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

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

FIRST AMENDED COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

TO THE HONORABLE COURT:

COME NOW Defendants and Counterclaim Plaintiffs Suffolk Administrative Services, LLC ("SAS") and Providence Insurance Company, I.I. ("PIC"), William Bryan ("Bryan"), Arjan Zieger (Zieger"), and Alexander Renfro ("Renfro") (collectively "Defendants"), for their counterclaims for declaratory and injunctive relief against Plaintiff Secretary of Labor Lori Chavez-DeRemer ("Chavez-DeRemer" or "the DOL") state as follows:

INTRODUCTION

1. This suit is a continuation of a collateral attack by the DOL against Defendants based upon their vendor relationships with single employer employee welfare plans ("Partnership Plans"), sponsored by Data Marketing Partnership, LP ("DMP") and LP Management Services, LLC ("LPMS"), which are the subject of (a) a 2018 request to the DOL for an advisory opinion

("AO Request") confirming their protection under the Employee Retirement Income Security Act ("ERISA), 29 U.S.C. § 1001, *et seq*.;[1] (b) a 2020 DOL Advisory Opinion ("Advisory Opinion") denying such protection;[2] and (c) litigation currently pending in the U.S. District Court for the Northern District of Texas, styled as *Data Marketing Partnership, LP, et al. v. U.S. Dept. of Labor, et al*., Civil Action No. 4:19-cv-00900-O ("Texas Suit"), in which both the District Court[3] and Fifth Circuit Court[4] vacated the Advisory Opinion as "arbitrary and capricious" and in which DMP and LPMS seek to enjoin the DOL from denying the ERISA-status of the DMP Partnership Plan.

2. In response to the AO Request, which alerted the DOL to the services provided by Defendants to the Partnership Plans, the DOL immediately launched an investigation of Defendants, which came to be known as the Anjo Investigation. Contrary to the allegations of the *Complaint,* any allegedly unlawful behavior by Defendants was disproved in the Anjo Investigation.

3. In response to the Texas Suit, the DOL proposed settlement terms as to the Anjo Investigation which would have allowed SAS and PIC to continue to provide vendor services to the Partnership Plans, and other ERISA plans. The proposal came with a catch, however: It was contingent upon the agreement of DMP and LPMS to (a) withdraw the AO Request, and (b) dismiss the Texas Suit. Even though Defendants were not parties to the AO Request or the Texas Suit, the DOL knew from the Texas Suit that the Partnerships Plans cannot operate without Defendants' services, as there are no other vendors willing or able to provide such services due, in part, to the Anjo Investigation. The threat of this suit thus provided leverage against DMP and LPMS which the DOL did not have in the Texas Suit. When LMPS and DMP declined to withdraw

[1] Exhibit A attached hereto.
[2] Exhibit B attached hereto.
[3] Exhibit C attached hereto.
[4] Exhibit D attached hereto.

the AO Request or dismiss the Texas Suit, the DOL punished Defendants with this egregiously punitive suit seeking (a) monetary remedies - $40 million - which would effectively bankrupt SAS and PIC; and (b) an injunction "enjoining Defendants … from ever acting as a fiduciary, service provider or trustee" to any employee benefits plans, including the Partnership Plans and the other ERISA plans.[5]

4. It is plain that this suit is inextricably intertwined with the AO Request, Advisory Opinion, and the Texas Suit, and is being prosecuted by the DOL for the improper purposes of (a) punishing Defendants for continuing to provide services to the Partnership Plans; (b) pressuring Defendants to sever their vendor relationships with the Partnership Plans; (c) "enjoining Defendants … from ever acting as a fiduciary, service provider or trustee" to the Partnership Plans; (d) punishing DMP and LPMS for making and later not withdrawing the AO Request; (e) punishing DMP and LPMS for filing and later not dismissing the Texas Suit; and (f) eventually rendering the Texas Suit moot by depriving the Partnership Plans of the vendor services provided by Defendants necessary to continue operations.

5. By such conduct, the DOL has been and is threatening the group health insurance of 30,000 individuals covered by the Partnership Plans, as well as the insurance provided by over 1,900 employer ERISA plans to their employees ("Employer Plans')*.*[6]

6. By such conduct, the DOL has been and is violating the First Amendment as to DMP, LPMS, and Defendants. As noted by the U.S. Supreme Court and other federal jurisprudence, the "threat of invoking legal sanctions and other means of coercion" by a government agency against a vendor "to achieve the suppression" or punishment of disfavored speech by a customer violates the First Amendment rights of both the customer and vendor. *NRA*

[5] *Complaint* ¶ 97 [Doc. 1], Attachment 1.
[6] *Complaint* ¶ 2, Note 1.

v. Vullo, 602 U.S. ___ (2024); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). *See also NRA v. Los Angeles*, 441 F.Supp.3d 915, 934-38 (C.D. Cal, 2019). Here, DMP and LPMS twice exercised their First Amendment rights of petition by (a) submitting the AO Request; and (b) filing the Texas Suit. That this suit was brought to suppress or punish DMP and LPMS for exercising their First Amendment rights, and to suppress or punish Defendants based upon their association with DMP and LPMS, is evidenced by (a) the timing of the Anjo Investigation, which commenced immediately after the AO Request; and (b) discussions preceding this suit, in which the DOL expressly and unilaterally linked the two matters, and tied resolution of the claims against Defendants to the withdrawal of the AO Request and the dismissal of the Texas Suit by DMP and LPMS.

7. By such conduct, the DOL has been and is acting contrary to the responsibility assigned to it by ERISA. As recognized by the U.S. Supreme Court, one of the purposes of ERISA is "to promote and facilitate employee benefit plans." *See Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon,* 541 U.S. 1, 17 (2004). As noted by both the District Court and the Fifth Circuit in the Texas Suit, the DOL has already acted contrary to these purposes in issuing the Advisory Opinion as to the Partnership Plans. Now, the DOL is doubling down on its rejected position by seeking to end the Partnership Plans altogether, which would be the inevitable result if the relief in this suit is ordered by this Court. Thus, the DOL seeks in this suit to accomplish what the purpose of ERISA forbids – the dismantling of a lawful ERISA plan.

8. In defense of its collateral attack against Defendants, the DOL claims sovereign immunity.[7] However, as set forth in the Administrative Procedure Act ("APA"): "An action in a court of the United States seeking relief other than money damages and stating a claim that an

[7] *Memorandum in Support of the Secretary's Motion to Dismiss Defendants' Original Counterclaim for Declaratory Relief* [Doc.48-1].

agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States." 5 U.S.C. § 702. In bringing this Counterclaim, Defendants do not seek damages; they seek only declaratory and injunctive relief for the DOL's unconstitutional and unlawful prosecution of this suit. Contrary to the DOL's claims, therefore, sovereign immunity is not a defense to such relief. *See U.S. v. Gilead Sciences, Inc*., 5151 F.Supp.3d 241, 254-55 (D.Del. 2021). *See also Delano v. Calif. Table Grape Comm'n*, 655 F.3d 1337, 1344 (Fed.Cir. 2011).

