employer sponsored plans. *See supra*, Background § III. Nor do Plaintiffs identify any authority for the notion that trying to settle a case, including discussion of terms that would involve settlement of multiple cases, could somehow “infringe[] upon this Court’s inherent authority in this case.” Pls.’ Am. Mot. at 6, ECF No. 69.

Indeed, Plaintiffs have failed to specify any legal theory under which the Court’s inherent authority could appropriately be exercised. Their discussion merely strings together irrelevant references to authority to enter injunctive relief. For example, Plaintiffs cite *McBride v. Coleman*, 955 F.2d 571, 582-83 (8th Cir. 1992) (Lay, C.J., concurring and dissenting), and *Chilcutt v. U.S.*,

4 F.3d 1313, 1327 (5th Cir 1993), but those cases addressed the appropriate sanction for failure to comply with an injunction already entered by the court. Similarly, *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181 (5th Cir. 2008), and *Ferguson v. MBank Houston, N.A.*, 808 F.2d 358, 359 (5th Cir. 1986), address the circumstances under which a court can “impose a pre-filing injunction to deter vexatious, abusive, and harassing litigation,” 513 F.3d at 187, a standard that Plaintiffs do not seek to apply here. And finally, Plaintiffs cite *Kerotest Manufacturing Co. v. C–O–Two Fire Equipment Co.*, 342 U.S. 180 (1952), for the proposition that courts can “enjoin the filing of related lawsuits in other courts,” Proposed Supp. Compl. ¶ 12, but that principle has largely developed through the first-to-file rule, which, as discussed in Section II *infra*, militates against the filing of Plaintiffs’ supplemental complaint here. *See, e.g., Rittman v. Amazon.com, Inc.*, No. C16-1554-JCC, 2024 WL 4253191, at *2 (W.D. Wash. Sept. 20, 2024).

3. APA Claims (Count IV)

Finally, Plaintiffs’ APA claims largely recapitulate their First Amendment claims and thus suffer from all of the same defects discussed above. Moreover, their APA claims suffer from additional defects rendering them nonviable in their own right. Plaintiffs assert that the Department violated the APA by “su[ing] or threaten[ing] imminent litigation against the Anjo Targets, not on the basis of their own actions or inactions, or any losses to the plans which they service, but rather to obstruct, chill, deter, and retaliate against Plaintiffs.” Proposed Supp. Compl. ¶¶ 142-144. Plaintiffs have not plausibly alleged a cognizable APA violation.

First, none of the activity that Plaintiffs seek to challenge—including initiation of the investigation, pre-suit notice of an intent to sue, settlement negotiations, and filing a civil enforcement action—is a “final agency action for which there is no other adequate remedy in a court,” 5 U.S.C. § 704, and, accordingly, none of these actions can support an APA claim. As the Fifth Circuit has explained, finality has two requirements:

(A) “the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature.” And (B) “the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.”

Data Marketing P’ship, 45 F.4th at 853 (quoting *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016)). It is well established that investigations are not final agency actions because legal consequences do not flow from them and they are not the consummation of agency decisionmaking. See *Jobs, Training & Servs., Inc. v. E. Texas Council of Governments*, 50 F.3d 1318, 1324 (5th Cir. 1995) (“[A]n agency’s initiation of an investigation does not constitute final agency action.”); *Harper v. Werfel*, 118 F.4th 100, 116 (1st Cir. 2024) (“Several of our sister circuits have likewise concluded that investigatory measures are not final agency action.” (collecting cases)). Similarly, pre-suit notices and settlement negotiations are inherently not final action. See, e.g., *Nimmrich & Prahm Reederei Gmbh & Co. KG MS Sonja v. United States*, 925 F. Supp. 2d 850, 854–55 (S.D. Tex. 2012) (“[I]t cannot be said on this record that the parties’ impasse in their negotiations marks the ‘consummation’ of the Coast Guard’s decision making process . . . Counsel for Respondents has stated that the Coast Guard remains willing to negotiate.”); compare Proposed Supp. Compl. ¶ 104 (DOL counsel stating, “It appears we have reached an impasse . . . Please advise as soon as possible if anything changes for your clients.”). And numerous courts have held that the filing of a civil enforcement action is not final agency action because “any . . . legal consequences are to be determined later by a judge” and the lawsuit itself provides “another adequate remedy.” See *City of Oakland v. Lynch*, 798 F.3d 1159, 1166-67 (9th Cir. 2015).⁵

Second, Plaintiffs provide no support for their allegation that the Department’s

⁵ See also *Walsh v. Peters*, No. 18-2933, 2021 WL 1662467, at *7 (D. Md. Apr. 28, 2021); *Endo Pharms. Inc. v. FTC*, 345 F. Supp. 3d 554, 561 (E.D. Pa. 2018); *Am. Fin. Benefits Ctr. v. FTC*, No. 17-04817, 2018 WL 3203391, at *9 (N.D. Cal. May 29, 2018); *Quicken Loans Inc. v. United States*, 152 F. Supp. 3d 938, 948–50 (E.D. Mich. 2015).

investigation, settlement negotiations, or filing of a civil enforcement action are “in excess of statutory . . . authority.” 5 U.S.C. § 706(2)(C); Proposed Supp. Compl. ¶¶ 140, 144. This allegation is also contradicted by the fact that each of these activities is plainly within the Department’s express statutory authority. *See supra* Background § I.A (citing 29 U.S.C. §§ 1132, 1135).

Third, Plaintiffs’ “arbitrary and capricious,” “abuse of discretion,” and “contrary to constitutional right” theories, Proposed Supp. Compl. ¶¶ 138-139, 142-143, simply recapitulate their First Amendment claims and, accordingly, suffer the same defects discussed above. *See supra* Arg. § I.C.1. Plaintiffs make the conclusory allegation that the ERISA enforcement action was not based on the investigated companies’ “own actions or inactions, or any losses to the plans which they service,” *see* Proposed Supp. Compl. ¶¶ 142-144, but fail to provide any supporting facts. This is key because, to the extent that the Department’s enforcement action is plausible, Plaintiffs cannot prevail under the APA. Without a substantive showing of bad faith—and Plaintiffs offer no facts that could support this—APA claims are limited to the agency’s administrative record and support for its actions. *See, e.g., Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that review “under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency” and the court must review the agency’s “explanation for its action” to “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment”). Because Plaintiffs fail to include any non-speculative allegations from which the Court could conclude that the ERISA enforcement action is baseless, they cannot show that the Department’s actions were unreasonable or an abuse of discretion.

D. The Court Should Exercise Its Discretion to Deny Plaintiffs’ Motion

Even if the Court rejects some or all of Defendants’ prior arguments, the Court should exercise its discretion to deny Plaintiffs’ motion. *See Dizon*, 2023 WL 3727704, at *1 (“[T]he

Court *may* permit the filing of a supplemental pleading, but need not do so.”). As discussed above, if Plaintiffs’ motion is granted, resolution of the new claims would require detailed analysis of the merits of the ERISA enforcement action now pending in the District of Puerto Rico. *See supra* Arg. § I.A-B. The duplicative nature of that analysis—which cannot be avoided in the enforcement action—strongly weighs against embroiling this lawsuit in those claims. “[A] court may ‘prophylactically refus[e] to hear a case raising issues that might substantially duplicate those raised by a case pending in another court’ in order to ‘maximize judicial economy and minimize embarrassing inconsistencies[.]’” *WRR Indus., Inc. v. Prologis*, No. 3:04-CV-2544, 2006 WL 1814126, at *6 (N.D. Tex. June 30, 2006) (quoting *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 604 (5th Cir. 1999)). The circumstances here are such that “[t]he risk of inconsistent decisions and concerns of judicial economy far outweigh any argument . . . that leave should be allowed under Rule 15(d).” *WRR Indus.*, 2006 WL 1814126, at *6.

Moreover, because it is highly likely that SAS and PIC will again raise their retaliation theories as counterclaims in the Department’s civil enforcement action in the District of Puerto Rico, *see supra* Background Section III (discussing prior rounds of litigation), claim splitting is a substantial concern. *See, e.g., Louisiana v. Horseracing Integrity & Safety Auth. Inc.*, No. 6:22-CV-01934, 2023 WL 6063813, at *5 (W.D. La. Sept. 13, 2023) (collecting Fifth Circuit caselaw holding that improper claim splitting occurs “where the claims in the more recent suit arise from the same nucleus of operative facts as those advanced in the prior suit and might have been properly asserted in the prior suit” and that the parties need not be identical in both suits where “the parties to the recent suit are in privity with those of the prior suit”).

Judicial economy will best be served by permitting the court handling the ERISA enforcement action to also resolve any argument that that lawsuit is retaliatory.

II. Alternatively, the Court Should Exercise Its Discretion to Transfer Plaintiffs’ Proposed Supplemental Complaint to the District of Puerto Rico Under the First-to-File Rule and 28 U.S.C. § 1404(a).

Alternatively, if the Court does not intend to deny Plaintiffs’ motion, the Court should transfer Plaintiffs’ proposed supplemental complaint to the District of Puerto Rico under the first-to-file rule and/or 28 U.S.C. § 1404(a).

A. The First-to-File Rule Would Require Transfer of Plaintiffs’ Claims to the District of Puerto Rico.

This Court has repeatedly applied the “first to file” rule “that the court in which an action is first filed determines whether subsequently filed cases involving substantially similar issues should proceed.” *Sport Supply Grp., Inc. v. R&G Prods., Inc.*, No. 3:08-CV-02031-O, 2009 WL 10677398, at *2 (N.D. Tex. Sept. 30, 2009). This rule “recognizes principles of comity and sound judicial administration.” *Id.* The Department’s ERISA enforcement action is the first case that substantively involves the merits of the Department’s claims against SAS, PIC, and their principals. *See* Ex. 1 (DOL Compl.).⁶ The Court should apply the first-to-file rule and transfer Plaintiffs’ new claims to the District of Puerto Rico out of respect for that court. *See Care Ambulance Servs., Inc. v. Scott Griffith Collaborative Sols., LLC*, No. 4:19-CV-00773-O, 2019 WL 13193953, at *2 (N.D. Tex. Dec. 13, 2019) (where “the likelihood of substantial overlap exists, then the proper course of action is for the second-filed court to transfer the case to the first-filed court” so that “[t]he court in the first-filed action can then decide whether the second suit filed must be dismissed, stayed, or transferred and consolidated”).

“The federal courts long have recognized that the principle of comity requires federal

⁶ As set forth in the DOL Complaint, that case was brought in the District of Puerto Rico because that is where SAS and PIC are located. *See* DOL Compl. ¶¶ 10, 12, 14. The ERISA enforcement action could not be brought in this district. *See* 29 U.S.C. § 1132(e)(2) (venue only “where the plan is administered, where the breach took place, or where a defendant resides or may be found”).

district courts—courts of coordinate jurisdiction and equal rank—to exercise care to avoid interference with each other’s affairs.” *West Gulf Maritime Ass’n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728 (5th Cir. 1985). “The concern manifestly is to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result.” *Id.* at 729. The “crucial inquiry is one of ‘substantial overlap’” which “exists if the core issues are the same or if much of the proof adduced would likely be identical.” *Care Ambulance*, 2019 WL 13193953, at *2. This does not “require that cases be identical” or that “the parties and issues be identical.” *Id.*

Here, the substantial overlap between the ERISA enforcement action and Plaintiffs’ retaliation claims is plain. Both depend on the merit of the Department’s claims against SAS, PIC, and their principals, which involve allegations of self-dealing and fiduciary breach resulting in potential losses to over 1,900 employee benefit plans. *See* DOL Compl. ¶¶ 1-7, 9, 64-79, 94, 96. The parties here and the Department’s action are not identical, but they have close business dealings, have the same counsel, and have at least one individual in common where Alexander Renfro represented LPMS and was an officer and partial owner of SAS and PIC. *Compare* Proposed Supp. Compl. ¶ 17 (SAS “co-developed, owns, and provides the intellectual property necessary to operate the Partnership Plans” and PIC “provides reinsurance” for the plans), *and* DOL Compl. ¶¶ 12-16 (describing SAS and PIC’s services to health plans as well as Renfro’s involvement and ownership). *See, e.g., GHER Sols., LLC v. HEB Grocery Co., LP*, No. 4:19-CV-00655-O, 2019 WL 13214979, at *2 (N.D. Tex. Dec. 12, 2019) (finding similarity of parties where they shared an officer and counsel in common).

Plaintiffs may argue that the ERISA enforcement action is not the first-filed case because they rushed to this Court four days earlier. That argument must be rejected for two reasons. First,

because Plaintiffs must obtain leave of court to lodge their proposed supplemental complaint, their retaliation claims have not yet been filed as claims. *See* ECF Nos. 66, 69. Second, courts apply an exception to the first-to-file rule to where “a party files a declaratory judgment action in anticipation of a suit by its adversary.” *Crestview Farm, L.L.C. v. Cambiaso*, No. 4:20-CV-01288-O, 2021 WL 1383135, at *3 (N.D. Tex. Apr. 13, 2021), *reconsidered on other grounds*, 2021 WL 2434845 (N.D. Tex. June 15, 2021). This “anticipatory-suit exception to the first-to-file rule” works to avoid “depriv[ing] a potential plaintiff of his choice of forum and creat[ing] disincentives to responsible litigation by rewarding the winner of a race to the courthouse.” *Id.* (quoting *Doubletree Partners, L.P. v. Land Am. Am. Title Co.*, No. 3-08-cv-1547-O, 2008 WL 5119599, at *3 (N.D. Tex. Dec. 3, 2008)). Plaintiffs here, like the plaintiff in *Crestview*, “had been engaged in lengthy negotiations” and then “filed suit in [their] home jurisdiction” in anticipation of the imminent filing of the Department’s enforcement action; so, even if this motion were deemed a filing under the first-to-file rule, the anticipatory-suit exception should apply. *See id.* at *3.

B. Transfer to the District of Puerto Rico Would Be In the Interest of Justice under 28 U.S.C. § 1404(a).

Under 28 U.S.C. § 1404(a), a district court may “transfer any civil action to any other district or division where it might have been brought” if such transfer is “[f]or the convenience of the parties and witnesses” and “in the interest of justice.” The purpose of such a transfer is “to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.” *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964). A party moving for a transfer must show “good cause,” *In re Clarke*, 94 F.4th 502, 508 (5th Cir. 2024), based on the following factors:

The private interest factors are: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.

The public interest factors are: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law.

In re Chamber of Com. of United States of Am., 105 F.4th 297, 304 (5th Cir. 2024).

The threshold question is whether the Proposed Supplemental Complaint may be brought in a different judicial district. Under 28 U.S.C. § 1391(e), actions against an agency of the United States may be brought in any judicial district where a substantial part of the events or omissions giving rise to the claim occurred. Venue for Plaintiffs’ proposed new claims is proper in the District of Puerto Rico because a substantial part of the events underlying Plaintiffs’ claims occurred there. *Id.* Both SAS and PIC are located in and conduct business from Puerto Rico. *See* DOL Compl. ¶¶ 12, 14. Plaintiffs explain how SAS and PIC are vendors to the health plans of DMP and other limited partnerships. *See* Proposed Supp. Compl. ¶¶ 53-59. Plaintiffs describe activity between the Department and SAS, PIC, and the individual defendants, centered in Puerto Rico, including the dismissed *Suffolk* lawsuit (Ex. 2), *id.* ¶ 81, and settlement communications “Defendants sent the Anjo Targets,” *id.* ¶¶ 82-86, 94-104. Most critically, the Department filed its ERISA enforcement action in the District of Puerto Rico, and Plaintiffs allege that actions contemplated by SAS and PIC in response will impact Plaintiffs’ ability to provide health insurance. *Id.* ¶¶ 105-107, 110.

Since the Plaintiff’s proposed claims may be brought in Puerto Rico, whether a transfer is proper depends on a showing, based on private and public interests, that Puerto Rico is a clearly more convenient venue. The private interest factors are easily met, since Plaintiffs’ claims largely stem from the dispute between the Department and SAS and PIC, who are both located in Puerto Rico. It would thus be more convenient for the parties to access evidence and call witnesses knowledgeable about SAS and PIC from Puerto Rico. Witnesses who work for or are familiar with SAS and PIC could be compelled to testify in district court in Puerto Rico, but not in this Court.

Fed. R. Civ. P. 45(c)(1)(A). Moreover, LPMS, which is located in Georgia, could just as easily travel to and from Puerto Rico as it could this district. *See* Am. Compl. ¶ 28, ECF No. 9.

Similarly, the public interest factors weigh in favor of transfer. Regarding administrative difficulties from court congestion, the Northern District of Texas is a far busier forum than the District of Puerto Rico—the former saw over 7,300 filings in the year ending September 30, 2024, while the latter saw only 1,807. *Federal Court Management Statistics-Profiles*, Sept. 2024 at 7, 34, <https://perma.cc/LXK5-J9HQ>. In the same period, a judge in this district oversaw an average of 15 trials, while a judge in Puerto Rico oversaw an average of 7. *Id.* The next factor—the local interest in having localized interests decided at home—also weighs in favor of Puerto Rico. This factor focuses on “the significant connections between a particular venue and the events that gave rise to a suit,” *Def. Distributed v. Bruck*, 30 F.4th 414, 435 (5th Cir. 2022). Puerto Rico’s local interest in the case lies with the claims against two of its businesses. Indeed, Plaintiffs’ claims allege potential harm—including closure—that SAS and PIC may suffer in Puerto Rico because of the Department’s lawsuit. *See, e.g.*, Proposed Supp. Compl. ¶¶ 105, 110; *see Blanton v. Arrow Ford, Inc.*, 2023 WL 4982258, at *4 (N.D. Tex. Aug. 3, 2023) (weighing the “local interest” based on which division has “the greater interest in resolving these localized injuries”).⁷

More importantly, where the merits of Plaintiffs’ proposed claims are so closely tied to the merits of the Department’s ERISA claims against SAS, PIC, and their principals, transfer is crucial so that both cases may be decided together. Such a move not only furthers the convenience of the parties, but promotes judicial economy by avoiding parallel and possibly conflicting adjudications.

⁷ The two other public interest factors are neutral; both districts can apply constitutional and federal APA and ERISA law, and a transfer would not implicate any conflict of law issues.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for leave to file and serve supplemental complaint, and alternatively should transfer venue to the District of Puerto Rico.

Dated: December 20, 2024

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CERTIFICATE OF SERVICE

On December 20, 2024, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties to this action electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Galen N. Thorp
GALEN N. THORP

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

JULIE A. SU,
ACTING SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR,

Plaintiff,

v.

SUFFOLK ADMINISTRATIVE SERVICES,
LLC; PROVIDENCE INSURANCE CO., I.I.;
ALEXANDER RENFRO; WILLIAM BRYAN;
ARJAN ZIEGER

Defendants.

CIVIL ACTION

Case No.

COMPLAINT

Julie A. Su, Acting Secretary of the United States Department of Labor (“Secretary”),
alleges as follows:

INTRODUCTION

1. Since at least 2016, Defendants Suffolk Administrative Services, LLC (“SAS”) and Providence Insurance Company, I.I. (“PIC”)—collectively “Providence” or the “Providence Companies”—and their owners and executives Alexander Renfro, William Bryan, and Arjan Zieger, have been marketing, selling, and servicing employer-sponsored health benefit plans governed by the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. § 1001. Providence markets its plans—the majority of which cover only preventive services and nothing more—as an “affordable” way for employers to offer health benefits to their employees while complying with the patient protections imposed by the Affordable Care Act (“ACA”) and incorporated in ERISA. But

what Providence does not disclose is that Defendants use the plans as vehicles to collect and divert to themselves massive fees through self-dealing in violation of ERISA.

2. Defendants' ERISA violations stem from their control over ERISA-plan assets. Though Defendants sell plans to separate and distinct employers, Defendants pool the plans' monthly contributions together, and service the plans with the same slate of service providers (including the Providence Companies), through a structure known as a multiple employer welfare arrangement ("Providence MEWA"). 29 U.S.C. § 1002(40)(A).¹ Because the Plans are "self-funded"—meaning that claims are paid out of Plan funds rather than by an insurance company—the Plans' monthly contributions to the MEWA are earmarked for benefit payments, and are thus assets of the Participating Plans, not of the MEWA or the Providence Companies.

3. However, SAS and its executives—not the Participating Plans—decide on their own how much to take from those Plan assets for SAS and the other service providers as fees. Indeed, the Participating Plans agree only to pay a set monthly contribution amount; they do not agree on or approve how their contribution payments are allocated among the Plans' service providers, including to SAS and PIC. Rather, those decisions are made exclusively by SAS and SAS's executives.

¹ Since 2016, over 1,900 employers, located across at least 45 states, have established ERISA-governed health plans through the Providence MEWA. The Providence MEWA also includes health plans for multiple limited partnerships. Those limited partnership plans are the subject of an advisory opinion issued by the U.S. Department of Labor, which concluded that plans sponsored by such limited partnerships are not governed by ERISA. The advisory opinion was challenged and vacated in another litigation, *Data Marketing Partnership, LP v. United States Department of Labor, et al.*, No. 4:19-cv-800 (N.D. Tex.). The U.S. Court of Appeals for the Fifth Circuit affirmed the vacatur and remanded the case, and proceedings remain ongoing. *Data Marketing Partnership, et al. v. United States Department of Labor*, 45 F.4th 846 (5th Cir. 2020). The limited partnership plans are not among the Participating Plans at issue in this Complaint.

4. In determining which service providers to pay with the Plans' assets and how much to pay them, SAS and its executives violate their duties under ERISA in a variety of ways. First, SAS and its executives engage in self-dealing by unilaterally determining SAS's own service-provider fee and directing the payment of those fees to itself from Plan assets, without any review or approval by an independent Plan fiduciary (*i.e.*, a non-Providence-related fiduciary of the Participating Plans). SAS and its executives also violate their fiduciary duties of prudence and loyalty in setting SAS's fees because those fees are excessive relative to the services SAS provides.

5. Second, SAS and its executives also engage in self-dealing by unilaterally determining how much to pay SAS's affiliate, PIC—which is owned and operated by the same individual defendants that own and operate SAS—to serve as a “reinsurer” to the Participating Plans, without any review or approval by an independent Plan fiduciary. Here too, PIC's fees are excessive relative to the services it provides—indeed, PIC has not paid a single dollar of reinsurance—and, by approving PIC's fees, SAS and its executives violate their fiduciary duties of prudence and loyalty. For its part, PIC is liable for knowingly participating in these ERISA violations.

6. Third, SAS and its executives breach their fiduciary duties by directing payment out of Plan assets to entities that market the MEWA to prospective employers and initially enroll the Participating Plans. Not only do the enrollers provide no discernible service to the Participating Plans, but the fees that SAS and its executives authorize be paid to them are excessive.

7. The Secretary brings this action to redress Defendants' ERISA violations by restoring the Plans' losses, recovering unjust profits, and obtaining other remedial and

equitable relief, including enjoining Defendants from acting as fiduciaries or service providers to ERISA-covered employee benefit plans in the future.

JURISDICTION AND VENUE

8. This action arises under ERISA and is brought by the Secretary to obtain relief under 29 U.S.C. §§ 1109 and 1132(a)(2) and (5), to redress violations and enforce the provisions of Title I of ERISA.

9. This Court has subject matter jurisdiction over this action pursuant to 29 U.S.C. § 1132(e)(1). The subject of the Secretary's Complaint is a MEWA (the Providence MEWA) as defined by 29 U.S.C. § 1002(40)(A), to which over 1,900 employers subscribed since 2016 for the purpose of providing health benefits to their employees, and in so doing established employee welfare benefit plans under ERISA (*i.e.*, the Participating Plans), 29 U.S.C. § 1002(1).

10. Venue is appropriate in this district under 29 U.S.C. § 1132(e)(2), and 28 U.S.C. § 1391(d), because SAS and PIC are headquartered in Puerto Rico, and they reside within this district. The Providence MEWA is administered by Providence in Puerto Rico and several of the alleged breaches took place here.

PARTIES

11. The Secretary is vested with the authority to enforce the provisions of Title I of ERISA by, among other means, the filing and prosecution of civil claims against fiduciaries and other parties who violate ERISA. 29 U.S.C. § 1132(a)(2) and (5).

12. **Defendant Suffolk Administrative Services ("SAS")** is a limited liability company registered in Puerto Rico. At all relevant times, SAS was owned by two holding companies, Anjo, LLC ("Anjo"), which owned 25% of SAS, and Momentum Capital, LLC ("Momentum Capital"), which owned the remaining 75%, and each company received a

proportional percentage of SAS's profits. SAS consists of three Strategic Business Units: (a) Incela HR ("Incela"); (b) Affordable Benefit Choices ("ABC"); and (c) ouTPAce. These units perform different functions within SAS. Incela generally provides administrative plan services and customer support (including health plan administration, approving fees of service providers, enrollment services, and Form 1094 and 1095 reporting); ABC provides consulting services, benefit designs, and plan documents; and ouTPAce collects a fee but does not provide services to the MEWA. SAS, through its Strategic Business Units, administers the entire Providence MEWA. Executives of SAS include Alexander Renfro (Chief Legal Officer), William Bryan (Chairman), and Arjan Zieger (Vice-Chairman). These executives are among the primary decisionmakers at SAS.

13. SAS performs functions that render it a fiduciary to the Participating Plans under 29 U.S.C. § 1002(21)(A). These functions include selecting and hiring the service providers to the Plans, determining the compensation for the service providers, and exercising authority over the disposition of Plan assets. As a fiduciary and service provider to the MEWA, SAS is a party-in-interest to the MEWA pursuant to 29 U.S.C. § 1002(14)(A) and (B).

14. **Defendant Providence Insurance Company, I.I. ("PIC")** is an insurance company incorporated in Puerto Rico. PIC is 100% owned by Suffolk Holdings, LLC ("Suffolk Holdings"). In turn, Suffolk Holdings was owned at all relevant times by Anjo (15% ownership) and Momentum Capital (85% ownership). PIC is a reinsurer to the Participating Plans. PIC's executives are William Bryan (President and Chief Executive Officer), Arjan Zieger (Treasurer and Chief Financial Officer), and Alexander Renfro (Secretary). As a service provider to the Participating Plans, PIC is a party-in-interest to the Plans under 29 U.S.C. § 1002(14)(B).

15. **Defendant Alexander Renfro (“Renfro”)**, at all relevant times, owned 100% of Anjo, and, through his ownership of Anjo, owned 25% of SAS and 15% of PIC, and was entitled to a proportional share of the profits of those companies.² Renfro also served as Chief Legal Officer of SAS and Secretary of PIC during the relevant time period.

16. Renfro performed functions that render him a fiduciary to the Participating Plans under 29 U.S.C. § 1002(21)(A). He exercised discretion over funds of the Participating Plans, including dictating the rates paid to the Providence MEWA’s service providers, confirming payment amounts to those service providers, and directing brokers on how to route participant contributions. He also participated in engaging service providers to the Providence MEWA and negotiating terms of the engagement.

17. **Defendant William Bryan (“Bryan”)** owns the Lobos Trust, which owns 50% of Momentum Capital. Through his ownership of Momentum Capital, Bryan owns 37.5% of SAS and 42.5% of PIC, and is entitled to a proportional share of the profits of those companies. He also serves as Chairman of SAS, and as President and CEO of PIC.

18. Bryan performs functions that render him a fiduciary to the Participating Plans under 29 U.S.C. § 1002(21)(A). He negotiates the terms of engagement of service providers to the Providence MEWA and hires those service providers.

19. **Defendant Arjan Zieger (“Zieger”)** owns the Tasman Trust, which owns 50% of Momentum Capital. Through his ownership of Momentum Capital, Zieger owns 37.5% of

² Shortly before the filing of this Complaint, on October 29, 2024, counsel for PIC, SAS, Bryan, and Zieger indicated that Renfro divested his ownership interest in SAS and PIC. The attorney did not represent Renfro and did not provide any supporting documentation. A recent ownership divestiture by Renfro, if true, does not impact the Secretary’s claims against him for prior or continued actions taken as an officer for SAS and PIC, nor does it change the relief sought by the Secretary, so this Complaint describes Renfro’s involvement in the present tense.

SAS and 42.5% of PIC, and is entitled to a proportional share of the profits of those companies. He also serves as Vice-Chairman of SAS, and as Treasurer and Chief Financial Officer of PIC.

20. Zieger performs functions that render him a fiduciary to the Participating Plans under 29 U.S.C. § 1002(21)(A). He exercises discretion over the Participating Plans' funds by, among other things, setting funding and replenishment levels of the Providence MEWA's claims accounts, approving fees to the Providence MEWA's service providers and directing third party administrators on routing the Participating Plans' assets. He also participates in engaging service providers to the Providence MEWA and negotiating terms of the engagement.

GENERAL ALLEGATIONS

I. Defendants Sell Self-Funded Health Plans to Employers Through the Providence MEWA

21. The Providence MEWA, though not itself an employee welfare benefit plan, consists of multiple underlying employee welfare benefit plans created by employers for their employees (*i.e.*, the Participating Plans). The employers that sponsor these Participating Plans are located in at least 45 states across the United States and come from a wide range of industries. The employer-sponsors of the Participating Plans are not under common control and do not have any other cohesive bond. The employers are heterogeneous and unrelated, with the only common purpose being a shared desire for employee medical coverage.

22. The Providence MEWA uses multiple enrollment companies ("enrollers") to market their plans and to enroll new employers into the arrangement.

23. Once recruited by an enroller, sponsoring employers create a Participating Plan by signing an Administrative Services Agreement ("ASA") with SAS.³

³ Before mid-2016, Participating Plans executed an ASA with a predecessor to SAS, Providence Insurance Partners, LLC ("PIP"). On or about mid-2016, PIP assigned the ASAs to SAS, which took over plan administration services.

24. SAS provides Participating Plans with Summary Plan Descriptions (“SPDs”), Plan Documents, or both, which outline employee eligibility, describe benefits, explain how the plan is financed, and detail the process for obtaining benefits.

25. The Participating Plans—as explained in the SPD—are “self-funded” or “self-insured,” meaning that the Plan sponsor, not an insurance company, is responsible for the payment of claims.

26. When employers join the Providence MEWA by establishing a Participating Plan, SAS obtains “reinsurance” for the employer through an insurance policy from PIC called a Contractual Liability Insurance Policy (“CLIP”).

27. The Participating Plans make monthly contribution payments to the Providence MEWA. They pay contributions either directly to the Plan’s third party administrator (“TPA”)—which is responsible for administering health claims—or to the enroller that recruited the Plan into the MEWA, who then remits the payment to the TPA after taking a fee. As discussed further *infra*, the TPAs use the Plans’ payments to (1) pay fees to other service providers as instructed by SAS, and (2) fund pooled accounts from which benefits for the Participating Plans are paid (“Claims Accounts”). If there are Plan contributions remaining after service providers are paid and the Claims Accounts are sufficiently funded, the TPA transfers the balance to PIC.

28. MEWA administrators are required to file a Form M-1 annually with the Secretary reporting the MEWA’s financial condition. The Providence MEWA has never filed a Form M-1.

II. SAS and Its Executives Unilaterally Select the Service Providers to the Participating Plans and Determine Their Compensation

29. One of SAS’s primary services to the Participating Plans is vendor management. The ASA states, “[SAS] maintains the right to subcontract services under any of the above

obligations or any aspect of forming, maintaining, or terminating a health and welfare benefits plan or program.” It further states that SAS “reserves the right to preselect any subcontracted vendors on behalf of Employer” and provides that “[s]ervices performed by [SAS] under this Agreement may be performed directly by [SAS] or through the use of affiliates, subsidiaries, or sub-contractors.”

30. The employers that sponsor the Participating Plans—who serve as the named plan administrators for their Plans—do not have any involvement in selecting or approving their Plans’ service providers other than SAS. They also have no involvement in setting or approving the specific fees paid from Plan contributions (such as administrative fees or insurance premiums) for any service providers to the Participating Plans (including SAS’s fee). Those decisions are made exclusively by SAS and its executives, including, at all relevant times, Renfro, Bryan, and Zieger. The employers agree only to the total monthly contributions paid by their respective Plans, but do not authorize or even know the discrete fee paid to each service provider of the Plan.

31. Among the service providers that SAS, Renfro, Bryan, and Zieger select is PIC, which provides reinsurance for the Participating Plans. PIC’s insurance is reflected in the CLIP, which is ostensibly between PIC and the employers. However, the CLIP typically is not executed by the employer. For some Plans, in an attempt to appear as though the employer selected PIC, SAS provides the employer with an appointment form (drafted by SAS) that designates a representative chosen by SAS to procure insurance for the Plan. This representative then executes the CLIP with PIC on behalf of the Participating Plan. In other cases, the CLIP is not signed at all, either by the employer or anyone purporting to represent the employer. Regardless,

in either situation, neither the employer nor another independent fiduciary of the Participating Plan executes the CLIP with PIC.

32. In addition, SAS, Renfro, Zieger, and Bryan exclusively determine and authorize PIC's compensation based in part on rate-setting calculations performed and/or approved by Renfro, Zieger, and Bryan. Neither the employer-sponsors nor any other independent fiduciary of the Participating Plans authorize or approve PIC's compensation.

33. SAS, Renfro, Bryan, and Zieger also select the TPAs for the Participating Plans, which have included Boon Group ("Boon"),⁴ Hawaii Mainland Administrators ("HMA"), S&S Health, Aither Health, Lucent Health, D.H. Cook, and others. SAS, Renfro, Bryan, and Zieger exclusively determine the compensation for all of the TPAs serving the Participating Plans, without authorization or approval by the employer-sponsors or any other independent fiduciary of the Participating Plans.

