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,	§	C.A. No. 3:22-cv-00243-K-BN
Plaintiffs,	§	
v.	§	
UNITED STATES DEPARTMENT OF LABOR and MARTIN J. WALSH, SECRETARY OF LABOR,	§	
Defendants.	§	

REPLY BRIEF IN SUPPORT OF
PLAINTIFFS' OBJECTIONS TO FINDINGS, CONCLUSIONS,
AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE

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Plaintiffs[1] file this reply brief in support of their Objections and Plaintiffs' Brief, and state:

I. INTRODUCTION

In its response ("Response") [Doc. 74] to Plaintiffs' Objections, the DOL continues to ignore or twist what the New Interpretation says and what the Fifth Circuit held in *Chamber of Commerce of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018). Having convinced the Magistrate Judge to accept the premise that it hasn't really reinterpreted the five-part test in any meaningful way, the DOL now hopes the Court will not look too closely under the hood but instead simply adopt the Magistrate Judge's erroneous Recommendations. The Court cannot do so, however, without running afoul of the Fifth Circuit's unequivocal holdings on the proper interpretation of ERISA and the five-part test. Accordingly, on *de novo* review, the Court should sustain Plaintiffs' Objections and enter an order vacating the New Interpretation in its entirety.

II. ARGUMENT

A. PLAINTIFFS' OBJECTIONS ARE SPECIFIC, PROPER, AND TRIGGER A DE NOVO REVIEW FROM THIS COURT

The DOL's Response begins with a half-hearted attempt to avoid *de novo* review of the Objections on the ground that they are not sufficiently specific, but instead merely "rehash the same absolutist, extreme arguments that the Magistrate Judge correctly

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[1] Defined terms and conventions 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.

rejected." Response at 19. This is nonsense. Plaintiffs have presented specific Objections to particular recommendations made by the Magistrate Judge, which they have supported with extensive briefing. The DOL's argument that this is insufficient misconstrues the applicable law and the nature of Plaintiffs' Objections. Indeed, under the DOL's argument, no party would ever be able to obtain *de novo* review of a Magistrate Judge's erroneous legal conclusion simply because it had previously presented its arguments on the issue to the Magistrate Judge in the first instance.[2] In fact, however, District Court judges routinely overrule incorrect conclusions of law proposed by Magistrate Judges. *See*, *e.g.*, *Apollo MedFlight, LLC v. Blue Cross Blue Shield of Tex.*, No. 2:18-cv-166-Z-BR, 2019 WL 4894263 (N.D. Tex. Oct. 4, 2019) (granting defendant's objection that Magistrate Judge erred in concluding that a Texas statute provided for implied private right of action). The DOL's attempt to avoid *de novo* review should be summarily rejected.

A party who files timely written objections is entitled to a *de novo* determination of the findings and recommendations of a Magistrate Judge to which the party specifically objects. 28 U.S.C. § 636(b)(l)(c); FED. R. CIV. P. 72(b)(2)–(3). *See Nettles v. Wainwright*, 677 F.2d 404, 409 (5th Cir. 1982) ("If objections are filed, the district judge must make a *de novo* determination, a 'fresh consideration,' of those findings objected to."), *overruled on other grounds by*, *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996).

[2] Of course, such a rule would subject the objecting party to a classic Catch-22. If the objecting party hadn't raised its arguments before the Magistrate Judge, the responding party would argue in the District Court that those arguments are waived. *Maurice v. State Farm Mut. Auto. Ins. Co.*, 235 F.3d 7, 10–11 (1st Cir.2000) ("The law is clear that when a dispositive motion is heard before a magistrate judge, the movant must make all her arguments then and there, and cannot later add new arguments at subsequent stages of the proceeding.").

The requirement that a party's objections be specific is intended to promote judicial efficiency and the objectives of the statute and rule by ensuring that the District Court is aware of, and need only consider, the aspects of the Magistrate Judge's to which a party objects. *Nettles*, 677 F.2d at 409; *Robert v. Tesson*, 507 F.3d 981, 994 (6th Cir. 2007) (objection is sufficient when it "explains and cites specific portions of the report which counsel deems problematic") (cleaned up). However, "[m]erely referring the court to previously filed papers or arguments does not constitute an adequate objection." *Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 766 (2d Cir. 2002).

The DOL cannot and does not try to claim there is any uncertainty about the specific recommendations Plaintiffs are objecting to or what the bases of their objections are. Plaintiffs have clearly identified each of the Magistrate Judge's legal conclusions with which they disagree. With respect to each, Plaintiffs' Brief provides sufficient background on the issue for the Court to understand the Magistrate Judge's ruling. Plaintiffs then set forth detailed arguments showing how and why those rulings are incorrect. *See, e.g.,* Plaintiffs' Brief at 8-9, 10-12 (common law fiduciary duty standard), 16-20 (regular basis prong), 25-29 (mutual agreement prong) 30-32 (remaining prongs), and 36-38 (fee for advice versus commission). Contrary to the DOL's arguments, this is anything but a general objection that the Magistrate Judge got it wrong or a wholesale incorporation of Plaintiffs' prior briefs.