9. In defense of this collateral attack, the DOL also claims litigation discretion. *See* 5 U.S.C. § 701(a)(2). It is settled law, however, that litigation discretion does not extend to constitutional violations, as alleged here. *See Rueda Vidal v. U.S. Dept. of Homeland Security,* 536 F.Supp.3d 604, 618 (C.D.Cal. 2021). Litigation discretion likewise does not extend to agency action contrary to established law or congressional intent, as alleged here. *See Electricities of North Carolina, Inc. v. Southeastern Power Admin*., 774 F.2d 1262, 1267 (4th Cir. 1985). *See also Cardoza v. CFTC*, 768 F.2d 1542, 1547 (7th Cir.1985)(claiming reviewal authority when not to do so would "'frustrate Congressional intent"'). Contrary to the DOL's claims, therefore, litigation discretion is not a defense to this Counterclaim.

10. In defense of this collateral attack, the DOL also claims this suit is not a final agency action. This claim incorrectly presumes this Counterclaim turns entirely on the merits of this suit. It does not. Federal jurisprudence has long held that otherwise lawful action by government officials can still run afoul of the law if motivated by an unlawful purpose. See *Bantam Books, Inc. v. Sullivan, supra*; NRA v. *Vullo*, *supra*; *NRA v. Los Angeles, supra*. *See also American Motor Club, Inc. v. Corcoran*, 644 F.Supp. 862 (S.D.N.Y. 1986); *Floridians Protecting Freedom, Inc. v.*

Ladapo, et al, Case No. 4:24-cv-00419 (N.D. Fla.). Accordingly, the DOL has violated the law merely by threatening to file this suit and continues to violate the law by prosecuting this suit.

11. In defense of this collateral attack, the DOL also claims the Partnership Plans "are not among the Participating Plans at issue in this" suit.[8] This claim is false. The $40 million demand in the cover sheet to this suit includes funds attributed to the Partnership Plans. The M-1 reports sought by this suit, as to an alleged multiple employer welfare arrangement ("MEWA"),[9] would require the reporting of the "[t]total number of participants covered under the entity", including participants in the Partnership Plans. This suit seeks to enjoin Defendants "from ever acting as a fiduciary, service provider, or trustee to any plan covered by Title I of ERISA", including the Partnership Plans.[10] Contrary to the DOL's claims, therefore, the Partnership Plans simply cannot be excised from the broad, albeit frivolous, allegations here.

12. In short, the U.S. Constitution, APA and ERISA do not simply provide defenses to this suit, they provide viable grounds for claims against the DOL based on its improper motivation in bringing this suit. This Counterclaim simply seeks to hold the DOL accountable.

PARTIES

13. The 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).

14. Chavez-Deremer is the Secretary of Labor and is sued solely in its official capacity.

15. 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.

[8] *Complaint* ¶ 2, Note 1.
[9] *Complaint* ¶ 92.
[10] *Complaint* ¶ 97.

16. PIC is a Puerto Rican international insurer with a principal place of business located at Calle Reverendo Domingo Marrero #5, Suite 4, San Juan, Puerto Rico 00925.

17. Bryan is an individual residing in Los Angeles, California.

18. Zieger is an individual residing in San Juan, Puerto Rico.

19. Renfro is an individual residing in Nashville, Tennessee.

JURISDICTION AND VENUE

20. 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).

21. Venue as to this Counterclaim is proper in this district under Rule 13 of the Federal Rules of Civil Procedure.

FIRST AMENDMENT

22. The First Amendment "right to petition the government for a redress of grievances is "one of the most precious of the liberties safeguarded by the Bill of Rights," and is "high in the hierarchy of First Amendment values." *Lozman v. City of Riviera Beach, Fla.*, 585 U.S. 87, 101 (2018). "The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular expression of freedom." *McDonald v. Smith,* 472 U.S. 479, 482 (1985). The right to petition the government for redress of grievances is such a fundamental right as to be "implied by '[t]he very idea of a government, republican in form.'"*BE & K Const.*, 536 U.S. at 524–25.

23. The right to petition "extends to all departments of the Government", including administrative agencies and courts. *Cal. Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition").

The right to petition includes not just petitions to redress grievances but petitions to influence government action. *E.R.R. Pres. Conf. v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 143 (1961).

24. "Retaliation, though it is not expressly referred to in the Constitution, is nonetheless actionable because retaliatory actions may tend to chill individuals' exercise of constitutional rights." *ACLU of Md., Inc. v. Wicomico County,* 999 F.2d 780, 785 (4th Cir. 1993).

25. Even otherwise lawful conduct by government officials can run afoul of the First Amendment. In *Bantam Books, Inc. v. Sullivan*, *supra*, the Supreme Court affirmed that the First Amendment prohibits government officials from relying on the "threat of invoking legal sanctions and other means of coercion … to achieve the suppression" of disfavored speech. Just this past term, in *NRA v. Vullo*, *supra*, the Supreme Court acknowledged in a 9-0 decision that actionable coercion includes actions directed at vendors which do business with the person or entity who exercised rights guaranteed by the First Amendment – precisely the behavior which the Plaintiff and Counterclaim Defendant engaged in by harassing the Partnership Plan vendors for years, making extortionate, impossible demands, and ultimately bringing this suit. Similarly, in *American Motor Club, Inc. v. Corcoran*, 644 F.Supp. 862 (S.D.N.Y. 1986), the U.S. District Court for the Southern District of New York issued a preliminary injunction against the New York Department of Insurance which, in response to a civil rights action against the Department by an automobile club, allegedly threatened the licenses of brokers who sold memberships in the automobile club. *See also Floridians Protecting Freedom, Inc. v. Ladapo*, et al, Case No. 4:24-cv-00419 (N.D. Florida).

26. Federal jurisprudence has held that First Amendment protections can extend to business partners based upon their association with a person or organization who has exercised a right protected by the First Amendment. If a governmental action would chill a business partner

of ordinary firmness from associating with a person who has exercised a right protected by the First Amendment, the business partner is also protected. *NRA v. Los Angeles, supra*

27. Federal courts are empowered to issue general injunctive relief that enjoins a government defendant from retaliating against or otherwise infringing upon a plaintiff's rights under the First Amendment. *Mahan v. Texas Dept. of Public Safety*, No. 9:20-CV-119-RC-ZJH, 2020 WL 6935555 at *3 (E.D.Tex. Oct. 29, 2020).

ERISA

28. A primary purpose of ERISA is "to promote and facilitate employee benefit plans." *Raymond B. Yates*. 541 U.S.at 17. Another primary purpose of ERISA is "uniform national treatment of … benefits." *Id*.

29. In an Aug. 1, 2023, publication, the U.S. Chamber of Commerce recognized:

> "For nearly 50 years, the Employee Retirement Income Security Act (ERISA) has provided the framework needed to provide a stable employer-sponsored insurance (ESI) system. As the single largest source of health benefits in the United States, ESI provides health coverage for nearly 160 million American workers and their families. ERISA underpins the success of system, playing an important role to keep employer-sponsored health coverage accessible and affordable… ERISA works for ESI. This foundation is critical to keeping our health care system efficient and cost-effective for tens of millions of American workers. For nearly five decades, ERISA has successfully strengthened the ESI system and contributed to the growing number of Americans covered by ESI plans."

30. The legal protections afforded these 160 million Americans by ERISA are uniform and strict. As noted by the U.S. Supreme Court: "ERISA's primary aim is to protect individuals who participate in employee benefit plans" and "[t]o effectuate this goal, Congress established 'strict standards' of conduct for those with discretionary authority over employee benefit plans." *Cent. States, Se. & Sw. Areas Pens. Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985).