34. SAS's exclusive role in selecting service providers and determining their fees is reflected in the ASAs, which, at all relevant times, have not disclosed to the employers the amount each service provider receives in fees for the services provided to the Plans.

35. In short, SAS, Renfro, Bryan, and Zieger select all of the service providers to the Participating Plans (other than SAS itself, which employer-sponsors select), and determine their compensation (including SAS's own compensation), without authorization or approval by the employer-sponsors or any other independent fiduciary of the Participating Plans.

⁴ While PIP initially hired Boon, PIP assigned SAS the obligations and benefits that PIP held in its agreement with Boon. In other words, SAS took over PIP's role in the Providence MEWA's relationship to Boon.

III. SAS Directs How TPAs Use Plan Contributions to Pay MEWA Service Providers, Including SAS and PIC

36. The ASA between an employer-sponsor and SAS includes a fee schedule for health plan services that lists the overall cost per enrollee per month (“PEPM”). Pursuant to the ASAs, employers make monthly payments (or “contributions”) on behalf of their Participating Plan to fund health plan benefits. The payment is made either to an enroller or to one of the TPAs selected by SAS.

37. From the contributions they receive, the TPAs pay fees to various service providers to the Participating Plans (including SAS and PIC) based on directions from SAS, referred to as Confidential Payment Instructions (“CPIs”).

38. After paying fees to the Plans’ service providers, the TPAs then transfer the Plans’ contributions to pooled bank accounts controlled by each of the TPAs, which are used specifically for paying benefit claims (“Claims Accounts”).

39. SAS requires the TPAs to maintain a minimum balance in their Claims Accounts, and the TPAs only place into their Claims Accounts enough of the Participating Plans’ contributions as necessary to maintain that minimum balance.

40. The TPAs each maintain only one Claims Account that includes contributions from multiple Participating Plans without tracking which assets in their Claims Accounts belong to which Plan.

41. The TPAs use the contributions placed in their Claims Account to pay for claims for all the Participating Plans they service, without regard to whether the funds used to pay a claim come from the contributions of the specific beneficiary’s sponsoring employer.

42. If a TPA has a question about whether a claim is covered under the Plan, they ask SAS for an interpretation of the Plan, which SAS provides. Renfro is often the person interpreting the Plan on behalf of SAS.

43. Once the TPAs pay all the MEWA's service providers and replenish their Claims Accounts, the TPAs, at SAS's direction, send the remainder of the Participating Plans' contributions to PIC.

IV. SAS Directs Substantial Fees to Itself and Other Service Providers

44. The fees that SAS directs to itself and the other service providers to the Participating Plans exceed the amount spent by the Plans on medical claims.

45. The medical loss ratio for a health benefits plan is the share of total health care premiums or contributions spent on medical claims. For example, the ACA requires that health insurers in the individual and small group markets allocate at least 80% of premiums towards health care costs and improvements. The remaining 20% of premiums can be allocated towards administrative costs, overhead, and marketing. For the large group market, the percentage that the ACA requires to be allocated towards health care costs is 85%.

46. From 2016 to 2022, the Providence MEWA, though not subject to the ACA's medical loss ratio standard, had a targeted loss ratio between 27% to 48%. In other words, the MEWA aimed to devote only 27% to 48% of the Plans' contributions to pay for healthcare costs, with the remaining 52% to 73% going towards administrative costs, which are the fees paid to service providers.

47. The proportion of contributions used by the Providence MEWA to pay administrative fees between 2016 and 2022 were consistent with or exceeded the MEWA's

targeted loss ratios due to both the low number of claims paid and the low dollar amount of claims paid by the MEWA.

48. Indeed, the ASAs between SAS and participating employers show that the proportion of the Participating Plans' monthly contribution payments that go towards paying administrative costs (such as service provider fees) exceed 50%. For example, in one ASA between SAS and employer sponsor Maberry Packing, LLC dated 2019, the "Administration Costs" for a single-employee enrollment in a coverage option called WellMEC was \$59.89 out of the total \$82.50 monthly contribution, or 72%. Similarly, the "Administration Costs" for a single-employee enrollment in another coverage option called WellPrime was \$62.95 out of the total \$113.45 monthly contribution, or 55.5%.

49. SAS directs to itself (through CPIs directed to the TPAs) at least one-third of the contribution amounts allocated towards administrative costs. SAS directs these payments without disclosure to, or approval by, the employer-sponsors or any other independent fiduciary of the Participating Plans. For example, a SAS-created CPI for one of the Participating Plans, sponsored by Tiger Labor and Staffing, lists a \$75.00 monthly contribution payment for a single employee enrolled in WellMEC coverage. Of that amount, \$20.81 was paid to ABC (a SAS business unit), and \$5.58 was paid to Incela (another SAS business unit) as fees, which means SAS received a total of \$26.39 in fees from the \$75.00 monthly payment, or 35.2%. Under the same CPI, for families enrolled in WellMEC coverage, the monthly contribution payment is \$205.00, with \$111.17 paid to SAS as fees (\$105.59 to ABC and \$5.58 to Incela), representing 54.2% of the total monthly payment.

50. As another example, for the Plan sponsored by Wegis Ranch, the monthly cost for single-employee enrollment in WellMEC coverage is \$80.00, of which SAS directs the claims

administrator to pay \$23.44 to ABC and \$2.95 to Incela as fees, for a total of \$26.39 paid as fees to SAS, or 33% of the monthly payment. For a family enrollment in WellMEC coverage, the monthly cost is \$240.00, with \$138.22 paid to ABC and \$2.95 paid to Incela as fees, for a total of \$141.17 paid as fees to SAS or 58.8% of the monthly payment.

51. Despite directing substantial fees to itself out of Plan assets, SAS does not actually perform the work of administering the Plans once they are established, which instead falls to other service providers to the Plans, most notably the TPAs. Yet SAS receives far greater compensation than the TPAs. For example, based on the CPI for Tiger Labor and Staffing, for a single-employee enrollment in WellMEC coverage, SAS receives \$26.39 (or 35.2%) of the Plan's payment, while the TPA, HMA, receives a flat fee of \$16.00 (or 21.3%). Similarly, based on the CPI for Wegis Ranch, for a single-employee enrollment in WellMEC coverage, SAS receives \$26.39 (or 33%) of the Plan's payment, while HMA receives \$16.00 (or 20%).

52. The discrepancy between SAS's compensation and the TPAs' is wider with respect to family coverage. For example, under the Tiger Labor and Staffing CPI, for a family enrollment in WellMEC coverage, SAS receives \$111.17 (or 54.2%) of the Plan's total contribution, while HMA receives the same flat fee of \$16.00 (or 7.8%). Similarly, under the Wegis Ranch CPI, for a family enrollment in WellMEC coverage, SAS receives \$141.17 (or 58.8%) of the Plan's payment, while HMA receives the same \$16.00 (or 6.7%). SAS performs the same services whether the participant enrolls in a single-employee or a family plan, but a TPA's workload increases because of the additional individuals—and potentially more claims—covered. Yet SAS's fee increases for higher-tier coverage while HMA's remains flat.

53. Additionally, the fees SAS directs to itself approximate the amount the Participating Plans pay in medical claims. For example, for all the claims adjudicated by HMA

between 2018 and 2020, the Providence MEWA paid just over \$1 million for benefits per month (on average), whereas SAS's monthly fee was as high as \$780,000 (based on its fee received in February 2019).

54. SAS also collects a fee for services performed by its Strategic Business Unit ouTPAce, despite ouTPAce providing no discernible service to the Participating Plans. SAS intended for ouTPAce to be a customer call center, but it never became operational. Nevertheless, the CPIs sent by SAS to claims administrators include fees to multiple of SAS's Strategic Business Units, including ouTPAce.

55. SAS also unilaterally directs compensation to be made to its affiliate, PIC, the amount of which is variable and unpredictable. The amount of PIC's compensation depends on the amount of contributions sent by the Participating Plans (which is set by SAS and varies for each client). After the TPAs receive the Plans' contributions, they distribute a portion of those contributions to pay the fees of the MEWA service providers (except for PIC) pursuant to SAS's directions. After divvying up the fees, TPAs then use another portion of the Plans' contributions to replenish their Claims Accounts (if necessary) so that they meet a minimum balance set by SAS. The amount needed to replenish the Claims Accounts varies each month depending on the starting balance.

56. The TPAs then send whatever remains of the Plans' contributions to PIC pursuant to SAS's instructions, no matter what that amount is. The amount of funds that PIC receives thus varies depending on (a) the amount of contributions from Participating Plans, (b) the amount of fees paid to other service providers, and (c) the amount needed to replenish the Claims Accounts. Neither the amount nor the variable nature of PIC's compensation is disclosed to the Participating Plans.

57. The funds transferred from TPAs to PIC are deposited into bank accounts under PIC's name at Banco Popular, in Puerto Rico. The accounts include, but are not limited to, those ending in the following numbers: -1129, -9630, -0667, -2350, -9312, -9923, and -9915. Funds transferred to PIC were also deposited into a bank account under PIC's name at Wells Fargo, N.A., with an account number ending -4609.

58. Moreover, PIC has never received and has never had to pay a claim for reinsurance. While PIC is responsible for paying any claims that exceed the amount of funds in the Claims Accounts, the Claims Accounts have never been overdrawn (due to the very low cost of benefits resulting from preventive-service-only coverage offered by the Plans).

59. The sums received from Plan contributions result in large profits for PIC, which PIC distributes as dividends to its owners, Anjo and Momentum Capital (which were in turn owned by Renfro, Bryan, and Zieger at the relevant time). For example, in 2019, PIC earned a net income of \$14.7 million and distributed \$12.6 million of that as dividend payments to Renfro, Bryan, and Zieger. For the first half of 2020, PIC earned a net income of \$5.3 million and distributed \$6.6 million in dividend payments to Renfro, Bryan, and Zieger.

60. SAS also directs a significant portion of the Participating Plans' contribution payments to pay the fees of the enrollers. The enrollers include the companies Crystal Bay, Enroll Prime, and Enrollment First.

61. While the enrollers market SAS's plans to potential new employer clients and enroll individuals in the Participating Plans, the enrollers provide no discernible ongoing administrative service to the Participating Plans.

62. SAS and its executives direct payments out of Plan assets to the enrollers without any review or approval by the employer sponsors or any other independent fiduciary of the

Participating Plans. SAS directs the TPAs to pay these rates to the enrollers through the CPIs that SAS issues.

63. Between 2016 and 2022, the enrollers received over 17% of all the contributions paid by the Participating Plans.

COUNT ONE

(Against SAS, Renfro, Bryan, and Zieger for Self-Dealing and Breaching Fiduciary Duties by Paying SAS with Plan Assets)

64. Paragraphs 1 through 63, above, are incorporated by reference.

65. SAS, Renfro, Bryan, and Zieger operate and administer the entire Providence MEWA through SAS's three Strategic Business Units (Incela, ABC, and ouTPAce).

66. SAS, Renfro, Bryan, and Zieger determine for themselves, without disclosure to the Participating Plans, multiple fees allocated to each of SAS's business units. Employer-sponsors of the Participating Plans do not authorize the specific fees that SAS collects.

67. The fees SAS directs to itself are excessive. Depending on the particular Participating Plan and coverage tier, SAS may receive as much as 58.8% of the Plan's contribution as compensation for itself. SAS often receives more than the TPAs as compensation from the Participating Plans, despite the TPAs performing the bulk of the ongoing administrative work necessary to operate the Plans. SAS also authorizes a fee to its Strategic Business Unit ouTPAce, though ouTPAce provides no discernible service to the MEWA.

68. SAS, Renfro, Bryan, and Zieger are fiduciaries to the Participating Plans based on the above-described actions, because they exercise discretionary authority over Plan management as well as authority and control over Plan assets by deciding how much to pay SAS out of Plan assets.

69. By the actions and failures to act as described above, SAS, Renfro, Bryan, and Zieger:

- a. failed to discharge their duties with respect to the Participating Plans solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the Participating Plans, in violation of ERISA section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);
- b. failed to act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B);
- c. dealt with the assets of the Participating Plans in their own interest, in violation of ERISA section 406(b)(1), 29 U.S.C. § 1106(b)(1); and
- d. acted on behalf of a party whose interests were adverse to the interests of the Participating Plans or the interests of their participants and beneficiaries, in violation of ERISA section 406(b)(2), 29 U.S.C. § 1106(b)(2).

COUNT TWO

(Against SAS, Renfro, Bryan, and Zieger for Self-Dealing and Breaching Fiduciary Duties by Paying PIC with Plan Assets)

70. Paragraphs 1 through 69, above, are incorporated by reference.
71. At all relevant times, Renfro, Bryan, and Zieger owned PIC through their ownership of the holding company Suffolk Holdings. Renfro, Bryan, and Zieger simultaneously

serve as executives of both SAS and PIC. As owners of PIC, Renfro, Bryan, and Zieger receive dividends from PIC's profits.

72. SAS, Renfro, Bryan, and Zieger selected SAS's affiliate, PIC, to provide reinsurance services for the Providence MEWA and its Participating Plans. On behalf of SAS, Renfro, Bryan, and Zieger directed payments to PIC from assets of the Participating Plans, without any review or approval by any independent fiduciaries of the Participating Plans as to the amount of PIC's compensation.

73. PIC's compensation is unreasonable because of its variable and unpredictable nature, which is not disclosed to sponsoring employers or participants. In addition, PIC has neither received nor had to pay a claim for reinsurance for any of the Participating Plans, allowing it to pocket all the Plan contributions it receives. PIC's ability to reap large profits is the product of SAS's plan designs, which intentionally cover very limited health benefits and thus incur low costs.

74. By the actions and failures to act as described above, SAS, Renfro, Bryan, and Zieger:

a. failed to discharge their duties with respect to the Participating Plans solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the Participating Plans, in violation of ERISA section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);

b. failed to act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like

character and with like aims, in violation of ERISA section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B);

c. dealt with the Participating Plans' assets in their own interest, in violation of ERISA section 406(b)(1), 29 U.S.C. § 1106(b)(1); and

d. acted in a transaction involving the Participating Plans on behalf of a party (or representing a party), whose interests are adverse to the interests of the Plan or the interests of its participants or beneficiaries, in violation of ERISA section 406(b)(2), 29 U.S.C. § 1106(b)(2).

e. caused the Participating Plans to engage in transactions that they knew or should have known constituted a direct or indirect "furnishing of goods, services, or facilities between the plan" and PIC, a "party in interest," in violation of ERISA section 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C).

COUNT THREE

(Against SAS, Renfro, Bryan, and Zieger for Breaching Fiduciary Duties by Authorizing Payment of Excessive Fees to the Enrollers)

75. Paragraphs 1 through 74, above, are incorporated by reference.

76. As described above, SAS authorizes payment of fees from Plan contributions to the entities that enroll employers in the Providence MEWA ("enrollers").

77. On behalf of SAS, Renfro, Bryan, and Zieger directed payments to the enrollers.

78. Between 2016 and 2022, the enrollers received over 17% of all the contributions paid by the Participating Plans. These fees are excessive because the enrollers provide no discernible ongoing administrative service to the Participating Plans.

79. By the actions and failures to act as described above, SAS, Renfro, Bryan, and Zieger:

a. failed to discharge their duties with respect to the Participating Plans solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the Participating Plans, in violation of ERISA section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A);

b. failed to act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B);

c. caused the Participating Plans to engage in transactions that they knew or should have known constituted a direct or indirect “furnishing of goods, services, or facilities between the plan” and the enrollers, who are service providers and thus a “party in interest,” 29 U.S.C. § 1001(14)(B), in violation of ERISA section 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C);

d. caused the Participating Plans to transfer to, or use by or for the benefit of a party in interest, of any assets of the plan, in violation of ERISA section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

COUNT FOUR

(Against PIC, Renfro, Bryan, and Zieger for Knowingly Participating in SAS’s Fiduciary Breaches)

80. Paragraphs 1 through 79, above, are incorporated by reference.

81. Renfro served as Chief Legal Officer of SAS and was one of its primary decisionmakers, including authorizing the fees paid to SAS, PIC, and the enrollers.

82. Bryan served as Chairman of SAS and was one of its primary decisionmakers for SAS, including authorizing the fees paid to SAS, PIC, and the enrollers.

83. Zieger served as Vice-Chairman of SAS and was one of its primary decisionmakers, including authorizing the fees paid to SAS and PIC.

84. Even if they are not themselves fiduciaries, Renfro, Bryan, and Zieger, through their involvement in SAS, knowingly participated in SAS's fiduciary breaches as alleged in Counts 1, 2, and 3, and are thus subject to liability under ERISA section 502(a)(5), 29 U.S.C. § 1132(a)(5).

85. Because Renfro, Bryan, and Zieger also served as PIC's executives, their knowledge is imputed to PIC, such that PIC also knowingly participated in SAS's breaches of fiduciary duty and prohibited transactions as alleged in Count 2, and are thus subject to liability under ERISA section 502(a)(5), 29 U.S.C. § 1132(a)(5).

COUNT FIVE

(Against SAS for Failing to Comply with ERISA Reporting Requirements)

86. Paragraphs 1 through 85, above, are incorporated by reference.

87. SAS has never on behalf of the Providence MEWA filed a "Form M-1 Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs)", which is required to be filed by MEWAs, in violation of ERISA section 101(g), 29 U.S.C. § 1021(g).

PRAYER FOR RELIEF

WHEREFORE, the Secretary asks that this Court enter an Order:

88. Permanently removing Defendants **SAS, PIC, Renfro, Bryan, and Zieger** and anyone acting on their behalf, including their officers, agents, employees, assigns, subsidiaries,

affiliates, service providers, accountants, attorneys, and any other party acting in concert with them or at their direction, as fiduciaries, service providers, and administrators of the Participating Plans.

89. Permanently enjoining Defendants **SAS, PIC, Renfro, Bryan, and Zieger**, and anyone acting on their behalf, including their officers, agents, employees, assigns, subsidiaries, affiliates, service providers, accountants, attorneys, and any other party acting in concert with them or their direction from acting as a fiduciary, service provider, or administrator to the Participating Plans and the Providence MEWA;

90. Appointing an Independent Fiduciary to the Participating Plans and the Providence MEWA, with full and exclusive fiduciary authority over the Participating Plans' administration and management, and full and exclusive control over the Providence MEWA and Participating Plans' assets, including, but not limited to:

- a. Authority to exercise all fiduciary responsibilities relating to the Providence MEWA and Participating Plans;
- b. Authority to take exclusive control of all plan assets of the Providence MEWA and the Participating Plans;
- c. Authority given to trustees and/or TPAs under the terms of the documents governing the Providence MEWA and Participating Plans;
- d. Exclusive authority to appoint, replace and remove such administrators, trustees, attorneys, employees, assigns, agents, and service providers as the Independent Fiduciary shall, in the Independent Fiduciary's sole discretion, determine as necessary to aid the Independent Fiduciary in the exercise

of the Independent Fiduciary's powers, duties, and responsibilities to the Providence MEWA and Participating Plans;

e. Authority to terminate the Providence MEWA and Participating Plans, if in the best interest of the Providence MEWA and Participating Plans and, in that event, to establish a claims submission deadline, and to adjudicate all claims filed by such deadline, and to deny claims not filed by the claims submission deadline;

f. Authority to pursue recovery of monies owed and due to the Providence MEWA and Participating Plans from any person obligated to make such payments under the terms and conditions of the Providence MEWA and Participating Plans;

g. Authority to identify, pursue, and disburse recovery of Providence MEWA and Participating Plans' assets, as well as any monies to which the Providence MEWA or Participating Plans have a right of recovery;

h. Authority to identify and pursue claims on behalf of the Providence MEWA and Participating Plans;

i. Except as provided herein, the authority to delegate to such administrators, trustees, attorneys, employees, assigns, agents, and service providers such fiduciary responsibilities as the Independent Fiduciary shall determine appropriate. The Independent Fiduciary may not, however, delegate the authority to appoint, replace, and remove such administrators, trustees, attorneys, employees, assigns, agents, and service providers, or the responsibility to monitor

the activities of the Providence MEWA and Participating Plans' trustees, attorneys, agents, and service providers;

j. Authority to make all required filings on behalf of the Providence MEWA, including Forms M-1; and

k. Authority to pay the reasonable and necessary fees of service providers from the Providence MEWA and Participating Plans' assets.

91. Requiring Defendants **SAS, PIC, Renfro, Bryan, and Zieger** to provide to the Independent Fiduciary all documents, records, accounts or other information required to administer and manage the Participating Plans;

92. Requiring Defendant **SAS** to file all delinquent Forms M-1;

93. Requiring Defendants **SAS, Renfro, Bryan, and Zieger** to jointly and severally restore all losses, including interest, they caused to the Participating Plans;

94. Requiring Defendants **SAS, PIC, Renfro, Bryan, and Zieger** to jointly and severally make equitable restitution to the Participating Plans' participants of all losses resulting from their fiduciary breaches;

95. Requiring Defendants **SAS, PIC, Renfro, Bryan, and Zieger** to jointly and severally reimburse the fees and expenses of the Independent Fiduciary;

96. Requiring Defendants **SAS, PIC, Renfro, Bryan, and Zieger** to disgorge to the Providence MEWA all profits and fees and other monies earned in connection with their violations;

97. Permanently enjoining Defendants **SAS, PIC, Renfro, Bryan, and Zieger** from ever acting as a fiduciary, service provider, or trustee to any plan covered by Title I of ERISA;

98. Awarding the Secretary her costs incurred in this civil action;

99. Retaining jurisdiction to ensure that the Independent Fiduciary and MEWA participants and beneficiaries receive all monies they are entitled to; and

100. Granting such other relief as may be equitable, just, and proper.

Dated: November 5, 2024

Respectfully Submitted:

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

SUFFOLK ADMINISTRATIVE
SERVICES, LLC, ET AL.,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
LABOR, ET AL.,

Defendants.

CIVIL NO.: 21-1031 (DRD)

OPINION AND ORDER

Pending before the Court is the United States Department of Labor, the Secretary of Labor, and the United States’ (jointly, “Defendants”) *Motion for Judgment on the Pleadings*. See Docket No. 28. After considering Defendants’ contentions and Suffolk Administrative Services, LLC (“SAS”), Providence Insurance Company, I.I., (“PIC”), Providence Insurance Partners, LLC (“PIP”), and Anjo, LLC’s (“Anjo”; jointly with SAS, PIC, and PIP, “Plaintiffs”) arguments in opposition; for the reasons detailed below, the Court hereby **GRANTS** Defendants’ petition.

I. INTRODUCTION

Plaintiffs filed the *Verified Complaint for Declaratory and Injunctive Relief* (“*Complaint*”) that commenced the instant proceedings. See Docket No. 1. Pursuant to the allegations contained therein, on October 2018, Plaintiffs met with the Department of Labor (“DOL”). During said meeting, Plaintiffs presented to the DOL a proposed “novel” health benefit plan structure (“*Plan*”), “in an effort to be transparent with the relevant regulatory agencies that would interact with the Plan, its participants, and its sponsors.” *Id.* at ¶ 34; see, also, *id.* at 37. Purportedly, during the course of said meeting, and during additional informal conversations that took place over the

following months, the DOL suggested that the *Plan* was compliant with the Employee Retirement Income Security Act (“ERISA”), and that Plaintiffs should implement it. *See id.* at ¶ 38-44.

Nonetheless, on November 8, 2018, LP Management Services, LLC (“LPMS”), a non-party to this litigation, filed a formal *Advisory Opinion Request* (“*2018 Request*”) before the DOL “seeking guidance on whether the *Plan* was a lawful single employer health plan under [29 U.S.C. § 1002 (1)] of [ERISA].” Docket No. 1 at ¶ 2. The *2018 Request* was revised on February 27, 2019 (“*Revised Request*”), to include additional information and applicable legal principles. *Id.* at ¶ 5.¹ After the submission of the *Revised Request*, other meetings and conversations took place between LPMS, Plaintiffs and the DOL. Purportedly, the representations made by the DOL at this stage made Plaintiffs doubt whether the *Revised Request* would be approved and whether the DOL would open an investigation with regards to the *Plan*. *See id.* at ¶ 46-50.

A year after the filing of the *2018 Request*, LPMS had yet to receive a response from the DOL. Therefore, LPMS -alongside Data Marketing Partnership LP (“DMP”), a limited partnership for which LPMS serves as general partner, which is not a Codefendant to the instant case- filed a suit before the United States District Court for the Northern District of Texas against the DOL. In essence, they claimed that the DOL’s decision as to the *Revised Request* had been unreasonably delayed (the “*AO Case*”). *See id.* at ¶ 14; *see, also*, Data Marketing Partnership, LP, and LP management Services, LLC v. Department of Labor, Civil Case No. 4:19-cv-00800-O. On January 24, 2020, while the *AO Case* was ongoing, the DOL entered their corresponding response to the

¹ The *2018 Request*, the *Revised Request* and the corresponding *Plan* was developed by Alexander Renfro, Esq., who is the Chief Legal Officer of Codefendants PIP and an officer of Codefendants, Anjo, SAS and PIC. *Id.* at ¶ 3. Specifically, the *Revised Request* asserts that the plan will be organized as a single-employer self-insured group health plan that would provide major medical health benefits to Limited Partnership’s eligible employees, along with Limited Partnership’s limited partners. In attention to the aforesaid, the *Revised Request* looked for the DOL to address the following matters: (1) the single-employer self-insured group health plan sponsored by LP is an “employee welfare benefit plan” within the meaning of ERISA section 3(1); (2) the limited partners participating in LP’s single-employer self-insured group health plan are “participants” within the meaning of ERISA section 3(7); (3) the single-employer self-insured group health plan sponsored by LP is governed by Title I of ERISA. *See* Docket No. 1-2 at 1-2.

Revised Request (the “*DOL Response*”). *See id.* at ¶ 16. In essence, the DOL determined that the *Plan* did not fall under the scope of ERISA. To reach said conclusion, the DOL determined, among other matters, that the limited partners could not be considered to “work for” or “perform any services” for the partnership, since they merely “install specific software on their personal electronic devices that capture data as they browse the Internet or use those devices for their own purpose.” *See* Docket No. 1-4 at 2. However, the District Court granted LPMS and DMP’s motion for summary judgment and concluded as follows: “the [DOL]’s Opinion is set aside as arbitrary and capricious under the [Administrative Procedure Act] and contrary to law under ERISA and Defendants are ENJOINED from refusing to acknowledge the ERISA-status of the Plan or refusing to recognize the Limited Partners as working owners of DMP.” Data Mktg. P’ship, LP v. United States Dep’t of Lab., 490 F. Supp. 3d 1048, 1068 (N.D. Tex. 2020). That is, the District Court concluded that the limited partners’ activities were sufficient to constitute services and would therefore activate ERISA eligibility. The Court notes that the District Court’s determination is currently pending appeal before the Fifth Circuit. *See Data Marketing Partnership v. LABR*, 20-11179.

On the other hand, in April 2019 -prior to the entry of the *DOL Response*-, the DOL opened an investigation against Anjo with regards to the implementation of the *Plan* (“*Anjo Investigation*”). *See* Docket No. 1 at ¶ 15. To that end, the DOL issued various subpoenas directed at Anjo and “almost every key entity doing business with [them], SAS, or PIP, including some businesses that have nothing whatsoever to do with any partnership plans.” *Id.* at ¶ 53; *see, also*, Docket No. 1-5. Said subpoenas were issued pursuant to 29 U.S.C. § 1134(a)(1), which grants the DOL the authority to investigate whether someone is violating or about to violate ERISA. *Id.* at ¶

62. Plaintiffs further alleged that they complied with all of the investigation requests and “encouraged their partners to do the same.” *Id.* at ¶ 55; ¶ 96.

On November 6, 2020, “Plaintiffs sent a letter to all known DOL officials involved in the investigation in an effort to seek clarity on the purpose, scope, and need for the Anjo Investigation.” *Id.* at 95; 97-98. Said letter was answered on December 14, 2020; the DOL stated that the agency had “ample authority to conduct its investigation in order to determine whether ERISA violations have or are about to occur [...and, therefore, the DOL] was not in a position to provide the specific information [Plaintiffs sought] regarding the timing and the scope] of the investigation.” *Id.* at 101; *see, also*, Docket No. 1-7. On December 30, 2020, Plaintiffs responded to said letter. *Id.*

Considering the above, in an attempt to stop the DOL’s administrative investigation and quash the subpoenas the agency issued, Plaintiffs assert five (5) causes of actions in the *Complaint*. First, violation to their right to free speech guaranteed under the Constitution of the United States. Specifically, Plaintiffs believe that, as a result of their filing of the *Revised Request* -which they categorize as “speech” for purposes of the corresponding analysis-, the DOL commenced their “retaliatory” administrative investigation in violation of the First Amendment. *Id.* at 19-20. Second, Plaintiffs also contend that the DOL’s administrative investigation violates their freedom of association rights, also guaranteed under the First Amendment. Their contention is premised in their belief that the DOL’s administrative investigation “prevented Plaintiffs from growing their business, because they have naturally been obliged to disclose the investigation to all potential new distribution sources [...] Additionally, current vendors and distribution partners of Plaintiffs have either reduced or terminated relations with Plaintiffs as a result of receiving subpoenas in the Anjo Investigation.” *Id.* at ¶ 57. Third, Plaintiffs argue that the DOL’s administrative investigation

violates their right to equal protection under the due process clause of the Fifth Amendment, considering that said investigation “[c]aused Plaintiffs to be treated differently than other similarly situated organizations filing AO Requests.” *Id.* at 27.

Additionally, Plaintiffs contend that the *Anjo Investigation* infringes the Administrative Procedure Act (“APA”), since the same violates their constitutional rights, the ERISA Procedure 76-1, 29 U.S.C. § 1134 (b) and is overly intrusive. *See id.* at 24. Finally, Plaintiffs believe that the DOL’s administrative investigation violated ERISA, considering that the “DOL has not provided any reasonable cause for its repetitive and abusive subpoenas issued [in] the Anjo investigation.” *Id.* at 25.²

I. LEGAL STANDARD

A. *Rule 12 (c)-Judgment on the Pleadings*³

Rule 12(c) of the Federal Rules of Civil Procedure “allows a party to move for judgment on the pleadings at any time ‘[a]fter the pleadings are closed but within such time as not to delay the trial.’” R.G. Fin. Corp. v. Vergara-Nuñez, 446 F.3d 178, 182 (1st Cir. 2006) (quoting Fed. R. Civ. P. 12(c)); Gulf Coast Bank & Tr. Co. v. Reder, 355 F.3d 50, 54 (1st Cir. 2004). Further, “because rendition of judgment in such an abrupt fashion represents an extremely early assessment of the merits of the case, the trial court must accept all of the nonmovant’s well-pleaded factual averments as true and draw all reasonable inferences in his favor.” Rivera-Gomez v. de Castro, 843 F.2d 631, 635 (1st Cir. 1988) (internal citations omitted); *see, also*, Kando v. R.I. State Bd. of Elections, 880 F.3d 53, 58 (1st Cir. 2018)).

² Defendants then proceeded to detail various of the complaints received between 2017-2019. *See* Docket No. 28 at 10-11.

³ “A motion for judgment on the pleadings bears a strong family resemblance to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and these two types of motions are treated in much the same way.” Integrand Assurance Co. v. Puma Energy Caribe, LLC, 463 F. Supp. 3d 291, 295 (D.P.R. 2020) (citing Kando v. R.I. State Bd. of Elections, 880 F.3d 53, 58 (1st Cir. 2018)).

Similar to the analysis of requests for dismissal under Rule 12 (b)(6) of the Federal Rules of Civil Procedure, the Court must “isolate and ignore statements in the complaint that simply offer legal labels and conclusions **or merely rehash cause-of-action elements.**” Ojeda-Resto v. Blankenship, 2018 WL 4657191, at *2 (D.P.R. 2018) (quotation omitted)(emphasis provided). When performing said examination, the Court must consider that “[a] Rule 12(c) motion, unlike a Rule 12(b)(6) motion, implicates the pleadings as a whole.” Aponte-Torres v. Univ. of P.R., 445 F.3d 50, 55 (1st Cir. 2006). Therefore, “only facts contained in the pleadings and documents fairly incorporated therein, and those susceptible to judicial notice” will be considered. Mercury Sys., Inc. v. Shareholder Representative Servs., LLC, 820 F.3d 46, 51 (1st Cir. 2016).

On the other hand, “[l]ike Rule 12(b)(6), Rule 12(c) does not allow for any resolution of contested facts; rather, a court may enter judgment on the pleadings only if the uncontested and properly considered facts conclusively establish the movant's entitlement to a favorable judgment.” Autoridad de Carreteras y Transportacion v. TransCore Atl., Inc., 387 F. Supp. 3d 163, 166 (D.P.R. 2017)(citing Cruz v. Puerto Rico, 558 F.Supp.2d 165, 179 (D.P.R. 2007) (Besosa, J.)).⁴ Therefore, dismissal is proper “if it appears that the nonmovant could prove no set of facts that would entitle” them to relief. Díaz-Nieves v. United States, 858 F.3d 678, 689 (1st Cir. 2017) (citation omitted).