Despite this, the Response asserts Plaintiffs have merely "copied and pasted" their prior briefing and are "rehashing" arguments the Magistrate Judge already rejected, citing

a handful of excerpts in which Plaintiffs' Brief uses the same or similar phrasing to arguments made in their summary judgment briefing before the Magistrate Judge. Response at 19-21. As noted above, however, an objection is not insufficient simply because it raises an issue the Magistrate Judge has considered and rejected. Indeed, that is the entire point of *de novo* review. As the Second Circuit has explained, the rule that the DOL is attempting to invoke is applicable to nonspecific or perfunctory objections. *Miller v. Brightstar Asia, Ltd.*, 43 F.4th 112, 120 (2nd Cir. 2022). That does not describe, however, a party that takes issue with legal conclusions contained in a Magistrate Judge's recommendation and timely files specific written objections to same, notwithstanding that the Magistrate Judge has already considered those issues. *Id*. at 121 ("To the extent that the objection sought to revisit an issue already argued, it was only because, in Miller's view, the magistrate judge's specific error was a fundamental one.").

The cases cited by the DOL are not to the contrary. Most of those decisions involved pro se prisoner complaints.[3] In several of the cases, it is apparent on the face of the opinion that only conclusory or general objections to a Magistrate Judge's rulings were filed.[4] Even then, however, the District Court did conduct a *de novo* review in most of the cases. Several

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[3] *Battle v. U.S. Parole Comm'n*, 834 F.2d 419 (5th Cir. 1987); *Garcia v. Lumpkin,* No. 6:22-CV-067-JDK-JDL, 2022 WL 1800935 (E.D. Tex. June 2, 2022); *Beck v. Texas Dep't of Crim. Just.*, No. 2:18-CV-218-Z, 2021 WL 272213 (N.D. Tex. Jan. 27, 2021); !*Vega v. Artuz*, No. 97CIV.3775LTSJCF, 2002 WL 31174466 (S.D.N.Y. Sept. 30, 2002).

[4] *Battle*, 834 F.2d at 421 (habeas petitioner cited no facts for his conclusion he was denied meaningful parole consideration, the magistrate judge's report did not mention that contention, and petitioner did not identify it in his objections to the report); *Vega*, 2002 WL 31174466, at *2 (prisoner's appeal of denial of Rule 60(b) motion merely rearranged portions of brief filed before Magistrate Judge and objected to Magistrate Judge's report "in its entirety on pages nine through twelve ... thirteen through twenty ... twenty-one through twenty-seven").

other cases cited by the DOL involved appeals from adverse benefits determinations made by the Social Security Administration, which involved first an appeal to an Administrative Law Judge and then to a Magistrate Judge.[5] Once again, while the claimant's objections were arguably insufficient, the Court in each case conducted a *de novo* review.[6]

Plaintiffs have presented specific Objections, supported by robust briefing, that more than meet the standard required under Rule 72. They are thus entitled to *de novo* review of those issues, and the DOL's suggestion to the contrary is unfounded.

B. THE MAGISTRATE JUDGE'S CONCLUSION THAT THE DOL'S REINTERPRETATION OF THE FIVE-PART TEST IS CONSISTENT WITH THE TRUST AND CONFIDENCE STANDARD REQUIRED BY ERISA AND *CHAMBER OF COMMERCE* IS BELIED BY THE TEXT OF THE NEW INTERPRETATION

Plaintiffs' Brief laid out how dramatically the text of the New Interpretation departs from the common law understanding of a fiduciary that Congress incorporated in ERISA. The DOL attempts to obscure this fundamental problem by littering the Response with repeated references to its intent to rely on the "facts and circumstances" in determining whether a relationship of "trust and confidence" exists between financial professionals and Retirement Investors. The Magistrate Judge erred in accepting this mantra as sufficient to uphold most of the New Interpretation. The facts and circumstances the New Interpretation says will satisfy the five-part test are clearly not those that would give rise to a special

[5] *Leslie G. v. Kijakazi,* No. 5:21-CV-202-H-BR, 2023 WL 2536111 (N.D. Tex. Mar. 16, 2023); *Mindy C. v. Kijakazi,* No. 1:20-CV-222-H-BU, 2022 WL 3210357 (N.D. Tex. Aug. 9, 2022); *Nolen-Davidson v. Comm'r, Soc. Sec. Admin.*, No. 4:20-CV-01085-P, 2021 WL 4476763, at *1 (N.D. Tex. Sept. 30, 2021).

[6] *See also CyWee Grp. Ltd. v. Google LLC*, No. 620CV000128ADAJCM, 2021 WL 2425999, at *3 (W.D. Tex. Feb. 17, 2021) (questioning whether objections merited *de novo* review but reviewing Magistrate's Report *de novo* regardless).

relationship of trust and confidence—*i.e.*, a fiduciary relationship—at common law. To this, the DOL essentially responds (with apologies to Lewis Carroll): "When I use a word, it means just what I choose it to mean—neither more nor less."[7]

Unable to defend what the New Interpretation says, the Response falls back to false characterizations of Plaintiffs' position as "absolutist" and seeking a "categorical exemption" for stockbrokers and insurance agents. Response at 22-24. As Plaintiffs have repeatedly pointed out, that is not their argument. But, as decades of common law demonstrate, it is true that the vast majority of sales encounters do not take place in the context of a fiduciary relationship. That is the common law understanding the Fifth Circuit held was incorporated in ERISA and captured by the five-part test. The New Interpretation undermines that rigorous standard by redefining what the five-part test means in a way that is just as flawed as the 2016 Fiduciary Rule's abandonment of the five-part test in its entirety.

