

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:21-cv-304-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.

**PLAINTIFFS' BRIEF REGARDING COMMON INTEREST AGREEMENT WITH THE
UNITED STATES DEPARTMENT OF LABOR**

Plaintiffs and the Department of Labor (“DOL”) share a common interest in this litigation, memorialized by their written Common Interest Agreement (“CIA”), dated April 21, 2023. Wheeler Decl. Ex. A. Pursuant to the Court’s Order, ECF 219, Plaintiffs file this short brief regarding the validity of the common interest agreement.

The common interest doctrine is not a stand-alone privilege but, rather, is an exception to the waiver of privilege when privileged information is shared with third parties. *Martinez v. Nationwide Affinity Ins. Co. of Am.*, 2023 WL 4706752, at *2 (D. Colo. July 24, 2023). “Under the doctrine, ‘communications shared with third persons who have a common legal interest with

respect to the subject matter thereof will be deemed neither a breach nor a waiver of the confidentiality surrounding the attorney-client relationship.’ The doctrine applies only to communications made in confidence and ‘intended and reasonably believed to be part of an ongoing and joint effort to set up a common legal strategy.’” *Id.* at *2 (quoting *Black v. Sw. Water Conservation Dist.*, 74 P.3d 462, 469 (Colo. App. 2003)); *see also Phillips v. Boilermaker-Blacksmith Nat’l Pension Trust*, 2021 WL 4453574, at *5 (D. Kan. Sept. 29, 2021) (“The Tenth Circuit recognizes the common interest doctrine which normally operates as a shield to preclude waiver of the attorney-client privilege when a disclosure of confidential information is made to a third party who shares a community of interest with the represented party”); *Gottlieb v. Wiles*, 143 F.R.D. 241, 250 (D. Colo. 1992).

The CIA in this case is facially valid, as it both demonstrates that DOL and Plaintiffs intended for the exchange of information to be confidential and intended to set up a common legal strategy. Ex. A at Recitals C, D, E and ¶¶ 3, 4; *Martinez*, 2023 WL 4706752 at *2. And the DOL and Plaintiffs have a common legal interest, as they are both authorized to bring the same representational claim on behalf of the ESOP. *Harrison v. Envision Management Holding Inc. Bd. of Directors*, 59 F.4th 1090, 1111-12 (10th Cir. 2023) (“It is true that [29 U.S.C.] § 1132(a)(2) authorizes the DOL, as well as plan participants (and beneficiaries and fiduciaries), to file suit and obtain the forms of relief outlined therein.”).

As DOL noted in its own filing, ECF 220, ERISA authorizes the agency to investigate violations of the statute and to share materials from investigations with “any person actually affected by any matter which is the subject of an investigation.” 29 U.S.C. § 1134(a); *see also Ramos v. Banner Health*, 325 F.R.D. 382, 396 (D. Colo. 2018) (observing that the Secretary of Labor’s enforcement of ERISA “depends in part on private litigation to ensure compliance with

the statute” (quoting *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 n.8 (8th Cir. 2009))). Courts routinely uphold a common interest privilege between DOL and private plaintiffs even where there is no explicit written common interest agreement. *See, e.g., Perez v. Brain*, 2015 WL 12914362, at *3-4 (C.D. Cal. Aug. 20, 2015). A written CIA simply helps to create clarity about when the common interest arose. *See Wheeler Decl. Ex. B (In re Beacon Common Interest Agreement)*; ECF 212-1 at 19-25 (*In re Beacon* Hearing Transcript). Plaintiffs received no documents from DOL (except documents received in response to a FOIA request) prior to execution of the CIA. ECF 176-1 (Bressman Decl.) ¶ 6-7.