⁴ The Court notes that “any new facts contained in the answer, to which no responsive pleading by the plaintiff is required, are deemed denied.” Kando v. Rhode Island State Bd. of Elections, 880 F.3d 53, 58 (1st Cir. 2018); *see, also*, Ortiz-Vazquez v. Aon Risk Servs. of Puerto Rico, Inc., 2021 WL 2221591 at 2 (D.P.R. June 1, 2021)(“In the context of the standard of review of a motion for judgment on the pleadings, Aon's allegations made in the answer that contradict Ortiz's complaint are treated as false.”); Lopes v. Riendeau, 177 F. Supp. 3d 634, 665 (D. Mass. 2016) (Gorton, J.) (“As a result of the obligation to view the facts and reasonable inferences in favor of the nonmovant, however, ‘the court treats any allegations in the answer that contradict the complaint as false.’”)

II. ARGUMENTS

Defendants' motion to dismiss contains multiple arguments tailored to challenge every one of Plaintiffs' claims. Hence, the Government commences their argumentation by providing the Court with their background to the *Anjo Investigation*.

A. Defendants' background to the Anjo Investigation

Defendants allege that the administrative investigation directed at Anjo was initiated because "[o]ver a two year period, the [DOL] had received several complaints about health plans and products designed and serviced by Plaintiffs PIC, PIP, and SAS, and the [DOL] began to suspect that the complaints might be related to the plans described in the advisory opinion request Mr. Renfro authored." Docket No. 28 at 10; *see, also*, Docket No. 24 at 8-9. Therefore, "the Anjo investigation's initial purpose was to determine whether the health plans and products designed and serviced by PIC, PIP, and SAS were covered by ERISA, since it was unclear at the time and, if so, whether any ERISA violation had occurred." *Id.* at 11; *see, also*, Docket No. 24 at 9-10. Further, Defendants informed that the DOL sent twenty-six (26) subpoenas to "entities it believed had information about Plaintiffs' business and related health plans". *Id.*

As a result of the responses to the aforementioned subpoenas, the DOL "learned that Plaintiffs' plans encompassed both plans administered through limited partnerships as well as traditional employee benefit plans unrelated to the partnerships." *Id.* Moreover, the DOL "continued to receive complaints and state referrals regarding Plaintiffs and entities associated with Plaintiffs"; therefore, the DOL "continued to investigate whether either the partnership plans or the traditional employee benefit plans had violated ERISA." *Id.*; *see, also*, Docket No. 24 at 11.

Plaintiffs' see it a little different. They contend that the *Anjo Investigation* was initiated due to the DOL's "retaliatory motivation and actions, all of which [they] believe -based on the facts as known to them- have the aim of destroying their respective business." Docket No. 32 at 6.

Further, Plaintiffs note that “[a]s evidenced by Assistant Secretary Rutledge telling LPMS to implement the proposed Plan before DOL launched its witch hunt, such an explanation is clearly a ruse, merely an effort to harass Plaintiffs, and an effort to inflict as much damage as possible.” *Id.* at 10. That is, Plaintiffs believe that the “DOL is not engaged in a legitimate effort to seek information, it is driven by animus to destroy Plaintiffs’ businesses for the sin of actually following the advice of Assistant Secretary Rutledge.” *Id.* at 11.

In reply, Defendants attempt to shift Plaintiffs’ narrative by providing perspective as to the extent of the *Anjo Investigation*; hence, Defendants contend that “Plaintiffs’ hyperbole obscures the fact that the Department has simply requested documents from three of the Plaintiffs, some of the partnerships they created, and entities that sponsored or serviced plans designed by Plaintiffs.” Docket No. 35 at 3.

B. Plaintiffs’ statutory claims

1. Defendants’ challenge to Plaintiffs’ APA claims

Defendants, first, highlight that ERISA grants the Secretary of the DOL the authority to perform an investigation to “determine whether any person has violated or is about to violate any provisions of [ERISA] or any regulation or order thereunder”. 29 U.S.C. § 1134 (a). Hinging on applicable case law discussed below, Defendants stress that “the [DOL’s] exercise of its investigatory power under ERISA [...] must be recognized as ‘committed to agency discretion by law’ and thus not subject to judicial review under the APA.” Docket No. 28 at 15.

Although Plaintiffs acknowledge the DOL’s investigative authority under ERISA, their stance is that the *Anjo Investigation* is being performed as if the DOL’s investigative powers were “limitless”. Docket No. 32, 18-19. Therefore, Plaintiffs suggest that the *Anjo Investigation* is one of the types that federal courts have deemed as improper and not reasonably limited in scope. Hence, they argue that, “while federal agencies have lawful regulatory power to investigate

businesses, that power is limited in scope.” *Id.* at 19. Moreover, Plaintiffs contend that the *Anjo Investigation* is subject to judicial scrutiny since “[t]his case involve allegations of an abuse of that discretion by a government agency [...] and courts have the ability to scrutinize investigations as is the subject of this case.” Docket No. 32 at 28. Plaintiffs further argue that the DOL acts in attention to the limits set by ERISA and, therefore, “[t]here is appropriate guidance in ERISA to provide appropriate limits to DOL’s activities and the investigation in this case.” *Id.*

Second, Defendants contend that Plaintiffs fail to provide any legal argument that would contravene the Third Circuit’s decision in *Gentile v. SEC*, 974 F.3d 311 (3d Cir. 2020), where it was decided that “a decision to start an investigation [is] not subject to review under the APA, even for a challenge to the agency’s ‘alleged retributive motive.’” Docket No. 35 at 4. On the other hand, Defendants argue that judicial review under the APA is only available for “final agency actions”. See 5 U.S.C. § 704. After referencing the applicable caselaw, which clearly states that agency investigations do not constitute “final agency actions” for purposes of judicial review under the APA, Defendants contend that “[t]he investigation is not the culmination of the [DOL’s] decision making process and, while Plaintiffs may complain about the burden of responding to subpoenas, the ‘expense and annoyance of administrative audits and investigations’ and ‘not the kind or burdens that support a finding of finality’”. Docket No. 28 at 16 (internal citations omitted).⁵

Plaintiffs attempt to counter Defendants’ reviewability argument by arguing that “the *Anjo Investigation* is intertwined with a final agency action, [the] DOL’s arbitrary and capricious AO.” Docket No. 32 at 29. Considering that the District Court in *Data Marketing Partnership v. U.S.*

⁵ It is worth noting that Defendants apply the same arguments to Plaintiffs’ challenge to the validity of the *DOL’s Response*; that is, they contest that the *DOL’s Response* is not a “final agency action” subject to judicial review under the APA. However, taking into account that the validity of the *DOL’s Response* is currently being reviewed by the Fifth Circuit, the District Court is without jurisdiction to examine the merits of said advisory opinion.

Dep't of Labor, determined that the *DOL Response* was a “final agency action”, and considering that they believe the *Anjo Investigation* is directly related to, and derivative of, the *DOL Response*, they propose that the *Anjo Investigation* “should be deemed to be part of a final agency action.” *Id.*

In reply, Defendants oppose Plaintiffs’ arguments by asserting that “[t]he [DOL’s] ongoing investigation is plainly not dependent on the currently-vacated advisory opinion.” Docket No. 35 at 5. Further, Defendants highlight that “Plaintiffs cite no authority for the proposition that a non-final agency action can be subject to APA review merely due to its connection to some other allegedly-final action.” *Id.*

Finally, Defendants contend that Plaintiffs’ claims under the APA also fail on the merits. Although Plaintiffs allege that the *Anjo Investigation* delayed the DOL’s response to the *Revised Request* and that said delay is unreasonable and unlawful, Defendants believe that said claims are now moot since the *Advisory Opinion* was issued on January 24, 2020. Further, Defendants contend that “Plaintiffs cannot show that the [DOL] was required to issue an advisory opinion or that it was unreasonable to issue it within fourteen months after it was first requested”. Docket No. 28 at 18. Defendants also highlight that the aforementioned ERISA Procedure 76-1 establishes the discretion the DOL holds over the issuance of Advisory Opinions and stresses that there is no law or regulation which would establish a timeframe to issue said Advisory Opinions.

In response to Defendants’ final arguments, Plaintiffs contend that, although they did not participate in the requests nor the judicial proceeding in DMP, “they have been directly harmed by the *Anjo Investigation* and the delay with which DOL acted in connection with the AO.” Docket No. 32 at 29. On the other hand, Plaintiffs agree that there is no “formula for deciding” what is a reasonable time for the DOL to respond to an Advisory Opinion request; however, they stress that

“in this case the delay occasioned by DOL cause great harm to Plaintiffs” and that it was motivated by the purported retaliatory intent. *Id.*

Defendants’ answer to Plaintiffs’ opposition is that it fails to establish constitutional standing to advance an APA claim for delay “where the desired action occurred before the case was filed.” Docket No. 35 at 5. Further, Defendants highlight that the purported “delay” in the issuance of the *DOL Response* was not unreasonable and Plaintiffs have failed to cite any caselaw, or regulation, which would support their contention that it was unduly delayed. *Id.*

2. Defendants’ challenge against Plaintiffs’ ERISA claims

Defendants contend that “ERISA provides a limited waiver of sovereign immunity and cause of action for certain suits against the [DOL].” Docket No. 28 at 19. Further, Defendants clarify that “[s]uits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter”. 29 U.S.C. § 1132 (k). Based on said provision, Defendants argue that Plaintiffs are neither participants, beneficiaries, administrators nor fiduciaries of an ERISA plan; and, therefore, the DOL’s “[s]overeign immunity to Plaintiffs” claims was not waived under 29 U.S.C. § 1132 (k)”.

Plaintiffs do not offer any concrete legal argument in opposition; they merely state that if the Court were to apply Defendants’ reasoning -which is based on the law- “[s]uch an outcome would give [the] DOL the ability to run roughshod over any party outside of the four groups identified in the statute -administrators, fiduciaries, participants, and beneficiaries of employees benefits plans[...]- with no judicial remedy available to the party suffering [the] DOL’s

inappropriate behavior.” Docket No. 32 at 31.⁶ In reply, Defendants stress that Plaintiffs admitted that they fall outside the groups ERISA permits, under 29 U.S.C. § 1132 (k), to file claims against agency actions. *See* Docket No. 35 at 5.

Further, considering that Plaintiffs’ assert their ERISA claims pursuant to 29 U.S.C. § 1132 (k), Defendants argue that the instant suit has to be filed before the proper venue; that is, “in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.” 29 U.S.C. § 1132 (k). Considering the aforesaid, Defendants reason that, “[b]ecause Plaintiffs SAS and PIC do not allege they are themselves employee benefit plans, their office locations cannot provide venue under § 1132 (k).” Docket No. 28 at 19. Further, Defendants contend that Plaintiffs did not allege that “any employee benefit plan relevant to the investigation ‘has its principal office’ in Puerto Rico” *Id.* at 20. Considering the aforesaid, Defendants believe that this District Court is not a proper venue for Plaintiffs’ ERISA claims.

Plaintiffs suggest that by including the term “may”, 29 U.S.C. § 1132 (k) allows for the claims to be filed before this District Court. *See* Docket No. 32 at 31. On the other hand, they contend that this Court may apply the pendent venue doctrine to maintain the suit before this District. However, Defendants refute said contentions, and reiterate that the statute is clear as to the available venues Plaintiffs have; that is, “Washington, D.C., or in ‘the district where the plan has its principal office.’” Docket No. 35 at 5. Further, Defendants cites to case law where sister District Courts have concluded that the pendent venue doctrine should not be applied where it

⁶ The Court takes the opportunity to note that “[i]t is not the place of this court, however, to pass judgment on the wisdom of the policies adopted by the [...] legislature.” Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 312-313 (1st Cir. 2005).

would override limitations to specific venue provision included in a statute such as 29 U.S.C. § 1132 (k). *See id.* at 5.

Defendants also challenge the merits of Plaintiffs' ERISA claims. To that end, Defendants contend that Plaintiffs have failed to show that the DOL took any actions contrary to ERISA. That is, although Plaintiffs believe that the DOL issued subpoenas during the *Anjo Investigation* without providing reasonable cause and as retaliation, "[i]t is well-established that the [DOL] is not required to show reasonable cause of an ERISA violation before opening an investigation or issuing subpoenas." *Id.* at 20. Moreover, Defendants argue that "ERISA [does not] provide any textual basis for courts to intervene in an investigation where the subject of the investigation alleges that the investigation is retaliatory." *Id.* Finally, in reply, Defendants highlight that Plaintiffs failed to show that their claims fall into one of the three (3) types of claims available under 29 U.S.C. § 1132. *See* Docket No. 35 at 6.

A. Plaintiffs' constitutional claims

1. Defendants' general arguments

First, Defendants suggest that Plaintiffs' constitutional claims are moot given that they have not been subject to neither a compulsory process nor any legal proceedings. *See* Docket No. 28 at 20-21. Therefore, Defendants reasons that Plaintiffs' claims should be dismissed since they constitute an "attempt to short-circuit the [DOL's] investigation." *Id.* at 21.

In opposition, Plaintiffs contend that their constitutional claims satisfy the applicable "ripeness" criteria. Specifically, Plaintiffs contend that the first element, fitness of the judicial decision, is satisfied since their "allegations as set forth in the complaint plausibly state a claim against DOL." Docket No. 32 at 15. Further, Plaintiffs assert that the second element, hardship to the parties of withholding court consideration, is also satisfied since "the draw-out nature of the *Anjo Investigation* and the ongoing business and reputational harms suffered by Plaintiffs are

certainly an ‘injury cognizable by a court of equity’ that satisfy the second element of ripeness.”

Id. Finally, Plaintiffs argue that their claims are also “justiciable” because they purportedly satisfy the elements of constitutional standing; that is, injury in fact, causation, and redressability. *Id.* at 15-16.⁷

In response, Defendants argue that “Plaintiffs have failed to show that, at this stage -where Plaintiffs have not been subject to either [a] compulsory process or any legal proceeding- the Court should wade into the [DOL’s] ongoing investigation.” Docket No. 35 at 6. Further, Defendants contend that this Court’s intervention in the investigation would cause it to be delayed and would present premature challenges to it. *See id.* Moreover, Defendants argue that declining to provide Plaintiffs with information about the scope of the investigation and requesting confidential documents through subpoenas does not need to call into question the legality of the *Anjo Investigation* nor should it suggest that the DOL is attempting to destroy Plaintiffs’ businesses. Therefore, none of Plaintiffs’ allegations “differentiate this investigation from many other routine government investigations or potential statutory violations by a regulated entity.” *Id.* at 7.

Second, Defendants contend that Plaintiffs do not have a right “‘not to be investigated for suspected violations of federal law by an agency authorized by Congress to conduct such investigations in its discretion, or not to be injured in one’s reputation or business prospect as a consequence of such an investigation.” Docket No. 28 at 21 (*citing Hunter v. SEC*, 879 F.Supp. 494, 501 (E.D. Pa. 1995)). Finally, Defendants stress that federal court are reluctant to intervene in agency investigations.

⁷ On the other hand, Plaintiffs recognize that their claims may be asserted under the provisions of the APA. However, they justify the inclusion of their constitutional claims since they “may be used in cases where the APA fails to provide a plaintiff with a remedy.” Docket No. 31 at 16. In opposition, Defendants assert that Plaintiffs’ argument fails since this “nonstatutory review” only applies in “limited circumstances” where the agency’s nonfinal action must wholly deprive the party of a meaningful and adequate means of vindicating its rights”. Docket No. 35 at 8 (internal citations omitted). Considering that “Plaintiffs have not show what they would be ‘wholly deprive[d]’ of an opportunity to vindicate their rights” their argument fails. *Id.*

2. Defendants' challenge to Plaintiffs' free speech retaliation claim

First, Defendants argue that “Plaintiffs have failed to allege facts from which retaliatory intent can plausibly be inferred.” Docket No. 28 at 23. To support said argument, first, they reference various of the allegations contained in the *Complaint* where Plaintiffs highlight that the DOL had multiple favorable meetings to discuss the *Plan* and also encouraged them to submit the *2018 Request* for their consideration. Further, although Defendants acknowledge that Plaintiffs alleged that there was an apparent shift in attitude towards the *Plan* by the DOL’s representatives sometime in 2019, “Plaintiffs identify no reason that the [DOL] needed Plaintiffs to withdraw their request. Under the [DOL’s] guidance, it could simply decline to issue an advisory opinion as a matter of discretion.” *Id.* at 24. Further, Defendants note that Plaintiffs made no allegations “suggesting that any [of the DOL’s officials] developed any malice after Plaintiffs declined to withdraw their request.” *Id.* at 24-25. Moreover, Defendants contend that Plaintiffs fail to make any allegations as to specific facts surrounding the investigation that would move the Court to reasonably infer retaliation or harassment as motivating factor to commence and continue the *Anjo Investigation*. *See id.*

Furthermore, Defendants suggest that Plaintiffs failed to allege “but for” causation. That is, Plaintiffs cannot show that the *Anjo Investigation* would not have occurred “but for” the purported retaliatory motive provoked by the presentation of the *2018 Request* and the *Revised Request*. *See id.* at 25-26.

Plaintiffs object to Defendants’ assertion as to the causation standard applicable to their free speech claims. Specifically, they contend that the “DOL interprets this standard to mean that if there is any other justification, then the adverse action is permissible. However, that is not the standard. It is clear that while there could have been other considerations, DOL’s animus having

been an inspiration for-a driving cause of- ‘a but for cause’ of the Anjo Investigation would give rise to redressable claims.” Docket No. 32 at 21.

Additionally, Defendants argue that Plaintiffs’ allegations as to the “but for” causation are not plausible. That is, they cannot show that “‘non-retaliatory grounds are in fact insufficient to provoke the adverse consequences.’” Docket No. 35 at 10 (internal citations omitted). To justify said contention, Defendants state that “[t]here is nothing unusual about an agency undertaking an investigation in light of concerns that entities may be violating applicable statutes.” *Id.*

Defendants further reiterate that the DOL is responsible for investigating potential violations of ERISA and that they received complaints that justified the *Anjo Investigation*; therefore, the presentation of the *2018 Request* and the *Revised Request* had no relation to the DOL’s decision to investigate. Finally, Defendants contend that Plaintiffs’ allegations are not even enough to “infer that the investigation would not have occurred without invidious intent”. Docket No 28 at 2.

In general, Plaintiffs oppose Defendants’ contentions by stating that they “have alleged sufficient facts to support their free speech claim.” Docket No. 32 at 21. To that end, Plaintiffs highlight that they “allege that [the] DOL acted with retaliatory animus against [them].” *Id.* Second, Plaintiffs argue that they, in fact, alleged that the “retaliatory animus was the but-for cause of Plaintiffs’ injury” by contesting that the “sole purpose” of the *Anjo Investigation* was to harass Plaintiffs. *Id.*; *see, also*, Docket No. 1 at ¶ 108.

Finally, Defendants contend that Plaintiffs’ allegation as to retaliatory intent consists of a “bare allegation of animus”. Docket No. 35 at 8. Therefore, “Plaintiffs rest on mere speculation because nothing suggests that any official actually developed animus-neither the number of

subpoenas nor the Department's decision not to specify the scope of the investigation to its subjects reasonably imply retaliatory intent." *Id.* at 9.

3. Defendants' challenge to Plaintiffs' free speech chilling effect claim

In response to Plaintiffs' allegations that the *Anjo Investigation* produced a "chilling effect" to their First Amendment rights, Defendants contend that conducting agency investigations nor issuing subpoenas, *per sé*, cause harm sufficient to give rise to a First Amendment claim. *See* Docket No. 28 at 27-28. Further, considering the objective standard adopted by the First Circuit in *Starr v. Dube*, 334 Fed. Appx. 341 (1st Cir. 2009), Defendants contend that "Plaintiff cannot show that businesses of 'ordinary firmness' would be deterred by an ERISA investigation." *Id.* at 29.

In opposition, Plaintiffs restated that they "have sufficiently pled that the investigation chilled their First Amendment rights." Docket No. 32 at 23. To that end, Plaintiffs argued that "[t]hese actions taken by DOL have inhibited Plaintiffs from growing their business, causing potential distribution sources to avoid forming a relationship with Plaintiffs until DOL's investigation has finally run its course". *Id.* They find that these allegations are sufficient to satisfy the standard of plausibility.

In reply, Defendants contend that it has shown that "an ERISA investigation does not, by nature, cause or threaten objective harm and this is insufficient to support a First Amendment retaliation claim." Docket No. 35 at 10. Further, Defendants argue that Plaintiffs' allegations are premised on the notion that "the investigation 'caus[ed] potential distribution sources to avoid forming a relationship with Plaintiffs until DOL's investigation has finally run its course.'" *Id.* In attention to the aforesaid, Defendants believe that said allegations are insufficient to plausibly assert a chilling effect claim since "allegations about third parties' choices are too 'speculative, indirect [and] too remote' to sustain a claim, [...], specially where the government's action had no effect on Plaintiffs' own behavior." *Id.*

4. Defendants' challenge to Plaintiffs' freedom of association claim

Defendants argue that Plaintiffs' freedom of association claims fail for two (2) reasons. First, "Plaintiffs have alleged no facts plausibly showing that any of the relationships they describe were 'for protected speech purposes.'" Docket No. 28 at 30. That is, Plaintiffs fail to "explain how their relationship with other companies, or those companies' clients, serve a constitutionally expressive purpose." *Id.* Second, Defendants contend that Plaintiffs' allegations do not reflect that the "DOL's actions have limited any opportunity to associate for expressive purposes." *Id.* at 31. Further, considering First Amendment violations examined in case law, Defendants highlight that Plaintiffs "do not challenge a disclosure requirement [...] [n]or has the [DOL] ordered or requested that anyone stop doing business with Plaintiffs." *Id.* Considering the above, Defendants find that Plaintiffs' allegations fall short of what is required to sustain a freedom of association claim under the First Amendment.

In opposition, Plaintiffs restate that they have "[a]lleged that business partners -actual and potential- have reduced, terminated, or avoided forming business relationships with Plaintiffs as a direct result of the investigation." Docket No. 32 at 24. Further, they highlight that their *Complaint* includes allegations as to the *Anjo Investigation* effect on "Plaintiffs' ability to freely associate for protected speech purposes with others of their choosing-including potential future limited partners, Partnership Plan participants, and Partnership Plan vendors." *Id.* at 25; *see, also*, Docket No. 1 at ¶ 119. Plaintiffs "are not petitioning this Court to be free from any 'restraint from the State' but rather to [be] free from unconstitutional, arbitrary, capricious, and retaliatory harassment from the State." Docket No. 32 at 25.

Defendants respond by reiterating that Plaintiffs' allegations do not reference any facts demonstrating that the relationships in which their asserted claims hinge on, were for protected speech purposes. Specifically, Defendants state that "Plaintiffs have pointed to no facts from which

the Court can conclude that either the individuals who signed up for health insurance by becoming ‘limited partners’ or the vendors who provided services to plans Plaintiffs created entered these business relationships for any expressive purpose.” Docket No. 35 at 11. Moreover, “Plaintiffs have likewise failed to plausibly allege that the [DOL’s] actions have limited any opportunity to associate for expressive purposes.” *Id.* Defendants find that the purported issues that Plaintiffs claim to be infringements to their free association rights “fall short of a ‘direct and substantial’ interference with associational rights.” *Id.*

5. Defendants’ challenge to Plaintiffs’ equal protection claim

Defendants note that Plaintiffs alleged Fifth Amendment claims are premised on the same allegations that sustain their purported First Amendment claims. Focusing on the First Circuit’s decision in *Pagan v. Calderon*, 448 F.3d 16, 36 (1st Cir. 2006), Defendants contents that “[b]ecause Plaintiffs merely recapitulate their First Amendment claims, there is no need to analyze their claims through the equal protection lens.” Docket No. 28 at 32.

In response, Plaintiffs cite a District of Massachusetts decision, *Wilborn v. Wall*, 2015 WL 5662717 (D. Mass. Sept. 25, 2015), for the proposition that Defendants’ reading of *Pagan* is too broad; that is, they allege that *Pagan’s* decision is of narrow application and should only be applicable in cases where there are discretionary decisions denying a state or local benefit.

On the other hand, taking aim at the merits of said claim, Defendants contend that Plaintiffs’ allegations that the DOL treated them differently from other similarly situated organizations filing Advisory Opinion requests merely constitutes a “conclusory restatement of an element of an equal protection claim [which] falls far short of what is required to state a plausible claim”. Docket No. 28 at 33. Plaintiff opposes said statement by merely restating the allegation that recites the applicable standard; that is, “Defendants, while acting under color of federal

authority, caused Plaintiffs to be treated differently than other similarly situated organizations filing AO Requests.” Docket No. 32 at 26.

Finally, in reply, Defendants reiterate that, pursuant to First Circuit precedent, equal protections claims that can be brought “under specific provisions of the First Amendment” should not be considered. Docket No. 35 at 12; *see, also, Pagan v. Calderon*, 448 F.3d at 36.

III. ANALYSIS

A. *Plausibility of Plaintiffs’ APA claims*

In order for a Court to engage in judicial review of an agency action, said action must be “final”. *See Manchanda v. Lewis*, No. 21-1088-CV, 2021 WL 5986877, at *5 (2d Cir. Dec. 17, 2021) (“[T]he APA makes clear that judicial review is only proper where there is a ‘final agency action for which there is no other adequate remedy.’”)(*citing* 5 U.S.C. § 704); *Larson v. United States*, 888 F.3d 578, 587 (2d Cir. 2018) (“APA review is limited to [a] final agency action.”); *Hindes v. FDIC*, 137 F.3d 148, 161 (3d Cir. 1998); *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 266 (9th Cir. 1990). Therefore, “[t]he core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties.” *Franklin v. Massachusetts*, 505 U.S. 788, 797, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992).

The Supreme Court has stated that, generally, the following two (2) conditions must be met for an agency action to be “final” under the APA: “[f]irst, the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature.” *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 597, 136 S. Ct. 1807, 1813, 195 L. Ed. 2d 77 (2016)(*citing Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)). That is, the action must not be of the kind which orderly process of adjudication would be disrupted by judicial review. *See Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget*

Transatlantic, 400 U.S. 62, 71 (1970). Second, “the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” U.S. Army Corps of Engineers v. Hawkes Co., 578 U.S. at 597 (citing Bennett v. Spear, *supra*). “In other words, it must have a ‘sufficiently direct and immediate’ impact on the aggrieved party and a ‘direct effect on [its] day-to-day business.’” Berry v. United States Dep’t of Lab., 832 F.3d 627, 633 (6th Cir. 2016).

Should the “final agency action” prerequisite is satisfied, said action is presumptively reviewable under the APA. See Sackett v. E.P.A., 566 U.S. 120 (2012); *see, also*, Berry v. United States Dep’t of Lab., 832 F.3d 627, 634 (6th Cir. 2016).⁸ Nonetheless, an agency action may be exempt from judicial review under the APA if it is “committed to agency discretion by law”. 5 U.S.C. § 701(a)(2). “Such a commitment exists when the agency action is of a kind ‘traditionally regarded as committed to agency discretion,’ or when the relevant statute ‘is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion’”. Union of Concerned Scientists v. Wheeler, 954 F.3d at 17-18 (internal citations omitted).

Taking the aforesaid into consideration, Federal Courts have concluded that the decision to initiate investigations do not constitute “final agency actions” subject to judicial review under the APA. See, *e.g.*, Manchanda v. Lewis, 2021 WL 5986877 at 6 (“It is well settled that such interlocutory investigative steps by an agency do not constitute final agency actions under the APA.”); Veldhoen v. U.S. Coast Guard, 35 F.3d 222, 225 (5th Cir. 1994)(“An agency’s initiation

⁸ The APA, generally, “provides a vehicle for reviewing agency decisions that are alleged to violate federal law.” Union of Concerned Scientists v. Wheeler, 954 F.3d 11, 17 (1st Cir. 2020); *see, also*, Cowels v. Fed. Bureau of Investigation, 936 F.3d 62, 66 (1st Cir. 2019) (“The [APA] waives federal sovereign immunity for suits alleging injury by agency action.”) (citing 5 U.S.C. § 702). There is a “strong presumption” of judicial review under said statute. See, *e.g.*, Mach Mining, LLC v. EEOC, 575 U.S. 480, 486, 135 S.Ct. 1645, 191 L.Ed.2d 607 (2015); NAACP v. Sec’y of Housing & Urban Dev., 817 F.2d 149, 152 (1st Cir. 1987).

of an investigation does not constitute final agency action [...] Normally, the plaintiff must await resolution of the agency's inquiry and challenge the final agency decision.”); FTC v. Standard Oil Co., 449 U.S. 232, 239-245 (1980). “An attack on the authority of an agency to conduct an investigation does not obviate the final agency action requirement.” Veldhoen v. U.S. Coast Guard, 35 F.3d at 225.

On the other hand, various Federal Courts have also concluded that refraining from initiating an agency investigation also fails to constitute a “final agency action”. See, e.g., Texas v. United States, 787 F.3d 733, 757 (5th Cir. 2015) (“The general exception to reviewability provided by § 701(a)(2) for action ‘committed to agency discretion’ remains a narrow one, but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise.”)(internal citations omitted); Takamiya v. DNP Am., LLC, No. 14-CV-10301 (VEC), 2016 WL 4030861, at *2 (S.D.N.Y. July 25, 2016)(“Here, the challenged action, DOL’s decision not to investigate because of the untimeliness of the complaint, is a discretionary function committed solely to DOL by law.”).

Finally, Federal Courts have concluded that carrying out agency investigations fall squarely under actions “committed to agency discretion by law”, which, as stated above, are not reviewable under the APA. Hence, the Court highlights the Third Circuit’s recent decision in *Gentil v. Securities & Exchange Commission*, where a *Formal Order of Investigation* issued by the SEC was challenged. After a careful analysis, the Third Circuit undoubtedly concluded that “an agency decision to exercise its investigative power overcomes the ‘basic presumption’ in favor of judicial review of agency action.” Gentile v. Sec. & Exch. Comm’n, 974 F.3d 311, 318 (3d Cir. 2020); see, also, Assoc. Of Am. Med. Colls v. United States, 217 F.3d 770, 781 (9th Cir. 2000)(“An investigation, even one conducted with an eye to enforcement, is quintessentially non-

final as a form of agency action”); Jefferson v. Harris, 170 F. Supp. 3d 194, 218 (D.D.C. 2016)(Concluding that investigations are not “final agency actions” and that they are exempt from judicial review since they are “committed to agency discretion by law”). Hence, the Third Circuit highlighted that an agency’s investigative activity is a type of agency action which is governed by a “tradition of nonreviewability”. *Id.* at note 12.⁹

Considering the aforementioned principles and judicial precedents from various Federal Courts, the Court concludes that the *Anjo Investigation* does not constitute a “final agency action” subject to judicial review under the APA. Therefore, the Court finds that Plaintiffs’ claims pursuant to the APA are not plausible, taking into account that there is no “final agency action” that may be reviewed by the Court. On the other hand, as previously stated, Plaintiffs attempt to escape this reality by alleging that the *Anjo Investigation* is, in fact, a “final agency action” because it is tied to the *DOL Response*. However, Plaintiffs did not offer any factual allegation, statutory reference

⁹ The Third Circuit referenced the following case law:

Chaney, 470 U.S. at 838, 105 S.Ct. 1649 (“[A]gency refusals to institute investigative or enforcement proceedings [are committed to agency discretion], unless Congress has indicated otherwise.”); *S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 461-64, 99 S.Ct. 2388, 60 L.Ed.2d 1017 (1979); *Am. Disabled for Attendant Programs Today v. U.S. Dep’t of Housing & Urban Dev.*, 170 F.3d 381, 384 (3d Cir. 1999) (opining, in a failure to investigate case, that *Chaney* “established a presumption against judicial review of agency decisions that involve whether to undertake investigative or enforcement actions” (emphasis in original)); see also *Webster v. Doe*, 486 U.S. 592, 608, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988) (Scalia, J., dissenting) (“A United States Attorney’s decision to prosecute, for example, will not be reviewed on the claim that it was prompted by personal animosity.”); *United States v. Nixon*, 418 U.S. 683, 693, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (“[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case”); see generally *Sec. & Exchange Comm’n v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 127 n.12 (3d Cir. 1981) (collecting cases); *Leighton v. Sec. & Exchange Comm’n*, 221 F.2d 91, 91-92 (D.C. Cir. 1955) (*per curiam*) (“The discretionary character of the [SEC]’s action [to refuse to investigate] likewise removes it from Section 10 of the [APA], which excepts from its provisions for judicial review agency action committed by law to agency discretion.”).

Gentile v. Sec. & Exch. Comm’n, 974 F.3d 311 at note 12 (3d Cir. 2020).

nor legal precedent that would justify their contention. That is, the Court finds no reason to view the *Anjo Investigation* and the *DOL Response* as one “final” agency action.

Further, and finally, the Court notes that, at this time, whether the *DOL Response* is a “final agency action”, is a matter to be considered on appeal before the Fifth Circuit. Taking this fact into account, the Court notes that it cannot entertain any matters related to the characterization of the *DOL Response* as a “final agency action”; therefore, Plaintiffs cannot use said characterization for purposes of their argumentation. *See, e.g., United States v. Naphaeng*, 906 F.3d 173, 177 (1st Cir. 2018) (“It is settled that once an appeal is taken, a district court generally loses jurisdiction to proceed with any matter related to the appeal's substance during the pendency of the appeal.”); *United States v. Distasio*, 820 F.2d 20, 23 (1st Cir. 1987) (“As a general rule with only limited exceptions, entry of a notice of appeal divests the district court of jurisdiction to adjudicate any matters related to the appeal.”).

