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

LORI CHAVEZ-DEREMER,

Plaintiff,

v.

SUFFOLK ADMINISTRATIVE SERVICES, LLC, et al.,

Defendants.

CIVIL NO. 24-1512 (CVR)

OPINION AND ORDER

INTRODUCTION

This case involves several parties and several cases in several jurisdictions. In the end, despite Defendants' artful pleading efforts, the Court finds the claims before it to be distinct and narrow.

"Data Marketing Partnership ("DMP") is a Texas limited partnership that specializes in the production and sale of its limited partners' electronic data to third party purchasers." Data Mktg. P'ship, LP v. U. S. Dep't of Labor, 490 F.Supp.3d 1048, 1052 (N.D. Tex. 2020). DMP has thousands of limited partners, but only one general partner: LP Management Services, LLC ("LPMS"). DMP and LPMS developed the structure of an employee benefit plan that would be "organized as a single-employer self-insured group health plan that w[ould] provide major medical health benefits to DMP's eligible employees, along with DMP's limited partners." Id., at 1053. Unsure whether this proposed program, known as a Partnership Plan, would be governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*. ("ERISA"), they sought

guidance from the United States Department of Labor ("Department"). On November 8, 2018, LPMS requested an Advisory Opinion ("AO") from the Department in which it requested confirmation that the plan it was going to propose was governed by ERISA.

In the Department's AO, it concluded that the plan would not be governed by any title of ERISA for a few reasons, namely, the outlined employment relationship, ownership interest and employee-to-partner ratio. Data Mktg., 490 F.Supp.3d at 1054. As a result, an extensive litigation ensued between DMP, LPMS and the Department in the Northern District of Texas (the "Texas suit"), whereby DMP and LPMS challenged the AO's validity. On September 28, 2020, the Texas District Court ultimately declared the AO arbitrary and capricious and concluded that the proposed plan was governed by Title I of ERISA. Id., at 1064. The Court of Appeals for the Fifth Circuit later affirmed the AO's invalidity. See Data Mktg. P'ship, LP v. U.S. Dep't of Labor, 45 F.4th 846 (5th Cir. 2022).

On November 5, 2024, Julie A. Su,[1] Acting Secretary of the United States Department of Labor (the "Secretary" or "Plaintiff") filed the present suit against Suffolk Administrative Services, LLC ("Suffolk"), Providence Insurance Company, I.I. ("Providence"), Alexander Renfro ("Mr. Renfro"), William Bryan ("Mr. Bryan"), and Arjan Zieger ("Mr. Zieger") (collectively, "Defendants").[2] Suffolk and Providence market, sell and service employer-sponsored health benefit programs sponsored by DMP and

1 On March 11, 2025, Lori Chavez-DeRemer ("Ms. DeRemer") was sworn in as Secretary of Labor. On March 20, 2025, pursuant to FED. R. CIV. P. 25(d), Ms. DeRemer was substituted as the Plaintiff. (Docket No. 47). For purposes of clarity, from this point forward, when the Court refers to the Secretary, it is referring to Ms. DeRemer.

2 Mr. Renfro is the sole owner of Anjo. Likewise, Mr. Bryan is the sole owner of the Lobos Trust and Mr. Zieger is the sole owner of the Tasman Trust. The Lobos and the Tasman Trust, jointly, are equal owners of Momentum Capital. Anjo and Momentum Capital own Suffolk Administration Services, LLC and Suffolk Holdings. Finally, Suffolk Holdings is the sole owner of Providence Insurance Company.

LPMS. Plaintiff alleges Defendants sell plans through these programs and use them as vehicles to collect and divert to themselves excessive fees through self-dealing.

After some motion practice, Defendants eventually filed their "First Amended Counterclaim for Declaratory and Injunctive Relief." Defendants' filings in this case are rather unique because they allege claims between other parties in other forums, mainly the Texas suit. Defendants herein allege the Secretary filed the present suit in retaliation for Defendants' relationship with DMP and LPMS, violating their First Amendment right to association, U.S. CONST., AMEND. I, and that in declining to recognize the Partnership Plans, the Department has violated the Administrative Procedure Act, 5 U.S.C. § 706 ("APA"). (Docket No. 52).

Before the Court is the Secretary's Motion to Dismiss (Docket No. 60, Exhibit No. 1), Defendants' Opposition (Docket No. 71) and the Secretary's corresponding Reply. (Docket No. 82).

For the reasons explained below, the "Secretary's Motion to Dismiss Defendants' First Amended Counterclaim for Declaratory and Injunctive Relief" is GRANTED. (Docket No. 60, Exhibit No. 1).

STANDARD

To rule on a 12(b)(6) motion, the Court must first "isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements." Schatz v. Republican State Leadership Comm., 669 F.3d 50, 55 (1st Cir. 2012). Second, it should take the complaint's well-pled allegations as true and draw all reasonable inferences in the non-movant's favor. Id.

Federal Rule of Civil Procedure 8(a) requires plaintiffs to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." FED.R.CIV. P. 8(a)(2). A "short and plain" statement needs only enough detail to provide defendants with "fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); Erickson v. Pardus, 551 U.S. 89, 93 (2007). To show entitlement to relief, a complaint must contain enough factual material "to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Twombly, 550 U.S. at 555. A plaintiff must provide the grounds of his cause of action with more than just a formulaic recitation of the elements of a cause of action. Id., at 555-556. "[T]he combined allegations, taken as true, must state a plausible, not a merely conceivable, case for relief." Sepúlveda-Villarini v. Dep't of Educ. of P.R., 628 F.3d 25, 29 (1st Cir. 2010).

