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 FINANCIAL ADVISORS' MOTION TO DISMISS

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NATURE AND STAGE OF PROCEEDING

This is an ERISA class action arising from the discretionary surrender charge in the variable annuity contract issued by Defendant Variable Life Insurance Company ("VALIC") 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 the United States District Court for the Eastern District of California. (Dkt. 1.) Venue has since been transferred to this Court. (Dkt. 36; 17: 14-15.) VALIC Financial Advisors, Inc. ("VFA") had filed a motion to dismiss Count I in the Eastern District of California, but the motion was denied as moot as part of the order transferring the case to this Court. The parties thereafter agreed to a dismissal of defendant VALIC Retirement Services Company ("VRSCO") from this action, as well as the dismissal of Count II as to VFA. (Dkts. 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 29 USC § 1106[406](a)(1)(C).[1] VFA has renewed its motion to dismiss as to Count I. (Dkt. 56.) This is Plaintiffs' Opposition to Defendant VFA's motion to dismiss.

If VFA's motion is granted in any respect, Plaintiffs request leave to amend.

RELEVANT FACTS

The Complaint's general factual allegations are more thoroughly detailed in Plaintiffs' concurrently-filed opposition to VALIC's motion to dismiss. As most relevant here, the Complaint alleges that "Justin Ozeroff, a VALIC sales representative, marketed VALIC's retirement plan services to Markham." (Complaint ¶ 8.) Plaintiffs placed significant reliance on the representations of Mr. Ozeroff. (Complaint ¶ 9.) If necessary, Plaintiffs can and would allege that Ozeroff works for VFA. That is what is his public LinkedIn profile says. VFA, of course, knows for whom Ozeroff works. Plaintiffs also can and would allege that, after Plaintiffs entered into the service relationship with VALIC, Ozeroff continued to provide Plaintiffs with services pursuant to that relationship.

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[1] The bracketed citation refers to the counterpart section of ERISA.

Plaintiffs' Complaint also alleges:

> Subsidiaries of VALIC include VALIC Financial Advisors, Inc. and VALIC Retirement Services Company. ***Each 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.

Plaintiffs can and would allege that VALIC's annuity products were marketed by VFA, a wholly-owned subsidiary of VALIC, and itself containing the "VALIC" brand name, and that Ozeroff marketed and sold VALIC's Service Provider Agreement (SPA), an "Agreement Regarding Transfer of Assets," and the annuity contract itself (the PD Contract) to Plaintiffs. Moreover, Ozeroff provided Plaintiffs with fee disclosures stating that he would receive a commission from VFA on selling the business. Thus, Plaintiffs can and would allege that the marketing of VALIC's services is conducted by its wholly-owned affiliate, VFA, which compensates its employees or agents for selling these services.

Plaintiffs can and would also allege that VFA's audited 2019 financial statements report Dealer Concession Revenue of $184 million, much of it representing sales of annuity contracts of affiliates. Defendants' assertion that "Plaintiff's claims do not involve VFA" is thus incorrect. VFA's financial statements even contain the following section:

Dealer Concession Revenue

> *Annuities and Group Retirement Plans*
> The Company earns revenue for selling affiliated and unaffiliated fixed and variable annuities. The sponsor provides compensation in the form of commissions on premiums collected, in accordance with the fixed rates applied, as a percentage based on the product type and term, to the amounts invested at the time of sale.

Roughly half of VFA's annual revenue reported on its 2019 audited income statement was Dealer Concession Revenue, some or all from its parent, VALIC, in exchange for marketing and selling VALIC's group annuity contracts to ERISA-covered employee pension benefit plans. VFA was the principle facilitator of the VALIC annuity contract arrangement with Plaintiffs, which Plaintiffs now allege violates ERISA.

VFA knew of the provisions in the VALIC annuity contract that are the subject of the Complaint based on it selling the contract and providing additional services to VALIC's customers. VFA facilitated the transaction whereby (i) Markham improperly agreed to a prohibited discretionary termination penalty and (ii) VALIC was the party to whom the discretion to impose the penalty was conferred. Thus, VFA's liability in this action is not derivative through VALIC – it is the direct consequence of its role in marketing, and receiving compensation for, an arrangement presumptively prohibited by ERISA for which the exemption that authorizes reasonable service arrangements is expressly unavailable. ERISA Regulation §2550.408b-2(c)(3) ("No contract or arrangement is reasonable within the meaning of section 408(b)(2) of the Act … 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….").
These allegations demonstrate the plausibility of ERISA claims against VFA.

