IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

D.L. MARKHAM DDS, MSD, INC. 401(K) PLAN and D.L. MARKHAM DDS, MSD, INC., as plan administrator, on behalf of themselves and others similarly situated,	§	**C.A. NO. 4:22-cv-00974**
Plaintiffs,	§	
v.	§	
THE VARIABLE ANNUITY LIFE INSURANCE COMPANY, VALIC FINANCIAL ADVISORS, INC., and VALIC RETIREMENT SERVICES COMPANY,	§	
Defendants.	§	

MOTION TO DISMISS OF DEFENDANT VALIC FINANCIAL ADVISORS, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Introduction and Summary of Argument

Plaintiffs, an ERISA plan and plan administrator, filed a putative class action Complaint against three Defendants, including VALIC Financial Advisors, Inc. ("VFA"), alleging prohibited transactions under ERISA. Inexplicably, the Complaint contains no allegation identifying a specific act, transaction or omission by VFA, much less one that harmed Plaintiffs. Indeed, VFA is not mentioned in the Complaint, except to note that it is a subsidiary of co-Defendant The Variable Annuity Life Insurance Company ("VALIC").[1] The alleged ERISA prohibited transactions, which are the subject of the Complaint, are entirely based on contracts to which VFA is not a party and fees imposed under those contracts which VFA never received. As a general rule, a parent corporation and its subsidiary are treated as separate legal entities such that VFA has no liability for the purported prohibited transactions involving VALIC. *See North Cypress Medical Center Operating Co. Ltd v. Fedex Corp.,* 892 F. Supp. 2d 861, 865 (S.D. Tex. 2012).

By grouping all three named Defendants together and omitting specific allegations as to VFA, Plaintiffs fail to satisfy the pleading requirements of Federal Rule of Civil Procedure 8(a)(2) and fail to provide VFA with necessary notice of the claim against it. For this preliminary reason, the Complaint is subject to dismissal as to VFA.

Additionally, the factual allegations in the Complaint, as well as the contracts incorporated by reference, show no cognizable legal theory exists against VFA under the ERISA statutes on which Count I is premised.[2] VFA was not a party to the service provider agreement or annuity on which Plaintiffs' ERISA claims are based, which is evidenced from the face of these contracts. Equally problematic, Plaintiffs offer no factual allegation that VFA acted as a fiduciary with

[1] A separate motion to dismiss is being filed on VALIC's behalf. The third defendant, VALIC Retirement Services Company, has been dismissed by agreed motion. ECF No. 51.

[2] Count II recently was dismissed against VFA. *See* ECF Nos. 50 and 51.

respect to the subject ERISA plan or engaged in any prohibited transaction. As such, no basis exists to assert a claim against VFA under ERISA § 406(a)(1)(C).

Finally, Plaintiffs are not legally entitled to the equitable relief they seek against VFA in Count I, under ERISA § 502(a)(3). This alone is fatal and warrants dismissal of Count I.

For these reasons, the Complaint is barred as a matter of law as to VFA and subject to dismissal under F.R.C.P. 12(b)(6). Moreover, leave to amend would be futile.

Nature and Stage of Proceedings

On January 4, 2021, Plaintiffs filed the Complaint in the United States District Court for the Eastern District of California, seeking relief on a class wide basis, and named as defendants VALIC, VFA and VRSCO. ECF No. 1. Thereafter, the Defendants' motion to transfer to this Court was granted. ECF No. 36. VFA filed a motion to dismiss in the Eastern District of California, but the motion was denied as moot as part of the order transferring the case to this Court. *Id.* at p. 17.

Subsequent to the transfer, the parties agreed to a dismissal of defendant VRSCO from this action, as well as the dismissal of Count II as to VFA. ECF Nos. 50 and 51. Thus, the only remaining claim against VFA is Count I of the Complaint, alleging a knowing participation in a prohibited transaction under ERISA § 406(a)(1)(C).

VFA hereby renews its motion to dismiss as to Count I.

