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

D.L. MARKHAM, DDS, MSD, INC. 401(k) PLAN; D.L. MARKHAM, DDS, MSD, INC., as plan administrator; Plaintiffs, vs. THE VARIABLE LIFE ANNUITY INSURANCE COMPANY (VALIC); VALIC FINANCIAL ADVISORS, INC.; VALIC RETIREMENT SERVICES COMPANY; 2929 Allen Parkway, Houston, Texas, 77019, Defendants.	Case No. 4:22-cv-00974

THE MARKHAM PLAINTIFFS' OPPOSITION TO DEFENDANT VALIC'S MOTION TO DISMISS AND/OR MOTION TO STRIKE

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NATURE AND STAGE OF PROCEEDING

This is an ERISA class action that primarily arises from the discretionary surrender charge in Defendant VALIC's variable annuity contract for ERISA plans. Plaintiffs are a small dental practice and its retirement plan for their employees. The Complaint was filed on January 1, 2021, in a California federal court and venue has since been here. The VALIC Defendants now bring motions to dismiss or strike the Complaint, which Plaintiffs oppose. If Defendants' motions are granted in any respect, Plaintiffs request leave to amend.

RELEVANT FACTS

Luminita Markham and her husband David are dentists with a small dental practice: Plaintiff D.L. Markham, DDS, MSD, Inc. The dental practice established a retirement plan for its employees named after the practice (the "Plan"). (Complaint ¶ 5.) The dental practice is the Plan fiduciary. Defendant VALIC, a subsidiary of AIG, specializes in retirement plans. (*Id.* at 6.)

Sometime in May 2018,[1] VALIC and Markham entered into a Service Provider Agreement (SPA) whereby VALIC would maintain Markham's Plan and provide other services. (Levy Decl., Ex. B; Complaint ¶ 10.) The SPA has a section devoted to "Service Fees." In addition to specific administrative fees, the fee schedule required Markham to pay a "set up fee" of $300 "for a takeover plan," as well as "annual per participant fees," and "document maintenance fees." (*Id.*, § V.A, App. C.)

On or around May 18, 2018, Markham and VALIC also entered into a Portfolio Director Group Fixed and Variable Deferred Annuity Contract (form # UITG-194) ("PD Contract"). VALIC was the Contract's issuer and record-keeper. (Complaint at ¶ 11.) If required, Markham can and would allege that, prior to entering into the PD Contract, VALIC provided certain

[1] The version of the SPA attached to VALIC's opposition is different than SPA in Markham's files. Notwithstanding Levy's declaration, VALIC's version of the SPA was seemingly executed on May 10, 2018, not May 18, though the handwriting is not entirely clear. (Levy Decl., Ex. B.) The precise date on which the parties entered into the SPA, and what was signed by whom and when, must be the subject of future discovery. The Court cannot take judicial notice of the SPA. To the extent Levy's Declaration contains facts, the Court cannot take judicial notice of those facts.

disclosures to Markham as required by 29 CFR § 2550.408b-2. In these disclosures, VALIC stated that "VALIC and VALIC Retirement Service Company . . . are considered to be covered service providers." The disclosures further state that VALIC's surrender charges applied to participant withdrawals, not Plan withdrawals. (Complaint ¶ 13.) As a result of its contracts with VALIC, Markham rolled its employees' retirement savings into the PD Contract and on to VALIC's platform.

At its most basic (technicalities aside), the PD Contract allows participants to save for retirement by investing money in variable annuities in a 401(k) plan, through "Purchase Payments," the funds for which can be rolled over or directly transferred from another plan. (Levy Decl., Ex. A, §§ 1, 2.04.) Purchase Payments are allocated to each Participant's Account which are held by VALIC for the participants' exclusive benefit, in a "Separate Account A" [2] (Levy Decl., Ex A §§ 1, 3.02, 6.03.) VALIC states it deducts fees – maintenance or separate account charges – from the Participants' Accounts in exchange for providing services. (*Id.* at § 2.05, 206.)

Under the contract, a participant can get his money back from VALIC through a "Cash Surrender" or a "Withdrawal" (*Id.* at §§ 4.01-02), but this comes at a potential price. "The Cash Surrender or Withdrawal charge is 5% of (1) the amount withdrawn, or (2) the amount of any Purchase Payments received during the most recent 60 months prior to the surrender or withdrawal, whichever is less." (*Id.* at 4.3.) VALIC, of course, knows the terms of the PD Contract that it drafted. (Complaint ¶ 17.) VALIC maintains that, under this contract, if a Plan changes service providers (as opposed to a participant withdrawing funds early for personal use), VALIC can charge all participants in the Plan **five percent of their retirement savings**. And the more that participants invest in their retirement, the more it can cost them – in pure dollar

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[2] "The Separate Account is registered with the SEC as a Unit Investment Trust." See Request for Judicial Notice of VALIC's Separate Account A 2019 Annual Report, p. 37, filed herewith. "The assets of the Separate Account are segregated from the Company's assets." *Id.* at 40. *Lovelace v. Software Spectrum,* 78 F.3d 1015, 1017-1018 (5th Cir. 1996) ("courts may . . . consider matters of which they may take judicial notice" in deciding motions to dismiss).

terms – for the Plan to change providers.

The existence of the surrender charge is prominently identified on the first page of the PD Contract. (Levy Decl., Ex. A.) As an ERISA fiduciary, Markham should have known the surrender charge is an unlawful termination penalty that violates ERISA and harms the Plan and its participants. But the Markhams are dentists, not a Variable Annuity Life Insurance Company. Moreover, whether or not to impose the surrender charge is entirely discretionary for VALIC. The PD Contract states:

> The surrender charge may be waived or reduced…under certain plans or arrangements which are expected to result in administrative savings… We may waive any withdrawal or surrender charge attributable to Purchased Payments received during specific periods of time, and under conditions and Limitations set by Us.

(Complaint ¶ 12; Ex. A § 4.06.)

In or around January 2020, Markham determined that VALIC's performance was insufficient to justify its high fees. (Complaint ¶ 12.) Markham sought to terminate the Plan's relationship with VALIC and select a different service provider. (*Id.* at ¶ 12.) Over the next eight months, VALIC resisted Markham's efforts to terminate the relationship, continuing to collect fees all the while. (*Id.*) On April 30, 2020, VALIC informed Markham that "the PD Contract provided for a 5% surrender charge on transfers out of the contract on amounts contributed in the previous 60 months <u>which would effectively cover all assets to be transferred by the Plan</u>." In other words, VALIC asserted it could take 5% of each participant's retirement savings should Markham leave the fold. (*Id.*) At the same time, VALIC also informed Markham that the PD contract contained exceptions to the imposition of the surrender charge. (*Id.*) Markham retained counsel. (*Id.* at 14.)