Argent has never asserted a challenge to the validity of the CIA, despite extensive opportunities to do so. After the Parties emailed chambers about the discovery dispute over the Interview Reports, the Court set a hearing but ordered the Parties to confer again beforehand. ECF 153. Argent did not raise a challenge to the validity of the CIA in that meeting. Wheeler Decl. ¶ 4. And as the Court correctly noted at the June 18 hearing, Argent did not challenge the validity of the CIA in its subsequent briefing on the Interview Reports. Wheeler Decl. Ex. C at 13-16, Hearing Transcript (“Now, I scoured the papers and maybe I missed something anyways, regardless of how closely I was looking at it. I could not see anywhere where Argent was challenging the common interest privilege in the first place. I mean, it sounds like they are not challenging the common interest agreement[.]”); ECFs 164, 179.

Nevertheless, because Judge Sweeney ordered Plaintiffs to “file a motion on the broader issue of the common interest agreement,” ECF 219, (even though Argent has never articulated a challenge to the CIA), Plaintiffs emailed Argent’s counsel on July 25 to clarify whether Argent in fact challenges the validity of the CIA, and if so, on what basis. Wheeler Decl. Ex. D at 2. Argent responded that it plans to challenge the DOL’s asserted privileges and noted that the

common interest doctrine is “not a stand-alone privilege.” *Id* at 1. However, Argent was silent as to whether it disputes the existence of a common interest between Plaintiffs and the DOL and did not articulate any basis or authority for such a challenge. *Id*. Having never provided Plaintiffs nor the Court any basis for its challenge to the common interest privilege, Argent cannot assert one for the first time now, especially when the Court will be deprived of briefing on the issue as the Court’s Order does not permit Plaintiffs to file a reply brief. ECF 219.

In sum, Argent has waived any argument that the CIA is invalid by failing to raise the threshold issue in conferral in April 2024, failing to raise the issue again when briefing its motion to compel production of the Interview Reports, ECFs 164, 179, and by failing to articulate any basis for a challenge when the parties conferred on July 25. Wheeler Decl. Ex. D. Plaintiffs cannot fairly be expected to defend the validity of the common interest privilege from unknown challenges. To the extent Argent articulates a basis to challenge the validity of the common interest privilege now, it has wasted significant judicial resources involved in the briefing and hearing of the arguments regarding the Interview Reports, which solely challenged whether the Interview Reports constituted the DOL’s protected work product, *not* whether Plaintiffs and the DOL share a valid common interest. *See* ECFs 164, 176, 179, 202.

For these reasons, the Court should find that Plaintiffs’ common interest agreement with the DOL is valid. To the extent that Argent raises for the first time a basis to challenge the validity of the common interest privilege, Plaintiffs respectfully request that the Court grant leave to Plaintiffs to file a reply brief to address these new arguments.

Dated: July 29, 2024

Respectfully submitted,

/s/ Ryan Wheeler

Michelle C. Yau

Caroline E. Bressman

Ryan A. Wheeler

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

barbara.smith@bclplaw.com
michael.hofmann@bclplaw.com
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/s/ Ryan Wheeler
Ryan Wheeler

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ROBERT HARRISON and GRACE HEATH,
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ENVISION MANAGEMENT HOLDING,
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DARREL CREPS, III,
PAUL SHERWOOD,
JEFF JONES, NICOLE JONES,
AARON RAMSAY,
TANWEER KHAN, and LORI SPAHN,

Defendants.

**DECLARATION OF RYAN A. WHEELER IN SUPPORT OF PLAINTIFFS' BRIEF
REGARDING COMMON INTEREST AGREEMENT WITH THE UNITED STATES
DEPARTMENT OF LABOR**

I, Ryan A. Wheeler, declare as follows:

1. I submit this Declaration in support of Plaintiffs' Brief Regarding Common Interest Agreement with the United States Department of Labor.

2. I have personal knowledge of the matters stated herein based on information reviewed and/or referenced herein. The following is true and correct to the best of my own personal knowledge, recollection, and belief.

3. I am an attorney with the law firm Cohen Milstein Sellers & Toll PLLC and am a member in good standing of the California State Bar and the District of Columbia Bar. I am generally admitted to the U.S. District Court for the District of Colorado.

4. At the Parties' conferral before the Court's June 18 hearing, Argent did not raise a challenge to the validity of the Common Interest Agreement between Plaintiffs and the United States Department of Labor.