STATEMENT OF ISSUES

VFA's Motion to Dismiss raises the following issues.

1. Have Plaintiffs alleged facts supporting a plausible claim against VFA?

The Complaint's factual allegations must be accepted as true and construed in a manner most favorable to Plaintiffs. *Doe v. U.S.,* 419 F.3d 1058, 1062 (9th Cir. 2005). 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." *Id.*

2. Have Plaintiffs alleged a cognizable legal theory against VFA?

The Complaint should not 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, 346 (2014) (reversing dismissal of claim that factually alleged violation but did not cite the applicable statute).

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3. Are Plaintiffs entitled to the equitable relief they seek?

The Complaint should not be dismissed where Plaintiffs have plausibly asserted that Plan assets can be traced to VFA. *Steinley v. Health Net, Inc.,* 2019 WL 3059383, at *4–5 (C.D. Cal. Mar. 28, 2019) ("[Plaintiffs] have alleged that each Defendant either played a part in formulating these policies or, in the case of [one defendant], should be liable for its subsidiaries' actions in formulating the policies.")

4. If VFA's motion to dismiss is granted, should the Court 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

Plaintiffs' Complaint appropriately groups the acts of VALIC and VFA together because they are part of the same corporate structure and they work closely together. At the pleadings stage, and without discovery, Plaintiffs cannot be required to plead which legal entity engaged in which alleged misconduct when the Defendants themselves obscure their roles. *Steinley v. Health Net, Inc.,* 2019 WL 3059383, at *4–5 (C.D. Cal. Mar. 28, 2019). Plaintiffs adequately allege that VFA, through Ozeroff, caused Plaintiffs to engage in a prohibited transaction with VALIC, as further discussed in Plaintiffs' opposition to VALIC's motion to dismiss. Plaintiffs thus seek appropriate equitable relief from VFA, which includes, at a minimum, the return of any commissions that can be traced from Plan assets. Requiring Plaintiffs to more clearly state their claim against VFA, when VFA already knows the nature of this claim, will result in busy-work for the litigants and the Court and unnecessarily delay the case's progress.

If the Court concludes that Plaintiffs have not adequately pled a claim against VFA, Plaintiffs ask for leave to amend. As detailed above, Plaintiffs can easily add allegations demonstrating VFA's liability for the ERISA claims alleged in this case.

ARGUMENT

I. The Complaint Satisfies The Notice Pleading Requirements Of Rule 8(a)

Defendant VFA contends that the Complaint does not meet the requirements of Federal Rule of Civil Procedure Rule 8(a) that the Complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." VFA's primary complaint is that Plaintiffs inappropriately lump together VALIC and VFA such that VFA is uncertain of the claims against it. As noted above, the only claim remaining against VFA is Count I for equitable relief under 29 USC § 1132[502](a)(3) arising from its knowing participation in a prohibited transaction under 29 USC § 1106[406](a)(1): VALIC's non-exempt furnishing of services to the Plan through a PD Contract with an unlawful termination penalty. There is nothing ambiguous or uncertain about this claim as it relates to VFA.

In *Callier v. National United Group, LLC,* 2021 WL 5393829, *4 (W.D. Tex. Nov. 17, 2021), the court reasoned that "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." In this case, however, Plaintiffs identify specific actions by Ozeroff, and Ozeroff works for VFA. Moreover, and as noted in *City National Rochdale Fixed Income Opportunities (Ireland) Limited*, 2018 WL 4732431, *3 (N.D. Tex. Sept. 13, 2018), "'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." Here, Plaintiffs did just that. Through Ozeroff, VFA marketed and sold VALIC's services, the furnishing of which constituted the prohibited transaction. "[A] claim may not be dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of her claim which would entitle her to relief." *Papania-Jones v. Dupree,* 275 F. App'x 301, 303 (5th Cir. 2008) quoting *Bombardier* at 351. And as noted above, and to the extent required, Plaintiffs can also allege VFA (through Ozeroff) continued to provide services to the Plan after May 18, 2018, and that VFA paid commissions to Ozeroff for his services relating to the Plan.