Factual Background

A. The Parties

Plaintiffs are the Plan (The D.L. Markham, DDS, MSD, Inc. 401(k) Plan), the Plan Sponsor (D.L. Markham, DDS, MSD, Inc.) and the Plan Administrator (D.L. Markham, DDS, MSD, Inc.) of an employee pension benefit plan governed by ERISA. *See* Complaint [ECF No. 1] at ¶¶ 1 and 5. As stated in the Complaint, Plaintiffs "seek redress, on a class-wide basis, for fees improperly

withheld from plan assets **by a life insurance company** that had been retained to administer and manage those assets." *Id.* at ¶ 1 (emphasis added). The Complaint identifies Defendant VALIC as that life insurance company. Compl. at ¶ 6.

As for VFA, the Complaint merely states that VFA is a subsidiary of VALIC and broadly alleges "[e]ach of the three VALIC-branded entities described in this paragraph (collectively, the "Defendants") provided services to the Plan, and any reference to VALIC herein is generally a reference to one or more of those three entities." *Id*. Other than this conclusory allegation, Plaintiffs make no additional mention of VFA, and instead consistently lump all three named Defendants into allegations regarding "VALIC."

B. <u>The Contracts Between Plaintiffs and VALIC</u>

Plaintiffs allege, effective May 18, 2018, the Plan Sponsor entered into an agreement with VALIC for services. Compl. at ¶ 10. Plaintiffs further allege that VALIC charged fees for its services. *Id.* Defendant VALIC did, indeed, enter into a "Service Provider Agreement – Portfolio Director" with the Plaintiff employer and Plan Sponsor, D.L. Markham DDS, MSD, Inc., on May 18, 2018 ("the SPA"). *See* Exhibit B to the Declaration of Eric S. Levy in Support of VALIC's Motion to Dismiss and/or Motion to Strike filed in this action ("Levy Dec").[3] **VFA is not a party to the SPA**. *See id.*

Further, on May 18, 2018, VALIC issued a Group Fixed and Variable Deferred Annuity Contract No. 72278 to D.L. Markham, DDS, MSD, Inc. ("the Annuity"). *See* Compl. at ¶ 11; *see*

[3] In considering this Rule 12(b)(6) motion, the Court may properly consider the Levy Dec. and its accompanying exhibits because the documents attached to the Levy Dec are referenced in the Complaint and are central to Plaintiffs' claims. *See Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498 (5th Cir. 2000) (explaining that a court may consider documents attached to a motion to dismiss that are referenced in the complaint and central to the claims); *see also Rittgers v. United States*, 131 F. Supp. 3d 644, 649 (S.D. Tex. 2015).

also Exhibit A to Levy Dec. Again, **VFA is not a party to the Annuity.** *See id.* The SPA and Annuity may be considered in ruling on this motion to dismiss because they are referred to in the Complaint, attached to this motion to dismiss, and are central to Plaintiffs' claims. *See In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007).

In or around January 2020, the Plan Sponsor decided to terminate the SPA and the Annuity. Compl. at ¶ 12. Thereafter, all Plan assets were transferred to another provider. *Id.* at ¶ 15. As set forth in the Annuity, VALIC assessed a surrender fee due to the transfer. *Id.* at ¶¶ 12 and 15. These allegations are the gravamen of Plaintiffs' claims and do not involve VFA, who is not a party to the Annuity nor contractually entitled to receive a surrender fee under the Annuity.

C. The Class Allegations and Count I of the Complaint

In the Complaint, the Class is defined as "[a]ll ERISA covered plan administrators/plans that entered an agreement with VALIC in which VALIC had discretion to impose a surrender charge on outgoing transfers and which paid VALIC a fee of any kind since January 4, 2018." Compl. at ¶ 18(a). Similarly, the subclass is defined as "[a]ll ERISA covered plan administrators/plans that entered an agreement with VALIC in which VALIC imposed the surrender charge on outgoing transfers since January 4, 2018." *Id.* at ¶ 18(b). VFA is not mentioned in either definition, and as noted, VFA was not a party to either contract pursuant to which fees allegedly were imposed, and which are the subject of the Complaint.