The Response argues that Plaintiffs overstate the reach of the Fifth Circuit's holdings in *Chamber of Commerce*. In doing so, however, the DOL rarely addresses what the Fifth Circuit actually said, and the Court need only read the opinion for itself to see how far off-base the DOL's criticism is. Indeed, a few quotations should suffice:

- DOL's 1975 regulation flowed directly from contemporary understanding of "investment advice for a fee," which contemplated ***an intimate relationship between adviser and client beyond ordinary buyer-seller interactions***.[8]

[7] Lewis Carroll, Through the Looking Glass.

[8] *Chamber of Commerce*, 885 F.3d at 374.

- Substantial case law has followed and adopted DOL's original ***dichotomy between mere sales conduct, which does not usually create a fiduciary relationship under ERISA, and investment advice for a fee, which does***. In the Fifth Circuit, this court held that "[s]imply urging the purchase of its products does not make an insurance company an ERISA fiduciary with respect to those products."[9]

- The contemporary case law similarly demonstrates that when investment advice was procured "on a fee basis," it ***entailed a substantial, ongoing relationship between adviser and client***.[10]

Plaintiffs have no need to overstate the holdings of *Chamber of Commerce*; they were more than emphatic. And the DOL's effort to convince the Court that the Fifth Circuit's core objection to the 2016 Fiduciary Rule has been satisfied in the New Interpretation is meritless. What the Fifth Circuit said about the repeal of the five-part test in the 2016 Fiduciary Rule is equally applicable to the DOL's radical reinterpretation of that test here:

> The [2016] Fiduciary Rule extends regulation to any financial transaction involving an ERISA or IRA plan in which "advice" plays a part, and a fee, "direct or indirect," is received. The Rule expressly includes ***one-time IRA rollover or annuity transactions where it is ordinarily inconceivable that financial salespeople or insurance agents will have an intimate relationship of trust and confidence with prospective purchasers***.

Id. at 380. Remarkably, while the New Interpretation professed adherence to this holding, AR 8, the Response now urges the Court to ignore what the Fifth Circuit said and to instead defer to the DOL's "view" that further consideration of "the facts and circumstance

[9] *Id*. (quoting *Am. Fed'n of Unions v. Equitable Life Assurance Soc'y,* 841 F.2d 658, 664 (5th Cir. 1988)).

[10] *Chamber of Commerce*, 885 F.3d at 375.

surrounding the actual interactions is necessary before determining how common or rare relationships of trust and confidence are, ***even for certain 'one-time' transactions***." Response at 26-27, n. 10.[11] Needless to say, Plaintiffs don't agree that the DOL, the Magistrate Judge, or this Court can simply ignore the Fifth Circuit's ruling on how Congress defined fiduciary investment advice in ERISA.

Similarly, the Response ignores or seeks to minimize the Fifth Circuit's repeated invocation of the historical understanding of a fiduciary investment adviser, arguing that brokers and insurance agents "are often not mere salespeople." Response at 26.[12] But neither the New Interpretation nor the Response attempts to describe those factors that might demonstrate the rare situation where a broker or agent has "crossed the line" from salesperson to investment adviser. Instead, the New Interpretation sweeps in ordinary sale transactions as fiduciary by wholly failing to distinguish advice that is incidental to a sales recommendation from investment advice for a fee. As *Chamber of Commerce* explained however, federal and state legislation, including the Investment Advisers Act, had long excluded advice that is incidental to a broker's sales activities, for which they receive no separate compensation, from the definition of fiduciary "investment advice." *Chamber of*

[11] The Response attempts to dismiss this language in *Chamber of Commerce* as dicta. As the Court will see from a review of the opinion, however, that is not the case. Instead, the Fifth Circuit included this passage as a key factor in holding that the 2016 Fiduciary Rule was arbitrary and capricious in violation of the APA. *Id*. at 380.

[12] Indeed, the DOL chides Plaintiffs for using some variation of the term "salesperson" at least 30 times in their brief. *Id*. But that is hardly surprising, as the historical divide between salespeople and investment advisers is the fundamental issue in this case, just as it was in *Chamber of Commerce*, where the Fifth Circuit itself referred to salespeople or sales transactions more than 30 times.

Commerce, 885 F.3d at 375. Congress incorporated that distinction into ERISA's definition of a fiduciary who provides investment advice for a fee. *Id*. at 371. And, according to the Fifth Circuit, the five-part test likewise "echoed the then thirty-five-year old distinction drawn between an investment adviser, who is a fiduciary regulated under the Investment Advisers Act, and a broker or dealer whose advice is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." *Id*. at 365 (cleaned up).

