

**UNITED STATES COURT OF APPEALS  
For the First Circuit**

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No. 25-1886

LORI CHAVEZ-DEREME, Secretary of Labor, US Department of Labor,  
Plaintiff-Appellee,

v.

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

Defendants,

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

Interested Parties – Appellants

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**MOTION TO STAY PROCEEDINGS IN THE DISTRICT COURT OF  
PUERTO RICO PENDING APPEAL**

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Interested Parties-Appellants Data Marketing Partnership, LP (“DMP”) and LP Management Services, LLC (“LPMS”) (collectively “Movants”), through their undersigned counsel, respectfully move to stay proceedings in the District Court for the District of Puerto Rico (“PR Action”) pending Movants’ appeal of the District Court Order denying their motion to intervene as of right in the underlying action.<sup>1</sup> Pursuant to Rule 8(a)(1)(A), Movants first sought a stay pending appeal to the District Court but it was denied.<sup>2</sup>

### **INTRODUCTION**

The Movants seek an interim stay of the PR Action while they pursue this appeal as this appeal divests the District Court’s jurisdiction to continue with the underlying matter while this appeal is being heard and Movants will be irreparably harmed if the PR Action continues without them participating. Movants, the proposed Intervenors below, have a direct and significant interest in full participation in the PR Action as their data marketing business that is rooted in the provision of single employer employee welfare plans (“Partnership Plans”) largely depend on the outcome of that case. In fact, the Movants are the real targets of the PR Action. Having successfully defended their Partnership Plans in years-long litigation with

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<sup>1</sup> On August 14, 2025, the District Court entered an Order denying the Motion to Intervene of DMP and LPMS. (Ex. A hereto).

<sup>2</sup> On September 29, 2025, the District Court denied Movants’ Motion to Stay (Ex. B hereto).

the Department of Labor (“DOL”) in Texas (including a significant win in the Fifth Circuit)<sup>3</sup> the Movants have been effectively barred from protecting their interests in this case when their motion to intervene was denied.

The DOL is essentially “backdooring” litigation against the Movants in the PR Action by suing the only vendors willing and capable of servicing Movants’ Partnership Plans. However, on August 14, 2025, the United States District Court for the District of Puerto Rico denied Movants’ Motion to Intervene: (1) without allowing Movants time to seek leave to file a reply to rebut misleading statements in the DOL’s Response, (2) without analyzing Movants’ argument that their First Amendment rights of petition are threatened as the PR Action was only filed against Movants’ vendors after Movants refused a global settlement in the Texas Suit that would require Movants to withdraw their Request for Advisory Opinion to the DOL and dismiss the Texas Action, or (3) without considering federal jurisprudence holding that “[o]therwise lawful government action may nonetheless be unlawful if motivated by retaliation for having engaged in activity protected by the First Amendment.” *O’Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016).

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<sup>3</sup> The Movants have successfully defended their Partnership Plans in litigation with the DOL in the U.S. District Court for the Northern District of Texas, captioned *Data Marketing Partnership, LP, et. al v. U.S. Dept. of Labor, et. al.*, Civil Action No.4:19-cv-00800-O (“Texas Suit”).

In order to pursue its right to intervene in the below action, Movants have appealed the Order denying their motion to intervene. A stay of the PR Action is warranted because this appeal divests the District Court's jurisdiction to hear the underlying case and, even if jurisdiction was not divested, the four-factor balancing test used to evaluate injunctive relief weighs in favor of staying the litigation.

### **RELEVANT FACTUAL BACKGROUND**

#### **A. Inter-connected Interests of the Movants and the Defendants in the PR Action**

The DOL brought this suit against Defendants as a collateral attack on their business relationship with Movants. Defendants provide consulting and administrative services essential to the Partnership Plans sponsored by Movants. The history of this collateral attack is complicated but it is important to understand Movants' argument that a stay should be granted in the District Court below pending the outcome of the appeal of their denied motion to intervene.

The background for this action began in 2019 with the Movants' request for an Advisory Opinion ("AO Request") from the DOL confirming the Partnership Plans were protected under ERISA. The DOL responded to this request with an Advisory Opinion that was later vacated by the Fifth Circuit as arbitrary and capricious, and remanded to the district court to resolve the issue of eligibility of limited partners to participate in the plans as bona fide partners and working owners

in the Texas Suit. *See Data Marketing Partnership, LP, et. al v. U.S. Dept. of Labor, et. al.*, 45 F.4<sup>th</sup> 846 (5<sup>th</sup> Cir. 2022), Ex. C hereto.

The PR Action arises from Movants’ 2019 AO Request that prompted the DOL to investigate Movants’ vendors, the Defendants (“the Anjo Investigation”). This investigation revealed no unlawful behavior, but as admitted by the DOL, when Movants attempted to settle the Texas Suit, the DOL proposed tying the Texas settlement to a settlement of the Anjo Investigation. [*See* PR Action, Docket No. 60, Secretary’s Motion to Dismiss Defendants’ First Amended Counterclaim for Declaratory and Injunctive Relief at pg. 24 and fn 8, Ex. D hereto]. The DOL understood that there was more than a slight connection between Movants, the Texas Suit, Defendants, and the Anjo Investigation. The DOL also spoke out of both sides of its mouth when it admits that it suggested a “global settlement” of the Texas Suit and the Anjo Investigation “due to the connection among the parties,” (*id.*) yet simultaneously argued that this connection was not sufficient to justify Movants’ intervention into the PR Action. *See* 8/14/25 Order (Ex. A).

When Movants declined a “global settlement” with the DOL that required them to withdraw the AO Request and dismiss its successful Texas Suit against the DOL, the DOL proceeded with the PR Action against Defendants alleging ERISA violations, seeking monetary remedies of \$40 million and to enjoin Defendants from “ever acting as a fiduciary, service provider or trustee” to any employee benefits

plans, which the DOL knows necessarily includes the Partnership Plans. (*See* Proposed Complaint In Intervention at ¶¶ 2-7, Ex. E hereto).

**B. Irreparable Harm Faced by Movants Absent an Interim Stay of the PR Action**

Ultimately, the DOL's PR Action attacks both Defendants and Movants who, absent allowance to intervene in the PR Action, will be unable to protect their very real interests. The effect of the DOL's PR Action on Movants is three-fold and demonstrates why the Movants interests are so intertwined with the entirety of the PR action that the District Court's jurisdiction is properly revoked pending this appeal and/or that a stay is otherwise appropriate. First, the DOL threatens group health insurance for roughly 30,000 individuals currently in the Partnership Plans. Second, the DOL violates the First Amendment rights of Movants to petition, and theirs and Defendants' right to association by threatening "invoking legal sanctions and other means of coercion" against a vendor (Defendants) "to achieve the suppression" or punishment of disfavored speech by a customer (Movants). *See NRA v. Vullo*, 602 U.S. 175, 176 (2024); *Bantam Books v. Sullivan*, 372 U.S. 58, 67 (1963). The DOL is also acting contrary to their responsibility under ERISA 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). Third, the DOL has already acted contrary to these purposes in the Texas Suit and is "doubling down" on its

rejected position in the Texas Suit by seeking to drive out the Partnership Plans through this onerous lawsuit against Movants' vendors.

Big picture the PR Action is part of a DOJ plan to dismantle a lawful ERISA plan sponsored by the Movants that they were unsuccessful in derailing through its Advisory Opinion and in the Texas Suit. The PR Action is inextricably intertwined with the AO Request, the Advisory Opinion, and the Texas Suit, which is why Movants seek to intervene in the PR Action. Against this backdrop, Movants respectfully request that the First Circuit issue an interim stay of the PR Action pending the appeal of the Order denying Movants' petition to intervene in the PR Action.

## **ARGUMENT**

### **I. The District Court Lacks Jurisdiction to Continue With Proceedings Pending the Interlocutory Appeal of the Motion to Intervene**

“The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). As a general rule, “entry of a notice of appeal divests the District Court of jurisdiction to adjudicate any matter relating to the appeal.” *Maine v. Norton*, 148 F.Supp.2d 81, 83 (D. Me. 2001) (citing *United States v. Distasio*, 829 F.2d 20, 23 (1<sup>st</sup> Cir. 1987)); *see also United States v. Mala*, 7 F.3d

1058, 1060 (1<sup>st</sup> Cir. 1993); *Garcia v. Burlington*, 818 F.2d 713, 721 (10<sup>th</sup> Cir. 1987) (holding that during the pendency of an interlocutory appeal the district court only “retains jurisdiction to proceed with matters not involved in that appeal.”). The “modest amount of flex” when applying this general rule is that the District Court “retains authority to decide matters not inconsistent with the pendency of the appeal.” *Norton, id.* (citing *United States v. Hurley*, 63 F.3d 1, 23 (1<sup>st</sup> Cir. 1995) (emphasis in original); *Spound v. Mohasco Indus., Inc.*, 534 F.2d 404, 411 (1<sup>st</sup> Cir.), *cert. denied*, 429 U.S. 886 (1976)).

As the *Norton* court made clear, where there are proposed intervenors who seek to participate as parties in the course of development of the case --- as in the case here for Movants – this is the type of appeal that falls squarely within the type of case in which the District Court’s jurisdiction is divested. As detailed by the *Norton* court:

The proposed intervenors filed a motion to be allowed by the Court to intervene *as parties* in this lawsuit. Granting of the motion would have meant that they could participate to the full extent that the existing parties to the case can participate in pleading, discovery, motion practice, advocacy on any of the issues that might arise in the course of pretrial preparation of the case, and, ultimately, trial participation, including direct and cross-examination of the witnesses at trial and the opportunity to present testimony and evidence at trial at their own initiative. The Court, however, denied that motion, thereby depriving the proposed intervenors of the participatory role they seek in this case. That is now on appeal to the Court of Appeals...It is clear beyond peradventure of any doubt to this Court, if the usual rules of analytical thought and process are to be applied, that any action that this Court

allows or takes for the development of the case without the opportunity of the proposed intervenors to participate therein *must* be inconsistent with the question pending on appeal as to whether they are entitled to such rights. Any other conclusion is nothing more than wishful thinking.

*Norton*, 148 F.Supp. at 83.

The *Norton* court emphasized that the application of the general rule divesting the District Court of jurisdiction “must be rigorous” and cannot be influenced by “exigency” or “artful stratagems.” “Jurisdiction either exists or it does not (here it clearly does not)...” *Id.* Several other federal courts have reiterated that in the context of an appeal of a denied motion to intervene that ruling necessarily impacts the entire underlying proceeding in the district court and cannot be isolated, therefore, the district court is divested of jurisdiction to proceed with any part of the action. *See Barnes v. Sec. Life of Denver Ins. Co.*, 2019 WL 142113, at \*1 (D. Colo. Jan 9, 2019) (holding interlocutory appeal of denied motion to intervene divests District Court of jurisdiction as there are no substantive parts of the litigation which would not be impacted should the Tenth Circuit determine that the proposed intervenor’s interests are not adequately protected by existing parties); *see also Brown v. Google, LLC*, 2024 WL 5682633, at \*1 (N.D. Cal. Nov. 8, 2024) (finding that appeal of an order denying a motion to intervene by 185 state court plaintiffs opposing a settlement in an almost-identical federal court action divests the

district court of jurisdiction to proceed while the motion is pending and granting motion to stay). Because the District Court's jurisdiction over substantive issues is divested pending the determination of Movants' appeal of the Order denying their motion to intervene, this Court should stay the proceedings until such time as this interlocutory appeal has been resolved.

**II. Even if the District Court Retains Jurisdiction Over Certain Issues, Consideration of the Four Equitable Factors for Injunctive Relief Supports the Grant of a Stay Pending Appeal.**

**A. Legal Standard**

The four factors this Court must consider in a motion to stay pending appeal are: (1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Boston Parent Coal. For Acad. Excellence Crop. v. Sch. Comm. of City of Boston*, 996 F.3d 37, 44 (1<sup>st</sup> Cir. 2021). “In essence, the issuance of a stay depends on whether the harm caused movant without the stay, in light of the movant’s likelihood of eventual success on the merits, outweighs the harm the stay will cause the non-moving party.” *Acevedo-Garcia v. Vera Monroig*, 296 F.3d 13, 16-17 (1<sup>st</sup> Circ. 2002) (internal citations omitted).

Where, as here, the Movants seek to preserve the status quo in the trial court pending an appeal of an important issue, the Court may give more weight to the factors balancing the harms and equities of interim relief than to the moving party's ability to demonstrate a likelihood of success on the merits on appeal. *See Maine v. U.S. Dep't of Interior*, 2001 WL 98373, at \*2 (D. Me. Feb. 5, 2001) (internal citation omitted). "Where ... the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay." *Id.* at \*3 (quoting *Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979)).

The balance of equities favors the grant of a stay of the PR Action pending appeal of the Order denying Movants' motion to intervene. As set forth in more detail below, Movants are likely to succeed on their appeal. Moreover, denial of the stay during the pendency of an appeal would cause irreparable harm to Appellants by the inevitable threat of their essential vendors facing total financial obliteration and a complete shutdown of their operations since the DOL seeks to "enjoin Defendants...from ever acting as a fiduciary, service provider, or trustee." Such a result would inevitably affect Movants whose business model is entirely reliant on the Defendants, who are the only vendors to service Movants' Partnership Plans. By contrast, a stay of the Order would cause the DOL to suffer some delay, though under

the current federal government shutdown the DOL lawyers are not able to prosecute the case in any event. Additionally, the public interest favors the grant of a stay to preserve the status quo so that the DOL cannot continue to actively violate the First Amendment rights of both Appellants and Defendants.

**B. Movants Will Suffer Irreparable Economic Injuries if the PR Action is Not Stayed Pending Appeal of the Order Denying Their Motion to Intervene**

Appellants' irreparable injury is not imagined or speculative. Since the Texas Suit, Movants have had to restrict the growth of DMP's data marketing business and use of the health plans as a recruiting tool pending its resolution, and it is currently in the discovery phase with summary judgment motion deadlines occurring well into 2026. At this time, the Texas Suit's remaining questions on remand are narrow. The only question in the Texas Suit is whether the working owner theory applies to the Movants' Partnership Plans, which this Court acknowledged that the court in the Texas Suit "did not have the power to hear the additional claims [Movants] wanted to present." See PR Action, Docket No. 55, Order re: Motion to Transfer, Ex. F hereto at pg. 7. Now, Movants have irreparably lost the opportunity in the Texas Suit to tell the story of the DOL's aggressive and groundless pursuit against vendors of Movants, which ultimately culminated in the PR Action.

But even if Movants prevail in the Texas Suit, their victory means very little if the DOL prevails against the Defendants here. To be clear, the Partnership Plans

are an entirely unique and new creation that is the result of considerable time and effort by multiple individuals to ensure its compliance with ERISA. This includes the Defendants in the PR Action, which are at this time the only vendors willing and able to provide their vital ERISA compliance and management services to support this unique structure. Without them, Movants' business and health plan structure that came to a screeching halt five years ago in the Texas Suit may very likely be their end. On the other hand, no ERISA violations of any kind have been alleged against the Partnership Plans in this matter; DOL has gone to great lengths in both the Anjo Investigation and this matter to state that none of the alleged violations stem from services provided by Defendants to Partnership Plans.

Ultimately, without a stay pending appeal of the motion to intervene, all litigants face the likelihood of irreparable harm should litigation continue while Movants' party status is unresolved and on appeal as any issues of significance decided in the interim in the PR Action may have to be relitigated, wasting both time and money. Avoiding potential duplication of lawsuits and a waste of time and efficiency for both the Court and the parties is another factor that can be considered "irreparable harm" particularly in the context of an appeal of a denial of a motion to intervene. *See W. Energy All. v. Jewell*, 2017 WL 3588648, at \*3 (D.N.M. Mar 1, 2017).

### **C. A Balance of the Harms and Equities Favors a Stay Pending Appeal**

The balance of the harms and equities of a stay tilt strongly toward the Movants here, because denial of the requested stay “will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay.” *Providence Journal Co.*, 595 F.2d at 890; *Maine*, 2001 WL 98373, at \*3.

Movants’ irreparable financial injuries absent a stay of the PR Action pending appeal far outweigh the DOL’s slight injury from delay. The PR Actions threatens group health insurance for roughly 30,000 individuals under Movants’ Partnership Plans. By contrast, a stay of the Order pending appeal of Movants’ motion to intervene would merely require the DOL to wait for a final determination on appeal.

Such delay amounts to a small inconvenience to the DOL considering that it began the Anjo Investigation in April 2019 and did not complete it until July 2022, over three years later. Then, after completing it, the DOL negotiated potential resolutions with Defendants for another two years, including taking the time to include Movants as part of those negotiations in 2024. The DOL then adopted highly aggressive negotiating positions, expressly leveraging the potential financial ruin of Defendants against Movants litigation success in the Texas Suit, once the DOL

orchestrated combining settlement discussions of the Texas Suit and the Anjo Investigation in 2024.

