IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Maritza Dominguez Braswell

Civil Action No. 21–cv–00304–CNS–MDB

ROBERT HARRISON and GRACE HEATH, on behalf of themselves,
the ENVISION MANAGEMENT HOLDING INC. ESOP,
and all other similarly situated individuals,

Plaintiffs,
v.

ENVISION MANAGEMENT HOLDING, INC. BOARD OF DIRECTORS,
ENVISION MANAGEMENT HOLDING, INC. EMPLOYEE STOCK OWNERSHIP PLAN COMMITTEE,
ARGENT TRUST COMPANY,
DARREL CREPS, III,
PAUL SHERWOOD,
JEFF JONES,
NICOLE JONES,
AARON RAMSAY,
TANWEER KHAN, and
LORI SPAHN

Defendants.

ORDER

Before this Court is the "issue of the common interest agreement," between Plaintiffs and the United States Department of Labor ("DOL"). (Doc. Nos. 219; *see also* 222.) The DOL shared its investigative materials with Plaintiffs pursuant to a common interest agreement. (["CIA"], Doc. No. 164-3.) The question before this Court is whether the DOL's privileges and protections were waived when it shared those materials, or whether a common legal interest

between the DOL and Plaintiffs precluded waiver. The DOL offers a Statement of Interest.[1] (["DOL SOI"], Doc. No. 220.) Plaintiffs filed a brief (Doc. No. 221) and reply (Doc. No. 231.) Defendants responded to the DOL SOI (Doc. No. 223) and to Plaintiffs' brief (Doc. No. 224.) After carefully considering the issues and applicable law, the Court finds the DOL and Plaintiffs do not share a common legal interest.[2]

BACKGROUND

This case involves an employee stock ownership plan ("The Plan") that allows participating employees to acquire an interest in company stock. (*See* Doc. No. 91). The Plan is subject to the Employment Retirement Security Act of 1974 ("ERISA"). (*See id.*) Plaintiff Robert Harrison, a former employee of Defendant Envision Management Holding ("Envision"), initiated this action on January 29, 2021, by filing a class action Complaint. (*See* Doc. No. 1.)

In their Amended Complaint (Doc. No. 91), Plaintiffs bring seven causes of action against the various named Defendants and seek plan-wide relief. (*Id.*) Plaintiffs identify their claims as follows:

(1) Count I: Prohibited Transaction in Violation of ERISA § 406(a), 29 U.S.C. § 1106(a) (Against Argent, the Board Defendants, and the ESOP Committee Defendants)

[1] The DOL SOI was submitted by the United States through its attorneys, but for ease of reference, this Order refers to the United States and the DOL, interchangeably.

[2] The documents directly impacted by this decision are the DOL Interview Reports (also known as the DOL Summaries). The Court already ordered their production, and Plaintiffs objected. (["Objection"], Doc. No. 212). Their Objection remains pending. This decision offers another basis for their disclosure and it will impact any other documents the DOL shared with Plaintiffs. For now, the Court *sua sponte* stays execution of this Order until such time as the Objection is resolved.

(2) Count II: Prohibited Transaction in Violation of ERISA § 406(a), 29 U.S.C. § 1106(a) (Alternatively against the Seller Defendants as Non-Fiduciaries)

(3) Count III: Prohibited Transaction in Violation of ERISA § 406(b), 29 U.S.C. § 1106(b) (Against Creps, Sherwood, Jeff Jones, and Khan)

(4) Count IV: Breach of Fiduciary Duties Under ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B) (Against Argent and ESOP Committee Defendants)

(5) Count V Failure to Monitor in Violation of ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B) (Against Board Defendants)

(6) Count VI: Co-Fiduciary Liability Under ERISA § 405(a)(1) and (a)(3), 29 U.S.C. § 1105(a)(1) and (a)(3) (Against the Board Defendants)

(7) Count VII: Illegal Agreement to Exculpate Fiduciary Liability under ERISA § 502(a)(2) and (a)(3), 29 U.S.C. § 1132(a)(2) and (a)(3), and ERISA § 410(a), 29 U.S.C. § 1110(a) (Against all Defendants)

(Doc. No. 91 at 31-43.)