B. Plausibility of Plaintiffs’ ERISA claims¹⁰

As previously stated, Plaintiffs articulate their ERISA claims pursuant to 29 U.S.C. § 1132 (k). *See* Docket No. 1 at 6.¹¹ As Defendants correctly point out, ERISA’s civil enforcement provision contains a special venue provision. Specifically, the referenced special venue provision states that claims under ERISA’s civil enforcement subchapter “may be brought in the district where the plan is administered, where the breach took place, or where a Defendants resides or may

¹⁰ ERISA was enacted to “protect ... the interests of participants in employee benefit plans and their beneficiaries’ by setting out substantive regulatory requirements for employee benefit plans and to ‘provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts.’” *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208, 124 S. Ct. 2488, 2495, 159 L. Ed. 2d 312 (2004)(citing 29 U.S.C. § 1001(b)); *Jette v. United of Omaha Life Ins. Co.*, 18 F.4th 18, 26 (1st Cir. 2021). In sum, the “purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans.” *Id.*

¹¹ The Court notes that Plaintiffs also state that venue is proper, pursuant to 28 U.S.C. § 1391 (b). However, 28 U.S.C. § 1391 (a) states that Section 1391 is applicable “[e]xcept as otherwise provided by law”. *See, e.g., Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 55, 134 S. Ct. 568, 577, 187 L. Ed. 2d 487 (2013). Therefore, taking into account that ERISA contains a special venue provision, we need to examine Defendants’ improper venue challenge in the context of said legislation.

be found”. 28 U.S.C. § 1132 (e)(2). As Defendants correctly highlight, the *Complaint* does not contain allegations that would lead the Court to ascertain that the District of Puerto Rico is the proper venue pursuant to the referenced criteria. In their opposition, Plaintiffs chose to focus on Congress use of the word “may” to justify the filing of their ERISA claims before this District. However, the word “may” does not open the door to other venue options that were not specifically contemplated in 28 U.S.C. § 1132 (e)(2). Just last year, the Circuit Court for the Ninth Circuit, clarified this matter, stating the following:

ERISA's venue provision provides that an action “*may* be brought” where: (1) the plan is administered; (2) the breach took place; or (3) a Defendants resides or may be found. 29 U.S.C. § 1132 (emphasis added). **Congress's use of permissive “may” is instructive. It chose to open three venues for suit,** but not to require them.

In re Becker, 993 F.3d 731, 732–33 (9th Cir. 2021)(emphasis provided). Therefore, Plaintiffs proposition that Congress use of the word “may” opened the possibility of filing ERISA claims on venues not contemplated on the special venue provision, is misplaced. Consequently, the Court finds that Plaintiffs have failed to present their claims before the proper venue; it its discretion, the Court hereby dismisses Plaintiffs’ ERISA claims without prejudice.¹²

On the other hand, Defendants highlight that 28 U.S.C. § 1132 allows for suits filed by “an administrator, fiduciary, participant, or beneficiary of an employee benefit plan”; however, there is no allegation in the *Complaint* that would lead the Court to conclude that any of Plaintiffs fall under one of said categories. Further, Plaintiffs also failed to allege that they are one of the “persons empowered to bring civil action” under 29 U.S.C. § 1132 (a). Certainly, if Plaintiffs are

¹² The Court notes that, pursuant to 28 U.S.C. § 1406, “[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.” No argument was made to convince the Court that the ERISA claims should be transferred to the appropriate venue, in the interest of justice.

not allowed to file a civil action under ERISA's civil enforcement provision, their claims pursuant to said statute are not plausible either and must be dismissed without prejudice.¹³

C. Plausibility of Plaintiffs' constitutional claims

As stated above, one of Defendants' challenges to Plaintiffs' constitutional claims is their "ripeness". Taking into account that Plaintiffs constitutional claims are directed towards the **ongoing** *Anjo Investigation*, Defendants argue that the Court's intervention at this time would present premature challenges to the DOL's proceedings.

The Court notes that "[t]he issue of ripeness turns on the 'fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" W.R. Grace & Co.-Conn. v. U.S. E.P.A., 959 F.2d 360, 364 (1st Cir. 1992)(citing Lincoln House, Inc. v. Dupre, 903 F.2d 845, 847 (1st Cir. 1990). "Insofar as ripeness is rooted in Article III, we must consider it as part of our assessment of whether we have jurisdiction to hear the lawsuit." Reddy v. Foster, 845 F.3d 493, 500–01 (1st Cir. 2017). The First Circuit has clarified that the ripeness analysis has two prongs: "fitness" and "hardship." Therefore,

[f]irst, the court must consider whether the issue presented is fit for review. This branch of the test typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed. The second branch of the Abbott Labs test requires the court to consider the extent to which hardship looms -- an inquiry that typically "turns upon whether the challenged action creates a 'direct and immediate' dilemma for the parties.

Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 535 (1st Cir. 1995) (citation omitted) (quoting W.R. Grace & Co. v. EPA, 959 F.2d 360, 364 (1st Cir. 1992)).

¹³ Considering that Plaintiffs' ERISA claims are not plausible as they do not meet the basic requirements established in 29 U.S.C. § 1132; the Court finds that it is unnecessary to evaluate Defendants' additional contentions as to the merits of Plaintiffs' ERISA claims.

As to the first part of the test, the Court finds it necessary to examine the ripeness requirements in the context of agency decisions. To that end, it is worth noting that the Supreme Court has explained that “ripeness” is a “doctrine designed ‘to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, **and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.**” Nat’l Park Hosp. Ass’n v. Dep’t of Interior, 538 U.S. 803, 807–08, 123 S. Ct. 2026, 2030, 155 L. Ed. 2d 1017 (2003)(internal citations omitted)(emphasis provided).

Moreover, the Supreme Court has warned that “**judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise.**” F.T.C. v. Standard Oil Co. of Cal., 449 U.S. 232, 239, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980)(emphasis provided). Therefore, “‘agency action is fit for review if the issues presented are purely legal and **the regulation at issue is a final agency action.**” Ass’n of Am. Med. Colleges v. United States, 217 F.3d 770, 780 (9th Cir. 2000)(citing Anchorage v. United States, 980 F.2d 1320, 1323 (9th Cir.1992))(emphasis provided); W.R. Grace & Co.--Conn. v. U.S. E.P.A., 959 F.2d at 364; “The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.” Franklin v. Massachusetts, 505 U.S. 788, 797, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992).

Finally, when addressing the second prong, the Court must examine whether “the challenged action creates a ‘direct and immediate’ dilemma for the parties.” Ernst & Young v. Depositors Economic Protection Corp., 45 F.3d 530, 535 (1st Cir. 1995) (internal citations omitted). “Plaintiff must generally demonstrate both prongs of the test to establish ripeness.” Matos v. O'Neill, 220 F. Supp. 2d at 103.

As previously stated, and taking into account the allegations provided by Plaintiffs in the *Complaint*, it is undisputed that the *Anjo Investigation* is ongoing and the DOL has not entered any final agency decision with regards to the result of said investigation. Considering this scenario, this Court's intervention on the DOL's ongoing investigation would be premature. Therefore, Plaintiffs' constitutional claims do not pass the "ripeness" criteria necessary to justify judicial intervention at this stage. As a result, the Court dismisses, without prejudice, all of Plaintiffs' constitutional claims.

IV. CONCLUSION

Pursuant to the above, the Court hereby GRANTS Defendants' *Motion for Judgment on the Pleadings*. Consequently, the Court DISMISSES, without prejudice, all of Plaintiffs' claims asserted in the *Complaint*.

IT IS SO ORDERED.

In San Juan, Puerto Rico, on March 28, 2022.

S/Daniel R. Domínguez
Daniel R. Domínguez
United States District Judge

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

SUFFOLK ADMINISTRATIVE
SERVICES, LLC, et al.,

Plaintiffs,

V.

UNITED STATES DEPARTMENT OF
LABOR, et al.,

Defendants.

Case No. 3:21-cv-01031-DRD

ANSWER

Defendants, the United States Department of Labor, the Secretary of Labor, and the United States, by and through undersigned counsel, hereby answer Plaintiffs' Complaint, ECF No. 1, as follows:

FIRST DEFENSE

Venue is not proper in the District of Puerto Rico for Count V.

SECOND DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

The United States has not waived its sovereign immunity to permit a jury trial over the matters subject to this action.

FOURTH DEFENSE

Defendants answer the individually numbered paragraphs of the Amended Complaint, using the same numbering contained in the Amended Complaint, as follows:

INTRODUCTION

1. This paragraph is denied except to admit that Plaintiffs presented a proposed business structure involving “novel” partnerships during meetings with U.S. Department of Labor (Department) officials.

2. Admitted.

3. Defendants are without sufficient knowledge or information to admit or deny the allegations in this paragraph. Defendants aver that Alexander Renfro is the owner of Anjo, LLC.

4. Defendants are without sufficient knowledge or information to admit or deny the allegations in the first sentence. The remaining sentences of this paragraph characterize the November 8, 2018 Advisory Opinion Request, and the Court is respectfully referred thereto for the terms thereof.

5. This paragraph is denied except to admit that revised versions of the November 8, 2018 Advisory Opinion Request were submitted on January 15, 2019 and February 28, 2019; and to further admit that Plaintiffs’ Exhibit 2 is a true and correct copy of the February 28, 2019 revised Advisory Opinion Request (Revised Request).

6. This paragraph characterizes the Revised Request, and the Court is respectfully referred thereto for the terms thereof. To the extent this paragraph asserts facts about LP Management Service’s (LPMS) intentions, Defendants are without sufficient knowledge or information to admit or deny the allegations in this paragraph.

7. Defendants admit that Suffolk Administrative Services, LLC (SAS) is a Puerto Rican limited liability company with principal offices located in Guaynabo, Puerto Rico, and further admit that SAS designs products for and services both the “novel Partnership Plan structure” (hereinafter, “novel partnership plans”) and traditional employee benefit plans unrelated

to the partnerships. Defendants deny that the group health plans with which SAS is associated are actually self-insured. Defendants are without sufficient knowledge or information to admit or deny the remaining allegations in this paragraph.

8. Defendants admit that Providence Insurance Company, I.I. (PIC) is a Puerto Rican international insurance company with principal offices located in San Juan, Puerto Rico, and further admit that PIC services both the “novel partnership plans” and traditional employee benefit plans unrelated to the partnerships. Defendants deny that what PIC provides is reinsurance, and further deny that the group health plans with which it is affiliated are actually self-insured, and further deny the balance of the allegations in this paragraph.

9. This paragraph is denied, except to admit that Anjo LLC (Anjo) is a Tennessee limited liability company which does not directly participate in or provide services to any of the health plans or products designed and serviced by PIC, PIP, and SAS, and to admit that Defendants have reason to believe that Anjo is a holding company that partially owns SAS and PIP, and indirectly owns PIC.

10. Defendants admit that Providence Insurance Partners, LLC (PIP) is a Tennessee limited liability company, and further admit that PIP designs products for and services both the “novel partnership plans” and traditional employee benefit plans unrelated to the partnerships. Defendants deny that what PIC provides is reinsurance, and further deny that the group health plans with which it is affiliated are actually self-insured, and further deny the balance of the allegations in this paragraph.

11. Defendants are without sufficient knowledge or information to admit or deny the allegations in this paragraph.

12. The first sentence is denied, except to admit that several state attorneys general submitted a letter dated February 21, 2019 to the Department (AG Letter), attached as Plaintiffs' Exhibit 3, and the Court is respectfully referred thereto for the terms thereof. The second sentence is admitted.

13. This paragraph is denied, except to admit that the Department did not respond in writing to the authors of the AG Letter, and to further admit that the contents of the AG Letter were considered in preparing the January 24, 2020 Advisory Opinion.

14. This paragraph is denied, except to admit that the January 24, 2020 Advisory Opinion was issued within one year of the Revised Request but more than one year after November 8, 2018, and to further admit that LPMS and Data Marketing Partnership LP filed suit against the Department of Labor on October 8, 2019 (*Data Marketing Partnership* case).

15. Denied.

16. This paragraph is denied, except to admit that the Department issued its Advisory Opinion responding to the Revised Request on January 24, 2020, and to further admit that Plaintiffs' Exhibit 4 is a true and correct copy of Advisory Opinion 2020-01A (Advisory Opinion).

17-18. Denied.

19. This paragraph is denied, except to admit that the parties to the *Data Marketing Partnership* case continued to litigate after the Department issued the January 24, 2020 Advisory Opinion.

20. This paragraph is denied, except to admit that the U.S. District Court for the Northern District of Texas granted the plaintiffs' motion for summary judgment; Defendants further aver that the judgment in the *Data Marketing Partnership* case is on appeal to the U.S. Court of Appeals for the Fifth Circuit, *see* Case No. 20-11179.

21. This paragraph contains Plaintiffs' characterization of this action to which no response is required, but insofar as one is deemed required, denied.

JURISDICTION AND VENUE

22-23. These paragraphs contain conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

24. The first sentence is admitted. The second sentence contains conclusions of law to which no answer is required.

25. The first sentence is admitted. The second sentence contains conclusions of law to which no answer is required.

26. The first sentence is admitted. The second sentence contains conclusions of law to which no answer is required.

27. The first sentence is admitted. The second sentence contains conclusions of law to which no answer is required.

28. The first sentence contains conclusions of law to which no answer is required, but insofar as one is deemed required, denied; Defendants further aver they are unaware of any employee benefit plan relevant to the Department's investigation that has a principal office in Puerto Rico; and further aver that none of the subpoenas described in Defendants' response to paragraph 61, below, were issued to a plan with a principal office in Puerto Rico. The second sentence contains conclusions of law to which no answer is required. The third sentence is denied, except to admit that the Department and Secretary of Labor are sued in their official capacity.

PARTIES

29. The first and second sentences are denied. The remaining sentences contain conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

30. Admitted.

31. This paragraph is denied, except to admit Eugene Scalia served as Secretary of Labor until January 20, 2021, and to further admit that Martin J. Walsh was confirmed as Secretary of Labor on March 23, 2021.

32. This paragraph contains conclusions of law to which no answer is required.

FACTS

33. This paragraph contains Plaintiffs' characterization of this action to which no response is required, but insofar as one is deemed required, denied.

PETITIONING THE GOVERNMENT

34-39. These paragraphs are denied, except [1] to admit that the Department's Employee Benefits Security Administration (EBSA) is responsible for, among other things, interpreting and administering the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.; [2] to further admit that at some point in 2018 Alexander Renfro met with then-Assistant Secretary of Labor for EBSA, Preston Rutledge, regarding the "novel partnership plans"; and [3] to further admit that Mr. Rutledge stated that EBSA's career staff would also need to review Mr. Renfro's proposal if Mr. Renfro wanted guidance.

40. This paragraph is denied, except to admit that Plaintiffs submitted revised advisory opinion requests to the Department on January 15, 2019 and February 28, 2019.

41-42. Denied.

43. This paragraph is denied, except to admit that Plaintiffs submitted revised advisory opinion requests to the Department on January 15, 2019 and February 28, 2019.

44. Defendants are without sufficient knowledge or information to admit or deny the allegations in this paragraph.

45. The first sentence characterizes the AG Letter, and the Court is respectfully referred thereto for the terms thereof. The second is denied, except [1] to admit that the Department did not respond in writing to the authors of the AG Letter; [2] to further admit that the contents of the AG Letter were considered in preparing the January 24, 2020 Advisory Opinion; and [3] to further admit that the Department responded to the Revised Request on January 24, 2020.

46. This paragraph is denied, except [1] to admit that on March 6, 2019, several Department officials, including then-Chief of Staff Nicholas Geale, met with Alexander Renfro, Christopher Condeluci, Jeff Landry, and others regarding the Revised Request; [2] to further admit that Department officials questioned Alexander Renfro, Christopher Condeluci, Jeff Landry, and others about the proposed plans described in the Revised Request; [3] to further admit that no Department official made any representations about whether the proposed plans would be encompassed by ERISA; and [4] to further admit that, while Mr. Geale expressed concern about whether the issues raised in the Revised Request would implicate the Department's Association Health Plan rule, no Department official stated that the Department would not respond to the Revised Request.

47-48. Denied.

49. This paragraph is ambiguous about what alleged meeting it refers to and is therefore denied. To the extent it describes state insurance regulation, Defendants admit that state insurance regulators are not bound by the Department's views regarding ERISA coverage, and further admit that at a meeting with Plaintiffs' representatives Mr. Geale explained that regardless of the outcome of the Revised Request the states may still try to regulate.

50. This paragraph is ambiguous about what alleged meeting it refers to, and is therefore denied. To the extent it concerns the March 6, 2019 meeting referenced in Paragraph 46,

it is admitted that Joseph Canary, Director of the Office of Regulations and Interpretations, was in attendance.

51. Denied.

52. Defendants are without sufficient knowledge or information to form a conclusion about what “Plaintiffs believe.” To the extent this paragraph makes factual allegations regarding the Department’s investigation, it is denied except [1] to admit that the Department initiated its investigation of the health plans and products designed and serviced by PIC, PIP, and SAS on April 29, 2019 (Anjo Investigation); [2] to further admit that the Department initiated the Anjo Investigation after receiving several participant complaints and state referrals involving Plaintiffs and entities associated with Plaintiffs, including:

- (a) five referrals from state insurance regulators on August 16, 2018, September 21, 2018, February 8, 2019, February 14, 2019, and April 10, 2019, regarding products, plans and companies associated with Plaintiffs; where the two 2018 were sent because the state regulators were told that the health plans complained about were covered by ERISA; the February 8, 2019 referral involved a complainant who believed they purchased an individual insurance policy, but the plan documents described the plan as a self-funded ERISA plan; and the April 10, 2019 referral specifically mentioned SAS;
- (b) a complaint received on March 17, 2017 involving alleged misrepresentations about health benefits, where the name “Providence LLC” appeared on the complainant’s temporary insurance card and the Department asked and the complainant confirmed that the insurance was not part of an employer-sponsored plan;
- (c) a complaint received on July 14, 2017 involving health insurance that the complainant had found online after they had lost a job, the payment required for the insurance included a membership fee to an alliance for self-employed individuals who were direct sellers, but the complainant was not a direct seller and did not seem to qualify for the alliance or the alliance’s group health plan;
- (d) a Congressional letter dated April 19, 2019, referring an individual complaint received through constituency services regarding a medical claim denial, and the Department determined that the health plan at issue had been purchased through a company that was associated with the Plaintiffs at the time;

[3] to further admit that the Department checked the Better Business Bureau website regarding the company named in the April 19, 2019 complaint, which had been enrolling individuals into Plaintiffs' plans and collecting premiums, and found that 125 complaints had been filed about that company as of April 2019; [4] to further admit that the Anjo investigation's initial purpose was to determine whether the health plans and products designed and serviced by PIC, PIP, and SAS were covered by ERISA and, if so, whether any ERISA violations had occurred; [5] to further admit that, upon receiving the complaints and state referrals, the Department began to suspect that the complaints were possibly related to the plans described in the Revised Request; and [6] to further admit that the Department first issued subpoenas in this investigation on July 19, 2019.

53. This paragraph is denied, except to admit that the Department issued subpoenas to PIC, PIP, and SAS, and other entities that the Department had reason to believe sponsored or serviced health plans and products designed and serviced by PIC, PIP, and SAS, including for both the "novel partnership plans" and traditional employee benefit plans unrelated to the partnerships.

54-55. Denied.

56-57. Defendants are without sufficient knowledge or information to admit or deny the allegations in these paragraphs.

58-60. Denied.

61. This paragraph is denied, except to admit that Plaintiffs' Exhibit 5 contains true and correct copies of 13 subpoenas the Department issued in the Anjo Investigation:

- (a) on July 19, 2019, the Department issued subpoenas to two affiliated partnerships: American Partnership Group, LP, and Data Partnership Group, LP;
- (b) on October 21, 2019, the Department issued subpoenas to seven affiliated partnerships: My Home Group Data Partnership, LP, Global Data Group, LP, Elite Data Group, LP, America's Independent Workers DG, LP, America's Consumers & Affiliates LP, Agridata Partnership Group, LP, United Data Group, LP;
- (c) on October 21, 2019, the Department issued subpoenas to SAS and PIP;

(d) on December 13, 2019, the Department issued a subpoena to LPMS;

(e) on July 7, 2020, the Department issued a subpoena to PIC.

Defendants further aver that the Department issued 13 additional subpoenas, which Plaintiffs did not attach to their complaint, to entities that the Department had reason to believe sponsored or serviced employee benefit plans designed and serviced by PIP, SAS, and PIC, including:

(f) on July 19, 2019 to one general partnership, one third party claims administrator, and one company that collected premiums for Plaintiffs' plans;

(g) on August 19, 2019 to two actuary companies that conducted analyses for Plaintiffs' plans;

(h) on October 21, 2019, to two other third party claims administrators;

(i) on November 7, 2019, to two companies that enroll employers for Plaintiffs' plans;

(j) on November 26, 2019, to another company that enrolls employers for Plaintiffs' plans;

(k) on January 29, 2020, to two sister companies that collected premiums for Plaintiffs' plans; and

(l) on April 1, 2020, a second subpoena to one of the third party administrators requesting more information.

62. This paragraph is denied, except to admit that the Department issued its subpoenas pursuant to 29 U.S.C. § 1134(a)(1) which provides authority to determine whether someone "has violated or is about to violate [ERISA]."

63. This paragraph is denied, except [1] to admit that the Department initiated the Anjo Investigation while it was considering the Revised Request and pursued that investigation separate from its consideration of the Revised Request; [2] to further admit that the Department continued the Anjo investigation after January 24, 2020, in light of the Department's clear jurisdiction under ERISA to investigate the health plans and products designed and serviced by PIC, PIP, and SAS to the extent the health plans and products were for traditional employee benefit plans, [3] to further admit that information obtained regarding the "novel partnership plans" remained part of

the Anjo investigation after January 24, 2020 and that the creators of those plans were seeking to be covered by ERISA and had filed suit seeking to enforce that view; [4] to further admit the entities to which the Department issued subpoenas are involved in the design, maintenance and/or administration of health plans or products designed and serviced by PIC, PIP, and SAS, including both the “novel partnership plans” and traditional employee benefit plans unrelated to the partnerships; and [5] to further admit that during the course of the investigation, the Department has continued to receive additional referrals and complaints involving Plaintiffs and entities associated with Plaintiffs, including ten referrals from state insurance regulators dated May 23, 2019, July 25, 2019, September 25, 2019, September 26, 2019, January 23, 2020, April 30, 2020, June 12, 2020, two on June 26, 2020, and July 22, 2020, as well as one more individual complaint on October 8, 2019.

64. This paragraph characterizes the January 24, 2020 Advisory Opinion, attached as Plaintiffs’ Exhibit 4, and the Court is respectfully referred thereto for the terms thereof.

65. This paragraph is denied, except to admit that the U.S. District Court for the Northern District of Texas concluded that LPMS and Data Marketing Partnership, LP were encompassed by ERISA.

66. This paragraph is denied, except to admit that the Department has pursued the Anjo Investigation to determine whether any relevant entity has violated or is about to violate ERISA; and to further admit that under the judgment of the U.S. District Court for the Northern District of Texas, it is plainly appropriate to assess whether Plaintiffs and related entities are complying with ERISA’s requirements.

67. The first sentence is denied. The second sentence is denied, except to admit that Department oversight must comply with the United States Constitution and ERISA. The third

sentence is denied to the extent it implies that the Anjo Investigation is a “baseless, retaliatory fishing expedition.”

68-69. Denied.

70. The first sentence is denied. With regard to the second sentence, Defendants deny that the Anjo Investigation is retaliatory and are without sufficient knowledge or information to admit or deny the remaining allegations in this sentence.

71. Defendants deny that the Anjo Investigation is “seemingly interminable.” Defendants are without sufficient knowledge or information to admit or deny the remaining allegations in this paragraph.

72. Defendants deny that the Anjo Investigation is retaliatory or “seemingly interminable;” Defendants further aver that the Department granted extensions on the production deadlines for every subpoena issued in the Anjo Investigation, upon request of the entities that received the subpoenas. Defendants are without sufficient knowledge or information to admit or deny the remaining allegations in this paragraph.

73. Defendants deny that the Anjo Investigation is retaliatory. Defendants are without sufficient knowledge or information to admit or deny the remaining allegations in this paragraph.

74. Denied.

75. Defendants deny both that the Anjo Investigation is abusive and that any aspect of its investigation must be stopped by the Court.

DOL CONTINUES TO DISREGARD ITS OWN RULES

76. This paragraph is denied, except to admit that Executive Order 13924, Regulatory Relief to Support Economic Recovery was issued on May 19, 2020, see 85 Fed. Reg. 31353 (May 22, 2020); to further admit that Executive Order 13924 specified that it was “not intended to, and

does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person,” 85 Fed. Reg. at 31356; and to further admit that Executive Order 13924 was revoked by Executive Order 14018, Revocation of Certain Presidential Actions, see 86 Fed. Reg. 11855 (Mar. 1, 2021).

77. Denied.

78. This paragraph is denied, except to admit that Paul J. Ray, Administrator for the Office of Information and Regulatory Affairs (OIRA), issued a memorandum dated August 31, 2020; and to further admit that Plaintiffs’ Exhibit 6 is a true and correct copy of that memorandum.

79. This paragraph characterizes the August 31, 2020 OIRA memorandum and the Court is respectfully referred thereto for the terms thereof. Defendants deny that the Department violated any of the terms of the OIRA memorandum, and further deny that the Anjo Investigation was “retaliatory.”

80-81. These paragraphs characterize the August 31, 2020 OIRA memorandum and the Court is respectfully referred thereto for the terms thereof.

82. Denied.

83-85. These paragraphs characterize the August 31, 2020 OIRA memorandum and the Court is respectfully referred thereto for the terms thereof.

86-89. Denied.

90. The first sentence is denied. The second sentence characterizes ERISA Procedure 76-1, 41 Fed. Reg. 36281 (Aug. 27, 1976), and the Court is respectfully referred thereto for the terms thereof.

91-93. Denied.

94. This paragraph is denied. Defendants specifically deny that the Department has violated its own policies or any provision of the Constitution.

**DOL REFUSES TO PROVIDE PLAINTIFFS INFORMATION ON SCOPE AND
PURPOSE OF INVESTIGATION**

95. This paragraph characterizes a letter from Jonathan Crumly dated November 6, 2020, attached in Plaintiffs' Exhibit 7, and the Court is respectfully referred thereto for the terms thereof.

96. This paragraph characterizes Jonathan Crumly's November 6, 2020 letter, and the Court is respectfully referred thereto for the terms thereof. To the extent this paragraph alleges facts beyond a characterization of Jonathan Crumly's November 6, 2020 letter, Defendants admit that the Department received approximately 20,000 documents comprised of over 200,000 pages in response to the subpoenas attached in Plaintiffs' Exhibit 5, including information related to the "novel partnership plans" as well as traditional employee benefit plans unrelated to the partnerships; Defendants are without sufficient knowledge or information to admit or deny the balance of the allegations.

97. This paragraph characterizes Jonathan Crumly's November 6, 2020 letter, and the Court is respectfully referred thereto for the terms thereof.

98. Defendants are without sufficient knowledge or information to admit or deny the allegations in the first sentence regarding Plaintiffs' motives. The second sentence and associated bullets characterize Jonathan Crumly's November 6, 2020 letter, and the Court is respectfully referred thereto for the terms thereof.

99. Defendants are without sufficient knowledge or information to admit or deny the allegations in this paragraph regarding Plaintiffs' intent and mental state.

100. Denied.

101. This paragraph characterizes a letter from Katrina Liu dated December 14, 2020, attached in Plaintiffs' Exhibit 7, and the Court is respectfully referred thereto for the terms thereof.

102. Denied.

103. The first three sentences of this paragraph characterize a letter from Jonathan Crumly dated December 30, 2020, attached in Plaintiffs' Exhibit 7, and the Court is respectfully referred thereto for the terms thereof. The fourth sentence is denied.

104. Admitted.

CAUSES OF ACTION

COUNT I (VIOLATIONS OF THE FIRST AMENDMENT)

105. Defendants restate and incorporate by reference their responses to Paragraphs 1 through 104 of the Complaint.

106-107. These paragraphs contain conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

108-112. Denied.

113-114. These paragraphs contain conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

COUNT II (VIOLATIONS OF THE FIRST AMENDMENT – FREEDOM OF ASSOCIATION)

115. Defendants restate and incorporate by reference their responses to Paragraphs 1 through 114 of the Complaint.

116-117. These paragraphs contain conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

118-120. Denied.

121-122. These paragraphs contain conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

COUNT III (VIOLATIONS OF THE FIFTH AMENDMENT – EQUAL PROTECTION UNDER THE DUE PROCESS CLAUSE)

123. Defendants restate and incorporate by reference their responses to Paragraphs 1 through 122 of the Complaint.

124. This paragraph contains conclusions of law to which no answer is required.

125. This paragraph contains conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

126-130. Denied.

131-132. These paragraphs contain conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

COUNT IV (VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT (“APA”))

133. Defendants restate and incorporate by reference their responses to Paragraphs 1 through 132 of the Complaint.

134-136. These paragraphs contain conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

137. Defendants admit that the United States Department of Labor is an “agency” as defined by the APA, 5 U.S.C. § 551(1).

138-140. Denied.

COUNT V (VIOLATIONS OF ERISA)

141. Defendants restate and incorporate by reference its responses to Paragraphs 1 through 140 of the Complaint.

142-143. Denied.

144. This paragraph is denied, except to admit that the subpoenas issued in the Anjo Investigation were sent to entities involved with Plaintiffs' business relating to the partnership plans and/or traditional employee benefit plans unrelated to the partnerships.

145. Denied.

146. This paragraph is denied, except to admit that all of the subpoenas issued in connection with the Anjo Investigation were issued pursuant to ERISA, 29 U.S.C. § 1134(a)(1).

147. This paragraph contains conclusions of law to which no answer is required, but insofar as one is deemed required, Defendants deny the allegation that the Anjo Investigation constituted "retaliation."

148. This paragraph contains conclusions of law to which no answer is required, but insofar as one is deemed required, denied.

PRAYER FOR RELIEF

The remaining paragraphs set forth plaintiffs' prayer for relief to which no answer is required, but insofar as an answer is deemed required, Defendants deny that plaintiffs are entitled to the relief requested or to any relief at all.

Defendants hereby deny all allegations of the Amended Complaint not otherwise specifically answered above.

Wherefore, having fully answered, Defendants respectfully request that the Court enter judgment dismissing the Complaint with prejudice, and awarding Defendants their costs and attorney's fees and such other relief as the Court deems just and proper.

* * * *

I HEREBY CERTIFY that on this same date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of the instant filing to the attorney(s) of record.

RESPECTFULLY SUBMITTED, this 21st day of May, 2021.

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

SUFFOLK ADMINISTRATIVE)
SERVICES, LLC, PROVIDENCE)
INSURANCE COMPANY, I.I.,)
PROVIDENCE INSURANCE)
PARTNERS, LLC, and ANJO, LLC,)

Plaintiffs,)

Civil No. _____

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.)

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

TO THE HONORABLE COURT:

COME NOW Plaintiffs, Suffolk Administrative Services, LLC (“SAS”), Providence Insurance Company, I.I. (“PIC”), Providence Insurance Partners, LLC (“PIP”), and Anjo, LLC (“Anjo”) and file this Verified Complaint for Declaratory and Injunctive Relief against Defendants United States Department of Labor (“DOL”), Eugene Scalia, in his official capacity as Secretary of the United States Department of Labor, and shows the Court as follows:

INTRODUCTION

1. Plaintiffs sought guidance from DOL to ensure that a proposed business structure to provide a novel way for companies to provide access to health coverage to their personnel and recruits complied with applicable law. Plaintiffs never approached this novel structure with a “catch us if you can” philosophy. Rather, Plaintiffs literally “walked through the front door” of DOL seeking its guidance and view on the applicable law before implementing it. Plaintiffs relied in good faith on the unequivocal representations and guidance of DOL officials regarding the novel concept. For this, DOL has been punishing Plaintiffs with a retaliatory “investigation.”

2. On November 8, 2018, LP Management Services, LLC (“LPMS”), filed a formal Advisory Opinion Request (“2018 Request”) with the United States Department of Labor (“DOL”) seeking guidance on whether a proposed health benefit plan (“Plan”) was a lawful single employer health plan under the Employee Retirement Income Security Act (“ERISA”). A true and correct of the 2018 Request is attached hereto as Exhibit 1.

3. The structure of the Plan was developed by Alexander Renfro (“Mr. Renfro”), the Chief Legal Officer of PIP and an officer of Anjo, SAS and PIC. Mr. Renfro is a benefits attorney licensed in the State of Tennessee. Mr. Renfro received a juris doctor from Southern Methodist University Dedman School of Law, and a certificate in employee benefits, as well as an LLM in taxation from Georgetown University Law Center.