HISTORY OF APA VIOLATIONS BY THE DOL

31. As emphasized in *Texas v. DOL*, Civil Action No. 4:24-CV-499 (E.D.Tex. Nov. 15, 2024), "an agency cannot 'exercise its authority in a manner that is inconsistent with the administrative structure that Congress has enacted into law' no matter how difficult the issue it seeks to address" *See FDA v. Brown & Williamson*, 529 U.S. 120, 125 (2000). In addition to the findings of the District Court and Fifth Circuit in the Texas Suit, however, federal jurisprudence has found DOL to have violated the APA in other decisions.

32. In *New York v. United States Department of Labor*, 363 F.Supp.3d 109 (D.D.C. 2019), the U.S. District Court for the District of Columbia vacated, in part, a DOL rule regarding association health plans under ERISA.

33. In *Chamber of Commerce of United States of America v. United States Department of Labor*, 885 F.3d 360 (5th Cir. 2018), the Fifth Circuit vacated DOL's 2016 "fiduciary rule" under ERISA, which purported to expand fiduciaries to include broker-dealers and insurance agents in conflict with the plain text of ERISA.

34. In *Federation of Americans for Consumer Choice, Inc. v. United States Department of Labor*, Case No. 6:24-cv-163, 2024 WL 3554879 (E.D.Tex. July 25, 2024), the U.S. District Court for the Eastern District of Texas stayed DOL's 2024 "fiduciary rule" under ERISA, which purported to impose ERISA-fiduciary status on "any insurance agent who merely complies with state insurance laws when dealing with an ERISA plan member or owner of an [IRA]."

35. In *American Council of Life Insurers v. United States Department of Labor*, Case No. 4:24-cv-00482 (N.D.Tex. July 26, 2024), the Court stayed DOL's 2024 "fiduciary rule" under ERISA as conflicting with ERISA.

36. In *American Securities Association v. United States Department of Labor*, Case No. 8:22-cv-330-VMC-CPT, 2023 WL 1967573 (M.D.Fla. Feb. 13, 2023), the U.S. District Court for the Middle District of Florida vacated, in part, guidance promulgated by DOL interpreting its ERISA Prohibited Transaction Exemption 2020-02, 85 Fed.Reg. 82798 (Dec. 18, 2020).

37. In *Nevada v. United States Department of Labor*, 275 S.Supp.3d 795 (E.D.Tex. 2017), the U.S. District Court for the Eastern District of Texas invalidated a 2016 DOL rule purporting to interpret the executive, administrative and professional employee exemptions of the Fair Labor Standards Act ("FLSA").

38. In *Texas v. United States Department of Labor*, Case No. 4:24-cv-00499, 2024 WL 3240618 (E.D.Tex. June 28, 2024), the U.S. District Court for the Eastern District of Texas issued a preliminary injunction as to a 2024 DOL rule purporting to interpret the executive, administrative and professional employee exemptions of the FLSA.

39. In *Restaurant Law Center v. DOL*, 115 F.4th 396 (5th Cir. 2024), the Fifth Circuit vacated DOL's so-called 80/20/30 Rule that governed how tipped employees must be paid under the FLSA.

40. In *New York v. United States Department of Labor*, 477 F.Supp.3d 1 (S.D.N.Y. 2020), the U.S. District Court for the Southern District of New York vacated, in part, a DOL rule interpreting the Families First Coronavirus Response Act.

41. In *New York v. Scalia*, 490 F.Supp.3d 758 (S.D.N.Y. 2020), the U.S. District Court for the Southern District of New York vacated, in part, a DOL rule narrowing the definition of "joint employer" under the FLSA.

42. In *State of Kansas v. DOL*, 2024 WL 3938839 (S.D.Ga. Aug. 26, 2024) the U.S. District Court for the Southern District of Georgia issued a preliminary injunction halting the effective date of DOL's farmworker protection rule.

43. In *Texas v. DOL*, Civil Action No. 4:24-CV-499 (E.D.Tex. Nov. 15, 2024), the U.S. District Court for the Eastern District of Texas vacated a 2024 DOL rule again purporting to interpret the executive, administrative and professional employee exemptions of the FLSA.

FACTS

I. BACKGROUND

44. SAS and PIC provide vendors services not only to the Partnership Plans sponsored by DMP and LPMS, but also to the Employer Plans.

A. DMP Plan

45. The primary business purpose of DMP is the production, capture, segregation, aggregation, anonymization, organization, and sale to third parties of electronic data generated by its partners.

46. The generation and aggregation of electronic data transmitted by each limited partner of DMP represents the most significant, income-generating commodity which DMP seeks to sell to third parties.

47. As a business seeking to profit from the electronic data generation, aggregation, and sales market, DMP must collect and aggregate data generated by tens of thousands of active users of its proprietary software.

48. The limited partners of DMP are compensated for, control and manage the production, capture, segregation, aggregation, and sale of, - data that they individually produce, empowering Limited Partners in a manner not otherwise available to them.

49. To attract and retain limited partners willing to contribute the data they generate for aggregation and sale, DMP established the DMP Plan, which implements the Partnership Plan structure set forth in the AO Request.

50. Without the DMP Plan as a recruiting and retention tool, DMP would be less able to attract and retain limited partners willing to generate and contribute their data as working owners for the business purpose of the limited partnership.

B. LPMS

51. LPMS is a general partner for DMP and other similar limited liability partnerships which rely upon the participation of limited partners to contribute their electronic data for aggregation and sale. The Partnership Plans were established in part to attract and retain limited partners and common law employees for these businesses.

52. Without the Partnership Plans as recruiting and retention tools, these businesses would be less able to attract and retain limited partners willing to participate as working owners for the business purposes of the limited partnerships.

C. Employer Plans

53. Unlike the sponsors of the Partnership Plans, the sponsors of the Employer Plans have vendor options in the marketplace other than SAS and PIC but have nevertheless opted to retain the plan services provided by SAS and PIC.

D. SAS

54. SAS provides intellectual property, benefits expertise, ministerial administrative services, such as a call center to handle incoming queries from participants or their assignees, and compliance support necessary to third parties who operate employee welfare benefit plans.

55. The Partnership Plans, including the DMP Plan, were established with the irreplaceable assistance of SAS. SAS expended resources, time, and expertise to develop lawful and compliant work product tailored to assist LPMS in implementing the novel Partnership Plan structure through limited partnerships such as DMP.

56. LPMS and DMP do not have the expertise or resources to ensure proper compliance with applicable ERISA provisions and regulations of the self-insured group health plans without the expertise of SAS.

57. In contrast to the Employer Plans, there are no companies other than SAS willing and able to provide the intellectual property and compliance services to plans that utilize the structure of the Partnership Plans. As the Partnership Plans are based upon a unique combination of employees and working owners or partners, no companies other than SAS have experience servicing such a structure.

E. PIC

58. PIC is an insurer licensed and operating exclusively in Puerto Rico, and it provides reinsurance to the sponsors of self-insured employee welfare benefit plans.