Current Dispute and Procedural History

The current dispute concerns the DOL Interview Reports[3] and whether the common interest doctrine protects against their disclosure in this litigation. The DOL Interview Reports are summaries of interviews the DOL conducted as part of its separate investigation into several employee stock ownership plans ("ESOPS"), including The Plan at issue here. (*See* Doc. No. 220-1.) Some of the DOL Interview Reports concern the individual Defendants in this case. (*Id.*) Plaintiffs are in possession of them and object to their disclosure. (*See* Doc. No. 212.)

This dispute over the DOL Interview Reports can be traced back to a prior dispute over a different document—a May 20, 2022, letter the DOL issued to Defendant Argent. ([“DOL

[3] As noted above, *see supra* fn. 2, the Court previously referred to these as "DOL Summaries." However, since these are the DOL's documents, and the DOL has interjected to describe them as DOL Interview Reports, the Court will use the DOL's preferred term.

Demand Letter"] Doc. No. 211-2.) A brief explanation of the dispute concerning the DOL Demand Letter will provide helpful context.

The DOL Demand Letter accuses Defendant Argent of breaching its fiduciary duties with respect to six different ESOPs, five of which are not relevant to this litigation, and one that is—The Plan. (*Id.*) In this litigation, Plaintiffs sought a copy of the DOL Demand Letter from Defendant Argent. However, the parties could not agree on appropriate redactions. The Court was forced to intervene, only to learn that while Plaintiffs were pressing for the production of the DOL Demand Letter in this litigation, they separately obtained the same letter—in unredacted form—directly from the DOL. It was then that the Court learned, for the first time (and Defendants learned the same just a month prior), that the DOL appeared to be feeding Plaintiffs information pursuant to a common interest agreement. Concerned that Plaintiffs failed to disclose that information sooner, the Court ordered the immediate production of the CIA, and required Plaintiffs to log all documents received from the DOL.

Soon thereafter, the parties raised their dispute over the DOL Interview Reports, and Defendant Argent eventually filed a motion to compel them. (*See* Doc. No. 164.) The Court heard oral argument on the issue. (Doc. No. 202). In their briefs, no one challenged the validity of the CIA. Thus, the Court presumed the existence of a valid common legal interest between Plaintiffs and the DOL. The Court also presumed, without deciding, a valid work product claim.[4]

[4] The Court presumed this, in part, because the parties offered different (and somewhat contradictory) descriptions of the DOL Interview Reports, and because the Court did not have the benefit of the DOL's description of its own documents. However, the Court expressed its doubts over the underlying work product claim, including in a subsequent order where it noted the DOL, a non-party, was apparently (and perhaps improperly) seeking to assert these objections through Plaintiffs. (Doc. No. 207 at 4.)

(*Id.*) On these two presumptions, the Court turned to analyze whether there was a substantial need for the DOL Interview Reports. (*Id*.) The Court found there was indeed a substantial need for them and that Defendants would be at a meaningful disadvantage without them. (*Id.*) In a subsequent order, the Court further noted that:

> Plaintiffs have tried to soften the relevance of the DOL investigation, arguing that Plaintiffs' reliance on the DOL's work product is limited. However, during the June 18, 2024, hearing it became clear to this Court that Plaintiffs' descriptions were inaccurate. The DOL investigation is a key part of Plaintiffs' theory of the case. Plaintiffs are relying on the DOL investigation and conclusions to make arguments about Defendants' liability, which places the DOL's conclusions and work front and center in this litigation. Defendants cannot adequately defend themselves if the DOL's information is being used as both a sword and shield.

(Doc. No. 207 at 4-5.)

