

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

DATA MARKETING PARTNERSHIP,)
LP and LP MANAGEMENT)
SERVICES, LLC)
)
Plaintiffs,)
)
UNITED STATES DEPARTMENT OF)
LABOR, et al.,)
)
Defendants.)

Civil Action File No.
4:19-cv-00800-O

PLAINTIFFS’ MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65 and 29 U.S.C. §§ 1132(a)(3) and 1132(k), Plaintiffs Data Marketing Partnership, LP (“DMP”) and LP Management Services, LLC (“LPMS”) (DMP and LPMS collectively referred to as “Plaintiffs”) respectfully request that this Court issue a temporary restraining order and preliminary injunction restraining the Defendants United States Department of Labor (“DOL”), Department of Labor Secretary Eugene Scalia, in his official capacity only (the “Secretary”) and the United States of America (“USA”) (DOL, the Secretary and USA collectively referred to as “Defendants”) from taking any action that is contrary to ERISA.

DMP is a Texas limited partnership that specializes in the production, capture, segregation, aggregation, organization, and sale to third-parties of electronic data. DMP captures this electronic data through a proprietary software that DMP’s individual limited partners install on the computers and/or mobile devices, which captures all of the electronic data that the limited partners generate as they use their devices and transmits the data to a secure, cloud-based “data bank” maintained by DMP. Once DMP captures a sufficiently large amount of electronic data from its limited partners, DMP will then market and sell the data to third-parties.

DMP's limited partners will receive income from DMP commensurate with the amount of electronic data that they generate and that DMP is able to sell to third parties. In addition to this monetary benefit, DMP's limited partners who contribute 500 or more hours of electronic data in a calendar year receive the added benefit, if they choose to use it, of participating in DMP's single-employer, self-insured, group health care plan (the "Plan") under the Employee Retirement Income Security Act ("ERISA"). *See* 29 U.S.C. § 1002 (1).

In this case, LPMS submitted a request for advisory opinion (the "AO Request") to DOL (at DOL's recommendation) seeking confirmation that DMP's business model and its Plan conform with ERISA's statutory requirements. Over 14 months later, DOL issued a fatally flawed, arbitrary and capricious advisory opinion (the "AO Response") in which it erroneously determined, among other things, that DMP's Plan does not qualify as a single-employer, group health care plan because its limited partners do not constitute "employees" under ERISA.¹

Plaintiffs seek immediate injunctive relief from this Court to prevent the irreparable harm that Plaintiffs will suffer as a result of the AO Response. Specifically, Plaintiffs seek to enjoin the Defendants from taking any action with respect to the AO Response pending this Court's final adjudication of the issues Plaintiffs raise in Counts I and III of their First Amended Complaint for Declaratory and Injunctive Relief (the "FAC"), to compel Defendants to remove the AO Response from the DOL website, and to restrain Defendants from taking any action with respect to the

¹ DOL's advisory opinion was submitted to DOL on November 8, 2018, then revised as of January 15, 2019 and again February 27, 2019. A true and correct copy of the AO Request is attached to the FAC as Exhibit A. DOL's response on January 24, 2020 (the "AO Response"), was issued four hundred forty-two (442) days after LPMS's submitted the AO Request, one hundred twelve (112) days after Plaintiffs filed the original Complaint, and a mere eleven (11) days before Defendants answer to the original Complaint was due. A true and correct copy of the AO Response is attached to the FAC as Exhibit B.

Plaintiffs until a final ruling from this Court. Plaintiffs seek to enjoin Defendants from taking any action regarding DOL's defective AO Response.

As discussed in detail in Plaintiffs' Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction (the "TRO Brief"), Plaintiffs' TRO Motion meets all four (4) requirements for granting a temporary restraining order. First, Plaintiffs have a substantial likelihood of success on the merits because DOL's defective AO Response: (1) fails to follow DOL's own procedures set forth in DOL Procedure 76-1; (2) fails to comply with the Administrative Procedure Act ("APA") requirements of analyzing and citing to relevant, applicable law; (3) is based on speculative and distorted factual findings in violation of ERISA Procedure 76-1 and the APA; and (4) violates the APA by implying standards that are inconsistent with well-established law. Thus, Plaintiffs have a substantial likelihood of success on the merits of their case against Defendants.

Second, Plaintiffs face a substantial threat of immediate and irreparable harm for which they do not have an adequate remedy at law. As discussed in the TRO Brief, the success of DMP's business model, as well as the other limited partnerships managed by LPMS, largely depends on its ability to attract a sufficiently large number of limited partners to join the partnership and generate electronic data for DMP to market and sell to third parties. DOL's defective AO Response effectively renders DMP's ability to attract limited partners extremely difficult at best. Consequently, DMP is harmed every day by the uncertainty surrounding their novel business model and health care plan structure, and DMP's Plan participants are harmed because, if this Court fails to grant the TRO Motion, they could immediately lose the health coverage and access to affordable health care that was previously available to them as a partner of DMP. Thus,

Plaintiffs (and their Plan participants) will be immediately and permanently harmed if this Court fails to grant the TRO Motion.

Third, much greater injury will result to Plaintiffs (and their Plan participants) if the Court denies the TRO Motion than any harm that might occur to Defendants or the general public if the Court grants the TRO Motion. As noted above, DMP's primary business purpose hinges on its ability to attract and maintain a broad assortment of partners to generate the electronic data that the company seeks to market and sell to third parties. Following DOL's erroneous AO Response, DMP has been forced to operate under a dark cloud of uncertainty concerning the viability of its business model and the legality of its Plan under ERISA. Thus, far greater injury will result to Plaintiffs (and their Plan participants) if the Court denies the TRO Motion than any injury that might occur to Defendants or the general public if the Court grants the TRO Motion.

Finally, the public interest will be served if the Court grants the TRO Motion because: (1) the general public will have clarity about how group health care plans provided by novel limited partnership business models, like DMP, are viewed under ERISA; and (2) all of DMP's over 50,000 Plan participants (including eligible spouses and dependents) will be able to maintain the current health coverage they have under the Plan (and similar plans maintained by the other LPMS-managed partnerships).

Thus, because Plaintiffs' TRO Motion meets all four (4) requirements for granting a temporary restraining order, this Court should grant the TRO Motion pending this Court's final adjudication of the issues Plaintiffs raise in their FAC concerning DOL's defective and misplaced analysis and erroneous conclusions about the viability of DMP's business model and Plan under ERISA.

Plaintiffs rely upon the Declaration of Randall Johnson, Declaration of Alexander Renfro, and its TRO Brief in filed concurrently herewith. Based upon the same, Plaintiffs respectfully request that the Court provide for expedited treatment of the TRO Motion and issue the injunctive relief as noted above.

Respectfully submitted,

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/s/Reginald Snyder

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing *Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction* was made, this 3rd day of February, 2020, by the Court's Case Management/Electronic Files system upon the attorneys for the parties.

Respectfully submitted this 3rd day of February, 2020.

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