

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

FEDERATION OF AMERICANS FOR §  
CONSUMER CHOICE, INC.; JOHN §  
LOWN d/b/a LOWN RETIREMENT §  
PLANNING; DAVID MESSING; §  
MILES FINANCIAL SERVICES, INC.; §  
JON BELLMAN d/b/a BELLMAN §  
FINANCIAL; GOLDEN AGE §  
INSURANCE GROUP, LLC; §  
PROVISION BROKERAGE, LLC; and §  
V. ERIC COUCH, §

*Plaintiffs,* §

v. §

UNITED STATES DEPARTMENT §  
OF LABOR and MARTIN J. WALSH, §  
SECRETARY OF LABOR, §

*Defendants.* §

C.A. No. 3:22-cv-00243-K-BN

**PLAINTIFFS’ UNOPPOSED MOTION FOR LEAVE  
TO FILE SUPPLEMENTAL BRIEF**

Plaintiffs<sup>1</sup> file this motion for leave to file supplemental briefing in support of their Objections and Plaintiffs’ Brief, and state:

1. On October 31, 2023, the DOL proposed yet another new rule for defining who is an investment advice fiduciary for purposes of ERISA. As with the 2016 Fiduciary Rule, the DOL’s new proposal is to replace the five-part test with a new definition that

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<sup>1</sup> Defined terms used herein shall have the same meaning as in Plaintiffs’ Objections to Findings, Conclusions, and Recommendation of the United States Magistrate Judge (the “Objections”) [Doc. 72] and supporting brief (“Plaintiffs’ Brief”) [Doc 73]. Unless otherwise stated, all emphases are supplied by counsel.

eliminates the requirements of regular basis, mutual agreement, and primary basis for the investment decision. The DOL has also proposed significant changes to PTE 84-24 and the New Exemption. The full text of the DOL's proposal can be found on its website at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/erisa/retirement-security>.

2. By this motion, Plaintiffs seek leave to file a supplemental brief of no more than ten (10) pages, with DOL having the opportunity to respond to same, in order to address the relevance of the DOL's new fiduciary proposal on the issues before the Court on the Objections. The new proposal makes explicit what Plaintiffs have said from the outset of this case: the DOL's purpose and intent—from the time of the 2016 Fiduciary Rule, through the New Interpretation of the five-part test, and now its latest proposal—is to ensure that every financial professional who sells an investment product to a Retirement Investor is deemed to be a fiduciary under ERISA and the Code. The DOL has continually disclaimed that was the meaning and intent of the New Interpretation, notwithstanding the clear language to the contrary contained therein. While the DOL was able to convince the Magistrate Judge of this in part, this Court should have before it the entire historical context in ruling on Plaintiffs' Objections to the Magistrate Judge's Recommendations.

3. The latest fiduciary proposal is also relevant to and undermines a number of the specific arguments the DOL has made in response to the Objections. In this regard, by now proposing to overhaul PTE 84-24, the DOL sabotages the assurances in its briefing that the New Interpretation had preserved that exemption for insurance agents who would be swept into its far broader reading of the five-part test. Similarly, the DOL has argued that the major question doctrine should not apply because the expansion of fiduciary

responsibility under ERISA did not have far-reaching economic impact or involve a matter of political significance. The contents of the new proposal, introduced with fanfare by the President himself, demonstrate otherwise.

4. In light of the foregoing, Plaintiffs respectfully request that the Court grant this motion and allow Plaintiffs the opportunity to submit a supplemental brief, of not more than ten (10) pages, within thirty (30) days of the order granting leave to file. Defendants do not oppose this request provided they are permitted to file a response brief, of not more than ten (10) pages, within thirty (30) days after Plaintiffs' brief is filed. A proposed order reflecting this schedule is being submitted with this motion.

Dated: November 2, 2023

Respectfully submitted,

By: /s/ Don Colleluori  
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**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF CONFERENCE**

On November 2, 2023, the undersigned counsel for Plaintiffs conferred with Galen Thorp, counsel for Defendants, regarding the foregoing motion. Mr. Thorp advised that Defendants do not oppose the relief requested herein.

*/s/ Don Colleluori* \_\_\_\_\_

Don Colleluori

**CERTIFICATE OF SERVICE**

I hereby certify that, on November 2, 2023, this document was served by email on all parties and/or attorneys of record in this matter through the Court's CM/ECF filing system.

*/s/ Don Colleluori* \_\_\_\_\_

Don Colleluori