But the DOL Interview Reports were never produced. Plaintiffs lodged their Objection, and the Court stayed its order to give the Honorable Charlotte N. Sweeney an opportunity to consider the Objection. (["Stay Order"]. Doc. No. 207.) In its Stay Order, the Court invited the parties to address the viability of the CIA, noting that addressing DOL privilege issues on a document-by-document basis may be inefficient. (*See* Doc. No. 207 at 5, fn. 2.) Judge Sweeney subsequently issued a text order, in which she deferred ruling on Plaintiffs' Objection, and held that, "addressing these discovery challenges on a document-by-document basis would be a waste of judicial resources." (Doc. No. 219.) She further ordered the parties to brief the "the broader issue of the common interest agreement[.]" (*Id.*) The Parties' briefs concerning the CIA followed.

Common Interest Arguments

In their opening brief, Plaintiffs argue the common interest agreement "is facially valid," and that "[c]ourts routinely uphold a common interest privilege between DOL and private

plaintiffs even where there is no explicit written common interest agreement. (Doc. No. 221 at 2-3 (citing *Perez v. Brain*, 2015 WL 12914362, *3-4 (C.D. Cal. Aug. 20, 2015).) Plaintiffs also rely on 29 U.S.C. § 1134(a) to argue the DOL is authorized to investigate violations of ERISA, and in so doing, can share materials with "any person actually affected by any matter which is the subject of an investigation." (Doc. No. 221 at 2 (quoting 29 U.S.C. § 1134(a).)

For its part, the DOL asserts various privileges and protections over the information it shared with Plaintiffs, including work product protection, the deliberative process privilege, and the law enforcement privilege.[5] (*See generally* Doc. No. 220.) The DOL argues that its disclosure to Plaintiffs waived none of these protections because the DOL shares a common interest with Plaintiffs, as memorialized in the CIA. (*Id.*) It also argues "ERISA authorizes [it] to investigate potential violations," and it also "authorizes [it] to share materials from investigations with 'any person actually affected by any matter which is the subject of an investigation.'" (*Id.* at 3 (quoting 29 U.S.C. § 1134(a)(2)).) The DOL explains that its "investigation is still open, and DOL has not yet made a disposition decision." (*Id.*) It argues the mental impressions in the DOL Interview Reports are therefore "preliminary," and their disclosure (in particular, to certain Defendants, who are among the targets of the DOL's investigation), would undermine the DOL's decision-making, impair executive function, and interfere with its investigation. (*Id.* at 3-4, 6, 9.)

[5] Because the Court is tasked with addressing the "broader issue of the common interest agreement," the Court assumes, without deciding, that the underlying privileges asserted by the DOL are valid. However, the Court continues to have reservations about the validity of the DOL's purported privileges and protections. Moreover, the DOL is not a party to the case, it was late to assert its purported privileges and protections, and even assuming it could properly and timely assert privileges and protections through Plaintiffs, it is clear Plaintiffs did not assert every privilege the DOL seeks to assert now. Also, it is difficult to see how the DOL can claim work product in anticipation of litigation, (*see* Doc. No. 220 at 4), when it now admits that the decision to litigate has not been made, and its investigation is ongoing. (*See id.* at 6.)

Defendants argue "Plaintiffs and the DOL hold contradictory views about the state of the DOL's audit of Argent[.]" (Doc. No. 224 at 4.) For example, while Plaintiffs aver the DOL reached the "ultimate conclusion that Argent violated ERISA in the ESOP Transaction," (Doc. No. 172 at 13), the DOL takes the contrary position that it has reached no conclusions. (Doc. No. 220 at 9 (DOL SOI stating, the "DOL has not made a conclusion").) Defendants appear to contend that these contradictory views cut against any purported common interest. (*See generally* Doc. No. 224.) They also argue that when the DOL gave Plaintiffs an unredacted version of the DOL's Demand Letter, the DOL knew Plaintiffs intended to use that letter in depositions. Thus, the DOL's disclosure was a knowing waiver of any protections purportedly afforded by the CIA, and it opened the door to discovery of other materials purportedly protected by the CIA. (*Id.* at 8; *see also* Doc. No. 223 at 11.)