STATEMENT OF FACTS

The Court accepts the allegations of the Amended Counterclaim as true for purposes of the Motion to Dismiss. Rae v. Woburn Pub. Sch., 113 F.4th 86, 98 (1st Cir. 2024); Rivera-Rosario v. LSREF2 Island Holdings, Ltd. Inc., 79 F.4th 1, 4 (1st Cir. 2023). All facts are derived from the Amended Counterclaim. (Docket No. 52).

Suffolk and Providence provide vendor services to DMP and LPMS for their Employer and Partnership Plans. To attract and retain limited partners willing to contribute the data they generate for aggregation and sale, DMP established the DMP Plan ("DMP Plan"), which implements the Partnership Plan structure set forth in the AO Request. Unlike the sponsors of Employer Plans, the Partnership Plans' only vendor options are Suffolk and Providence.

Suffolk's area of expertise is intellectual property, benefits, ministerial administrative services, and compliance support necessary to third parties that operate employee welfare benefit plans. Similarly, Providence is an insurer licensed and operating exclusively in Puerto Rico, where it provides reinsurance to the sponsors of the self-insured employee welfare benefit plans. The DMP Plan, like other Partnership Plans, was established with Suffolk and Providence's irreplaceable assistance, since DMP and LPMS do not have the expertise or resources to ensure proper compliance with applicable ERISA provisions and regulations, nor the insurance necessary to cover the potential financial exposure inherent in sponsoring self-funded group health plans. Without Suffolk and Providence, DMP and LMPS would not be able to service the plans that use the Partnership Plan structure.

In 2018, Mr. Renfro was retained as legal counsel for LPMS to assist in pursuing an advisory opinion from the Department concerning a novel application of the "working owner" that was going to be proposed in the Partnership Plans. At the time, Mr. Renfro was a principal of Suffolk and provided services to LPMS, with Suffolk's consent.

In October of 2018, Mr. Renfro, representing LPMS, attended a meeting in Washington D.C. with Department representatives to discuss ERISA's applicability to the Partnership Plans. At the meeting, Mr. Renfro explained the Partnership Plan structure and provided extensive details of the plan's goals and the business structure LPMS sought to implement. Assistant Secretary of the Department, Preston Rutledge ("Mr. Rutledge"), told Mr. Renfro that the best route to ensure approval of the proposed plan was to request an advisory opinion. The meeting ended with an explicit agreement to continue

discussions so that the Department would approve the Partnership Plan as ERISA-compliant.

On November 8, 2018, on behalf of LPMS, Mr. Renfro submitted the AO Request for the Partnership Plans with the Department. The AO Request detailed the legal and factual basis for application of ERISA to the Partnership Plans, building upon the "working owners" concept of ERISA. LPMS sought to implement this Partnership Plan structure through limited partnerships.

In the weeks and months that followed, occasional informal conversations continued between LPMS and the Department. At one point, Mr. Rutledge told one of Suffolk's advisors that he did not see why the Department needed to issue an advisory opinion since ERISA already allowed partners to be treated like employees for purposes of plan eligibility and Defendants claim he told the Suffolk advisor to "just do it."[3] Thus, LPMS began accepting limited partners into DMP and formed the Partnership Plans.

On March 6, 2019, Mr. Renfro attended another meeting with Department officials in Washington D.C. During this meeting Defendants allege that the Chief of Staff of the Department, Nicholas Geale ("Mr. Geale"), stated that, although the Partnership Plan structure was ingenious and he wished he had thought of it himself, the Department could not respond to the AO Request.[4] Mr. Geale proposed that if LPMS withdrew its AO Request, the Department would not investigate or otherwise interfere with any LPMS-managed partnership plans. Once Defendants and LPMS declined Mr. Geale's offer,

[3] Docket No. 52, p. 17.
[4] In the beginning of 2019, seven state Attorney Generals sent letters to the Secretary stressing the urgency with which the AO should be emitted and requesting its expedited consideration.

Defendants aver that the Department embarked on a fishing expedition that they describe as the "vindictive and retaliatory Anjo Investigation."[5]

Within one month of the March 6 meeting, the Department began investigating Suffolk and Providence.[6] Defendants claim this investigation was separate from the AO Request and that, as part of the investigation, the Department issued numerous requests for information and subpoenas not only to Suffolk and Providence, but also to various entities that did business with them. Defendants aver that, in conducting the inquiry, the Department failed to follow the procedure required for information requests and for the issuance of advisory opinions. Defendants argue the existence of this examination, i.e. the Anjo Investigation, frightened potential Partnership Plan vendors and dissuaded them from providing services to the Partnership Plans and from generally conducting business with Suffolk and Providence. They further claim that, because of the investigation, enrollment of both Partnership and Employer Plans dropped. The Anjo Investigation also delayed a meeting between Defendants, LPMS and the Department, which, when finally celebrated, ended up lasting only ten minutes as the Department demonstrated little interest in continuing discussions about the Partnership Plans.

