IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN J. WALSH, Secretary of Labor, United States Department of Labor, Petitioner, v. METLIFE, INC., Respondent.	Misc. Civ. Action No. 21-mc-381

SECRETARY OF LABOR'S REPLY TO METLIFE'S OPPOSITION

As shown in Petitioner's initial memorandum, the Secretary's subpoena is valid under controlling case law because the investigation is conducted pursuant to a legitimate purpose, the inquiry may be relevant to the purpose, the information sought is not already within the Secretary's possession, and the proper administrative steps have been followed. MetLife has not demonstrated that the subpoena is unreasonable or that compliance would be unnecessarily burdensome. Instead, in its opposition, MetLife proposes that this Court impose on the Secretary a requirement that the Second Circuit has explicitly rejected: that, in order to continue the investigation, the Secretary must first conclusively establish that he would have jurisdiction to obtain a hypothetical merits judgment over MetLife. Supreme Court and Second Circuit case law has thoroughly rejected such a requirement because it would put the cart before the horse and fundamentally undercut the ability of federal agencies to determine whether violations of law exist in the first place. MetLife cannot thwart an investigation with self-interested conclusions that the Secretary must unquestioningly accept without a full opportunity to complete the investigation and confirm whether they are correct.

This Court must enforce the subpoena.

I. MetLife's Arguments Are Foreclosed by Supreme Court and Second Circuit Case Law Prohibiting Attempting to Resolve the Possible Merits at the Subpoena Enforcement Stage.

MetLife's arguments are contrary to longstanding and unbroken Supreme Court precedents holding that courts should not consider potential challenges to agency jurisdiction at the subpoena enforcement stage. See, e.g., Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 200 (1946) (noting that, under the Secretary's subpoena authority, "District Courts are called upon to enforce the subpoena through their contempt powers, without express condition requiring showing of coverage"); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943) ("[T]he District Court [was not] authorized to decide the question of coverage itself. The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose . . . and it was the duty of the District Court to order its production."). The Supreme Court has noted that a contrary ruling "would require the Secretary, in order to get evidence of violation, either to allege she had decided the issue of coverage before the hearing or to sever the issues for separate hearing and decision." Endicott Johnson Corp., 317 U.S. at 508.

The Second Circuit has repeatedly and consistently reaffirmed that these principles, which foreclose MetLife's arguments, holding that questions of regulatory coverage "are not to be decided in subpoena enforcement actions." SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1052 (2d Cir. 1973); see Mollison v. United States, 481 F.3d 119, 123 (2d. Cir. 2007) (holding that a jurisdictional challenge is "immaterial" at the subpoena enforcement stage, and explaining that, at this stage, the court is "not concerned with whether any subsequent enforcement action is likely to be meritorious, jurisdictionally or otherwise"); United States v. Constr. Prod. Research, Inc. 73 F.3d 464, 470 (2d Cir. 1996) (holding that a regulatory "coverage determination should wait until an enforcement action is brought" on the merits, rather than the court deciding it at the subpoena enforcement stage). The Second Circuit has adopted the Supreme Court's reasoning that

administrative subpoena power "is an important tool in the preliminary information-gathering process designed to determine *whether* a violation exists, not to actually prosecute the violation." Mollison, 481 F.3d at 123 (emphasis in original). Therefore, the agency "must be free without undue interference or delay" to conduct its investigation. Brigadoon Scotch Distrib. Co., 480 F.2d at 1052; see United States v. Fischer, 993 F. Supp. 2d 238, 241-42 (E.D.N.Y. 2013) (noting that delaying ruling on jurisdiction questions "is consonant with the principle that government agencies should be afforded broad latitude to enforce their regulations and investigate potential violations of the same").

Non-enforcement because of "unreasonableness" is the decided exception and is limited to cases in which the Court's authority is invoked to harass a respondent, pressure it to resolve a collateral dispute, or "similar kinds of bad faith abuse," which MetLife has not alleged here. PAA Mgmt., Ltd. v. United States, 962 F.2d 212, 216 (2d Cir. 1992). As a result, the Second Circuit and other courts have consistently enforced subpoenas even where respondents have raised fundamental jurisdictional challenges. See Brigadoon Scotch Distrib. Co., 480 F.2d at 1052 (enforcing the subpoena that even though respondent raised "serious questions" about whether the activities at issue were subject to the agency's regulation, because the jurisdictional challenge was premature); Huerta v. Haughwout, No. 3:16-cv0358, 2016 WL 3919799, at *4 (D. Conn. July 18, 2016) (enforcing an administrative subpoena despite "serious questions" about the scope of the agency's authority that could be addressed "were this a penalty enforcement action").