Defendants also take issue with the DOL's and Plaintiffs' reliance on the ERISA statute that authorizes sharing investigative materials with persons "actually affected." Specifically, they contend 29 U.S.C. § 1134(a) is being misapplied and "should not be read to permit what DOL has done here, which is to in effect deputize a private plaintiffs' firm to litigate ERISA claims against entities that," are also "actually affected" by the DOL's audit. (Doc. No. 224 at 7.) In other words, according to Defendants, the DOL should not be allowed to "involve[] itself in ongoing litigation by plan participants … against an institutional trustee that DOL is charged with regulating," when the information it is "feeding" to Plaintiffs is—by DOL's own admission—merely "preliminary." (*Id.*)[6]

[6] Defendants also contend the DOL violated the Freedom of Information Act ("FOIA") when it shared information "in violation of pre-disclosure requirements under [FOIA]." (Doc. No. 224 at 7 (citing 29 C.F.R. § 70.26; E.O. 12,600); *see also* Doc. No. 223 at 9.) At least one court has held

In their reply brief, Plaintiffs argue they and the DOL share a common legal interest in restoring losses to the ESOP. (Doc. No. 231 at 2-4.) They also argue the Tenth Circuit's decision in this case supports a finding in their favor because in it, the court noted that both "the DOL, as well as plan participants (and beneficiaries and fiduciaries)," are authorized "to file suit and obtain the forms of relief outlined [in ERISA]" and "[r]egardless of who brings suit … the suit is 'on behalf of [the] plan' itself." (*Id.* at 2, 5 (quoting *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Directors*, 59 F.4th 1090, 1111–12 (10th Cir. 2023), *cert. denied sub nom.*, *Argent Tr. Co. v. Harrison*, 144 S. Ct. 280 (2023).)

Plaintiffs further note that "[t]he 'contradiction' Defendants cite is no contradiction at all." (*Id.* at 3.) They explain the DOL Demand Letter is relevant and offers conclusions, but the DOL Interview Reports (which were created before the DOL Demand Letter was issued), are what the DOL refers to as containing "irrelevant" and "preliminary" impressions. (*See* Doc. No. 231 at 3.) They further point out that the DOL Demand Letter is not at issue here, and that the only question now, is whether the DOL Interview Reports remain protected under the CIA. Plaintiffs also argue Defendants waived their right to challenge the validity of the common interest agreement.[7] (*Id.* at 4-5.)

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that a party seeking disclosure of the DOL's investigative files must make their "request pursuant to [FOIA]." *Mallick v. Usery*, 427 F. Supp. 964, 966 (W.D. Pa. 1977). Moreover, the Fourth Circuit has warned of "the need for watchfulness where the common interest doctrine is sought as a means to avoid FOIA's disclosure requirements." *Hunton & Williams v. U.S. Dep't of Just.*, 590 F.3d 272, 286 (4th Cir. 2010). But an analysis of this issue is not necessary to this decision, and the Court declines to determine whether a violation occurred.

[7] This argument is unavailing. The presiding judge expressly ordered the parties to brief "the broader issue of the common interest agreement." (Doc. No. 219.) That Defendants refused to disclose the precise basis for their challenge, (*see* Doc. No. 231 at 4-5), is of no moment. The parties knew the briefing was authorized, had instructions from the presiding judge on the

ANALYSIS

The Court is tasked with determining whether the common interest doctrine applies to the information-sharing between the DOL and Plaintiffs. (*See* Doc. No. 219 (ordering that the parties brief the "the broader issue of the common interest agreement[.]"); Doc. No. 222 (referring the matter to this Court.).) However, before analyzing whether the DOL and Plaintiffs share a common legal interest sufficient to protect against waiver, the Court considers whether ERISA offers special protections to the DOL under these circumstances.