In *Steinley v. Health Net, Inc.,* 2019 WL 3059383, at *4–5 (C.D. Cal. Mar. 28, 2019), the court denied a motion to dismiss under circumstances similar to those here. The court explained:

> It is true that Plaintiffs do not attribute the specific acts they allege in the SAC to any one Defendant in particular. But under the circumstances of this case, the Court concludes that this is not fatal to their ability to assert plausible claims against each Defendant. … They have alleged that each Defendant either played a part in formulating these policies or, in the case of [one defendant], should be liable for its subsidiaries' actions in formulating the policies. ... While the Defendants may be separate legal entities, all are part of the same corporate structure, and the SAC alleges that they worked closely together. The Court believes that these allegations are sufficient to render it plausible that all Defendants are jointly liable for at least some of the alleged wrongful acts, even if Plaintiffs cannot identify precisely which Defendant did what without an opportunity to conduct discovery.

Steinley is persuasive. The Complaint defines "Defendants" and "VALIC" to include both VALIC and VFA. (Complaint ¶ 6.) This approach was taken in the Complaint because the boilerplate VALIC documents use often do not differentiate between each affiliate's function. For example, Plaintiffs can, and if necessary would, allege that the service provider fee disclosure required under 29 CFR §2550.408b-2 provided by "VALIC" contains the following statement: "VALIC represents The Variable Annuity Life Insurance Company and its subsidiaries Financial Advisors, Inc. and VALIC Retirement Services Company." Thus, Defendants view *themselves* as an aggregated entity providing a bundled retirement plan product. These allegations should be sufficient to survive Defendant's motion because "general factual allegations suffice at the pleading stage." *Harold H. Huggins Realty, Inc. v. FNC, Inc.,* 634 F.3d 787 (5th Cir. 2011) at note 41, internal quotes omitted. And in *Wisbar v. Health Care Serv. Corp.,* 2021 WL 4429451, *2 (M.D. La., Sep. 27, 2021), the court, citing *Lormand v. U.S. Unwired, Inc.,* 565 F.3d 228, 257 (5th Cir. 2009), stated that "The complaint (1) on its face (2) must contain enough factual matter (taken as true) (3) to raise a reasonable hope or expectation (4) that discovery will reveal relevant evidence of each element of a claim."

VALIC issued the PD Contract to the Plan, knew that it contained a prohibited termination penalty, and thereby knowingly engaged in the prohibited transaction under ERISA § 406(a)(1)(C). Plaintiffs can and would allege that VFA marketed, sold and brokered the PD Contract to the Plan knowing that it contained the prohibited termination penalty,[2] and that VFA was compensated for performing that role.

Should the Court decline to interpret the Complaint to be sufficiently clear that it puts VFA on notice of the basis of Plaintiffs' claims against it, Plaintiffs have amply demonstrated that, if granted leave to amend, it would be readily able to state a case that would demonstrate that it is entitled to relief from VFA.

II. Any Party That Violates ERISA Properly Faces Liability Under § 502(a)(3)

VFA argues the alleged Count I fail against it because it was not a party to the at-issue contracts. VFA cites no authority for that position, and VFA need not be a party.

For Count I, whether VFA was a fiduciary or a formal party to the prohibited arrangement is relevant only to the type of relief available to the plan – not whether liability exists at all. The Supreme Court in *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.,* 530 U.S. 238, 120 S.Ct. 2180 (2000) found that ERISA § 502(l) contemplated actions against "other persons" (*Id.,* 530 U.S. at 248, 120 S.Ct. at 2188) and that ERISA § 502(a)(3) "admits of no limit … on the universe of possible defendants." *Id.,* 530 U.S. at 246, 120 S.Ct. at 2183. *Perez v. Bruister,* 823 F.3d 250, 272 (5th Cir. 2016) ("This provision [502(a)(3)] authorizes suits against a non-fiduciary 'party in interest' to a prohibited transaction barred by ERISA § 406(a)[.] . . . As a non-fiduciary party in interest, [defendant] is subject to liability even though it had no duty to the plan under substantive ERISA provisions." The Fifth Circuit in

[2] VFA knew all of the material contents of the documents memorializing the services and investment products it was selling to the Plan. The parent-subsidiary relationship between VALIC and VFA, the broker-dealer function performed by VFA with respect to VALIC's annuity products, and the commissions paid to VFA representatives for selling VALIC's products, support Plaintiffs' allegation that VFA knew all of the materials terms of the VALIC products it was selling. One of those material terms was any Plan that terminated the services of VALIC, if that termination included a termination of the PD Contract, would pay a termination penalty of up to 5% of Plan assets if VALIC decided not to waive all or part of the fee.