The majority of courts of appeals have expressly agreed with this reasoning and held that that jurisdictional questions should not be resolved in subpoena enforcement proceedings. United States v. Sturn, Ruger & Co., 84 F.3d 1, 6 (1st Cir. 1996) (noting that "subpoena enforcement proceedings are designed to be summary in nature and an agency's investigations should not be

bogged down by premature challenges to its regulatory jurisdiction" (internal quotations omitted)); Chao v. Koresko, No. 04-3614, 2005 WL 2521886, at *3 (3d Cir. 2005) (enforcing an administrative subpoena in an ERISA matter without considering respondent's jurisdictional challenge); CFTC v. Tokheim, 153 F.3d 474, 477 (7th Cir. 1998) (noting that respondent's argument "conflates the issue of whether the Commission may investigate to determine whether conduct falls within its jurisdiction with the ultimate issue of whether conduct does in fact fall within its jurisdiction"), cert. denied, 119 S. Ct. 905 (1999); Donovan v. Shaw, 668 F.2d 985, 989 (8th Cir.1982) (upholding an administrative subpoena in an ERISA matter and holding that "[i]t is well-settled that a subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular federal statute"); EEOC v. Children's Hosp. Med. Ctr., 719 F.2d 1426, 1429 (9th Cir. 1983) (en banc) (noting that "agency jurisdiction is not abrogated because the party being investigated may have a valid defense to a subsequent suit by the agency"); CSG Workforce Partners v. Watson, 512 Fed App'x 830, 837 (10th Cir. 2013) (holding that lack of coverage is "not an appropriate defense" in an enforcement action, "even if the subpoena is not limited to information relevant to coverage"); EEOC v. Kloster Cruise Ltd., 939 F.2d 920, 924 (11th Cir. 1991) (noting that "the jurisdictional issue was prematurely resolved by the district court in this subpoena enforcement action and that the EEOC must be allowed to investigate the facts, including the facts relevant to jurisdiction, as an initial matter"); FTC v. Ken Roberts Co., 276 F.3d 583, 586 (D.C. Cir. 2001) (following the Second Circuit's ruling in Construction Products Research).

MetLife does not engage with these authorities but asks the Court to adopt a different standard on enforcing subpoenas, for which it cites a handful inapposite decisions from a small number of other courts, none of which has been followed by any court within the Second Circuit,

and each of which is distinguishable by the specific facts and applicable circuit law. (Opp'n. Mem. at 8-9). Indeed, the Seventh Circuit's decision in Reich v. Great Lakes Indian Fish & Wildlife Commission, 4 F.3d 490, 493 (7th Cir. 1993), MetLife's leading case on enforcing subpoenas, has been rejected by the Second Circuit and courts within it. See Constr. Prod. Research, Inc., 73 F.3d. at 471 (acknowledging Great Lakes but declining to follow it, holding instead that the "coverage determination should wait until an enforcement action is brought against the subpoenaed party"); Fischer, 993 F. Supp. 2d at 241, n. 3 (specifically rejecting Great Lakes and other contrary authority from other circuits because the Second Circuit has "well-established precedent" that jurisdiction determinations should not be made in subpoena enforcement proceedings). Furthermore, the Seventh Circuit in Great Lakes reached its decision refusing to enforce a subpoena for lack of jurisdiction specifically based on the presumption against abrogating Indian treaty rights. Great Lakes, 4 F.3d at 493 (explaining the presumption as resulting from recognition that Indian tribes retain "at least vestiges of sovereignty," and the canon of construction disfavoring repeals by implication). MetLife has identified no similar value that the Court here should respect at the expense of the Secretary's authority to investigate possible violations.

MetLife's other authorities have, likewise, never been followed in this Circuit and are inapposite to the facts here. In Chao v. Community Trust Co. (which no court in the Second Circuit has ever followed), the Third Circuit specifically limited its holding requiring proof of jurisdiction before enforcing a subpoena to the text of the Gramm–Leach–Bliley Act, which circumscribed the investigative authority in order to safeguard sensitive consumer data. 474 F.3d 75, 87 (3d Cir. 2007). However this case did not alter the general principle in the Third Circuit that, for a subpoena enforcement action brought by the Secretary (including under ERISA), "coverage by the statute is not an element of DOL's prima facie case, and lack of coverage is not a defense to enforcement."

Koresko, No. 04-3614, 2005 WL 2521886, at *3 (3d Cir. Oct 12, 2005) ("Koresko I"); see also Secretary of Labor v. Koresko, 377 Fed. App'x 238, 1 (3d Cir. 2010) (reaffirming the holding of Koresko I and rejecting a similar jurisdictional challenge by the same respondent, after Community Trust). And United States v. Newport News Shipbuilding & Dry Dock Co. (which no court in the Second Circuit has ever followed) was tied to the narrow statutory authority at issue, which limited the Defense Contract Audit Agency to seeking specific categories of corporate records related to the agency's purpose of cost verification. 837 F.2d 162, 165-68 (4th Cir. 1988). By contrast, ERISA gives the Secretary the broad administrative subpoena authority of the FTC Act. See ERISA 504(c), 29 U.S.C. § 1134(c) (incorporating 15 U.S.C. § 49 and granting the "power to require by subpoena . . . the production all such documentary evidence relating to any matter under investigation").