But as the DOL was easily able to inextricably entwine Movants with Defendants as part of these negotiations, it should also be able to await a final determination on appeal as to whether their suggested entwinement will be able to continue. Further, the DOL has taken none of the steps it would ordinarily take when an investigation has revealed activity that is a current threat to ERISA plan participants – typically, the appointment of a Receiver to take over fiduciary duties from the Sponsor. There is no current, ongoing harm, or even allegation of harm in this matter or the Texas Suit, to plans or their participants.

#### **D. The Public Interest Favors a Stay Pending Appeal**

Movants bring First Amendment claims against the DOL, a government agency, and there is a public interest in ensuring that the DOL does not commit such constitutional violations. As argued in its Complaint in Intervention, courts have held that First Amendment protections can extend to business partners based on their association with a person or organization exercising First Amendment rights. If a government 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. See *NRA v. L.A.*, 441 F.Supp.3d

915, 934-38 (C.D. Cal. 2019). In sum, “a stay will serve the public interest by protecting the [Movants’] right to meaningful review on appeal and by “promot[ing] the public interest in accurate interpretation of the constitutional issues at hand.” *Ne. Patients Grp. v. Maine Dep't of Admin. & Fin. Servs.*, 2021 WL 5041216, at \*3 (D. Me. 2021) (quoting *Maine*, 2001 WL 98373, at \*4).

### **E. Movants Have a Likelihood of Success on Appeal**

Movants have a likelihood of success on the merits of their appeal of the Order denying their motion to intervene. “To intervene as of right under Rule 24(a)(2), a movant must demonstrate that: (i) the motion is timely; (ii) the movant has an interest relating to the property or transaction that is the subject of the action; (iii) the action’s resolution may impair or impede the movant’s ability to protect its interest; (iv) no existing party adequately represents the movant’s interest.” *Aspen Am. Ins. Co. v. Luquis-Gaudalupe*, No. CV 24-01277 (MAJ), 2024 WL 4456954, at \*1 (D.P.R. Oct. 10, 2024); *see also T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 39 (1<sup>st</sup> Cir. 2020). The Movants here seek intervention at an early stage of the litigation (pre-discovery) and, as set forth above, have a significant and protectable interest in the disposition of the PR Action as the end result of that action might completely eviscerate Movants’ ability to continue with their Partnership Plans and the provision of benefit plans. The Texas Action does not address this issue directly as it was focused solely on the AO and the qualifications of the Partnership Plans under

ERISA and the narrow remand from the Fifth Circuit was determined to be too narrow to bring the issue relating to the suit against its vendors before that court. Thus, the PR Action is the only forum in which Movants can protect these interests and they are substantial. Alternatively, courts have discretion to grant permissive interventions based on any rationally relevant factor if the intervening party has a claim or defense that shares a common question of law or fact with the main action and intervention will not “unduly delay or prejudice the adjudication of the original parties’ rights.” *See* Fed. R. Civ. P. 24(b); *Melone v. Coit*, 100 F.4th 21, 28-29 (1st Cir. 2024).

But the District Court did not consider or rule on any of these facts. Instead, it focused on the ongoing Texas Suit, and how the Movants’ claims “are directly related to the Texas case and not to the ones before this Court” and that “the cases involve different parties, wholly different claims, and harms. Thus, they are not the type of actions that would merit a finding in favor of intervention.” Of note, the language of this analysis is exactly the same as the District Court’s analysis of a Motion to Transfer earlier filed in this suit, where the District Court stated, “as candidly argued by the Secretary, the cases involve different parties, different claims, and harms, and are not the types of ‘identical actions’ that militate a finding in favor of a transfer for purposes of judicial economy.” *See* Order, [Ex. F], pg. 4.

Even if the Court were uncertain as to the Movants' likelihood of success, in this context, that factor is not as important as the irreparable harm Movants face or the balancing of equities in their favor. Granting interim injunctive relief, such as by a stay pending appeal, "is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). "An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success." *Id.*

The First Circuit adopted the *Washington Metro* court's reasoning in *Pub. Serv. Co. of New Hampshire v. Patch* as this Court's "lesser standard" for evaluating a movant's likelihood of success on appeal in instances where the balance of harm weighs in a movant's favor. 167 F.3d 15, 26-27 (1st Cir. 1998). There, the First Circuit clarified that a party seeking interim relief through Rule 8(a) put forth claims that provide "fair grounds for further litigation" in light of a powerful showing of irreparable harm. *Id.* This Court made no such statement regarding a party's showing of likelihood of success on the merits. Instead, this Court has stated that an appellant is entitled to a stay pending appeal when the appellant has shown that its appeal has

“potential merit,” but the appellant need not show “an absolute probability of success” in order to receive interim relief when the appellant has demonstrated that the denial of a stay would “utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee.” *Providence Journal Co.*, 595 F.2d at 890.

It is without a doubt that Movants’ appeal has provided “fair grounds for further litigation.” *Pub. Serv. Co. of New Hampshire*, 167 F.3d at 26-27. Particularly where the appeal is of a denial of a motion to intervene, as is the case here, federal courts have often used a more liberal definition of the “probability of success” where the other elements weigh in favor of the stay because of the potential deprivation to the Movants of a chance to influence the outcome of a case that has great practical significance to them. *See Greendige v. Allstate Insur. Co.*, 2003 WL 22871905, at \*2 (S.D.N.Y. Dec. 3, 2003) (holding that a stay of proceedings pending appeal of a denied motion to intervene was appropriate, citing the Second Circuit’s approval of an approach that varies the level of probability of success on the merits needed according to the court’s assessment of other stay factors); *see also W. Energy All. V. Jewell*, 2017 WL 3588648, at \*2 (D.N.M. Mar 1, 2017) (staying proceedings in the District Court while potential intervenors appealed a denied motion to intervene to the Tenth Circuit, noting the Tenth Circuit’s liberal definition of “probability of success” and ordinarily “enough that the plaintiff has raised questions going to the

merits, so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.”).

Here, the District Court failed to consider the factors of intervention as of right or permissive intervention or applied completely different standards. The Court considered that Movants “already have a case that has been ongoing for 5 years” in Texas, while failing to acknowledge its previous statement in its Order Denying Motion to Transfer where it stated “the District of Texas has already rejected Defendants’ attempt to amend the pleadings before that court.” The Court knew Movants could not pursue their claims in the Texas Suit but operated on the assumption the ongoing litigation in Texas meant Movants could pursue their claims there. Movants were denied this opportunity in the Texas Suit because, as the court noted there, the scope on the remand issued in 2022 is very narrow and these claims arose in 2024, after the 2022 remand. In other words, these claims could not have been brought in the Texas Suit before appeal (in 2022) because they did not yet exist (prior to 2024) and could not be brought upon remand because of the narrow scope of what is now before the Texas court.

Indeed, the fact that Movants have a case in Texas challenging the DOL’s Advisory Opinion as to the same plans to which Defendants provide vital services only justifies intervention—at the very least, a common question of law or fact is involved between all parties, which is the DOL’s scrutiny of Movants and its vendors

as it relates to ERISA. The Court further failed to acknowledge the connection the DOL itself created between the parties and Movants through settlement negotiations and its linking of the Texas Suit. (Ex. D).

Ultimately, the District Court was required to consider and reach a decision based on facts relevant to intervention, not facts considered in deciding whether to transfer venue. The District Court's focus on other factors is an abuse of discretion, and Movants are likely to prevail on appeal.

### **CONCLUSION**

WHEREFORE, Intervenors Data Marketing Partnership, LP ("DMP") and LP Management Services, LLC ("LPMS"), for the aforementioned reasons, respectfully move pursuant to Fed. R. App. P. 8(a)(1) that this Court stay the proceedings below in the United States District Court for the District of Puerto Rico's while the appeal of Movants' Motion to Intervene is pending before the First Circuit Court of Appeals.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing motion complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because the motion contains 4,874 words. The motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) because it has been prepared using Microsoft Word for Office 365 in proportionally spaced 14-point Times New Roman typeface.

/s/ Lisa Carney Eldridge  
Lisa Carney Eldridge

## **CERTIFICATE OF SERVICE**

I, Lisa Carney Eldridge, hereby certify that on October 30, 2025, I caused this document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the Court's appellate CM/ECF system. Plaintiff/Appellee's counsel is a registered CM/ECF user and will be served via the Notice of Docket Activity through the Court's CM/ECF system.

/s/ Lisa Carney Eldridge  
Lisa Carney Eldridge

## EXHIBITS TO MOTION TO STAY

Ex. A – August 14, 2025 District Court Order denying the Motion to Intervene of DMP and LMPS (“Movants”).

Ex. B – September 29, 2025 District Court Order denying Movants’ Motion to Stay.

Ex. C – *Data Marketing Partnership, LP, et. al v. U.S. Dept. of Labor, et. al.*, 45 F.4th 846 (5th Cir. 2022).

Ex. D – PR Action [Docket No. 60] Secretary’s Motion to Dismiss Defendants’ First Amended Counterclaim for Declaratory and Injunctive Relief.

Ex. E – Proposed Complaint In Intervention in PR Action.

Ex. F – June 10, 2025 District Court Order denying Motion to Transfer.

# **EXHIBIT A**

08/14/2025

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ORDER: denying Docket No. [53](#) Motion to Intervene. Data Marketing Partnership, LP and LP Management Services, LLC request intervention in this case alleging financial interests in the outcome of this litigation. As well explained by the Secretary in her opposition, these parties already have a case that has been ongoing for 5 years before the District Court for the Northern District of Texas against her regarding an advisory opinion as to whether certain plans were covered under the Employee Retirement Income Security Act (ERISA). (Docket No. 62). The claims they want to bring before this Court are directly related to the Texas case and not to the ones before this Court, where the Secretary alleges violations to fiduciary duties of ERISA plans by different plaintiffs. This Court has already ruled that besides the Secretary, the cases involve different parties, wholly different claims, and harms. (Docket No. 55). Thus, they are not the type of actions that would merit a finding in favor of intervention. In addition, the Court bases its ruling on the other grounds raised by the Secretary in her opposition to the motion to intervene, which are found to be persuasive. Signed by Judge Camille L. Velez-Rive on August 14, 2025. (ASE) (Entered: 08/14/2025)

## **EXHIBIT B**

09/29/2025	75	ORDER denying <a href="#">67</a> Motion to Stay for the reasons well explained by Secretary Lori Chavez-DeRemer in her Memorandum in Opposition (ECF No. 74). Signed by Judge Camille L. Velez-Rive on 09/29/2025. (CVR) (Entered: 09/29/2025)
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# **EXHIBIT C**

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

August 17, 2022

Lyle W. Cayce  
Clerk

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No. 20-11179

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

*Plaintiffs—Appellees,*

*versus*

UNITED STATES DEPARTMENT OF LABOR; MARTIN WALSH,  
SECRETARY, U.S. DEPARTMENT OF LABOR; UNITED STATES OF  
AMERICA,

*Defendants—Appellants.*

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:19-cv-800

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Before SMITH, ELROD, and OLDHAM, *Circuit Judges*.

ANDREW S. OLDHAM, *Circuit Judge*:

There are three questions presented. The first is whether the Department of Labor’s self-labeled “advisory opinion” is reviewable “final agency action” under the Administrative Procedure Act. It is. The second is whether the Department’s action is arbitrary, capricious, or otherwise contrary to law. Again, it is. The third is whether the district court issued the appropriate relief. Here, we affirm the district court’s vacatur of the agency

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action. But we vacate and remand the district court’s injunction for further consideration in light of this opinion.

I.

We first (A) detail the relevant statutory and regulatory background. Then we (B) describe the factual and procedural background.

A.

First, some legal background. This appeal involves the Employee Retirement Income Security Act of 1974 (“ERISA”). ERISA was “[e]nacted to protect the interests of participants in employee benefit plans and their beneficiaries.” *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 6 (2004) (quotation omitted). It “pre-empts ‘any and all State laws insofar as they may now or hereafter relate to any employee benefit plan’ covered by ERISA.” *Rutledge v. Pharm. Care Mgmt. Ass’n*, 141 S. Ct. 474, 479 (2020) (quoting 29 U.S.C. § 1144(a)). If ERISA doesn’t regulate the plan, then state law does.

One relevant plan regulated by ERISA is an “employee welfare benefit plan,” which can be used by employers to provide health insurance to “participants.” 29 U.S.C. § 1002(1). ERISA defines a “participant” as “any employee or former employee of an employer, . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . , or whose beneficiaries may be eligible to receive any such benefit.” *Id.* § 1002(7). It in turn defines an “[e]mployee” as “any individual employed by an employer” and an “employer” as “any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan.” *Id.* § 1002(5), (6). As relevant here, a “working owner” or a “bona fide partner” may be an “employee.” *See Yates*, 541 U.S. at 6 (working owner); 29 C.F.R. § 2590.732(d)(2) (bona fide partner).

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The Department of Labor set up a procedure to formally provide guidance to entities. *See* Advisory Opinion Procedure, 41 Fed. Reg. 36,281 (Aug. 27, 1976). It provides two options: (1) “advisory opinions” and (2) “information letters.” An “advisory opinion” is “a written statement issued to an individual or organization, or to the authorized representative . . . , that interprets and applies the Act to a specific factual situation.” *Id.* at 36,282. In certain circumstances, the requester “may rely on the opinion.” *Id.* at 36,283. By contrast, an “information letter” is “a written statement . . . that does no more than call attention to a well-established interpretation or principles . . . without applying it to a specific factual situation.” *Id.* at 36,282.

B.

Next, the factual and procedural background. LP Management Services, LLC (“Management Services”) serves as the general partner of several limited partnerships, including Data Marketing Partnership (“Data Marketing”).

In November 2018, Management Services requested an advisory opinion from the Department to confirm that a proposed health insurance plan for its limited partnerships would qualify as an employee welfare benefit plan under ERISA. In the request, it described Data Marketing’s business model. Its business is “the capture, segregation, aggregation, and sale to third-party marketing firms of electronic data generated by [limited partners] who share such data with” Data Marketing. The limited partners share that data by “install[ing] specific software [that] tracks the capture of such data by other companies . . . and provides access of such data to” Data Marketing. Data Marketing then processes, aggregates, and sells that data to marketers.

The request also described the limited partners’ relationship with Data Marketing. Individuals become limited partners by executing a joinder agreement subject to the approval of Management Services. They then

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receive a “Limited Partnership Interest” that permits them to “participate in global management issues through periodic votes of all Partners.” That partnership interest also lets them receive income distributions from Data Marketing that “will be reported as guaranteed payments and subject to employment taxes.”

By October 2019, the Department still had not issued an advisory opinion. So plaintiffs sued, sought a declaration that their plan was covered by ERISA, and moved for an injunction ordering the Department not to release a contrary advisory opinion.

A few months later, the Department issued a six-page advisory opinion. Based on the facts in the request and the complaint, the Department concluded that plaintiffs’ plan was not covered by ERISA. According to the Department, the limited partners were neither working owners nor bona fide partners because their work lacked hallmarks of a traditional employment relationship and their financial stake and participation in the management of the business was not serious enough. The Department also emphasized that plaintiffs’ structure was a sham, intended only to sell insurance to consumers under ERISA rather than state law.

Plaintiffs then amended their complaint to challenge the lawfulness of the advisory opinion. Thereafter, plaintiffs and the Department cross-moved for summary judgment. The district court granted plaintiffs’ motion, denied the Department’s cross-motion, vacated the agency action, and permanently enjoined the Department “from refusing to acknowledge the ERISA-status of the Plan or refusing to recognize the Limited Partners as working owners of” Data Marketing.

The district court reached two relevant conclusions. First, the district court concluded that the advisory opinion was final agency action. That’s because no further agency review was available and because the opinion

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denied plaintiffs the safe harbor of federal preemption, which exposed them to state insurance regulation. Second, the district court concluded that the advisory opinion was arbitrary, capricious, and contrary to law. The court determined that the limited partners were “working owners” under a definition that the Department had previously used in another advisory opinion. In the alternative, the district court determined that the limited partners were “bona fide partners” because they had a “more-than-pretextual relationship” with Data Marketing and because the “bona fide partner” standard was easier to meet than the “working owner” standard.

The Department timely appealed. We have appellate jurisdiction under 28 U.S.C. § 1291. We review the grant of summary judgment *de novo*. *Playa Vista Conroe v. Ins. Co. of the W.*, 989 F.3d 411, 414 (5th Cir. 2021). And we review the district court’s permanent injunction and vacatur of the agency action for abuse of discretion. *Whole Woman’s Health v. Paxton*, 10 F.4th 430, 438 (5th Cir. 2021) (en banc); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 985 F.3d 1032, 1051 (D.C. Cir. 2021).

We (II) determine whether the advisory opinion is final agency action. We next (III) address whether the advisory opinion is (A) arbitrary and capricious and (B) contrary to law because it unreasonably interpreted the applicable statutory and regulatory provisions. Finally, we (IV) tackle the proper remedy.