The DOL and the Magistrate Judge ignore this important factor that historically differentiated salespeople and investment advisers. Indeed, the only times the concept of advice incidental to a sale is even mentioned in the Response is when it quotes from Plaintiffs' briefing. This omission is not accidental. The DOL is well aware that the "investment advice" it has targeted in the New Interpretation is a broker's or insurance agent's "advice" to a Retirement Investor to purchase an investment product the broker or agent is selling—*i.e.*, advice incidental to a sale. The New Interpretation then purports to describe how the five-part test can now be applied to that advice in order to deem the broker or agent a fiduciary.[13] The end result is that virtually every sale of a security or annuity to a Retirement Investor will be held to a fiduciary standard under ERISA.[14]

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[13] As discussed *infra*, in addition to its flawed starting point, the New Interpretation must also contort the plain language of the five-part test itself to reach this desired result.

[14] Notably, the Recommendations theoretically recognize that Congress intended to incorporate the line between salespeople and investment advisers in ERISA's definition of fiduciary. Recommendations at 40-41 (stating that a financial professional should be held responsible as a fiduciary if he or she "crosses the line from mere selling of investment products to offering investment advice"). However, the Magistrate Judge failed to address the ways in which

As a further purported justification for its defiance of *Chamber of Commerce*'s plain holding, the DOL also argues that, since 2018, the "regulators of stockbrokers and insurance agents have adopted heightened conduct standards that recognize that these financial professionals are not mere salespeople," referring to the SEC's Regulation Best Interest and the NAIC's model regulation. Response at 27. As Plaintiffs have previously explained, however, those regulations explicitly do not create or impose a fiduciary standard on brokers and insurance agents. Plaintiffs' Brief at 31, n.17. Although the Response argues this distinction is irrelevant and there is "no meaningful difference" between those standards and "ERISA's requirements for fiduciary investment advice," Response at 29, the DOL's own prior pronouncements belie that argument. In this regard, the New Interpretation itself expressly refused to accept the SEC's and NAIC's standards of conduct in the place of the fiduciary obligation the DOL sought to impose. AR 5. And, in oral argument before the Magistrate Judge, the DOL reaffirmed that it would not accept those other regulators' standards in lieu of holding brokers and agents to a fiduciary duty under ERISA. Oral Argument Tr. at 64-65.

Moreover, the DOL's citation to new standards the true regulators of brokers and insurance agents have chosen to impose is simply irrelevant to the question of ***the DOL's authority*** to redefine into existence a fiduciary duty under ERISA that Congress did not authorize. The SEC and state insurance regulators have been legislatively empowered to

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the DOL improperly shifted where Congress placed that line when it reinterpreted the five-part test.

enact the standards of conduct to which brokers and insurance agents must conform. The DOL's authority, on the other hand, is limited to issuing regulations to implement the standard Congress has enacted. In *Chamber of Commerce*, the Fifth Circuit authoritatively held what that fiduciary standard encompasses. The DOL's attempt to substantively alter that meaning by reinterpretation of the five-part test cannot stand, regardless of whatever code of conduct the actual regulators of financial salespeople choose to impose.

C. ORDINARY SALES COMMISSIONS ARE NOT A FEE FOR INVESTMENT ADVICE

The DOL's conflation of ordinary sales transactions and fiduciary investment advice is further evidenced by its argument that a broker or agent who receives a sales commission in a transaction will automatically have satisfied ERISA's investment advice "for a fee or other compensation" if the requirements of its watered-down five-part test have been met. In response to Plaintiffs' argument that this cannot be squared with *Chamber of Commerce*, the DOL accuses Plaintiffs of pushing for "an extraordinarily restrictive reading of ERISA (and expansive reading of *Chamber of Commerce*)" that effectively walls off brokers and agents from ERISA's fiduciary standard based solely on the manner in which they are compensated. Response at 39. As with the relationship of trust and confidence issue discussed above, however, it is the DOL, not Plaintiffs, that is mischaracterizing what the Fifth Circuit said.

The Fifth Circuit could not have been clearer about the importance of distinguishing between sales commissions and fees for investment advice in explaining who is an investment advice fiduciary as that term is used in ERISA:

> Significant federal and state legislation ***also used the term "investment adviser" to exclude broker-dealers when their investment advice was "solely incidental" to traditional broker-dealer activities and for which they received no "special compensation."*** The Investment Advisers Act of 1940, for example, defines "investment adviser" as "any person who, for compensation, engages in the business of advising others ... as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." But the Act ***excludes "any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor***."

Chamber of Commerce, 885 F.3d at 375 (cleaned up). Moreover, the opinion goes on to explain that the "case law similarly demonstrates that when investment advice was procured "on a fee basis," it entailed a substantial, ongoing relationship between adviser and client." *Id*. (citing multiple cases involving fee-based advisory services).

Chamber of Commerce further held that one of the problems with the 2016 Fiduciary Rule was that it conjoined "advice" with a "fee or other compensation, direct or indirect," but it ignored the preposition "***for***," which demonstrates that the fee must be for "advice" not for a "sale." *Id*. at 372-73. The Fifth Circuit held that ERISA preserved the historical distinction between commissions paid for completed sales and fees paid for provision of advice, and it therefore rejected the DOL's attempt to expand that statutory definition of investment advice for a fee to encompass ***any*** compensation paid in a transaction in which ***any*** investment advice is provided. *Id*. Neither the Recommendations nor the Response even acknowledge the Fifth Circuit's analysis of this issue of "special compensation" ***for*** the advice.