5. Attached hereto as Exhibit A is a true and correct copy of the Common Interest Agreement between Plaintiffs and the United States Department of Labor in this case, dated April 21, 2023.

6. Attached hereto as Exhibit B is a true and correct copy of the Common Interest Agreement between the United States Department of Labor and plaintiffs in *In re: Beacon Associates Litigation*, 09-cv-0777 (S.D.N.Y.) and *In re: J.P. Jeanneret Associates, Inc., et al.*, 09-cv-3907 (S.D.N.Y.), dated October 14, 2010.

7. Attached hereto as Exhibit C is a true and correct copy of excerpts of the transcript of the June 18, 2024 hearing before this Court in this case.

8. Attached hereto as Exhibit D is a true and correct copy of email correspondence between Plaintiffs' and Defendants' Counsel regarding Plaintiffs' Common Interest Agreement with the United States Department of Labor, dated July 25, 2024.

Executed on July 29, 2024.

/s/ Ryan A. Wheeler
Ryan A. Wheeler

EXHIBIT A

COMMON INTEREST AGREEMENT

This Common Interest Agreement ("Agreement") between the United States Department of Labor ("Department") and Named Plaintiffs in *Harrison v. Envision Management Holding, Inc. Board of Directors*, No. 1:21-cv-00304-CNS-MDB (D. Colo) (collectively, "the Parties") is dated as of the last date on which all the Parties have executed this Agreement.

RECITALS

A. This Agreement serves to memorialize the understanding of the Parties with respect to the pending litigation undertaken by the Named Plaintiffs and any prospective litigation that may be undertaken by the Department involving the Envision Management Holding, Inc. Employee Stock Ownership Plan, which is covered by the Employee Retirement Income Security Act of 1974 ("ERISA").

B. ERISA section 504(a) provides discretion to the Department to make available to any person actually affected by any matter which is the subject of an investigation under this section information concerning any matter which may be the subject of such investigation.

C. The Parties have determined that their common interests will best be served by permitting each to share with the other certain documents, factual materials, mental impressions, memoranda, interview reports, research, and other information (the "Shared Information").

D. The Parties understand that privileges and protections (including, without limitation, the investigative files privilege, informant's privilege, attorney-client privilege, work product doctrine, and deliberative process privilege) may apply to certain of the Shared Information (the subset of the Shared Information subject to any such privileges or protection is defined as the "Privileged Shared Information").

E. The Parties wish to pursue their common but separate interests without waiving any privilege or protection that may apply to the Privileged Shared Information.

AGREEMENT

WHEREFORE, the Parties agree as follows:

1. Each Party will share with the other Party such Privileged Shared Information as it deems appropriate.

2. Each Party electing to share Privileged Shared Information shall clearly mark "privileged" any physical material or documents it regards as privileged before providing such Privileged Shared Information to the other Party.

3. All Privileged Shared Information shall be shared or exchanged solely pursuant to this Agreement and the common interest it protects.

4. To the extent permitted by applicable procedural and ethical rules and any other applicable law, the Party receiving Privileged Shared Information will maintain the confidentiality of such Privileged Shared Information provided by another Party unless:

4.01 the Party providing the Privileged Shared Information agrees in writing that the Privileged Shared Information need not be treated as confidential; or

4.02 the Privileged Shared Information is now or hereafter becomes public knowledge without violation of this Agreement; or

4.03 the Privileged Shared Information is required to be disclosed by court order or other legal authority.

5. The provisions of this Agreement notwithstanding, the Parties recognize and acknowledge that the Department may share with other state or federal governmental agencies, both civil and criminal, any information within its possession including all information covered

by this Agreement. The Department shall provide a copy of this Agreement to any agency receiving information covered by this Agreement.

6. The provisions of this Agreement notwithstanding, the Parties recognize and acknowledge that the Department may be subject to requests calling for the disclosure of information covered by the Agreement pursuant to the Freedom of Information Act and on other bases. The Department will provide notice of any such request in writing to the Party who produced such information in order to give the Party an opportunity to object in writing to the Department's disclosure of such information.