4. Mr. Renfro, as attorney for LPMS, was the principal author of the 2018 Request. The 2018 Request detailed the legal and factual basis for application of ERISA to the Plan building upon the previously recognized concept under ERISA of “working owners.” Given the novel nature of the structure applicable to limited partnerships, LPMS sought guidance from DOL with respect to four issues, seeking confirmation from DOL that:

- a. A single-employer self-insured group health plan sponsored by a limited partnership is an “employee welfare benefit plan” within the meaning of ERISA § 3(1).
- b. A single-employer self-insured group health plan sponsored by a limited partner is a “group health plan” within the meaning of Part 7 of Subtitle B of Title I of ERISA (“Part 7”).
- c. The limited partners participating in the limited Partnership’s single-employer self-insured group health plan are “participants” within the meaning of ERISA Section 3(7).

d. The single-employer self-insured group health plan sponsored by the limited partnership is governed by Title I of ERISA.

5. On January 15, 2019, and on February 27, 2019, Mr. Renfro revised the 2018 Request culminating in a final revised request (“Revised Request”) to include additional factors and legal arguments for consideration by DOL. A true and correct copy of the Revised Request is attached hereto as Exhibit 2.

6. As noted in the Revised Request, LPMS sought to implement this Plan structure through several limited partnerships for which LPMS would act as general partner (the “Partnership Plans”).

7. SAS is a Puerto Rican limited liability company with principal offices located in Guaynabo, Puerto Rico, providing benefits consulting and vendor management company providing compliance assistance to employers located in the United States mainland to implement, administer, and maintain self-insured group health plans. In addition to traditional benefits administration services, SAS provides other services including ERISA compliance advice, Affordable Care Act compliance advice, advice on local or federal wage ordinance provisions, and vendor management to employers with self-insured group health plans. SAS provides such benefits consulting and vendor management services to employers implementing both traditional self-insured group health plans and the novel Partnership Plan structure.

8. PIC is Puerto Rican international insurance company with principal offices located in San Juan, Puerto Rico, providing reinsurance for employers located in the United States mainland implementing both traditional self-insured group health plans and the novel Partnership Plan structure.

9. Anjo is a Tennessee limited liability company that does not provide any services of any kind to any individual or entity relating to ERISA or group health plans, be they fully insured or self-insured. Anjo does not participate in any ERISA plans of any nature nor does it act as a vendor to any ERISA plan. Its only involvement in any of the issues relevant to this Complaint is its connection to Mr. Renfro.

10. PIP is a Tennessee limited liability company providing consultation and advice on structuring reinsurance coverage for employers implementing both traditional self-insured group health plans and the novel Partnership Plan structure.

11. SAS, PIC, and PIP all expended resources, time, and expertise to develop products tailored to assist employers seeking to implement the novel Partnership Plan structure.

12. On February 21, 2019, several state Attorneys General sent DOL a letter encouraging them to act on the Revised Request because the applicability of ERISA to the Plan heavily impacts the economic and public health interests of the states (“AG Letter”). A true and correct copy of the AG Letter is attached hereto as Exhibit 3.

13. DOL has never provided any response to the AG Letter.

14. For more than one year, DOL provided no formal response to the Revised Request, forcing LPMS and Data Marketing Partnership LP (“DMP”), a limited partnership for which LPMS serves as general partner, to file suit in the United States District Court for the Northern District of Texas, *Data Marketing Partnership, LP, and LP Management Services, LLC v. Department of Labor*, Civil Case 4:19–cv–00800–O (the “AO Case”).

15. While DOL refused to make any formal response to the AO Request and AG Letter, and in so doing violated the terms of its own published policies for AO review and response, DOL simultaneously opened a retaliatory investigation against Anjo, targeting the Partnership Plans,

Plaintiffs, and several related organizations in a transparent effort to provide a post hoc explanation for their lack of action on the Revised Request, and with the transparent aim to chill the speech and association rights of Plaintiffs and those organizations in violation of the First and Fifth Amendments to the United States Constitution (the “Anjo Investigation”).

16. On January 24, 2020, six business days before its response was due in the AO Case, and more than fourteen months after the Request had been duly and properly filed, DOL finally issued an adverse action response (“Response”) to the AO Request. A true and correct copy of the AG Letter is attached hereto as Exhibit 4.

17. The six-page Response was arbitrary and capricious, containing almost no legal analysis by DOL and, in direct violation of ERISA Procedure 76-1, was based on erroneous facts and misstatements of the proposed business structure.

18. Because the Response contained so many factual misstatements and so little legal analysis, it appeared to be just another calculated effort by DOL to hamper implementation of the novel structure at the expense of Plaintiffs’ constitutional rights and the rights of employers, limited partners, and employees seeking the benefits of the Partnership Plans and similar plans providing affordable access to health care.

19. In light of the adverse Response, the AO Case continued.

20. LPMS and DMP eventually received relief when the court granted its Motion for Summary Judgment setting aside DOL’s Response (*See*, AO Case at Doc. 37).

21. This lawsuit seeks relief from the ongoing retaliatory and unconstitutional acts of DOL related to their purported Anjo Investigation.

JURISDICTION AND VENUE

22. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (Federal Question) and 2201 (Declaratory Judgment Act), 29 U.S.C. § 1132(k), and 5 U.S.C. § 702 (Administrative Procedure Act).

23. The United States has waived its sovereign immunity in this action pursuant to 5 U.S.C. § 702, 28 U.S.C. § 2201, and 29 U.S.C. § 1132(k).

24. SAS is a Puerto Rican limited liability company with a principal place of business located at Metro Office Park, 2 Calle 1, Suite 400, Guaynabo, PR 00968. SAS is subject to the jurisdiction and venue of the Court.

25. PIC is a Puerto Rican international insurer with a principal place of business located at 954 Ponce de Leon Avenue, Miramar Plaza, Suite 802, San Juan, PR 00907. PIC is subject to the jurisdiction and venue of the Court.

26. PIP is a Tennessee limited liability company with a principal place of business located at 3200 West End Ave, Suite 500, Nashville, TN 37203. PIP voluntarily submits itself to the jurisdiction and venue of the Court.

27. Anjo is a Tennessee limited liability company with its business office located at 5032 South Bur Oak Place, Sioux Falls, SD 57108. Anjo voluntarily submits itself to the jurisdiction and venue of the Court.

28. Venue is proper in this district pursuant to the express provisions of ERISA, 29 U.S.C. §§ 1132(k). Venue is also proper in this district pursuant to 28 U.S.C. §§ 1391(b) and (e)(1). Defendants are United States agencies or officers sued in their official capacities; Defendants reside in this District; and a substantial part of the events giving rise to this action occurred in this District.

PARTIES

29. Plaintiffs are aggrieved by the unreasonable, retaliatory investigation into all businesses engaged in providing services to the Partnership Plans. This investigation, and the vindictive manner in which it has been carried out over the past 18 months, evinces a clear design to silence Plaintiffs and otherwise inflict damage upon Plaintiffs by any and all means available to DOL. Notably, and as further described herein, DOL is violating its own procedures for the conduct of such investigations. Accordingly, Plaintiffs have standing to bring this action pursuant to 29 U.S.C. § 1132(k).

30. Defendant DOL is an agency of the United States government and has responsibility for implementing and enforcing portions of ERISA. It is an “agency” under 5 U.S.C. § 551(1).

31. Defendant Eugene Scalia (“Secretary”) is the Secretary of Labor and is sued solely in his official capacity.

32. Defendant the United States of America is sued as permitted under 5 U.S.C. § 702.

FACTS

33. This case arises out of DOL’s blatant retaliation against the Plaintiffs for exercising their constitutionally protected rights and, in doing so, relying on the unequivocal representations and guidance of DOL officials regarding a business structure which provided the personnel and prospective recruits of its client companies with a novel way to access private health coverage.

PETITIONING THE GOVERNMENT

34. In October, 2018 (the “October Meeting”), the Plaintiffs met with the United States DOL in an effort to be transparent with the relevant regulatory agencies that would interact with the Plan, its participants, and its sponsors.

35. In attendance at the October Meeting and representing the interests of the Plaintiffs was Alex Renfro, among others.

36. In attendance at the October Meeting and representing the interests of DOL was Preston Rutledge, then Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA), the division of DOL responsible for ERISA compliance and interpretations.

37. By all accounts, the October Meeting was very successful. Plaintiffs' representatives explained the plan structure to DOL representatives and provided high level detail of the goals of the plan and the business structure.

38. At the October Meeting, Assistant Secretary Rutledge told representatives from Plaintiffs that an Advisory Opinion Request was the best route to ensure approval of the Plan by DOL, which Mr. Renfro promptly submitted.

39. The parties parted ways with an explicit agreement to continue discussions so that DOL could be comfortable approving the Plan as ERISA compliant.

40. In the weeks and months that followed, occasional informal conversations continued between representatives of Plaintiffs and representatives of DOL in anticipation that a more formal meeting or exchange would soon follow.

41. Assistant Secretary Rutledge verbally expressed to Christopher Condeluci, an advisor to Plaintiff SAS, that he didn't see why DOL needed to issue an Advisory Opinion, because ERISA already allows partners to be treated as employees for purposes of plan eligibility.

42. During this conversation, Assistant Secretary Rutledge told Mr. Condeluci that LPMS should "just do it," meaning implement the Plan.

43. As a result of this and other advice from DOL, the 2018 request was slightly revised and resubmitted to DOL in early 2019, culminating in the final Revised Request submitted on or about February 26, 2019.

44. Simultaneously, and in reliance on Assistant Secretary Rutledge's statements, LPMS began accepting limited partners into DMP and formed the Plan for the same.

45. At or around this time, seven sitting state Attorneys General sent a letter to then DOL Secretary Acosta, stressing the urgency of the public health problem that the LPMS structure addressed, and requesting expedited consideration of the Revised Request. DOL made no formal response to any of these submissions.

46. Instead, during a meeting on March 6, 2019, then DOL Chief of Staff Nicholas Geale told a group of representatives from the Plaintiffs and interested states, including Mr. Renfro, Mr. Condeluci, and Louisiana Attorney General, Jeff Landry (the lead signatory to the aforementioned letter) that although the Partnership Plan structure was "ingenious" and that he "wished he'd thought of it," DOL could not respond to the Revised Request due to perceived conflict with litigation around DOL's new Association Health Plan ("AHP") rule.

47. At one point during the meeting, representatives from DOL became animated and said that if the Plaintiffs' group disagreed about DOL's priorities, they should "take it up with the White House," which had instructed DOL not to approve the Revised Request.

48. In a subsequent meeting between Mr. Condeluci and Mr. Geale at DOL, Mr. Geale proposed that if LPMS would withdraw its AO request (and/or cease pressing for an answer to it), Mr. Geale would "look [LPMS representatives] in the eye" and promise that DOL would not investigate or otherwise interfere with any LPMS-managed partnership plans.

49. Representatives for Plaintiffs attempted to explain to Mr. Geale that even assuming DOL refrained from investigating or hampering DMP, the fifty separate state insurance regulators could pose significant and indefinite regulatory burdens on DMP through investigations and rulings of their own. It simply was not practical or advisable to rely on handshake promises with the looming threat of politically motivated investigations by individual states in the absence of an ERISA ruling.

50. Several staff members of DOL were present at this meeting, including, upon information and belief, members of the enforcement division of DOL and Joseph Canary, who is the Director of the Office of Regulations and Interpretations and the purported author of the adverse Response.

51. It turns out Plaintiffs' reticence to accept handshake deals with DOL was well-founded, because once Plaintiffs declined DOL's offer, DOL embarked on a fishing expedition through what can only be described as a vindictive and retaliatory investigation.

52. Plaintiffs believe the first subpoena related to the Anjo Investigation was issued by DOL shortly after the earlier described meeting in which Joseph Canary was in attendance, thus beginning the investigation into Anjo despite DOL having *never* posed a single written question or other formal response to the Revised Request or the AG Letter. This lack of interaction on the Revised Request is highly unusual for DOL's advisory opinion process, as questions from DOL to the requestor routinely occur following submission of an advisory opinion request.

53. DOL issued subpoenas to almost every key entity doing business with Anjo, SAS, or PIP, including some businesses that have nothing whatsoever to do with any partnership plans.

54. The clear intent of the investigation and the subpoenas is to intimidate Plaintiffs and their partners, and to stifle their speech and associational rights, while inflicting as much economic damage on Plaintiffs as possible.

55. The maltreatment by DOL notwithstanding, Plaintiffs have complied with all requests, and encouraged their partners to do the same.

56. But such compliance comes at a price, having collectively cost hundreds of thousands of dollars and immeasurable time and energy to date (precious time diverted from serving clients and improving all aspects of Plaintiffs' businesses and those of Plaintiffs' clients, including data collection and marketing).

57. Defendants' actions have also prevented Plaintiffs from growing their business, because they have naturally been obliged to disclose the investigation to all potential new distribution sources, who have all understandably said, "Call us when it's over." Additionally, current vendors and distribution partners of Plaintiffs have either reduced or terminated relations with Plaintiffs as a result of receiving subpoenas in the Anjo Investigation.

58. Immediately before the initiation of the investigation of Anjo and since that time, DOL rapidly changed course in its dealings with the Plaintiffs regarding the propriety of the Partnership Plans as well.

59. As the investigation got under way, a long-scheduled June 2019 meeting between LPMS, Plaintiffs' representatives, and DOL was abruptly pushed back to July.

60. When the scheduled meeting finally occurred, it lasted only ten minutes and the representatives from DOL demonstrated little interest in continuing discussions with LPMS, Plaintiffs' representatives about the Partnership Plans, or the Revised Request.

61. During this time-period, DOL subpoenaed more than ten entities related to LPMS and Plaintiffs as part of the Anjo Investigation. True and correct copies of these subpoenas are attached hereto as Exhibit 5.

62. The subpoenas from DOL are ostensibly issued pursuant to 29 U.S.C. § 1134(a)(1), which grants EBSA the authority to determine whether someone is violating or about to violate ERISA.

63. Nevertheless, this explanation is especially curious since these subpoenas were issued within weeks of the adverse Response issued by DOL that explicitly presumed the Partnership Plans are not covered by ERISA. Despite this Response, DOL continued to pursue its amorphous, ill-defined, and indefinite “investigation” into Anjo.

64. The Response, in fact, expressly states, “it is the Department’s view that the proposed [Partnership Plan] health benefit programs would not be single-employer group health plans *or ERISA plans at all.*” [Emphasis Added].

65. In the AO Case, the District Court rejected DOL’s view.

66. DOL is attempting to have it both ways. On the one hand, they state that the Partnership Plans covered by the Revised Request are not subject to ERISA, and yet they are investigating Anjo and others under their authority to ensure compliance with ERISA. Now that the District Court in the AO Case has resoundingly rejected this misguided view of DOL, it has failed to abandon (or even curtail) its retaliatory investigation of Anjo. This is emblematic of the abusive, duplicitous, and unconstitutional conduct DOL has subjected Plaintiffs to for well over a year.

67. Plaintiffs welcomed DOL oversight from the beginning – literally walking in its front door to seek guidance on the novel Partnership Plans before implementing them. However, DOL oversight must still comply with the United States Constitution and ERISA. DOL oversight does not extend to baseless, retaliatory fishing expeditions.

68. DOL issued the subpoenas to stifle the ability of Plaintiffs to continue their services with respect to the Partnership Plans, to hinder or altogether block the right of the partners to join together and freely associate with one another, to hinder or altogether block the right of Plaintiffs’

customers to join together and freely associate with one another and/or with Plaintiffs, and in response to LPMS' petition to the government through the 2018 Request and Revised Request.

69. Having been thwarted by the District Court's ruling in the AO Case, DOL is using its abusive investigatory tactics to achieve its desired end by other, unlawful means.

70. DOL's efforts have been highly successful. Indeed, the effect of this retaliatory investigation and the associated subpoenas has been to thwart the ability of Plaintiffs to refine and implement the Partnership Plan, as well as conduct their ordinary course of business with respect to more traditional group health plans.

71. The very existence of the seemingly interminable investigation has understandably both frightened potential Partnership Plan vendors and dissuaded them from providing services to the Partnership Plans.

72. The very existence of the seemingly interminable investigation has understandably both frightened potential Partnership Plan vendors and dissuaded them from providing services to the Partnership Plans and frightened potential vendors and partners from conducting business with Plaintiffs both generally and with respect to Partnership Plans. Additionally, existing vendors of Plaintiffs have reduced or terminated relations with Plaintiffs as a result of the retaliatory Anjo Investigation.

73. Such an outcome threatens the viability and longevity of the Partnership Plans and the limited partnerships sponsoring them, because the success of such limited partnerships depends on attracting many partners, as well as Plaintiffs' viability as going concerns, since their ability to conduct business at all has been stymied by the loss of goodwill and reputation among existing and potential partners while the cost of complying and attempting to respond in good faith to the retaliatory Anjo Investigation continues.

74. The retaliatory investigation has inhibited the ability of Plaintiffs, the clients they service, their clients' plan participants, potential plan participants, and Plaintiffs' customers and business partners to associate with one another on the basis of their political and protected viewpoints.

75. This abuse must stop.

DOL CONTINUES TO DISREGARD ITS OWN RULES

76. On May 19, 2020, the President signed Executive Order 13924, *Executive Order on Regulatory Relief to Support Economic Recovery* ("EO").

77. Because the President is the head of the Executive Branch, the executive agency leaders, including the Secretary of the Department of Labor, are bound by the terms of the EO.

78. Understanding this, Paul J. Ray, Administrator for the Office of Information and Regulatory Affairs, instituted a Memo implementing Section 6 of the EO, at the direction of the Director of the Office of Management and Budget, Russel T. Vaught ("Memo"). A true and correct copy of the Memo is attached hereto as Exhibit 6.

79. Section 6 of the EO directs heads of all agencies to "consider principles of fairness in administrative enforcement and adjudication." To effect this policy, the Office of Information and Regulatory Affairs suggested implementation of a number of practices and procedures, many of which DOL violate by continuing their retaliatory investigation into Plaintiffs.

80. For example, the Memo reiterates many of the directives contained in the EO, stating, "[a]dministrative enforcement should be prompt and fair."

81. It further instructs agencies that, "[a]dministrative enforcement should be free of improper Government coercion." Importantly, it emphasizes, "***[r]etaliatory or punitive motives, or the desire to compel capitulation***, should not form the basis for an agency's selection of targets or investigations ..." (emphasis added).

82. Defendants do not comply with these basic tenants of due process, fairness, and justice highlighted by the Memo and commanded by the EO.

83. Moreover, the Memo suggests certain practices for the conduct of otherwise appropriate investigations. Specifically, the Memo instructs agencies to “ensure that members of the regulated public are not required to prove a negative to prevent liability,” and to “consider applying the rule of lenity in administrative investigations...”

84. The Memo further instructs that “regulations should require investigating staff to either recommend or bring an enforcement action, or instead cease the investigation...”

85. Finally, the Memo provides that “[a]dministrative adjudicators should operate independently of enforcement staff on matters within their areas of adjudication.”

86. The content of this Memo and the EO that inspired its creation, coupled with the aforementioned facts, show not only that the Defendants’ investigation is nothing more than a thinly veiled attempt to silence the speech and association rights of Plaintiffs, but also a blatant violation of the direction of the President expressed in the EO.

87. Beyond the terms of the EO and the implementing Memo, DOL also failed to follow its own procedures, specifically ERISA Procedure 76-1.

88. After submission of the Revised Request, DOL never requested any follow up information from LPMS and it never contacted any representative of LPMS to confirm its understanding of the facts presented in the Revised Request. This failure led to DOL’s flawed understanding of the relevant facts.

89. Crucially, DOL applied little, if any, of the relevant law discussed in the Revised Request to the facts presented. The failure led to DOL’s legally defective Response and, ultimately, the District Court’s rejection of DOL’s position.

90. Further, DOL relied on speculative facts even though ERISA Procedure 76-1 bars such reliance. Specifically, Section 10 of Procedure 76-1 states “The opinion assumes that all material facts and representations set forth in the request are accurate, and applies only to the situation described therein.”

91. In the Response, however, DOL did not accept as true even the most basic facts presented in the Revised Request.

92. For these violations of ERISA Procedure 76-1, among other reasons, the District Court in the AO Case found DOL’s conduct relative to the Response to be arbitrary and capricious.

93. Rather than seek clarification, submit follow up questions to the Revised Request, or follow its own ERISA Procedure 76-1, DOL initiated the retaliatory Anjo Investigation, which is not a permitted form of follow-up listed in the Procedure.

94. This Court should not permit DOL to run roughshod over its own policies and over Constitutional restraints that exist to safeguard American citizens from the considerable power of the administrative state.

**DOL REFUSES TO PROVIDE PLAINTIFFS INFORMATION ON SCOPE AND PURPOSE OF
INVESTIGATION**

95. On November 6, 2020, counsel for Plaintiffs sent a letter to all known DOL officials involved in the investigation in an effort to seek clarity on the purpose, scope, and need for the Anjo Investigation.

96. As noted in the November 6, 2020, letter, Plaintiffs have all cooperated with DOL in the Anjo Investigation at great cost in legal fees and lost productivity. Plaintiffs noted that each is a small business with limited personnel resources available to respond to the subpoenas. Despite these limited resources, Plaintiffs and associated entities implementing the Partnership Plans have

produced nearly 20,000 documents comprising over 200,000 pages in response to the various DOL subpoenas issued in furtherance of the Anjo Investigation.

97. Having expended considerable resources in legal fees and lost productivity cooperating with DOL, Plaintiffs requested that DOL provide responses to reasonable requests for clarifying information on the Anjo Investigation, posing the following questions:

1. Based on the information provided to date in the Anjo Investigation, have any of our clients violated or, in your informed opinion, are they about to violate any provision of Title I of ERISA or any regulation or order thereunder?
 - a. If so, which clients?
 - b. If so, which specific provision of Title I of ERISA or any regulation or order thereunder are they suspected of violating or being “about to violate”?
2. Given that the Anjo Investigation has now continued for over fifteen months, what is the period within which DOL intends to either recommend or bring an enforcement action for any such alleged violation?
 - a. If DOL cannot provide this period, why not?
 - b. If DOL can provide this period, when will it provide this information to our clients?

98. Regardless of whether DOL desired to respond to the above reasonable requests, Plaintiffs sought a path to reach a resolution to the Anjo Investigation without needing to resort to litigation. Specifically, Plaintiffs offered to engage in a constructive dialogue with DOL around the following suggestions:

- The scope and concerns of the Anjo Investigation will be explicitly defined by DOL.
- The Anjo Investigation will hereafter be limited to SAS, PIP, PIC, other vendors to the Partnership Plans, and entities sponsoring the Partnership Plans, and all other entities will receive formal notice that they are not targets of the Anjo Investigation.
- A target date for formal conclusion of the Anjo Investigation will be established and agreed to by the Parties.

- Our clients will voluntarily provide annual reporting on the claims history and average claims trust account balances for any Partnership Plans to DOL every March, beginning March 2021, for 3 years.
- If any of the Partnership Plans modify their plan documents, trust documents, or summaries of benefits and coverage, and SAS, PIP, or PIC are still servicing said organization(s), then copies of these modifications will be provided to DOL within thirty (30) days of their effective date.
- Mr. Renfro will sit down with EBSA and DOL Solicitor's Office at their convenience to describe the model of the Partnership Plans and application of applicable ERISA treatment, including any consumer protection enhancements implemented by the LPs at the recommendation of SAS, PIP, and PIC.

99. As with all of Plaintiffs prior interactions with DOL, the November 6 letter was delivered in good faith seeking to develop a working framework between Plaintiffs and DOL within which DOL could be fully satisfied that the implementation of the Partnership Plans complies with ERISA and allow Plaintiffs to continue their business within the requirements of ERISA.

100. Rather than accept the good faith offer to engage in constructive dialogue on how best to ensure ERISA compliance, satisfy DOL's concerns (assuming there were any legitimate concerns at the onset of the Anjo Investigation) that led to the amorphous and undefined Anjo Investigation, and create a structure for future interactions ensuring Plaintiffs' ERISA compliance, DOL rejected out of hand Plaintiffs' overtures.

101. On December 14, 2020, Katrina Liu, Trial Attorney, Office of the Solicitor of DOL (also an attorney representing DOL in the AO Case), responded on behalf of DOL with a letter essentially noting DOL's "ample authority to conduct its investigation in order to determine whether ERISA violations have or are about to occur." In short, DOL was "not in a position to provide the specific information you seek regarding the timing and scope" of the Anjo Investigation.

102. If there is or ever was a legitimate basis for the Anjo Investigation, DOL refuses to state what it is.

103. On December 30, 2020, Plaintiffs responded to Attorney Liu with citations to authority showing that, while broad, DOL's investigatory authority is not as limitless as portrayed in her letter of December 14. Plaintiffs closed their reply letter with yet another request that DOL reconsider its inexplicable approach to the Anjo Investigation. Plaintiffs noted "In the midst of the harsh economic impacts of this pandemic on all small businesses in America, I would hope DOL would reconsider the position taken in your letter." Despite the obvious damage that the DOL is causing, DOL has not reconsidered its position.

104. True and correct copies of the November 6, December 14, and December 30 letters are attached hereto as Exhibit 7.

CAUSES OF ACTION

COUNT I

(VIOLATIONS OF THE FIRST AMENDMENT)

105. The preceding allegations are all incorporated by reference herein as if fully set out.

106. The First Amendment protects private speech from government interference or restriction when the specific motivating ideology, opinion, or perspective of the speaker is the rationale for the restriction.

107. Plaintiffs' speech, via its submission of the 2018 Request and Revised Request, is entitled to First Amendment protection.

108. Defendants unlawfully deprived Plaintiffs of their First Amendment rights in connection with and arising from their Advisory Opinion Requests by launching a retaliatory investigation into an entity, Anjo, for the sole purpose of harassing Plaintiffs and the entities that were subpoenaed due to their partnership or other relationship with the Partnership Plans; issuing unconstitutional and overly

intrusive requests for information via the subpoena process; delaying the processing of LPMS's Advisory Opinion Request on the basis of DMP's viewpoints and in violation of ERISA Procedure 76-1, the EO and 29 U.S.C. § 1134(b); seeking to undermine the duly issued order of a Federal Court determining that the Partnership Plans are explicitly legal constructs under ERISA, and failing to prevent such conduct by DOL employees and agents under their direct supervision and control while they were fully aware of such unconstitutional misconduct.

109. In targeting Plaintiffs' business associates and partners for additional and illegitimate scrutiny, Defendants engaged in impermissible viewpoint-based discrimination in violation of established First Amendment principles, while acting under color of federal authority in their respective official DOL positions.

110. Defendants' conduct directly infringed upon Plaintiffs' speech by inhibiting their ability to engage in effective advocacy and other expressive activities.

111. Defendants' conduct constitutes retaliation against Plaintiffs on the basis of the actual or perceived viewpoint of their protected speech.

112. Defendants knew, or reasonably should have known, that their conduct would violate Plaintiffs' federal constitutional rights.

113. Plaintiffs have no other adequate monetary remedy in court for Defendants' violations of their constitutional rights as complained of herein.

114. Absent congressional direction otherwise, courts may grant injunctive relief against prospective harms.

COUNT II
(VIOLATIONS OF THE FIRST AMENDMENT – FREEDOM OF ASSOCIATION)

115. The preceding allegations are all incorporated by reference herein as if fully set out.

116. The First Amendment to the United States Constitution protects Plaintiffs' right to freely associate with others of their choosing for the purposes of engaging in protected speech.

117. Plaintiffs and their partners and business affiliates are entitled under the First Amendment to freely associate with one another.

118. Defendants unlawfully deprived Plaintiffs of their First Amendment rights in connection with and arising from their AO Request by launching a retaliatory investigation into an entity, Anjo, as a pretext to issue overly broad, intrusive subpoenas to Plaintiffs and any other vendor providing services to Partnership Plans, for the sole purpose of harassing Plaintiffs and the entities that were subpoenaed due to their servicing or other relationship with limited partnerships sponsoring Partnership Plans; issuing unconstitutional and overly intrusive requests for information via the subpoena process; delaying the processing of LPMS's Advisory Opinion Request on the basis of DMP's viewpoints and in violation of ERISA Procedure 76-1, the EO and 29 U.S.C. § 1134(b); seeking to undermine the duly issued order of a Federal Court determining that the Partnership Plans are explicitly legal constructs under ERISA, and failing to prevent such conduct by DOL employees and agents under their direct supervision and control while they were fully aware of such unconstitutional misconduct.

119. Defendants, while acting under color of federal authority, infringed upon Plaintiffs' ability to freely associate for protected speech purposes with others of their choosing – including potential future limited partners, Partnership Plan participants, and Partnership Plan vendors.

120. Defendants knew, or reasonably should have known, that targeting Plaintiffs and their partners and affiliates for additional and illegitimate scrutiny would violate Plaintiffs' federal constitutional rights.

121. Plaintiffs have no other adequate monetary remedy in court for Defendants' violations of their constitutional rights as complained of herein.

122. Absent congressional direction otherwise, courts may grant injunctive relief against prospective harms.

COUNT III
(VIOLATIONS OF THE FIFTH AMENDMENT – EQUAL PROTECTION UNDER THE DUE PROCESS
CLAUSE)

123. The preceding allegations are all incorporated by reference herein as if fully set out.

124. The Fifth Amendment to the United States Constitution protects persons against the deprivation of life, liberty, or property without due process of the law and forbids the federal government from denying the equal protection of the laws.

125. The Fifth Amendment to the United States Constitution guarantees persons the right to be free from illegal discrimination and selective viewpoint-based scrutiny and enforcement.

126. Defendants unlawfully deprived Plaintiffs of their First Amendment rights in connection with and arising from their Advisory Opinion Requests by launching an investigation into an entity, Anjo, for the sole purpose of harassing Plaintiffs and the entities that were subpoenaed due to their relationship as sponsors of Partnership Plans or vendors to Partnership Plans; issuing unconstitutional and overly intrusive requests for information via the subpoena process; delaying the processing of LPMS's Advisory Opinion Request on the basis of DMP's viewpoints and in violation of ERISA Procedure 76-1, the EO and 29 U.S.C. § 1134(b); seeking to undermine the duly issued order of a Federal Court determining that the Partnership Plans are explicitly legal constructs under ERISA, and failing to prevent such conduct by DOL employees and agents under their direct supervision and control while they were fully aware of such unconstitutional misconduct.

127. Defendants, while acting under color of federal authority, caused Plaintiffs to be treated differently than other similarly situated organizations filing AO Requests.

128. The disparate treatment of Plaintiffs based on their viewpoints was a result of a discriminatory purpose on the part of Defendants.

129. Defendants' disparate treatment of Plaintiffs based on their viewpoints is not rationally related to any legitimate governmental interest.

130. Defendants knew, or reasonably should have known, that their conduct would violate Plaintiffs' federal constitutional rights.

131. Plaintiffs have no other adequate monetary remedy in a court for Defendants' violations of their constitutional rights as complained of herein.

132. Absent congressional direction otherwise, courts may grant injunctive relief against prospective harms.

COUNT IV
(VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT ("APA"))

133. The preceding allegations are all incorporated by reference herein as if fully set out.

134. The APA provides a cause of action for persons suffering a legal wrong from – or adversely or aggrieved by – actions or inactions of an agency of the United States or officers thereof acting in an official capacity. 5 U.S.C. § 702

135. The APA requires the federal courts to: (1) compel agency action unlawfully withheld or unreasonably delayed and (2) hold unlawful and set aside agency action, findings, and conclusions found to be contrary to any constitutional right, power, privilege, or immunity. 5 U.S.C. § 706.

136. The United States has waived its sovereign immunity pursuant to 5 U.S.C. § 702 in actions seeking relief other than money damages and stating a claim that an agency of the United States and/or officers thereof acted or failed to act in an official capacity.

137. DOL is an agency of the United States of America for purposes of the APA.

138. Defendants' unlawful and viewpoint-based discriminatory investigation into Plaintiffs' partners and affiliates and unconstitutional and intrusive requests for information unreasonably delayed DOL's final determinations of Plaintiffs' Revised Request.

139. Defendants' perfunctory Response and simultaneous retaliatory investigation described herein – based solely on Plaintiffs' viewpoints – violates the United States Constitution, ERISA Procedure 76-1, 29 U.S.C. § 1134(b), and the continuing the investigation constitutes final agency actions having the force and effect of law that are contrary to Plaintiffs' federal constitutional rights to freedom of speech and freedom of association under the First Amendment and the equal protection of the laws under the Fifth Amendment.

140. Defendants' demand that Plaintiffs, partnerships implementing the Partnership Plans, and business associates supporting the Partnership Plans respond to irrelevant, unlawful, unconstitutional, and overly intrusive requests for information issued by subpoena described herein is plainly contrary to the intent of Congress as expressed in ERISA and therefore, such action is not committed to agency discretion by law. 5 U.S.C. §701(a)(2).

COUNT V
(VIOLATIONS OF ERISA)

141. The preceding allegations are all incorporated by reference herein as if fully set out.

142. DOL's ongoing and interminable investigation is marked by repeated and intrusive subpoenas either to Plaintiffs, plan members, plan supporters, plan providers, plan vendors, or affiliates thereof.

143. DOL's seemingly disparate issuance of subpoenas are, in reality, all targeting the same Partnership Plans and the entities which facilitated the Revised Request on their behalf.

144. Many of the targets of the subpoenas are associated with or vendors to the Partnership Plans either by facilitating its existence or participating its benefits.

145. DOL has not provided any reasonable cause for its repetitive and abusive subpoenas issued the Anjo Investigation.

146. Indeed, the only explanation proffered by DOL is that it issuing the subpoenas pursuant to its authority to determine whether someone is violating or is about to violate ERISA.