Markham's counsel sent VALIC a letter and explained the prohibition on termination penalties in 29 CFR §2550.408b-2(c). (*Id.*) VALIC responded that its Executive Review Committee ("Committee") would review the matter. (*Id.*) According to VALIC (as Plaintiffs can and would allege), this Committee apparently consisted of five senior executives and two attorneys. (Levy Decl. ISO Motion to Transfer Venue ¶¶ 10-11.) Also according to VALIC, the

decision to impose the surrender fee was made by Eric Levy, VALIC's Executive Vice President, "after consulting the appropriate persons." (*Id.* at ¶ 14.) The consultation period lasted six weeks. (Complaint ¶ 14.)

If necessary, Plaintiffs can and would allege that VALIC refused to transfer the Plan's assets to the new service provider unless Markham first entered into a "transition agreement" with VALIC. The transition agreement required Markham to release certain claims against VALIC as a condition of VALIC releasing the Plan's assets. In order to finally end the Plan's disadvantageous relationship with VALIC, and finally transfer the assets to a new service provider, the Plan had no choice but to sign the transition agreement. Pursuant to this agreement, on or about August 19, 2020, VALIC transferred the Plan's assets to the successor's platform, minus a surrender penalty of $20,703, representing approximately 4.5% of each participants' retirement savings. (*Id*. at ¶ 15.)

This lawsuit followed.

STATEMENT OF THE ISSUES

VALIC's motion to dismiss raises these issues.

1. Was VALIC a "party in interest" for purposes of 29 U.S.C. § 1106[406][3] when entering into its relationship with the Plan or when assessing the surrender charge?

The Court must accord *Chevron* deference to the Department of Labor's interpretation of "party in interest." *Meredith v. Time Ins. Co.*, 980 F.2d 352, 357-58 (5th Cir. 1993). Factual allegations are construed in a manner most favorable to Plaintiffs. *Baker v. Putnal,* 75 F.3d 190, 196 (5th Cir. 1996). There is no heightened pleading standard for ERISA claims. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425-426, 134 S.Ct. 2459, 2470-2471 (2014) (rejecting a

[3] The case law often refers to the ERISA statute by its original code sections as opposed to its placement in the U.S. Code, and the citations are not intuitively cross-referenced. For example, ERISA § 3 is found at 29 U.S.C. § 1002, ERISA § 406 is found at 29 U.S.C. § 1106, and ERISA § 502 is found at 29 U.S.C. § 1132. In an effort at clarity, we use generally cite to the U.S. Code and place the ERISA citation in brackets, e.g., 29 U.S.C. § 1002[3] means 29 U.S.C. § 1002 and ERISA § 3.

proposed presumption of prudence for an ERISA action and directing the Court of Appeals to apply *Twombly* and *Iqbal* on remand). "If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009).

2. Did Markham and VALIC have actual or constructive knowledge that the PD Contract was a prohibited transaction within the meaning of 29 U.S.C. § 1106[406]?

This is a factual issue. At the pleadings stage, factual allegations are construed in a manner most favorable to Plaintiffs.

3. Was VALIC a Plan fiduciary when it chose to assess the surrender charge?

This is a factual issue and factual allegations are construed in a manner most favorable to Plaintiffs.

4. Must or do Plaintiffs plead facts sufficient to allege that the surrender charge was an unlawful penalty?

This issue raises questions of law and fact. Factual allegations are construed in a manner most favorable to Plaintiffs.

5. Do Plaintiffs adequately plead a claim for "appropriate injunctive relief" under 29 U.S.C. § 1132[502](a)(3)?

A "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 46, 78 S.Ct. 99, 102 (1957). A complaint cannot be dismissed for an "imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11, 135 S.Ct. 346 (2014).

6. Should the Court strike the complaint's allegations as they relate to fees paid pursuant to VALIC's SPA?

A motion to strike is disfavored and infrequently granted. *Ross v. Dejarnetti*, 514 F.Supp.3d 845, 850 (E.D. La. 2021). It should be granted only when the pleading to be stricken

has no possible relation to the controversy. *Augustus v. Board of Public Instruction of Escambia County*, 306 F.2d 862, 868 (5th Cir. 1962). Matters of importance should not be decided on a motion to strike. *Id.*

7. If the Court grants VALIC's motion to dismiss in whole or in part, should it grant Plaintiffs leave to amend?

In the absence undue delay, bad faith, dilatory motive, undue prejudice, or futility of amendment, leave to amend should be freely given. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962); F.R.C.P. 15(a).

SUMMARY OF ARGUMENT

As to Count One

VALIC was a "party in interest" both at the time it entered into its relationship with the Plan and at the time it chose to assess the surrender charge. This is the best interpretation of the statutory text and it is the interpretation established by the ERISA regulations. See 29 CFR §§ 2550.408b-2(c)(1)(i), (v)(A). VALIC's proposed interpretation is contrary to ERISA's text and purposes. If adopted, it would potentially void by implication (either in whole or part) long-standing ERISA regulations governing service provider conduct prior to entering into an initial contract and render nugatory text distinguishing a contract from its extension or renewal that is contained in recent amendments to the relevant prohibited transaction exemption. 29 U.S.C. § 1108[408](b)(2)(B).

Markham caused its Plan to engage in a transaction that constitutes furnishing services between the Plan and VALIC. This transaction-furnishing-services was prohibited by 29 U.S.C. §1106[406] and thus violated ERISA unless an exemption applied. No exemption applied because the surrender charge was an unlawful termination penalty. The charge provides VALIC with "payment in excess of actual loss" and it failed to require VALIC's "mitigation of damages." 29 CFR § 2550.408b-2(c)(3). Regardless, it is VALIC's burden to plead and prove the surrender charge is not an unlawful penalty, not vice versa, because the exemption is an affirmative defense. *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996).

VALIC's assessment of the surrender charge in the course of terminating the relationship was also a prohibited transaction. The imposition of this charge resulted in the transfer to VALIC, or use for VALIC's benefit, of plan assets. 29 U.S.C. § 1106[406](a)(1)(D). Namely, 4.5% of the Plan participants' retirement savings. To the extent necessary, Plaintiffs can and would also allege the surrender charge was part and parcel of an entirely separate transaction, e.g., the transition agreement VALIC required of the Plan as a condition of releasing the Plan's assets. Because VALIC was not just a party in interest, but also a fiduciary, at the time it chose to impose the surrender charge, the imposition of the charge was prohibited 29 U.S.C. § 1106[406](b)(1). Plaintiffs and VALIC had either actual or constructive knowledge of the prohibited transaction. *Intel Corp. Inv. Policy Comm. v. Sulyma*, --- U.S. 321 ---, 140 S.Ct. 768, 776 (2020). (Complaint ¶¶ 6, 17.) Regardless, knowledge is a question for the trier of fact and not something that can be resolved through a motion to dismiss. *Volk v. D.A. Davidson & Co.* 816 F.2d 1406, 1417 (9th Cir. 1987).