So, not only have the authorities that MetLife relies on never been followed within the Second Circuit, they do not, even on their own logic, support MetLife's assertion that the Secretary must prove that he has regulatory jurisdiction over MetLife in order for the Court to enforce the subpoena. This Court must follow Supreme Court and Second Circuit precedent and not require the Secretary at this preliminary stage to show ultimate jurisdiction before getting access to relevant documents to complete his investigation.

II. The Secretary Is Investigating Plausible ERISA Violations Involving MetLife and Others, and the Project Chestnut Documents Are Relevant to That Inquiry.

ERISA was enacted because of Congress's concerns regarding the well-being and security of America's employees and their dependents. See ERISA section 2, 29 U.S.C. § 1001 (Congressional findings and declaration of policy). The Secretary's role in investigating ERISA violations remains a critical part of the protections that Congress put in place to address those concerns. In section 504 of ERISA, Congress gave the Secretary broad authority "to determine

whether any person has violated or is about to violate any provision of" title I of ERISA. 29 U.S.C. § 1134(a). This is exactly what the Secretary is doing: attempting to determine whether MetLife or others associated with the benefit plans that purchased MetLife's annuities violated Title I of ERISA.

In addition to other grants of enforcement authority, in ERISA section 502(a)(9), Congress specifically authorized suits in situations involving pension risk transfer transactions, like those here, "to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity." 29 U.S.C. § 1132(a)(9). MetLife acknowledges what it euphemistically calls an "issue" regarding its annuities, but it assures the Court that it has "worked closely with . . . the New York Department of Financial Services . . . to address this matter." (Opp Br. at 2-3.) However, the Secretary does not have to accept MetLife's assurances without completing his investigation. As the Supreme Court has explained, an agency "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950). The details of Project Chestnut, which MetLife refers to as a "publicly-disclosed remediation initiative by MetLife" to address errors relating to pension risk transfer transactions (Opp'n Mem. at 9), are highly relevant to the Secretary's inquiry respecting MetLife's annuities program.

MetLife's assertion that the Secretary would ultimately lack jurisdiction over the annuities resulting from pension risk transfer in a merits action assumes facts that have not been proven and that the Secretary has a right to test, namely that each subject "[p]lan was properly terminated and all obligations and claims under the [p]lan were satisfied prior to the termination." DOL Advisory Opinion No. 2003-05A, 2003 WL 1901900, at *3 (Apr. 10, 2003). To try to avoid this question, MetLife suggests that PBGC regulations "requir[e] the PBGC to issue a notice sufficiency or

insufficiency" before termination. (Opp'n. Mem. 10.) But these regulations only apply in cases of "distress terminations" pursuant to 29 C.F.R. § 4041.45(b) or (c), and there is no evidence that this applies to the transactions involved here. See 29 C.F.R. § 4041.47. By contrast, "standard terminations" are governed by 29 C.F.R. §§ 4041.21 - 4041.31 and do not require any such sufficiency determination. This is to say nothing of partial pension risk transfer transactions, where some number of participants remain within the plan, and which are not treated as plan terminations by PBGC.

Yet, even if the Secretary lacked jurisdiction over the annuities because all the plans serviced by MetLife had engaged in proper terminations, the steps leading up to termination would still be within ERISA's purview. For example, a plan's selection of an annuity provider is a fiduciary act that caries liability. See Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974, 60 Fed. Reg. 12328, 12328 (Mar. 6, 1995) (describing previous failures by annuity providers involved in pension risk transfer transactions and the Secretary's enforcement actions focusing on the selection of such providers). A failure to have undertaken these actions prudently could carry liability not only for fiduciaries but also for service providers who knowingly participated in these actions. See Lowen v. Tower Asset Management, 829 F.2d 1209, 1220 (2d Cir.1987) ("[P]arties who knowingly participate in fiduciary breaches may be liable under ERISA to the same extent as the fiduciaries."). These are the kinds of liability that this investigation may uncover.

Because MetLife is withholding the documents relating to Project Chestnut, the Secretary cannot know whether they will resolve the Secretary's questions. Indeed, the documents related to Project Chestnut are not the only ones that EBSA will review as part of its investigation, and they may not alone determine whether EBSA finds actionable violations by MetLife or any other

person. MetLife points to no authority to suggest that EBSA can only seek documents related to coverage before moving on to determining whether there have been violations. To the contrary, lack of coverage is "not an appropriate defense" in an enforcement action, "even if the subpoena is not limited to information relevant to coverage." CSG Workforce Partners, 512 Fed App'x at 837 (discussing Endicott Johnson Corp., 317 U.S. at 508-09, and Oklahoma Press Publ'g Co., 327 U.S. at 211-14). The Project Chestnut documents will undoubtedly shed light on the issues in the Secretary's investigation, even if they do not, themselves, show actionable violations.

CONCLUSION

For the reasons stated above and in the Secretary's previous memorandum of law, the Secretary respectfully requests that the Court grant the Secretary's Petition to Enforce Administrative Subpoena and enter a conforming order.

Dated: May 18, 2021
New York, New York

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