Count I of the Complaint is generally alleged against "Defendants" and is premised on the terms of the SPA and the Annuity. Compl. at ¶¶ 10, 11, 18(a), 28 and 29. Count I, entitled "Knowing Participant in a Prohibited Transaction – ERISA §§ 406(a)(1)(C); 502(a)(3)," seeks "an amount equal to all fees paid by the Class Members' plans to VALIC (including its affiliates) in connection with the arrangement . . ." *Id.* at ¶ 29. Plaintiffs make no mention of VFA.

Statement of the Issues

VFA's Motion raises the following issues:

A. Whether Plaintiffs' Complaint should be dismissed because it fails to satisfy the pleading requirements under Federal Rules of Civil Procedure 8(a)(2) and 12(b)(6) by lumping multiple defendants together in the complaint and failing to identify specific actions of an individual defendant, which denies VFA fair notice.

B. Whether Plaintiffs' Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6) because a prohibited transaction claim under ERISA § 406(a)(1)(C) cannot be plausibly stated against VFA as it is neither a plan fiduciary nor a party to the subject contracts.

C. Whether Plaintiffs' Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6) because Plaintiffs fail to allege an entitlement to "appropriate equitable relief" under ERISA § 502(a)(3).

Argument

A. Plaintiffs Fail To Satisfy the Notice Pleading Requirements of Rule 8(a)

"Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Del Castillo v. PMI Holdings North America Inc.*, No. 4:14-CV-03435, 2016 WL 3745953, *2 (S.D. Tex. July 13, 2016)[4]; F.R.C.P. 8(a)(2). "The purpose of this requirement is to give the defendant fair notice of what the claim is and the grounds upon which it rests." *City National Rochdale Fixed Income Opportunities (Ireland) Limited v. American General Life Insurance Company*, No. 3:17-cv-2067-S (BT), 2018 WL 4732431, *2 (N.D. Tex. Sept. 13, 2018); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-

[4] In accordance with the Court's Procedures 5.I., copies of all cases not found in the United States Code, Supreme Court Reporter, Federal Reporter, Federal Rules Decisions, Federal Supplement, Southwestern Reporter, or Vernon's Revised Statutes and Codes Annotated are attached hereto as Exhibit 1.

unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009) (citations omitted).

"A complaint that 'lumps together' multiple defendants' conduct fails to satisfy the pleading requirements of Fed. R. Civ. P. 8(a)(2) and 12(b)(6)." *City National Rochdale Fixed Income Opportunities (Ireland) Limited*, 2018 WL 4732431, *2; *see also Del Castillo*, 2016 WL 3745953, *13 ("lumping together multiple defendants without identifying who is responsible for which acts does not satisfy the requirements of Rules 8(a)(2) and 12(b)(6).") Here, the Complaint lumps all three named defendants under the terms "Defendants" and "VALIC" after paragraph 6, and never again specifically mentions VFA or identifies any conduct or actions allegedly undertaken by VFA. In particular, the Complaint makes no allegation of what services VFA provided to the Plan nor any allegation regarding fees paid to VFA. Yet, the purported wrongs alleged in the Complaint stem only from services provided to the Plan and fees charged. It remains entirely unknown how VFA is liable for the conduct alleged in the Complaint.

"General allegations lumping all defendants together and failing to identify specific actions of individual defendants will not suffice to raise an inference of plausible liability against any individual defendant." *Callier v. National United Group, LLC*, No. EP-21-CV-71-DB, 2021 WL 5393829, *4 (W.D. Tex. Nov. 17, 2021) (citation omitted). "A pleading must provide specific factual allegations of violations against specific defendants to suffice" and "[u]sing the 'collective term "Defendants" ... with no distinction as to what acts are attributable to whom' fails to meet the fair notice standard under Rule 8." *Id.* at *4 (citations omitted); *see also Taylor v. Coca-Cola Company*, No. 3:20-CV-2880-D, 2020 WL 6799257, **1-2 (N.D. Tex. Nov. 19, 2020). A complaint which "continues to lump together multiple defendants—and, in many instances, all defendants—while providing insufficient factual basis on which to distinguish the individual

defendant's conduct" fails to satisfy the pleading requirements of Rules 8(a)(2) and 12(b)(6). *Del Castillo*, 2016 WL 3745953, *17. The instant Complaint contains no factual basis identifying conduct of VFA which violates ERISA § 406(a)(1)(C).