More than a year after filing the AO Request and not receiving an answer, DMP and LPMS filed suit in the District Court for the Northern District of Texas as more than fifty thousand people had signed up for the Partnership Plan and the Department had yet to decide if the plan was ERISA-compliant. On February 3, 2020, the Department published the AO where it concluded that the Partnership Plans were not protected by

[5] Docket No. 52, p. 19.
[6] To avoid confusion, the Court will refer to this investigation as the "Anjo Investigation."

ERISA because of the nature of the "work" performed by the limited partners. Soon thereafter, DMP and LPMS amended their Complaint and included claims regarding the AO. However, on September 28, 2020, the District Court for the Northern District of Texas found the DMP Plan to be a single employer ERISA plan, vacated the AO as arbitrary and capricious, in material conflict with previous Department advisory opinions and in violation of the APA, and enjoined the Department from refusing to recognize the ERISA-status of the Partnership Plan. On appeal, the Court of Appeals for the Fifth Circuit affirmed the vacatur of the AO but remanded to the District Court for further findings as to some of the plan's participants.

On November 6, 2020, counsel for Suffolk and Providence sent a letter to all known Department officials involved in the investigation to seek clarity on the purpose, scope and need for the Anjo Investigation. On December 14, 2020, twenty months after the investigation began, the Department responded to the letter essentially noting its "ample authority to conduct its investigation in order to determine whether ERISA violations have or are about to occur" noting that the Department was "not in a position to provide the specific information [Defendants] seek[sought] regarding the timing and scope of the Anjo Investigation."[7] On December 30, 2020, Suffolk and Providence responded with citations to authority showing that, while broad, the Department's investigatory authority is not as limitless as portrayed in its December 14 letter. They, once again, requested the Department reconsider its approach to the Anjo Investigation.

[7] Docket No. 52, p. 21-22.

On January 19, 2021, Suffolk and Providence filed a civil action before in this District Court against the Department. They alleged freedom of speech, freedom of association, equal protection, APA and ERISA violations. It was ultimately dismissed without prejudice on March 28, 2022, for lack of ripeness. See Suffolk Administrative Services, LLC, et al. v. U.S. Department of Labor, et al., Civil No. 21-1031 (DRD).[8]

Defendants aver that on July 31, 2021, they learned that the Department of Insurance for Delaware and the Pennsylvania Chamber of Commerce told prospective business partners to refrain from doing business with Suffolk and Providence due to investigations that the Department was conducting regarding the Partnership Plans. Defendants communicated with these offices and learned that their high-level representatives made it clear that much of their skepticism and concerns about Suffolk and Providence arose from communications with Department officials who expressed their disdain with plans administered and/or insured by Suffolk or Providence.

On July 21, 2022, the Department gave notice to counsel for Suffolk and Providence of the substance of its Anjo Investigation. After this day, Suffolk and Providence were in active settlement negotiations with the Department. The Department and Defendants made slow progress between June 2023 and February 2024 while they entered into several tolling agreements which extended the statute of limitations for legal

8 Plaintiffs filed the Complaint in Civil No. 21-1031 (DRD) against the Department, the Secretary and the United States alleging violations to their constitutional rights to free speech, freedom of association and equal protection under the due process clause. They also argued the Anjo Investigation violated the APA and ERISA since no reasonable cause was provided for the investigation and discovery was repetitive and abusive. The Court ultimately dismissed all claims because they were premature but discussed that Plaintiffs had otherwise failed to prove that they had standing to bring an ERISA claim or that there was a final agency action that the Court could review. Finally, the Court asserted that whether the AO was a final agency action was a matter for the Fifth Circuit to decide on appeal from the Texas suit, not in this new suit in another District Court. As a result, the constitutional claims were not considered ripe for adjudication.

action and precluded the Department and Defendants from initiating any legal proceedings with respect to the Anjo Investigation.

On January 11, 2024, counsel for DMP and LPMS sent a letter to counsel for the Department offering to engage in settlement discussions as to the Texas suit. In response, the Department sent an e-mail on February 8, 2024, to DMP, LPMS and all Defendants proposing settlement discussions regarding both the Texas suit and the Anjo Investigation. The discussion as to the Anjo Investigation accelerated substantially once DMP, LPMS and Defendants agreed to participate in "global settlement discussions."[9] The Department's monetary demands for settling the Anjo Investigation lowered considerably over the next two months. However, as the demands for settling the Anjo Investigation were lowered, the Department's position on the Texas suit began with, what Defendants consider, a wholly unreasonable position.[10]

On May 10, 2024, counsel for the Department directly stated to counsel for DMP, LMPS and Defendants that, if the Texas suit was not dismissed, the monetary demands for the Anjo Investigation settlement would increase. The Department indicated that either both matters would be settled together, or neither matter would be settled. Later, counsel for the Department averred that, if the Texas Suit was not dismissed, the Department's monetary settlement demand would increase to $15 million inclusive of penalties, and the Department later put this offer in writing. Counsel for the Defendants advised the Department that their clients would be unable to pay it immediately.

[9] Docket No. 52, p. 27.
[10] The Department offered to settle the Anjo Investigation for $5.5 million, dependent on the dismissal of the Texas suit and the withdrawal of the AO Request.

However, the Department refused to entertain a payment schedule that the Defendants could undertake.