The Fifth Circuit's discussion of the importance of the distinction between sales commission and fees for advice is equally applicable to the New Interpretation, and the

Response does not really try to argue otherwise.[15] Instead, the DOL attempts to divert the Court's attention from that holding by erecting another strawman, accusing Plaintiffs of mounting the "extreme" argument that commissions "can ***never*** be 'investment advice for a fee' under ERISA." Response at 41, n. 20 (emphasis original). Citing to ERISA's broad reference to "a fee or other compensation, direct or indirect," the DOL argues it would be illogical to allow financial professionals to evade fiduciary status based solely on how they structure their compensation. *Id*. at 41. This argument misses the Fifth Circuit's point. It is not a question of how compensation is calculated or paid that is critical, but what the compensation is for. A salesperson is typically paid for completing a sale while an investment advisor is paid for providing advice. A rule that fails to recognize this distinction in defining who is a fiduciary is, as *Chamber of Commerce* held, fundamentally flawed.

Likewise, the DOL gains nothing by pointing to other language in the Fifth Circuit's opinion that acknowledges the possibility of situations in which commissions may

[15] Although *Chamber of Commerce* is clearly the controlling authority here, the Response cites to two cases from other circuits, neither of which is on point, to argue that other courts have found ordinary sales commissions to be a fee for investment advice. *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978), was a suit against the trustee of an ERISA plan, who the court held would be responsible as a fiduciary for his actions in "recommending, designing and implementing [an] amendment" of the plan. *Id*. at 459. The language cited in the Response is actually a quotation from a law review article that had no relevance to the court's decision. *See id*. at 458. In *Farm King Supply, Inc. v. Edward D. Jones & Co.*, 884 F.2d 288 (7th Cir. 1989), the plaintiffs, like the DOL here, tried to rely on the same language from *Eaves* to argue that a brokerage firm was an investment advice fiduciary. *Id*. at 293-94. The Seventh Circuit disregarded *Eaves* as irrelevant and rejected the plaintiffs' argument that the broker was a fiduciary, explaining "[t]he only 'agreement' between the parties was that the trustees would listen to Jones' sales pitch and if the trustees liked the pitch, the Plan would purchase from among the suggested investments, the very cornerstone of a typical broker-client relationship." *Id*. at 293.

constitute a fee for investment advice. In this regard, Plaintiffs have never disputed that a broker or agent can agree to serve as a customer's investment advisor and also agree he or she will only receive compensation for that service if and when the customer purchases commissioned products. That is the exception, however, and the problem is the DOL now seeks to have that exception swallow the rule, arguing that the payment of any sales commission will "presumably" satisfy the requirement that investment advice was being provided for a fee. Defendants' Motion [Doc. 40] at 51; AR 12 (investment advice for a fee requirement is construed "broadly" to cover "all fees or other compensation incident to the transaction"). The DOL's argument, which the Magistrate Judge erred in accepting, cannot be squared with any sensible reading of *Chamber of Commerce*.

D. THE NEW INTERPRETATION OF THE FIVE-PART TEST IS A SIGNIFICANT DEPARTURE FROM A SPECIAL RELATIONSHIP OF TRUST AND CONFIDENCE

The DOL's defense of its radical reinterpretation of the five-part test begins with the curious complaint that Plaintiffs have analyzed what the DOL has said about each of the individual prongs of the test. Response at 29. The Response suggests that Plaintiffs have argued that each prong must individually be sufficient to demonstrate that a financial professional is a fiduciary, which is patently incorrect. Instead, Plaintiffs have argued, as *Chamber of Commerce* held, that the entirety of the five-part test, at least as it had been understood for almost 50 years, captured the essence of a special relationship of trust and confidence as described in common law. In determining whether that is still the case under

the New Interpretation, the Court must of course examine what the DOL has said about each of its prongs.[16]

The Response also wrongly accuses Plaintiffs of grounding their arguments on assumptions about what the DOL meant in the New Interpretation rather than what it says. Response at 30. To the contrary, Plaintiffs have consistently cited the actual language of the New Interpretation in making their arguments. It is the DOL that has attempted to ignore what the New Interpretation says about each of the individual prongs of the five-part test by trying to hide behind the all-purpose cover that it intends to look at all the facts and circumstances. The Magistrate Judge allowed the DOL to get by with this evasion. The Court should not do the same.

1. Regular Basis

To demonstrate the fatal defect in the DOL's reinterpretation of the primary basis prong of the five-part test, and mindful of the Response's misguided criticism of Plaintiffs' arguments, we begin with a quote from the New Interpretation:

> [W]hen the parties reasonably expect an ongoing advice relationship at the time of the rollover recommendation, the regular basis prong is satisfied. ***This expectation can be shown by various kinds of objective evidence***, of which some examples are discussed below, ***such as the parties agreeing to check-in periodically on the performance of the customer's postrollover financial products***. In such cases, the parties' expectation at the time of the rollover recommendation ***appropriately demonstrates that the regular basis prong has been satisfied***, and, if the other prongs of the

[16] Although it is not at all clear, the DOL may be responding to Plaintiffs' criticism of the Recommendations' statement that "the mutual agreement and primary basis prong may be easy to satisfy under the DOL's present application." Recommendations at 62. Significantly, nowhere does the Response either directly disavow or defend this frank acknowledgement by the Magistrate Judge that Plaintiffs are correct in their assertion that the New Interpretation has significantly watered down the settled understanding of the five-part test.