Pursuant to 29 U.S.C. § 1134(a), the Secretary of Labor has investigative authority, and permission to "make available to any person actually affected by any matter which is the subject of an investigation under this section, and to any department or agency of the United States, information concerning any matter which may be the subject of such investigation…." 29 U.S.C. § 1134(a)(1)-(2). The statute does not *require* the DOL to share information, and there is no express protection against waiver when the DOL *decides* to share its information. Moreover, the Court has not found, and no party has offered, a case that interprets this provision as a protection against waiver. The statute simply and straightforwardly grants the DOL authority and discretion. And—like any party who has discretion about what to share or not share—the DOL must be cautious when it comes to sensitive, privileged, or protected information. Indeed, the DOL acknowledged this responsibility when it entered into the CIA. The CIA itself may be the best indication that ERISA does not confer special protections because by entering into the CIA, the DOL behaved like any other party or potential litigant that needs to protect a purported

submission of their briefs, and did not have some additional duty to detail their arguments before submitting their briefs.

privilege. In short, the Court is not persuaded that ERISA confers special protections against waiver, and the Court therefore moves on to consider whether Plaintiffs and the DOL share a common legal interest that protects against waiver. *See Martinez v. Nationwide Affinity Ins. Co. of Am.,* 2023 WL 4706752, at *2 (D. Colo. Jul. 24, 2023) ("[T]he common interest doctrine is not a stand-alone privilege; it is an exception to the waiver of privilege when privileged information is shared with third parties.").

Courts in this district apply the common interest privilege "only to communications given in confidence and intended and reasonably believed to be part of an on-going and joint effort to set up a common legal strategy." *Marianist Province of U.S., Inc. v. Century Indem. Co*., 2010 WL 3938355, at *2 (D. Colo. Oct. 5, 2010) (quoting *Black v. Southwestern Water Conservation Dist.,* 74 P.3d 462, 469 (Colo.App. 2003) (citations omitted)).[8] The parties' shared interests must be *legal* in nature, not just, for example, financial. *Martinez,* 2023 WL 4706752 at *5*; see also Arkansas River Power Auth. v. The Babcock & Wilcox Co.*, 2016 WL 192269, at *9 (D. Colo. Jan. 15, 2016). Moreover, "a common adversary," will not suffice. *Martinez,* 2023 WL 4706752 at *5. There must be some showing that the parties are working towards a common legal strategy. *Black*, 74 P.3d at 469; *see, e.g., Keybank Nat'l Ass'n v. Williams*, 2022 WL 278516, at *3 (D. Colo. Jan. 31, 2022) (where the parties shared a common legal interest in ensuring the defendants' hiring and employment of an individual complied with the defendants' restrictive

[8] "Colorado and Federal common law both recognize the common-interest doctrine as an exception to the waiver of [attorney-client] privilege" when privileged information is shared with a third-party. *Viesti Assocs., Inc. v. Pearson Educ., Inc.*, 2013 WL 3825899, at *2 (D. Colo. July 24, 2013). There is no federal procedural rule regarding the common interest doctrine, there is only federal common law and Colorado law.

covenants, and in developing defenses if accused of violating those covenants). Moreover, the Tenth Circuit has cautioned against construing the common interest doctrine too broadly. *See Frontier Refining., Inc. v. Gorman-Rupp Co*., 136 F.3d 695, 705 (10th Cir. 1998) (cautioning that "[a] growing majority of courts appear to reject the applicability of the doctrine unless the current adversaries were actually represented by the same attorney in the prior litigation").[9]

The DOL has not described the legal interest(s) it purportedly shares with Plaintiffs. (*See* Doc. No. 220 (stating only that it shares interests, but not specifying what those interests are); *see also* Doc. Nos. 220-1; 220-2 (declarations attached to DOL SOI, in which declarants describe the DOL's investigation at a high-level, explain it remains open, admit they have not reached conclusions, and state in conclusory terms that the DOL shares interests with Plaintiffs); Doc. No. 164-3 (CIA declaring in conclusory terms that the parties share a common interest, but not describing that interest).)