DMP and LPMS did not agree to the dismissal of the Texas Suit or the withdrawal of the AO Request. As a result, the Department demanded payment of $15 million from Providence and Suffolk. Defendants claim that the time frame given for this payment would likely bankrupt them.

This lengthy recount brings the Court to the present case. After their inability to pay, the Department filed this suit against Mr. Renfro, Mr. Bryan and Mr. Zieger alleging breach of fiduciary duty for mismanaging Suffolk and Providence's assets, against Providence for knowingly participating in the fiduciary breaches, and against Suffolk for failing to comply with ERISA reporting requirements. (Docket No. 1).

Defendants filed this Counterclaim because they provided all documents to the Department in the Anjo Investigation and the Department simply ignored the rebuttal evidence provided to them. Specifically, Defendants argue the Secretary is in possession of documents disproving the very allegations she raises in this suit. They also argue the Secretary's request is punitive because she claims more than seven times the amount of $5.5 million, which would effectively bankrupt Suffolk and Providence and prevent them from servicing their Partnership Plans.

Defendants posit the filing of the present suit violated their First Amendment right of association and the APA by retaliating against Defendants for their association with DMP and LPMS, who had in turn filed the AO Request and the Texas suit. They further argue the Department has declined to recognize the Partnership Plans as a single employer welfare plan subject to ERISA and that it has actively sought to discredit the

plans through the present suit and the Texas suit, creating a cause of action under the APA for making Defendants suffer legal harm from their actions or inactions. Defendants request injunctive relief to prohibit any further enforcement by the Department against Defendants based on the Anjo Investigation and the Texas suit, that the Court declare the Department's conduct violated the U.S. Constitution and the APA, attorney's fees, costs and expenses.

LEGAL ANALYSIS

The Secretary requests dismissal of the Counterclaim for failure to state a claim. First, the Secretary argues Defendants fail to meet the elements to establish a *prima facie* First Amendment claim. Second, the Secretary argues Defendants fail to plead any reviewable agency action or any APA violation. (Docket No. 60, Exhibit No. 1).

Defendants in opposition argue that they sufficiently pled a *prima facie* First Amendment case and that the Department's ERISA claims do not excuse its violation of the First Amendment. They support their First Amendment violation argument on the United States Supreme Court's ruling in Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175 (2024) and their APA violation argument on Alpine Sec. Corp. v. SEC, Civil No. 2:18-cv-00504-CW-CMR, 2024 WL 4681816 (D. Utah November 5, 2024) and on AT&T Co. v. E.E.O.C., 270 F.3d 973 (D.C. Cir. 2001). (Docket No. 71).

The Secretary's Reply focuses on distinguishing Vullo, Alpine and AT&T from the present case and reiterating that Defendants have failed to state a claim for both First Amendment and APA violations. (Docket No. 82).

A. First Amendment violation claims.

The First Amendment of the United States' Constitution guarantees, among other things, freedom of association. U.S. CONST. amend. I. The Supreme Court's interpretation of freedom of association has "two distinct senses." Roberts v. U.S. Jaycees, 468 U.S. 609, 617 (1984). On one hand, freedom of association implies "protection as a fundamental element of personal liberty" and protects the choices of entering or maintaining "certain intimate human relationships" from intrusion from the State. Id. at 617-618. On the other, it protects peoples' engagement in activities that are already protected by the First Amendment, i.e., speech, assembly, petition for the redress of grievances and the exercise of religion. Id.

> When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, 'because First Amendment freedoms need breathing space to survive.'
>
> Americans for Prosperity Found. v. Bonta, 594 U.S. 595, 619 (2021) (quoting Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 433 (1963)).

Thus, a violation of freedom of association does not necessarily entail a prohibition to associate with someone else. A chilling effect, namely, the fear of being subjected to illegal surveillance which deters the person from conducting constitutionally protected activities is enough to conclude there was a First Amendment violation. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 418 (2013). The First Amendment also prohibits "retaliation [ ] subject to recovery as the but-for cause of official action offending the Constitution." Hartman v. Moore, 547 U.S. 250, 257 (2006).

To establish a *prima facie* case of First Amendment retaliation, a party must allege that: (1) they engaged in activity that is protected by the First Amendment, (2) the government took an adverse action against them and (3) there is a causal link between the protected activity and the adverse action. Staples v. Gerry, 923 F.3d 7, 15 (1st Cir. 2019). In essence, the party alleging the violation must prove that it engaged in one of the two senses of freedom of association, that the government took an adverse action against the party and that its "protected activity was a substantial or motivating factor in the adverse action." Id.

Defendants aver they have the right under the First Amendment to associate with DMP and LPMS without suppression or retaliation by the Department because of their association as vendors to DMP and LPMS, who in turn, exercised their own right of petition in the AO Request and by filing the Texas suit. In other words, Defendants' harm flows, via their association, from DMP and LPMS's own protected activity. They contend both petitions are protected by the First Amendment of the Constitution regarding a matter of public concern. They proffer the Anjo Investigation, all actions associated with it, and conditioning the resolution of the Anjo Investigation to the dismissal of the Texas suit were done intentionally to obstruct, chill, deter and retaliate against Defendants. They algo argue the Department's unlawful and intentional actions are not justified by a substantial or compelling government interest, nor are they tailored to serve any such interest. (Docket No. 52).

