U.S. Department of Labor Office of the Solicitor

Via ECF and E-mail January 15, 2021

Hon. Andrew L. Carter, Jr.
U.S. District Court for the Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007
ALCarterNYSDChambers@nysd.uscourts.gov

Re: ***Ferguson v. Ruane, Cunniff & Goldfarb Inc.*, No. 1:17-cv-6685-ALC-BCM**
***Ferguson v. Goldfarb*, No. 1:20-cv-07092-ALC-BCM**
(Related Case *Scalia v. Ruane, Cunniff & Goldfarb, Inc.*, No. 1:19-cv-9302-ALC-BCM)
Letter re: Proposed Class Action Settlement Agreements

Dear Judge Carter:

Eugene Scalia, U.S. Secretary of Labor (the "Secretary"), writes to strongly object to any attempt to bind the Secretary through the injunctive provisions in the proposed settlement agreements and related proposed orders filed in the above-captioned cases. "[T]he ERISA enforcement scheme, carefully constructed by Congress, is undermined if private litigants can sue ERISA violators first, reach a settlement, and bar the Secretary's action." *Herman v. S.C. Nat'l Bank*, 140 F.3d 1413, 1425–26 (11th Cir. 1998). Yet the parties attempt to undermine ERISA in exactly the same manner here. For example, each of the parties' proposed Preliminary Approval Orders includes the following provision:

> the Court preliminarily enjoins and bars . . . the Secretary . . . from bringing or prosecuting in any forum any Claim that arises from, relates to, or is connected with . . . the conduct alleged in a complaint or demand filed in any Related Proceeding and any subsequent pleading or legal memorandum filed in any Related Proceeding; [and] . . . the Plan (including, without limitation, the selection, retention and monitoring PSP investments, the performance, fees, and any other characteristic of the PSP) . . . .[1]

[1] *Ferguson*, ECF No. 261-4 ¶ 18 (emphasis added); *see also Ferguson*, ECF No. 263-4 ¶ 18; *Ferguson II*, ECF No. 7-4 ¶ 18. The parties' proposed Final Approval Orders contain similar injunction provisions. *See Ferguson*, ECF No. 261-3 ¶ 13; *Ferguson*, ECF No. 263-3 ¶ 13; *Ferguson II*, ECF No. 7-3 ¶ 13.

Moreover, the Secretary is not a party in these cases or to the proposed settlement agreements, nor has he communicated any endorsement of the proposed settlements to the parties.[2] Nevertheless, the parties have improperly conditioned their proposed class action settlement agreements on enjoining the Secretary from litigating his claims in his related case *Scalia v. Ruane, Cunniff & Goldfarb, Inc.*, No. 1:19-cv-9302-ALC-BCM ("*Scalia*"), pending before Your Honor, which would amount to a *de facto* motion to dismiss the *Scalia* action.[3]

As detailed in the Secretary's Opposition to Plaintiff's Motion for a Preliminary Injunction and Appointment of a Special Master in *Ruane, Cunniff & Goldfarb, Inc. v. Payne*, No. 1:19-cv-11297-ALC, ECF No. 40 (S.D.N.Y. Jan. 24, 2020) (attached as Exh. A), the Secretary has primary enforcement and regulatory authority for the fiduciary responsibility provisions in Title I of ERISA. 29 U.S.C. §§ 1132(a)(2) & (5), 1134, 1135. Pursuant to that authority, the Secretary sued Ruane, Cunniff & Goldfarb, Inc., DST Systems, Inc., Robert Goldfarb, and fifteen other individuals who committed breaches of their ERISA fiduciary duties in connection with the mismanagement of investments of the DST Systems, Inc. 401(k) Profit Sharing Plan ("Plan"), causing major losses to the Plan that far exceed the proposed settlement amounts. *Scalia*, ECF No. 1. The *Scalia* matter is currently being litigated before Your Honor, and the Secretary recently filed an opposition to the defendants' motions to dismiss in that matter. *Scalia*, ECF No. 134.