Plaintiffs also adequately allege entitlement to "appropriate equitable relief," 29 U.S.C. § 1132[502](a)(3), under Count I. Almost all of the Plan's assets were held by VALIC for the participants' exclusive benefit in Separate Account A. When VALIC imposed the surrender and other charges, it took these charges from the Plan's assets and, in doing so, transferred Plan assets to its General Account. (Complaint ¶¶ 10, 16, Levy Decl., Ex A, §§ 2.06, 4.03, 6.03.) These funds are specifically identifiable and fully traceable. *See Coop. Benefit Adm'rs Inc. v. Ogden,* 367 F.3d 323, 332 (5th Cir. 2004). Regardless, Plaintiffs seek, not just the Plan assets wrongfully held by VALIC, but also other equitable relief, including recission, disgorgement, and an injunction.

As to Count Two

VALIC was not just a party in interest when it chose to impose the surrender charge, it was also a plan fiduciary. The PD contract gave VALIC discretionary authority or responsibility in the administration of the plan. 29 U.S.C. § 1002[3](21)(A)(iii). VALIC could either waive the surrender charge or not. Alternatively, VALIC *exercised* that discretionary authority by

considering Plaintiffs' request for a waiver and denying it. 29 U.S.C. § 1002[3](21)(A)(i) [clause 1]. Finally, even if VALIC neither had nor exercised *discretion*, it nevertheless had *authority* and *control* respecting management or disposition of the Plan's assets. 29 U.S.C. § 1002[3](21)(A)(i) [clause 2]. After Plaintiffs sought to terminate the relationship, VALIC held onto the Plan's assets for eight months and (as Plaintiffs can and would allege) conditioned release of the assets on a transition agreement requiring that the Plan waive certain claims. *See Blatt v. Marshall and Lassman,* 812 F.2d 810, 813 (2d Cir. 1987).

Because VALIC was a fiduciary, it had fiduciary duties, including an obligation to not deal with the assets of the plan in its own interest or for its own account. 29 U.S.C. § 1106[406](b)(2). VALIC did exactly that when it imposed the surrender charge. VALIC is subject to liability for its fiduciary breaches irrespective of 29 U.S.C. § 1132[503](a)(3)

As to the Motion to Strike

VALIC does not cite to the paragraphs or portions of paragraphs it seeks to strike from Plaintiffs' Complaint. This makes it impossible for the Court to intelligently rule on the motion. Rather, VALIC appears to seek a ruling, at the pleadings stage, that Plaintiffs cannot adequately represent class members with respect to SPA fees different from the fees incurred by Plaintiffs. This issue, to the extent it might exist, should not be resolved through a motion to strike.

As to Leave to Amend

If VALIC's motion is granted in any respect, Plaintiffs ask for leave to amend to address any deficiencies identified by the Court. There is no reason to deny Plaintiffs this opportunity.

ARGUMENT

I. The ERISA Statute And Regulations

We start with the ERISA statute and its implementing regulations, as contemplated by Congress through 29 U.S.C. § 1135. These regulations are entitled to *Chevron* deference. *Meredith, supra,* 980 F.2d at 357-58. Thus, if the statute is ambiguous, and the agency's interpretation of the statute is reasonable, the Court should defer to the agency. *Id.*

ERISA provides that every employee benefit plan shall be established and maintained

pursuant to a written instrument. 29 U.S.C. § 1102[402](a)(1). Generally, the assets of the plan "shall be held for the exclusive purposes of providing benefits to participants of the plan and defraying the reasonable expenses of administering the plan." 29 U.S.C. §§ 1103[403](c)(1). A plan fiduciary must discharge his duties with respect to a plan for these purposes alone, and with the "care, skill, prudence, and diligence" of a prudent man. 29 U.S.C. § 1104[404](a)(1)(A)-(B). The fiduciary must act in accordance with the documents and instruments governing the plan, but only to the extent they are consistent with ERISA. 29 U.S.C. § 1104[404](a)(1)(D).

A person is a fiduciary under ERISA to the extent: (i) he exercises any discretionary authority or discretionary control respecting management of the plan [clause 1] *or* exercises *any* authority or control respecting management or disposition of its assets [clause 2]; (ii) he renders investment advice . . . ; *or* (iii) he *has* any discretionary authority or discretionary responsibility in the administration of such plan" [without regard to whether it is exercised]. 29 U.S.C. § 1002[3](21)(A)(i)-(iii) (emphasis added).

A. Prohibited Transactions and Their Exemptions

To protect ERISA plans and their participants, ERISA expressly prohibits certain transactions. For example, "a fiduciary *with respect* to a plan shall not *cause* the plan to engage in a transaction, if he knows or *should know* that such a transaction *constitutes* a direct or indirect *furnishing* of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. § 1106[406](a)(1)(C) (emphasis added, cleaned up). ERISA defines a "party in interest" to include "a person providing services to [an ERISA] plan," 29 U.S.C. § 1002[3](14)(B), i.e., service providers.

A service provider's status as a party in interest for "prohibited transaction" purposes does not depend on a pre-existing contract or even a plan. This is because the prohibited transaction constitutes the *furnishing* of services, with the use of the present participle evidencing continuing and thus future conduct. This textual reading is confirmed by 29 U.S.C. § 1108[408], which sets forth a number of exemptions to prohibited transactions. Most relevant here, § 1108[408] states that the prohibitions set forth in § 1106[406] "shall not apply to any of the

following transactions:"

> *Contracting* or *making reasonable* arrangements with a party in interest for office space, or legal, accounting, or other services necessary for *the establishment or operation* of the plan, *if no more than reasonable compensation is paid for.*

29 U.S.C. § 1108[408](b)(2)(A). This exemption only makes sense if a person furnishing services to the plan is considered a party in interest at the time of initial contracting or the making of reasonable arrangements. A service provider hired to *establish* a plan can have no preexisting relationship with a plan not yet established, but to give meaning to the phrase in the exemption, it must nonetheless be a party in interest.[4]