147. But this authority does not provide rights to issue subpoenas as retaliation for invoking ERISA Procedure 76-1.

148. An order from this Court preliminarily and permanently enjoining the Defendants' unlawful conduct is the only adequate remedy available at law.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs demand judgment against Defendants and in favor of Plaintiffs as follows:

- A. That this Court declare that the conduct of the Defendants, while acting under color of federal authority, violated the constitutional rights of Plaintiffs;
- B. That this Court declare the conduct of the agency Defendants violated the Administrative Procedure Act;
- C. That this Court declare the conduct of the agency Defendants violated the Employee Retirement Income Security Act;
- D. That this Court issue a permanent injunction prohibiting all Defendants, and all those in active concert with them, from unlawfully targeting the Plaintiffs through its retaliatory investigation, immediately cease issuing new subpoenas related to the investigation to Plaintiffs, any affiliates, or potential partners or participants involved in the Partnership Plans; and an order quashing any active or pending subpoenas issued by Defendants to the Plaintiffs, its affiliates, or others related to the Anjo Investigation;

E. Alternatively to the preceding prayer for relief, that this Court issue a permanent injunction prohibiting all Defendants, and all those in active concert with them, from unlawfully targeting the Plaintiffs through its retaliatory Anjo Investigation, immediately cease issuing new subpoenas related to the investigation to Plaintiffs, any affiliates, or potential partners or participants involved in the Partnership Plans unless and until Defendants (i) define in writing the scope and concerns of the Anjo Investigation, and (ii) either recommend or bring an enforcement action for any alleged ERISA violation by Plaintiffs; and an order quashing or suspending enforcement of any active or pending subpoenas issued by Defendants to the Plaintiffs, its affiliates, or others related to the Anjo Investigation unless and until Defendants (i) define in writing the scope and concerns of the Anjo Investigation, and (ii) either recommend or bring an enforcement action for any alleged ERISA violation by Plaintiffs;

F. Award Plaintiffs their reasonable attorneys' fees, costs, and expenses associated with this action pursuant to 29 U.S.C. § 1132(g)(1) and 28 U.S.C. § 2412; and

G. Award Plaintiffs such other and further relief as this Court deems necessary and proper.

JURY DEMAND

Plaintiffs demand trial by jury on all claims and issues so triable.

DATED: January 19, 2021

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

SUFFOLK ADMINISTRATIVE SERVICES,

LLC, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF

LABOR, et al.,

Defendants

CIVIL NO. 21-1031 (DRD)

OPINION AND ORDER

Pending before the Court is Suffolk Administrative Services, LLC (“SAS”), Providence Insurance Company, I.L., (“PIC”), Providence Insurance Partners, LLC (“PIP”), and Anjo, LLC’s (“Anjo”; jointly with SAS, PIC, and PIP, “Plaintiffs”) Rule 59(e) *Motion to Alter or Amend the Judgment* entered in favor of United States Department of Labor, the Secretary of Labor, and the United States’ (jointly, “Defendants”). See Docket No. 46. Defendants filed their opposition thereto. See Docket No. 49. After considering the parties positions, the Court hereby **DENIES** Plaintiffs’ Rule 59 Motion.

I. INTRODUCTION

On October 2018, Plaintiffs met with the Department of Labor (“DOL”) and presented to them a proposed “novel” health benefit plan structure (“Plan”). See Docket No. 1 at ¶¶ 34, 37. At issue during this and subsequent meetings, which took place over the course multiple months, was whether the Plan would be considered as compliant with the Employee Retirement Income

Security Act (“ERISA”). *Id.* at ¶ 38-44. After the set of meetings concluded, the DOL suggested that the Plan was compliant with ERISA and that Plaintiff’s should implement it. *Id.*

On November 2018, LP Management Services, LLC (“LPMS”), a non-party to this suit, filed a formal Advisory Opinion Request (“2018 Request”) so that the DOL would confirm whether the Plan was a lawful health plan under 29 U.S.C. § 1002 (1) of ERISA. See Docket No. 1 at ¶ 2. After a year without a response from the DOL, LPMS and others filed a suit against the DOL seeking for the publication of the DOL’s Advisory Opinion (“AO”). The DOL responded that it did not believe the Plan was within the scope of ERISA, but the Court ruled in favor of Plaintiffs, prohibiting the DOL from refusing the Plan’s ERISA-status. *Id.* at ¶ 16; see also *Data Mktg. P’ship, LP v. United States Dep’t of Lab.*, 490 F. Supp. 3d 1048, 1068 (N.D. Tex. 2020). The Court notes that the District Court’s determination is currently pending appeal before the Fifth Circuit. See *Data Marketing Partnership v. LABR*, 20- 11179.

Prior to the DOL response, the DOL opened an investigation against Anjo (“*Anjo Investigation*”) on April 2019 regarding the implementation of the Plan. See Docket No. 1 at ¶ 15. Various subpoenas were issued to investigate whether Anjo and its business associates were violating or about to violate ERISA. *Id.* at ¶ 53; see also, Docket No. 1-5. Said subpoenas were issued pursuant to 29 U.S.C. § 1134(a)(1), which grants the DOL the authority to investigate whether someone is violating or about to violate ERISA. *Id.* at ¶ 62. Plaintiffs further alleged that they complied with all of the investigation requests and “encouraged their partners to do the same.” *Id.* at ¶ 55; ¶ 96.

The investigation allegedly caused financial and social strains against Plaintiffs who brought this suit seeking for the DOL to conclude its investigation into them and their associates, having described it as a retaliatory action over a perceived offense between the DOL Chief of Staff and Plaintiffs. See Docket No. 1 at ¶46, 63-104. Defendants, on the other hand, claimed that their investigation is not retaliatory and was launched in response to several complaints, referrals

from state insurance regulators, and a referral from a congressional office. See Docket No. 28 at 4.

On January 19, 2021, Plaintiffs filed this suit against Defendants seeking the conclusion of the *Anjo Investigation*; Defendants, in turn, raised an opposition against Plaintiffs' Complaint seeking dismissal via a motion for judgment on the pleadings claiming that a final agency action had occurred and asserting their rights to conduct their investigation until it has reached its natural end. See Docket Nos. 1, 28. On March 28, 2022, this Court granted Defendants' *Motion for Judgment on the Pleadings*, dismissing Plaintiffs' *Complaint* without prejudice. See Docket No. 43.

On April 25, 2022, Plaintiffs submitted their *Motion to Alter or Amend the Judgment Pursuant to Rule 59(e)*, wherein they assert that the conclusions made by the Court, granting the Defendants' *Motion for Judgment on the Pleadings* are based on "manifest errors of law", particularly referring to the Court's interpretation and application of the relevant law regarding whether an agency action is "final", and failing to apply the required standard to Plaintiffs' assertion of facts when considering a Rule 12(c) motion. See Docket No. 46 at 1-2.

On May 27, 2022, Defendants filed a *Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend the Judgment Pursuant to Rule 59(e)*. See Docket No. 49. In said Memorandum, Defendants contend that Plaintiffs have failed to state a claim under Rule 59(e) and overall have not offered "any grounds that undermine the Court's reasoning, let alone identify a 'plain and disputable' error." *Id.* at 3.

II. LEGAL STANDARD

Motions to Alter or Amend a Judgment pursuant to Rule 59(e) should be granted "to correct 'manifest errors of law' or to present newly discovered evidence." See *Hernandez v. Sealand Servs.*, 230 F. Supp. 2d 258, 259 (D.P.R. 2002) (quoting *F.D.I.C. v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992)). See also *Global Naps, Inc. v. Verizon New England, Inc.*, 489 F.3d 13, 25 (1st Cir. 2007) (noting Rule 59(e) relief is granted when "the original judgment

evidenced a manifest error of law, if there is newly discovered evidence, or in certain other narrow situations”); *Nat'l Metal Finishing Co. v. BarclaysAmerican/Commercial, Inc.*, 899 F.2d 119, 123 (1st Cir. 1990). The standard requires “[a]n error that is plain and indisputable, and that amounts to a complete disregard of the controlling law.” See *Integrand Assurance Co. v. Everest Reinsurance Co.*, No. 19-1111, 2020 WL 2109202, at *2 (D.P.R. May 1, 2020) (quoting *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 195 (1st Cir. 2004), which cited *Black's Law Dictionary* 563 (7th ed. 1999)).

"The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact." See *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999). "Rule 59(e) permits a court to alter or amend a judgment, but it 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008); See also: *Integrand Assurance Co.*, 2020 WL 2109202, at *3 (quoting *Feliciano Hernandez v. Pereira-Castillo*, 663 F.3d 527, 537 (1st Cir. 2011)).

The extremely limited nature of the Rule 59(e) remedy cannot be overstated. To prevail, “[t]he losing party must do more than show that a grant of the motion might have been warranted; he must demonstrate a justification for relief so compelling that the court was required to grant the motion.” See *Jenkins v. Dunn*, 2017 U.S. Dist. LEXIS 71194 (N.D. Ala. May 10, 2017) (citing *Maradiaga v. United States*, 679 F.3d 1286, 1291) (11th Cir.2012) (citations and internal marks omitted)."

III. LEGAL ANALYSIS

A. THERE IS NO ADMINISTRATIVE PROCEDURE ACT (“APA”) ERROR BECAUSE THE ANJO INVESTIGATION IS NOT A FINAL AGENCY ACTION

The Court concluded that the *Anjo Investigation* was not a final agency action. See Docket No. 43 at 20-24. Plaintiffs assert that the Court’s conclusion was erroneous due to an improper interpretation and application of *Gentile v. Sec. & Exch. Comm’n*, 974 F.3d 311, 318 (3d Cir. 2020)

because (1) the Court agreed with *Gentile* that “administrative subpoenas constitute a discrete agency action” subject to review under the APA and (2) the Court’s reliance on *Gentile* was a mistake given the complaint referred to in *Gentile* is sufficiently different from Plaintiffs’ complaint for *Gentile* to apply here. See Docket No. 46 at 9-10; see also Docket No. 43 at 20-24; *Gentile v. Sec. & Exch. Comm’n*, 974 F.3d 311, 318 (3d Cir. 2020).

This Court, without relying on *Gentile*, established that for any Court to engage in judicial review of an agency action, said action must be final. See Docket No. 43 at 20-21; see also *Manchanda v. Lewis*, No. 21-1088-CV, 2021 WL 5986877, at *5 (2d Cir. Dec. 17, 2021). Finality is determined when an action marks the consummation of the agency’s decision-making process, and will either determine rights or obligations, or will dictate legal consequences for others. *Id.* See also *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. at 597 (citing *Bennett v. Spear*, *supra*). Initiating the *Anjo Investigation* is not a final agency action, nor is sending subpoenas to assist with the investigation, for they do not mark the consummation of an agency’s decision-making process. A final agency action would relate to the results of the *Anjo Investigation* and the action taken by the agency once the investigation has concluded. Only after a final agency action is made can a Court begin to consider whether the action is subject to, or exempt from, review under the APA. See Docket No. 43 at 20-21. To the Plaintiffs’ dismay (and again, without relying on *Gentile*), “Federal Courts have concluded that the decision to initiate investigations do not constitute ‘final agency actions’ subject to judicial review under the APA.” See *Manchanda v. Lewis*, 2021 WL 5986877 at 6. Additionally, “[a]n attack on the authority of an agency to conduct an investigation does not obviate the final agency action requirement.” See *Veldhoen v. U.S. Coast Guard*, 35 F.3d at 225.

Plaintiffs’ claims against this Court’s supposed reliance on *Gentile* are exhaustive but do not demonstrate an error by this Court. Their first contention is that *Gentile* described administrative subpoenas as discrete agency actions subject to judicial review under the APA; while true, this does not show an error occurred. See Docket No. 46 at 10. An agency action is subject to review

only after it is finalized, and even if a final agency action exists it may not necessarily be subject to review if the final action falls under agency discretion by law. See *Sacket v. E.P.A.*, 566 U.S. 120 (2012); see also *Berry v. United States Dept. of Lab.*, 832 F3d. 627, 634 (6th Cir. 2016). Even if an administrative subpoena is a discrete agency action, a review of this action is impermissible for no final agency action exists, therefore no Court may engage in judicial review of agency actions until they are finalized. Put simply, “the plaintiff[s] must await resolution of the agency’s inquiry and challenge the final agency decision.” See *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-245 (1980).

Plaintiffs’ second assertion consists of the difference in complaints. The complaint in *Gentile* does not directly address the subpoenas present in that case, only the investigation itself. In the present case, Plaintiffs directly raise an issue against the subpoenas and claim this somehow makes the use of *Gentile* erroneous. As was just stated, this is irrelevant and does not show the existence of an error, because without a final agency action no review can be executed by a Court. Plaintiffs have not successfully argued how the use of *Gentile* establishes that the *Anjo Investigation* is a final agency action, nor do they attempt to dispute the myriad of case law which explicitly states that investigations do not constitute final agency actions. Even if this Court were to assume that a final agency action was made, the challenged subpoenas (as discrete agency actions) would not be subject to review if the action is one committed to agency discretion by law. See *Gentile*; see also 5 U.S.C. §701(a)(2). An agency decision to investigate fits within the 5 U.S.C. §701(a)(2) exceptions, therefore, even under assumptions most favorable to the plaintiffs, the Court’s use of *Gentile* does not constitute an error despite the variance between the complaints for they have not established that the agency actions are final, a requirement for a Court to engage in the requested judicial review, nor have they established that the subpoenas are distinct enough to not be committed to agency discretion by law and, thus, subject to review. See *Jefferson v. Harris*, 170 F. Supp. 3d 194, 218 (D.D.C. 2016) (Concluding that investigations are not “final agency actions” and that they are exempt from judicial review since they are

“committed to agency discretion by law”). Plaintiffs’ use of *COMSAT Corp. v. Nat’l Sci. Found* is also erroneous as here, Defendants have not refused to comply with a subpoena but are instead sending them so that parties associated with the plaintiffs would comply with the *Anjo Investigation*, rendering that particular contention moot. See Docket No. 46 at 10.

Plaintiffs assert that they did not challenge the DOL’s decision to initiate the investigation, and that the Court’s focus on the “decision to initiate an investigation” constitutes an error. *Id.* at 10-11. They particularly take issue with the use of *Machanda* and the focus on the “decision to initiate an investigation” yet completely disregard the rest of the citation which clarifies that “[i]t is well settled that such interlocutory investigative steps by an agency do not constitute final agency actions under the APA.” See Docket No. 43 at 21; see also *Machanda*, 2021 WL 5986877 at 6 (citing *Veldhoen v. U.S. Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994)). The challenges raised by Plaintiffs are against subpoenas and other interlocutory investigative steps made by an agency; assuming Plaintiffs did not challenge the decision to initiate the investigation, there is no error in acknowledging that Plaintiffs are attempting to have this Court classify an interlocutory step of an ongoing investigation as a final agency action to forcibly terminate said investigation. The *Anjo Investigation* is at an interlocutory step, has not concluded and is therefore not subject to judicial review until it is finalized. What the Court has done is explain how the decision to initiate an investigation does not constitute a final action, further clarifying that refraining from initiating an investigation also does not constitute a final action, and that carrying out investigations falls under agency discretion by law (protecting it from judicial review). See Docket No. 43 at 21-23.

Next, Plaintiffs argue that the *Anjo Investigation* is directly related to the Response Letter and constitutes a legal consequence which flows directly from an alleged grievance of the Defendants. See Docket No. 46 at 11. They rely on *Ipsen Biopharmaceuticals, Inc. v. Azar*, 943 F.3d 953, 444 U.S. App. D.C. 329, 2019 U.S. App. LEXIS 35819 (D.C. Cir. 2019) which held that a letter could constitute a final agency action if it significantly increased a company’s risk of statutory civil penalty for knowingly providing false information. *Id.* The *Ipsen* case relied on the two-prong test

from *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). The test details that agency actions are final if they mark the consummation of the agency's decision-making process and is an action from which legal consequences will flow. It is not sufficient that a legal consequence will flow from the act, the decision must also mark the consummation of the decision-making process and be finalized. See *Bennett*, 520 U.S. 154, 177-78. In *Ipsen*, both parties agreed that only the existence of legal consequence was in dispute, meaning both parties agreed that the letters were the consummation of the agency's decision-making process. Here, there is no such concurrence. After applying the same standard (and assuming a relation between the Response Letter and *Anjo Investigation*), the *Anjo Investigation* does not represent the consummation of the decision-making process of the Defendants as the investigation is ongoing and has not been finished, meaning there is no final agency action. Since there is no final agency action, there is no relief which may be afforded to Plaintiffs at this time, for the very case law they cite explicitly states that both prongs must be met, and Plaintiffs have failed to establish that an ongoing investigation or the issuance of subpoenas satisfies the first prong of the two-prong test *Ipsen* relies on. The mere allegation of a relation between the Response Letter and *Anjo Investigation* is insufficient to establish finality, it would instead establish a chain of events that is currently expanding and developing. As such, Plaintiffs' argument has failed to establish an error.

Their final APA argument consists of Plaintiffs' disparagement of the subpoenas, labeling them as potentially illegal, abusive, excessively broad, and solely for harassment. See Docket No. 32 at 10, 12-13, 15-16. At no point do Plaintiffs demonstrate any support for these allegations. These allegations exist on a foundation of case law which states that subpoenas can be unlawful, can be abusive, can be excessively broad in their scope, but not once do the plaintiffs demonstrate how the subpoenas issued by Defendants conform to any of the descriptions made by the plaintiffs. Plaintiffs correctly argued that a subpoena can be challenged under *FTC v. Shaffner*, 626 F.2d 32, 36 (7th Cir. 1980), but they do not raise a challenge at all regarding the alleged impropriety of these subpoenas. See Docket No. 32 at 20.

Defendants correctly pointed out that citing caselaw about the standards applied in a subpoena proceeding does not demonstrate how the Court has erred in its decision that the *Anjo Investigation* is not a final agency action. See Docket No. 49 at 3. Additionally, Plaintiffs have not demonstrated “[a]n error that is plain and indisputable, and that amounts to a complete disregard of the controlling law”, what has instead occurred is a challenge against the use of a singular case. See *Integrand Assurance Co. v. Everest Reinsurance Co.*, No. 19-1111, 2020 2 WL 2109202, at *2 (D.P.R. May 1, 2020) (quoting *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 195 (1st Cir. 2004), which cited *Black’s Law Dictionary* 563 (7th ed. 1999)). As such, this Court finds no reversible error regarding any of the Plaintiffs’ APA claims.

This assertion cannot be considered sufficient or substantial enough to demonstrate that the Court has completely disregarded the controlling law on this issue.

B. THE COURT’S DECISION REGARDING PLAINTIFFS’ CONSTITUTIONAL CLAIMS ARE NOT ERRONEOUS.

Plaintiffs hinge their contention of an error regarding their constitutional claims on their belief that the Court had erred when it refused to describe the *Anjo Investigation* as a final agency action. See Docket No. 46 at 14. As stated in the opinion and above, an ongoing investigation by an agency is interlocutory by nature and therefore cannot constitute a final agency action. See Docket No. 43 at 26-28. Plaintiffs attempt to group the investigation with the Request Letter to conclude that both are final agency actions rather than separate actions by the same agency at different levels of finality, relying on this mischaracterization to attempt establish that a reversible error exists. See Docket No. 46 at 9-14.

The fact that two actions exist by the same agency does not mean they are automatically enjoined, they must instead be viewed separately and uniquely to determine whether each is finalized or not. Plaintiffs had filed suit for the AO and Request Letters, and once he received them these constituted an individual answer that was then finalized. See Docket No. 46 at 29-30; *see also Data Marketing Partnership v. U.S. Dep’t of Labor*, 490 F. Supp. 3d 1048 (N.D. Tex.

2020). Before the AO and Request Letter issue was finalized, the *Anjo Investigation* was launched by Defendants to verify whether an ERISA violation was about to be committed or had been committed by Plaintiffs or their associates after receiving complaints about Plaintiffs for two years. See Docket No. 28 at 10-11. The cause for the investigation is of a different nature than that of the AO, they were initiated at different times and the DOL is within its rights to conduct such an investigation under 29 U.S.C. § 1134(a)(1). See Docket No. 1 at ¶ 62.

This Court refused to deny the DOL's right to investigate a potential ERISA violation and denied Plaintiff his request for judicial review as it would be improper for any Court to do so prior to the conclusion of the investigation. See Docket No. 43 at 26-27. Because the investigation and AO are separate, and the investigation is not finalized, this Court's decision that Defendant's constitutional claims are not "ripe" or fit for review remains free from error as Plaintiffs fail to show a manifest error of law. *Id.*

Finally, Plaintiffs have also erred in their Rule 59(e) motion when stating that an error regarding their constitutional claims is based on the same alleged error that supposedly exists regarding their APA claims. See Docket No. 46 at 14. The Court's Opinion addressed Plaintiffs' constitutional claims using the legal standard they themselves provided regarding the ripeness of a claim: fitness and hardship based on the *Abbott Labs* test. See Docket No. 32 at 14-15; see also *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). The Court reviewed whether Plaintiffs' constitutional claims were fit under the *Abbott Labs* test, as Plaintiff's themselves requested in their Opposition to Defendants' Motion for Judgment on the Pleadings and found that fitness required the *Anjo Investigation* to be finalized. See Docket No. 43 at 26-28. Whether the *Anjo Investigation* could be considered a final agency action did not rely on *Gentile*, therefore the Court did not rely on the alleged prior error and has rightfully determined that Plaintiffs' constitutional claims are not ripe and cannot justify judicial intervention.

**C. THE COURT DID NOT ERR WHEN DECIDING THAT VENUE WAS IMPROPER DESPITE
ERISA'S PERMISSIVE SPECIAL VENUE PROVISION.**

Plaintiffs allege that because the facts surrounding the APA and constitutional claims are the same, then they also support their ERISA claim by default. See Docket No. 46 at 14-15. The Court considers this argument as meritless. The key issues under Plaintiffs ERISA claims are not ripeness or the finality of an agency action, but whether the venue was permissible under ERISA's special venue provision. See 29 U.S.C. § 1132(k). The Court relied on the recent decision by the Ninth Circuit which held that "ERISA's venue provision provides that an action 'may be brought' where: (1) the plan is administered; (2) the breach took place; or (3) a defendant resides or may be found." See *Becker v. United States Dist. Court*, 993 F.3d 731, 732-733 (9th Cir. 2021). Under this provision permission (2) is inapplicable as no ERISA breach has yet been identified. Venue would therefore only be proper if the ERISA plans are administered in Puerto Rico or if a defendant resides or may be found in Puerto Rico. *Id.*

According to the complaint, SAS is a Puerto Rican company that provides benefits consulting and vendor management compliance services. See Docket No. 1 at ¶ 7. Since SAS does not administer an ERISA plan in Puerto Rico, SAS' presence as a Plaintiff does not justify venue in Puerto Rico.

PIP is a Tennessee company providing consultation and advice regarding reinsurance coverage for employers implementing traditional health plans and the novel Partnership Plan, but do not administer plans themselves, and would not justify venue in Puerto Rico. *Id.* at ¶ 10.

Anjo is not related to ERISA plans at all and is connected solely because of Mr. Renfro's involvement in the company, the novel Partnership Plan and this lawsuit. *Id.* at ¶ 9.

PIC is a Puerto Rican company dealing with international insurance and has its principal offices in San Juan, Puerto Rico. *Id.* at ¶ 8. They implement traditional health plans and LPMS' novel Partnership Plan (which, after *Data Mktg. P'ship, LP.*, 490 F. Supp. 3d 1048 must be considered an ERISA plan) and therefore would likely fall under the special venue provisions of ERISA if they administer the plan in Puerto Rico. *Id.* Under 28 U.S.C. §1391(e)(1) and 29 U.S.C. § 1132(k), venue may also be proper for the United States of America is a defendant in this suit.

The Court reconsiders its prior finding that venue is improper strictly under the special venue provision as PIC's insurance dealings may be sufficient to establish proper venue under said provision; however, **the suit remains improper and impermissible as sovereign immunity has not been waived.** (emphasis added). As stated in the Opinion and Order, "28 U.S.C. § 1132 allows for suits filed by 'an administrator, fiduciary, participant, or beneficiary of an employee benefit plan'; however, there is no allegation in the Complaint that would lead the Court to conclude that any of the plaintiffs fall under one of said categories. Further, Plaintiffs also failed to allege that they are one of the 'persons empowered to bring civil action' under 29 U.S.C. § 1132 (a)." See Docket No. 43 at 25-26. Plaintiffs have not demonstrated a limited waiver of sovereign immunity and cause of action for certain suits against the [DOL]. See 29 U.S.C. § 1132(k); see also *McCarthy v. Marshall*, 723 F.2d 1034, 1037 (1st Cir. 1983). It is Plaintiffs' burden to "prov[e] sovereign immunity has been waived." See Docket No. 28 at 19; see also *Mahon v. United States*, 742 F.3d 11, 14 (1st Cir. 2014).

IV. CONCLUSION

Pursuant to the above stated arguments, the Court **DENIES** Plaintiffs *Motion to Alter or Amend the Judgment Pursuant to Rule 59(e)*, upholding its prior decision and leaving the claims asserted in their Complaint **DISMISSED without prejudice.**

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 17th day of February 2023.

S/Daniel R. Domínguez

Daniel R. Domínguez
United States District Judge

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

**MARTIN J. WALSH, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,**

Petitioner,

V.

PROVIDENCE INSURANCE COMPANY, I.I.,

Respondent.

No. _____

PETITION TO ENFORCE ADMINISTRATIVE SUBPOENA

Petitioner Martin J. Walsh, Secretary of Labor, United States Department of Labor, through his undersigned counsel, hereby asserts:

1. This Petition is brought to compel Respondent, Providence Insurance Company, I.I. (“PIC”), to comply with an administrative subpoena *duces tecum* (“Subpoena”) issued and directed to it by the Regional Director of the Chicago Region of the Employee Benefits Security Administration (“EBSA”), United States Department of Labor. The Subpoena was issued in an investigation being conducted pursuant to the section 504 of the Employee Retirement Income Security Act of 1974 (“ERISA”) in order to determine whether any person has violated or is about to violate any provision of Title I of ERISA or any regulation or order promulgated thereunder. 29 U.S.C. § 1134.

2. This Court has subject matter jurisdiction over this petition pursuant to section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, as made applicable by section 504(c) of ERISA, 29 U.S.C. § 1134(c), and pursuant to ERISA section 502(e)(1), 29 U.S.C. § 1132(e)(1).

3. PIC is located at 954 Ave Ponce de Leon, Suite 802, San Juan, Puerto Rico 00907.

Accordingly, venue is proper in the District of Puerto Rico, pursuant to ERISA section 502(e), 29 U.S.C. § 1132(e)(2).

4. In 2019, EBSA began conducting an investigation of Anjo, LLC and its subsidiaries, including PIC, to determine whether these entities are complying with Title I of ERISA (“Anjo Investigation”). Declaration of Thomas Gewin ¶ 2 [Gewin Decl.].¹

5. In connection with the Anjo Investigation, on July 7, 2020, Jeffrey A. Monhart, Regional Director for the Chicago Regional Office of EBSA, issued the Subpoena to PIC pursuant to the authority provided by ERISA section 504(c), 29 U.S.C. § 1134(c). A true and correct copy of the Subpoena is attached as Exhibit 1 to Investigator Gewin’s Declaration.

6. The Subpoena was served electronically to Diane Festin LaRoss, PIC’s counsel, who was authorized to accept service of the Subpoena. Gewin Decl. ¶ 10. The Subpoena was also sent by certified mail to PIC’s place of business at the address referenced above, but it was unclaimed and returned to the Department. Gewin Decl. ¶ 9.

7. The Department attempted to secure PIC’s compliance with the Subpoena over the next eight months, as detailed in the accompanying Petitioner’s Memorandum of Law in Support of Petition to Enforce Administrative Subpoena, incorporated herein by reference. PIC eventually produced to the Department some, but not all of the documents requested in the Subpoena. Of the documents produced, many were so heavily redacted that they essentially provided none of the requested information.

¹ The Gewin Declaration is Exhibit A to the Petitioner’s Memorandum of Law in Support of Petition to Enforce Administrative Subpoena.

8. On March 12, 2021, in response to a letter from the Department’s counsel, PIC’s counsel stated that it had “nothing to add to [its] previous correspondence and document productions.” Declaration of Katrina Liu ¶ 9, Ex. 8 [Liu Decl.].² It claimed that “[t]he redacted documents along with PIC’s general ledgers and financial documents fully inform the Department of PIC’s business operations related to any ERISA group plans which, as a reinsurer, is only tangentially related.” Id. Ex. 8. It argued that the Department’s continued pursuit of PIC’s customers and vendors “constitute[d] harassment,” and was “particularly egregious given the Department’s refusal to offer some indication of the parameters of the Anjo Investigation.” Id. The parties have had no further communication about this Subpoena. Liu Decl. ¶ 10.

9. Respondent refuses to produce certain documents in full and unredacted form in response to the Subpoena. Complete and unredacted copies of all responsive documents specifically requested in the Subpoena are necessary for EBSA to make a determination as to whether any person has violated or is about to violate any provision of Title I of ERISA or any regulation or order promulgated thereunder. Gewin Decl. ¶ 19.

10. The issuance and service of the Subpoena at issue are authorized by section 504 of ERISA, which states in pertinent part:

INVESTIGATIVE AUTHORITY

(a) Investigation and submission of reports, books, etc.

The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this title or any regulation or order thereunder—

- (1) to make an investigation, and in connection therewith to require the submission of reports, books, and records

² The Liu Declaration is Exhibit B to the Petitioner’s Memorandum of Law in Support of Petition to Enforce Administrative Subpoena.

(c) Other provisions applicable relating to attendance of witnesses and production of books, records, etc.

For the purposes of any investigation provided for in this subchapter, the provisions of sections 49 and 50 of Title 15 [the Federal Trade Commission Act, 15 U.S.C. §§ 49, 50]³ (relating to the attendance of witnesses, and the production of books, records and documents) are hereby made applicable (without regard to any limitation in such sections respecting persons, partnerships, banks, or common carriers) to the jurisdiction, powers, and duties of the Secretary or any officers designated by him.

29 U.S.C. § 1134(a)(1), (c).

³ The Federal Trade Commission, and by incorporation EBSA, is authorized to examine and copy documentation, and has:

[the] power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. . .

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

15 U.S.C. § 49.

WHEREFORE, for all the reasons set forth herein and in the accompanying Memorandum of Law, the Secretary of Labor respectfully requests that this Court issue an Order:

- a. Requiring Respondent to produce all of the records requested by the Subpoena in unredacted form by a date certain; and
- b. Granting Petitioner such other relief as may be necessary and appropriate.

Respectfully submitted,

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Solicitor of Labor

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Associate Solicitor
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**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO**

**MARTIN J. WALSH, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,**

Petitioner,

v.

PROVIDENCE INSURANCE COMPANY, I.I.,

Respondent.

No. _____

**PETITIONER’S MEMORANDUM OF LAW IN SUPPORT OF PETITION TO
ENFORCE ADMINISTRATIVE SUBPOENA**

Petitioner, Martin J. Walsh, Secretary of Labor, U.S. Department of Labor (“Secretary”) submits the following Memorandum of Law in support of his Petition to Enforce Administrative Subpoena issued to Respondent pursuant to section 504 of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1134.

FACTUAL BACKGROUND

In 2019, the Employee Benefits Security Administration of the United States Department of Labor (“EBSA” or “Department”) opened an investigation to determine whether Anjo, LLC, its subsidiaries, or any person has violated or is about to violate any provision of Title I of ERISA or any regulation or order promulgated thereunder (“Anjo Investigation”). Respondent Providence Insurance Company (“PIC”) is a subsidiary of Anjo, LLC. PIC is registered in Puerto Rico as an international insurance company and provides “reinsurance” services to ERISA-covered health benefit plans located in the United States. Some—but not all—of PIC’s clients are limited partnerships that provide health benefits to their limited partners. These limited partnership arrangements are the subject of ongoing litigation, to which the U.S. Department of

Labor is a party. See Data Marketing Partnership v. United States Department of Labor, No. 20-11179 (5th Cir.) (Data Marketing Partnership case).

As part of the Anjo Investigation, EBSA issued, on July 7, 2020, an administrative subpoena *duces tecum* directed to PIC (“Subpoena”). Declaration of Thomas Gewin ¶ 8 [hereinafter Gewin Decl.].¹ The Subpoena requested, among other things, “[d]ocuments or lists sufficient to show all Employee Welfare Benefit Plans for which PIC provides Services” and “[a]ll contracts and agreements relating to Services PIC provides to Employee Welfare Benefit Plans, including all contracts for PIC’s provision of reinsurance.” Id. Ex. 1 at 9-10, Request Nos. 6-7. The Subpoena specifically sought information about the employee benefit plans serviced by PIC, including “the name and address of the Plan Sponsor [and] the name and address of the Employee Welfare Benefit Plan” Id. at 9-10, Request No. 6. The Subpoena contained 30 document requests, along with detailed definitions and instructions. Id. at 4-13. The Subpoena required PIC to produce its responsive documents by July 31, 2020. Id. at 3. The July 31, 2020 production date came and went without any production from PIC.