7. The provisions of this Agreement notwithstanding, the Parties recognize and acknowledge that the Department will not destroy or return Shared Information provided to the Department and shall retain copies of all Shared Information provided to it as necessary to comply with its legal obligations.

8. Information that is otherwise discoverable and not privileged shall not become privileged simply because one Party shares such information with another Party.

9. The Party receiving Privileged Shared Information shall use such information solely for the purpose of advancing its legal interest in connection with its potential or actual litigation relating to possible violations of ERISA or other claims related to the same or similar underlying facts.

10. Nothing in this Agreement shall:

10.01 preclude a Party who (a) independently develops information or (b) receives information not pursuant to this Agreement, from disclosing, managing or otherwise using such information as it sees fit and without the consent of the other Party;

10.02 require any Party to share any information with any other Party;
10.03 be deemed to create any attorney-client relationship;
10.04 be used as a basis for seeking to disqualify any counsel from
representing any Party in any proceeding;

10.05 prevent a Party from using Privileged Shared Information in
examining or preparing to examine any person, so long as Privileged Shared
Information is not disclosed to persons not a Party except pursuant to the provisions
of this Agreement, or as required by court order or other legal authority;

10.06 prevent a Party, at that Party's sole discretion, from disclosing its
own Privileged Information (i.e., that it has provided or to which it has granted access
to other Parties), in which event the information disclosed shall no longer be deemed
Privileged Shared Information pursuant to this Agreement; or

10.07 create any agency or similar relationship among the Parties.

11. No Party shall have authority to waive any applicable privilege or doctrine on
behalf of the other Party.

12. Should any Party receive, from a person not a Party, a request or subpoena that
would, fairly construed, seek production of Privileged Shared Information received from another
Party, the Party receiving such a request or subpoena shall:

12.01 take reasonable measures, including but not limited to asserting the
common interest privilege, to preclude or restrict the production of such Privileged
Shared Information to persons not a Party; and

12.02 promptly notify the Party providing such Privileged Shared
Information that such a request or subpoena has been received, so that the Party

providing such Privileged Shared Information may file any appropriate objections or motions, or take any other appropriate steps, to preclude or condition the production of such Privileged Shared Information to persons not a Party.

13. The requirements of this Agreement, as applied to all Privileged Shared Information, shall survive all of the following: (a) withdrawal by any Party from this Agreement; (b) termination of this Agreement, (c) final disposition of claims or actions relating to possible violations of ERISA or related laws, whether by judgment, settlement, or other means of disposition.

14. A Party may withdraw from this Agreement by written notice to the other Party.

15. This Agreement:

15.01 embodies the entire agreement and understanding among the Parties and supersedes any prior agreements and understandings whether written or oral relating to the subject matter of the Agreement;

15.02 may not be modified or amended except by written agreement signed by each of the Parties;

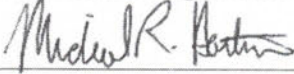
15.03 may be executed in separate counterparts, which together shall constitute the full Agreement and electronic transmission copies of signatures shall be treated as originals;

15.04 shall be construed in accordance with, and the rights of the Parties hereto shall be governed by, federal law, and to any extent not addressed by federal law, by the laws of Delaware;

15.05 contains rights and obligations that shall not be assigned by any Party without the written consent of the other Party; and

15.06 shall be binding upon and shall inure to the benefit of the Parties, and the
respective successors and any permitted assigns of the Parties.

The United States Department of Labor

By 

Dated April 21, 2023

Cohen Milstein Sellers & Toll, PLLC

By  *Michelle Yau*

Dated April 21, 2023

EXHIBIT B

COMMON INTEREST AGREEMENT

This Common Interest Agreement ("Agreement") between the United States Department of Labor ("Department") and Named Plaintiffs in *In re: Beacon Associates Litigation*, 09-cv-0777 (S.D.N.Y.) and *In re: J.P. Jeanneret Associates, Inc., et al.*, 09-cv-3907 (S.D.N.Y.) (collectively, "the Parties") is dated as of the last date on which all the Parties have executed this Agreement.