"In some cases, multiple defendants' conduct may be lumped together if 'the plaintiff's allegations elsewhere designate the nature of the defendants' relationship to a particular scheme and identify the defendants' role.'" *City National Rochdale Fixed Income Opportunities (Ireland) Limited*, 2018 WL 4732431, *3 (citations omitted). Here, the Complaint fails to meet this exception, as it contains **no** allegations setting forth the nature of VFA's relationship to the allegedly prohibited transactions which form the basis of Count I, i.e. the imposition of an early surrender fee under the Annuity. Compl. at ¶¶ 16, 17 and 28. In short, VFA is left to guess as to what alleged conduct it committed in violation of § 406(a)(1)C). Where, as in this case, a complaint does not sufficiently describe the nature of each entity's role in an alleged scheme, it fails to meet federal pleading standards and is subject to dismissal. *See City National Rochdale Fixed Income Opportunities (Ireland) Limited*, 2018 WL 4732431, *3.

The limited and general allegations that VFA is a VALIC subsidiary and "provided services to the Plan" are insufficient to put VFA on notice of the claims against it. Compl. at ¶ 6. The fact that one defendant is a wholly-owned subsidiary of another "does not defeat their presumably separate corporate identities or the necessity of making separate allegations as to each entity." *City National Rochdale Fixed Income Opportunities (Ireland) Limited*, 2018 WL 4732431, *3.

Count I of the Complaint is subject to dismissal as to VFA because it fails to meet the requirements of Rule 8(a)(2).

B. Count I of the Complaint Fails To State A Claim Against VFA

1. The 12(b)(6) Standard

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted."

In ruling on a 12(b)(6) motion, the court accepts as true the well-pleaded factual allegations in the complaint. *See Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations" and pleadings, that are no more than conclusions, are not entitled to the assumption of truth. *Iqbal*, 556 U.S. 662, 679. A plaintiff has an obligation to provide more than labels and conclusions and the Complaint must contain enough facts to state a claim to relief that is plausible on its face. *See Twombly*, 550 U.S. 544, 555 & 569. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. 662, 678.

2. VFA Was Not a Party to the Subject Transactions/Contracts

Count I is brought under ERISA §§ 406(a)(1)(C) and 502(a)(3). § 406(a)(1)(C) prohibits a plan fiduciary from causing the plan to engage in a transaction that constitutes a furnishing of goods, services, or facilities between the plan and a party in interest.[5] Here, Plaintiffs make no factual or specific allegation that VFA was a plan fiduciary, provided services to the Plan, or received fees for any "transaction" with the Plan. In short, no plausible claim under § 406(a)(1)(C) therefore has been stated against VFA.

[5] "Party in interest" includes "a person providing services to such plan." 29 U.S.C. § 1002(14)(B).

The transactions forming the basis of Count I are the contracts entered between Plaintiffs and VALIC. *See* Compl. at §§ 10-12 and 16 ("Because VALIC was a service provider to the Plan, VALIC was a party-in interest" and "VALIC's early surrender fee . . . is prohibited by ERISA). Count I seeks to recover fees allegedly paid under the SPA and the Annuity. *See e.g.* Compl. at ¶¶ 28 and 29 ("VALIC understood that it would receive additional compensation from the Plans and Class Members' plans by inserting a substantial surrender penalty in its contract documents" and "[b]ecause the Plan's contractual arrangement with VALIC contained a penalty provision . . . the arrangement thus constituted a prohibited transaction under ERISA §406(a)(1)(C) . . ." VFA was not a party to these contracts. *See* Exhibits A and B to Levy Dec. Accordingly, VFA cannot be and was not a party in interest to the subject transactions and this bars any prohibited transaction claim against VFA.