59. As a Puerto Rico domiciled and regulated insurer, PIC provides reinsurance to the sponsors of Partnership Plans and Employer Plans. In accordance with PIC's direct procurement procedures, all reinsurance policies are issued in Puerto Rico even though the insureds (plan sponsors) are domiciled elsewhere.

60. The plan sponsors for the Partnership Plans, including the DMP Plan, obtain reinsurance, or stop loss insurance, from PIC to cover the potential financial exposure inherent in sponsoring self-funded group health plans.

61. PIC expended resources, time, and expertise to develop products tailored to assist LPMS and others in implementing the novel Partnership Plan structure.

62. LPMS and DMP do not have the financial resources nor the expertise to properly manage the risk of covered claims exceeding contributions without the stop loss insurance provided by PIC.

63. In contrast to the Employer Plans, there are no insurance carriers other than PIC willing to underwrite the risk of covered claims exceeding contributions to the Partnership Plans. Indeed, LPMS has reached out to several A-rated insurance carriers about providing reinsurance or stop loss insurance for the Partnership Plans. Each has declined to provide reinsurance to the Partnership Plans, in part based upon the negative Advisory Opinion by the DOL.

F. What End of Services of SAS and PIC Would Mean to the Partnership Plans and the Employer Plans

63. Without the services provided by SAS and the stop loss insurance provided by PIC, the Partnership Plans would not be able to continue their respective plans. The administration of the Employer Plans would also face interruptions and hardships as those plans sought replacement vendors.

64. If the DMP Plan and the Partnership Plans are discontinued, DMP and the other LPMS managed limited partnerships would experience significant financial hardship and probable dissolution.

II. PETITION FOR ADVISORY OPINION

65. In 2018, Renfro was retained as legal counsel for LPMS to assist it in pursuing an advisory opinion from the DOL concerning a novel application of the "working owner" theory to the proposed Partnership Plans. At the time, Renfro was a principal of SAS, and provided services to LPMS with the consent and participation of SAS, facts which are known to the DOL.

66. On Nov. 8, 2018 (revised on Jan. 15, 2019, and Feb. 27, 2019), Renfro submitted the AO Request with the DOL on behalf of LPMS, for the Partnership Plans.

67. The AO Request detailed the legal and factual basis for application of ERISA to the Partnership Plans building upon the previously recognized concept under ERISA of "working owners," including those recognized by the U.S. Supreme Court in *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon,* 541 U.S. 1 (2004), and DOL in Advisory Opinion 99-04A.

68. As noted in the AO Request, LPMS sought to implement this Plan structure through limited partnerships for which LPMS would act as general partner.

69. Given the novel nature of the structure applicable to limited partnerships, LPMS retained Renfro, with SAS's approval, to seek guidance from the DOL that the proposed application was consistent with ERISA statutes and regulations.

70. In October 2018, prior to submitting the AO Request, Renfro attended a meeting in Washington D.C. with various DOL representatives to discuss the applicability of ERISA to the Partnership Plans. At this meeting, Renfro was representing the interests of LPMS. In attendance at the October Meeting and representing the interests of the DOL were Preston Rutledge, then Assistant Secretary of Labor for the Employee Benefits Security Administration ("EBSA"), the division of the DOL responsible for ERISA compliance and interpretations, and others.

71. At the meeting, Renfro explained the Partnership Plan structure to the DOL representatives and provided high level detail of the goals of the plan and the business structure sought to be implemented by LPMS. At this meeting, Assistant Secretary Rutledge told representatives from Plaintiffs that an Advisory Opinion Request was the best route to ensure approval of the Partnership Plans by the DOL. Rutledge further advised that it was standard

practice of the DOL to engage in collaborative revisions of AO Requests prior to granting them. Renfro drafted and submitted the AO Request eight days after this meeting.

72. The initial meeting ended with an explicit agreement to continue discussions so that the DOL could be comfortable approving the Plan as ERISA compliant.

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

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

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

76. The 2018 request was slightly revised and resubmitted to the DOL in early 2019, culminating in the final Revised Request submitted on or about Feb. 26, 2019.

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

78. 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. The DOL made no formal response to any of these submissions.

79. On March 6, 2019, Renfro attended another meeting with various DOL officials in Washington D.C. Also attending this meeting was then Louisiana Attorney General (current Governor) Jeff Landry, who was the lead signatory among seven sitting state Attorneys General

of a letter sent to the DOL stressing the urgency of the public health problem that the LPMS structure addressed and requesting expedited consideration of the AO Request.[11]

80. During the March 6 meeting, then DOL Chief of Staff Nicholas Geale told a group of representatives from the Defendants that although the Partnership Plan structure was "ingenious" and that he "wished he'd thought of it," the DOL could not respond to the AO Request due to perceived conflict with litigation around the DOL's new Association Health Plan ("AHP") rule.

81. 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 the DOL would not investigate or otherwise interfere with any LPMS-managed partnership plans.

82. Representatives for Defendants attempted to explain to Mr. Geale that even assuming the DOL refrained from investigating or hampering DMP, the fifty separate state insurance regulatory agencies could pose significant and indefinite 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 regulatory actions by individual states in the absence of the DOL guidance on their interpretation of ERISA.

83. Several staff members of the DOL were present at this meeting, including, upon information and belief, members of the enforcement division of the DOL and Joseph Canary, who is the Director of the Office of Regulations and Interpretations and the signatory of the adverse response to the AO Request.

[11] Exhibit E attached hereto.

84. Defendants' reticence to accept handshake deals with the DOL was prescient, because once Defendants and LPMS declined the DOL's offer extended by Mr. Geale, the DOL embarked on a fishing expedition through what can only be described as the vindictive and retaliatory Anjo Investigation.

III. AS TO DEFENDANTS, AO REQUEST LEADS TO RETALIATORY ANJO INVESTIGATION

86. The DOL first learned of Defendants as a result of the AO Request. This knowledge quickly led to the Anjo Investigation, which began within one month of the March 6, 2019 meeting between LPMS and the DOL as to the AO Request.

87. Shortly after opening the Anjo Investigation, DOL issued numerous requests for information and subpoenas not only to SAS and PIC, but to numerous key entities doing business with SAS or PIC, including some that have nothing whatsoever to do with any of the Partnership Plans or the Employer Plans.[12]. These subpoenas were issued despite the DOL having never posed a single written question or other formal response to the AO Request. (The negative AO letter, which was the only written response to the AO Request, from the DOL followed later, after issuance of the subpoenas and the filing of the Texas suit by DMP and LPMS).

88. This lack of interaction on the AO Request is highly unusual for the DOL's advisory opinion process, as questions from THE DOL to the requestor routinely occur following submission of an advisory opinion request.

89. ERISA Procedure 76-1 requires certain procedures related to information requests that the DOL failed to follow.

[12] Exhibit F attached hereto.

90. After submission of the AO Request, the DOL never requested any information from LPMS to confirm its understanding of the facts presented in the AO Request. This failure led to the DOL's flawed understanding of the relevant facts.

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

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

93. In its Response, the DOL did not accept as true even the most basic facts presented in the AO Request.

94. For these violations of ERISA Procedure 76-1, among other reasons, the District Court and the Fifth Circuit in the Texas Suit found the DOL's conduct to be "arbitrary and capricious.".