RECITALS

A. This Agreement serves to memorialize the understanding of the Parties with respect to the pending litigation undertaken by the Named Plaintiffs and any prospective litigation that may be undertaken by the Department involving any employee benefit plan covered by the Employee Retirement Income Security Act of 1974 ("ERISA") that invested directly or indirectly with Bernard Madoff as a result of decisions or advice by any of the Defendants in the above-referenced actions (the "Actions").

B. ERISA section 504(a) provides discretion to the Department to make available to any person actually affected by any matter which is the subject of an investigation under this section information concerning any matter which may be the subject of such of investigation.

C. The Parties have determined that their common interests will best be served by permitting each to share with the other certain documents, factual materials, mental impressions, memoranda, interview reports, research and other information (the "Shared Information").

D. The Parties understand that privileges and protections (including without limitation the investigative files privilege, informant's privilege, attorney-client privilege, work product doctrine, and deliberative process privilege) may apply to certain of the Shared Information (the subset of the Shared Information subject to any such privileges or protection is defined as the "Privileged Shared Information").

E. The Parties wish to pursue their common but separate interests without waiving any privilege or protection that may apply to the Privileged Shared Information;

WHEREFORE, the Parties agree as follows:

1. Each Party will share with the other Party such Privileged Shared Information as it deems appropriate.
2. Each Party electing to share Privileged Shared Information shall clearly mark "privileged" any physical material or documents it regards as privileged before providing such Privileged Shared Information to the other Party.
3. All Privileged Shared Information shall be shared or exchanged solely pursuant to this Agreement and the common interest it protects.
4. To the extent permitted by applicable procedural and ethical rules and any other applicable law, the Party receiving Privileged Shared Information will maintain the confidentiality of such Privileged Shared Information provided by another Party unless:
 - 4.01 the Party providing the Privileged Shared Information agrees in writing that the Privileged Shared Information need not be treated as confidential;
 - or
 - 4.02 the Privileged Shared Information is now or hereafter becomes public knowledge without violation of this Agreement; or

4.03 the Privileged Shared Information is required to be disclosed by court order or other legal authority.

5. The provisions of this Agreement notwithstanding, the Parties recognize and acknowledge that the Department may share with other state or federal governmental agencies, both civil and criminal, any information within its possession including all information covered by this Agreement. The Department shall provide a copy of this Agreement to any agency receiving information covered by this Agreement.

6. The provisions of this Agreement notwithstanding, the Parties recognize and acknowledge that the Department may be subject to requests calling for the disclosure of information covered by the Agreement pursuant to the Freedom of Information Act and on other bases. The Department will provide notice of any such request in writing to the Party who produced such information in order to give the Party an opportunity to object in writing to the Department's disclosure of such information.

7. The provisions of this Agreement notwithstanding, the Parties recognize and acknowledge that the Department will not destroy or return Shared Information provided to the Department and shall retain copies of all Shared Information provided to it as necessary to comply with its legal obligations.

8. Information that is otherwise discoverable and not privileged shall not become privileged simply because one Party shares such information with another Party.

9. The Party receiving Privileged Shared Information shall use such information solely for the purpose of advancing its legal interest in connection with its potential or actual litigation relating to possible violations of ERISA or related laws.

10. Nothing in this Agreement shall:

- 10.01 preclude a Party who (a) independently develops information or (b) receives information not pursuant to this Agreement, from disclosing, managing or otherwise using such information as it sees fit and without the consent of the other Party;
- 10.02 require any Party to share any information with any other Party;
- 10.03 be deemed to create any attorney-client relationship;
- 10.04 be used as a basis for seeking to disqualify any counsel from representing any Party in any proceeding;
- 10.05 prevent a Party from using Privileged Shared Information in examining or preparing to examine any person, so long as Privileged Shared Information is not disclosed to persons not a Party except pursuant to the provisions of this Agreement, or as required by court order or other legal authority;
- 10.06 prevent a Party, at that Party's sole discretion, from disclosing its own Privileged Information (*i.e.*, that it has provided or to which it has granted access to other Parties), in which event the information disclosed shall no longer be deemed Privileged Shared Information pursuant to this Agreement; or
- 10.07 shall create any agency or similar relationship among the Parties.
- 11. No Party shall have authority to waive any applicable privilege or doctrine on behalf of the other Party.