Further, Plaintiffs fail to assert any factual allegation that VFA was entitled to or received any fees from either the Plaintiffs or the contracts. In fact, the Complaint is brought to recover fees allegedly "improperly withheld from plan assets by a life insurance company . . ." Compl. at ¶ 1. The only insurance company identified in the Complaint is VALIC. *Id.* at ¶ 6. This second omission also renders Count I defective as to VFA.

Finally, the mere allegation that VFA is a subsidiary of VALIC fails to impose legal liability on VFA. "Parent corporations and subsidiary corporations are distinct and separate 'persons' as a matter of law." *North Cypress Medical Center Operating Co. Ltd v. Fedex Corp.*, 892 F. Supp. 2d 861, 865 (S.D. Tex. 2012). Thus, "[u]nder the common law, a parent corporation and its subsidiary are separate legal entities" and are regarded as separate entities for purposes of legal proceedings. *Metropolitan Life Ins. Co. v. La Mansion Hotels & Resorts, Ltd.*, 762 S.W.2d 646, 652 (Tex. App.–San Antonio 1988, writ dismissed); *see also Lucas v. Texas Industries, Inc.*,

696 S.W.2d 372, 374 (Tex. 1984) (confirming "disregard of the 'legal fiction of corporate entity' is 'an exception to the general rule which forbids disregarding corporate existence'") (citation omitted).

Here, no facts are alleged to support that VFA entered into any contracts with Plaintiffs which constitute the allegedly prohibited transactions under Count I, or that VFA received the purported penalty imposed by the Annuity. As such, the Complaint fails to allege sufficient facts to support an ERISA prohibited transaction claim against VFA and Count I must be dismissed under F.R.C.P. 12(b)(6).[6]

3. Count I Does Not Allege an Entitlement to Equitable Relief Against VFA

Finally, but equally fatal, Count I fails as to VFA because Plaintiffs have not sought appropriate equitable relief against VFA as required by ERISA § 502(a)(3). Neither the Complaint's factual allegations nor the referenced contracts establish that VFA received plan assets, such that any of the requested equitable remedies are legally permissible. In fact, the Complaint alleges otherwise and seeks to recover "fees improperly withheld from plan assets by a life insurance company. . ." Compl. at ¶ 1. VFA is not a life insurance company.

In Count I, Plaintiffs seek equitable relief under § 502(a)(3) in an amount equal to all fees paid by "the Class Members' plans" to "VALIC." Compl. at ¶ 29. Plaintiffs do not identify any specific fund in VFA's possession from which they seek to recover fees paid under the subject contracts nor have they adequately traced the subject fees to VFA's possession. As such, Plaintiffs are seeking a legal remedy disallowed under § 502(a)(3).

[6] Count I also fails as a matter of law against VFA for the same reasons set forth in the renewed Motion to Dismiss and/or Motion to Strike filed by VALIC in this action, which VFA incorporates in its entirety by reference as if fully set forth herein.

The text of § 502(a)(3) makes clear that the relief sought must be "appropriate equitable relief," not legal relief. *See Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Health Special Risk, Inc.*, 756 F.3d 356, 360 (5th Cir. 2014) (noting, "[e]ver since its decision in *Mertens v. Hewitt Associates*, 508 U.S. 248, 256, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), the Supreme Court has repeatedly defined 'appropriate equitable relief' as 'those categories of relief that were *typically* available in equity.'") "The classic form of purely legal relief is money damages." *Id.* "[A] plaintiff bringing suit against a non-fiduciary party in interest must show that equitable relief can be granted" and "[s]atisfying § 502(a)(3) functions as an element of the ERISA claim." *Teets v. Great-West Life & Annuity Insurance Company*, 921 F.3d 1200, 1223 (10th Cir. 2019). "If a plaintiff cannot demonstrate that equitable relief is available, the suit cannot proceed." *Id.*