Plaintiffs, on the other hand, argue they and the DOL share a common legal interest in restoring losses to The Plan. (Doc. No. 231 at 2-4.) They rely almost exclusively on the contents of the DOL Demand Letter, issued over two years ago.[10] In that letter, the DOL accuses

[9] Some courts in this Circuit interpret *Frontier Ref., Inc.,* as requiring "*identical*" interests. *See KPH Healthcare Servs., Inc. v. Mylan N.V.,* 2022 WL 17471572, at *7 (D. Kan. Dec. 6, 2022) (finding the Tenth Circuit's decision in *Frontier Ref., Inc.*, 136 F.3d 695, may not have squarely decided that "identical" versus "similar" legal interests are required for a common interest privilege, but the "identical" standard was part of its holding, and is therefore binding). Here, the outcome is the same under either standard. Moreover, the Court has reservations about the interpretation in *KPH*. Thus, at this time, the Court proceeds under the less stringent standard articulated in, *Martinez,* 2023 WL 4706752 at *2.

[10] The DOL Demand Letter appears to be the only instance in which the DOL articulates some specific interest that touches on this litigation. Therefore, it seems Plaintiffs had no choice but to rely on this document.

Defendant Argent of breaching its fiduciary duties as trustee for various ESOP transactions, including the one at issue in this litigation. (Doc. No. 211-2.). The DOL also states it "has concluded that Argent violated its fiduciary duties under [ERISA]," and it demands, among other things, that Argent restore losses for the various transactions at issue in that letter. (*Id.*)

Plaintiffs' description of the DOL Demand Letter is generally accurate, but for purposes of identifying a common legal interest, the letter's significance is overstated. ***First***, the DOL Demand Letter concerns *six* different ESOPs, and only one of those is The Plan. ***Second***, the DOL Demand Letter concerns the alleged breach of fiduciary duties by one Defendant—Argent. In contrast here, Plaintiffs filed multiple claims against Argent, and multiple claims against multiple other Defendants. (*See generally* Doc. No. 91.) ***Third***, and accepting for the sake of argument Plaintiffs' articulation of its shared interest with the DOL, an interest in "restoring funds" is not a *legal* interest, it is a *financial* one. Seeking to restore money to a fund, or multiple funds, is hardly a reflection of some joint legal strategy. Indeed, as the Tenth Circuit pointed out on interlocutory appeal, both the DOL and Plaintiffs are authorized to pursue plan-wide relief, but that does not mean they both will. *See Harrison*, 59 F.4th at 1111-2.[11] ***Fourth***, and perhaps most importantly, regardless of the statements made in the DOL Demand Letter over two years ago, the DOL's *current* position directly contradicts the notion that it has some defined legal

[11] Plaintiffs rely on this discussion by the Tenth Circuit to argue the common legal interest requirement "is clearly met," and it is "impossible" to hold otherwise. (Doc. No. 231 at 2-3.) The Court disagrees. As the Tenth Circuit noted, "nothing in the statute *requires* the Secretary of the DOL to file any such suit, and it is unreasonable to assume that the DOL is capable of policing every employer-sponsored benefit plan in the country." *Harrison,* 59 F.4th at 1111–12. "'[T]here could be a host of reasons preventing the Secretary from bringing even the most meritorious of claims,' including its limited resources." *Id.* In other words, the Tenth Circuit's discussion of this issue highlights exactly why—despite dual authority to seek plan-wide relief—there could still be a divergence of legal interests and legal strategy.

interest or strategy, much less one it shares with Plaintiffs. (*See generally* Doc. No. 220.) The DOL admits it has not reached any conclusions, made any decisions about litigation, or even developed a view on the merits of this case. (*Id.* at 2 (DOL SOI stating, the DOL "takes no position on the merits of this case."); *see also id.* at 6 (stating, "the Interview Reports were specifically prepared to assist DOL in deciding whether to litigate, a decision that has not been made.").) If the DOL has not even formed a position on the merits of this case, how can it develop a common legal strategy with Plaintiffs?

Moreover, while Plaintiffs argue "[c]ourts *routinely* uphold a common interest privilege between DOL and private plaintiffs," (Doc. No. 221 at 3 (emphasis added)), a closer look at the two out-of-circuit cases on which they rely, reveals their statement is a stretch.