On August 10, 2020, PIC sent to the Department its first production of documents, which contained only 13 PDF files totaling 79 pages, along with a cover letter dated August 7, 2020. Gewin Decl. ¶ 11, Ex. 2. The letter, written by PIC’s counsel, stated that PIC did not have any responsive documents to some of the requests in the Subpoena and, with respect to other requests, more responsive documents were forthcoming. Id. Ex. 2. PIC’s counsel also explained that it withheld responsive documents if the documents did not pertain to the limited partnerships that are at issue in the Data Marketing Partnership case:

Some of the described requests in the subpoena to PIC may apply to documents and contracts involving clients of PIC outside of its reinsurance policies issued to

¹ The Secretary incorporates by reference the Gewin Declaration, attached hereto as Exhibit A.

the limited partnership structure that is the subject of the Fort Worth litigation [Data Marketing Partnership case] and prior subpoenas issued in the *In re: Anjo LLC* investigation. PIC issues reinsurance policies to other Plan Sponsors not utilizing the partnership structure at issue in the Fort Worth litigation. The responses provided are limited to those customers of PIC utilizing the partnership structure.

Id. Ex. 2 at 2. In response, Department counsel had a telephone conference with PIC's counsel on August 17, 2020, and explained that the Subpoena was not limited to the limited partnerships at issue in the Data Marketing Partnership case, and PIC was obligated to produce all responsive documents related to PIC's services to ERISA plans, whether or not they were for limited partnerships. Declaration of Katrina Liu ¶ 2 [hereinafter Liu Decl.].² Department counsel also stated that PIC had not yet responded to Requests Nos. 13-21 and 29-30, and PIC should produce its reinsurance policies promptly after completing the process of notifying relevant clients. Id. After the conference, Department counsel sent an email explaining the Department's need for all responsive documents. Id. ¶ 3, Ex. 4 at 1. On August 26, 2020, after PIC's counsel did not reply, Department counsel again emailed to check on the status of the outstanding requests and requested production by September 4, 2020. Id. ¶ 4, Ex. 4 at 1.

On September 4 and September 18, 2020, PIC produced more documents, but some requests remained outstanding. Gewin Decl. ¶ 13. Department counsel had a follow-up conference call with PIC counsel on September 23, 2020, to discuss questions about the production, including about PIC's continued withholding of responsive documents related to ERISA plans that do not involve the limited partnerships in the Data Marketing Partnership litigation. Id. ¶ 14; Liu Decl. ¶ 5.

² The Secretary incorporates by reference the Liu Declaration, attached hereto as Exhibit B.

On November 5, 2020, PIC produced more documents, but continued to withhold responsive documents, stating in its cover letter, “We are producing documents pertaining only to the limited partners and have redacted the names of PIC’s other partners and insureds.” Gewin Decl. ¶ 15, Ex. 3 at 1. PIC did not further explain why it was limiting its responses only to documents involving the limited partnerships. See id. Ex. 3 at 1.

On December 14, 2020, Department counsel sent a letter to PIC counsel regarding PIC’s production to date. Liu Decl. ¶ 6, Ex. 5. The Department requested in writing the basis for PIC’s decision to limit its production to information related to limited partnerships. Id. Ex. 5 at 1. Department counsel further stated the legal basis for its investigative authority under ERISA section 504, 29 U.S.C. § 1134, and explained that PIC cannot withhold information solely on the grounds that the information is confidential. Id. at 1-2.

On December 23, 2020, PIC replied to counsel for the Department’s request for a legal basis for its actions, asserting that it “feels that . . . it is obliged to respect the confidentiality of its business partners and customers” in replying to the Department’s Subpoena. Liu Decl. ¶ 7, Ex. 6 at 1. PIC also asserted that “[w]ithout any clarification or articulation of the scope of the Anjo Investigation, it is hard to imagine how the names and identities of PIC’s business partners and insureds whose businesses are wholly unconnected to the operations of Anjo, LLC, are reasonable and would ‘fall squarely’ within the Department’s authority. . . .” Id. Ex. 6 at 2. PIC did, however, indicate that it would produce copies of its reinsurance contracts involving ERISA plans and provided an expected production date of mid-January 2021. Id. Ex. 6 at 1.

PIC eventually produced reinsurance contracts to the Department on February 12, 2021, but the contracts were heavily redacted such that it was impossible for the Department to identify the client—the ERISA plan sponsor—with which PIC had contracted. Gewin Decl. ¶ 16. On

February 24, 2021, Department counsel once again asked for the written basis, legal or otherwise, for the information withheld or redacted in the February 12 production. Liu Decl. ¶ 8, Ex. 7. Counsel reiterated that PIC may not withhold information solely on the grounds that the information is confidential, and stressed that the information sought pertained to services provided to Employee Welfare Benefit Plans as defined by ERISA. Id. Ex. 7 at 1.

On March 12, 2021, PIC's counsel replied, stating that it had "nothing to add to [its] previous correspondence and document productions." Liu Decl. ¶ 9, Ex. 8. It claimed that "[t]he redacted documents along with PIC's general ledgers and financial documents fully inform the Department of PIC's business operations related to any ERISA group plans which, as a reinsurer, is only tangentially related." Id. Ex. 8 at 1. It argued that the Department's continued pursuit of PIC's customers and vendors "constitute[d] harassment," and was "particularly egregious given the Department's refusal to offer some indication of the parameters of the Anjo Investigation." Id. The parties have had no further communication about this Subpoena. Liu Decl. ¶ 10.

Meanwhile, on January 21, 2021, PIC, along with Anjo, LLC and two other Anjo subsidiaries ("Suffolk Plaintiffs"), filed suit against the Department in this Court, alleging that the Anjo Investigation was impermissible retaliation against the Suffolk Plaintiffs and violated the United States Constitution, the Administrative Procedure Act ("APA"), and ERISA. See Suffolk Administrative Services, LLC et al. v. United States Department of Labor, Civil Action No. 3:21-cv-01031-DRD (D.P.R. Jan. 21, 2021) (Suffolk Administrative Services case). The Department filed an Answer and Motion for Judgment on the Pleadings, arguing that the Suffolk Plaintiffs failed to state a claim under the Constitution, the APA, or ERISA, and their claims were premature when the Department had not sought to enforce any subpoenas. Defs.' Mot. for

J. on the Pleadings, Suffolk Administrative Services case, ECF No. 28. The Department's motion in the Suffolk Administrative Services case is currently pending.³

ARGUMENT

1. Applicable Law

“When investigative . . . duties are delegated by statute to an administrative body,” the agency “may take steps to inform itself as to whether there is a probable violation of the law.” United States v. Morton Salt, 338 U.S. 632, 643 (1950). Under ERISA, Congress granted the Secretary broad authority to “determine whether any person has violated or is about to violate any provision of [ERISA] or any regulation or order thereunder.” 29 U.S.C. § 1134(a). This authority explicitly includes the power “to require the submission of reports, books, and records, and the filing of data in support of any information required.” Id.

The Secretary need not show that a law has been violated before seeking enforcement of a subpoena. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208-09 (1946). Neither is the Secretary required to tie the material he seeks to a particular theory of violation. F.T.C. v. Invention Submission Corp., 965 F.2d 1086, 1090 (D.C. Cir. 1992). The purpose of an agency's investigative authority “is not to accuse, but to inquire.” United States v. Bisceglia, 420 U.S. 141, 146 (1975). Indeed, an administrative subpoena “may be judicially enforced without a showing that probable, or even reasonable, cause exists to believe that a violation of law has occurred.” United States v. Tivian Laboratories, Inc., 589 F.2d 49, 54 (1st Cir. 1978); see also S.E.C. v. Howatt, 525 F.2d 226, 229 (1st Cir. 1975).

³ The Suffolk Plaintiffs also filed a Motion for Leave to Amend the Complaint on August 17, 2021, which remains pending. Pls.' Mot. for Leave to Amend the Compl., Suffolk Administrative Services case, ECF No. 36.

Accordingly, federal courts are reluctant to interfere with agency investigations. The First Circuit acknowledges that it is “not the court’s role to intrude into the investigative agency’s function.” Howatt, 525 F.2d at 229. This is because:

Congress has authorized the [agency], rather than the District Courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise [its] subpoena power for securing evidence upon that question, by seeking the production of [a company’s] relevant books, records, and papers; and, in case of refusal to obey [its] subpoena, issued according to the statute’s authorization, to have the aid of the District Court in enforcing it.

Oklahoma Press Pub. Co., 327 U.S. at 214. Proceedings to enforce administrative subpoenas are thus summary in nature, and the scope of the proceeding is narrow. United States v. Sturm, Ruger & Co., Inc., 84 F.3d 1, 5 (1st Cir. 1996).

To obtain judicial enforcement of an administrative subpoena, an agency must prove that: 1) the subpoena is issued for a congressionally authorized purpose; 2) the information sought is relevant to that authorized purpose; 3) the information sought is adequately described; and 4) proper procedures have been employed in issuing the subpoena. Sturm, 84 F.3d at 4; see also United States v. Powell, 379 U.S. 48, 57-58 (1964). A district court’s role in subpoena enforcement proceedings is “strictly limited to inquiring whether the above requirements have been met.” United States v. Comley, 890 F.2d 539, 541 (1st Cir. 1989). Assertions made via “affidavit of the investigating agent that the requirements are satisfied are sufficient to make the prima facie case.” United States v. Lawn Builders of New England, Inc., 856 F.2d 388, 392 (1st Cir. 1988) (quoting Liberty Financial Services v. United States, 778 F.2d 1390, 1392 (9th Cir. 1985)). If “an agency’s assertion of authority is not obviously apocryphal, a procedurally sound subpoena must be enforced.” Sturm, Ruger & Co., Inc., 84 F.3d at 5-6.

Once the Secretary has met his prima facie case for subpoena enforcement, the burden shifts to the respondent to demonstrate that enforcement of the administrative subpoena would be

an abuse of the court's process. Powell, 379 U.S. at 57-58; United States v. Tobins, 512 F. Supp. 308, 313 (D. Mass. 1981). While a court has a "broad power of inquiry" to ensure that its process is not abused (for instance, where the government appears to be acting in bad faith), the respondent must present "meaningful evidence that the Government might be exceeding or abusing its investigatory powers." Howatt, 525 F.2d at 229-30.

Where "the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose," the respondent has a difficult burden to show that the agency request is "unduly burdensome or unreasonably broad" such that enforcement should be denied. F.T.C. v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir. 1977). Where Congress has given an agency a broad mandate, courts have been "loath to accord the agency anything less than 'extreme breadth' in conducting its investigation." Linde Thomas Langworthy Kohn & Van Dyke v. Resolution Trust Corp., 5 F.3d 1508, 1517 (D.C. Cir. 1993) (quoting Genuine Parts Co. v. F.T.C., 445 F.2d 1382, 1391 (5th Cir. 1971)).

2. The Secretary's Subpoena is Proper and Should be Enforced

In this case, the Subpoena meets all four prongs of *Sturm* and should be enforced. First, the Subpoena was issued for a congressionally-authorized purpose; namely, the Subpoena relates to an investigation of employee welfare benefit plans as defined by ERISA. In passing section 504 of ERISA, Congress authorized the Secretary to "determine whether any person has violated or is about to violate any provision of [ERISA] or any regulation or order thereunder." 29 U.S.C. § 1134(a), ERISA section 504(a). The Supreme Court and the First Circuit have acknowledged that Congress conferred "broad investigatory powers" to the Secretary under section 504 of ERISA. See Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 578 (1985); Wadsworth v. Whaland, 562 F.2d 70, 74 (1st Cir. 1977). In

Senior Investigator Gewin's declaration, he states under penalty of perjury that the investigation in question was initiated pursuant to the broad authority conferred under ERISA section 504(a)(1), 29 U.S.C. §1134(a)(1), to determine "whether any person has violated or is about to violate any provision of Title I of ERISA or any regulation or order promulgated thereunder." Gewin Decl. ¶ 2.

Second, the information sought is relevant to the Secretary's authority under ERISA section 504(a), 29 U.S.C. § 1134(a). The Supreme Court broadly construes the term "relevance" in the context of administrative subpoena enforcement. In Endicott Johnson Corp. v. Perkins, the Supreme Court held that it was "the duty of the District Court to order . . . production" of information that "was not plainly incompetent or irrelevant to any lawful purpose of the Secretary." 317 U.S. 501, 509 (1943); see also I.C.C. v. Bay State Transp. Brokers, 579 F.2d 113, 115 (1st Cir. 1978). "The proper scope of an ERISA investigation can be determined only by reference to the statute itself; the appropriate inquiry is whether the information sought might assist in determining whether any person is violating or has violated any provision of Title I of ERISA." Donovan v. Nat'l Bank of Alaska, 696 F.2d 678, 684 (9th Cir. 1983). In evaluating relevance, courts have found that a "wide range of investigation is necessary and appropriate where . . . multifaceted activities are involved, and the precise character of possible violations cannot be known in advance." Texaco, Inc., 555 F.2d at 877.

The information sought in the Subpoena is patently relevant to the Secretary's lawful purpose of investigating employee welfare benefit plans and their service providers. See 29 U.S.C. §§ 1003(a), 1002(14)(B). For example, Subpoena Requests No. 29 and 30, to which PIC particularly objects and refuses full compliance, requests the following:

- "Communications *related to any Employee Welfare Benefit Plan* either from or to (including as carbon copies) the following individuals and entities: . . ."

- “Communications with any of the following words or phrases and *related to any Employee Welfare Benefit Plan* for whom You provide, provided, or bid to provide Services:”

Gewin Decl. Ex. 1 at 12-13 (emphasis added). The Subpoena clearly defines “Employee Welfare Benefit Plan” using the same definition contained in the statute:

any plan, fund, or program which was established or maintained by an Employer by an Employee Organization or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability or death, as defined in Section 3(1) of ERISA, 29 U.S.C. § 1002(1).

Id. at 5. Indeed, PIC appears to concede that the information it is withholding relates to ERISA plans, which is squarely within the Secretary’s authority to investigate: “PIC issues reinsurance policies *to other Plan Sponsors* not utilizing the partnership structure at issue in the Fort Worth litigation. The responses provided are limited to those customers of PIC utilizing the partnership structure.” Gewin Decl. Ex. 2 at 2 (emphasis added); see also Liu Decl. Ex. 8 at 1 (suggesting its business operations are “tangentially related” to ERISA group plans).

In restricting its production, PIC inappropriately decided of its own accord that its proffered information “fully inform[ed]” the Secretary of its business operations “related to any ERISA group plans.” Liu Decl. Ex. 8 at 1. But this determination of adequacy is not one for PIC to make. At the enforcement stage, a district court is “not free to speculate about possible charges that might be included in a future complaint, and then to determine the relevance of the subpoena requests by reference to those hypothetical charges.” Texaco, Inc., 555 F.2d at 874; see also Oklahoma Press Pub. Co., 327 U.S. at 216 (an agency investigation is not “limited by forecasts of the probable result of the investigation” (citation omitted)); Howatt, 525 F.2d at 230 (“[W]hether or not certain activities are subject to [agency] regulation is not to be decided in a subpoena enforcement action.”). If a court cannot speculate on what may be relevant to a

potential future charge, neither can the target of a subpoena. Where the information requested is plainly relevant to an ERISA investigation—as it is here—PIC must comply in full.

Third, the information sought was adequately described. Along with thirty clearly-enumerated requests, the Subpoena includes five pages of definitions and instructions for compliance. Where applicable, the requests include subparts naming specific components of each item to be produced. See, e.g., Gewin Decl. Ex. 1 at 9-10, Request No. 6 (requesting documents or lists to show all Employee Welfare Benefit Plans for which PIC provides services, including the name of the plan sponsor, the name and address of the plan, and the services and products provided by PIC). PIC has not objected or otherwise suggested that the Subpoena was vague or inadequately described. In fact, PIC has already produced responsive information as it relates to limited partnership plans, but is withholding the same information with respect to other potential ERISA-covered employee welfare benefit plans. See Gewin Decl. Ex. 2 at 2. This indicates that PIC fully comprehends the request, but refuses to comply.

Finally, the Department followed proper procedures in issuing the Subpoena, where Jeffrey Monhart, Regional Director of EBSA's Chicago Regional Office, issued the Subpoena and it was served electronically to counsel for PIC, whom PIC had authorized to accept service of the Subpoena. The Department had also sent the Subpoena by certified mail to PIC's business address in San Juan, Puerto Rico, but it was unclaimed and returned. Gewin Decl. ¶¶ 8-10.

3. PIC Cannot Carry Its Burden to Defeat Enforcement of the Subpoena

PIC refuses to comply in full with the Subpoena on what appear to be two bases, neither of which defeat the Secretary's petition for enforcement. First, PIC argues it is obligated to

protect the confidentiality of its business partners and clients.⁴ PIC cannot, however, withhold information solely on the grounds that it is confidential. See United States v. Ritchie, 15 F.3d 592, 601 (6th Cir. 1994) (enforcing a summons by the Internal Revenue Service, requiring a law firm to disclose its clients' identities despite the existence of a confidential relationship). The Subpoena contains explicit instructions about the production of confidential information, requiring PIC to "mark those documents as [proprietary or confidential] and produce the documents." Gewin Decl. Ex 1 at 7.⁵

Second, PIC contends that the Secretary's "scope of investigative authority is not unlimited" and the previously-provided information "fully informs" the Department of PIC's relevant business operations. PIC, however, cannot show how the Secretary has exceeded its investigative authority when, as previously discussed, the Subpoena requests information specifically related to employee welfare benefit plans as defined by ERISA. Moreover, PIC's claim that the proffered information "fully informs" the Secretary is inapposite. As discussed, PIC may not hypothesize about the Department's probable use of information and curate its responses to that hypothetical theory of liability, nor may the Court decline to enforce the Subpoena based on that speculation. See Texaco, Inc., 555 F.2d at 874; Linde Thomson Langworthy Kohn & Van Dyke, P.C., 5 F.3d at 1516-17.

Further, PIC cannot show that the Secretary's actions constitute an abuse of process or that the Subpoena imposes an undue burden. The Department permitted production long after the

⁴ PIC withholds five documents based on the attorney-client privilege, Gewin Decl. Ex. 3 at 1, and the Department does not seek production of those documents, see id. Ex. 1 at 7.

⁵ To the extent PIC is concerned about producing confidential information, properly designated confidential material produced to the Department is generally protected from disclosure to the public under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and the Department's regulations, 29 C.F.R. § 70.26.

initial deadline of July 31, 2020, and accepted documents on a rolling basis between August 2020 and February 2021. Gewin Decl. ¶¶ 11, 13, 15-16. Investigator Gewin and Department counsel held telephone calls and exchanged emails and letters with PIC counsel multiple times over several months to explain the Subpoena requests in an effort to facilitate PIC's compliance. Gewin Decl. ¶¶ 12, 14; Liu Decl. ¶¶ 2-6, 8. PIC also cannot claim that compliance is an undue burden when, for example, it produced responsive documents but redacted relevant information, which is arguably more burdensome than producing all responsive documents without redaction. Particularly given the repeated extensions and mitigation efforts the Department has already offered to PIC in an effort to gain compliance, PIC is unable to meet the high bar of demonstrating how compliance with the Subpoena is unduly burdensome.

Finally, PIC cannot show that the Department acted in bad faith in issuing the Subpoena. In conclusory terms, PIC wrote in its letter dated March 12, 2021, "The Department's pursuit of the customers and vendors of PIC, a reinsurer, constitutes harassment." Liu Decl. Ex. 8 at 1. But PIC has no evidence that the Department has engaged in anything beyond its regulatory authority, which includes conducting a duly-authorized investigation under ERISA. See Korpi v. United States, No. 83-0361-MA, 1984 WL 2772, at *2 (D. Mass. Jan. 20, 1984) (denying a motion to quash and enforcing an administrative subpoena where the petitioners "have provided no evidence whatsoever of harassment beyond the fact that these summonses were issued"). To the contrary, the Department initiated the Anjo Investigation after receiving several complaints, referrals from state regulators, and a referral from a congressional office regarding products, plans, and/or companies associated with Anjo, LLC, and has continued to receive additional

complaints and referrals during the course of the investigation. See Gewin Decl. ¶¶ 3, 5.⁶ And even if the Department's investigation had a negative impact on PIC's business, this flows from the choices third parties make based on the fact of a government investigation and does not support a finding of bad faith by the Department. See Benistar Employer Servs. Trust Co. v. United States, No. 3:04 CV 02197(JBA), 2005 WL 3429423, at *6 (D. Colo. May 12, 2005) ("Simply claiming enforcement of a summons would be onerous and/or have a detrimental effect on a business relationship is insufficient to show bad faith on the part of the [agency]."); see also S.E.C. v. Brigadoon Scotch Distributing Co., 480 F.2d 1047, 1056 (2d Cir. 1973) ("[T]he mere suggestion by appellants of possible damage to their business activities is not sufficient to block an authorized inquiry into relevant matters.").

CONCLUSION

The Secretary has made a *prima facie* showing of his statutory authority supporting the Subpoena, the subpoenaed documents are relevant, the information sought was adequately described, and the procedural requirements for issuing the Subpoena have been met. Moreover, PIC cannot carry its burden to show compelling reasons why the Subpoena should not be enforced. The Subpoena should therefore be enforced as issued.

⁶ PIC, along with the other Suffolk Plaintiffs, has already sued the Department and claimed that the Anjo Investigation was retaliatory in violation of the Constitution, the APA, and ERISA, see Compl., Suffolk Administrative Services case, ECF No. 1, and the Department has explained in the Suffolk Administrative Services case how PIC's claims against the validity of the Anjo Investigation cannot prevail because they are meritless. See Defs.' Mot. for J. on the Pleadings, Suffolk Administrative Services case, ECF No. 28; Defs.' Reply in Supp. of Their Mot. for J. on the Pleadings, Suffolk Administrative Services case, ECF No. 35. The Department respectfully refers this Court to its Answer and briefing on a motion for judgment on the pleadings in the Suffolk Administrative Services case for a fuller discussion of why PIC's harassment allegations must fail.

Dated: August 31, 2021

Respectfully Submitted:

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

**MARTIN J. WALSH, SECRETARY)
LABOR, UNITED STATES)
DEPARTMENT OF LABOR,)
) Petitioner,)
))
**PROVIDENCE INSURANCE)
COMPANY, I.I.,)
))
Respondent.)****

**Civil No.
3:21-mc-00413 (ADC)**

**ANSWER TO PETITION TO ENFORCE ADMINISTRATIVE SUBPOENA AND COUNTERCLAIM FOR
DECLARATORY AND INJUNCTIVE RELIEF**

TO THE HONORABLE COURT:

COMES NOW Respondent, Providence Insurance Company, I.I. (“PIC”), and file this, its Answer to Petition to Enforce Administrative Subpoena and Counterclaim for Declaratory and Injunctive Relief against Petitioner Martin J. Walsh, Secretary of Labor, United States Department of Labor (“DOL”), and shows the Court as follows:

ANSWER TO PETITION

PIC hereby files its Answer, showing the Court its response to the allegations in the numbered paragraphs of the Petition as follows:

1. Paragraph 1 contains conclusions of law, not assertions of fact. As such, PIC is not required to either admit or deny the same. To the extent paragraph 1 is deemed to include factual allegations, PIC is without sufficient knowledge and information to admit or deny the allegations in paragraph 1 concerning the motivations of DOL as to the purpose and issuance of the Subpoena and therefore denies same.

2. PIC admits the allegations in paragraph 2.

3. PIC admits the allegations in paragraph 3.

4. PIC is without sufficient knowledge and information to admit or deny the allegations in paragraph 4 concerning the motivations of DOL as to the purpose and origins of the Anjo Investigation and therefore denies same. By way of further response, PIC notes that it, along with three other entities, previously commenced litigation against DOL asserting claims for various constitutional and statutory violations arising from DOL's retaliatory and improper conduct in the Anjo Investigation. That matter is currently pending in the United States District Court, District of Puerto Rico and is known as *Suffolk Administrative Services, LLC, et al., v. United States Department of Labor, et. al.*, United States District Court, District of Puerto Rico, Civil Action No. 3:21-cv-01031 (DRD) (the "Constitutional Case").

5. PIC admits that counsel for PIC accepted service of the Subpoena on July 9, 2020 and that a true and correct copy of the Subpoena was attached as Exhibit 1 to the Gewin Declaration. The remaining allegations of paragraph 5 contain conclusions of law, not assertions of fact. As such, PIC is not required to either admit or deny the same.

6. PIC admits that counsel for PIC accepted service of the Subpoena on July 9, 2020 and upon information and belief admits the remaining allegations in paragraph 6.

7. PIC denies the allegations in paragraph 7.

8. PIC states that the correspondence referenced in paragraph 8 speak for themselves, and PIC denies any characterization or paraphrasing of the correspondences' contents that is incomplete or inconsistent with its express language. PIC admits that DOL did not respond to its letter of March 12, 2021 until filing of the Petition.

9. In response to paragraph 9, PIC admits that it will not voluntarily produce certain documents unredacted in response to the Subpoena. PIC denies the remaining allegations in paragraph 9.

10. Paragraph 10 contains conclusions of law, not assertions of fact. As such, PIC is not required to either admit or deny the same. To the extent paragraph 10 is deemed to include factual allegations, PIC denies the same.

WHEREFORE, Respondent PIC, having filed its Answer to DOL's Petition, respectfully requests that the Petition be dismissed or, in the alternative, that Subpoena be reasonably limited with all costs of this action being cast against DOL and for such other and further relief as this Court deems just and proper.

COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF¹

INTRODUCTION

1. PIC, Suffolk Administrative Services, LLC ("SAS") and Providence Insurance Partners, LLC ("PIP") sought guidance from DOL to ensure that a proposed business structure to provide a novel way for companies to provide access to health coverage to their personnel and recruits complied with applicable law. PIC, SAS and PIP never approached this novel structure with a "catch us if you can" philosophy. Rather, they literally "walked through the front door" of DOL seeking its guidance and view on the applicable law before implementing it. PIC, SAS and PIP relied in good faith on the unequivocal representations and guidance of DOL officials

¹The facts and claims asserted in this Counterclaim have been asserted by PIC in the Constitutional Case and are re-asserted herein in order to preserve all of PIC's rights and remedies. The facts asserted in the Counterclaim have been updated to include additional unconstitutional actions by DOL. The claims have also been modified to account for the fact that not all of the Plaintiffs in the Constitutional Case are parties to this action. Given the interconnectedness of the claims, PIC believes that the best course for both this case and the Constitutional Case is for this case to be re-assigned to the judge assigned to the Constitutional Case.

regarding the novel concept. For this, DOL has been punishing PIC, as well as SAS and PIP, with a retaliatory “investigation” – the Anjo Investigation referenced in the Petition.

2. On November 8, 2018, LP Management Services, LLC (“LPMS”), filed a formal Advisory Opinion Request (“2018 Request”) with the United States Department of Labor (“DOL”) seeking guidance on whether a proposed health benefit plan (“Plan”) was a lawful single employer health plan under the Employee Retirement Income Security Act (“ERISA”). LPMS is an owner of clients of SAS and PIC and is not otherwise connected to Anjo LLC (“Anjo”), PIC, PIP, and SAS. A true and correct copy of the 2018 Request is attached hereto as Exhibit 1.

3. The structure of the Plan was developed by Alexander Renfro (“Mr. Renfro”), the Chief Legal Officer of PIP and a manager of Anjo, SAS, and PIC. Mr. Renfro is a benefits attorney licensed in the State of Tennessee. Mr. Renfro received a juris doctor from Southern Methodist University Dedman School of Law, and a certificate in employee benefits, as well as an LLM in taxation from Georgetown University Law Center.

4. Mr. Renfro, as attorney for LPMS, was the principal author of the 2018 Request. The 2018 Request detailed the legal and factual basis for application of ERISA to the Plan building upon the previously recognized concept under ERISA of “working owners.” Given the novel corporate structure of the limited partnerships, LPMS sought guidance from DOL with respect to four issues, seeking confirmation from DOL that:

- a. A single-employer self-insured group health plan sponsored by a limited partnership is an “employee welfare benefit plan” within the meaning of ERISA § 3(1).
- b. A single-employer self-insured group health plan sponsored by a limited partner is a “group health plan” within the meaning of Part 7 of Subtitle B of Title I of ERISA (“Part 7”).

c. The limited partners participating in the limited Partnership's single-employer self-insured group health plan are "participants" within the meaning of ERISA Section 3(7).

d. The single-employer self-insured group health plan sponsored by the limited partnership is governed by Title I of ERISA.

5. On January 15, 2019, and on February 27, 2019, Mr. Renfro again as attorney for LPMS revised the 2018 Request culminating in a final revised request ("Revised Request") to include additional factors and legal arguments for consideration by DOL. A true and correct copy of the Revised Request is attached hereto as Exhibit 2.

6. As noted in the Revised Request, LPMS sought to implement this Plan structure through several limited partnerships for which LPMS would act as general partner (the "Partnership Plans").

7. SAS is a Puerto Rican limited liability company with principal offices located in Guaynabo, Puerto Rico, providing benefits consulting and vendor management company providing compliance assistance to employers located in the United States mainland to implement, administer, and maintain self-insured group health plans. In addition to traditional benefits administration services, SAS provides other services including ERISA compliance advice, Affordable Care Act compliance advice, advice on local or federal wage ordinance provisions, and vendor management to employers with self-insured group health plans. SAS provides such benefits consulting and vendor management services to employers implementing both traditional self-insured group health plans and the novel Partnership Plan structure.

8. PIC is Puerto Rican international insurance company with principal offices located in San Juan, Puerto Rico, providing reinsurance for employers located in the United States

mainland implementing both traditional self-insured group health plans and the novel Partnership Plan structure.

9. Anjo is a Tennessee limited liability company that does not provide any services of any kind to any individual or entity relating to ERISA or group health plans, be they fully insured or self-insured. Anjo does not participate in any ERISA plans of any nature nor does it act as a vendor to any ERISA plan. Its only involvement in any of the issues relevant to this Complaint is its connection to Mr. Renfro.

10. PIP is a Tennessee limited liability company providing consultation and advice on structuring reinsurance coverage for employers implementing both traditional self-insured group health plans and the novel Partnership Plan structure.

11. SAS, PIC, and PIP all expended resources, time, and expertise to develop products tailored to assist employers seeking to implement the novel Partnership Plan structure.

12. On February 21, 2019, several state Attorneys General sent DOL a letter encouraging them to act on the Revised Request because the applicability of ERISA to the Plan heavily impacts the economic and public health interests of the states (“AG Letter”). A true and correct copy of the AG Letter is attached hereto as Exhibit 3.

13. DOL has never provided any response to the AG Letter.

14. For more than one year, DOL provided no formal response to the Revised Request, forcing LPMS and Data Marketing Partnership LP (“DMP”), a limited partnership for which LPMS serves as general partner, to file suit in the United States District Court for the Northern District of Texas, *Data Marketing Partnership, LP, and LP Management Services, LLC v. Department of Labor*, Civil Case 4:19-cv-00800-O (the “AO Case”).

15. While DOL refused to make any formal response to the AO Request and AG Letter, and in so doing violated the terms of its own published policies for AO review and response, DOL simultaneously opened a retaliatory investigation against Anjo, targeting the Partnership Plans, PIC, and several related organizations in a transparent effort to provide a post hoc explanation for their lack of action on the Revised Request, and with the transparent aim to chill the speech and association rights of PIC, as well as SAS and PIP, in violation of the First and Fifth Amendments to the United States Constitution (the “Anjo Investigation”).

16. On January 24, 2020, six business days before its response was due in the AO Case, and more than fourteen months after the Request had been duly and properly filed, DOL finally issued an adverse action response (“Response”) to the AO Request. A true and correct copy of the Response is attached hereto as Exhibit 4.

17. The six-page Response was arbitrary and capricious, containing almost no legal analysis by DOL and, in direct violation of ERISA Procedure 76-1, was based on erroneous facts and misstatements of the proposed business structure.

18. Because the Response contained so many factual misstatements and so little legal analysis, it appeared to be just another calculated effort by DOL to hamper implementation of the traditional plan to a less common corporate structure at the expense of PIC’s, as well as SAS and PIP’s, constitutional rights and the rights of employers, limited partners, and employees seeking the benefits of the Partnership Plans and similar plans providing affordable access to health care.

19. In light of the adverse Response, the AO Case continued.

20. LPMS and DMP eventually received relief when the court granted its Motion for Summary Judgment setting aside DOL’s Response (See, AO Case at Doc. 37).

21. This counterclaim seeks relief from the ongoing retaliatory and unconstitutional acts of DOL related to their purported Anjo Investigation.

JURISDICTION AND VENUE

22. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (Federal Question) and 2201 (Declaratory Judgment Act), 29 U.S.C. § 1132(k), and 5 U.S.C. § 702 (Administrative Procedure Act) as well as by virtue of DOL having filed the instant Petition in this Court.

23. The United States has waived its sovereign immunity in this action pursuant to 5 U.S.C. § 702, 28 U.S.C. § 2201, and 29 U.S.C. § 1132(k).

24. PIC is a Puerto Rican international insurer with a principal place of business located at 954 Ponce de Leon Avenue, Miramar Plaza, Suite 802, San Juan, PR 00907. PIC is subject to the jurisdiction and venue of the Court.

25. Venue is proper in this district pursuant to the express provisions of ERISA, 29 U.S.C. §§ 1132(k). Venue is also proper in this district pursuant to 28 U.S.C. §§ 1391(b) and (e)(1). Respondent is a United States agency or officer sued in his official capacity and a substantial part of the events giving rise to this action occurred in this District.