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

96. Crucially, the Procedure "is designed to promote efficient handling of inquiries and to facilitate prompt responses." Nothing about the DOL's actions resembles efficient or prompt responses and are instead attempts to unnecessarily prolong through harassment what was a valid good faith attempt to seek guidance from agency authority by DMP and LPMS.

97. The very existence of the Anjo Investigation both frightened potential Partnership Plan vendors and dissuaded them from providing services to the Partnership Plans and from conducting business with SAS and PIC, both generally and with respect to Partnership Plans.

98. Additionally, existing vendors of SAS and PIC reduced or terminated relations with SAS and PIC as a result of the Anjo Investigation. Further, enrollment in Partnership Plans and Employer Plans dropped as a result of the Anjo Investigation.

99. Immediately before the initiation of the Anjo Investigation and since that time, the DOL rapidly changed course in its dealings with the Defendants and LPMS regarding the propriety of the Partnership Plans as well.

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

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

102. On Nov. 6, 2020, counsel for SAS and PIC 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.[13]

103. On Dec. 14, 2020, twenty months after the commencement of the Anjo Investigation, Katrina Liu, Trial Attorney, Office of the Solicitor of the DOL (also an attorney representing the DOL in the instant litigation, as well as in the Texas Suit), responded on behalf of the DOL with a letter essentially noting the DOL's "ample authority to conduct its investigation in order to determine whether ERISA violations have or are about to occur" noting that the DOL

[13] Exhibit G attached hereto.

was "not in a position to provide the specific information you seek regarding the timing and scope" of the Anjo Investigation.[14]

104. On Dec. 30, 2020, SAS, and PIC responded to Attorney Liu with citations to authority showing that, while broad, the DOL's investigatory authority is not as limitless as portrayed in its letter of December 14.[15]

105. SAS and PIC closed their reply letter with yet another request that the DOL reconsider its inexplicable approach to the Anjo Investigation. SAS and PIC 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."

106. The Anjo Investigation ultimately prompted a civil action in this Court filed by SAS and PIC on Jan. 19, 2021, against the DOL, styled as Suffolk Administrative Services, LLC, et al. v. U.S. Department of Labor, et al, Cause No. 3:21-CV-01031. This civil action was dismissed without prejudice on March 28, 2022, on the ground of lack of ripeness, without addressing its merits.

107. The DOL continued to engage in intentional conduct for the purpose of confusing and prejudicing state regulatory entities and illegally thwarting the legitimate economic activity of SAS and PIC whether that activity involves providing services to Partnership Plans or the Employer Plans referenced by the DOL in this suit.

108. On July 20, 2021, the DOL initiated an unprompted direct interview of one of SAS and PIC's Employer Plan clients. A DOL investigator named Zinnia Adams ("Ms. Adams") engaged in a telephone interview of the client's controller then sent an email to the client's controller listing several questions regarding the details of SAS and PIC's business with the client.

[14] Exhibit H attached hereto.
[15] Exhibit I attached hereto.

Ms. Adams asked the controller to provide "All information and materials received before enrolling in the benefit arrangement" including presentations, brochures, and application forms. Ms. Adams also asked for "[a]nything breaking down the fees/premium" and other information about the client's arrangement with SAS or PIC.[16].

109. On July 23, 2021, SAS and PIC 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."[17] He was informed there were "major concerns" with SAS' plan – even though the contemplated plans were not Partnership Plans – and that "the plan" was "under investigation in several jurisdictions."

110. Upon learning of this disturbing contact by the Delaware Department of Insurance ("DE DOI") to a prospective business partner, Renfro, on behalf of SAS and PIC, contacted DE DOI to organize a conference call with the appropriate DE DOI personnel, SAS, and its business partners. On July 26, 2021, Renfro received a call from Mr. Frank Pyle, Special Deputy Commissioner of DE DOI. During this extensive conversation, 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 the DOL as to the Texas Suit and other state Departments of Insurance who were passing on misinformation provided by the DOL to those states. Mr. Pyle insisted that DE DOI must engage in a "review" of any program involving SAS and PIC because of the DOL guidance, regardless of whether the client of SAS and/or PIC was implementing Partnership Plans or traditional employer self-insured health plans.

[16] Exhibit J attached hereto.
[17] Exhibit K attached hereto.

111. On Aug. 6, 2021, a business 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 SAS' structured plans in the State of Washington "was under investigation and shut down" following entanglement with the DOL and that SAS structured plans were likely not "ACA compliant".[18] Additionally, this business partner also noted that the PA DOI special investigator admitted his information came from the DE DOI. This business partner of SAS and PIC also indicated that when he contacted the DE DOI he was informed by a "Delaware DOI regulator" 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.

112. Also on Aug. 6, 2021, SAS and PIC learned that the President of one of their potential business partners had spoken with the "Special Deputy Commissioner of DE".[19] Following that conversation that potential business 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."

113. On Aug. 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."[20]. Upon information and belief, each of these facts relates directly to the improper actions of the DOL at least, and perhaps are a result of a larger effort (orchestrated by the 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

[18] Exhibit L attached hereto.
[19] Exhibit M attached hereto.
[20] Exhibit N attached hereto.

SAS and PIC by "poisoning the well" with the potential business partners, customers, and vendors that might work with them.

114. On Aug. 10, 2021, Renfro and SAS' 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 Employer Plans designed, administered, and/or insured by SAS or PIC.

115. As previously indicated, SAS and PIC provided documents to the DOL during the Anjo Investigation showing that: a) neither handled plan funds; b) PIC and SAS suffered a net loss with respect to the plans that, per the DOL, were the subject of the investigation; c) the fees/premium charged by SAS and PIC were below market; and d) that all valid stop loss claims were paid by PIC.

116. On July 21, 2022, after over three years of seemingly endless subpoenas and "investigation," the DOL gave notice to counsel for SAS and PIC as to the substance of its Anjo Investigation and alleged violations of ERISA.[21]

117. After July 21, 2022, all of the targets of the Anjo Investigation, including Defendants, were in active settlement negotiations with the DOL.

118. Nearly one year later, on June 8, 2023, the DOL submitted its first express demand for injunctive and monetary relief.[22]

[21] Exhibit O attached hereto.

[22] Exhibit P attached hereto.

119. Progress towards settlement between the DOL, SAS, PIC, and the individual Defendants was very slow between June 2023 and February 2024. During this time, the DOL, SAS, PIC, and the individual Defendants entered into several tolling agreements which (1) extended the statute limitations for legal action, and (2) precluded the DOL, SAS, PIC, and the individual Defendants from initiating any legal proceedings with respect to the Anjo Investigation. The litigation standstill expired on Oct. 23, 2024, and the tolling agreements on Nov. 6, 2024.

IV. AS TO DMP AND LPMS, AO REQUEST LEADS TO NEGATIVE ADVISORY OPINION AND TEXAS SUIT

120. As to LMPS, the AO Request ultimately led to an unfavorable Advisory Opinion dated Feb. 3, 2020, that the Partnership Plans are not protected by ERISA. Contrary to U.S. Supreme Court precedent and the DOL's own previous advisory opinions, the Advisory Opinion found the Partnership Plans were not subject to ERISA because of the nature of the "work" being performed by the limited partners.