The ERISA regulations confirm this statutory interpretation. On February 3, 2012, the Department of Labor (DOL) issued a final rule on the Reasonable Contract or Arrangement under Section [1108]408(b)(2) – Fee Disclosure." As the DOL explained in promulgating this rule: "The furnishing of goods, services, or facilities between a plan and a party in interest to the plan generally is prohibited under section [1106]406(a)(1)(C) of ERISA. As a result, a service relationship between a plan and a service provider would constitute a prohibited transaction, because any person providing services to the plan is defined by ERISA to be a party in interest to the plan. . . [But] section [1108]408(b)(2) provides relief from ERISA's prohibited transaction rules for service contracts or arrangements between a plan and a party in interest if the contract or arrangement is reasonable, the services are necessary for the establishment or operation of the plan, and no more than reasonable compensation is paid for the services." (See F.R. Vol. 77, No. 23 p. 5632 (Feb 3, 2012) found at https://www.govinfo.gov/content/pkg/FR-2012-02-03/pdf/2012-2262.pdf). The regulations thus declare that "no contract or arrangement for services between a covered plan and a covered service provider, *nor any extension or renewal*, is reasonable within the meaning of section [1108]408(b)(2) of the Act" unless specific regulatory

[4] Applying similar logic, an employer hiring a service provider for unreasonable pay before plan establishment would no more be a fiduciary than the service provider would be a party in interest, locking the plan into an unreasonable arrangement that is neither a prohibited transaction nor a fiduciary breach.

requirements are met, including the disclosure of certain information "*reasonably in advance of the date the contract or arrangement is entered into, and extended or renewed*." 29 CFR § 2550.408b-2(c)(1)(i), (v)(A) (emphasis added).

Thus, the DOL interprets "parties in interest" under ERISA, for both prohibited transaction and exemption purposes, to include service providers as of the time of the initial contract or arrangement, *as well as* any extension or renewal. Significantly, Congress has since confirmed the DOL's regulatory interpretation of § 1106[406] through recent amendments to the § 1108[408] exemption provision. 29 U.S.C. § 1108[408](b)(2)(B); The Consolidated Appropriations Act, 2021, Pub. L. 116-260, ("CAA"). Under this amendment – that became effective in December 2021[5]—service providers to both welfare and pension plans must satisfy certain disclosure requirements, for initial, extended, or renewed contracts to fall within the § 1108[408] exemption.

An interpretation of ERISA concluding that service providers are not parties in interest at the time the service provider relationship is first formed would effectively render ERISA's disclosure and other regulations inapplicable as to new service providers, but not existing ones. When a plan went out for bid, an existing service provider would have disclosure obligations but its competitors would not. The competitors could rig the process and obscure their fees because they are not "parties in interest," frustrating the plan's fiduciary and harming the plan participants. The unscrupulous outside competitor would also be unconcerned about knowingly participating in a fiduciary breach since the fiduciary would have made the decision to hire the outside competitor on the best (though wrong) information it had at the time.

As with the regulation, the statute does not support this interpretation, and Congress surely did not intend it.

B. Exemption Requirements

Of course, just because a transaction involving a service provider is presumptively

[5] The new requirements became effective for contracts entered into on or after December 27, 2021. See DOL Field Assistance Bulletin 2021-03, introductory paragraph.

prohibited does not mean it is always forbidden. The exemption permits service provider transactions so long as they are reasonable. Surrender penalties, as a general rule, are not. The Regulations state:

> No contract or arrangement is reasonable within the meaning of section [1108]408(b)(2) of the Act and paragraph (a)(2) of this section if it **does not permit termination by the plan without penalty to the plan on reasonably short notice under the circumstances to prevent the plan from becoming locked into an arrangement that has become disadvantageous. …**

29 CFR § 2550.408b-2(c)(3) (emphasis added). The Regulations further provide that a fee is really a penalty "if it provides for payment in excess of actual loss or if it fails to require mitigation of damages." *Id*.

C. Remedies

ERISA empowers a participant or fiduciary to bring a civil action to enjoin ERISA violations, redress these violations, or "obtain other appropriate equitable relief." 29 U.S.C. § 1132[502](a)(3). This provision sets no limits on the universe of possible defendants for ERISA violations. *Bombardier Aero. Emple. Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, P.C.*, 354 F.3d 348, 352 (5th Cir. 2003). ERISA also empowers a participant or fiduciary to sue other fiduciaries for breach of their ERISA obligations. 29 U.S.C. § 1132[502](a)(2). In the event of a breach, the fiduciary is liable for plan losses, unjust profits, and other equitable or remedial relief. 29 U.S.C. § 1109[409]. ERISA favors the class action device. *In re Beacon Associates Litigation*, 282 F.R.D. 315, 338-39 (S.D.N.Y. 2012).

II. Plaintiffs State A Claim Under Count I

A. VALIC Was a Party in Interest with Respect to the SPA and PD Contract

The case law conflicts on whether a service provider is a "party in interest" for purposes of 29 U.S.C. § 1106[406](a)(1)(C) when it enters into an initial service contract with a Plan. This demonstrates that, at a minimum, the statute is ambiguous. Reasonable courts can and do differ. Thus, under *Chevron*, the Court should defer to the DOL's interpretation. The DOL's interpretation is also correct.

The "statutory language does not say that the contract that causes the service provider to

be a party in interest must be different than the prohibited transaction." *Comerica Bank for DALRC Retiree Benefit Trust v. Voluntary Employee Benefits Associates, Inc.*, 2012 WL 12948705 at *18 (N.D. Ga., Jan. 11, 2012). "Moreover, the legislative history reveals Congress was specifically concerned with the danger that a Plan would become locked into a long-term, disadvantageous service contract ..." *Id*. at n. 27 (citations omitted). "The danger of long-term contracts is only addressed if every service contract is required to be reasonable, rather than just successive contracts." *Id*.

Thus, in *Ronches v. Dickerson Employee Benefits, Inc*., 2009 WL 10669571, at *7-8 (C.D. Cal., Oct. 30, 2009), the court denied a motion to dismiss a § 1132[502](a)(3) claim based on § 1106[406](a)(1)(C) and (D)), declining to "impose an additional requirement for prohibited transactions liability that is not found in the statute. ERISA's plain language includes 'person providing services to such plan.' [ERISA § 3(14)(B)]. … Limiting liability under § [406] to service providers who have a preexisting relationship would not only contravene the clear language of the statute, but would not be rationally related to 'Congress's overriding concern with the protection of plan participants and beneficiaries.' *Id*; *See also Peters v. Aetna Inc.,* 2 F.4th 199, 240 (4th Cir. 2021). "Thus, [the service provider] could be a party in interest because it 'provided services to the plan at the time [its administrative] fees were paid[.]'" (Citing *Sweda v. Univ. of Pa.,* 923 F.3d 320, 339 (3d Cir. 2019)). Similarly, in *Braden v. Wal-Mart Stores*, the 8th Circuit reasoned; "[Defendants] caused the Plan to enter into an arrangement with Merrill Lynch, a party in interest, under which Merrill Lynch received undisclosed amounts of revenue sharing payments in exchange for services rendered to the Plan. This arrangement amounts to a 'direct or indirect. . .furnishing of services. . .between the plan and a party in interest.' 29 U.S.C. § 1106[406](a)(1)(C)." *Braden v. Wal-Mart Stores, Inc*. 588 F.3d 585, 601 (8th Cir. 2009).