Well-established case law expressly forbids private parties from attempting to use settlements as a vehicle to enjoin the Secretary from exercising his right and responsibility to independently enforce ERISA. *See Herman v. S.C. Nat'l Bank*, 140 F.3d 1413, 1425–26 (11th Cir. 1998); *Agway, Inc. Employees' 401(k) Thrift Inv. Plan v. Magnuson*, 409 F. Supp. 2d 136, 146 (N.D.N.Y. 2005) ("Endorsement of a private settlement attempting to bar the Secretary's action in a particular case would effectively undermine the ERISA enforcement scheme carefully constructed by Congress."). In asserting his claims in *Scalia*, the Secretary does not represent or otherwise step into the shoes of any participant or purported class member in the above-captioned cases. Exh A. at 9; *see also* Exh. A at 6–10 (citing *S. C. Nat'l Bank*, 140 F.3d at 1426 n.22 ("ERISA gives plan beneficiaries and the Secretary independent rights of action . . . and

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[2] The parties suggest that their proposed settlement agreements have the endorsement or approval of interested third parties. *See Ferguson*, ECF No. 265-1 at 23–24 ("If any [interested parties] have legitimate criticisms of the settlement (which *Plaintiffs strongly believe they do not*), those criticisms should be heard by the Court . . . ." (emphasis added)); *see also Ferguson*, ECF No. 266-1 at 23–24; *Ferguson II*, ECF No. 8-1 at 23. As the Secretary has discussed previously: "the Secretary does not join or endorse any of the settlement agreements reached by the other parties." Secretary's Letter Requesting Resolution of Pending Requests, *Scalia*, ECF No. 105 (attached as Exh. B).

[3] *See Ferguson v. Ruane Cunniff & Goldfarb Inc.*, No. 1:17-cv-6685-ALC-BCM ("*Ferguson*"), ECF No. 261 ¶¶ 1.38, 1.6, 3.2.1, 3.2.6, 3.2.6.1; *Ferguson*, ECF No. 263 ¶¶ 1.39, 1.62, 3.2.1, 3.2.6, 3.2.6.1; *Ferguson v. Goldfarb*, No. 1:20-cv-07092-ALC (S.D.N.Y.) ("*Ferguson II*"), ECF No. 7 ¶¶ 1.39, 1.61, 3.2.1, 3.2.6, 3.2.6.1; *Doctor's Assocs., Inc. v. Reinert & Dupree, P.C.*, 191 F.3d 297, 303 (2d Cir. 1999) (reversing district court entry of injunction against non-party as contrary to Federal Rule of Civil Procedure 65(d)).

nowhere forecloses private actions after the Secretary files suit, or, the Secretary's suit after a private action commences.")).[4]

The fact that private parties have reached settlements in their cases has no impact on the Secretary's independent enforcement authority. *See* Exh. B. As the Secretary explained in his letter filed with the Court in *Scalia* on September 1, 2020, all participants have the right to pursue private actions "whether through federal litigation or arbitration." *Id.* Private settlements, however, cannot "affect the Secretary's own action except to reduce the total applicable recovery amount," and the Secretary remains committed to aggressively pursuing his claims in *Scalia* "until full relief is secured." *Id.*

The Secretary strongly requests that the Court reject the improper injunctive provisions in the parties' proposed settlement agreements and, most urgently, the parties' requests for preliminary injunction in their proposed Preliminary Approval Orders. These improper provisions impermissibly attempt to impede the Secretary's legal authority and ongoing litigation in *Scalia,* and would illegally undermine the ERISA enforcement scheme carefully constructed by Congress.[5] Should the Court consider granting any of these proposed orders, the Secretary requests the opportunity to provide further briefing.

Respectfully submitted,

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[4] *See also Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 691 (7th Cir. 1986) (in the context of private parties' settlements, explaining that "[t]o hold that res judicata bars the Secretary from independently pursuing enforcement of ERISA would effectively limit the authority of the Secretary under ERISA"); *Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991) (per curiam) (noting that ERISA "authorizes the Secretary of Labor to bring suit concurrently with private plaintiffs to recover appropriate damages").

[5] Only Goldfarb has provided any legal argument in support of enjoining the Secretary's action in *Scalia*. *See Ferguson II*, ECF No. 9 at 13–16. Goldfarb merely reprises the failed arguments of Ruane's declaratory action in *Payne*, and they should be rejected for the reasons explained in the Secretary's briefing in that case. Exh. A at 6–10. The Court should also reject Goldfarb's inappropriate attempts to re-litigate here (where the Secretary is not a party) the arguments he made in support of his motion to dismiss in *Scalia*. *See Ferguson II*, ECF No. 9 at 2–9, 15–16.

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