## II.

Start with finality. The Administrative Procedure Act (“APA”) provides judicial review of “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. Our circuit considers finality “a jurisdictional prerequisite of judicial review.” *Louisiana v. U.S. Army Corps of Eng’rs*, 834 F.3d 574, 584 (5th Cir. 2016). There are two requirements: (A) “the action must mark the consummation of the agency’s

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decisionmaking process—it must not be of a merely tentative or interlocutory nature.” *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016) (quotation omitted). And (B) “the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Ibid.* (quotation omitted). This is generally a “pragmatic” inquiry. *Id.* at 599 (quotation omitted); *but see Biden v. Texas*, 142 S. Ct. 2528, 2559 n.7 (2022) (Alito, J., dissenting) (explaining that the Court sometimes uses an “expansive, formalist approach to the second *Bennett* factor . . . at odds with the usual pragmatic approach” (quotation omitted)). We consider each requirement in turn and find both satisfied.

## A.

The advisory opinion consummated the Department’s decisionmaking process. That’s because it is “not subject to further Agency review.” *Sackett v. EPA*, 566 U.S. 120, 127 (2012). The Department effectively concedes that the advisory opinion is not subject to additional agency review.

Instead, the Department recycles an argument that the Supreme Court has repeatedly rejected: The action isn’t final because the agency can change its position or its reasons for the decision after more factfinding. This argument is squarely foreclosed by numerous Supreme Court decisions. *See, e.g., ibid.* (“The mere possibility that an agency might reconsider in light of ‘informal discussion’ and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.”); *Hawkes*, 578 U.S. at 598 (“The Corps may revise an [action] within the five-year period based on new information. That possibility, however, is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal.” (quotation omitted)). An action is either final or not, and the mere fact that the agency could—or actually does—reverse course in the future does not

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change that fact. *See Biden v. Texas*, 142 S. Ct. at 2545 (“[B]oth the June 1 Memorandum and the October 29 Memoranda, *when they were issued*, marked the consummation of the agency’s decisionmaking process and resulted in rights and obligations being determined.” (emphasis added) (quotation omitted)). Were it otherwise, no agency action would be final because an agency could always revisit it. And that can’t be right.<sup>1</sup>

Prong one is thus satisfied.

B.

The advisory opinion also determined rights, produced obligations, or caused legal consequences. That’s for three reasons.

First, it’s well-established that “where agency action withdraws an entity’s previously held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action.” *Texas v. EEOC*, 933 F.3d 433, 442 (5th Cir. 2019) (quotation omitted). The advisory opinion did that here. The applicable regulation provides requestors the right to “rely” in certain circumstances on the opinion. 41 Fed. Reg. at 36,283. So the advisory opinion bound the Department to some degree and withdrew its previously held discretion. That’s textbook final agency action.

Contrary to the Department’s suggestion, it doesn’t matter that there are preconditions to the requestor’s reliance. *See* 41 Fed. Reg. at 36,283 (allowing reliance where the request is accurate). Nor does it matter that a future event must occur to satisfy those preconditions. *See Biden v. Texas*, 142

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<sup>1</sup> The Department also points to *Taylor-Callahan-Coleman Counties District Adult Probation Department v. Dole*, 948 F.2d 953 (5th Cir. 1991), for the idea that actions that are “subject to change” are not final. *See id.* at 957. This opinion was contradicted by the Supreme Court’s subsequent decisions in *Sackett* and *Hawkes*, so we aren’t bound by it. *See, e.g., Gahagan v. USCIS*, 911 F.3d 298, 302 (5th Cir. 2018).

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S. Ct. at 2545 n.7 (“The fact that the agency could not cease implementing MPP, as directed by the October 29 Memoranda, until it obtained vacatur of the District Court’s injunction, did not make the October 29 Memoranda any less the agency’s final determination of its employees’ obligation to do so once such judicial authorization had been obtained.”). All that matters is that, when those preconditions are met, the Department loses discretion.

The Department insists that it hasn’t lost any discretion because plaintiffs can’t prevent state regulation with the particular advisory opinion they received. In other words, the Department focuses on how plaintiffs would use the *current* advisory opinion rather than the advisory opinion *plaintiffs wanted*. That focus is wrong. “The fact that the advisory opinion procedure is complete and deprives the plaintiff of a legal right . . . [that] it would enjoy if it had obtained a favorable resolution in the advisory opinion process . . . denies a right with consequences sufficient to warrant review.” *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010) (quotation omitted); *see also Env’t Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 589 n.8 (D.C. Cir. 1971). The Department can’t escape finality just by ruling against the requester.

Second, the applicable regulation contemplates that the “failure to obtain an advisory opinion” can cause “unusual hardship.” 41 Fed. Reg. at 36,282. This further confirms that an advisory opinion is “binding as a practical matter” and thus final. *Texas v. EEOC*, 933 F.3d at 442 (quotation omitted). After all, how can an advisory opinion alleviate “unusual hardship” without determining any rights, producing any obligations, or causing any legal consequences?

Third, comparing the Department’s advisory opinions to its information letters reinforces that its advisory opinions are final agency action. Information letters are “informational only” and are “not binding on

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the Department with respect to any particular factual situation.” 41 Fed. Reg. at 36,282. Advisory opinions, by contrast, are the “opinion of the Department as to the application[s] of” ERISA and may be relied on in certain circumstances. *Id.* at 36,283. The Department thus had the choice to provide final agency action (advisory opinion) instead of non-final agency action (information letter). *See id.* at 36,282 (“[T]he Department may, when it is deemed appropriate and in the best interest of sound administration of the Act, issue information letters calling attention to established principles under the Act, even though the request that was submitted was for an advisory opinion.”). It chose final agency action. And that choice has consequences.

Prong two is thus satisfied. The agency’s action is final.

### III.

Next, the action’s lawfulness. We (A) conclude that the advisory opinion is arbitrary and capricious. We then (B) frame the relevant interpretive questions for the district court’s consideration on remand.

#### A.

The APA directs courts to “hold unlawful and set aside agency action[s]” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2). “The APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.” *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). We must not “substitute” our “own policy judgment for that of the agency.” *Ibid.* Still, we must ensure that “the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.” *Ibid.*; *see also Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). “Put simply, we must set aside any action premised on reasoning that

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fails to account for ‘relevant factors’ or evinces ‘a clear error of judgment.’” *Univ. of Tex. M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 475 (5th Cir. 2021) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)).

In reviewing an agency’s action, we may consider only the reasoning “articulated by the agency itself”; we cannot consider *post hoc* rationalizations. *State Farm*, 463 U.S. at 50; *see also DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (“An agency must defend its actions based on the reasons it gave when it acted.”). At the same time, the fact that an agency provided a *post hoc* rationalization is relevant evidence that the action is arbitrary and capricious. *See, e.g., Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1140 (5th Cir. 2021) (“The very fact that the FDA perceived the need to rehabilitate its Order with new and different arguments before our court underscores that the Order itself omitted a reasoned justification for the agency’s action.”); *Texas v. Biden*, 20 F.4th 928, 993 (5th Cir. 2021).<sup>2</sup>

Our review is “not toothless.” *Sm. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019). In fact, it’s well-established that “after *Regents*, it

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<sup>2</sup> The Supreme Court recently reversed our judgment in *Texas v. Biden*. *See Biden v. Texas*, 142 S. Ct. at 2548 (reversing the court of appeals). It’s thus important to determine the extent to which the panel’s opinion is still binding under this circuit’s rule of orderliness. Our rule of orderliness requires us to follow the panel opinion except for the portions of it on statutory interpretation and final agency action. *See Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893 n.57 (5th Cir. 2001) (concluding that circuit opinions in which the judgment was reversed on some but not all grounds are still precedential with respect to the portions not reversed); *United States v. Kirk*, 528 F.2d 1057, 1063–64 (5th Cir. 1976); *see also Texas v. United States*, 40 F.4th 205, 222 n.9 (5th Cir. 2022) (per curiam) (understanding *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021), to be binding on all grounds not reversed). So the panel’s understanding of arbitrary-and-capricious review, reviewability under *Heckler v. Chaney*, 470 U.S. 821 (1985), Article III standing, mootness, &c. remains binding. *Cf. Stokes v. Sm. Airlines*, 887 F.3d 199, 205 (5th Cir. 2018) (“[T]he determination whether a given precedent has been abrogated is itself a determination subject to the rule of orderliness.”).

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has serious bite.” *See, e.g., Wages*, 16 F.4th at 1136; *Texas v. United States*, 40 F.4th 205, 226 (5th Cir. 2022) (per curiam).

The Department failed to “reasonably consider[] the relevant issues and reasonably explain[]” the advisory opinion. *Prometheus*, 141 S. Ct. at 1158; *see also Michigan v. EPA*, 576 U.S. 743, 750, 752 (2015) (“[A]gency action is lawful only if it rests on a consideration of the relevant factors” and “important aspect[s] of the problem.” (quotation omitted)). The key factors the Department ignored were its prior advisory opinions discussing the term “working owner” and its regulation adopting a definition of the term in a related context. *See* Dep’t of Labor, Advisory Op. No. 99-04A, 1999 WL 64920, at \*2 n.3 (Feb. 4, 1999) [hereinafter 1999 opinion]; Dep’t of Labor, Advisory Op. No. 2006-04A, 2006 WL 1401678, at \*3 (Apr. 27, 2006) [hereinafter 2006 opinion]; Definition of “Employer” Under Section 3(5) of ERISA—Association Health Plans, 83 Fed. Reg. 28,912, 28,931 (June 21, 2018); 29 C.F.R. § 2510.3-5(e). These omissions doom the Department’s action.

Start with the omitted advisory opinions. In 1999, the Department issued an advisory opinion that characterized the term “working owner”:

By the term “working owner,” [the requester] apparently mean[s] any individual who has an equity ownership right of any nature in a business enterprise and who is actively engaged in providing services to that business, as distinguished from a “passive” owner, who may own shares in a corporation, for example, but is not otherwise involved in the activities in which the business engages for profit.

1999 opinion, *supra*, at \*2 n.3. In 2006, the Department issued another advisory opinion reiterating this prior characterization. *See* 2006 opinion, *supra*, at \*3. Yet the Department never even mentioned this prior characterization in the advisory opinion at issue here.

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The Department’s failure is hardly “reasoned decisionmaking.” *Michigan*, 576 U.S. at 750 (quotation omitted). The opinion at issue adopts a definition of “working owner” materially different from the definitions in the 1999 and 2006 opinions. The opinion thus has “an unexplained inconsistency”—the hallmark of “an arbitrary and capricious change from agency practice.” *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (quotation omitted). Plus, if courts must give the Department’s advisory opinions *Skidmore* deference, then the Department itself must meaningfully consider relevant advisory opinions as well to issue a “reasonable and reasonably explained” action. *Prometheus*, 141 S. Ct. at 1158. “That omission alone renders [the Department’s opinion] arbitrary and capricious, but it was not the only defect.” *Regents*, 140 S. Ct. at 1896.

The Department justifies ignoring its prior characterization of the term “working owner” because the characterization originated in an advisory opinion predating the Supreme Court’s 2004 decision in *Yates*. But *Yates* is no justification. For one thing, the Department referred to the 1999 opinion’s definition of “working owner” after *Yates* in the 2006 advisory opinion. See 2006 opinion, *supra*, at \*3. For another, the Supreme Court in *Yates* relied on that very same 1999 opinion, though not specifically for defining the term “working owner.” See 541 U.S. at 17–18, 20. Still, *Yates* shows that the Department was on notice of the 1999 opinion’s significance and potential continued significance. And in all events, Data Marketing cited the 1999 opinion in its submission, putting the Department on notice of the relevant authority.

The Department also failed to address a regulation that adopted a definition of “working owner.” See 29 C.F.R. § 2510.3-5(e) (definition). The Department in promulgating the regulation justified at length its definition of “working owner.” See 83 Fed. Reg. at 28,929–33; see also *id.* at 28,964 (providing the definition). Yet the Department adopted a contrary definition

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in the opinion here and never acknowledged the regulation. It did so even though Data Marketing cited the regulation in its request. One would think that a reasonable agency’s “natural response” to seeing a regulation with a definition of the exact same term at issue in the request would be to consider the definition—perhaps explaining why the Department is adopting a different one. *Regents*, 140 S. Ct. at 1916.<sup>3</sup>

More fundamentally, the Department spills much ink in its response brief either explaining away the prior advisory opinions and the regulation or arguing that the definitions they adopted are consistent with the ones adopted elsewhere. But all those arguments were not made in the final agency action itself and thus aren’t “contemporaneous explanations.” *Regents*, 140 S. Ct. at 1909. They are instead “impermissible *post hoc* rationalizations.” *Ibid.* And these *post hoc* rationalizations confirm that the action here is arbitrary and capricious. *See Wages*, 16 F.4th at 1140; *Texas v. Biden*, 20 F.4th at 993.

## B.

Next we consider whether the district court interpreted the relevant provisions correctly. The court interpreted two relevant terms: (1) “working owner” and (2) “bona fide partners.” We remand as to both terms, so that the district court may address certain interpretive questions in the first instance.

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<sup>3</sup> It’s true that a district court in March 2019 held the regulation’s definition unreasonable because it included working owners without employees. *See New York v. DOL*, 363 F. Supp. 3d 109, 136–39 (D.D.C. 2019). But this makes the Department’s failure to discuss the regulation all the more perplexing. The Department appealed the decision to defend the definition. If the definition is worth defending in court, it’s worth meaningfully addressing in an advisory opinion when the request cites the regulation.

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1.

First, “working owner.” In *Yates*, the Supreme Court concluded that a “working owner” may qualify as an “employee” and a “participant” under ERISA. 541 U.S. at 6. In reaching this conclusion, the Court did not “resort to common law.” *Id.* at 12. Instead, the Court determined that “ERISA’s text contains multiple indications that Congress intended working owners to qualify as plan participants” and that “these indications combine to provide specific guidance.” *Ibid.* (quotation omitted). The Court, however, did not “clearly define who exactly makes up this class of ‘working owners.’” *Id.* at 25 n.\* (Thomas, J., concurring in the judgment). All it said was that “a working owner may have dual status, *i.e.*, he can be an employee entitled to participate in a plan and, at the same time, the employer (or owner or member of the employer) who established the plan.” *Id.* at 16 (majority op.); *see also ibid.* (stating that “a working owner can wear two hats, as an employer and employee”). Lower courts were thus left to determine the scope of the term.

*Yates* nevertheless provided courts a framework for assessing working-owner questions. *Yates* requires courts to determine whether ERISA’s text provides “specific guidance” on the precise question before the court, such that resort to the common law is unnecessary. To determine whether ERISA provides “adequate[] informati[on],” courts must consider, among other things, all four titles of ERISA and the Internal Revenue Code. *Ibid.*; *see also id.* at 12–13 (“Congress enacted ERISA against a backdrop of IRC provisions that permitted corporate shareholders, partners, and sole proprietors to participate in tax-qualified pension plans. . . . Congress’ objective was to harmonize ERISA with longstanding tax provisions.”).

The district court did not perform this analysis. It appears to have understood *Yates* to say that ERISA *always* provides specific guidance for *all* working-owner questions. In our estimation, however, *Yates* only concluded

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there was sufficient guidance for the particular threshold question before the Court—*i.e.*, whether working owners may qualify as participants at all. That, however, does not mean the same guidance is relevant, let alone specific enough, to resolve all working-owner questions. Rather, the question on remand is whether all of the *Yates* factors, including the various provisions of ERISA and the IRC, combine to make these particular working owners qualify as plan participants.

2.

Now, bona fide partners. The applicable regulation says:

*Employment relationship.* In the case of a group health plan, the term *employer* also includes the partnership in relation to any bona fide partner. In addition, the term *employee* also includes any bona fide partner. Whether or not an individual is a bona fide partner is determined based on all the relevant facts and circumstances, including whether the individual performs services on behalf of the partnership.

29 C.F.R. § 2590.732(d)(2). The regulation requires the determination to be “based on all the relevant facts and circumstances” and then provides one example consideration (“whether the individual performs services on behalf of the partnership”). In essence, the regulation commands a totality-of-the-circumstances analysis.

The district court did not appear to apply a totality-of-the-circumstances inquiry. It instead understood the regulatory definition to “simply require[] a more-than-pretexual relationship between the employer and employee.” And it determined that the limited partners were bona fide partners because the “standard is a lower threshold” than for working owners. Insofar as these standards differ from a totality-of-the-circumstances inquiry, the district court erred.

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As with the working-owner inquiry, we believe it best to remand for the district court to apply the totality-of-the-circumstances inquiry in the first instance. On remand, the district court should also consider whether the Department's interpretation of the regulation warrants *Auer* deference or whether the Department forfeited the argument for such deference. *See Ortiz v. McDonough*, 6 F.4th 1267, 1275–76 (Fed. Cir. 2021) (*Auer* deference forfeitable); *cf. HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180 (2021) (“[T]he government is not invoking *Chevron*. We therefore decline to consider whether any deference might be due its regulation.” (quotation omitted)); *Texas v. Biden*, 20 F.4th at 961 (“The Government thus forfeited the *Chevron* issue by failing to mention it in its brief.”).