"Simply framing a claim as equitable relief is insufficient to escape a determination that the relief sought is legal." *Cent. States, Se. & Sw. Areas Health & Welfare Fund*, 756 F.3d 356, 361. A plaintiff's claim for monetary relief under § 502(a)(3) will be considered equitable only if it fits into one of the few categories of "typical equitable relief" that allow for money damages. *See id.* Further, the Fifth Circuit has "stressed that, for a plan fiduciary's action to fall within § 502(a)(3)'s jurisdictional grant, it must seek recovery of (1) specifically identifiable funds, (2) that belong in good conscience to the Plan, **and (3) that are within the possession and control of the defendant** . . . " *Cooperative Ben. Adm'rs, Inc. v. Ogden*, 367 F.3d 323, 332 (5th Cir. 2004) (emphasis added).

Count I allegedly seeks "an amount equal to all fees paid by the Class Members' plans to VALIC (including its affiliates) in connection with the arrangement . . . Those fees have been retained by VALIC, and should be returned to the Class Members' plans on the basis of either equitable disgorgement or an accounting." Compl. at p. 9:22-26. The "arrangement" is the

"contractual arrangement with VALIC" containing an alleged penalty provision. *See* Compl. at ¶¶ 28 and 29. Again, the Complaint identifies no contract to which VFA is a party – let alone a contract pursuant to which VFA was entitled to a surrender charge or any fees from the Plan. Count I clearly seeks money damages against VFA in the amount of the surrender charge imposed by VALIC under the subject Annuity. This is not "appropriate equitable relief" under § 502(a)(3).

"Accounting for profits (also referred to as an 'accounting') and disgorgement of profits are forms of restitution." *Teets*, 921 F.3d 1200, 1225. Only equitable restitution is available under § 502(a)(3) and equitable liens by restitution require that the "res" be clearly traceable to a particular fund in the defendant's possession. *See Cent. States, Se. & Sw. Areas Health & Welfare Fund*, 756 F.3d 356, 362 and 366; *see also JPMorgan Chase Severance Pay Plan Administrator v. Romo*, No. H-21-1685, 2021 WL 4442519, *8 (S.D. Tex. Sept. 28, 2021). Thus, the tracing requirement for equitable restitution also applies to accounting and disgorgement of profits. *See Teets*, 921 F.3d 1200, 1225. To qualify for this remedy in equity, plaintiff must show entitlement to a constructive trust on particular property held by the defendant that the defendant used to generate the profits. *Teets* at 1226. Absent Plaintiffs' allegation of particular property held by VFA subject to a constructive trust, Plaintiffs seeks payment out of VFA's general assets which is a request for legal relief which cannot be awarded under § 502(a)(3). *See id.* The failure to seek appropriate equitable relief under § 502(a)(3) alone warrants dismissal of Count I against VFA.

Conclusion

For the above reasons, Count I of the Complaint should be dismissed as to Defendant VALIC Financial Advisors, Inc. Further, in light of the facts alleged in the Complaint and the terms of the subject contracts, amendment would be futile and leave to amend therefore should be denied.

Dated: April 22, 2022

By: */s/ David T. McDowell*

David T. McDowell*
Tex. Bar No. 00791222
Federal ID No. 18464
david.mcdowell@mhllp.com

Robert P. Debelak III
Tex. Bar No. 24078410
Federal ID No. 1357835
bobby.debelak@mhllp.com

Elizabeth P. Wroblewski
Tex. Bar No. 24115966
Federal ID No. 3529283
elizabeth.wroblewski@mhllp.com

MCDOWELL HETHERINGTON LLP
1001 Fannin Street, Suite 2700
Houston, Texas 77002
Telephone: (713) 337-5580
Facsimile: (713) 337-8850

Charan M. Higbee**
California Bar No. 148293
charan.higbee@mhllp.com

MCDOWELL HETHERINGTON LLP
1999 Harrison Street
Suite 2050
Oakland, California 94612
Telephone: (510) 628-2145
Facsimile: (510) 628-2146

**Attorney-in-charge*
***Admitted pro hac vice*

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and forwarded the foregoing via email to all counsel of record.

/s/ David T. McDowell
David T. McDowell