The Secretary posits Defendants fail to allege that they engaged in any constitutional exercise of associational rights through their association with DMP and LPMS, or that they were associated with them for any sort of protected purpose. Since

Defendants admit their relationship with DMP and LPMS is a business one with financial interest, she argues those associations are not protected by the First Amendment. Moreover, she claims Defendants fail to state an adverse action sufficient to constitute retaliation since an agency's investigation, and its subsequent enforcement, is insufficient to constitute an adverse action by the government in the context of a retaliation claim. (Docket No. 60, Exhibit No. 1).

In Defendants' Opposition they raise several points, to wit: they argue the Secretary brings facts that were not alleged in the Complaint; she is holding Defendants to a higher burden than required this early in the case; they have sufficiently plead their right of association with DMP and LPMS; the Secretary's ERISA claims do not justify their violation of the First Amendment; they have sufficiently alleged that the Secretary's actions would chill a person of ordinary firmness; and they have sufficiently alleged the three factors of a *prima facie* First Amendment retaliation claim. They specifically reference Vullo to argue this case has the intent and effect of pressuring DMP and LPMS to abandon the AO Request and the Texas suit and of pressuring Defendants to disassociate from DMP and LMPS.[11] (Docket No. 71).

The Secretary reiterates in her Reply that Defendants did not plead a First Amendment claim under any legal framework since they fail to evince standing or the *prima facie* elements of a First Amendment claim. (Docket No. 82).

[11] In Vullo, the Supreme Court held that "Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors." 602 U.S. at 180. Evidently, there is a clear difference between Vullo and the present case, since in Vullo government officials were allegedly terminating business relationships with the National Rifle Association to punish them and suppress their advocacy. In the present suit, Defendants are alleging freedom of association merely due to a business relationship with others which, without more, does not qualify for First Amendment protection.

For purposes of this Motion to Dismiss, the Court will assume Defendants have standing to bring their claims. However, after evaluating the arguments on the merits, the Court finds there is no valid First Amendment claim.

1. Protected activity.

"[T]he [F]irst [A]mendment does not protect against all deprivations arising out of an act of association unless the act itself [ ] falls within the scope of activities eligible for inclusion within the constitutional tent." Correa Martínez v. Arrillaga-Beléndez, 903 F.2d 49, 57 (1st Cir. 1990). As examples of these eligible activities, the Court listed "joining a church or political party, speaking out on matters of public interest, [and] advocacy of reform." Id. Thus, these eligible activities are actions that would be protected by the First Amendment, had the subject engaged in them himself/herself.

Now, "[e]ntry into the constitutional orbit requires more than a mere relationship." Correa-Martínez, 903 F.2d at 57. As Courts have stated in more than one occasion, "there is only minimal constitutional protection of the freedom of commercial association." Pérez-Acevedo v. Puerto Rico, Civil No. 04-1962 (HL/CVR), 2006 WL 8445542 (D.P.R. September 27, 2006) (quoting U.S. Jaycees, 468 U.S. at 634 (O'Connor, J., concurring in part and concurring in judgment)). See also El Día, Inc. v. Rosselló, 20 F.Supp.2d 296, 305 (D.P.R. 1998) ("Protected associations include, for example, political or religious associations."); Correa-Martínez, 903 F.2d at 56 ("the [F]irst [A]mendment protects nonpolicy makers from being drummed out of public services on the basis of their political affiliation or advocacy of ideas."); Elrod v. Burns, 427 U.S. 347, 357 (1976) (the First Amendment protects "freedom to associate with others for the common advancement of political beliefs and ideas"). In sum, "the embedded associational right protects only

collective speech and expressive conduct in pursuit of those ends; it does not cover concerted action that lacks an expressive purpose." Wine and Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36, 50 (1st Cir. 2005).

"[A]n organization engaged in commercial activity enjoys only minimal constitutional protection of its recruitment, training, and solicitation activities." U.S. Jaycees, 468 U.S. at 635 (O'Connor, J., concurring in part and concurring in judgment). In determining whether a group enjoys First Amendment protection, the Court must evaluate whether a group "engage[s] in some form of expression, whether it be public or private." Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000). Since Defendants have failed to plead that they associate with DMP or LPMS for non-commercial reasons, i.e. for some sort of expressive association, the Court cannot conclude their alleged association falls within the scope of the "constitutional tent." Correa-Martínez, 903 F.2d at 57. See U.S. Jaycees, 468 U.S. at 626-627 (where the Court declined to recognize First Amendment protection for freedom of association for the U.S. Jaycees because there was no evidence on the record that validating the challenged law would affect the organization's "civic, charitable, lobbying, fundraising, [or] other activities worthy of constitutional protection under the First Amendment"); Wine & Spirits, 418 F.3d at 48 (where the Court declined to recognize First Amendment protection for Wine & Spirits Retailers, Inc. because plaintiff alleged defendant was constricting its ability to peddle marketing and management advice, advertising services and trade name protection, to wit, no expressive conduct).

Defendants here admit that their relationship with DMP and LPMS is a business one. Specifically, Defendants only provide them with intellectual property, benefits,

administrative, compliance support and reinsurance services to operate employee welfare benefit plans. There is no allegation on record of any expressive conduct on the record. As a business association, without more, is not protected by the constitutional tent, this relationship does not meet the threshold to establish it is protected by the First Amendment. Moreover, Defendants do not allege any protected activity they engaged in other than this business association. Thus, the Court finds Defendants have not engaged in protected activity that justifies First Amendment protection.

