

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	§	C.A. No. 3:22-cv-00243-K-BN
INSURANCE GROUP, LLC;	§	
PROVISION BROKERAGE, LLC; and	§	
V. ERIC COUCH,	§	
	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	
	§	
UNITED STATES DEPARTMENT	§	
OF LABOR and MARTIN J. WALSH,	§	
SECRETARY OF LABOR,	§	
	§	
<i>Defendants.</i>	§	

PLAINTIFFS' AMENDED NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs hereby file this amendment to their previously filed Notice of Supplemental Authority [Doc. 61] with respect to Plaintiffs' Motion for Summary Judgment and supporting brief ("Plaintiffs' Motion") [Doc. 19-20], and Defendants' Cross-Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, for Summary Judgment and supporting brief ("Defendants' Motion") [Doc. 39-40], and state:

1. On February 13, 2023, the United States District Court for the Middle District of Florida, Tampa Division, issued its opinion in Case No. 8:22-cv-330-VMC-CPT, *American Securities Association v. United States Department of Labor* (the "ASA

Order”). The ASA Order resolved the parties’ cross-motions for summary judgment in that case, which involved an Administrative Procedures Act challenge to two “Frequently Asked Questions” promulgated by the DOL¹ in connection with the New Interpretation and Revised Exemption. The ASA Order declared unlawful and vacated the policy referenced in a Frequently Asked Question regarding the New Interpretation and Revised Exemption concerning what constitutes “regular basis” in connection with rollover transactions from an employee benefit plan to an IRA. A copy of the ASA Order was attached to Plaintiffs’ Notice of Supplemental Authority [Doc. 61] filed on February 17, 2023.

2. By order entered March 10, 2023, the Court allowed the DOL to respond to Plaintiffs’ Notice of Supplemental Authority, “specifically to discuss how it affects the status of their claims.” [Doc. 62.] The DOL filed its Response to Plaintiffs’ Notice of Supplemental Authority (“DOL’s Response”) [Doc. 63] on March 20, 2023. DOL’s Response did not address the question posed in the Court’s March 10 order, but instead presented arguments why the DOL disagreed with the ASA Order on the merits. DOL’s Response indicated that the DOL was “currently considering next steps in the [ASA] case, including a potential appeal.”

3. Thereafter, the DOL did file a notice of appeal of the ASA Order on April 14, 2023, a true and correct copy of which is attached hereto as Exhibit A. Earlier this week, however, the ASA plaintiffs and DOL filed a Joint Stipulation to Voluntary Dismissal of Appeal (“Joint Stipulation”) pursuant to FED. R. APP. P. 42(b), which resulted

¹ Defined terms used herein shall have the same meaning as in Plaintiffs’ Motion and supporting brief.

in the dismissal of the DOL's appeal from the ASA Order. A true and correct copy of the Joint Stipulation is attached hereto as Exhibit B.

4. As explained in Plaintiffs' Notice of Supplemental Authority, the ASA Order vacated the New Interpretation's determination that the regular basis requirement for determining fiduciary status will be satisfied in the case of an Investment Professional's advice to an ERISA plan member with respect to a rollover transaction based on the provision or anticipated provision of post-rollover advice to the IRA owner. [ASA Order at 41-57, 65-68.] Plaintiffs in this case have challenged that same aspect of the New Interpretation, among others, which is a critical and core component of the New Interpretation. With the DOL's abandonment of its appeal of the ASA Order, the judgment vacating that aspect of the New Interpretation is final and non-appealable. *See generally Data Marketing Partnership, LP. V. United States Dep't of Labor*, 45 F.4th 846, 859 (5th Cir. 2022). (rule that has been vacated is "void"; vacatur does not simply prevent the agency from enforcing the rule as an injunction does, but formally nullifies and revokes the unlawful agency action).

5. Plaintiffs contend that the New Interpretation should be vacated in its entirety for multiple reasons as described in their Complaint and summary judgment briefing, including the reasons cited in the ASA Order regarding the interpretation of "regular basis." The DOL's decision not to appeal the ASA Order nullifying and vacating this central feature of the New Interpretation underscores that the DOL's attempted reimagining of the five-part test is simply unworkable and further supports the relief requested by Plaintiffs in this case.