> test are satisfied, the financial service providers making the recommendation are appropriately treated as investment advice fiduciaries under Title I and the Code. ***Likewise, to the extent that financial service providers hold themselves out to the customer as providing such ongoing services, and meet the other elements of the five-part test, they are fiduciaries.***

AR 9. Plaintiffs submit the Court cannot read this description and conclude it comports with the Fifth Circuit's teaching as to what constitutes the provision of investment advice on a regular basis that characterizes a special relationship of trust and confidence.

The DOL apparently recognizes this as well, as it has never addressed this point in its briefing in this case. The Response continues to dodge the issue, lamely arguing that this checking-in test is no longer relevant because the Magistrate Judge has recommended vacating the New Interpretation to the extent it would allow consideration of anticipated ongoing advice to a different plan. Response at 30. Of course, the DOL knows full well its revised interpretation of the regular basis prong will still be effective with respect to a broker's or insurance agent's dealings with a single IRA or employer plan. The DOL's silence on this issue thus makes clear that it has no legitimate argument in defense of its gutting of what it means to provide investment advice on a regular basis. Moreover, the Recommendations likewise fail to deal with the consequences of this rewriting of a critical requirement of the five-part test.

The Response argues that Plaintiffs err in claiming that the New Interpretation of regular basis means that any type of anticipated ongoing relationship or interaction between a financial professional and a Retirement Investor will be sufficient. According to the DOL, the New Interpretation captures only an "ongoing advice relationship" with respect to the

ERISA plan or IRA. Response at 31. But once again, the DOL's own words make clear that such an "ongoing advice relationship" can be satisfied by the parties agreeing to "check in" or financial professionals merely holding themselves out as offering ongoing services. As Plaintiffs have repeatedly noted, this standard (in combination with the other reinterpreted prongs of the five-part test) will mean that virtually every broker or insurance agent is a fiduciary when they deal with Retirement Investors. This conclusion is not a function of Plaintiffs' suppositions as to the DOL's motivations, but the terms of the New Interpretation itself.[17]

The Response also disputes Plaintiffs' characterization of this reinterpretation of regular basis as creating an "expectations-based model" that ignores whether a relationship of trust and confidence does in fact ever arise. Response at 33. The DOL argues instead that the test is based on the nature of the parties' relationship at the time of the sale. *Id*. Apparently without irony, the DOL then goes on to admit that the facts of the current relationship it will rely on includes the parties' "expectation of an ongoing relationship." Response at 33-34. Thus, in the span of a single paragraph, the DOL first disputes then confirms Plaintiffs' reading of the New Interpretation.

Finally, the DOL attempts to defend the Magistrate Judge's conclusion that investment "advice" provided in a first-time sales transaction may be sufficient to confer

[17] Of course, the DOL's motives to impose fiduciary responsibility in all transactions with a Retirement Investor were not some secret Plaintiffs had to divine. The DOL's own briefs before the Magistrate Judge were explicit: "The [New] Interpretation aligns the definition of investment advice with today's marketplace realities ***and ensures***, consistent with ERISA's text and congressional intent, ***that fiduciary status applies to "persons whose actions affect the amount of benefits retirement plan participants will receive***." Defendants' Motion [Doc. 40] at 39-40.

fiduciary status where the other prongs of the five-part test are met, citing *Goldsenson v. Steffens*, No. 2:10-cv-00440-JAW, 2014 WL 12788001 (D. Me. Mar. 7, 2014), and *Chiste v. Hotels.com L.P.*, 756 F. Supp. 2d 382 (S.D.N.Y. 2006). Even if they were on point, these two District Court opinions would obviously have little persuasive value here in light of the Fifth Circuit's clear holding to the contrary in *Chamber of Commerce*. However, neither case supports the Recommendations or the DOL's argument in any event. In *Goldsenson*, the court merely held, based on a detailed and complicated factual record, that a fact issue existed as to whether a common law fiduciary duty had arisen between an investment company and a client. *Goldsenson*, 2014 WL 12788001, at *83-84. Meanwhile, *Chiste* involved an Illinois rule that a fiduciary relationship exists between travel agents and their customers under traditional concepts of principal and agent. *Chiste*, 756 F. Supp. 2d at 416. As should be self-evident, that rule has no relevance at all to the definition of an investment advice fiduciary under ERISA.[18]

2. Mutual Agreement

The DOL's defense of the revised mutual agreement prong of the five-part test is both brief and unpersuasive. The Response does not address Plaintiffs' argument that the language of the New Interpretation conflicts with the reasoning of *Chamber of Commerce* by rejecting the idea that ERISA and the five-part test should be interpreted in a manner

[18] Somewhat desperately, the DOL cites *Chiste* solely for one out-of-context quote: !"A travel agent is a special agent, akin to a broker, which engages in a single business transaction with the principal." *Id*. As noted, however, the Illinois rule for travel agents is grounded in the law of principal and agent, and the court was evidently referring not to investment advice from a stockbroker but real estate sales agents/brokers, who become agents of buyers and sellers for a single transaction.

consistent with common law precedent, established market practices and understandings, and other federal and state statutory authorities in determining who is a fiduciary. Nor does the DOL attempt to defend the Magistrate Judge's misguided assertion that a contractual disclaimer cannot be relied upon to evidence the lack of a fiduciary relationship because of ERISA's non-waiver provision.[19] Finally, the Response fails to address the Recommendations' acknowledgement that, as Plaintiffs contend, the New Interpretation makes the mutual agreement prong (as well as the regular basis prong) easier to satisfy, thereby chipping away at the elements that the Fifth Circuit held reflect the essence of the common law fiduciary standard.