Thus, and consistent with the DOL regulations, this line of cases holds that "ERISA presumptively prohibits all service contracts by ERISA plans unless an exception applies." *Comerica Bank, supra,* 2012 WL 12948705 at *53.

VALIC relies on a different line of a cases. VALIC cites dicta in *Chavez v. Plan Benefit*

Servs., Inc., 2018 WL 6220119, *4 (W.D. Tex. Sept. 12, 2018), that section "[1106]406(a) 'does not cover arms-length transactions with third parties who have no prior relationship with a plan or its fiduciaries.'" However, neither *Chavez* nor the unpublished Third Circuit opinion on which it relied considered the "necessary for the establishment … of the plan" text in ERISA § [1108]408(b)(2). *Chavez*, 2018 WL 6220119, *4.

In *Sellers v. Anthem Life Ins. Co.,* 316 F. Supp. 3d 25 (D.D.C. 2018), the court considered whether an insurer's high insurance premiums paid by a plan could constitute a prohibited transaction, at least before renewal of the initial contract. The court concluded that no ERISA § 1106[406](a)(1)(C) prohibited transaction can occur with respect to the initial engagement of the service provider. *Id.* at 33. Respectfully, the *Sellers* court came to the wrong conclusion.

First, the *Sellers* court suggests that because § 1106[406](a)(1)(A)-(D) are confined to transactions with parties in interest, but (E) applies to anyone, that means (A)-(D) transactions "cannot be read to categorically prohibit the very transactions that cause a person to obtain the status of a party in interest." *Id.* at 34. But §1106[406](a)(1)(E) describes the acquisition by a plan of either an "employer security" or "employer real property," terms expressly defined in §§ 1107[407](d)(1) and (2). They are types of property highly associated with the employer sponsoring the plan, and the prohibition is concerned with the property, not the identity or status of the counter-party. Thus, § 1106[406](a)(1)(E)'s distinction from 1106[406](A)-(D) is not dispositive.

On the other hand, ERISA treats service contracts differently than all of the other transactions described in § 1106[406](a)(1)(A) through (D) because ERISA defines a party in interest to include a service provider. 29 U.S.C. § 1002[3](14)(B). None of the other transactions described in (A) through (D) cause a person engaged in a plan transaction to become a party in interest. So, when the *Sellers* court states that, if a service provider were treated as a party in interest at the time of the initial contract, it "would turn Section 406(a)(1) into 'a statutory provision that proscribes [a] retirement pension plan's most basic operations'" (*Sellers* at 36), the court is merely choosing to recognize the apparent oddity of an outright prohibition on providing

services to a plan while ignoring the far greater oddity of allowing unreasonable contracts with initial service providers. But the apparent oddity is addressed by exemption in § 1108[408] and the DOL's implementing regulations. Under the exemption, the transaction is allowed if it is reasonable.

The rule Defendants promote would result in a plan fiduciary, faced with a contract containing a penalty provision but no stated termination date, being permanently unable to escape the contract on behalf of the plan without penalty, harming the interests of participants. It would also effectively read the § 1108[408] exemption out of the statute for initial service providers. It would also mean that all service providers that have been gearing up for compliance with the new, Congressionally-mandated 2021 disclosure rules in order to satisfy the exemption requirement of § 1108[408](b)(2) for new clients having been wasting their time. Under VALIC's analysis, there is no obligation to meet the disclosure requirements of the exemption because the initial contract – regardless of its terms – cannot be prohibited.

In accordance with its obligations to defer to the DOL under *Chevron*, the Court should therefore follow *Peters, Braden,* and *Comerica* and rule that VALIC was a party in interest for purposes of all services performed under the at-issue contracts.

B. VALIC's Taking the Penalty Was a Separate Prohibited Transaction

VALIC cites *Chavez, supra,* 2018 WL 6220119, * 4 for the proposition that taking a penalty from the Plan's assets was not a transaction. The *Chavez* court explained that its "best reading of § 1106[406](a)," based on § 1108[408](b)(2) is that "'a plan fiduciary does not cause the plan to engage in a [presumptively prohibited] transaction' when it pays the fees of a party in interest, so long as the contractual obligation to pay those fees arose before the third party assumed party in interest status." *Chavez*, 2018 WL 6220119 at *3 (emphasis supplied). This analysis, even assuming it is correct, does not apply in this case. Here, the Plan's obligation to pay the surrender charge did not arise until VALIC's services were terminated and the Committee decided to impose the penalty.

As in *Peters,* the imposition of the penalty here was a transaction distinct from the

performance of services. Though the agreement for the penalty preceded the relationship, VALIC "earned" the termination penalty (improper and unreasonable as it was) over the short course of the two years that VALIC "furnished" the services as a party in interest.

C. Markham and VALIC Knew They Entered into a Prohibited Transaction

Contrary to VALIC's argument, Plaintiffs do not allege they had neither actual *nor constructive* knowledge of the surrender charge. (Complaint at ¶ 13.) *Constructive* knowledge is imputed "to a person who fails to learn something that a reasonably diligent person would have learned." *Intel Corp. Inv. Policy Comm. v. Sulyma*, *supra*, 140 S.Ct. at 776. Plaintiffs alleged – at least by inference – *constructive* knowledge. Moreover, VALIC contends: "*The surrender fee is plainly disclosed on the first page of the annuity contract.*" (Motion, 1:14-15.) Whether those disclosures create constructive knowledge is a "question for the trier of fact.'" *Volk v. D.A. Davidson & Co.* 816 F.2d 1406, 1417 (9th Cir. 1987). Count I should not be dismissed based on Markham's knowledge because Plaintiffs had *constructive* knowledge.

As for VALIC's knowledge, the Complaint alleges that VALIC drafted the contract that contained the fee and reserved for itself discretion to impose it. VALIC was also told the surrender charge was a prohibited transaction. (Complaint at ¶ 17.) These allegations are adequate.