Dated: May 17, 2023

Respectfully submitted,

By: /s/ Don Colleluori
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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that, on May 17, 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

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

AMERICAN SECURITIES
ASSOCIATION,

Plaintiff,

v.

JULIE A. SU¹, Acting Secretary of
Labor, and UNITED STATES
DEPARTMENT OF LABOR,

Defendants.

Civil Action No. 8:22-cv-00330-VMC

NOTICE OF APPEAL

Notice is hereby given that all Defendants in the above-named case hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the Judgment dated February 13, 2023 (ECF No. 56), and from all prior adverse rulings in this action.

Dated: April 14, 2023

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant
Attorney General

BRAD P. ROSENBERG
Special Counsel

¹ Pursuant to Federal Rule of Civil Procedure 25(d), Julie A. Su is automatically substituted for Martin J. Walsh as a defendant sued in an official capacity.

s/ Alexander N. Ely
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Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that on April 14, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent e-mail notification of such filing to all CM/ECF participants.

/s/ Alexander N. Ely
Alexander N. Ely

*Counsel for Defendants Department
of Labor and Julie A. Su*

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMERICAN SECURITIES ASSOCIATION,

Plaintiff-Appellee,

v.

U.S. DEPARTMENT OF LABOR, et al.,

Defendants-Appellants.

No. 23-11266

JOINT STIPULATION TO VOLUNTARY DISMISSAL OF APPEAL

American Securities Association v. U.S. Department of Labor, No. 23-11266

**JOINT CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

The following persons and entities have an interest in the outcome of this case:

1. American Securities Association, Plaintiff-Appellee / Cross-Appellant
2. Begakis, Steven C., Counsel for Plaintiff-Appellee / Cross-Appellant
3. Connolly, J. Michael, Counsel for Plaintiff-Appellee / Cross-Appellant
4. Consovoy McCarthy PLLC, Counsel for Plaintiff-Appellee / Cross-

Appellant

5. Covington, Hon. Virginia M. Hernandez, U.S. District Court Judge
6. Ely, Alexander N., Counsel for Defendant-Appellant / Cross-Appellee
7. Holder, Gregory P., Mediator
8. Raab, Michael S., Counsel for Defendant-Appellant / Cross-Appellee
9. Robert W. Baird & Co. Inc., Member of Plaintiff-Appellee / Cross-

Appellant ASA

10. Shih, Michael, Counsel for Defendant-Appellant / Cross-Appellee
11. Stephens, Inc., Member of Plaintiff-Appellee / Cross-Appellant ASA
12. Su, Julie A., in her official capacity as Acting Secretary of Labor,

Defendant-Appellant / Cross-Appellee

13. Thorp, Galen N., Counsel for Defendant-Appellant / Cross-Appellee
14. Tuite, Hon. Christopher P., U.S. Magistrate Judge
15. U.S. Department of Labor, Defendant-Appellant / Cross-Appellee

American Securities Ass'n v. U.S. Dep't of Labor,
No. 23-11266

Plaintiff-Appellee and Cross-Appellant American Securities Association has no parent corporation, and no corporation owns 10% or more of its stock.

Pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, the parties hereby stipulate to the voluntary dismissal of Defendants-Appellants' appeal in the above-captioned case, with all parties to bear their own fees and costs.

Respectfully submitted,

MICHAEL S. RAAB

/s/ Michael Shib

MICHAEL SHIH

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/s/ J. Michael Connolly

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*Counsel for American Securities
Association*

MAY 2023

CERTIFICATE OF SERVICE

I hereby certify that, on May 16, 2023, I electronically filed the foregoing document with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Michael Shih

MICHAEL SHIH

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document complies with the requirements of Fed. R. App. P. 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 36 words according to the count of Microsoft Word.

/s/ Michael Shih

MICHAEL SHIH