#### IV.

Next, the proper remedy. The APA gives courts the power to “hold unlawful and set aside agency action[s].” 5 U.S.C. § 706(2). Under prevailing precedent, § 706 “extends beyond the mere non-enforcement remedies available to courts that review the constitutionality of legislation, as it empowers courts to ‘set aside’—*i.e.*, formally nullify and revoke—an unlawful agency action.” Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 950 (2018); *see also id.* at 1012–16; *Texas v. Biden*, 20 F.4th at 957 (“That statutory empowerment means that, unlike a court’s decision to hold a statute unconstitutional, the district court’s vacatur rendered the June 1 Termination Decision *void*.” (emphasis added)); *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 522 (7th Cir. 2021) (“Vacatur [of an agency action] retroactively undoes or expunges a past [agency] action. . . . Unlike an injunction, which merely blocks enforcement, vacatur unwinds the challenged agency action.”); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) (describing vacatur as “a less drastic remedy” than an injunction); *but see* John Harrison, *Section 706 of the*

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*Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REG. BULL. 37 (2020). The default rule is that vacatur is the appropriate remedy. *See, e.g., Texas v. Biden*, 20 F.4th at 1000 (“[B]y default, remand *with* vacatur is the appropriate remedy.”); *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (“The ordinary practice is to vacate unlawful agency action.”). The Department makes no developed argument that the district court abused its discretion in following the default rule, so the Department forfeited the argument. *See, e.g., DeVoss v. Sw. Airlines Co.*, 903 F.3d 487, 489 n.1 (5th Cir. 2018) (concluding that an argument was “forfeited” because it wasn’t “structured”); *United States v. Maes*, 961 F.3d 366, 377 (5th Cir. 2020); *United States v. Avants*, 367 F.3d 433, 442 (5th Cir. 2004); *Trevino v. Johnson*, 168 F.3d 173, 181 n.3 (5th Cir. 1999). We therefore uphold the court’s vacatur.

The district court also permanently “enjoined” the Department “from refusing to acknowledge the ERISA-status of the Plan or refusing to recognize the Limited Partners as working owners of” Data Marketing. This injunction, however, turned on the interpretative questions that the district court must further address on remand. So we vacate this injunction without opining on whether such relief might be appropriate.

\* \* \*

The Supreme Court has made clear that when it comes to arbitrary-and-capricious review, “the Government should turn square corners in dealing with the people.” *Regents*, 140 S. Ct. at 1909 (quotation omitted). The Department failed to do that. For the foregoing reasons, the district court’s judgment is AFFIRMED in part, VACATED in part, and REMANDED.

*United States Court of Appeals*

FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE,  
Suite 115  
NEW ORLEANS, LA 70130

August 17, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing  
or Rehearing En Banc

No. 20-11179 Data Marketing Partnership v. LABR  
USDC No. 4:19-CV-800

Enclosed is a copy of the court's decision. The court has entered judgment under **FED. R. APP. P. 36**. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

**FED. R. APP. P. 39** through 41, and **5TH CIR. R. 35, 39, and 41** govern costs, rehearings, and mandates. **5TH CIR. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following **FED. R. APP. P. 40** and **5TH CIR. R. 35** for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. **5TH CIR. R. 41** provides that a motion for a stay of mandate under **FED. R. APP. P. 41** will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under **FED. R. APP. P. 41**. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you **MUST** confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that each party bear its own costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk



By: \_\_\_\_\_  
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Jon Breyfogle  
Mr. Jonathan D. Crumly Sr.  
Mr. Jason Elam  
Mr. Warren W. Harris  
Mr. Bryan Francis Jacoutot  
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Ms. Tammy Killion  
Mr. Matthew W. Lanahan  
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Mr. Michael Shih  
Mr. Reginald L. Snyder  
Ms. Kathryn McDermott Speaks  
Mr. Mark Bernard Stern  
Ms. Caroline Van Zile  
Ms. Allison M. Zieve

## **EXHIBIT D**

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

LORI CHAVEZ-DEREMER,  
SECRETARY OF LABOR,  
U.S. DEPARTMENT OF LABOR,

Plaintiff-Counterclaim Defendant,

v.

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

Defendants-Counterclaim Plaintiffs.

Civil Action No. 3:24-CV-01512 (CVR)

**MOTION TO DISMISS DEFENDANTS' FIRST AMENDED COUNTERCLAIM FOR  
DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff-Counterclaim Defendant Lori Chavez-DeRemer, Secretary of the U.S. Department of Labor (“Secretary”), hereby moves to dismiss Defendants-Counterclaim Plaintiffs’ First Amended Counterclaim for Declaratory and Injunctive Relief, ECF No. 52, pursuant to Federal Rule of Civil Procedure 12(b)(6).

As explained more fully in the accompanying memorandum of law, Defendants’ Amended Counterclaim, which asserts claims under the First Amendment and the Administrative Procedure Act, should be dismissed in its entirety. Defendants’ First Amendment claims (Counts I and II) fail to identify (i) any First Amendment protected activity; (ii) any adverse action by the Department of Labor sufficient to chill Defendants’ exercise of their constitutional rights; and (iii) any causal link between an alleged protected activity and alleged adverse action.

With respect to Defendants' claim under the Administrative Procedure Act, none of the challenged actions (the investigation, settlement negotiations, or enforcement action) are final actions subject to judicial review.

For these reasons, the Secretary respectfully requests that the First Amended Counterclaim for Declaratory and Injunctive Relief be dismissed in its entirety.



**CERTIFICATE OF SERVICE**

I hereby certify that I filed the Secretary's Motion to Dismiss Defendants' First Amended Counterclaim for Declaratory and Injunctive Relief on the docket via CM/ECF. Notice of this filing will be sent to all counsel of record through the Court's Electronic Case Filing System.

/s/ Jamie L. Troutman  
Jamie L. Troutman

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

LORI CHAVEZ-DEREMER,  
SECRETARY OF LABOR,  
U.S. DEPARTMENT OF LABOR,

Plaintiff-Counterclaim Defendant,

v.

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

Defendants-Counterclaim Plaintiffs.

Civil Action No. 3:24-CV-01512 (CVR)

**SECRETARY'S MOTION TO DISMISS DEFENDANTS' FIRST  
AMENDED COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE  
RELIEF**

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Defendants' First Amended Counterclaim for Declaratory and Injunctive Relief ("Amended Counterclaim") seeks to rehash and relitigate meritless claims against the Department of Labor ("Department"). Defendants have amended their counterclaims by abandoning their declaratory judgment and ERISA claims, replacing them instead with a variation of the First Amendment and Administrative Procedure Act ("APA") claims that they already unsuccessfully raised four years ago in this district, in a complaint against the Department that contains allegations nearly identical to those in the Amended Counterclaim. *Suffolk Admin. Servs. v. U.S. Dep't of Labor*, No. 3:21-cv-1031-DRD (D.P.R.), ECF No. 1 ("Suffolk"). The *Suffolk* court dismissed those claims at the pleadings stage. *Id.*, ECF No. 43 (March 28, 2022 Opinion and Order). Defendants' attempt to revive those claims should fair no better.

The First Amendment to the U.S. Constitution is designed to protect *expressive* activities, such as speech, advocacy, and religious and political conduct. Defendants' First Amendment claims are premised not on their own speech but on conduct by Data Marketing Partnership ("DMP") and LP Management Services ("LPMS"), plan sponsors who engaged Defendants as service providers and are not parties to this litigation. To the extent Defendants claim First Amendment protection for their association with DMP and LPMS, the conduct they have alleged is *business* activity that falls short of protected *expressive* activities. Even if any of Defendants' alleged conduct were subject to First Amendment protections, Defendants nevertheless fail to allege that the Department engaged in any "adverse action" to trigger scrutiny. The Department's investigation and the present enforcement action by the Secretary of Labor ("Secretary") do not constitute "adverse action" under the First Amendment, and Defendants point to no expressive conduct purportedly chilled by the government's actions. In any event, Defendants establish no

causal link between their actions and the Department’s alleged retaliatory investigation. The only connection they allege is the submission of the request for an advisory opinion and filing of a lawsuit (actions taken by DMP and LPMS); otherwise, Defendants make no plausible, non-conclusory link between actions taken by other parties and the purported retaliation against Defendants.

Defendants’ APA claim is similarly unavailing because the actions Defendants challenge—the Department’s decision to investigate SAS and PIC, its efforts to resolve the violations revealed in the course of the investigation, and its decision to bring an enforcement action—are not “final agency action,” and thus are not judicially reviewable under the APA. Defendants’ efforts to convolute the facts of this case by dragging in extraneous parties and claims from other, separate lawsuits do not change the reality that the challenged actions fall squarely within the Department’s discretionary authority and are not subject to judicial review under the APA.

For all these reasons, the Court should grant the Department’s motion and dismiss Defendants’ scattershot Amended Counterclaim with prejudice.

## **I. BACKGROUND**

### **A. Defendants and the Health Benefit Plans They Service**

The Amended Counterclaim describes two distinct groups of health benefit plans for whom Defendants provide services—Employer Plans and Partnership Plans. The Employer Plans are health plans sponsored by “over 1,900 [] employers.” Am. Countercl. ¶ 5. These employers are not limited partnerships, and use Defendant Suffolk Administrative Services (“SAS”) and Defendant Providence Insurance Co. I.I. (“PIC”) as service providers to provide health benefits to their employees. *See* Am. Countercl. ¶¶ 5, 44, 53, 57, 63. The Secretary’s

Complaint (“Complaint”) only addresses the services that SAS and PIC provide to Employer Plans. Am. Countercl. ¶ 11; Compl. ¶ 2 n.1.

The Partnership Plans are “single employer employee welfare plans” that are the subject of a 2018 advisory opinion request (“AO Request”) to the Department, a related January 2020 advisory opinion (“Advisory Opinion”), and “litigation currently pending in the U.S. District Court for the Northern District of Texas,” *Data Marketing Partnership v. U.S. Department of Labor*, No. 4:19-cv-800-O (N.D. Tex.) (“*Data Marketing* case”). Am. Countercl. ¶ 1. The Partnership Plans are sponsored by DMP (and other similar partnerships) with LPMS as general partner; both entities are putative intervenors but are not currently parties to the instant litigation. *See, e.g., id.* ¶¶ 49, 51; ECF Nos. 53 & 54.

Defendants SAS and PIC provide vendor services to the Partnership Plans and Employer Plans. *See* Am. Countercl. ¶ 44. SAS provides “intellectual property, benefits expertise, ministerial administrative services, . . . and the compliance support necessary to third parties who operate employee welfare benefit plans.” *Id.* ¶ 54. PIC “provides reinsurance to the sponsors of self-insured employee welfare benefit plans,” including the sponsors of the Partnership and Employer Plans. *Id.* ¶¶ 58–59.

#### **B. The Department of Labor’s Advisory Opinion and the *Data Marketing* Case**

On November 8, 2018, Defendant Alexander Renfro, acting as legal counsel for LPMS, sent the Department the AO Request regarding whether a plan sponsored by a limited partnership (as described in the AO Request) was an employee welfare benefit plan under ERISA. Am. Countercl. ¶¶ 65–66. The AO Request described a “novel” hypothetical partnership different from the classic partnership, like a law firm or a physician’s group, in which individual partners offer services to the public. *Id.* ¶¶ 67–69. The hypothetical partnership’s business is to sell

“electronic data generated by [limited partners],” styled as “working owners,” to “third-party marketing firms.” Am. Countercl. Ex. A at 1–2, ECF No. 52-1. LPMS requested the Department’s opinion on whether health benefits offered to limited partners who joined such a hypothetical partnership were covered under ERISA. *Id.* at 10.

In January 2020,<sup>1</sup> the Department issued an Advisory Opinion concluding that the health benefits administered by the partnership described in the AO Request were not ERISA-covered, because the nature of the purported “work” being performed by the limited partners did not establish an employment relationship. Am. Countercl. ¶ 120 & Ex. B. In an amended complaint, DMP (the sponsor of one of these partnerships) and LPMS (the general partner to DMP and other, similar partnerships) challenged the Advisory Opinion under the APA. *Data Marketing*, ECF No. 9; *see generally Data Mktg. P’ship, LP v. U.S. Dep’t of Labor*, 490 F. Supp. 3d 1048 (N.D. Tex. 2020); Am. Countercl. ¶¶ 1, 121. In September 2020, the district court granted summary judgment to DMP and LPMS and vacated the Advisory Opinion as “arbitrary and capricious under the APA and contrary to law under ERISA,” and enjoined the Department “from refusing to acknowledge the ERISA-status of the Plan[.]” *Data Mktg. P’ship, LP*, 490 F. Supp. 3d at 1064, 1069; *see also* Am. Countercl. Ex. C, ECF No. 52-3.

On appeal, the Fifth Circuit affirmed the vacatur of the Advisory Opinion but “vacate[d] . . . the district court’s injunction” and remanded for the district court to determine whether the limited partners were “working owner[s]” or “bona fide partner[s]” under ERISA (inquiries relevant to the question of ERISA coverage). *Data Mktg. P’ship, LP v. U.S. Dep’t of Labor*, 45

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<sup>1</sup> The Amended Counterclaim describes the Advisory Opinion as dated February 3, 2020 (*see* Am. Countercl. ¶ 120), but the attached Exhibit B is dated January 24, 2020.

F.4th 846 (5th Cir. 2022); *see also* Am. Countercl. Ex. D, ECF No. 52-4.<sup>2</sup> The parties are currently in discovery before the district court on remand. *See Data Marketing*, ECF No. 76.

The hypothetical plan structure at issue in the *Data Marketing* case is ostensibly the structure that Defendants refer to as the “Partnership Plans” in their Amended Counterclaim. *See* Am. Countercl. ¶ 1 (defining the Partnership Plans, among other things, as the subject of the AO Request). Should the *Data Marketing* court conclude, after factual development, that the partnerships do not create an employment relationship, then a limited partnership plan such as one described in the AO Request would not be governed by ERISA and the Department would lack jurisdiction to regulate it.

### **C. The Secretary’s Investigation of Defendants and Defendants’ Lawsuit to Enjoin the Secretary**

The Amended Counterclaim includes allegations about the Secretary’s investigation of SAS and PIC that led to her Complaint in this case (the “SAS/PIC Investigation,” referred to by Defendants as the “Anjo Investigation,” where Anjo is a holding company that directly owns part of SAS and indirectly owns part of PIC). Am. Countercl. ¶ 2. As part of the SAS/PIC Investigation, which began in 2019, the Department “issued numerous requests for information . . . to SAS and PIC” as well as other “key entities doing business with” them. *Id.* ¶ 87. The

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<sup>2</sup> Defendants’ renewed assertion in their Amended Counterclaim that “[a]t least four authorities show that the Partnership Plans are single employer employee welfare plans . . . subject to ERISA” is incorrect. The district court injunction they reference (mandating that the Partnership Plans be treated as ERISA plans) was *vacated* by the Fifth Circuit nearly three years ago, and three months ago the same district court which issued the initial ruling held that it did not have sufficient facts to determine whether the limited partners were working owners or bona fide partners such that their health plan was subject to ERISA. *Compare* Am. Countercl. ¶ 168 with *Data Mktg. P’ship*, 45 F.4th at 860 and *Data Marketing*, ECF No. 75 at 4–5. Additionally, contrary to Defendants’ representations, neither “ERISA,” the opinion in *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1 (2004), nor the Department’s 1999 Advisory Opinion state that the Partnership Plans (as described in the AO Request) are single-employer employee welfare benefit plans.

parties here agree that Defendants SAS and PIC are service providers to the Employer Plans—i.e., health plans sponsored by individual employers—that provide health benefits to their employees. Compl. ¶¶ 2 n.1, 12–14; Am. Countercl. ¶¶ 44, 53, 54, 58–59. The Employer Plans are separate and independent from the Partnership Plans.

In January 2021, after the Department opened the SAS/PIC Investigation, Defendants sued the Department in this district, claiming (i) the investigation was retaliatory and violated their First Amendment right to freedom of speech and freedom of association; (ii) the investigation violated their Fifth Amendment right to “equal protection of the law”; (iii) the investigation violated the APA; and (iv) the investigation violated ERISA. *See Suffolk*, Complaint ¶¶ 105–48 (attached as Exhibit A). After filing an answer, the Secretary moved for judgment on the pleadings (ECF No. 28) and the court granted her motion (ECF No. 43, attached as Exhibit B). Specifically, the court held that there was no final agency action to review under the APA and that the constitutional claims were not ripe because the Department had not made any final agency decision. Ex. B.<sup>3</sup>

#### **D. The Parties Attempt to Resolve the Secretary’s Investigation**

On July 21, 2022, the Secretary sent a letter to Defendants summarizing the findings of her investigation and the basis of the Secretary’s prospective ERISA claims. Am. Countercl. ¶ 116, & Ex. O, ECF No. 52-15. The letter sparked initial negotiations between the parties. Am.

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<sup>3</sup> The *Suffolk* Complaint is not the only other time Defendants have brought their constitutional and APA claims against the Secretary. Defendants also raised the same First Amendment and APA claims in a counterclaim they filed in a subpoena enforcement proceeding related to the SAS/PIC Investigation in November 2021 in this district. *See Walsh v. Providence Ins. Co., I.I.*, No. 3:21-mc-00413 (ADC) (D.P.R.) (answer/counterclaim attached as Exhibit C). The counterclaim was dismissed as part of a voluntary dismissal of the action by both parties. *Walsh*, ECF No. 19. As discussed in the Secretary’s opposition to Defendants’ motion to transfer, DMP and LPMS attempted to raise similar arguments in a proposed supplemental complaint in the *Data Marketing* case, but the court rejected that attempt on April 8, 2025.