Bombardier Aero. Empl. Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, P.C., 354 F.3d 348, 354 (5th Cir. 2003), stated that § 502(a)(3) "places limits on the proper *plaintiffs* to a suit for equitable relief … [but] Congress did not see fit … to include a similar limitation on the set of proper *defendants* to a § 502(a)(3) action …" (Emphasis in original.) See also *Nat'l Sec. Sys., Inc. v. Iola,* 2007 WL 2868634, at *2 (D.N.J., Sep. 24, 2007) ("liability of a nonfiduciary under *Harris* 'does not depend upon whether the nonfiduciary can be classified as a party in interest …'"); also, generally, *Admin. Comm. for the Wal-Mart Stores, Inc. v. Horton,* 513 F.3d 1223 (11th Cir. 2008).

On information and belief, VFA is a wholly-owned subsidiary of VALIC, was the broker-dealer of the PD Contract, employed or otherwise affiliated with the representative (Ozeroff) who marketed and sold the PD Contract containing the improper penalty provision, and apparently paid commissions to the representative. Plaintiffs, therefore, could allege that VFA earned revenue, and incurred expenses, in connection with the placement of the PD Contract arrangement with VALIC, and that VFA continued to provide services to Plaintiffs during the relationship. This alleges a knowing participant in a prohibited transaction.[3] VALIC also may have paid a portion of the Plan assets generated by the termination penalty to VFA to cover a portion of those expenses. Whether or not a portion of the Plan's assets was transferred from VALIC to VFA, VFA participated (indeed, facilitated) the selling of the non-exempt PD Contract, and knew or should have known that the arrangement it sold was non-exempt.

III. To the Extent Alleged, Plaintiffs Can Amend To State A Claim For Knowing Participation In A Fiduciary Breach

VFA claims that because VFA was neither a fiduciary nor a party in interest with

[3] ERISA § 406 prohibits certain transactions between plans and parties in interest, because they are "likely to injure the pension plan," unless exempted. *Harris Trust*, 530 U.S. at 242, 120 S.Ct. at 2185. Under ERISA § 3(14)(B), a "party in interest" includes a person (or entity) providing services to the plan. The additional arguments on Count I from Plaintiffs' Opposition to VALIC's Motion to Dismiss and/or Motion to Strike and all supporting documents, filed in this action, are incorporated in their entirety by reference as if fully set forth herein.

respect to the Plan that it therefore must be dismissed from Count 1. We disagree. Since *Harris Trust*, courts have regularly allowed claims under § 1132[502](a) for a variety of ERISA violations against nonfiduciaries and non-parties in interest beyond those related to ERISA § 1106[406](a) and (b). For instance, the Ninth Circuit extended the Supreme Court's holding in *Harris Trust* to claims brought under § 1132[502](a)(1)(B). *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1206 (9th Cir. 2011) (reversing summary judgment for plan's insurer on claim for improperly denied benefits). And in *Solis v. Couturier*, 2009 WL 1748724 at *3–4 (E.D. Cal., June 19, 2009) the court held that "the statutory language of ERISA places no such limits on who may be a defendant to a suit under § 1132[502](a)(5)" (§ 1132[502](a)(3)'s analog for the government). In denying a non-party in interest law firm's motion to dismiss, the court explained:

> Defendants cite a number of pre-*Harris Trust* Ninth Circuit cases, such as *Nieto v. Ecker,* 845 F.2d 868, 874 (9th Cir.1988), where the court extended § 502(a)(3) liability to fiduciaries and "parties in interest" as defined by § 3(14)(B). [¶]
>
> When the Supreme Court states that there is "no limit [...] on the universe of possible defendants" who knowingly participate in a fiduciary's violation, this Court must conclude that "no limit" means "no limit". Therefore, to the extent that Ninth Circuit case law previously limited the universe of § 502(a)(3) or § 502(a)(5) defendants to fiduciaries and parties in interest (the Court is unconvinced that it did so), that case law has been superseded by *Harris Trust.*

Also in *Bombardier,* at 353, "the Supreme Court's reasoning in Harris Trust influences us to conclude today that § 502(a)(3) authorizes a cause of action against a non-fiduciary, non-'party in interest' attorney-at-law when he holds disputed settlement funds on behalf of a plan-participant client who is a traditional ERISA party."