12. Should any Party receive, from a person not a Party, a request or subpoena that would, fairly construed, seek production of Privileged Shared Information received from another Party, the Party receiving such a request or subpoena shall:

- 12.01 take reasonable measures, including but not limited to asserting the common interest privilege, to preclude or restrict the production of such Privileged Shared Information to persons not a Party; and
- 12.02 promptly notify the Party providing such Privileged Shared Information that such a request or subpoena has been received, so that the Party providing such Privileged Shared Information may file any appropriate objections or motions, or take any other appropriate steps, to preclude or condition the production of such Privileged Shared Information to persons not a Party.

13. The requirements of this Agreement, as applied to all Privileged Shared Information, shall survive all of the following: (a) withdrawal by any Party from this Agreement; (b) termination of this Agreement, (c) final disposition of claims or actions relating to possible violations of ERISA or related laws, whether by judgment, settlement, or other means of disposition.

14. A Party may withdraw from this Agreement by written notice to the other Party.

15. This Agreement:

- 15.01 embodies the entire agreement and understanding among the Parties and supersedes any prior agreements and understandings whether written or oral relating to the subject matter of the Agreement;

15.02 may not be modified or amended except by written agreement signed by each of the Parties;

15.03 may be executed in separate counterparts, which together shall constitute the full Agreement and electronic transmission copies of signatures shall be treated as originals;

15.04 shall be construed in accordance with, and the rights of the Parties hereto shall be governed by federal law, and to any extent not addressed by federal law, by the laws of New York;

15.05 the rights and obligations contained therein shall not be assigned by any Party without the written consent of the other Party; and

15.06 shall be binding upon and shall inure to the benefit of the Parties, and the respective successors and any permitted assigns of the Parties.

The United States Department of Labor

By

Robert Turst

Dated

10/14/10

Cohen Milstein Seller & Toll, PLLC

By

Mark C. Seltzer

Dated

10/13/10

Lowey Dannenberg Cohen & Hart, PC.

By

Barbara G. Hart

Dated

10/13/10

EXHIBIT C

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLORADO

3 Case No. 21-cv-00304-CNS-MDB

4 ROBERT HARRISON,

5 Plaintiff,

6 vs.

7 ENVISION MANAGEMENT HOLDING, INC. BOARD OF DIRECTORS, et
8 al.,

9 Defendants.

10 Proceedings before MARITZA DOMINGUEZ BRASWELL,
11 United States Magistrate Judge, United States District Court
12 for the District of Colorado, commencing at 2:34 p.m., June
13 18, 2024, in the United States Courthouse, Denver, Colorado.

15 WHEREUPON, THE ELECTRONICALLY RECORDED PROCEEDINGS
16 ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED. . .

18 APPEARANCES

19 CAROLINE BRESSMAN, MICHELLE YAU and RYAN WHEELER,
20 Attorneys at Law, appearing for the Plaintiff.

21 WILLIAM BROCKMAN, PAUL RINEFIERD, JAMES DELANY,
22 ANDREW SALEK-RAHAM, KATELYN HARRELL and RICHARD PEARL,
Attorneys at Law, appearing for the Defendants.

23 MOTION HEARING

24

25

1 otherwise, this may not be all they're entitled to. I mean,
2 they may be entitled to more than just these interviews.

3 And I do question what other information you might
4 have access to that you're intending to sort of build your
5 case with that they aren't accessing.

6 Now, I scoured the papers and maybe I missed
7 something anyways, regardless of how closely I was looking
8 at it. I could not see anywhere where Argent was
9 challenging the common interest privilege in the first
10 place. I mean, it sounds like they are not challenging the
11 common interest agreement, but to the extent that you're --
12 that, you know, you're using this information in the case
13 against them, I could see this analysis, you know, yielding
14 a similar finding, that there is a substantial need for
15 certain information and you're going to have to turn over
16 more.