2. Adverse action.

By the same token, the Court finds the adverse action prong is not met. An adverse action is an action that would deter a reasonably hardy person from exercising his or her constitutional right. Barton v. Clancy, 632 F.3d 9, 29 (1st Cir. 2011). Thus, an action that causes a chilling effect, that is, "when the government's actions are sufficiently severe to [make people] compromise their political beliefs and associations in favor of the prevailing party," is enough to raise a First Amendment violation claim. Agosto-de-Feliciano v. Aponte-Roque, 889 F.2d 1209, 1217 (1st Cir. 1989). Defendants claim that the alleged Anjo Investigation is enough to meet this factor. The Court disagrees.

ERISA gives the Secretary "the power, [] to determine whether any person has violated or is about to violate any provision of [ERISA]." 29 U.S.C. § 1134. Upon belief that there may be an ERISA violation, the Secretary can exercise its investigative authority by conducting investigations of places, reports, books and records, or by requesting any data she deems necessary. Id. Her investigative authority is only limited to evidentiary privileges and to conducting an investigation once every twelve months. Id.

Through the Anjo Investigation, which began in 2019, the Department has requested numerous subpoenas and information requests and has spoken to entities that have been doing business with Suffolk and Providence. These actions are within the Secretary's investigative authority as outlined in 29 U.S.C. § 1134. Therefore, the Secretary has been exercising her authority as head of the Department and Defendants have limited their arguments to conclusory allegations that she exceeded her authority in doing so. See 29 U.S.C.A. § 1134 (detailing Secretary of Labor's investigative authority); Wadsworth v. Whaland, 562 F.2d 70, 74 (1st Cir. 1977) (indicating that ERISA "gives the Secretary of Labor broad investigative powers and authority to promulgate regulations"); West v. Butler, 621 F.2d 240, 244 (6th Cir. 1980); Donovan v. Shaw, 668 F.2d 985, 987 (8th Cir. 1982).

The Supreme Court has not decided whether an investigation can give rise to a First Amendment retaliation claim. See Hartman v. Moore, 547 U.S. at 262 n. 9 ("Whether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation is not before us."). The Court of Appeals for the First Circuit has likewise not addressed this issue. However, other courts have concluded that a retaliatory investigation does not form the basis of a constitutional claim. See Buckner v. Shumlin, No. 1:12-cv-90-jgm, 2013 WL 6571814 at *5 (D. Vt. December 13, 2013) (where the Court stated the Second Circuit had not resolved whether an investigation could give rise to a First Amendment retaliation claim, and declined to do so); Calabria v. State Operated Sch. Dist. for City of Paterson, Civil Action No. 06-cv-6256 (DMC), 2008 WL 3925174 at *3 (D. N.J. August 26, 2008) (where the Court highlighted Hartman's lack of a conclusion as to a constitutional tort for a

retaliatory investigation and failed to consider the plaintiff's retaliatory investigation claim); Trueman v. U.S., 7:12-CV-73-F, 2015 WL 1456134 at *13 (E.D.N.C. March 30, 2015) *aff'd*, 615 Fed. Appx. 122 (4th Cir. 2015) ("conducting a retaliatory investigation does not, in and of itself, form the basis of a constitutional tort"); Grisham v. Valenciano, Case No. SA-21-CV-00983-JKP, 2023 WL 367216 at *5 (W.D. Tex. January 20, 2023) ("the Fifth Circuit has explicitly said an investigation is not actionable under its First Amendment retaliation jurisprudence" (citing Colson v. Graham, 174 F.3d 498, 512 (5th Cir. 1999))); Evans v. City of Chicago, No. 16 CV 7665, 2017 WL 1954544 at *6 (N.D. Ill. May 11, 2017) (declining to recognize a First Amendment retaliation claim because the plaintiff "cite[d] no case law suggesting that a retaliatory investigation, alone, is a sufficient deprivation to support a First Amendment retaliation claim"); J.T.H. v. Missouri Dep't of Soc. Serv. Child. Div., 39 F.4th 489, 493 (8th Cir. 2022) ("[W]e have never recognized a retaliatory-investigation claim of this kind. Nor have other courts around the country, which have either rejected the possibility outright or concluded, like we do today, that the law is still in flux."); Moore v. Garnand, 83 F.4th 743, 752 (9th Cir. 2023) (declining to recognize a First Amendment violation based on a retaliatory investigation because the "Supreme Court has not decided the issue"); Rehberg v. Paulk, 611 F.3d 828, 850 n. 24 (11th Cir. 2010), *aff'd*, 566 U.S. 356 (2012) ("The initiation of a criminal investigation in and of itself does not implicate a federal constitutional right. The Constitution does not require evidence of wrongdoing or reasonable suspicion of wrongdoing by a suspect before the government can begin investigating that suspect."). The Court similarly declines to do so today.

Defendants only claim the investigation prevented prospective growth of their business. Since ERISA gives the Secretary ample investigative authority and the Supreme Court has not expressly addressed the existence of a First Amendment cause of action due to a retaliatory investigation, concluding today that a mere investigation constitutes an adverse action would limit the Secretary's ample authority and be contrary to her functions as head of the Department. Therefore, the "adverse action" prong also fails.[12]

3. Causal link.

Since Defendants failed to prove the existence of the first two factors, the Court need not address the causal link prong.