Countercl. ¶ 117. On June 8, 2023, the Secretary sent a demand letter outlining estimated plan losses at \$60.3 million, and proposed settling for \$40 million, among other terms. Am. Countercl. Ex. P at 2–3, ECF No. 52-16. Based on the Secretary’s demand, the parties executed tolling agreements to allow time to continue settlement discussions. Am. Countercl. ¶ 119.

While negotiations about the SAS/PIC Investigation were ongoing, DMP and LPMS sent a letter on January 11, 2024, to the Department’s counsel in the *Data Marketing* case “to explore the possibility of settlement discussions.” Am. Countercl. ¶ 123 & Ex. Q, ECF No. 52-17. On February 8, 2024, counsel for the Department responded with a request “to have a broader conversation” including the *Data Marketing* case and the SAS/PIC Investigation. Am. Countercl. ¶ 124 & Ex. R, ECF No. 52-18. Thereafter, the parties to both the *Data Marketing* case and the SAS/PIC Investigation engaged in global negotiations that included the proposed dismissal of the *Data Marketing* case and a reduced monetary demand of \$5.5 million from Defendants to settle the SAS/PIC Investigation. *See* Am. Countercl. ¶¶ 124–28 & Ex. S, ECF No. 52-19. Ultimately, DMP and LPMS did not agree to dismiss the *Data Marketing* case, and the “global” negotiations failed. Am. Countercl. ¶ 135.

The Department resumed negotiations with Defendants alone in an attempt to resolve the SAS/PIC Investigation, but the discussions were unsuccessful and the Secretary filed the instant Complaint. *Id.* & Ex. U, ECF No. 52-21. Defendants filed answers to the Secretary’s Complaint, along with their original counterclaim asserting claims under the Declaratory Judgment Act, the APA, and ERISA. ECF Nos. 20, 21, 24, 25. The Secretary moved to dismiss the original counterclaim, ECF No. 48, and in response, Defendants amended their counterclaim, reasserting their APA claims but replacing their declaratory judgment and ERISA claims with First Amendment claims, ECF No. 52.

## II. LEGAL STANDARD

When considering a motion to dismiss under Rule 12(b)(6), the First Circuit describes a two-step test for the sufficiency of a claim or counterclaim: “Step one: isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements.” *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012) (citing *Ocasio–Hernández v. Fortuño–Burset*, 640 F.3d 1, 12 (1st Cir. 2011)); *see also* *Bautista Cayman Asset Co. v. Reliance Mfg.*, No. 16-1418 (FAB), 2017 WL 243362, at \*2 (D.P.R. Jan. 20, 2017) (applying Rule 12(b)(6) to a counterclaim). “Step two: take the complaint’s well-pled (i.e., non-conclusory, non-speculative) facts as true, drawing all reasonable inferences in the pleader’s favor, and see if they plausibly narrate a claim for relief.” *Schatz*, 669 F.3d at 55.

“Plausible, of course, means more than merely possible, and gauging a pleaded situation’s plausibility is a ‘context-specific’ job that compels [the court] ‘to draw on’ [its] ‘judicial experience and common sense.’” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009)). One reason a claim might be implausible is where there is an “obvious alternative explanation” for the challenged conduct, such that the reviewing court cannot plausibly “draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678, 682.

## III. ARGUMENT

### A. Defendants’ Counts I and II Fail to State a Claim

Defendants’ Counts I and II allege that the Department has violated the First Amendment by retaliating against Defendants for their association with DMP and LPMS, the entities that submitted the AO Request and filed the *Data Marketing* case. *See* Am. Countercl. ¶¶ 156–164,

159–165 (pp. 35–37).<sup>4</sup> These First Amendment claims are nearly identical to Defendants’ claims in *Suffolk*, which they filed while the SAS/PIC Investigation was ongoing. But, as the Department also argued in *Suffolk*, the First Amendment claims are meritless.

Defendants’ claims under the First Amendment suffer multiple fatal flaws—Defendants fail to allege (i) that they engaged in activity that is protected by the First Amendment, (ii) that the Department has taken an adverse action sufficient to chill Defendants’ exercise of First Amendment rights, or (iii) that Defendants’ purported protected activity caused any alleged retaliation by the Department. For these reasons, Defendants’ First Amendment claims (Counts I and II) should be dismissed.

1. The First Amendment to the U.S. Constitution

The First Amendment exists to protect an individual’s freedom of speech, which includes the right to advocate ideas, associate with others, and petition the government. *See Smith v. Ark. State Highway Emp., Local 1315*, 441 U.S. 463, 464 (1979). The First Amendment prohibits official retaliation on the basis of protected speech. *Mattei v. Dunbar*, 217 F. Supp. 3d 367, 373 (D. Mass. 2016) (citing *Hartman v. Moore*, 547 U.S. 250, 256 (2006)).

To present a *prima facie* case of First Amendment retaliation in the First Circuit, a party must allege that they (1) “engaged in an activity protected by the First Amendment;” (2) that 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). Importantly, “[i]t is not enough to show that an official acted with a retaliatory motive,” but “the motive must *cause* the injury. Specifically, it must be a ‘but-for’ cause, meaning that the adverse

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<sup>4</sup> Defendants’ Amended Counterclaim includes two separate sets of paragraphs labeled as 159–164.

action . . . would not have been taken absent the retaliatory motive.” *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019) (quotation omitted). With respect to the second element, any alleged “adverse action” must be sufficient to “have a chilling effect” on the plaintiff’s exercise of their First Amendment rights for a constitutional violation. *Barton v. Clancy*, 632 F.3d 9, 29 (1st Cir. 2011) (citing *Bergeron v. Cabral*, 560 F.3d 1, 8 (1st Cir. 2009)). The pertinent question when determining whether an action has a “chilling effect” is whether it would “deter a reasonably hardy individual from exercising his constitutional rights.” *Id.* (citing *Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209, 1217 (1st Cir. 1989) (internal quotations omitted)). And “[w]here a chilling effect is speculative, indirect or too remote, finding an abridgment of First Amendment rights is unfounded.” *Sullivan v. Carrick*, 888 F.2d 1, 4 (1st Cir. 1989) (citation omitted). Defendants fail to plead facts sufficient to meet *any* prong of this test.

## 2. Defendants Fail to Allege That They Engaged in Protected First Amendment Activity

As best the Department can understand, Defendants allege that they engaged in protected First Amendment activity because they were associated with DMP and LPMS, who submitted the AO Request (Count I) and initiated the *Data Marketing* case (Count II),<sup>5</sup> and that the Department began investigating SAS and PIC—and ultimately filed this enforcement action—to retaliate either for DMP and LPMS’s actions or Defendants’ association with DMP and LPMS.

Defendants’ First Amendment claim fails at the first prong, because Defendants did not submit the AO Request or file the *Data Marketing* case, the purported protected speech. Rather, those actions were taken by separate actors—DMP and LPMS. Defendants lack standing to assert any alleged violation of the First Amendment rights of these third parties. *See Nogueras Cartagena v. María Calderón*, 150 F. Supp. 2d 338, 345 (D.P.R. 2001) (“Generally, a plaintiff

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<sup>5</sup> Defendants’ Amended Counterclaim refers to the *Data Marketing* case as the “Texas Suit.” *See* Am. Countercl. ¶ 1.

has standing only to bring claims for his own rights and interests, and not for the rights and interests of third parties.”). Nor have Defendants attempted to plead that they satisfy an exception to standing requirements that would allow them to litigate First Amendment claims on behalf of DMP or LPMS. And absent the AO Request and *Data Marketing* case, Defendants fail to identify any protected activity that they engaged in to support their own First Amendment claim.

Defendants also fail to allege that they engaged in any constitutional exercise of associational rights through their association with DMP and LPMS. As the First Circuit has explained, the First Amendment’s guarantee of freedom of association is not “defined unreservedly.” *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 57 (1st Cir. 1990), *abrogated on other grounds by Ecuadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61 (1st Cir. 2004). The First Amendment only applies to acts of association if the purpose of the association falls within the scope of activities considered protected under the First Amendment. *Id.*; *see also Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 50 (1st Cir. 2005) (“[T]he 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[.]”) (citation omitted). “Protected associations include, for example, political or religious associations.” *El Día, Inc. v. Rossello*, 20 F. Supp. 2d 296, 305 (D.P.R. 1998) (citing *Correa-Martinez*, 903 F.2d at 57).

Defendants did not plead that they associate with DMP and LPMS for any sort of protected purpose—such as political expression, religious expression, or advocacy. To the contrary, they explicitly allege that their relationship with DMP and LPMS is a business one, with a financial interest shared between the entities. Am. Countercl. ¶¶ 1, 3, 6, 44, 57, 63(1), 63(2), 64, 160 (p. 34), and 161 (p. 36). But financial or business relationships are not

associations protected by the First Amendment. *El Día, Inc.*, 20 F. Supp. 2d at 305 (“Neither friendship nor financial interest is a protected association under the First Amendment.”); *Wine & Spirits Retailers*, 418 F.3d at 51 (“concerted business activities” are not speech or expressive conduct protected by the First Amendment); *Perez Acevedo v. Puerto Rico*, No. 04-1962 (HL/CVR), 2006 WL 8445542, at \*3 (D.P.R. Sept. 27, 2006) (explaining that expressive activities enjoy First Amendment protection while commercial association does not).

Defendants’ failure to plead facts that show they engaged in protected First Amendment activity means their Counts I and II must be dismissed.

3. The Department’s Actions Are Not Adverse Actions Sufficient to Chill Defendants’ First Amendment Rights

Defendants also fail to establish the second prong of a First Amendment retaliation claim, which requires “adverse action” by the government. They complain about the Department’s investigation and this subsequent enforcement action, but such action does not suffice as “adverse action” sufficient to constitute retaliation. An agency investigation, without more, is insufficient to constitute “adverse action” by the government in the context of a First Amendment retaliation claim. *See 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.”); *Trueman v. United States*, No. 7:12-cv-73-F, 2015 WL 1456134, at \*13 (E.D.N.C. Mar. 30, 2015), *aff’d*, 615 F. App’x 122 (4th Cir. 2015) (agreeing with other courts “that a retaliatory investigation does not form the basis of a constitutional claim”); *Buckner v. Shumlin*, No. 1:12-cv-90-JGM, 2013 WL 6571814, at \*5 (D. Vt. Dec. 13, 2013) (collecting cases); *cf. Hartman v. Moore*, 547 U.S. 250, 262 n.9 (2006) (addressing retaliatory prosecutions but declining to address whether “simply conducting a retaliatory investigation with a view to promote a prosecution is a constitutional tort”).

Moreover, a subsequent civil enforcement action by a government agency is not necessarily an adverse action. Relevant factors to consider include whether the government's enforcement action is legitimate or frivolous, and whether it would deter a person from engaging in constitutionally protected activity. *See Nat'l Rifle Ass'n of Am. v. Vullo*, No. 21-0636-CV, 2025 WL 1966596, at \*7–8 (2d Cir. July 17, 2025) (the First Amendment does not bar legitimate law enforcement by the government); *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1298–1300 (11th Cir. 2019) (discussing other circuit decisions that examine whether the government's civil action against the plaintiff was frivolous when addressing a First Amendment retaliation claim); *Shero v. City of Grove, Oklahoma*, 510 F.3d 1196, 1203–04 (10th Cir. 2007) (the government filing a declaratory judgment action against a plaintiff would not chill a person of ordinary firmness from engaging in constitutionally protected activity).

Here, neither the Department's investigation nor enforcement action constitute adverse action for purposes of Defendants' retaliation claim. The Amended Counterclaim describes the Department's actions in a manner consistent with the Department's investigative authority under ERISA and thus does not allege that the Department conducted the SAS/PIC Investigation in a retaliatory manner. For example, the Amended Counterclaim states that the Department issued subpoenas and conducted interviews. Am. Countercl. ¶¶ 87, 108. ERISA gives the Department authority "to make an investigation," and the Department may "require the submission of reports, books, and records . . . and question such persons as he may deem necessary to enable him to determine the facts relative to such investigation." 29 U.S.C. § 1134(a)(1)–(2).

To the extent Defendants instead argue that the Department's investigation infringes upon their First Amendment right to freedom of association, they have also failed to state a claim. In the First Circuit, "the target of a subpoena" who is challenging a subpoena or investigative action

pursuant to the First Amendment “must make a prima facie showing of a first amendment infringement—typically, that enforcement of the disclosure requirement will result in harassment of current members, a decline in new members, or other chilling of associational rights.” *United States v. Comley*, 890 F.2d 539, 544 (1st Cir. 1989) (finding that challenged subpoena did not violate First Amendment, because the target made only “general allegations concerning the harassment or harm that will result to his associates” by the requested information, which fell short of the “solid, uncontroverted evidence of actual harassment” required to find a violation of the freedom of association).

The only adverse action Defendants allege is that the SAS/PIC Investigation has prevented prospective growth of their business and lost them vendors because it makes companies wary of transacting with them. Am. Countercl. ¶¶ 97–98, 109–13. But such natural consequences of an investigation do not rise to the level of infringing on Defendants’ associational rights. *See Nat’l Rifle Ass’n of Am. v. Cuomo*, 350 F. Supp. 3d 94, 120–21 (N.D.N.Y. 2018) (where the NRA contended that public statements by Governor Cuomo led to financial institutions ending their business relationships with the NRA, the court found that this did not “directly and substantially” interfere with the NRA’s associational rights); *see also Lyng v. Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 367 (1988) (government must pose a “direct and substantial” threat to the right to associate to rise to the level of a First Amendment violation). Defendants’ allegations—that a government investigation of their operations caused other companies to be wary of engaging in business with them—would likely be true for any government investigation by any agency. Finding a First Amendment violation for the natural consequences of a routine investigation and enforcement

action is unwarranted, and it does not constitute a “direct and substantial” threat to Defendants’ right to associate. *See Lyng*, 485 U.S. at 367.

Defendants cite to *National Rifle Ass’n of America v. Vullo*, 602 U.S. 175 (2024) (“*Vullo*”), to argue that the “threat of invoking legal sanctions and other means of coercion” by the government “to achieve the suppression” of disfavored speech is a First Amendment violation. Am. Countercl. ¶ 6 (citing *Vullo* and *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)). But *Vullo* did not hold that a governmental entity cannot investigate potential violations of law—in fact, it stated that “[Government official] Vullo was free to criticize the NRA and pursue the conceded violations of New York insurance law.” *Vullo*, 602 U.S. at 187. The Supreme Court clarified that what the government is prohibited from doing is “threaten[ing] enforcement actions” to “punish or suppress the NRA’s gun-promotion advocacy,” which is a First Amendment protected activity. *Id.* By contrast, Defendants’ provision of services related to health plans is not protected speech or advocacy, and the Department’s actions are consistent with its mandate to investigate potential violations of ERISA. *See Vullo*, 602 U.S. at 187; 29 U.S.C. § 1134(a).

But even if an alleged retaliatory investigation *could* support a First Amendment claim, it is clear that neither the initiation of the SAS/PIC Investigation nor the filing of this enforcement action have had any chilling effect on Defendants’ ability to engage in protected speech. *See Barton*, 632 F.3d at 29 (citing *Bergeron*, 560 F.3d at 7–8). Since the Department opened the SAS/PIC Investigation, Defendants have sued to stop the investigation in this district (*see* Ex. A), negotiated for a potential resolution with the Department, and filed multiple counterclaims against the Department in this action and in the Department’s subpoena enforcement action (*see* Ex. C). *See also* Am. Countercl. ¶¶ 106, 123–36. The vigorous litigation against the Department

indicates that Defendants are not intimidated by any action taken by the Department. *See, e.g., Sullivan*, 888 F.2d at 4 (finding that the exercise of First Amendment rights were not chilled by letter from a government official, where recipient filed a section 1983 claim against the official and moved to dismiss a complaint related to the letter).

Accordingly, because Defendants fail to show any adverse action taken against them by the Department, let alone one sufficient to chill their exercise of their First Amendment rights, Counts I and II should be dismissed as meritless.

4. Defendants Fail to Allege Any Plausible Causal Link Between Their Actions and the Department's Alleged Retaliation

Even assuming that Defendants engaged in protected activity and the Department engaged in adverse action—neither of which is true—the Amended Counterclaim fails to establish the third prong of a First Amendment retaliation claim: a causal link between the protected activity and the adverse governmental action. *See Staples*, 923 F.3d at 15. Causation requires a showing that the plaintiff's conduct was a “substantial” or “motivating” factor in bringing about the allegedly retaliatory action. *Goldstein v. Galvin*, 719 F.3d 16, 30 (1st Cir. 2013) (citation omitted). Where the government's action is supported by “another explanation that is so obviously correct” as opposed to retaliatory motive, “the charge of improper motivation [is rendered] implausible.” *Maloy v. Ballori-Lage*, 744 F.3d 250, 253 (1st Cir. 2014).