D. VALIC Must Prove the Exemption Applies

In truth, VALIC attempts to use the knowledge requirement to seek a pleading-stage ruling on a potential defense: "The lack of factual allegation prevents the Court from determining whether the surrender fee is a prohibited penalty or a permitted 'necessary services exemption.'" (Motion, p. 20.) This is improper.

The exemption in ERISA § 1108[408](b)(2) is an affirmative defense, and "a defendant has the burden to prove its applicability." *Howard v. Shay,* 100 F.3d 1484, 1488 (9th Cir. 1996); accord *Harris v. Amgen, Inc.* 788 F.3d 916, 943 (9th Cir. 2015). "[T]he statutory exemptions . . . are defenses which must be proven by the defendant" and "a plaintiff need not plead facts

responsive to an affirmative defense before it is raised." *Braden*, 588 F.3d at 601 n.10. Also, *Chavez,* at *41 ("reasonable compensation is an affirmative defense to the claim that Defendants engaged in prohibited transactions.").[6]

Trying to justify the surrender charge, VALIC cites *Cruson v. Jackson Nat'l Life Ins. Co.,* 954 F.3d 240 (5th Cir. 2020). (Motion, p. 5.) *Cruson* does not deal with ERISA, and however common termination penalties may be where state insurance law governs, they are illegal under ERISA. 29 CFR §2550.408b-2(c)(3); also *In re Iron Workers Local 25 Pension Fund,* 811 F. Supp. 2d 1295 (E.D. Mich. 2011) at 1321; *St. Jude Heritage Medical Group v. Integrated Wealth Management, Inc.,* 2019 WL 4419003, at *13 (C.D. Cal., Aug. 20, 2019) (granting plaintiff's affirmative summary judgment motion on prohibited transaction claim where "annuity represented an unreasonable arrangement because it 'locked' the Plan into an arrangement that it could not escape in the first five years of the contract without incurring a surrender charge.").

Since the surrender charge would continuously increase for at least the first five years of the contract as new contributions were made, it had the effect of increasing in amount over that period even while VALIC had already charged, or was continuing to "earn," a set-up fee and other fees. But the most pernicious effect of this penalty is its tendency to cause a plan fiduciary to continue with VALIC's services instead of another provider's merely to avoid the outrage from plan participants that would inevitably ensue once the penalty was imposed on participant accounts. This creates extraordinary pressure on plan fiduciaries to retain VALIC regardless of the existence of better alternatives. The regulation aims to prevent this unhealthy fiduciary quandary. That Plaintiff decided to cut its losses after two years does not change the fact that the penalty provision rendered the entire agreement unreasonable.

Plaintiffs claim that VALIC cannot establish that its fee meets the exemption; it does not

[6] VALIC relies on *Del Castillo v. Community Child Care Council of Santa Clara Cty., Inc.*, 2019 WL 6841222, at *7 (N.D. Cal., Dec. 16, 2019), where the reasonableness of the fee would be determined by facts not "peculiarly within the possession and control" of defendants. Here, reasonableness may, plausibly, be determined by VALIC's loss on termination, which only VALIC would know before discovery.

reduce over time, exceeds reasonable startup costs, exceeds actual losses, requires no mitigation of damages, and duplicates fees already imposed. VALIC's defense must await discovery and further motion practice.

E. Plaintiffs Properly Request Equitable Relief

The Complaint seek an accounting, disgorgement, and "such other appropriate equitable relief as the court sees fit." When determining whether an action for equitable relief is properly brought under ERISA, "[c]ourts must focus on the substance of the relief sought and the allegations pleaded, not on the label used." *Innova Hosp. San Antonio, Ltd. P'ship v. Blue Cross & Blue Shield of Ga., Inc.,* 892 F.3d 719, 733 (5th Cir. 2018). "At the pleading stage … [t]he form and nature of any appropriate equitable relief need not be specified …" *Amy F. v. Cal. Physicians' Serv.,* 2020 WL 2850282, *3 (N.D. Cal. June 20, 2020).

Here, Plaintiffs seek appropriate equitable relief within the meaning of § 1132[502](a)(3). They have identified adequately a fund from which equitable relief can be directed. Plan participants made contributions "for allocation to a Participant Account." (Levy Decl. Ex. A, §1). Those were plan assets under *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank,* 510 U.S. 86, 114 S. Ct. 517 (1993).[7] VALIC imposed a penalty on those assets, and collected other fees for services under the nonexempt arrangement, and thus wrongfully appropriated assets belonging to the Plan. (Levy Decl., Ex. B at §§ 4.01 and 4.03.) VALIC's "Separate Account A holds all assets for Variable Investment Options for the exclusive benefit of Participants … and other holders of annuity contracts." (*Id.* at §6.03; see also §3.02.) The fees are "payable to the Company."[8] RJN, Ex. A, p. 42. Thus, the Complaint (in conjunction with the PD Contract) alleges the specific fund holding assets rightfully belonging to the Plan. Separate Account A's annual report also indicates that VALIC pays the penalties to its general account, enabling tracing. (*See* Levy Decl. Ex. A, §1 General Account – the assets of VALIC

[7] See also 29 CFR § 2510.3-101(h)(1)(iii).

[8] Plaintiffs can add allegations that over 94 percent of their plan was invested in Variable Investment Options, as they would expect to be true for all plans.

other than those in the Separate Account.") And the Complaint alleges VALIC's financial reserves,[9] making plausible that VALIC's account balance remained above the amounts Plaintiffs seek to recover under the "lowest intermediate balance" theory. Thus, all requirements for tracing cited in *Coop. Benefit Adm'rs, Inc. v. Ogden, supra*, 367 F.3d at 332 are satisfied. Plan money was paid to VALIC into the Separate Account A, in which it was held as Plan assets. Those are the funds Plaintiffs seek.[10]

In *Del Castillo*, 2019 WL 6841222, at *8, the court denied a motion to dismiss on the part of a claim seeking return of insurance premiums. Plaintiffs argued that the funds sought were "identifiable because the annuity contracts maintain a specific 'premium account,' for each participant in which the premiums are deposited and is separate from the "'interest account.'" *Id*. The motion to dismiss was denied – "the Court agrees that those funds should be traceable to each annuity account." *Id*.