First, Plaintiffs rely on a transcript from a hearing in the Southern District of New York, in which the same firm representing Plaintiffs here, argued common interest with the DOL. (Doc. No. 212-1); *see In re Beacon Associates Litigation*, 1:09-cv-00777-LBS-AJP (S.D.N.Y. 2011). There, Judge Peck offered a preliminary view on the common interest privilege. (*See* Doc. No. 212-1, 19-25.) But he specifically deferred ruling on the issue so the parties could first raise it with a special master, Judge Hughes. (*Id.* at 19:17-23 ("If there are any legal issues that remain after both the voluntary look-see and whatever else you then do in front of Judge Hughes…you can then tee a motion up with enough data that I am not ruling in the abstract on what is specifically an issue in your case. Common interest privilege.").) Juge Peck anticipated he may find a common interest or joint privilege, but he did not issue a ruling. (*Id.* at 25:3-6 ("[I]f you want to make a motion, make a motion. I am not ruling on this just on letter briefs. Frankly, I think you are going to lose, but I will read your material with a semi open mind and rule

accordingly.").) More importantly, it appears that in *Beacon Associates*, the DOL had *already filed litigation*. (*See id.* at 20 (discussing whether the common interest privilege covers the shared damages analysis, and noting that "the Secretary brought litigation," and that if the parties were cooperating towards common litigation—with lawyers talking to lawyers—there would likely be a common interest).)

That the DOL already filed litigation, also appears true in the second case Plaintiffs cite, *Perez*, 2015 WL 12914362, at *2. There, like in *Beacon Associates,* the court expressly referenced "[t]he Secretary's *civil lawsuit*," which sought "reinstatement and back pay," and the court repeatedly referenced the parties' "joint strategy" and "shared litigation strategy." (*Id.* (emphasis added).) In other words, *Perez* and *Beacon Associates*, are distinguishable[12] because there the DOL had already reached conclusions about its claims and legal strategy. And while litigation—or looming litigation—is not necessarily required for there to be a common legal interest, the parties must be engaged in some joint effort towards a common legal strategy. *See Martinez*, 2023 WL 4706752 at *2. That is not the case here. (*See* Doc. No. 220 at 2 (DOL SOI stating, the DOL "takes no position on the merits of this case.").)

[12]*Perez* is also distinguishable because it appears the court applied a lower standard than is applied in this District. *Compare Perez*, 2015 WL 12914362, at *2 (stating, "[a] common interest agreement may be implied from conduct and situations, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in litigation….The doctrine may apply even without an express understanding that the recipient shall not communicate the contents thereof to others' and may reasonably be inferred from consultation among clients and counsel allied in common legal cause that disclosures are confidential." (internal quotations and citations omitted)); *with Martinez,* 2023 WL 4706752 at *2 (finding the doctrine only applies when the communications are "intended and reasonably believed to be part of an on-going and joint effort to set up a common legal strategy." (internal quotation omitted)). And, as noted above, there is some indication that an even more stringent standard (identical interest), might apply in this Circuit. *See generally KPH Healthcare Servs., Inc.*, 2022 WL 17471572 at *7.

The Court recognizes the special circumstances of this case—where the government and private plaintiffs necessarily have some overlapping interests—but contrary to Plaintiffs' contention, the Court has not found that "[c]ourts *routinely* uphold a common interest privilege between DOL and private plaintiffs." (Doc. No. 221 at 3 (emphasis added).) Indeed, one court very recently *declined* to find that a common interest preserved government privilege (including the deliberative process privilege). *See, e.g.*, *Georgia v. United States Dep't of Just*., 657 F. Supp. 3d 1 (D.D.C. 2023);[13] *see also McMorgan & Co. v. First California Mortgage Co.,* 931 F.Supp. 703, 707-08 (N.D. Cal. 1996) (distinguishable in some respects—including that the information flowed from private litigant to DOL apparently without written agreement—but expressly *declining* to find a common interest privilege between DOL and private litigants in ERISA case).