The Amended Counterclaim lacks any allegations that any supposed First Amendment activities by Defendants were a “substantial” or “motivating” factor in the Department's initiation of the SAS/PIC Investigation. Defendants seem to argue that the Department's initiation of the SAS/PIC investigation in April 2019 is retaliatory because it occurred five months after DMP and LPMS submitted the AO Request to the Department. Am. Countercl. ¶¶ 66, 86. But temporal proximity, on its own, is insufficient to establish a causal connection

between First Amendment protected activity and adverse action by the government.<sup>6</sup> *See, e.g., Pagán-Colón v. Walgreens of San Patricio, Inc.*, 697 F.3d 1, 10 (1st Cir. 2012) (temporal proximity between FMLA-protected leave and termination, alone, is insufficient to establish a causal connection); *Acevedo-Diaz v. Aponte*, 1 F.3d 62, 69 (1st Cir. 1993) (temporal proximity between a change of administration and a public employee’s termination was not (alone) enough to establish discriminatory animus).

Further, as Defendants admit, they did not submit the AO Request or file the *Data Marketing* case; DMP and LPMS were responsible for both. *See* Am. Countercl. ¶¶ 66, 121. The Department is unaware of any support for a First Amendment retaliation claim for an adverse governmental action based on protected speech *by another person*. To allege a causal link in such circumstances strains credulity. *See, e.g., El Día, Inc.*, 20 F. Supp. 2d at 305–06 (finding that a company who alleged financial injury due to its association with a newspaper that published critical stories about the governor did not have the requisite causal link to support a First Amendment claim); *Correa-Martinez*, 903 F.2d at 57 (a government employee who claimed he was forced to resign due to a friendship with an employee who had political differences with others at work lacked requisite causal link for a First Amendment claim).

To the extent Defendants claim that their association with DMP and LPMS was a “substantial” or “motivating” factor in the Department’s investigation, that also cannot establish the requisite causal link. First, as explained in the Amended Counterclaim, Defendants’

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<sup>6</sup> The Secretary’s Answer in the *Suffolk* litigation notes that the SAS/PIC Investigation was initiated “after receiving several participant complaints and state referrals involving [Suffolk Administrative Services and Providence Insurance Company] and entities associated with [them], including: (a) five referrals from state insurance regulators on August 16, 2018, September 21, 2018, February 8, 2019, February 14, 2019, and April 10, 2019, regarding products, plans and companies associated with [SAS and PIC][.]” *See Suffolk*, Answer ¶ 52 (attached as Exhibit D).

association with DMP and LPMS is for business purposes, not expressive purposes protected by the First Amendment (such as advocacy). Am. Countercl. ¶¶ 1, 3, 6, 44, 57, 63(1), 63(2), 64, & 160 (p. 34). Additionally, Defendants make no plausible, non-conclusory allegations as to why the Department would be motivated to investigate them due solely to their association with DMP and LPMS. To the contrary, the Department's initiation of the SAS/PIC Investigation is supported by a clear, lawful explanation other than retaliation: the Department was investigating the service providers SAS and PIC, along with the other individuals named as defendants here, for their services related to the Employer Plans, to determine if they were engaging in any violations of ERISA. *See* note 6, *supra*; 29 U.S.C. § 1134(a). Whether Defendants violated ERISA is entirely unrelated to DMP and LPMS's submission of the AO Request and filing of the *Data Marketing* case, which concern whether DMP and LPMS are operating plans governed by ERISA. Where the government's action has another "explanation that is so obviously correct as to render the charge of improper motivation implausible," there is no First Amendment violation. *Maloy*, 744 F.3d at 253. Accordingly, Defendants' Count I and II should be dismissed because they cannot establish a causal link between any protected activity and adverse action by the Department.

### **B. Defendants' Count III Fails to State a Claim**

Defendants also renew their claim under the APA as Count III, which largely repeats the allegations made in their initial Counterclaim, ECF No. 25. Count III avers that the Department "sue[d] or threaten[ed] suit against Defendants" based on "unsupported monetary demands" and "the identity of plans with which they lawfully do business," with the goal of "discredit[ing] or dismantl[ing] the Partnership Plans as well as SAS and PIC." Am. Countercl. ¶¶ 176–79. Defendants argue that the Department's lawsuit and threats of the lawsuit violate 5 U.S.C. §

706(2)(A)–(D). This claim, however, should be dismissed for failure to state a claim upon which relief can be granted.

1. Threshold Requirements Under the APA for Judicial Review

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

Where the APA does provide for judicial review, that review is limited to “final agency action for which there is no other adequate remedy in a court[.]” 5 U.S.C. § 704; *see also Conservation Law Found., Inc. v. Busey*, 79 F.3d 1250, 1261 (1st Cir. 1996). The APA’s judicial review provision “is not so all-encompassing as to authorize . . . judicial review over everything done by an administrative agency.” *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 800–01 (9th Cir. 2013) (quotation marks omitted). “Agency action” is defined as “the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). The agency action must also be final to be reviewable, which means it satisfies two conditions. *Harper v. Werfel*, 118 F.4th 100, 116 (1st Cir. 2024). First, it “must mark the ‘consummation’ of the agency’s decisionmaking process.” *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). Second, “the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Id.*

2. Defendants Fail to Plead any Reviewable Agency Action

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

Accordingly, Count III is meritless and should be dismissed.

To begin, Defendants’ Count III does not provide “fair notice” of the basis for their APA claim, as they interchangeably allude to the SAS/PIC Investigation, the Secretary’s Complaint in this case, and negotiations to settle the Secretary’s claims. *See* Am. Countercl. ¶¶ 167–79; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It is also not clear whether the challenged actions relate to the Partnership Plans, the Employer Plans, or both. *See, e.g.*, Am. Countercl. ¶¶ 167–79. Such a pleading cannot stand under Rule 8. *See Gonzalez-Camacho v. Banco Popular de Puerto Rico*, 318 F. Supp. 3d 461, 504 (D.P.R. 2018), *aff’d in part, dismissed in part*, No. 17-1973, 2020 WL 5543934 (1st Cir. July 21, 2020) (“Finally, Plaintiffs’ ‘kitchen [sink] type’ approach [ . . . ] has created lack of compliance with Rule 8(a) also causing dismissal.”).

Nonetheless, whichever of these actions underlie Defendants’ Count III, none pass muster as reviewable under the APA. First, to the extent Defendants challenge the SAS/PIC Investigation, such decisions are committed to agency discretion. It has long been recognized that the APA precludes judicial review of “agency refusals to institute investigative or enforcement proceedings[.]” *Heckler*, 470 U.S. at 838; *see also S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 461 (1979); *Mass. Pub. Interest Research Grp., Inc. v. Nuclear Regulatory Comm’n*, 852 F.2d 9, 14–15 (1st Cir. 1988). The same logic applies to an agency’s decision to open an investigation. In *Gentile v. Securities and Exchange Commission*, the Third Circuit applied *Heckler* to a Securities and Exchange Commission decision to initiate an

investigation, concluding that “a decision to investigate involves a complicated balancing of several factors peculiarly within the agency’s expertise, including the allocation of scarce resources,” and the APA precluded judicial review where Congress had not “articulated specific standards governing a decision to initiate an investigation under the Exchange Act.” 974 F.3d 311, 319 (3d Cir. 2020). Further, the court also concluded that the agency’s “allegedly retributive motive” did not alter the unreviewability of the investigation because the APA “shields the entirety of an agency action that is committed to agency discretion by law.” *Id.* at 319–20.

Along with being committed to agency discretion, conducting an investigation pursuant to an agency’s authority is not reviewable final agency action. The First Circuit has clearly explained that “investigatory measures are not final agency action” for failure to mark the “consummation” of the agency’s decision-making process. *Harper*, 118 F.4th at 116–17 (collecting cases); *see also Conservation Law Found., Inc. v. Jackson*, 964 F. Supp. 2d 152, 167 (D. Mass. 2013) (“[I]nvestigation prior to any enforcement action is quintessentially non-final as a form of agency action.” (quotation omitted)). Defendants previously challenged the SAS/PIC Investigation in this Court prior to the filing of the enforcement action, and this Court properly dismissed Defendants’ APA claim because the investigation was not final agency action. *See* Ex. A ¶¶ 133–40; Ex. B at 23–24. Further, to the extent that Defendants are challenging any settlement negotiations with the Secretary during the investigation, such discussions are similarly an interim step that is not final agency action subject to review. *See Nimmrich & Prahm Reederei GmbH & Co. KG MS Sonja v. United States*, 925 F. Supp. 2d 850, 854–55 (S.D. Tex. 2012) (“[I]t cannot be said on this record that the parties’ impasse in their negotiations marks the ‘consummation’ of the Coast Guard’s decision making process[.]”); *Robishaw Eng’g, Inc. v.*

*United States*, 891 F. Supp. 1134, 1150–51 (E.D. Va. 1995) (statements during settlement negotiations are not final agency action).

Neither is the Secretary’s decision to bring an enforcement action a reviewable “final agency action” under the APA. *City of Oakland v. Holder*, 901 F. Supp. 2d 1188, 1195 (N.D. Cal. 2013), *aff’d*, *City of Oakland v. Lynch*, 798 F.3d 1159 (9th Cir. 2015). As the *Holder* court explained, an agency’s decision to file a civil action does not meet the definition of agency action because “it is not a rule, order, license, sanction, form of relief, or failure to act.” *Id.* at 1195. Furthermore, an agency’s filing of a civil complaint does not meet the *Bennett* criteria for finality, as simply filing a complaint does not determine any rights or obligations or result in consequences. *Id.* The *Holder* court could not locate any authority holding that filing a civil complaint qualified as final agency action under the APA, and it was unwilling to expand the definition of “final agency action” to allow every civil or criminal suit filed by the United States government to be subject to separate judicial review. *Id.* at 1195–96.

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

### 3. Defendants Have Not Pled Any Violation of the APA

Even if the Secretary’s decisions to investigate, negotiate, or bring an enforcement action were reviewable under the APA, Defendants have still failed to state a claim under APA sections 706(2)(A), (B), (C), and (D). The standard for review under the APA is “narrow” and requires courts to ensure that the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Defendants plead no facts that the SAS/PIC Investigation, settlement negotiations,

or filing of a civil enforcement action are either (i) arbitrary and capricious; (ii) contrary to their constitutional right, power, privilege or immunity; (iii) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (iv) without observance of procedure required by law. 5 U.S.C. §§ 706(2)(A)–(D).

Frankly, Defendants’ allegations undercut their claim that the Secretary has violated the APA. With respect to the SAS/PIC Investigation, Defendants allege that the Secretary investigated Defendants for over five years, from 2019 through 2024 (Am. Countercl. ¶¶ 86, 87, 133–35), the Secretary gathered information using at least ten subpoenas to SAS, PIC, and other “key entities” (*Id.* ¶¶ 87, 116), and the Secretary gave notice to SAS and PIC “as to the substance of its [ ] Investigation and alleged violations of ERISA” (*Id.* ¶ 116 & Ex. O).<sup>7</sup> Defendants’ Amended Counterclaim also explains how, for more than two years, the Secretary attempted to negotiate a resolution of Defendants’ alleged violations of ERISA (Am. Countercl. ¶¶ 123–36), engaged in several rounds of proposals and responses on potential settlement terms (*Id.* ¶¶ 118, 125 & Exs. P, Q, R), and filed the Complaint only after negotiations broke down (*Id.* ¶ 135). None of these actions are arbitrary and capricious, retaliatory, or otherwise a violation of law.

To the contrary, the obvious alternative explanation for the Secretary’s actions is that she was pursuing her lawful investigative authority under 29 U.S.C. § 1134 and conducting a thorough investigation. Upon a determination of ERISA violations, the Secretary made a good faith attempt at resolving the claims in a way that would protect the Employer Plans and their

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<sup>7</sup> The Counterclaim also references state investigations of SAS and PIC, but such activities are clearly not “agency action” by the Secretary. Am. Countercl. ¶¶ 109–14. To the extent Defendants attempt to connect state investigations with the SAS/PIC Investigation, ERISA permits coordination by the Secretary and states. *See* 29 U.S.C. § 1134(d) (communications between Secretary and state authorities), § 1136(c) (Secretary may delegate authority to states), and § 1144(b)(6)(A) (Secretary and states may have concurrent jurisdiction over MEWAs).

participants. Defendants admit that, as of July 21, 2022, the parties were in “active settlement negotiations” (Am. Countercl. ¶ 117 & Ex. O) and those negotiations, though at times “very slow,” continued into 2024 as the Secretary delayed filing any enforcement action (*Id.* ¶ 119). The Counterclaim describes how DMP and LPMS first proposed settling the *Data Marketing* case,<sup>8</sup> which prompted the Secretary’s suggestion for global settlement discussions, to which Defendants, DMP, and LPMS agreed. *Id.* ¶¶ 123–25 & Exs. Q & R. With the potential for settling the *Data Marketing* case, the Secretary accordingly lowered her monetary demand of the Defendants (Am. Countercl. ¶ 125), and, when DMP and LPMS refused to dismiss the *Data Marketing* case, the Secretary accordingly withdrew her lower monetary offer (*id.* ¶¶ 130, 133, 135). While Defendants claim that such demands were “extortive,” increasing a monetary demand after a proposed benefit is taken off the table is not extortion—it is a basic principle of negotiations. Only when the parties were unable to reach resolution did the Secretary file for enforcement pursuant to 29 U.S.C. §§ 1132(a)(2) and (a)(5). The Secretary’s actions as alleged in the Counterclaim are thus commensurate with her statutory authority and do not support an APA violation. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) (“An inference pressed by the plaintiff is not plausible if the facts he points to are precisely the result one would expect from lawful conduct in which the defendant is known to have engaged.”).

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

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<sup>8</sup> Contrary to Defendants’ suggestion that the Secretary linked the *Data Marketing* case with this action, DMP and LPMS suggested settling the *Data Marketing* case, not the Secretary. Only after DMP and LPMS suggested settlement did the Secretary propose a resolution of both the SAS/PIC Investigation and the *Data Marketing* case due to the connection among the parties. Am. Countercl. ¶¶ 123–24.

#### **IV. CONCLUSION**

For the foregoing reasons, the Secretary respectfully requests that her Motion to Dismiss Defendants' First Amended Counterclaim for Declaratory and Injunctive Relief be granted and the Amended Counterclaim be dismissed in its entirety.

Dated: August 8, 2025

Respectfully Submitted:

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**CERTIFICATE OF SERVICE**

I hereby certify that I filed the Secretary's Motion to Dismiss Defendants' First Amended Counterclaim for Declaratory and Injunctive Relief on the docket via CM/ECF. Notice of this filing will be sent to all counsel of record through the Court's Electronic Case Filing System.

/s/ Jamie L. Troutman  
Jamie L. Troutman

# **EXHIBIT E**

**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,	)	Civil No.: 3:24-cv-01512 (CVR)
	)	
v.	)	
	)	
SUFFOLK ADMINISTRATIVE	)	
SERVICES, LLC; PROVIDENCE	)	
INSURANCE CO., I.I.; ALEXANDER	)	
RENFRO; WILLIAM BRYAN; ARJAN	)	
ZIEGER,	)	
	)	
Defendants-Counterclaim Plaintiffs.	)	
_____	)	

**COMPLAINT IN INTERVENTION**

COME NOW Intervenors Data Marketing Partnership, LP (“DMP”), and LP Management Services, LLC (“LPMS”) (collectively “Intervenors”), and by way of complaint 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 Suffolk Administrative Services (“SAS”), Providence Insurance Co., I.I. (“PIC”), Alexander Renfro (“Renfro”), William Bryan (“Bryan”), and Arjan Zieger (“Zieger”) (collectively “Defendants”) based upon their vendor relationships with single employer employee welfare plans (“Partnership Plans”), sponsored by Intervenors, which are the subject of (a) a 2019 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.*;<sup>1</sup> (b) a 2020 DOL Advisory Opinion

<sup>1</sup> Exhibit A attached hereto.

(“Advisory Opinion”) denying such protection;<sup>2</sup> 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<sup>3</sup> and Fifth Circuit Court<sup>4</sup> vacated the Advisory Opinion as “arbitrary and capricious” and in which Intervenor seek to enjoin the DOL from denying the ERISA-status of the DMP Partnership Plan.<sup>5</sup>

2. In response to the AO Request, which alerted the DOL to the services provided by Defendants to the Partnership Plans, the DOL almost immediately launched an investigation of Defendants, which came to be known as the “Anjo Investigation.” Contrary to the allegations of the *Complaint*, any 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 DOL’s offer of settlement came with a major condition, however. The proposal was contingent upon the agreement of Intervenor 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 Intervenor which the DOL did not have in the Texas Suit. When Intervenor declined to withdraw the AO Request or dismiss the Texas Suit, the DOL

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<sup>2</sup> Exhibit B attached hereto.

<sup>3</sup> Exhibit C attached hereto.

<sup>4</sup> Exhibit D attached hereto.