PARTIES

26. PIC, as well as SAS and PIP, is aggrieved by the unreasonable, retaliatory investigation into all businesses engaged in providing services to the Partnership Plans. This investigation, and the vindictive manner in which it has been carried out over the past 30 months, evinces a clear design to silence PIC, SAS and PIP and otherwise inflict damage upon them by any and all means available to DOL. Notably, and as further described herein, DOL is violating its

own procedures for the conduct of such investigations. Accordingly, PIC has standing to bring this action pursuant to 29 U.S.C. § 1132(k).

27. DOL is an agency of the United States government and has responsibility for implementing and enforcing portions of ERISA. It is an “agency” under 5 U.S.C. § 551(1).

FACTS

28. This case arises out of DOL’s blatant retaliation against PIC, as well as SAS and PIP, for exercising its constitutionally protected rights and, in doing so, relying on the unequivocal representations and guidance of DOL officials regarding a business structure which provided the personnel and prospective recruits of its client companies with a novel way to access private health coverage.

PETITIONING THE GOVERNMENT

29. In October, 2018 (the “October Meeting”), representatives of PIC, SAS, and PIP met with the United States DOL in an effort to be transparent with the relevant regulatory agencies that would interact with the Plan, its participants, and its sponsors.

30. In attendance at the October Meeting and representing the interests of PIC, SAS, and PIP was Alex Renfro, among others.

31. In attendance at the October Meeting and representing the interests of DOL was Preston Rutledge, then Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA), the division of DOL responsible for ERISA compliance and interpretations.

32. By all accounts, the October Meeting was very successful. PIC, SAS, and PIP’s representatives explained the plan structure to DOL representatives and provided high level detail of the goals of the plan and the business structure.

33. At the October Meeting, Assistant Secretary Rutledge told representatives from PIC and co-Plaintiffs in the Constitutional Case that an Advisory Opinion Request was the best route to ensure approval of the Plan by DOL, which Mr. Renfro promptly submitted.

34. The parties parted ways with an explicit agreement to continue discussions so that DOL could be comfortable approving the Plan as ERISA compliant.

35. In the weeks and months that followed, occasional informal conversations continued between representatives of PIC, SAS, and PIP and representatives of DOL in anticipation that a more formal meeting or exchange would soon follow.

36. Assistant Secretary Rutledge verbally expressed to Christopher Condeluci, an advisor to SAS, that he didn't see why DOL needed to issue an Advisory Opinion, because ERISA already allows partners to be treated as employees for purposes of plan eligibility.

37. During this conversation, Assistant Secretary Rutledge told Mr. Condeluci that LPMS should "just do it," meaning implement the Plan.

38. As a result of this and other advice from DOL, the 2018 request was slightly revised and resubmitted to DOL in early 2019, culminating in the final Revised Request submitted on or about February 26, 2019.

39. Simultaneously, and in reliance on Assistant Secretary Rutledge's statements, LPMS began accepting limited partners into DMP and formed the Plan for the same.

40. At or around this time, seven sitting state Attorneys General sent a letter to then DOL Secretary Acosta, stressing the urgency of the public health problem that the LPMS structure addressed, and requesting expedited consideration of the Revised Request. DOL made no formal response to any of these submissions.

41. Instead, during a meeting on March 6, 2019, then DOL Chief of Staff Nicholas Geale told a group of representatives from PIC, SAS, and PIP and interested states, including Mr. Renfro, Mr. Condeluci, and Louisiana Attorney General, Jeff Landry (the lead signatory to the aforementioned letter) that although the Partnership Plan structure was “ingenious” and that he “wished he’d thought of it,” DOL could not respond to the Revised Request due to perceived conflict with litigation around DOL’s new Association Health Plan (“AHP”) rule.

42. At one point during the meeting, representatives from DOL became animated and said that if PIC, SAS, and PIP’s group disagreed about DOL’s priorities, they should “take it up with the White House,” which had instructed DOL not to approve the Revised Request.

43. In a subsequent meeting between Mr. Condeluci and Mr. Geale at DOL, Mr. Geale proposed that if LPMS would withdraw its AO request (and/or cease pressing for an answer to it), Mr. Geale would “look [LPMS representatives] in the eye” and promise that DOL would not investigate or otherwise interfere with any LPMS-managed partnership plans.

44. Representatives for PIC, SAS, and PIP attempted to explain to Mr. Geale that even assuming DOL refrained from investigating or hampering DMP, the fifty separate state insurance regulators could pose significant and indefinite regulatory burdens on DMP through investigations and rulings of their own. It simply was not practical or advisable to rely on handshake promises with the looming threat of politically motivated investigations by individual states in the absence of an ERISA ruling.

45. Several staff members of DOL were present at this meeting, including, upon information and belief, members of the enforcement division of DOL and Joseph Canary, who is the Director of the Office of Regulations and Interpretations and the purported author of the adverse Response.

46. It turns out PIC, SAS, and PIP's reticence to accept handshake deals with DOL was well-founded, because once PIC, SAS, and PIP declined DOL's offer, DOL embarked on a fishing expedition through what can only be described as a vindictive and retaliatory investigation.

47. PIC believes the first subpoena related to the Anjo Investigation was issued by DOL shortly after the earlier described meeting in which Joseph Canary was in attendance, thus beginning the investigation into Anjo despite DOL having never posed a single written question or other formal response to the Revised Request or the AG Letter. This lack of interaction on the Revised Request is highly unusual for DOL's advisory opinion process, as questions from DOL to the requestor routinely occur following submission of an advisory opinion request.

48. DOL issued subpoenas to almost every key entity doing business with Anjo, PIC, SAS, or PIP, including some businesses that have nothing whatsoever to do with any partnership plans.

49. The clear intent of the investigation and the subpoenas is to intimidate PIC, SAS, PIP and their partners, and to stifle their speech and associational rights, while inflicting as much economic damage on PIC, SAS, and PIP as possible.

50. The maltreatment by DOL notwithstanding, PIC, SAS, and PIP have complied with all requests, and encouraged their partners to do the same.

51. But such compliance comes at a price, having collectively cost hundreds of thousands of dollars and immeasurable time and energy to date (precious time diverted from serving clients and improving all aspects of PIC, SAS, and PIP's businesses and those of PIC, SAS, and PIP's clients, including data collection and marketing).

52. DOL's actions have also prevented PIC, SAS, and PIP from growing their business, because they have naturally been obliged to disclose the investigation to all potential new

distribution sources, who have all understandably said, “Call us when it’s over.” Additionally, current vendors and distribution partners of PIC, SAS, and PIP have either reduced or terminated relations with PIC, SAS, and PIP as a result of receiving subpoenas in the Anjo Investigation.

53. Immediately before the initiation of the investigation of Anjo and since that time, DOL rapidly changed course in its dealings with the PIC, SAS, and PIP regarding the propriety of the Partnership Plans as well.

54. As the investigation got under way, a long-scheduled June 2019 meeting between LPMS, PIC, SAS, and PIP’s representatives, and DOL was abruptly pushed back to July.

55. When the scheduled meeting finally occurred, it lasted only ten minutes and the representatives from DOL demonstrated little interest in continuing discussions with LPMS, PIC, SAS, and PIP’s representatives about the Partnership Plans, or the Revised Request.

56. During this time-period, DOL subpoenaed more than ten entities related to LPMS, PIC, SAS, and PIP as part of the Anjo Investigation. True and correct copies of these subpoenas are attached hereto as Exhibit 5.

57. The subpoenas from DOL are ostensibly issued pursuant to 29 U.S.C. § 1134(a)(1), which grants EBSA the authority to determine whether someone is violating or about to violate ERISA.

58. Nevertheless, this explanation is especially curious since these subpoenas were issued within weeks of the adverse Response issued by DOL that explicitly presumed the Partnership Plans are not covered by ERISA. Despite this Response, DOL continued to pursue its amorphous, ill-defined, and indefinite “investigation” into Anjo.

59. The Response, in fact, expressly states, “it is the Department’s view that the proposed [Partnership Plan] health benefit programs would not be single-employer group health plans *or ERISA plans at all.*” [Emphasis Added].

60. In the AO Case, the District Court rejected DOL’s view.

61. DOL is attempting to have it both ways. On the one hand, they state that the Partnership Plans covered by the Revised Request are not subject to ERISA, and yet they are investigating Anjo and others under their authority to ensure compliance with ERISA. Now that the District Court in the AO Case has resoundingly rejected this misguided view of DOL, it has failed to abandon (or even curtail) its retaliatory investigation of Anjo. This is emblematic of the abusive, duplicitous, and unconstitutional conduct DOL has subjected PIC, SAS, and PIP to for over two and a half years.

62. PIC, SAS, and PIP welcomed DOL oversight from the beginning – literally walking in its front door to seek guidance on the novel Partnership Plans before implementing them. However, DOL oversight must still comply with the United States Constitution and ERISA. DOL oversight does not extend to baseless, retaliatory fishing expeditions.

63. DOL issued the subpoenas to stifle the ability of PIC, SAS, and PIP to continue their services with respect to the Partnership Plans, to hinder or altogether block the right of the partners to join together and freely associate with one another, to hinder or altogether block the right of PIC, SAS, and PIP’s customers to join together and freely associate with one another and/or with PIC, SAS, and PIP, and in response to LPMS’ petition to the government through the 2018 Request and Revised Request (“Advisory Opinion Requests”).

64. Having been thwarted by the District Court’s ruling in the AO Case, DOL is using its abusive investigatory tactics to achieve its desired end by other, unlawful means.

65. DOL's efforts have been highly successful. Indeed, the effect of this retaliatory investigation and the associated subpoenas has been to thwart the ability of PIC and PIC's co-Plaintiffs in the Constitutional Case to refine and implement the Partnership Plan on behalf of their client(s), as well as conduct their ordinary course of business with respect to more traditional group health plans.

66. The very existence of the seemingly interminable investigation has understandably both frightened potential Partnership Plan vendors and dissuaded them from providing services to the Partnership Plans.

67. The very existence of the seemingly interminable investigation has understandably both frightened potential Partnership Plan vendors and dissuaded them from providing services to the Partnership Plans and frightened potential vendors and partners from conducting business with PIC, SAS, and PIP both generally and with respect to Partnership Plans. Additionally, existing vendors of PIC, SAS, and PIP have reduced or terminated relations with PIC, SAS, and PIP as a result of the retaliatory Anjo Investigation.

68. As a direct result of this egregious conduct, PIC, along with SAS, PIP and Anjo filed the Constitutional Case on January 19, 2021.

69. Since late July 2021, DOL has accelerated the abusive wielding of its investigative power to confuse and prejudice state agencies and intimidate those who engage in business or contemplate engaging in business with PIC, SAS and PIP. In short, DOL has intentionally targeted PIC, SAS and PIP's business efforts whether they are connected to providing services to the limited number of clients implementing Partnership Plans, or to PIC, SAS and PIP's broader client base of traditional employers implementing uncontroversial self-insured benefit plans.

70. On July 20, 2021, DOL initiated an unprompted direct interview of one of PIC, SAS and PIP's traditional employer clients. This unannounced and unwarranted action by DOL was the first of several new instances of DOL's inappropriate conduct that have become known to PIC, SAS and PIP since late July.

71. On July 23, 2021, PIC, SAS and PIP learned that a potential business partner had a telephone conversation "with the deputy commissioner at the DOI [Department of Insurance] for Delaware" during which he was "advised to stay away from this program." He was informed there were "major concerns" with PIC, SAS and PIP's plan – even though the contemplated plans were not Partnership Plans – and that "the plan" was "under investigation in several jurisdictions."

72. Upon learning of this disturbing contact by the Delaware Department of Insurance ("DE DOI") to a prospective business partner, Mr. Renfro made contact with DE DOI in an effort to organize a conference call with the appropriate DE DOI personnel, SAS, and its business partners. On July 26, 2021, Mr. Renfro received a call from Mr. Frank Pyle, Special Deputy Commissioner of DE DOI. During this extensive conversation, Mr. Renfro learned from Mr. Pyle that DE DOI had, in fact, advised potential business partners of SAS and PIC to "hold off" on any relationship due to "concerns" of DE DOI arising from direct discussions with DOL regarding the AO Case and other state Departments of Insurance who were passing on misinformation provided by DOL to those states. Mr. Pyle insisted that DE DOI must engage in a "review" of any program involving SAS and PIC as a result of the DOL guidance, regardless of whether the client of SAS and/or PIC was implementing Partner Plans or not.

73. On August 6, 2021, a distribution partner of SAS and PIC spoke with a leader in the Pennsylvania Chamber of Commerce who had been informed by Mr. Mike Fissel, a special investigator with the Pennsylvania Department of Insurance ("PA DOI") that one of PIC, SAS and

PIP's programs in the State of Washington "was under investigation and shut down" following entanglement with DOL and that SAS structured plans were likely not "ACA compliant". Additionally, this business partner also noted that the PA DOI special investigator admitted his information came from the DE DOI, likely Mr. Pyle. This business partner of PIC and SAS also indicated that when he contacted the DE DOI he was informed by a "Delaware DOI regulator" (again, likely Mr. Pyle) that the "program is not authorized" and that the DE DOI would also be contacting the Maryland Insurance Administration ("MIA") just as it had done with PA DOI.

74. Later that same day, PIC, SAS and PIP learned that the President of one of their potential distribution partners had spoken with the "Special Deputy Commissioner of DE" (presumably Mr. Pyle). Following that conversation with Mr. Pyle, that potential distribution partner decided "to not refer the [SAS affiliated] program at this time" and to wait for "full approval from the Delaware State Dept of Insurance."

75. On August 9, 2021, the same potential distribution partner affirmed the decision communicated on August 6 that it is now "not representing the [SAS affiliated] program pending the DE Insurance Commission investigation." Upon information and belief, each of these facts relates directly to the improper actions of DOL at least, and perhaps are a result of a larger effort (orchestrated by DOL) to prejudice select states departments of insurance and subsequently enlist the support of these and other state departments of insurance to inflict harm on PIC, SAS and PIP by "poisoning the well" with the potential business partners, customers, and vendors that might work with PIC, SAS and PIP.

76. On August 10, 2021, Mr. Renfro and PIC, SAS and PIP's counsel participated in a lengthy conference call with DE DOI's Director of Consumer Protection and Enforcement Division, Susan Jennette, Deputy Attorney General for DE DOI, Kathleen Makowski, and Mr.

Pyle. While that conversation was seemingly productive, these high-level representatives of DE DOI made it abundantly clear that much of their skepticism and concerns about SAS and PIC arose from communications with unnamed DOL officials and multiple assumptions by those DOL officials as to SAS and PIC services for even employers implementing traditional (i.e. non-Partnership Plan) self-insured benefit plans designed, administered, and/or insured by PIC and SAS.

77. Such an outcome threatens the viability and longevity of the Partnership Plans and the limited partnerships sponsoring them, because the success of such limited partnerships depends on attracting many partners, as well as PIC, SAS, and PIP's viability as going concerns, since their ability to conduct business at all has been stymied by the loss of goodwill and reputation among existing and potential partners while the cost of complying and attempting to respond in good faith to the retaliatory Anjo Investigation continues.

78. The retaliatory investigation has inhibited the ability of PIC, SAS and PIP, the clients they service, their clients' plan participants, potential plan participants, and PIC, SAS, and PIP's customers and business partners to associate with one another on the basis of their political and protected viewpoints.

79. This abuse must stop.

DOL CONTINUES TO DISREGARD ITS OWN RULES

80. DOL also failed to follow its own procedures, specifically ERISA Procedure 76-1.

81. After submission of the Revised Request, DOL never requested any follow up information from LPMS and it never contacted any representative of LPMS to confirm its understanding of the facts presented in the Revised Request. This failure led to DOL's flawed understanding of the relevant facts.

82. Crucially, DOL applied little, if any, of the relevant law discussed in the Revised Request to the facts presented. The failure led to DOL's legally defective Response and, ultimately, the District Court's rejection of DOL's position.

83. Further, DOL relied on speculative facts even though ERISA Procedure 76-1 bars such reliance. Specifically, Section 10 of Procedure 76-1 states "The opinion assumes that all material facts and representations set forth in the request are accurate, and applies only to the situation described therein."

84. In the Response, however, DOL did not accept as true even the most basic facts presented in the Revised Request.

85. For these violations of ERISA Procedure 76-1, among other reasons, the District Court in the AO Case found DOL's conduct relative to the Response to be arbitrary and capricious.

86. Rather than seek clarification, submit follow up questions to the Revised Request, or follow its own ERISA Procedure 76-1, DOL initiated the retaliatory Anjo Investigation, which is not a permitted form of follow-up listed in the Procedure.

87. This Court should not permit DOL to run roughshod over its own policies and over Constitutional restraints that exist to safeguard American citizens from the considerable power of the administrative state.

DOL REFUSES TO PROVIDE PIC INFORMATION ON SCOPE AND PURPOSE OF INVESTIGATION

88. On November 6, 2020, counsel for PIC, SAS and PIP sent a letter to all known DOL officials involved in the investigation in an effort to seek clarity on the purpose, scope, and need for the Anjo Investigation.

89. As noted in the November 6, 2020, letter, PIC, SAS and PIP have all cooperated with DOL in the Anjo Investigation at great cost in legal fees and lost productivity. PIC, SAS and

PIP noted that each is a small business with limited personnel resources available to respond to the subpoenas. Despite these limited resources, PIC, SAS and PIP and associated entities implementing the Partnership Plans have produced nearly 20,000 documents comprising over 340,000 pages in response to the various DOL subpoenas issued in furtherance of the Anjo Investigation.

90. Having expended considerable resources in legal fees and lost productivity cooperating with DOL, PIC, SAS and PIP requested that DOL provide responses to reasonable requests for clarifying information on the Anjo Investigation, posing the following questions:

1. Based on the information provided to date in the Anjo Investigation, have any of our clients violated or, in your informed opinion, are they about to violate any provision of Title I of ERISA or any regulation or order thereunder?
 - a. If so, which clients?
 - b. If so, which specific provision of Title I of ERISA or any regulation or order thereunder are they suspected of violating or being “about to violate”?
2. Given that the Anjo Investigation has now continued for over fifteen months, what is the period within which DOL intends to either recommend or bring an enforcement action for any such alleged violation?
 - a. If DOL cannot provide this period, why not?
 - b. If DOL can provide this period, when will it provide this information to our clients?

91. Regardless of whether DOL desired to respond to the above reasonable requests, PIC, SAS and PIP sought a path to reach a resolution to the Anjo Investigation without needing to resort to litigation. Specifically, PIC, SAS and PIP offered to engage in a constructive dialogue with DOL around the following suggestions:

- The scope and concerns of the Anjo Investigation will be explicitly defined by DOL.

- The Anjo Investigation will hereafter be limited to SAS, PIP, PIC, other vendors to the Partnership Plans, and entities sponsoring the Partnership Plans, and all other entities will receive formal notice that they are not targets of the Anjo Investigation.
- A target date for formal conclusion of the Anjo Investigation will be established and agreed to by the Parties.
- Our clients will voluntarily provide annual reporting on the claims history and average claims trust account balances for any Partnership Plans to DOL every March, beginning March 2021, for 3 years.
- If any of the Partnership Plans modify their plan documents, trust documents, or summaries of benefits and coverage, and SAS, PIP, or PIC are still servicing said organization(s), then copies of these modifications will be provided to DOL within thirty (30) days of their effective date.
- Mr. Renfro will sit down with EBSA and DOL Solicitor's Office at their convenience to describe the model of the Partnership Plans and application of applicable ERISA treatment, including any consumer protection enhancements implemented by the LPs at the recommendation of SAS, PIP, and PIC.

92. As with all of PIC, SAS and PIP's prior interactions with DOL, the November 6 letter was delivered in good faith seeking to develop a working framework between PIC, SAS and PIP and DOL within which DOL could be fully satisfied that the implementation of the Partnership Plans complies with ERISA and allow PIC, SAS and PIP to continue their business within the requirements of ERISA.

93. Rather than accept the good faith offer to engage in constructive dialogue on how best to ensure ERISA compliance, satisfy DOL's concerns (assuming there were any legitimate concerns at the onset of the Anjo Investigation) that led to the amorphous and undefined Anjo Investigation, and create a structure for future interactions ensuring PIC, SAS and PIP's ERISA compliance, DOL rejected out of hand PIC, SAS and PIP's overtures.

94. On December 14, 2020, Katrina Liu, Trial Attorney, Office of the Solicitor of DOL (also an attorney representing DOL in this Petition, the AO Case, and the Constitutional Case),

responded on behalf of DOL with a letter essentially noting DOL's "ample authority to conduct its investigation in order to determine whether ERISA violations have or are about to occur." In short, DOL was "not in a position to provide the specific information you seek regarding the timing and scope" of the Anjo Investigation.

95. If there is or ever was a legitimate basis for the Anjo Investigation, DOL refuses to state what it is.

96. On December 30, 2020, PIC, SAS and PIP responded to Attorney Liu with citations to authority showing that, while broad, DOL's investigatory authority is not as limitless as portrayed in her letter of December 14. PIC, SAS and PIP closed their reply letter with yet another request that DOL reconsider its inexplicable approach to the Anjo Investigation. PIC, SAS and PIP noted "In the midst of the harsh economic impacts of this pandemic on all small businesses in America, I would hope DOL would reconsider the position taken in your letter." Despite the obvious damage that the DOL is causing, DOL has not reconsidered its position.

97. True and correct copies of the November 6, December 14, and December 30 letters are attached hereto as Exhibit 6.

CAUSES OF ACTION

COUNT I

(VIOLATIONS OF THE FIRST AMENDMENT)

98. The preceding allegations are all incorporated by reference herein as if fully set out.

99. The First Amendment protects private speech from government interference or restriction when the specific motivating ideology, opinion, or perspective of the speaker is the rationale for the restriction.

100. PIC's speech, via submission of the Advisory Opinion Requests, is entitled to First Amendment protection.

101. DOL unlawfully deprived PIC of its First Amendment rights in connection with and arising from LPMS's Advisory Opinion Requests by launching a retaliatory investigation into an entity, Anjo, for the sole purpose of harassing PIC, PIC's co-Plaintiffs in the Constitutional Case and the entities that were subpoenaed due to their partnership or other relationship with the Partnership Plans; issuing unconstitutional and overly intrusive requests for information via the subpoena process; delaying the processing of LPMS's Advisory Opinion Request on the basis of DMP's viewpoints and in violation of ERISA Procedure 76-1, the EO and 29 U.S.C. § 1134(b); seeking to undermine the duly issued order of a Federal Court determining that the Partnership Plans are explicitly legal constructs under ERISA; and failing to prevent such conduct by DOL employees and agents under their direct supervision and control while they were fully aware of such unconstitutional misconduct.

102. PIC holds the same viewpoint as LMPS in the Advisory Opinion Requests as evidenced by the fact that PIC voluntarily and continues to service clients owned by LPMS which are the subject of the Request itself.

103. In targeting PIC's business associates and partners for additional and illegitimate scrutiny, DOL engaged in impermissible viewpoint-based discrimination in violation of established First Amendment principles, while acting under color of federal authority in their respective official DOL positions.

104. DOL's conduct directly infringed upon PIC's speech by inhibiting their ability to engage in effective advocacy and other expressive activities.

105. DOL's conduct constitutes retaliation against PIC on the basis of the actual or perceived viewpoint of their protected speech.

106. DOL knew, or reasonably should have known, that their conduct would violate PIC's federal constitutional rights.

107. PIC has no other adequate monetary remedy in court for DOL's violations of its constitutional rights as complained of herein.

108. Absent congressional direction otherwise, courts may grant injunctive relief against prospective harms.

COUNT II
(VIOLATIONS OF THE FIRST AMENDMENT – FREEDOM OF ASSOCIATION)

109. The preceding allegations are all incorporated by reference herein as if fully set out.

110. The First Amendment to the United States Constitution protects PIC's right to freely associate with others of their choosing for the purposes of engaging in protected speech.

111. PIC and its partners and business affiliates are entitled under the First Amendment to freely associate with one another.

112. DOL unlawfully deprived PIC of its First Amendment rights in connection with and arising from LPMS's Advisory Opinion Requests by launching a retaliatory investigation into an entity, Anjo, as a pretext to issue overly broad, intrusive subpoenas to PIC and any other vendor providing services to Partnership Plans, for the sole purpose of harassing PIC and the entities that were subpoenaed due to their servicing relationship with limited partnerships sponsoring Partnership Plans; issuing unconstitutional and overly intrusive requests for information via the subpoena process; delaying the processing of LPMS's Advisory Opinion Request on the basis of DMP's viewpoints and in violation of ERISA Procedure 76-1, the EO and 29 U.S.C. § 1134(b); seeking to undermine the duly issued order of a Federal Court determining that the Partnership Plans are explicitly legal constructs under ERISA, and failing to prevent such conduct by DOL

employees and agents under their direct supervision and control while they were fully aware of such unconstitutional misconduct.

113. DOL, while acting under color of federal authority, infringed upon PIC's ability to freely associate for protected speech purposes with others of their choosing – including potential future clients, plan participants, and plan vendors.

114. DOL knew, or reasonably should have known, that targeting PIC and its partners and affiliates for additional and illegitimate scrutiny would violate PIC's federal constitutional rights.

115. PIC has no other adequate monetary remedy in court for DOL's violations of its constitutional rights as complained of herein.

116. Absent congressional direction otherwise, courts may grant injunctive relief against prospective harms.

COUNT III
(VIOLATIONS OF THE FIFTH AMENDMENT – EQUAL PROTECTION UNDER THE DUE PROCESS
CLAUSE)

117. The preceding allegations are all incorporated by reference herein as if fully set out.

118. The Fifth Amendment to the United States Constitution protects persons against the deprivation of life, liberty, or property without due process of the law and forbids the federal government from denying the equal protection of the laws.

119. The Fifth Amendment to the United States Constitution guarantees persons the right to be free from illegal discrimination and selective viewpoint-based scrutiny and enforcement.

120. DOL unlawfully deprived PIC of its First Amendment rights in connection with and arising from LPMS's Advisory Opinion Requests by launching an investigation into an entity,

Anjo, for the sole purpose of harassing PIC and the entities that were subpoenaed due to their relationship as sponsors of Partnership Plans or vendors to Partnership Plans; issuing unconstitutional and overly intrusive requests for information via the subpoena process; delaying the processing of LPMS's Advisory Opinion Request on the basis of DMP's viewpoints and in violation of ERISA Procedure 76-1, the EO and 29 U.S.C. § 1134(b); seeking to undermine the duly issued order of a Federal Court determining that the Partnership Plans are explicitly legal constructs under ERISA, and failing to prevent such conduct by DOL employees and agents under their direct supervision and control while they were fully aware of such unconstitutional misconduct.

121. DOL, while acting under color of federal authority, caused PIC to be treated differently than other similarly situated organizations which serve as plan vendors of plan sponsors or their owners who file advisory opinion requests.

122. The disparate treatment of PIC based on their viewpoints was a result of a discriminatory purpose on the part of DOL.

123. DOL's disparate treatment of PIC based on its viewpoint is not rationally related to any legitimate governmental interest.

124. DOL knew, or reasonably should have known, that its conduct would violate PIC's federal constitutional rights.

125. PIC has no other adequate monetary remedy in a court for DOL's violations of its constitutional rights as complained of herein.

126. Absent congressional direction otherwise, courts may grant injunctive relief against prospective harms.

COUNT IV
(VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT ("APA"))

127. The preceding allegations are all incorporated by reference herein as if fully set out.

128. The APA provides a cause of action for persons suffering a legal wrong from – or adversely or aggrieved by – actions or inactions of an agency of the United States or officers thereof acting in an official capacity. 5 U.S.C. § 702

129. The APA requires the federal courts to: (1) compel agency action unlawfully withheld or unreasonably delayed and (2) hold unlawful and set aside agency action, findings, and conclusions found to be contrary to any constitutional right, power, privilege, or immunity. 5 U.S.C. § 706.

130. The United States has waived its sovereign immunity pursuant to 5 U.S.C. § 702 in actions seeking relief other than money damages and stating a claim that an agency of the United States and/or officers thereof acted or failed to act in an official capacity.

131. DOL is an agency of the United States of America for purposes of the APA.

132. DOL's unlawful and viewpoint-based discriminatory investigation into PIC's partners and affiliates and unconstitutional and intrusive requests for information unreasonably delayed DOL's final determinations of the Revised Request.

133. DOL's perfunctory Response and simultaneous retaliatory investigation described herein – based solely on PIC's viewpoint – violates the United States Constitution, ERISA Procedure 76-1, 29 U.S.C. § 1134(b), and the continuing the investigation constitutes final agency actions having the force and effect of law that are contrary to PIC's federal constitutional rights to freedom of speech and freedom of association under the First Amendment and the equal protection of the laws under the Fifth Amendment.

134. DOL's demand that PIC, partnerships implementing the Partnership Plans, and business associates supporting the Partnership Plans respond to irrelevant, unlawful,

unconstitutional, and overly intrusive requests for information issued by subpoena described herein is plainly contrary to the intent of Congress as expressed in ERISA and therefore, such action is not committed to agency discretion by law. 5 U.S.C. §701(a)(2).

COUNT V
(VIOLATIONS OF ERISA)

135. The preceding allegations are all incorporated by reference herein as if fully set out.

136. DOL's ongoing and interminable investigation is marked by repeated and intrusive subpoenas either to PIC, plan members, plan supporters, plan providers, plan vendors, or affiliates thereof.

137. DOL's seemingly disparate issuance of subpoenas are, in reality, all targeting the same Partnership Plans and their vendors, real or perceived, stemming from LPMS's submission of the Revised Request.

138. Many of the targets of the subpoenas are associated with or vendors to the Partnership Plans either by facilitating its existence or participating its benefits.

139. DOL has not provided any reasonable cause for its repetitive and abusive subpoenas issued the Anjo Investigation.

140. Indeed, the only explanation proffered by DOL is that it issuing the subpoenas pursuant to its authority to determine whether someone is violating or is about to violate ERISA.

141. But this authority does not provide rights to issue subpoenas as retaliation for invoking ERISA Procedure 76-1.

142. An order from this Court preliminarily and permanently enjoining the DOL's unlawful conduct is the only adequate remedy available at law.

PRAYER FOR RELIEF

WHEREFORE PIC demand judgment against DOL and in favor of PIC as follows:

- A. That this Court declare that the conduct of the DOL, while acting under color of federal authority, violated the constitutional rights of PIC;
- B. That this Court declare the conduct of DOL violated the Administrative Procedure Act;
- C. That this Court declare the conduct of DOL violated the Employee Retirement Income Security Act;
- D. That this Court issue a permanent injunction prohibiting DOL, and all those in active concert with it, from unlawfully targeting PIC through its retaliatory investigation, immediately cease issuing new subpoenas related to the investigation to PIC, any affiliates, or potential partners or participants involved in the Partnership Plans; and an order quashing any active or pending subpoenas issued by DOL to PIC, its affiliates, or others related to the Anjo Investigation;
- E. Alternatively to the preceding prayer for relief, that this Court issue a permanent injunction prohibiting DOL, and all those in active concert with it, from unlawfully targeting PIC through its retaliatory Anjo Investigation, immediately cease issuing new subpoenas related to the investigation to PIC, any affiliates, or potential partners or participants involved in the Partnership Plans unless and until DOL (i) defines in writing the scope and concerns of the Anjo Investigation, and (ii) either recommend or bring an enforcement action for any alleged ERISA violation by PIC; and an order quashing or suspending enforcement of any active or pending subpoenas issued by DOL to PIC, its affiliates, or others related to the Anjo Investigation unless and until DOL (i) defines in writing the scope and concerns of the Anjo Investigation, and (ii) either recommend or bring an enforcement action for any alleged ERISA violation by PIC;
- F. Award PIC its reasonable attorneys' fees, costs, and expenses associated with this action pursuant to 29 U.S.C. § 1132(g)(1) and 28 U.S.C. § 2412; and
- G. Award PIC such other and further relief as this Court deems necessary and proper.

JURY DEMAND

PIC demands trial by jury on all claims and issues so triable.

DATED: November 19, 2021

I HEREBY CERTIFY that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of the instant filing to all CM/ECF participants in this case.

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UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

JULIE A. SU, ACTING SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

Petitioner,

v.

PROVIDENCE INSURANCE COMPANY, I.I.

Respondent.

No. 3:21-mc-00413

JOINT STIPULATION OF DISMISSAL

1. Julie A. Su, Acting U.S. Secretary of Labor (the “Secretary”) and Providence Insurance Company, I.I. (“PIC”) (collectively, the “Parties”) hereby notify the Court that they have reached resolution as to PIC’s production of documents pursuant to the Secretary’s administrative subpoena since the Secretary’s Petition was filed.

2. Accordingly, the Parties hereby stipulate that the Secretary’s Petition to Enforce Administrative Subpoena, ECF No. 1, be dismissed without prejudice pursuant to Federal Rule of Civil Procedure 41(a). Each party shall bear its own attorneys’ fees, expenses and costs.

3. The Secretary and PIC each represent and warrant that they have carefully read the contents of this Joint Stipulation, they have made such investigation of the pertinent facts relating to the Joint Stipulation and Secretary’s Petition, and that the Joint Stipulation is signed freely by each Party executing the Joint Stipulation.

Dated: January 30, 2024

Respectfully submitted,

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Company, I.I.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will automatically send notifications of this filing to all attorneys of record.

s/ *Jamie Bowers*
Jamie Bowers