VFA was the marketer and facilitator of the investment arrangement between VALIC and the Plan. It was intricately bound up in the process of selling these arrangements that were improper because of the termination penalty. It was even compensated by VALIC for performing that function. It was plainly a knowing participant in either a prohibited transaction with its affiliate, VALIC, or (should the Court deny the existence of a prohibited transaction) a

fiduciary breach (given the prominence of the disclosure of the termination penalty). Thus, it is not necessary for the Court to conclude that VFA was a party in interest for Plaintiff to maintain its claim against VFA. *See e.g.*, *Solis,* 2009 WL 1748724, at *3–4; *Netel v. Netel*, 2012 WL 13162839, at *2 (C.D. Cal., Mar. 29, 2012) (denying motion to dismiss on claim for aiding and abetting a fiduciary duty breach because a fiduciary may bring suit against an "other person" not a party in interest."); *Bush v. Liberty Life Assurance Company of Boston*, 130 F.Supp.3d 1320, 1331 (N.D. Cal. 2015) (denying motion to dismiss claim that insurer knowingly participated in a fiduciary breach); *National Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 92-93 (3d Cir. 2012) (noting that the Fifth and Sixth Circuits had confirmed that *Harris Trust* is not limited to § 406(a) transactions in denying a motion to dismiss by a nonfiduciary); and *Perez v. Brain,* 2015 WL 3505249, at *12 (Jan. 30, 2015, C.D. Cal.) (alleged attorney misconduct enabling an ERISA violation established knowing participation in a fiduciary breach).

VFA plainly knowingly participated in, if not aided and abetted, Markham's fiduciary breach by entering the PD Contract. VFA sold the platform to Plaintiffs. It should not be allowed to retain any assets that are rightfully Plan assets.

IV. Plaintiffs Request Equitable Relief In Count I

As for relief, Plaintiffs should be given the opportunity in discovery to trace any commission payments made by VALIC of Plan assets to VFA. Even if the Court does not, however, the Complaint seeks an accounting, disgorgement, and "such other appropriate equitable relief as the court sees fit." "In determining whether an action for equitable relief is properly brought under ERISA, a court "look[s] to the substance of the remedy sought ... rather than the label placed on that remedy." *Watkins v. Westinghouse Hanford Co.,* 12 F.3d 1517, 1528 n.5 (9th Cir. 1993). "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, at *3 (N.D. Cal., June 2, 2020).

Plaintiffs' request for appropriate equitable relief also includes request for rescission and an injunction. "Rescission is an appropriate equitable remedy under ERISA § 502(a)(3) which

does not require tracing. *Foster v. Adams and Associates, Inc.,* 2020 WL 3639648, at *9 (N.D. Cal., July 6, 2020) (citing *Hurtado v. Rainbow Disposal Co., Inc.,* 2018 WL 3372752, at *15 (C.D. Cal. July 9, 2018)). Injunction is also available equitable relief. *LD v. United Behavioral Health*, 2020 WL 7432566, at *7–9 (N.D. Cal., Dec. 18, 2020). The equitable remedy of injunction[4] – that VFA cease selling and brokering arrangements it knows or should know is non-exempt—is particularly appropriate to VFA. The Court can interpret the Complaint to include an equitable injunction against VFA (Complaint p. 11, Prayer for Relief #4), or the Complaint can be amended to request specific equitable relief.

Finally, the record establishes that Markham's employees made premium payments "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).[5] VALIC imposed a penalty on those assets. (*Id.* 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 surrender penalty "is payable to the Company." Plaintiffs' Request for Judicial Notice in support of Opposition to VALIC's Motion to Dismiss (RJN), Ex. A, p. 42. Thus, Plaintiffs have established the specific fund holding Plan assets. Separate Account A's annual report indicates that VALIC pays the surrender penalties to its general account, enabling tracing. (RJN Ex. 1; Levy Decl. Ex. A, §1 General Account – the assets of VALIC other than those in the Separate Account.") And the Complaint alleges VALIC's financial reserves, making plausible the "lowest intermediate balance" theory. From that point, Plaintiffs will be able to trace any amounts paid from VALIC's general account to VFA to compensate VFA for its role in securing Markham's business.

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[4] "The most common equitable remedies are coercive. They are intended to force the defendant to … cease from acting in specified ways. The most general term for a coercive remedy is 'injunction.'" Dobbs, *Law of Remedies,* Sec. Ed., §2.1(2) Equitable Remedies.

[5] See also ERISA Regulation § 2510.3-101(h)(1)(iii).

CONCLUSION

Accordingly, the motion to dismiss should be denied as to Count I against VFA.

Dated: May 23, 2022

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