<sup>5</sup> By Order dated April 8, 2025, the District Court in the Texas Suit denied, as exceeding the scope of the Fifth Circuit’s remand, Intervenor’s Motion for Leave to File to file a Supplemental Complaint alleging the claims now set forth in this Complaint. Exhibit E attached hereto.

punished Defendants with this 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.<sup>6</sup>

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 Intervenors for making and later not withdrawing the AO Request; (e) punishing Intervenors 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.<sup>7</sup>

6. By such conduct, the DOL has been and is violating the First Amendment as to Intervenors 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 v. Vullo*, 602 U.S. 175, 176 (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, Intervenors twice exercised their First

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<sup>6</sup> *Complaint* ¶ 97 [Doc. 1], Attachment 1.

<sup>7</sup> *Complaint* ¶ 2, Note 1.

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 Intervenors for exercising their First Amendment rights, and to suppress or punish Defendants based upon their association with Intervenors is evidenced by (a) the timing of the Anjo Investigation, which commenced almost immediately after the AO Request; and (b) discussions preceding this suit in which the DOL expressly tied resolution of the claims against Defendants to the withdrawal of the AO Request and the dismissal of the Texas Suit by Intervenors.

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 sought by the DOL in this suit is ordered by this Court. Thus, the DOL seeks in this suit to accomplish what ERISA expressly forbids—the dismantling of a lawful ERISA plan.

8. In defense of its collateral attack against Defendants and Intervenors, the DOL claims sovereign immunity.<sup>8</sup> 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 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 Complaint, Intervenors do not

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<sup>8</sup> *Memorandum in Support of the Secretary’s Motion to Dismiss Defendants’ Original Counterclaim for Declaratory Relief* [Doc. 48-1].

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 (4<sup>th</sup> Cir. 1985); *see also Cardoza v. CFTC*, 768 F.2d 1542, 1547 (7<sup>th</sup> 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 Complaint.

10. In defense of this collateral attack, the DOL also claims this suit is not a final agency action. This claim incorrectly presumes this Complaint 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.<sup>9</sup> This claim is false. In addition to the

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<sup>9</sup> *Complaint* ¶ 2, Note 1.

blatant actions described in Paragraph 3 above, through which the DOL unilaterally tied these matters together in order to gain improper coercive leverage in the Texas suit, numerous other facts belie the DOL's assertion. 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"),<sup>10</sup> would require the reporting of the "[t]otal 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.<sup>11</sup> 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 Complaint 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 her 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.

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.

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<sup>10</sup> *Complaint* ¶ 92.

<sup>11</sup> *Complaint* ¶ 97.

17. Zieger is an individual residing in San Juan, Puerto Rico.
18. Bryan is an individual residing in Los Angeles, California.
19. Renfro is an individual residing in Nashville, Tennessee.
20. DMP is a Texas limited liability partnership.
21. LPMS is the general partner of DMP.

### **JURISDICTION AND VENUE**

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

23. Venue as to this Complaint is proper in this district under Rule 24 of the Federal Rules of Civil Procedure.

### **FIRST AMENDMENT**

24. 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. Co. v. N.L.R.B.*, 536 U.S. 516, 524-25 (2002).

25. 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).

26. It is a violation of the First Amendment for the federal government to directly or indirectly thwart, or endeavor to thwart, the availability of judicial machinery to resolve disputes with a federal court. *Doe v. Schneider*, 443 F.Supp. 780, 787 (D. Kan. 1978). An unconstitutional deprivation of the right of access to the courts takes place “when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively.” *Barrett v. U.S.*, 798 F.2d 565, 575 (2<sup>nd</sup> Cir. 1986).

27. “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).

28. 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. 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*, 754 F. Supp. 3d 1165, 1175-76 (N.D. Fla. 2024)

29. 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. *See NRA v. Los Angeles*, 441 F.Supp.3d 915, 934-38 (C.D. Cal, 2019).

30. 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**

31. 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.*

32. 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.”

33. 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**

34. 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 this Court and the Fifth Circuit in this suit, federal jurisprudence nevertheless has repeatedly found the DOL to have exceeded or abused its statutory authority in violation of the APA.

35. 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, the DOL rule regarding association health plans under ERISA.

36. In *Chamber of Commerce of United States of America v. United States Department of Labor*, 885 F.3d 360 (5<sup>th</sup> Cir. 2018), the Fifth Circuit vacated the 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.

37. 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 the 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].”

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

39. 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 the DOL interpreting its ERISA Prohibited Transaction Exemption 2020-02, 85 Fed.Reg. 82798 (Dec. 18, 2020).

40. 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”).

41. 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.

42. In *Restaurant Law Center v. United States Department of Labor*, 120 F.4<sup>th</sup> 163, 177 (5<sup>th</sup> Cir. 2024), the Fifth Circuit vacated the DOL’s so-called “Final Rule” adding onto the previous 80/20 Rule that governed how tipped employees must be paid under the FLSA.

43. 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.

44. In *New York v. Scalia*, 490 F.Supp.3d 758, 796 (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.

45. 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 enforcement of the SCOL's farmworker protection rule during pendency of the case or until the court's further orders.

46. In *Tex. v. United States Dep't of Labor*, 756 F. Supp. 3d 361, 399 (E.D. Tex. 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**

#### **A. The DMP Plan**

47. 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.

48. 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.

49. As a business seeking to profit from the electronic data generation, aggregation, and sales market, DMP must collect and aggregate data generated by as many active users of its proprietary software and mobile applications as possible.

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

51. To attract and retain limited partners willing to contribute the data they generate for aggregation and sale, DMP established the DMP Plan, an ERISA plan with its employees being the limited partners as working owners contributing their data. The DMP Plan provides health

coverage more affordable than found elsewhere in non-ERISA plans, in particular those sold to individuals on the various “exchanges” established under the Patient Protection and Affordable Care Act (ACA).

52. Without the DMP Plan as a recruiting and retention tool, DMP would not be able to successfully 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**

53. 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.

54. Dozens of companies, including DMP, are currently competing with each other to gain market share in the user-driven electronic data aggregation space, which is colloquially known as “Own Your Data,” or “OYD.” Without the DMP Plan as a recruiting and retention tool, DMP would be severely hampered in its ability to compete in OYD, by attracting and retaining limited partners willing to generate and contribute their data as working owners for the business purpose of the limited partnership.

**C. SAS**

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

56. Intervenors 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. There are no companies other than SAS able and willing to provide the 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 structures.

**D. PIC**

58. The Partnership Plans, including the DMP Plan, obtain reinsurance, or stop-loss insurance, from PIC to cover the potential significant financial exposure inherent in sponsoring self-insured group health plans.

59. PIC expended resources, time, and expertise to develop insurance and reinsurance products tailored to assist LPMS in implementing the Partnership Plans structure through limited partnerships such as DMP.

60. LPMS and DMP do not have the revenues to properly manage the risk of covered claims exceeding contributions without the stop-loss insurance provided by PIC.

61. 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 insurance to the Partnership Plans, in part due to the negative Advisory Opinion by the DOL.

**E. What End of Services of SAS and PIC Would Mean to DMP and LPMS**

62. Without the services provided by SAS and reinsurance provided by PIC, DMP could not continue the DMP Plan and LPMS could not continue the other Partnership Plans.

63. If the DMP Plan and the Partnership Plans are discontinued, DMP and the other LPMS managed limited partnerships would have significantly more difficulty attracting and

retaining partners, thus threatening the long-term viability their core businesses, which rely upon achieving sufficient scale to profitably monetize electronic data.

## II. INTERVENORS PETITION THE DOL FOR AN ADVISORY OPINION

64. As set forth in ERISA Procedure 76-1, the DOL “invites inquiries of individuals or organizations affected, directly or indirectly, by the Employee Retirement Income Security Act ... as to their status under the Act and as to their status under the Act.”

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 and salaried consultant to SAS, and provided services to LPMS with the consent and participation of SAS, facts which are known to the DOL.

66. In October 2018, 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 was 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.

67. At the meeting, Renfro and other LPMS representatives explained the Partnership Plan structure to DOL representatives and provided high level detail of the goals of the plan and the business structure sought to be implemented by LPMS. Assistant Secretary Rutledge told the representatives that an Advisory Opinion Request was the best route to ensure approval of the Plan by the DOL. Renfro drafted and submitted the AO Request after this meeting.

68. On Nov. 8, 2018 Renfro submitted the AO Request under ERISA Procedure 76-1 to the DOL on behalf of LPMS, for the Partnership Plans. Following several telephone

conversations between LPMS representatives and DOL officials, revisions to the AO request were submitted on Jan. 15, 2019, and Feb. 27, 2019.

69. The AO Request detailed the legal and factual basis for application of ERISA to the Partnership Plans building upon the recognized concept under ERISA of “working owners,” including the concepts recognized by the U.S. Supreme Court in *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1 (2002), and the DOL in Advisory Opinion 99-04A.

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

71. 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 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.<sup>12</sup>

72. The DOL only became aware of Defendants through the AO Request.

### **III. DOL INITIATES ANJO INVESTIGATION AND THREATEN LITIGATION**

73. Within weeks of the March 6, 2019 meeting, the DOL began aggressive systematic efforts to discredit and dismantle the Partnership Plans. In what came to be known as the “Anjo Investigation,” the DOL began requesting information and issuing subpoenas, targeting Defendants.

74. Shortly after opening the Anjo Investigation, the DOL issued numerous requests for information and subpoenas not only to SAS and PIC, but also to numerous entities doing

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<sup>12</sup> Exhibit E attached hereto.

business with SAS or PIC.<sup>13</sup> The subpoenas were issued despite the DOL having never posed a single written question or other formal response to the AO Request.

75. 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.

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

77. Additionally, existing vendors of SAS and PIC reduced or terminated relations with SAS and PIC as a result of the Anjo Investigation.

78. On Nov. 6, 2020, 20 months after the commencement of the Anjo Investigation, counsel for SAS and PIC sent a letter to all known DOL officials involved in the investigation in an effort to seek clarity on its purpose, scope, and need<sup>14</sup>.

79. On Dec 14, 2020, , Katrina Liu, Trial Attorney, Office of the Solicitor of the DOL (also an attorney representing the DOL in the instant litigation), responded on behalf of the DOL with a letter asserting 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 was "not in a position to provide the specific information you seek regarding the timing and scope" of the Anjo Investigation.<sup>15</sup>

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<sup>13</sup> Exhibit F attached hereto.

<sup>14</sup> Exhibit G attached hereto.

<sup>15</sup> Exhibit H attached hereto.

80. 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 her December 14<sup>th</sup> letter.<sup>16</sup>

81. SAS and PIC closed their reply letter with yet another request that the DOL reconsider its opaque and open-ended approach to the Anjo Investigation. Counsel for SAS and PIC noted "In the midst of the harsh economic impacts of this pandemic on all small businesses in America, I would hope the DOL would reconsider the position taken in your letter."

82. The Anjo Investigation ultimately prompted a suit in the U.S. District Court for the District of Puerto Rico 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 suit was dismissed on March 28, 2022, on the ground of lack of ripeness without addressing the substantive merits.

83. On July 21, 2022, after over three years of seemingly endless subpoenas and "investigation," the DOL finally gave notice to Defendants as to the substance of its Anjo Investigation and alleged violations of ERISA.<sup>17</sup>

84. After July 21, 2022, Defendants were engaged in active settlement negotiations with the DOL.

85. Nearly one year later, on June 8, 2023, the DOL submitted its first threat of suit against Defendants which included an express demand for injunctive and monetary relief.<sup>18</sup>

86. Progress towards settlement between the DOL and Defendants was very slow between June 2023 and January 2024. During this time, the DOL and Defendants entered into several tolling agreements which (1) extended the statute limitations for legal action, and (2)

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<sup>16</sup> Exhibit I attached hereto.

<sup>17</sup> Exhibit J attached hereto.

<sup>18</sup> Exhibit K attached hereto.

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

87. Under a continuing threat of litigation, Defendants sent the Anjo Targets, on Jan. 24, 2024, a demand for \$15 million, a figure which would severely and negatively impact the companies and potentially force SAS and PIC to file for bankruptcy protection.

**IV. THE DOL DIRECTLY TIES FATE OF THREATENED LITIGATION AGAINST DEFENDANTS TO INTERVENORS' FIRST AMENDMENT PETITIONS<sup>19</sup>**

88. On Jan. 11, 2024, counsel for Intervenors sent a letter to counsel for the DOL as to potential settlement discussions in this suit.<sup>20</sup>

89. In response, the DOL sent an e-mail on February 8, 2024 to Intervenors and Defendants proposing “global” settlement discussions as to the Texas Suit and the Anjo Investigation.<sup>21</sup> Counsel for Intervenors and Defendants replied that although one individual attorney – Jonathan Crumly of Freeman, Mathis, & Gary – had at times represented some parties in each matter, the parties were nevertheless distinct, sharing no common ownership or control.

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<sup>19</sup> 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. Wash. State Bar Ass’n*, 860 F.App’x 508, 510 (9<sup>th</sup> 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 Complaint in Intervention, 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)).

<sup>20</sup> Exhibit L attached hereto.

<sup>21</sup> Exhibit M attached hereto.

Further, Mr. Crumly did not and does not represent all of the targets of the Anjo Investigation, and each party was and is represented by additional counsel. Counsel made these facts clear to the DOL and also stressed that no “global settlement” which favored one or more parties at the expense of others would be possible, nor could any attorney ethically advise any client to accept demands against its self-interest in order to assist another, separate client. The DOL nonetheless pressed for “global settlement.” Notably, in addition to demands made for PIC and SAS, one of the DOL’s demands was that Intervenors drop their AO Request and the Texas Suit.

90. Thereafter, settlement discussions as to the Anjo Investigation accelerated substantially once Intervenors and Defendants agreed to participate in “global settlement discussions.” The DOL’s monetary demands for settling with Defendants lowered considerably over the next two months. As the demands for settling with Defendants were lowered, the DOL revealed its true purpose in pursuing global settlement: An inflexible demand that the Intervenors dismiss the Texas Suit entirely and withdraw the AO Request.

91. That any settlement with Defendants was entirely dependent upon the dismissal of the Texas Suit was made plain in the DOL’s April 26, 2024 demand. The settlement demand was \$5.5 million as to Defendants but was contingent upon the withdrawal of the AO Request and the dismissal of the Texas Suit by Intervenors.<sup>22</sup>

92. On Friday, May 10, 2024, counsel for the DOL directly stated to counsel for Intervenors and Defendants that if the Texas Suit was not dismissed, the monetary demands for settling threatened litigation against Defendants would increase.

93. On Thursday, May 23, 2024, counsel for the DOL repeated that the AO Request needed to be withdrawn, and the Texas Suit needed to be dismissed, by Intervenors as part of a

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<sup>22</sup> Exhibit N attached hereto.

settlement with Defendants. Counsel for the DOL stated that either both matters were settled together, or neither matter would be settled.

94. In an e-mail dated Monday, May 27, 2024, counsel for the DOL again tied the settlement with Defendants to the dismissal of the Texas Suit by Intervenors.<sup>23</sup>

95. On Tuesday, May 28, 2024, counsel for the DOL stated that if the Texas Suit was not dismissed by Intervenors, the DOL's monetary settlement demand as to Defendants would increase from \$5.5 million inclusive of penalties back up to \$15 million inclusive of penalties, the last demand from the DOL before it tied this suit to the settlement with Defendants.

96. On Tuesday, June 11, 2024, counsel for the DOL responded to an inquiry from counsel for Defendants as to whether the January 24, 2024 demand of \$15 million was still on the table if the Texas Suit was not dismissed by Intervenors. The e-mail responded: "Yes, that January 24 demand is still on the table... But we'd have to know relatively soon if your clients are interested in that offer, as we're planning on filing the complaint by the end of the week, and I can't promise what our client would be willing to do once we file."<sup>24</sup> (See Exhibit N, attached hereto)

97. Counsel for 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 Defendants were capable of meeting.

98. Intervenors did not agree to undo the findings of the District Court and Fifth Circuit by dismissing the Texas Suit, or to withdrawing the AO Request. As a result, the DOL demanded

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<sup>23</sup> Exhibit O attached hereto.

<sup>24</sup> Exhibit P attached hereto.

payment of \$15 million in a time frame which would likely bankrupt SAS and PIC to avoid a costly federal complaint against them in the U.S. District Court for the District of Puerto Rico.

99. On Thursday, October 31, 2024, the DOL sent Defendants, through their legal counsel, an e-mail expressly referencing previous settlement negotiations tying this case to the Anjo Investigation and other investigations.<sup>25</sup> The e-mail advised:

“It appears we have reached an impasse. Accordingly, with the tolling period expiring on November 6, the Department will prepare to file suit before that date. Please advise as soon as possible if anything changes for your clients. Otherwise, **please let us know if you will accept service of the complaint on behalf of your clients via email.** [emphasis in original].”

Previous e-mails had indicated any suit would be filed in the U.S. District Court for the District of Puerto Rico.

## VI. THIS SUIT

100. On Nov. 5, 2024, the DOL carried through on their threats by filing this suit against Defendants.

101. Subject to the withdrawal by Intervenors of the AO Request, and the dismissal by Intervenors of the Texas Suit, the DOL was willing to settle the Anjo Investigation for \$5.5 million. Now that Intervenors 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.

102. Only upon Intervenors withdrawing its AO Request and dismissing its Texas Suit was the DOL willing to settle the Anjo Investigation under terms allowing SAS and PIC to continue operations. Now that Intervenors 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.