In *Georgia*, the state revised its election procedures following the 2020 presidential election. *Id.* at 6. Thereafter, the United States Department of Justice began working with private organizations and individuals to block certain changes through multifaceted litigation. *Id.* Georgia submitted a FOIA request to determine how the DOJ might be collaborating with private parties. *Id.* The DOJ produced some documents but invoked work product protections and the deliberative process privilege to withhold others. *Id.* at 18. However, the documents it withheld had previously been provided to private litigants. *Id.* Thus, the question was whether the DOJ's purported common interest agreement with those non-governmental private litigants, preserved its privileges. *Id.*

[13] The DOL SOI cites this case favorably. (*See* Doc No. 220 at 8.) This decision is currently on appeal to the U.S. Court of Appeals for the D.C. Circuit. *See State of Georgia, et al v. DOJ*, 23-5083 (D.C. Cir.).

The DOJ argued (like the DOL does here) that even if the DOJ's interests are somewhat different, the DOJ and the private plaintiff groups "have a 'substantial overlap' in the claims brought and the provisions challenged." *Id.* at 21. The DOJ also argued there was overlap "with respect to relevant evidence and the legal standard applicable to the … claims." *Id.* But the court rejected the DOJ's arguments. It held the overlap was insufficient, stating:

> The plaintiff groups and DOJ did not merely bring separate lawsuits against SB 202. The groups, and DOJ, brought substantively different lawsuits asserting separate claims under separate legal theories. In its suit, for example, DOJ challenges SB 202 only as having a discriminatory purpose in violation of the Voting Rights Act. Yet the other lawsuits variously allege that SB 202 violates the First, Fourteenth, and Fifteenth Amendments, the Americans with Disabilities Act, the Rehabilitation Act, and the Civil Rights Act of 1964. And of those suits that did include claims under the Voting Rights Act, the private plaintiffs alleged discriminatory effects. But DOJ's allegations were limited to discriminatory purpose.

Id. at 20-21 (internal citations omitted). The court ultimately concluded the "DOJ and the private plaintiffs were not a united front in their litigation against the Act. Nor did they employ the same weapons or seek the same objectives." *Id.* at 21.

So too, here. The DOL is not a party to this case, it continues to separately investigate other ESOPs, it has not reached conclusions, and it expressly takes no position on the merits of this litigation. This makes a common legal strategy with Plaintiffs not only improbable, but impossible. To hold otherwise in a case like this could set a dangerous precedent. It would allow a government agency to weaponize private litigation against some target *before* confirming the target should be a target. Moreover, the government could litigate in the shadows, without giving the opposing party an opportunity to adequately probe and defend itself. The inverse is also true. A private litigant could leverage government powers for its own use in private litigation—*before*

the government has sufficient grounds to leverage those powers itself. And while it is true that the DOL "depends in part on private litigation to ensure compliance with [ERISA]," *Ramos v. Banner Health*, 325 F.R.D. 382, 396 (D. Colo. 2018) (observing this in the context of a class certification motion), the DOL cannot have it both ways. It cannot on the one hand, claim it has no view of the merits of this litigation, while on the other hand, align itself with one set of litigants to share information in confidence. The Plaintiffs' arrangement with the DOL has given Plaintiffs' access to information they can leverage, use to take shortcuts, and rely upon to circumvent ordinary discovery protocols.[14] The Court cannot allow that to continue.

CONCLUSION

(1) There is no common legal interest between the DOL and Plaintiffs.

(2) The DOL cannot rely on the CIA to protect against waiver.

(3) Execution of this Order is stayed until such a time as the Objection is resolved.

(4) The parties shall file a Joint Status Report within five (5) days of the court's decision on the pending Objection.

Dated this 11th day of September, 2024.

BY THE COURT:

Maritza Dominguez Braswell
United States Magistrate Judge

[14] For example, and as noted above, while Plaintiffs challenged Defendants' redactions of the DOL Demand Letter in this litigation, they simultaneously secured an unredacted version directly from the DOL. And while the DOL Demand Letter was not privileged in the first place, it illustrates the advantages of the arrangement.