The DOL's only substantive argument on the mutual agreement prong is that the Magistrate Judge did not err in concluding that the New Interpretation "is not defective for promulgating a facts-and-circumstances" approach, and financial professionals cannot rely on a "boilerplate disclaimer while simultaneously holding themselves out as a trusted adviser." Response at 35. The fundamental flaw in the DOL's premise, however, is revealed in the remainder of that same paragraph, where it explains that this means brokers and agents must "act accordingly to demonstrate that there is in fact no mutual agreement, arrangement, or understanding" contrary to the contractual disclaimer. *Id*. (quoting AR 11). As we have already seen, however, the DOL's position in the New Interpretation is that

[19] The Response suggests in a footnote that the Magistrate Judge was merely invoking a similar principle from a different section of ERISA to support the correctness of the DOL's interpretation of mutual agreement in a functional manner. Response at 34, n. 14. Whatever this doubletalk is supposed to mean, it cannot obscure the error of the Magistrate Judge's clearly stated conclusion that, in light of ERISA's non-waiver provision, a disclaimer of fiduciary status could not be dispositive because it violates public policy. Recommendations at 59.

something as innocuous as agreeing to follow up with customers about financial products they purchase will evidence an ongoing advisory relationship. The net result, therefore, is financial professionals simply cannot contractually disclaim fiduciary status whenever they have, or expect to have, any kind of ongoing contact with their customers.

3. The Remaining Prongs

When it gets to the remaining prongs of the five-part test, the Response seemingly concedes that Plaintiffs are correct that the New Interpretation has rendered them virtually meaningless, which the DOL sees as no problem whatsoever. For example, Plaintiffs argued that the New Interpretation collapses the individualized advice and primary basis prongs and deems both of them satisfied whenever a Retirement Investor accepts a broker's or agent's recommendation to purchase a financial product. Plaintiffs' Brief at 31-32. DOL does not dispute this point, but argues it is a function of brokers and agents conforming with the SEC and NAIC standards that govern their conduct. Response at 36-37. However, this is just another variation of the argument (discussed above) that because the true regulators of stockbrokers and insurance agents have promulgated heightened standards of conduct, the DOL is now free to reinterpret its rule in a manner that will impose an even more stringent fiduciary duty on those brokers and agents. The Fifth Circuit flatly rejected this argument the last time the DOL made it. *Chamber of Commerce*, 885 F.3d at 378-79. The Court should do the same here.

The DOL then goes on to address the hypothetical involving a stockbroker's single cold call that was posed in Plaintiffs' Brief. When presented with the same scenario in the briefing before the Magistrate Judge, the DOL refused to respond, asserting it was an

"absurd hypothetical[]." [Doc. 40 at 58.] Now, however, the DOL confirms that Plaintiffs were correctly reading the New Interpretation all along, and that the broker in their hypothetical would indeed be deemed a fiduciary. Response at 38.[20] This remarkable admission should tell the Court everything it needs to know. The DOL is merely paying lip service to *Chamber of Commerce* in the New Interpretation and this litigation. In truth, the New Interpretation is designed to accomplish exactly what the Fifth Circuit held the DOL may not do—turn ordinary sales transactions into fiduciary investment advice.

E. THE DOL'S REINTERPRETATION OF THE FIVE-PART TEST IS UNREASONABLE UNDER ANY STANDARD OF REVIEW

Plaintiffs also objected to the Recommendations on the ground that the Magistrate Judge erred in concluding that New Interpretation is, apart from its conflation of Title I and II plans, a reasonable interpretation of the ERISA's definition of an investment advice fiduciary. The DOL's Response is largely devoted to arguing that the New Interpretation should not be reviewed through the lens of the major questions doctrine. In this regard, the DOL adopts the Magistrate Judge's flawed premise that the major question doctrine "circumvent[s] standard principles of judicial statutory interpretation." Response at 42. As Plaintiffs' Brief explained, that is not the case. The major questions doctrine "is a tool for discerning—not departing from—the text's most natural interpretation" in those cases in which it is unlikely that Congress would have left an issue of major economic or political

[20] Of course, the DOL dutifully recites that this will be the result if all elements of the five-part test are met, *id.*, but does not dispute Plaintiffs' argument that the hypothetical in fact satisfies all those elements as the DOL has revised them in the New Interpretation.

significance to an administrative agency without clear authorization. *Biden v. Nebraska*, 143 S. Ct. 2355, 2376-78 (2023) (Barrett, J. concurring).