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<sup>25</sup> Exhibit Q attached hereto.

**COUNT I: VIOLATION OF FIRST AMENDMENT  
RIGHTS AS TO AO REQUEST**

103. Intervenors incorporate and re-allege the allegations in paragraphs 1 to 102 as if fully set forth herein.

104. The AO Request was a petition by Intervenors protected by the First Amendment of the Constitution regarding a matter of public concern, i.e., the applicability of ERISA to Partnership Plans providing health coverage to more than 30,000 individuals.

105. The DOL has intentionally undertaken the following actions to obstruct, chill, deter, and retaliate against Intervenors for submitting the AO Request, and/or to coerce Intervenors to withdraw the AO Request:

- a. Launching the Anjo Investigation as to Defendants, which the DOL knew, based upon the AO Request, provided services essential to the continued operation of the Partnership Plans;
- b. Making unsupported allegations of wrongdoing against Defendants, with inflated monetary demands, and refusing to consider or acknowledge evidence provided by Defendants which largely, if not entirely, refutes or mitigates said allegations and monetary demands;
- c. Making exorbitant unwarranted monetary demands on Defendants, under threat of litigation;
- d. Conditioning settlement on achievable terms with Defendants on the withdrawal of the AO Request by Intervenors;
- e. Conditioning settlement with Defendants, after Intervenors refused to withdraw the AO Request, on a public complaint which threatened to jeopardize their reputations in the employee benefits industry; and

f. Threatening imminent litigation, and now filing litigation contemporaneous to the Texas Suit, against Defendants, after Intervenors refused to withdraw the AO Request.

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

107. 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.

108. As a direct and proximate result of the DOL's unlawful conduct as alleged under this Count, the DMP Plan and the other Partnership Plans now face imminent, irrevocable, and irreparable harm which includes (a) the end of the DMP Plan and Partnership Plans and the termination of health insurance for more than 30,000 individual participants; or (b) vulnerability of the DMP Plan and Partnership Plans to regulation under state law rather than ERISA. Accordingly, Intervenors seek and are entitled to a permanent injunction enjoining the DOL from engaging in any conduct against Intervenors or third parties which is intended to circumvent, moot or otherwise thwart the injunction or its issuance in the Texas Suit.

**COUNT II: VIOLATION OF FIRST AMENDMENT  
RIGHTS AS TO TEXAS SUIT**

109. Intervenors incorporate and re-allege the allegations in paragraphs 1 to 108 as if fully set forth herein.

110. The *First Amended Complaint*, filed in the Texas Suit by Intervenors on Feb. 3, 2020, was a petition protected by the First Amendment of the Constitution regarding a matter of public concern, i.e., the applicability of ERISA to the Partnership Plans providing health coverage to more than 30,000 individuals.

111. The DOL has intentionally undertaken the following actions to obstruct, chill, deter, and retaliate against Intervenors for filing the *First Amended Complaint*, and/or to coerce Intervenors to dismiss the Texas Suit:

- a. Making exorbitant unwarranted monetary demands on Defendants, under threat of litigation;
- b. Making unsupported allegations of wrongdoing against Defendants, with inflated monetary demands, and refusing to consider or acknowledge evidence provided by Defendants which largely, if not entirely, refutes or mitigates said allegations and monetary demands;
- c. Conditioning settlement on achievable terms with Defendants on the dismissal of the Texas Suit by Intervenors;
- d. Conditioning settlement with Defendants, after Intervenors refused to dismiss the Texas Suit, on a public complaint which threatened to jeopardize their reputations in the employee benefits industry; and
- e. Threatening imminent litigation, and now filing contemporaneous litigation contemporaneous to the Texas Suit, against Defendants because Intervenors refused to dismiss the Texas Suit.

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

113. 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.

114. As a direct and proximate result of the DOL's unlawful conduct as alleged under this Court, the DMP Plan and the other Partnership Plans now face imminent, irrevocable, and irreparable harm which includes (a) the end of the DMP Plan and Partnership Plans and the

termination of health insurance for more than 30,000 individual participants; or (b) vulnerability of the DMP Plan and Partnership Plans to regulation under state law rather than ERISA. Accordingly, Intervenor seeks and is entitled to a permanent injunction enjoining the DOL from engaging in any conduct against Intervenor or third parties which is intended to circumvent, moot or otherwise thwart the injunction or its issuance in the Texas Suit.

### **COUNT III: VIOLATION OF APA**

115. Intervenor incorporates and re-alleges the allegations in paragraphs 1 to 114 as if fully set forth herein.

116. Intervenor is suffering legal harm because of the threats imposed by the DOL against Defendants and is otherwise adversely affected or aggrieved by such action, within the meaning of 5 U.S.C. § 702.

117. 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.”

118. 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.”

119. 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.”

120. 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.”

121. It is a clear abuse of power for the DOL, in violation of 5 U.S.C. § 706(2)(A), to sue or threaten imminent litigation against Defendants, not on the basis of their own actions or inactions, or any losses to the plans which they service, but rather to obstruct, chill, deter, and retaliate against Intervenors for (a) sponsoring the DMP Plan and the Partnership Plans; (b) sending an AO Request to the DOL; and (c) filing the Texas Suit against the DOL.

122. It is likewise a clear abuse of power for the DOL, in violation of 5 U.S.C. § 706(2)(B), to sue or threaten imminent litigation against Defendants, not on the basis of their own actions or inactions, or any losses to the plans which they service, but rather to obstruct, chill, deter, and retaliate against Intervenors, for (a) creating the DMP Plan and the Partnership Plans; (b) sending an AO Request to the DOL; and (c) filing the Texas Suit against the DOL.

123. It is also in clear excess of the authority of the DOL, in violation of 5 U.S.C. § 706(2)(C), for them to sue or threaten imminent litigation against Defendants, not on the basis of their own actions or inactions, or any losses to the plans which they service, but rather to obstruct, chill, deter, and retaliate against Intervenors for (a) creating the DMP Plan and the Partnership Plans; (b) sending an AO Request to the DOL; and (c) filing the Texas Suit against the DOL.

124. As a direct result of the DOL’s unlawful conduct as alleged under this Count, the DMP Plan and other Partnership Plans now face imminent, irrevocable, and irreparable harm which includes (a) the end of the DMP Plan and the Partnership Plans and the termination of health coverage for more than 30,000 individual participants or (b) vulnerability of the DMP Plan and Partnership Plans to regulation under state law rather than ERISA. Accordingly, Intervenors seek and are entitled to a permanent injunction enjoining the DOL from engaging in any conduct against

Intervenors or third parties which is intended to circumvent, moot or otherwise thwart the injunction or its issuance by the Court.

**PRAYER FOR RELIEF**

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

A. That this Court declare the conduct of the DOL violated and continues to violate the First Amendment.

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 enjoining the DOL from engaging in any conduct against Intervenors or Defendants in violation of the First Amendment or the APA.

D. Award Intervenors 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.

**RESPECTFULLY SUBMITTED.**

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

**FREEMAN MATHIS & GARY, LLP**

/s/ Jonathan Crumly

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*Local Counsel for Intervenors*

# **EXHIBIT F**

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

LORI CHAVEZ-DEREMER, SECRETARY  
OF LABOR, U.S. DEPARTMENT OF  
LABOR,

Plaintiff,

v.

SUFFOLK ADMINISTRATIVE  
SERVICES, LLC, et al.,

Defendants.

CIVIL NO. 24-1512 (CVR)

**ORDER**

The present case was brought by the Secretary of Labor Lori Chavez-DeRemer<sup>1</sup> (the “Secretary”) against Defendants Suffolk Administrative Services, LLC (“Suffolk”), Providence Insurance Co., I.I. (“PIC”), Alexander Renfro (“Renfro”), William Bryan (“Bryan”) and Arjan Zieger (“Zieger”) (collectively “Defendants”). Suffolk and PIC are companies headquartered in Puerto Rico which market, sell, and service employer-sponsored health benefit plans governed by the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. § 1001. Renfro, Bryan, and Zieger are officers and indirect owners of both companies. The Secretary brings this case against Defendants alleging violation of their fiduciary duties of prudence and loyalty. She seeks to restore losses of the plans administrated by Defendants and to obtain other equitable

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<sup>1</sup> Julie Su was Acting Secretary of Labor in 2024 when this case was filed. Secretary of Labor Lori Chavez-DeRemer is automatically substituted as Plaintiff. See Fed. R. Civ. P. 25(d).

Lori Chavez-DeRemer v. Suffolk Administrative Services, LLC, et al.

Order

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Page 2

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relief, including enjoining Defendants from future management of other employee benefit plans.

Before the Court is Defendants' "Motion to Transfer Venue and Memorandum in Support" (Docket No. 26) and "Motion to Stay and Memorandum in Support" (Docket No. 27), as well as Plaintiff's combined Opposition thereto. (Docket No. 49). Defendants were granted leave to reply to the combined opposition, but did not timely file a Reply. (Docket No. 51).

Defendants seek to transfer this action to the U.S. District Court for the Northern District of Texas, where a separate but related lawsuit is pending against the Secretary, to wit, Data Marketing Partnership, LP v. U.S. Department of Labor, Civil No. 19-0800-O (N.D. Tex.) (the "Data Marketing case"). Defendants proffer that the present case was improperly brought against them as part of a concerted effort by the Secretary to dismantle Defendants' plans because they compete with Affordable Care Act insurance. Defendants aver the Secretary, thorough her actions in the Data Marketing case and in filing the present case, is attempting to pressure them by disparaging their services, opening investigations into the vendors providing services to the plans, and to force the withdrawal of the Texas lawsuit in which the Secretary has already suffered a loss. Defendants proffer that the Department of Labor's actions against them, which are the subject of their Counterclaim against the Secretary in this case, are the same as those contained in a proposed "Supplemental Complaint" before the Texas court to amend those allegations. Defendants admit both cases involve separate parties with the only

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constant being the Secretary, but argue that the operative allegations are the same, whereby the Secretary threatens or causes such damage to Defendants that they cannot provide the necessary services to run their benefit plans. Defendants ask this Court to transfer the present case to Texas where the Data Marketing case is pending or in the alternative, to stay this case until the Texas court rules on the pending motion to amend the pleadings or this Court rules on their transfer petition.

The Secretary proffers in opposition that Defendants have not met their burden of demonstrating that a transfer or a stay should be granted. She argues both cases are distinct, as are the parties and the causes of action, so the request to transfer should be denied. The Secretary also posits that the Texas court recently denied the Data Marketing Plaintiffs' leave to supplement the allegations, holding it did not have the power to hear those claims, which renders hollow Defendants' reason to transfer this case to that district. For that same reason, the request for stay, which was contingent upon that ruling, is likewise not warranted.

After a careful review, Defendants' "Motion to Transfer Venue and Memorandum in Support" (Docket No. 26) is DENIED for substantially the same reasons espoused by the Secretary.

Under § 1404(a), a district court may transfer any civil action to any other district where it may have been brought "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). The Court of Appeals for the First Circuit has identified the following factors for district courts to consider when evaluating a motion for

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transfer, to wit: “(1) the convenience of the parties and the witnesses, (2) the availability of documents, (3) the possibility of consolidation, and (4) the order in which the district court obtained jurisdiction.” Coady v. Ashcraft & Gerel, 223 F.3d 1, 11 (1st Cir. 2000). “Where identical actions are proceeding concurrently in two federal courts, entailing duplicative litigation and a waste of judicial resources, the first filed action is generally preferred in a choice-of-venue decision.” Cianbro Corp. v. Curran-Lavoie, Inc., 814 F.2d 7, 11 (1st Cir. 1987).

Before reaching the § 1404(a) elements, the Court notes that no claims or parties other than the Secretary overlap. The Data Marketing case was brought by Data Marketing Partnership, LP and LP Management Services, LLC against the Secretary regarding an advisory opinion as to whether certain plans were covered under the Employee Retirement Income Security Act (“ERISA”). These are the plans Defendants currently administrate in the present case, but Defendants herein are not parties in the Data Marketing case.

In contrast, the case at bar alleges that Defendants, as fiduciaries to those plans, breached their fiduciary duties and violated federal law by engaging in self-dealing and charging disproportionately high fees to their plan clients. As candidly argued by the Secretary, the cases involve different parties, different claims, and harms, and are not the types of “identical actions” that militate a finding in favor of a transfer for purposes of judicial economy. This issue alone mitigates against the transfer petition.

The first two (2) elements of § 1404(a), the convenience of the parties and the witnesses and availability of documents, do not favor Defendants’ request to transfer.

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According to the Complaint, which the Court must accept as true at this stage of the litigation, co-Defendant Suffolk is a limited liability company registered in Puerto Rico, and co-Defendant PIC is an insurance company incorporated in Puerto Rico. The crux of the action in this case, that Defendants breached their fiduciary duties towards the ERISA plan assets, occurred in Puerto Rico. Therefore, and for that same reason, the witnesses and documentation supporting Defendants' claims and defenses should also be located in Puerto Rico.

Element number three (3), consolidation, is not feasible either, as the District of Texas has already rejected Defendants' attempt to amend the pleadings before that court. (Docket No. 49, pp. 3-4). Moreover, Defendants' argument that the case should nevertheless be heard in Texas because the Secretary has somehow "inextricably connected" the cases together by previously attempting a global settlement of all claims, is unavailing. Although the cases may be loosely related, as already discussed, the Data Marketing case involves wholly different claims, parties, and defenses than the ones raised in the case at bar.<sup>2</sup>

Additionally, the fact that the Secretary attempted to settle all claims together cannot be construed as somehow linking the cases for purposes of proper venue. Pursuant to federal law, a civil action may only be transferred to a district "where it might have been brought." 28 U.S.C. § 1404(a); Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49, 59, 134 S. Ct. 568, 579 (2013). Defendants argue that Texas constitutes proper

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<sup>2</sup> This also addresses Defendants' argument of the possibility of conflicting judgments. If the parties and claims are different, it is hard to argue that the two (2) cases will somehow result in conflicting judgments.

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venue because “a substantial part of the events or omissions giving rise to the claim” occurred in Texas, and argue that the Secretary explicitly connected the cases. (Docket No. 26, pp. 6-7). The record however, belies this assertion. The only “substantial event” they mention are the “global settlement” talks to settle both the Texas case and the investigation that eventually gave rise to the instant case. A review of the exhibits accompanying the request further shows those talks entailed back and forth communications via email, video calls, and letters sent via U.S. Postal Service, and the attorneys involved were located in Tennessee, Georgia, and Florida, while the Secretary was acting out of offices in Washington, D.C., and Illinois. On this record, it is hard to argue that these actions can be construed as having all “occurred” in Texas. (Docket No. 25, Exhibits 5, 7, 10, 17, 18 and 19). In fact, the only link to Texas seems to be that it was the venue where the Data Marketing case was filed.

Conversely, Puerto Rico has a significant nexus to this action, since at least both corporations run their businesses from Puerto Rico and the activities complained of took place in Puerto Rico. Therefore, proper venue for *the instant* case is Puerto Rico, notwithstanding any related claims Defendants might have against the Secretary in a related case. See Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29, 108 S. Ct. 2239, 2243 (1988) (venue is proper in judicial district in which a corporation is doing business).

Element number four (4), that the Texas cases was filed first, only helps Defendants marginally. While Texas did indeed win the race to the courthouse in the Data Marketing case, that litigation has been ongoing for five (5) years, and is in a substantially more

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advanced stage than this case, which is only beginning.

Defendants' additional argument in support of transfer, that Texas courts have more experience in ERISA cases, is likewise unavailing. The fact that Texas may have seen more ERISA cases is not a sufficiently valid reason for transfer, insofar as "a court with jurisdiction has a 'virtually unflagging obligation' to hear and resolve questions properly before it." Fed. Bureau of Investigation v. Fikre, 601 U.S. 234, 240, 144 S. Ct. 771, 777 (2024) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S.Ct. 1236 (1976)).

In sum, Defendants bring nothing to the Court to tilt the pendulum in favor of transferring the case at bar to the Northern District of Texas. Therefore, the Court declines Defendants' invitation and DENIES the Motion to Transfer. (Docket No. 26).

Lastly, Defendants ask the Court to stay the present case until one of two (2) things happen, namely, either a ruling by this Court on their Motion to Transfer in the present case, or a ruling by the Texas court allowing the Data Marketing case plaintiffs to file a Supplemental Complaint. In other words, Defendants' request to stay is contingent on either one of those conditions happening. Both conditions have been addressed above. The District Court for the Northern District of Texas recently denied the motion to amend the pleadings, finding it did not have the power to hear the additional claims those Plaintiffs wanted to present. Thus, Defendants' reason to transfer this case to that district has vanished. Additionally, this Court has denied herein Defendants' Motion to Transfer for the reasons explained above. Hence, Defendants' Motion to Stay (Docket No. 27) is

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DENIED as moot.

For the foregoing reasons, Defendants’ “Motion to Transfer Venue and Memorandum in Support” (Docket No. 26) is DENIED and “Motion to Stay and Memorandum in Support” (Docket No. 27) is DENIED as moot.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 10<sup>th</sup> day of June of 2025.

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