121. This Advisory Opinion was the subject of the Texas Suit brought by LPMS and DMP against the DOL. In a *Memorandum Opinion and Order* dated Sept. 28, 2020, the District Court (1) found the DMP Plan to be a single employer ERISA plan; (2) vacated the Advisory Opinion as arbitrary and capricious, and in material conflict with previous DOL advisory opinions, in violation of the APA, 5 U.S.C. § 706(2); and (3) enjoined DOL "from refusing to recognize the ERISA-status of the [DMP Partnership] Plan." On appeal, the Fifth Circuit affirmed the vacatur of the Advisory Opinion and remanded to the District Court for further findings to support its injunction.

122. The DOL continues to fight the Texas Suit. The issue now is whether to reinstate the injunction enjoining the DOL from refusing to recognize the ERISA-status of the DMP Partnership Plan.

V. THE DOL CONNECTS FATE OF DEFENDANTS IN ANJO INVESTIGATION AND DMP AND LPMS IN TEXAS SUIT[23]

123. On Jan. 11, 2024, counsel for DMP and LPMS sent a letter to counsel for the DOL offering to engage in settlement discussions in the Texas Suit.[24]

124. In response, the DOL sent an e-mail on Feb. 8, 2024, to DMP, LPMS, SAS, PIC, and the individual Defendants proposing "global" settlement discussions regarding both the Texas Suit and the Anjo Investigation.[25]

125. Settlement discussions as to the Anjo Investigation accelerated substantially once DMP, LPMS, SAS, PIC, and the individual Defendants agreed to participate in "global settlement discussions." The DOL'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 DOL's position on the Texas Suit began with a wholly unreasonable position and remained constant thereafter – dismiss the Texas Suit entirely and withdraw the 2018 AO Request.

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[23] Although Federal Rule of Evidence 408 says that evidence of a statement made during compromise negotiations is "inadmissible … either to prove or disprove the validity or amount of a disputed claim or to impeach a prior inconsistent statement or a contradiction …", the Rule also states that a "court may admit this evidence for another purpose…" Purposes for which a statement has been found to be admissible include, as here, the improper use of settlement statements to harass or extort another person or entity. *See Block v. Washington State Bar Ass'n*, 860 F.App'x 508, 510 (9th Cir. 2021) ("Because the emails were offered to prove [Plaintiff's] pattern of harassment, they were not offered "to prove or disprove the validity or amount of a disputed claim or to impeach," as is required under the rule. Fed. R. Evid. 408(a)"); *Collier v. Town of Harvard*, No. Civ. A.95-11652, 1997 WL 33781338 at *3 n. 10 (D. Mass. March 28, 1997) ("The other purpose here, of course, is to show an extortionate scheme"). Since the statements made by the DOL are themselves the basis of this Counterclaim, the grounds for their admissibility are even more compelling. *See Service Employees Int'l Union v. Local 1199,* 70 F.3d 647, 654, n. 7 (1st Cir.1995) (citing *Overseas Motors, Inc. v. Import Motors Ltd., Inc.,* 375 F.Supp. 499, 537 (E.D.Mich.1974) ("it would also seem reasonable to admit such evidence where the settlement negotiations are themselves ... operative facts"), *aff'd* 519 F.2d 119 (6th Cir.), *cert. denied,* 423 U.S. 987 (1975)).

[24] Exhibit Q attached hereto.

[25] Exhibit R attached hereto.

126. That any settlement of the Anjo Investigation (including with the Defendants) was entirely dependent upon the dismissal of the Texas Suit was made plain in the DOL's April 24, 2024, demand. The settlement demand was $5.5 million as to the Defendants but was contingent upon the withdrawal of the AO Request and the dismissal of the Texas suits by DMP and LPMS.[26]

127. On Friday, May 10, 2024, counsel for the DOL directly stated to counsel for DMP, LPMS, SAS, PIC, and the individual Defendants that if the Texas Suit was not dismissed, the monetary demands for settling the Anjo Investigation would increase.

128. On Thursday, May 23, 2024, counsel for the DOL repeated that the Texas Suit needed to be dismissed as part of a settlement of the Anjo Investigation. Counsel for the DOL stated that either both matters would be settled together, or neither matter would be settled.

129. In an e-mail dated Monday, May 27, 2024, counsel for the DOL again tied the settlement of the Anjo Investigation to the dismissal of the Texas Suit.[27]

130. On Tuesday, May 28, 2024, counsel for the DOL stated that if the Texas Suit were not dismissed, the DOL's monetary settlement demand would increase from $5,500,000 inclusive of penalties back up to $15,000,000 inclusive of penalties, the latter amount being the last demand before the DOL tied the Texas Suit to the settlement of the Anjo Investigation.

131. On Monday, June 10, 2024, counsel for the DOL made startling revelations. First, when counsel for DMP and LPMS informed DOL counsel that the Texas Suit would not be dismissed without some written acknowledgement of the single employer status of the DMP Plan, the DOL counsel stated that no such written acknowledgement of any form would be provided by

[26] Exhibit S attached hereto.
[27] Exhibit T attached hereto.

the DOL, and its counsel was not sure if the DOL would settle the Anjo Investigation at all without DMP dismissing the Texas Suit.

132. Second, other counsel for the DOL explicitly stated that the DOL believed that DMP cannot function without PIC and SAS providing services to the DMP Plan. This admission demonstrates that the DOL acted with malicious intent in its request to link the Anjo Investigation settlement discussions with the Texas Suit settlement discussions.

133. On June 11, 2024, DOL counsel confirmed in writing that without a dismissal of the Texas Suit, it would not settle the Anjo Investigation for less than $15,000,000 inclusive of penalties, the amount of the last demand before the DOL tied the Texas Suit to the settlement of the Anjo Investigation.[28] This confirmation came after a statement by DOL counsel that the Defendants could not bear the financial exposure of such a settlement.

134. Counsel for the Defendants advised the DOL that even if, in order to avoid litigation and reputational damage, their clients were willing to accept such a large and disproportionate penalty, they would be unable to pay it immediately. The DOL refused to entertain a payment schedule that the Defendants were capable of meeting.

135. DMP and LPMS did not agree to the dismissal of the Texas Suit or the withdrawal of the AO Request. As a result, the DOL demanded payment of $15 million from PIC and SAS in a time frame which would likely bankrupt SAS and PIC, to avoid a costly federal complaint against them in this Court. When informed SAS and PIC could not agree to such a settlement, the DOL filed this suit.

136. From these admissions by the DOL, it is clear that the purpose and function of the Anjo Investigation and this suit has never been to ensure compliance with ERISA, but instead to

[28] Exhibit U attached hereto.

coerce PIC and SAS to disassociate with LPMS and DMP (thereby ending any ability for the continuing of the Partnership Plans and indirectly ending the Texas Suit) or risk enforcement action by the DOL. The DOL refused to settle the Anjo Investigation because they could not achieve a settlement which included (a) a withdrawal of the AO Request; and (b) a dismissal of the Texas Suit. The motivation for bringing this suit was not based upon its merits, but rather on the continued goal of achieving a settlement on its terms, which, despite the allegations of the Complaint to the contrary, necessarily entailed the dismantling and/or discrediting of the Partnership Plans.

VI. THE DOL DISREGARDS EXECUTIVE ORDER 13924

137. On Jan. 20, 2025, President Trump rescinded the revocation (under the Biden Administration) of Trump's Executive Order 13924, *Executive Order on Regulatory Relief to Support Economic Recovery* ("EO") signed May 19, 2020. Therefore, the EO is now once again in effect, and the following arguments and authorities are now enforceable against the DOL.