17 So I'm hearing Mr. Delany invite some sort of
18 stipulation as to, you know, the limited purpose, the notice
19 issue and somehow, you know, agreeing not to reference DOL
20 audit information otherwise. Is that something you all want
21 to talk about before I enter a ruling? Because I am
22 inclined to give them this. And again, I'm concerned that
23 it's going to really open the door for other things as well.
24 The reason I'm concerned is it's going to -- it's going to
25 drag out discovery, but go ahead, Mr. Delany.

1 MR. DELANY: Yeah.

2 THE COURT: I don't know if Mr. Delany was going
3 to supplement with something else. Go ahead and then I'll
4 go to you, Mr. Wheeler.

5 MR. DELANY: Your Honor, we are absolutely
6 challenging the common interest agreement at this point, and
7 we have asked the Court and we would intend to take
8 discovery from the Department of Labor regarding its
9 findings in the letter.

10 The interview summaries are in furtherance of
11 that, because either one of two things happen: We
12 accurately capture the Argent and other witnesses' testimony
13 in their summaries and disregarded it, or they, in fact, did
14 not capture it accurately, which -- both of which were
15 geared to a bias and predisposition by the department.

16 And the plaintiffs are attempting to use the
17 common interest privilege as a shield to block us from
18 learning what they know and what the Department of Labor
19 knows related to this case, but they're using it as a sword,
20 by now rolling out the Department of Labor's findings or
21 effectively proof of the matter asserted therein, which is
22 that there were ERISA fiduciary violations.

23 So we are -- we very much intend to challenge and
24 there is a --

25 THE COURT: I mean, this issue was squarely in

1 front of me in this motion. I don't see anywhere where you
2 challenged it. Point me somewhere where you said in this
3 motion that you were challenging the common interest
4 agreement.

5 MR. DELANY: Your Honor, in the portion of our
6 filing where we have asked for sanctions, part of what we
7 have asked for is that we be permitted to conduct additional
8 discovery and that would be discovery of the
9 (indiscernible), but primarily the Department of Labor and
10 its findings.

11 As I understand it, Your Honor, the only thing
12 that has not been produced by plaintiffs at this point,
13 based upon their log, are the DOL subpoenas. So I think,
14 you know, in terms of their common interest shield, that's
15 the only issue that's left in that regard, but we do intend
16 to seek discovery from the Department of Labor.

17 THE COURT: Okay. Mr. Wheeler, go ahead.

18 MR. DELANY: The plaintiffs --

19 THE COURT: Hold on, Mr. Delany. Hold on, let me
20 hear from Mr. Wheeler. Go ahead, Mr. Wheeler.

21 MR. WHEELER: Yeah. Well, I first wanted to
22 clarify that there -- other than the six interview reports,
23 there are no other documents being withheld, so we have
24 nothing to produce. And as far as a stipulation, I -- it
25 doesn't sound to me as if a stipulation would resolve this

1 issue, given what Mr. Delany said about seeking depositions
2 of the Department of Labor. So we would not be inclined to
3 try to resolve any issue through a stipulation.

4 Was there -- was there another issue the Court
5 wanted to hear?

6 THE COURT: No. I guess maybe respond to my
7 question which is, did they challenge the common -- have
8 they challenged the common interest agreement that you all
9 have?

10 MR. WHEELER: I mean, that was not my read of
11 their brief.

12 THE COURT: Yeah, I agree.

13 MR. WHEELER: That would have been the simplest
14 way to challenge the interview reports to say that there was
15 no privilege (indiscernible).

16 THE COURT: Yeah, I agree. I was kind of
17 scratching my head, like why aren't you all going there.
18 So, Mr. Delany, I didn't see you challenging the common
19 interest agreement.

20 In any event, let me get through this. I am going
21 to order the disclosure of the summaries, having gone
22 through the analysis and even assuming they are work product
23 and even assuming there is a protection that applies here.
24 I find that there is a substantial need for them and the
25 equivalent can't be obtained without undue hardship. So

1 Your Honor. Thank you very much for your time.

2 THE COURT: Okay. Nothing else?

3 MS. YAU: No, Your Honor.

4 THE COURT: Okay. Thank you very much. I
5 appreciate your time. Court is adjourned.

6 (WHEREUPON, the hearing concluded at 4:06 p.m.)