Further, Plaintiffs' request for appropriate equitable relief includes requests for rescission and an injunction. "'Equitable or remedial' relief generally includes all of the kinds of relief available to restore the plaintiff's losses or protect him from future harm – recission[.]" *Sommers Drug Stores Co. Emp. Profit Sharing Tr. v. Corrigan Enters., Inc.,* 793 F.2d 1456, 1463 (5th Cir. 1986); *Foster v. Adams and Associates, Inc.*, 2020 WL 3639648, at *9 (N.D. Cal., July 6, 2020) (citing *Hurtado v. Rainbow Disposal Co,* 2018 WL 3372752, at *15 (C.D. Cal. July 9, 2018)). An injunction is also available equitable relief. *Gearlds v. Entergy Servs.,* 709 F.3d 448, 450 (5th Cir. 2013); *Amschwand v. Spherion Corp.,* 505 F.3d 342, 345 (5th Cir. 2007).

Count I sufficiently pleads a claim for appropriate equitable relief.[11]

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[9] Complaint ¶ 20 referenced the nearly $4 billion dollars it holds in group annuities with surrender penalties but Plaintiffs could allege myriad other indicators of VALIC's wealth.

[10] VALIC's Contract Maintenance Charges, which this lawsuit also seeks, are also identifiable and traceable from the annual statement for Separate Account A.

[11] This analysis is irrelevant to Count II. Even without allegations of identifiable property or traceable proceeds," equitable remedies such as surcharge, disgorgement or accounting for

III. VALIC Was A Plan Fiduciary For Purposes Of Count II

Courts construe the term "fiduciary" broadly under ERISA. *Donovan v. Mercer*, 747 F.2d 304, 308 (5th Cir. 1984). The central, threshold question "is whether the party was acting as an ERISA fiduciary when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226, 120 S.Ct. 2143, 2146 (2000). Here, VALIC was a fiduciary because it exercised discretionary control, 29 U.S.C. 1002[3](21)(A)(i) (clause 1), had authority over the management of the plan and distribution of plan assets, § 1002[3](21)(A)(i) (clause 2), and had discretionary authority in the administration of the plan. 29 U.S.C. § 1002[3](21)(A)(iii).

A. The Grant of Fee Discretion Made VALIC a Fiduciary under § 1002[3](21)(A)**(iii)**

Under ERISA § 1002[3](21)(A)(iii) a person is a plan fiduciary to the extent he has any discretionary authority or responsibility in the administration of the plan, and contracts can confer discretionary authority to parties other than the named fiduciary. *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1417-18, 1420-21 (9th Cir. 1997) (motion to dismiss reversed because insurer hired to administer plan could be fiduciary under § 3(21)(A)(iii)); *Tybout v. Karr Barth Pension Admin., Inc.* 819 F. Supp. 371, 377, 381 (D. Del. 1993) (motion to dismiss denied in part because insurer could be a fiduciary where contract allowed it to exercise authority over withdrawals); *Healthcare Strategies, Inc. v. ING Life Ins. and Annuity Co.*, 961 F. Supp. 2d 393, 401-402 (D. Conn. 2013) (denying summary judgment for a financial services provider who argued it had no administration authority because it was not the named administrator).

Here, the PD contract gave VALIC discretionary authority over its surrender charge. As explained in *Seaway Food Town, Inc. v. Med. Mut.,* 347 F.3d 610 (6th Cir. 2003), "when a contract . . . grants an insurer discretionary authority, even though the contract itself is the product of an arm's length bargain, the insurer may be a fiduciary." *Id.* at 618 (citations omitted); *F.H. Krear & Co. v. Nineteen Named Trs.,* 810 F.2d 1250, 1259 (2d Cir. 1987)

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profits "may be available if the defendant owed a fiduciary duty to the plaintiff and breached that duty." *Amy F., supra*, at *6, note 3.

("[A]fter a person has entered into an agreement with an ERISA-covered plan, the agreement may give it such control over factors that determine the actual amount of its compensation that the person thereby becomes an ERISA fiduciary with respect to that compensation."); *Charters v. John Hancock Life Ins. Co.,* 583 F. Supp. 2d 189, 197 (D. Mass. 2008) ("Because the Contract gave Hancock discretionary authority over its fees it acquired a fiduciary status with respect to those fees."); *Borroughs Corp. v. Blue Cross Blue Shield of Mich.,* 2012 WL 3887438, at *7 (E.D. Mich. Sep. 7, 2012) (finding that it made no difference whether the service provider's discretion over its fee related to the fee amount or whether to impose it at all); *Glass Dimensions, Inc. v. State St. Bank & Tr. Co.,* 931 F. Supp. 2d 296,304 (D. Mass. 2013) ("[I]f a contract gives an entity discretion and control over the factors that determine the amount of its compensation, the entity becomes an ERISA fiduciary with respect to its compensation."); *In re EpiPen ERISA Litigation*, 341 F.Supp.3d 1015, 1018 (D. Minn. 2018) ("Plaintiffs have plausibly alleged that Defendants control the amount they receive in … fees … and likewise exercise discretion over how much of that money is paid to the plans.").

VALIC cites *Depot, Inc. v. Caring for Montanans, Inc.,* 915 F.3d 643 (9th Cir. 2019) for the proposition that a service provider cannot be held liable for accepting previously-bargained-for compensation. *Depot* expressly states that subdivision (iii) of ERISA's fiduciary definition was not issue in that case, *Id.* at 654 n. 5, so *Depot* is inapplicable. Regardless, the *Depot* rule is conditioned upon both the § 1108[408] exemption and a lack of discretion with respect to the fee itself, since such discretion implicates fiduciary authority to administer the plan (*e.g.,* determining plan fees) under ERISA § 3(21)(A)(iii) and the attendant duty of loyalty. *Depot* is also unhelpful to VALIC because the fee discretion at issue there was subject to a 60-day advance notice provision giving the plan time to select an alternate provider. Here, the imposition of the penalty was not conditioned on notice, and discretion was exercised in *VALIC's* favor when it chose to impose the surrender charge.

Santomenno v. Transamerica Life Ins. Co., 883 F.3d 833 (9th Cir. 2018) is consistent with this analysis. The court reviewed only the "narrow, question … whether [defendant] was

acting as a fiduciary when withdrawing precise, preset fees from the pooled accounts." *Id.* at 840 (emphasis supplied.) It further explained: "Our holding today is narrow. We simply conclude that when a service provider's definitively calculable and nondiscretionary compensation is clearly set forth in a contract with the fiduciary-employer, collection of fees out of plan funds in strict adherence to that contractual term is not a breach of the provider's fiduciary duty." *Id.* at 840-841 n. 6. This case, by contrast, involves a surrender charge that was discretionary, and because of that discretion, not definitively calculable. VALIC secured for itself the discretion to waive the fee whenever it decided it would "result in administrative savings" or under unidentified "conditions and Limitations set by Us."