Due to Defendants' failure to establish the existence of protected activity and an adverse action, the Court finds there is no viable First Amendment claim. Consequently, the Motion to Dismiss the First Amendment causes of action of the Amended Counterclaim is GRANTED. (Docket No. 60, Exhibit No. 1).

B. APA violation claim.

The APA governs procedures of administrative law, specifically, how agencies are meant to regulate and adjudicate. 5 U.S.C. §§ 553-554. "The APA provides for judicial review of final agency action for which there is no other adequate remedy in a court." Harper v. Werfel, 118 F.4th 100, 116 (1st Cir. 2024). An "agency action" is defined as "includ[ing] the whole or a part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof." 5 U.S.C. § 551(13). However, to be considered final, the

[12] The Court, like the Secretary, is unaware of any support for a First Amendment retaliation claim for an adverse governmental action based on protected speech by a third party. Even assuming this could be a valid cause of action, it could give rise to a possible standing challenge. That issue, however, has not been properly briefed by the parties in this case.

Supreme Court developed a set of factors in Bennett v. Spear, 520 U.S. 154, 177-178 (1997) for courts to consider (the "Bennett factors"). First, "the action must mark the consummation of the agency's decision[-]making process." Id. Second, "the action must be one by which rights or obligations have been determined or from which legal consequences will flow." Id.

As an administrative agency, the Department must comply with the APA. Among the many topics the Department specializes in are retirement plans, specifically those governed by ERISA. ERISA is a federal United States tax and labor law that establishes minimum standards for pension plans in the private sector. As such, the Department is tasked with issuing information letters and advisory opinions to individuals and organizations that it applies to. ERISA Procedure 76-1 for ERISA Advisory Opinions, § 5.[13] Relevant to the present suit, "[a]n advisory opinion is a written statement issued to an individual or organization, or to the authorized representative of such individual or organization . . . that interprets and applies [ERISA] to a specific factual situation." Id. The issuance of the advisory opinion is up to the Department's discretion and only the parties described in the request for opinion may rely on it. Id. The advisory opinion, though given deference because of the Department's expertise, is not binding between the people that did not request it. Id.

Defendants allege the Department has declined to recognize the Partnership Plans as single employer welfare plans subject to ERISA, in defiance of its responsibility to enforce ERISA, and has actively sought, through its efforts in the Texas suit and the

[13] Employee Benefits Security Administration, U.S. DEPARTMENT OF LABOR, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/filing-requests-for-erisa-aos (last visited January 12, 2026).

present suit, to dismantle or discredit the Partnership Plans to the detriment of Defendants and the thousands of participants of those plans. They posit their Counterclaim is necessary because the Complaint makes no mention of the undeniable connections to the Texas suit or the inextricable link the Department created between this lawsuit and the Texas suit as part of its efforts to discredit or dismantle the Partnership Plans, as well as Suffolk and Providence. Specifically, they claim the Department abused its power by threatening to sue Defendants based on unsupported monetary demands and the identity of plans with which they lawfully do business. 5 U.S.C. § 706(2)(A)-(C). For these reasons, they move the Court to issue an injunction to prevent the Department from continuing to violate the APA. (Docket No. 52).

Conversely, the Secretary raises three different arguments. First, she claims Defendants fail to meet the Rule 8(a) standard since they fail to provide fair notice of their basis for the APA claim because they interchangeably allude to the Anjo Investigation, the present suit, and the negotiations to settle the Secretary's claims. Additionally, she states it is unclear whether the challenged actions relate to the Partnership Plans, the Employer Plans or both. Second, she maintains Defendants challenge a decision committed to agency discretion, the Anjo investigation, which is not reviewable under the APA. She also asserts the actions complained of are not final actions subject to judicial review because investigatory measures and the decision to bring an enforcement action are not final agency actions. Thus, the Secretary avers her investigation, negotiation, and the filing of this case vis-à-vis the Employer and Partnership Plans are not subject to judicial review under the APA. Finally, even if her actions here were reviewable under the APA, the

Secretary claims Defendants have not pled any specific APA violations under 5 U.S.C. §§ 706(2)(A)–(D). (Docket No. 60, Exhibit No. 1).

In Defendants' Opposition, they posit that, even if the APA gives the Department discretion, it does not allow them to violate the law. Furthermore, they maintain that their Counterclaim is based on final agency actions. Specifically, they argue the Secretary's decision to file suit against them was the consummation of the Department's decision-making process as to the Anjo Investigation, as supported by Alpine and AT&T, where the courts concluded that the decision to file an enforcement action in court is the conclusion of the administrative review and evinces the need for judicial intervention, which proves the agency's action was final. [14] (Docket No. 71).

In the Secretary's Reply, she argues that Defendants APA claims fail under the two-prong test set forth in Bennett v. Spear, because the filing of this case, alone, does not determine any rights or obligations of Defendants or impose legal consequences for purposes of APA review. She further asserts that under AT&T, the proper response to an enforcement action is not to file a separate suit or counterclaim under the APA to challenge the enforcement action, but rather, to defend that action on the merits. (Docket No. 82).

