GROOM LAW GROUP

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Committee on Education and Workforce
Subcommittee on Health, Employment, Labor, and Pensions

"Restoring Trust: Enhancing Transparency and Oversight at EBSA"
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Good morning, Chairman Allen, Ranking Member DeSaulnier, and members of the Subcommittee on Health, Employment, Labor, and Pensions ("Subcommittee"). Thank you for the opportunity to testify today about the issues surrounding common interest agreements between the U.S. Department of Labor (the "DOL") and private plaintiffs' attorneys, and the proposed legislation requiring disclosure of such agreements to ERISA plan sponsors, employers, and fiduciaries.

My name is Lars Golumbic. I am a Principal at Groom Law Group, Chartered ("Groom"), a law firm that has specialized in employee benefits (advising plan sponsors, fiduciaries, and service providers) since it was founded 50 years ago by Theodore R. Groom, who was instrumental in developing ERISA's landmark fiduciary responsibility provisions and later the Multiemployer Pension Plan Amendments of 1980. I am Co-Chair of Groom's ERISA Litigation Group and have been practicing in this area for nearly 25 years, representing plan sponsors, fiduciaries, and service providers in virtually every type of ERISA class action litigation and in DOL investigations and enforcement actions.

The ERISA defense bar has long suspected that the DOL had been supplying private plaintiffs' attorneys information it collected during investigations. It has been common in my experience for a frenetic DOL investigation to suddenly stagnate after the target produces documents or sits for interviews, only for a plaintiffs' law firm that specializes in ERISA class action lawsuits to

file a complaint against the fiduciaries or company sponsor of the same retirement plan concerning the very issues at the center of the DOL's investigation.

It was not until last year that my law firm uncovered concrete proof that the DOL has been working hand-in-glove with the plaintiffs' bar. My firm represents Defendant-fiduciaries accused of causing an employee stock ownership plan to overpay for employer stock in a class action lawsuit filed in the Federal District Court for the District of Colorado. Plaintiffs—represented by Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein"), a plaintiffs' firm that specializes in bringing ERISA class action lawsuits—were forced to produce in discovery an agreement formally memorializing the supposed common interest relationship between the DOL and Plaintiffs' counsel. This "common interest agreement" outlined the terms governing the manner in which the DOL would spoon-feed Plaintiffs' counsel information designated as confidential under the Freedom of Information Act ("FOIA") that the DOL collected during its investigation to help Plaintiffs' counsel prosecute its case.

In a series of rulings, the District Court rightly lambasted Cohen Milstein and the DOL for this insidious practice, holding that they did not, in fact, share a common interest. "To hold otherwise in a case like this," the Court held, "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. . . . 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. The Court cannot allow that to continue.

We had uncovered proof positive that the DOL has been secretly feeding confidential information and documents that plan sponsors, fiduciaries, and service providers had provided during investigations and audits to private plaintiffs' attorneys.

Since this initial discovery last year, my firm and others have uncovered even more evidence of this secret partnership between the plaintiffs' bar and the government. For example, just one recent, targeted FOIA request revealed that the DOL has shared information with plaintiffs' counsel in many other class action lawsuits in the past few years alone, providing information and documents, coordinating on discovery, recommending favorable mediators, discussing legal strategy, and much more. Our understanding is that the DOL has done so in some matters even without the existence of a written common interest agreement. To be sure, the Office of the Inspector General's investigation into the DOL's historical practices that is currently underway may reveal many more examples of the cozy relationship between the DOL and the ERISA class action plaintiffs' bar.

The DOL's actions are not only distastefully underhanded, but they also run afoul of a number of legal protections to which plan sponsors, fiduciaries, and service providers are entitled under the law.

For example, FOIA exempts from public disclosure documents a producing party marks "confidential" or "exempt from disclosure under FOIA" because they are "trade secrets and commercial or financial information," and other provisions of federal law penalize the unauthorized disclosure of such confidential information by federal employees. Though FOIA allows the government to disclose confidential material under certain circumstances, the producing party must be notified beforehand so that it may act to protect its confidential material. Consistent with these protections, the DOL's enforcement manual for its employee benefits investigators prohibits

disclosing confidential material to third parties without first adhering to the procedural protections afforded by FOIA and other federal statutes. Yet, in my experience, the DOL regularly circumvents these safeguards when it shares such information with the plaintiffs' bar.