7

8 CERTIFICATE

9 I, Dyann Labo, certify that the foregoing
10 transcript from the electronic sound recording from the
11 proceedings is in compliance with Chief Justice Directive
12 05-03.

13 Dated: June 27, 2024

14 /s/ Dyann Labo
15 DYANN LABO
16 Transcriber

17

18

19

20

21

22

23

24

25

EXHIBIT D

Jillian Pincus

From: Rinefierd, Paul (prinefierd@groom.com) <PRinefierd@groom.com>
Sent: Thursday, July 25, 2024 4:54 PM
To: Ryan Wheeler; Katelyn Harrell; Caroline Bressman; Michelle C. Yau
Cc: Delany, Will (WDelany@groom.com); Bard Brockman; Egan, Allison; Salek-Raham, Andrew (ASalek-Raham@groom.com); Golumbic, Lars (lgolumbic@groom.com); Jillian Pincus; Pearl, Richard J.; Genelle L. Viars
Subject: RE: Harrison v. EMHI Board - DOL Common Interest Agreement

Ryan,

We disagree with Plaintiffs' arbitrary deadlines, especially those seeking a substantive response in less than four hours. We also disagree that Defendants have waived any arguments.

Defendants will be filing a response to DOL's Statement of Interest (D.E. 220) to challenge each of the privileges that DOL has asserted and to argue that none of the privileges justify withholding the interview summaries from Defendants. As courts have noted, the common interest doctrine itself is "not a stand-alone privilege," but instead is "an exception to the waiver of privilege when privileged information is shared with third parties." *See, e.g., Martinez v. Nationwide Affinity Ins. Co. of Am.*, No. 1:21-CV-02495, 2023 WL 4706752, at *2 (D. Colo. July 24, 2023). Accordingly, Judge Braswell properly compelled Plaintiffs to produce the interview summaries to Defendants.

Thank you,

Paul

Paul Rinefierd

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GROOM LAW GROUP



From: Ryan Wheeler <rwheeler@cohenmilstein.com>
Sent: Thursday, July 25, 2024 1:37 PM
To: Katelyn Harrell <Katelyn.Harrell@bclplaw.com>; Caroline Bressman <cbressman@cohenmilstein.com>; Michelle C. Yau <myau@cohenmilstein.com>
Cc: Rinefierd, Paul (prinefierd@groom.com) <PRinefierd@groom.com>; Delany, Will (WDelany@groom.com)

<WDelany@groom.com>; Bard Brockman <Bard.Brockman@bclplaw.com>; Egan, Allison
<allison.egan@faegredrinker.com>; Salek-Raham, Andrew (ASalek-Raham@groom.com) <ASalek-Raham@groom.com>;
Golumbic, Lars (lgolumbic@groom.com) <LGolumbic@groom.com>; Jillian Pincus <jpincus@cohenmilstein.com>; Pearl,
Richard J. <rick.pearl@faegredrinker.com>; Genelle L. Viars <Genelle.Viars@bclplaw.com>

Subject: RE: Harrison v. EMHI Board - DOL Common Interest Agreement

Counsel,

Earlier this week Judge Sweeney requested briefing on the viability of Plaintiffs' common interest agreement with the Department of Labor. ECF 219. We do not understand Defendants to have articulated a challenge to the common interest agreement. We intend to tell the Court that Defendants have not challenged the validity of the common interest agreement unless we hear otherwise by 5PM ET today. If Defendants do challenge the validity of the agreement, please provide all the bases of that challenge and authority in support of those bases. Plaintiffs believe that Defendants waived any challenge to the common interest agreement by not raising it with Judge Braswell in the first instance. We will consider a failure to respond to this email as further evidence of waiver, as Plaintiffs will be unable to address any unidentified basis in the pleading due on Monday.

Thanks,
Ryan

Ryan Wheeler

Associate
he/him

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