[14] Although Defendants cite cases from different districts, that are merely persuasive, they also cite cases which do not help further their argument. In Alpine, the questioned agency action failed the second prong of the Bennett test, and thus, the court there found plaintiffs lacked standing to bring their claim under the APA. Alpine, 2024 WL 4681816 at *12. Similarly, in AT&T, the Court said "[u]nder the circumstances of this case, there clearly would be final agency action if the Commission filed a lawsuit against AT&T. (Of course, the Company could not challenge that decision as final agency action under the APA; it would instead simply defend itself against the suit.)" AT&T, 270 F.3d at 976. Thus, both cases concluded there was no final agency action that could be reviewable under the APA. In fact, if the Court were to adopt AT&T's analysis, Defendants' only option would be to defend themselves from the suit, not to present a Counterclaim.

Before moving on, the Court notes that Defendants' APA claim is wholly centered around the facts that gave rise to the Texas suit. As such, the relevance of the acts alleged in the Counterclaim to those alleged in this case is limited. Defendants aver this Counterclaim is necessary because this suit and the Texas suit are inextricably linked, but the Court disagrees. The present claim is about Defendants' mismanagement of the assets used to fund the plans they market, sell and service, while the Counterclaim alleges constitutional and APA violations for their alleged association with third parties DMP and LPMS and based upon the actions of those third parties.

Nevertheless, even assuming the relevance of these facts to this case, Defendants do not plead any specific APA violation. Instead, they merely list the clauses of 5 U.S.C. § 706(2) without detailing how they were allegedly infringed. Rule 8(a) of Civil Procedure requires "a short and plain statement of the claim showing that the pleader is entitled to relief." FED.R.CIV.P. 8(a)(2). Apart from including a multitude of allegations of what led to the Anjo Investigation, the Texas suit and the AO Request, Defendants simply conclude that the Secretary filed this suit in retaliation, without giving any plausible indication as to how her actions were either (i) arbitrary and capricious, (ii) contrary to their constitutional right, power, privilege or immunity, (iii) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, or (iv) without observance of procedure required by law. 5 U.S.C. §§ 706(2)(A)–(D). As the Secretary argues, her actions here were taken pursuing her lawful investigative authority under 29 U.S.C. § 1134 and conducting a thorough investigation. The settlement talks were undertaken in furtherance of that authority and Defendants provide no reasoning, besides conclusory allegations, in support of their allegations.

The Court finds there is also no final agency action that merits judicial review. As stated by the Secretary, the standard for review under the APA is narrow and "a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made". Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). Although it is unclear what final agency action Defendants seek judicial review of, the Court finds none of the actions mentioned in the Counterclaim are reviewable.

From the outset, the Anjo Investigation fails to meet the Bennett factors, as it is not considered a final agency action. See Harper, 118 F.4th at 116 (listing cases that hold that investigatory measures do not constitute final agency action). The Anjo Investigation additionally did not create any rights or obligations from which legal consequences flow that would give rise to a cognizable claim under the APA, as it was simply an investigation.

Furthermore, the Secretary's decision to bring an enforcement action, i.e. the present suit, is also not reviewable under the APA because the simple act of filing a complaint does not determine any rights or obligations and it is not a rule, order, license, sanction, form of relief or failure to act conducted by an agency. See City of Oakland v. Holder, 901 F.Supp.2d 1188, 1195 (N.D. Cal. 2013), *aff'd sub nom.* City of Oakland v. Lynch, 798 F.3d 1159 (9th Cir. 2015) (finding that the filing of a civil action does not fit within the APA's definition of agency action); 5 U.S.C. § 551(13). As noted by the Secretary, "the Holder court could not locate any authority holding that filing a civil complaint qualified as final agency action under the APA, and it was unwilling to expand the definition of 'final agency action' to allow every civil or criminal suit filed by the United

States government to be subject to separate judicial review." (Docket No. 60, Exhibit No. 1, p. 29).

Finally, if the agency action refers to the Texas suit or the AO, this Court lacks jurisdiction to entertain it since the parties present in this suit were not the parties that brought that suit or requested the opinion. "Federal judges decide only *live* controversies that will have a real effect on real parties in interest." Boston Bit Labs, Inc. v. Baker, 11 F4th 3, 8 (1st Cir. 2021). Since Defendants are not parties in the Texas suit nor did they request the AO, they are not real parties in interest. Furthermore, this Court cannot alter the judgment the Northern District of Texas emitted. See Baker by Thomas v. General Motors Corp., 522 U.S. 222, 233 (1988) ("A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land."); see also Miliken v. Meyer, 311 U.S. 457, 462 (1940) ("the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based."). Thus, if Defendants intend to use their Counterclaim to review and alter the AO Request or the Texas suit, this Court lacks jurisdiction to do so.

In sum, Defendants have failed to present a viable APA claim, and consequently, the Motion to Dismiss as to the APA claim in the Amended Counterclaim is also GRANTED. (Docket No. 60, Exhibit No. 1).

CONCLUSION

For the above-mentioned reasons, the "Secretary's Motion to Dismiss Defendants' First Amended Counterclaim for Declaratory and Injunctive Relief" is GRANTED. (Docket No. 60, Exhibit No. 1). Consequently, Defendants' Amended Counterclaim (Docket No. 52) is DISMISSED WITHOUT PREJUDICE. Partial Judgment will be entered accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, on this 14th day of January 2026.

S/CAMILLE L. VELEZ-RIVE
CAMILLE L. VELEZ-RIVE
UNITED STATES DISTRICT JUDGE