138. 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.

139. 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").[29]

140. 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 the DOL violate by continuing their retaliatory investigation into Defendants.

[29] Exhibit V attached hereto.

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

142. 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).

143. Plaintiff has not, and still does not, comply with these basic tenets of due process, fairness, and justice highlighted by the Memo and commanded by the EO.

144. 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…"

145. The Memo further instructs that "regulations should require investigating staff to either recommend or bring an enforcement action, or instead cease the investigation…"[30]

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

147. The content of this Memo and the EO that inspired its creation, coupled with the aforementioned facts, show not only that the Plaintiff's investigation is nothing more than a thinly veiled attempt to silence the speech and association rights of Defendants, but that the DOL continuing to do so is now also a blatant violation of the direction of the President expressed in the reinstated EO. The DOL cannot continue this practice any longer.

[30] This is, in fact, the very thing that Defendants sought in its late 2020 correspondence with the DOL. Despite these pleas for clarity and conclusion to the lengthy Anjo Investigation, the DOL simply responded that it would conduct the investigation as it saw fit and for as long as it saw fit.

VII. THIS SUIT

A. Allegations Against Defendants Were Disproven by Anjo Investigation

148. Even though the Anjo Investigation disproved any wrongdoing by Defendants, this Suit makes unsubstantiated claims against them.

149. Contrary to the DOL's allegations of self-dealing, for instance, Defendants provided documents to the DOL in the Anjo Investigation showing that, as to the plans encompassed by this suit during the period between 2016-2022, SAS had net income of approximately $2.3 million, and PIC had a net loss of approximately $2.4 million. The DOL simply ignored the rebuttal evidence provided to them, posing no questions to Defendants about the discrepancy, nor any providing any facts to support the DOL's allegations.

150. Contrary to the DOL's allegations that Defendants commingled plan funds, Defendants also provided documents to the DOL in the Anjo Investigation showing Defendants never touched plan funds. Rather, all plan funds were and are handled by third-party administrators other than Defendants. SAS simply invoiced and was paid for its vendor services by the third-party administrators, and PIC invoiced and was paid premiums and other charges for insurance policies it issued to the plan sponsors.

151. Contrary to the DOL's allegations that Defendants charge excessive fees, Defendants provided documents to the DOL in the Anjo Investigation showing their average fees are well below industry standards. A fee below industry standards cannot, by definition, be excessive. Again, the DOL ignored this evidence and offered none of its own.

152. Perhaps the most incendiary and absurd allegation made by the DOL is that Defendants "never paid claims." Defendants provided documents to the DOL in the Anjo

Investigation showing PIC paid out more than $300 million in claims to its insureds, the plan sponsors.

153. The DOL thus is in possession of documents disproving the very allegations now made in this suit. To make allegations which ignore this proof is malicious and calculated to harm Defendants' business and personal reputations and discredit or dismantle the Partnership Plans.

B. Relief Sought Against Defendants is Punitive

154. In exchange for the withdrawal by DMP and LPMS of the AO Request, and the dismissal by DMP and the LPMS of the Texas Suit, the DOL was willing to settle the Anjo Investigation for $5.5 million. Now that DMP and LPMS have refused to withdraw the AO Request and dismiss the Texas Suit, the DOL claims damages of more than seven (7) times the amount of $5.5 million, which would effectively bankrupt SAS and PIC and prevent them from servicing the Partnership Plans.

155. In exchange for the withdrawal by DMP and LPMS of the AO Request, and the dismissal by DMP and the LPMS of the Texas Suit, the DOL was willing to settle the Anjo Investigation under terms that would allow SAS and PIC to continue operations. Now that DMP and LPMS have refused to withdraw the AO Request and dismiss the Texas Suit, the DOL seeks to enjoin Defendants "from ever acting as a fiduciary, service provider, or trustee to any plan covered by Title I of ERISA", including the Partnership Plans.

COUNT I: VOLATION OF FIRST AMENDMENT AS TO AO REQUEST

156. Defendants hereby incorporate and re-allege the allegations in paragraphs 1 to 155 as if fully set forth herein.

157. It is settled law federal courts are empowered to issue general injunctive relief that enjoins a government defendant from retaliating against or otherwise infringing upon a plaintiff's

rights under the First Amendment. *Mahan v. Tex. Dept. of Pub. Safety*, No. 9:20-CV-119-RC-ZJH, 2020 WL 6935555 at *3 (E.D.Tex. Oct. 29, 2020).

158. Retaliation, though not expressly referenced in the Constitution, is nonetheless actionable because retaliatory actions may tend to chill individuals' exercise of constitutional rights." *ACLU of Md., Inc. v. Wicomico County,* 999 F.2d 780, 785 (4th Cir. 1993).

159. The AO Request is a petition by DMP and LPMS protected by the First Amendment of the Constitution regarding a matter of public concern, i.e., the applicability of ERISA to single employer employee welfare plans providing health coverage to more than 30,000 individuals.

160. Defendants have the right under the First Amendment to associate with DMP and LPMS without suppression or retaliation by the DOL because of their association as vendors to DMP and LPMS, which exercised their right of petition in the AO Request.

161. The DOL has intentionally undertaken the following actions against Defendants to obstruct, chill, deter, and retaliate against Defendants because of their association as vendors to DMP and LPMS, which exercised their right of petition in the AO Request:

a. Launching the Anjo Investigation shortly after the AO Request;

b. Making allegations of unlawful conduct against Defendants in conjunction with the Anjo Investigation;

c. Making monetary demands against Defendants in conjunction with the Anjo Investigation;

d. Conditioning the resolution of the allegations of unlawful conduct against Defendants in the Anjo Investigation on the withdrawal by DMP and LPMS of the AO Request;

e. Conditioning the resolution of the monetary demands against Defendants in the Anjo Investigation on the withdrawal by DMP and LPMS of the AO Request;

f. Making allegations of unlawful conduct against Defendants in this suit based upon the refusal of DMP and LPMS to withdraw the AO Request;

g. Making monetary demands against Defendants in this suit based on the refusal of DMP and LPMS to withdraw the AO Request; and

h. Seeking injunctive relief against SAS and PIC to enjoin them from servicing ERISA plans based on the refusal of DMP and LPMS to withdraw the AO Request.

162. Such actions have been undertaken by the DOL with full knowledge as to their potential devastating impact on the Partnership Plans.

163. The DOL's unlawful and intentional actions are not justified by a substantial or compelling government interest and are not narrowly tailored to serve any such interest.

164. As a direct and result of the DOL's' unlawful conduct as alleged under this Count, Defendants now face imminent, irrevocable, and irreparable harm which includes (a) the end of SAS and PIC; and/or (b) the termination of the vendor relationships between Defendants and DMP and LPMS. Accordingly, Defendants seek a permanent injunction enjoining the DOL from further violations of the First Amendment as to the AO Request including the continued prosecution of this suit against Defendants.

