**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.	§	

REPLY IN SUPPORT OF MOTION TO DISMISS AND/OR MOTION TO STRIKE OF DEFENDANT THE VARIABLE ANNUITY LIFE INSURANCE COMPANY

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Introduction

Plaintiffs can only plausibly state a claim against VALIC by disregarding binding precedent, the majority views taken by courts around the country, and ERISA public policy. Plaintiffs also all but concede the insufficiency of their Complaint by asking the Court to consider purported facts found nowhere in the Complaint.

This lawsuit is about whether VALIC violated its ERISA obligations by assessing a surrender fee on the Markham Plan assets that was permitted by the VALIC-issued Annuity the Markham Plan purchased. Per the Plaintiffs, VALIC engaged in a prohibited transaction by including the surrender fee in the Annuity and breached a fiduciary obligation by assessing the fee. But binding ERISA law dictates that service providers like VALIC do not act in a fiduciary capacity when negotiating for and assessing an agreed upon fee. Indeed, Plaintiffs concede the former and only argue that VALIC exercised "discretionary authority" when assessing the surrender charge. Yet, VALIC would only have acted with discretion if it waived the expressly stated surrender charge. By applying the definitively calculable surrender charge, VALIC was simply complying with the contract to which Plaintiffs agreed, and thus, did not act in a fiduciary capacity, as required for Plaintiffs to state a plausible claim for Count II.

As to Count I, Plaintiffs admit their pleading failure to show that VALIC engaged in a prohibited transaction as a party in interest by asserting a host of new facts. Yet even with the new allegations, leave to amend should be denied because Plaintiffs cannot plausibly allege that VALIC engaged in a "prohibited transaction" by negotiating its fees with the Markham Plan in an arms-length transaction. Plaintiffs also fail to identify a "specifically identifiable fund" within VALIC's possession from which equitable relief is possible.

As such, VALIC's Motion should be granted, Plaintiffs' Complaint should be dismissed, and any leave to amend should be denied.

Argument

I. Plaintiff's Complaint Must Be Dismissed Against VALIC

Plaintiffs' Response glosses over ERISA public policy, specifically that ERISA only seeks to impose duties on plan fiduciaries and those with existing relationships to a plan—not insurers negotiating and selling their products up front and at arm's length with plan fiduciaries. *See, e.g.,* 29 U.S.C. §§ 1104, 1106, and 1109. The statutes upon which Plaintiffs rely aim to prohibit transactions with characteristics such as "commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length." *Lockheed Corp. v. Spink*, 517 U.S. 882, 893 (1996). "Contracting at arm's length with unrelated service providers plainly does not share that characteristic: it is not a deal struck with 'plan insiders.'" *Sellers v. Anthem Life Ins. Co.*, 316 F.Supp.3d 25, 36 (D.D.C. 2018).

Because this fundamental principle does not answer in Plaintiffs' favor, they focus on perceived technicalities and rely on opinions taking the minority view of ERISA law. However, the prevailing view confirms that a service provider to an ERISA plan does not act as a fiduciary when negotiating for and imposing an agreed-upon fee with a prospective customer, *Am. Fed'n of Unions v. Equitable Life Assur. Soc'y*, 841 F.3d 658, 664 (5th Cir. 1998), and ERISA's prohibited transaction statute does not cover arms-length transactions with third parties who have no preexisting relationship with a plan or its fiduciaries, *Chavez v. Plan Benefit Services, Inc.*, No. AU-17-CA-00659-SS, 2018 WL 6220119, *3 (W.D. Tex. Sept. 12, 2018).

Despite this prevailing (and recent) view, Plaintiffs contend a February 3, 2012, Department of Labor rule pertaining to the disclosure of certain information supports a reading

that a "party in interest" must include service providers contracting with a plan. ECF No. 58 at 9-12. The relied-on rule pertains to certain disclosure requirements a service provider must satisfy; however, Plaintiffs concede they "do not contest adequacy of disclosure" and, instead, "[t]his case concerns a service provider imposing a contractual penalty provision . . .." ECF No. 23 at 5, n.6. The DOL rule does not address the sole issue in this case: a service provider negotiating for and imposing a plainly disclosed, contractually agreed to fee. Because the DOL rule is inapplicable, Plaintiffs' contention that it is entitled to *Chevron* deference is misplaced. ECF No. 58 at 20.