B. The Exercise of Fee Discretion Made VALIC a Fiduciary under § 1002[3](21)(A)**(i)** [clause 1]

In addition to its discretionary authority to impose the surrender charge under § 1002[3](21)(A)**(iii)**, VALIC also affirmatively exercised that authority within the meaning § 1002[3](21)(A)(i) [clause 1]. VALIC's Executive Review Committee considered Plaintiffs' request that it waive the surrender charge, and, after about six weeks, concluded that the penalty would be imposed. The declaration filed in support of VALIC's motion to change venue demonstrates that VALIC's Executive Vice President only chose to impose the charge after consulting with other senior executives and counsel. This was clearly an exercise of discretion. Plaintiffs further allege that VALIC exercises its discretionary authority to impose the surrender charge, or not, with respect to other class members. (Complaint ¶ 30.)

In *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield*, 751 F.3d 740, 744 (6th Cir. 2014), the defendant argued that it "exercised no discretion with respect to the Disputed Fees because they were part of the standard pricing arrangement ..." The court rejected that argument because "the imposition of the Disputed Fees was not universal," citing an underwriting manager's email acknowledging that individual underwriters had the "flexibility to determine" how and when the fees were charged and testimony that "the Disputed Fees were sometimes waived entirely for certain self-funded customers." *Id.* In *Charters v. John Hancock Life Ins. Co.*, 583 F.Supp.2d

189 (D. Mass. 2008), Hancock's summary judgment motion was denied because it could be a fiduciary. Hancock's "sole authority to set the administrative maintenance charge … between no charge at all and a maximum of … 0.5% to .75% … per dollar invested," meant that it could be a liable fiduciary. *Id*. at 191, 197.

In *Rozo v. Principal Life Ins. Co*. 949 F.3d 1071, 1074 (8th Cir. 2020), the court held a service provider was a fiduciary because it exercised discretion to set the Composite Crediting Rate ("CCR") for plan sponsors, even though the provider's contract allowed it to do so. The court distinguished the discussion from *Santomenno,* 883 F.3d at 841 about "withdrawal of *predetermined* fees," on which VALIC relies, explaining that the power to set the CCR is not a "specific term[ ] of the contract." *Id*. Instead, *Rozo* applied the analysis from *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200 (10th Cir. 2019), which held that a service provider acts as a fiduciary: if (1) it "did not merely follow a specific contractual term set in an arm's-length negotiation" and (2) it "took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision." *Id.* at 1212. Here, VALIC did not merely follow a specific contractual term in imposing the surrender charge. It established a formal process which, presumably, sometimes resulted in no penalty and sometimes a penalty of up to 5% on a case-by-case basis. VALIC exercises discretion in deciding whether to pay itself a 5% surrender charge, and thus acts as a fiduciary under § 1002[3]21(A)(i)(clause 1).

C. The Exercise of Authority and Control Respecting the Management and Disposition of Plan Assets Made VALIC a Fiduciary under § 1002[3](21)(A)**(i)** [clause 2]

Finally, VALIC was a fiduciary because it exercised authority and control respecting the management or disposition of plan assets. 29 U.S.C. § 1002[3](21)(A)(i) [clause 2]. This authority and control is apparent because VALIC refused to release the Plan's assets for eight months despite Plaintiffs' efforts to terminate the relationship. During this time, VALIC decided to impose the surrender charge. Moreover, Plaintiffs can and would allege that VALIC would

not agree to release the Plan assets unless the Plan first signed a transition agreement that included a release of certain claims. VALIC's exercise of this authority – regardless of whether or not it was "discretionary" – rendered it a plan fiduciary with respect to the terms under which the parties ended their relationship. *Blatt v. Marshall and Lassman, supra,* 812 F.2d at 813. VALIC confiscated the Plan's assets for its own purposes in violation of ERISA's requirement that assets of the plan "be held for the exclusive purposes of providing benefits to participants of the plan and defraying the reasonable expenses of administering the plan." 29 U.S.C. § 1103[403](c)(1). It thus breached its fiduciary duties.

IV. The Motion To Strike Should Be Denied

VALIC also seeks to strike the complaint's allegations as they relate to class members who paid fees under the SPA, arguing that Plaintiffs paid no such fees. VALIC references no particular paragraph or portion of a paragraph it seeks to strike, so it is unclear what the Court is supposed to do with this request. Regardless, the SPA submitted by VALIC in support of its motion to dismiss – assuming the Court takes judicial notice of it – evidences that Markham did pay fees under the SPA. According to the SPA, Markham paid a "set up fee," annual per participant fees, and plan document maintenance fees. (See Levy Decl., Ex. B §§ V.A, V.E, and Appendix B.) Whether Plaintiffs are adequate class representatives with respect to administrative fees under the SPA is an issue for class certification, not a motion to strike. *E.g., Ross, supra,* 514 F.Supp.3d at 850 (motions to strike disfavored); *Johnson v. Fujitsu Technology and Business of America, Inc.*, 250 F. Supp. 3d 460, 465 (N.D. Cal. 2017) (denying motion to strike class claims that presented questions suited for class certification).

V. The Court Should Grant Leave To Amend

In the event the Court grants any part of VALIC's motion to dismiss, Plaintiffs seek leave to amend. For example, if the Court doubts VALIC is a party in interest, Plaintiffs can allege VALIC conceded this fact in its disclosures by describing itself as a "covered service provider" – and thus a party in interest – withing the meaning of ERISA prior to entering into any relationship with Plaintiffs. If it concludes VALIC is not a party in interest, Plaintiffs can amend

the complaint (to the extent necessary) to allege claims against VALIC based on VALIC's knowing participation in Plaintiffs' fiduciary breach – irrespective of VALIC's party in interest status. *Bombardier, supra,* 354 F.3d at 352. If the PD contract falls outside of ERISA's scope (because VALIC was not at service provider at the time), Plaintiffs can potentially amend to allege state law claims such as fraud in the inducement based on VALIC's misleading disclosures. Plaintiffs could also potentially add allegations about VALIC's decision to hold the Plan's assets ransom unless Plaintiffs signed its transition agreement, allegations about the fees paid under the SPA, allegations about the manner in which VALIC exercised discretion in imposing the surrender charge, or allegations about Plaintiffs' ability to trace the Plan's assets.

While Plaintiffs cannot know how they might amend their complaint until they know the manner in which it might be deficient, Plaintiffs can foresee numerous ways in which any deficiencies could be addressed.

For these reasons and others, Plaintiffs seek a chance to amend in the event VALIC's motion is in any way successful. There is no basis for denying such leave, and it should be freely given.

CONCLUSION

The motion to dismiss should be denied. If it is granted, Plaintiffs seek leave to amend.

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