COUNT II: VIOLATION OF FIRST AMENDMENT AS TO TEXAS SUIT

159. Defendants hereby incorporate and re-allege the allegations in paragraphs 1 to 164 as if fully set forth herein.

160. The Texas Suit is a petition by DMP and LPMS protected by the First Amendment of the Constitution regarding a matter of public concern, i.e., the applicability of ERISA to single employer employee welfare plans providing health coverage to more than 30,000 individuals.

161. Defendants have the right under the First Amendment to associate with DMP and LPMS without suppression or retaliation by the DOL because of their association as vendors to DMP and LPMS, which exercised their right of petition in the Texas Suit.

162. The DOL has intentionally undertaken the following actions against Defendants to obstruct, chill, deter, and retaliate against Defendants because of their association as vendors to DMP and LPMS, which exercised their right of petition in the Texas Suit:

a. Conditioning the resolution of the allegations of unlawful conduct against Defendants in the Anjo Investigation on the dismissal by DMP and LPMS of the Texas Suit;

b. Conditioning the resolution of the monetary demands against Defendants in the Anjo Investigation on the dismissal by DMP and LPMS of the Texas Suit;

c. Making allegations of unlawful conduct against Defendants in this suit based upon the refusal of DMP and LPMS to dismiss the Texas Suit;

d. Making monetary demands against Defendants in this suit based on the refusal of DMP and LPMS to dismiss the Texas Suit; and

e. Seeking injunctive relief against SAS and PIC seeking to enjoin them from servicing ERISA plans based on the refusal of DMP and LPMS to dismiss the Texas Suit.

163. Such actions have been undertaken by the DOL with full knowledge as to their potential devastating impact on the Partnership Plans.

164. The DOL's unlawful and intentional actions are not justified by a substantial or compelling government interest and are not narrowly tailored to serve any such interest.

165. As a direct and proximate result of the DOL's' unlawful conduct as alleged under this Count, Defendants now face imminent, irrevocable, and irreparable harm which includes (a) the forced dissolution of SAS and PIC; and/or (b) the termination of the vendor relationships between Defendants and DMP and LPMS. Accordingly, Defendants seek a permanent injunction enjoining the DOL from further violations of the First Amendment as to the Texas Suit including the continued prosecution of this suit against Defendants.

COUNT III: VIOLATION OF APA (5 U.S.C. § 706)

166. Defendants hereby incorporate and re-allege the allegations in paragraphs 1 to **Error! Reference source not found.**65 as if fully set forth herein.

167. The role of the DOL is to enforce ERISA. In this regard, DOL is not the final arbiter of which employee benefit plans are subject to ERISA and which employee benefit plans are not subject to ERISA; that responsibility falls on Congress and the courts.

168. The DOL's actions herein negatively and wrongfully impact, and retaliate against not only the Partnership Plans in the Texas Suit, but also the Employer Plans which have opted to use the services of SAS and PIC over other vendors. At least four authorities show that the Partnership Plans are single employer employee welfare plans (like the Employer Plans referenced in the Complaint) subject to ERISA – (a) ERISA itself; (b) the U.S. Supreme Court decision in *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon,* 541 U.S. 1 (2004); (c) the U.S. District Court decision in the Texas Suit; and (d) the DOL in Advisory Opinion 99-04A.

169. Despite this abundance of authority, the DOL has not only declined to recognize the Partnership Plans as single employer employee welfare plans subject to ERISA, in defiance of

its responsibility to enforce ERISA, the agency has actively sought through its efforts in the Texas Suit and this suit to dismantle or discredit the Partnership Plans, all to the detriment of Defendants and the thousands of participants in the Employer Plans and the Partnership Plans.

170. APA provides a cause of action for persons suffering a legal wrong from – or adversely 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.

171. Under 5 U.S.C. § 706(2)(A) this Court has jurisdiction "[t]o the extent necessary to decision and when presented to … hold unlawful and set aside agency action, findings and conclusions to be (A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law."

172. Under 5 U.S.C. § 706(2)(B) this Court has jurisdiction "[t]o the extent necessary to decision and when presented to … hold unlawful and set aside agency action, findings and conclusions to be (B) contrary to constitutional right, power, privilege, or immunity."

173. Under 5 U.S.C. § 706(2)(C) this Court has jurisdiction "[t]o the extent necessary to decision and when presented to … hold unlawful and set aside agency action, findings and conclusions to be (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

174. Under 5 U.S.C. § 706(2)(D) this Court has jurisdiction "[t]o the extent necessary to decision and when presented to … hold unlawful and set aside agency action, findings and conclusions to be (D) without observance of procedure required by law."

175. A counterclaim under the APA is necessary in this lawsuit because the *Original Complaint* makes no mention of the undeniable connections to the Texas Suit, or the inextricable link which has been created by the DOL between this lawsuit and the Texas Suit as part of its

efforts to discredit or dismantle the Partnership Plans as well as SAS and PIC. By shedding light on this connection, Defendants/Counter Plaintiffs intend to provide the necessary context for this Court to grant declaratory and injunctive relief under Section 706 of the APA.

176. It is a clear abuse of discretion for the DOL, in violation of 5 U.S.C. § 706(2)(A), to sue or threaten suit against Defendants, as they undisputedly did before this suit, not on the basis of their own actions or inactions, or any losses to the plans which they service, but rather on (a) unsupported monetary demands; and (b) the identity of the plans with which they lawfully do business.

177. It is likewise a clear abuse of power, in violation of 5 U.S.C. § 706(2)(B), for the DOL to sue or threaten suit against Defendants, as they undisputedly did before this suit, not on the basis of their own actions or inactions, or any losses to the plans which they service, but rather on (a) unsupported monetary demands; and (b) the identity of plans with which they lawfully do business.

178. It is also in clear excess of the authority of the DOL, in violation of 5 U.S.C. § 706(2)(C), for the agency to sue or threaten suit against Defendants, as they undisputedly did before this suit, not on the basis of their own actions or inactions, or any losses to the plans which they service, but rather on (a) unsupported monetary demands; and (b) the identity of plans with which they lawfully do business.

179. It is also without observation of procedure required by law, in violation of 5 U.S.C. § 706(2)(B), for the DOL to sue or threaten suit against Defendants, as they undisputedly did before this suit, not on the basis of their own actions or inactions, or any losses to the plans which they service, but rather on (a) unsupported monetary demands; and (b) the identity of the plans with which they lawfully do business.

180. As a direct and proximate cause of the DOL's violations of the APA, Defendants are suffering and will likely continue to suffer irreparable harm in the absence of an injunction preventing the DOL from continuing to violate the APA.

181. An injunction preventing the DOL from continuing to violate the APA would be in the public interest since it would protect the health benefits of more than 30,000 participants in the Partnership Plans and the Employer Plans.

PRAYER FOR RELIEF

WHEREFORE, Defendants demand dismissal of the Complaint and judgment against the DOL and in favor of Defendants as follows:

A. That this Court declare the conduct of the DOL violated the U.S. Constitution;

B. That this Court declare the conduct of the DOL violated and continues to violate the APA;

C. That this Court issue a permanent injunction prohibiting any further enforcement action by the DOL against Defendants based upon the Anjo Investigation and the Texas Suit;

D. Award Defendants 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

E. Award Defendants such other and further relief as this Court deems necessary and proper.

WE HEREBY CERTIFY that on this date, we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

Civil No.: 3:24-cv-01512 (CVR)

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico this 9th day of June 2025.

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