In arguing this is not a major questions case, the Response, like the Recommendations, ignores one of the most important facets of the New Interpretation—the DOL's attempt to assert regulatory authority over the IRA marketplace by imposing ERISA fiduciary duties on financial professionals who recommend rollovers of retirement assets from an investor's 401k plan to an IRA. Of course, the Magistrate Judge recommended that this portion of the New Interpretation be vacated, and the DOL has not challenged that conclusion. That does not diminish, however, the scope of the regulatory coup the DOL originally attempted, which is precisely the type of case the Supreme Court has held the major questions doctrine applies to. The Response's efforts to portray the New Interpretation as nothing more than quotidian regulatory guidance that is well within the DOL's historical wheelhouse (Response at 42-44) ignores both the breadth of the attempted takeover and the Fifth Circuit's clear rebuke the first time the DOL attempted it. Indeed, even after excising the portion of the New Interpretation that the Magistrate Judge ruled should be vacated, the remainder of the New Interpretation still seeks to redefine who is a fiduciary in ways that represent a seismic shift in the financial services industry. The Magistrate Judge erred in concluding that the DOL's attempt to redefine what constitutes fiduciary investment advice under ERISA, contrary to the Fifth Circuit's holding on that

issue, is a matter that rests within the DOL's core competencies and expertise. Recommendations at 35-36.[21]

Regardless of whether the major questions doctrine applies, the Court should hold that the New Interpretation of the five-part test is an unreasonable reading of ERISA's definition of an investment advice fiduciary for all the reasons already discussed in the Plaintiffs' Brief and above. The DOL's Response merely rehashes its argument that the New Interpretation does in fact focus on the parties' reasonable understanding as to whether a relationship of trust and confidence exists. Response at 46. As Plaintiffs have made clear, however, the problem is those words do not accurately describe the actual behaviors that the New Interpretation says will create a fiduciary relationship. Thus, in addition to being contrary to law, the New Interpretation is an arbitrary and capricious reading of ERISA.

F. THE COURT SHOULD VACATE THE NEW INTERPRETATION IN ITS ENTIRETY

Finally, the DOL disputes Plaintiffs' contention that the New Interpretation should be vacated in its entirety and/or a permanent injunction against its enforcement should be entered. On the former point, the Response suggests Plaintiffs contradict themselves in arguing that a complete vacatur is appropriate given that the central focus of the New Interpretation—*i.e.*, rollover transactions—is being struck down. If that is so, the DOL argues, why are Plaintiffs objecting to the Magistrate Judge's Recommendation and

[21] The rest of DOL's argument on the applicability of the major questions doctrine largely parrots the Magistrate Judge's Recommendations and tries to distinguish individual major question cases on their facts. Plaintiffs have already addressed these arguments in Plaintiffs' Brief and will not belabor them here.

requesting that the Court hold the rest of the DOL's reinterpretation of the five-part test is also at odds with ERISA's definition of fiduciary and is arbitrary and capricious? Response at 49. The answer is, of course, that both things can be true, and Plaintiffs are entitled to pursue all arguments supporting the relief they seek just like any other litigant.

Although the DOL wrongly accuses Plaintiffs of speaking out of both sides of their mouths, it is interesting to note that while the DOL is arguing in this Court that the remainder of the New Interpretation can be readily severed and enforced without the portion the Magistrate Judge has recommended be vacated, it has simultaneously sent yet another proposed rule to redefine who is an investment advice fiduciary under ERISA to the Office of Management and Budget for review. *See* RIN 1210-AC02, Title: Retirement Security (Sept. 8, 2023).[22] While Plaintiffs and the rest of the public are not privy to what is contained in the DOL's new proposal, the abstract contained on the DOL's regulatory agenda reflects that it intends to amend the definition of fiduciary found in the 1975 rule "to more appropriately define when persons who render investment advice for a fee to employee benefit plans and IRAs are fiduciaries within the meaning of" ERISA and the Code, and will take into account "developments in the investment marketplace, including in the ways advisers are compensated that can subject advisers to harmful conflicts of interest."[23] Similarly, while the Response touts that, unlike the 2016 Fiduciary Rule, the New Interpretation preserved PTE 84-24 for use by insurance agents, the DOL has also

[22] https://www.reginfo.gov/public/do/eoReviewSearch

[23] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=1210-AC02

indicated that its new proposed rule will amend or eliminate existing PTEs, *id*., a change that is almost certainly aimed at PTE 84-24.

To turn the DOL's question back on it then, why is it now proposing yet another rule—its third in five years—to redefine who is a fiduciary if the five-part test as reinterpreted in the New Interpretation describes the special relationship of trust and confidence that the Fifth Circuit has unequivocally held was incorporated by Congress in ERISA's definition of investment advice fiduciary? Unlike its words, the DOL's actions tell the Court it would not have promulgated the New Interpretation in its present form without the language authorizing the aggregation of advice to employer plans and IRAs for purpose of establishing the regular basis prong of the five-point test. The entire New Interpretation should therefore be vacated, and a permanent injunction against its enforcement entered, so that ordinary stockbrokers and insurance agents are not left to guess at the limits of its reach in non-rollover transactions.

III. CONCLUSION

For the reasons set forth above and in Plaintiffs' Brief, Plaintiffs respectfully request that the Court sustain its Objections and enter an order granting all of the relief requested therein.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 4, 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