If that were not enough, these secret arrangements also subvert the enforcement scheme Congress created within ERISA by allowing plaintiffs to circumvent the rules of discovery in federal court. Congress created two avenues for enforcing ERISA's provisions: first, the DOL may open investigations and issue findings; and, second, private litigants or the DOL may file suit in federal court. ERISA section 504(a) grants the Secretary of Labor broad authority to open investigations, subpoena documents, and interview individuals "as he may deem necessary to enable him to determine the facts":

> **(a) Investigation and submission of reports, books, etc.** The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this subchapter or any regulation or order thereunder—
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> > **(1)** to make an investigation, and in connection therewith to require the submission of reports, books, and records, and the filing of data in support of any information required to be filed with the Secretary under this subchapter, and
> >
> > **(2)** to enter such places, inspect such books and records and question such persons as he may deem necessary to enable him to determine the facts relative to such investigation, if he has reasonable cause to believe there may exist a violation of this subchapter or any rule or regulation issued thereunder or if the entry is pursuant to an agreement with the plan.

But ERISA does not bestow this same authority on private litigants, like plaintiffs' firms that specialize in finding plan participants to sign onto ERISA class actions. Instead, a private litigant must file a complaint containing sufficient factual details about their claims to make out a viable legal claim before obtaining any information from a counterparty. If after hearing the defendant's objections in a motion to dismiss, the federal judge assigned to the case finds that the

plaintiff satisfied that legal standard, then the plaintiff may request certain documents and depositions from the defendant, subject to the protections afforded by the Federal Rules of Civil Procedure as interpreted and applied by the federal court in which he or she have sued.

The DOL stomps on the scales of justice when it circumvents these litigation guardrails, creating an uneven playing field for plan sponsors, fiduciaries, and service providers—not to mention potentially significant pay days for the ERISA plaintiffs' bar. Armed with key information and documents that they otherwise would not have access to, private plaintiffs' attorneys have far better odds of surviving a motion to dismiss, unlocking the gates to costly discovery and, by extension, obtaining leverage to extort favorable settlements—even for defendants who have fully complied with ERISA's standards but, in the absence of a settlement, would need to endure onerous discovery to get to trial and prove it. As the Supreme Court recently put it:

> [I]n modern civil litigation, getting by a motion to dismiss is often the whole ball game because of the cost of discovery. Defendants facing those costs often calculate that it is efficient to settle a case even though they are convinced that they would win if the litigation continued.

This continues to be true in the ERISA class action space, even as defendants in such lawsuits have largely prevailed on summary judgment and at trial, i.e., once the case actually reaches the merits.

The DOL's apparent practice of using common interest agreements is a disappointing development. Earlier in my career, the DOL was viewed as a welcome partner in a collaborative regulatory process. While the DOL and private sector did not always see eye-to-eye, the relationship was not antagonistic; reasonable minds were able to come together to reach commonsense agreements that worked for all stakeholders. Now, the notion that the DOL is on the same "team" as the ERISA plaintiffs' bar, with the regulated community on "the other side," seems to have metastasized within the DOL—despite the fact that all are aligned in furthering ERISA's goal of

encouraging employers to create and maintain benefit plans for their employees. Common interest agreements are but one symptom of this broader problem.

One reason for this unwelcome development seems to be the revolving door between the DOL and the ERISA plaintiffs' bar: frequently, attorneys departing the DOL slide directly into private practice with the very plaintiffs' firms to which the DOL attorneys backchanneled confidential information during their tenures. This incestuous relationship creates an alarming conflict for DOL personnel: use the DOL's subpoena power to force businesses to produce valuable confidential information, enrich plaintiffs' firms by providing it to them under the guise of a common interest, and get rewarded with a lucrative landing spot after leaving your government post.

Given the current state of affairs, the "Balance the Scales Act" is a much needed and welcome reform that will help to bring the DOL's underhanded activities out into the light of the public eye—as they should have been from the very beginning. Likewise, the "EBSA Investigations Transparency Act" will help hold the DOL accountable and provide essential oversight that has been lacking for far too long.

The importance of protecting the retirement assets of American workers cannot be understated. It is equally as essential to encourage employers to sponsor retirement plans in the first place. Fewer will do so if they feel that the playing field is tilted against them, even where they and fiduciaries unquestionably meet their obligations under ERISA. Together, these laws are an important first step in remedying the broken system that has, unsurprisingly, disrupted the careful balance that Congress struck when it enacted ERISA's regulatory and enforcement scheme.