Even then, Plaintiffs' proffered interpretation of the DOL rule is not supported. Most courts that have ruled on this issue since the February 3, 2012, DOL rule have rejected Plaintiffs' proffered interpretation. *See Chavez*, 2018 WL 6220119, *4 (holding that paying a service providers' fees in accordance with the terms of the initial contract is not the risk that Congress sought to legislate against). Accepting Plaintiffs' argument would undermine ERISA's very purpose by "discourage[ing] service providers from contracting with [plans] in the first place." *Sellers*, 316 F.Supp.3d at 36 (collecting cases). To avoid this nonsensical outcome, the majority view confirms that "some prior relationship must exist between the fiduciary and the service provider to make the provider a party in interest under § 1106." *See, e.g.*, *Ramos v. Banner Health*, 1 F.4th 769, 787 (10th Cir. 2021).

A. <u>VALIC Did Not Act as a Fiduciary in Negotiating or Applying the Surrender Fees</u>

Acting as a fiduciary is a prerequisite for Plaintiffs' self-dealing claims asserted under Count II. Thus, to state a plausible claim, Plaintiffs must allege facts demonstrating that VALIC was acting as a fiduciary when negotiating and assessing the surrender fee. Plaintiffs concede the former, and instead solely argue that VALIC acted as a fiduciary when assessing the fee because

VALIC *could* waive it. ECF No. 58 at 28-32. Plaintiffs make no attempt to distinguish the binding Fifth Circuit law cited in VALIC's Motion to Dismiss establishing this is insufficient to bestow fiduciary status on VALIC because the *ability* to waive fees does not equate to the "exercise" of discretion where the service provider imposed the fee as agreed. *Compare* ECF No. 58 at 28-32 *with* ECF No. 55 at 13-16.

Instead, Plaintiffs focus on two Ninth Circuit cases briefly cited by VALIC. ECF No. 58 at 29-30 (*citing Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643 (9th Cir. 2019) and *Santomenno v. Transamerica Life Ins. Co.*, 883 F.3d 833 (9th Cir. 2018)). Plaintiffs do not dispute that both *Depot* and *Santomenno* hold that an insurer is not a fiduciary when it charges a fee to which the parties agreed at arm's length. Rather, Plaintiffs contend both cases are inapplicable because VALIC deliberated on whether to apply the surrender charge.[1] ECF No. 58 at 29-30. Plaintiffs are incorrect. *Santomenno* explains that a service provider's *ability* to change or waive its fees does not create fiduciary status when the service provider does not *change* its fee, as is the case here. *Santomenno*, 883 F.3d at 841, n.8. The Ninth Circuit provided examples of "changing fees" such as when a service provider withdrew more than it was entitled to under the contract or if the service provider's fee was based on self-reported hours worked. *Id.* at 841. Plaintiffs make no such allegation here. Plaintiffs solely allege that VALIC imposed a surrender charge in accordance with the contract terms. Compl. at ¶¶ 12, 14 and 17. Further, *Depot* explains that "[t]he mere existence of a discretionary ability is insufficient to bestow fiduciary

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[1] Plaintiffs also try to distinguish *Depot* by claiming it did not analyze whether the defendant exercised discretion in administering the plan. ECF No. 58 at 29. While *Depot* states the plaintiffs did not argue that the defendants acted as fiduciaries under 29 U.S.C. § 1002(21)(A)(iii), the Ninth Circuit explained this provision is generally only applicable when an insurer "mak[es] a discretionary determination about whether a claimant is entitled to benefits"—which is inapplicable here. *Depot*, 915 F.3d at 654, n.5.

status if that discretion was not 'exercise[d].'" 915 F.3d at 656. Here, the "discretionary" act by VALIC (if any) would be deciding to waive the surrender fee. The Complaint makes clear that VALIC did not waive the fee; instead, it assessed the fee per the Annuity's terms. Compl. at ¶¶ 12, 14 and 17.

To distract from binding case law, Plaintiffs cite to distinguishable case law from outside this circuit. ECF No. 58 at 30-31 (citing *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield*, 751 F.3d 740, 744 (6th Cir. 2014); *see also Charters v. John Hancock Life Ins. Co.*, 583 F.Supp.2d 189 (D. Mass. 2008); *see also Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071, 1074 (8th Cir. 2020)).[2] Yet, applying this circuit's precedent, Count II fails as a matter of law because VALIC imposed the surrender charge in accordance with terms of the Annuity. *See, e.g., Reich v. Lancaster*, 55 F.3d 1034, 1047 (5th Cir. 1995) ("We recognize, of course, that '[a]n entity which assumes discretionary authority or control over plan assets will not be considered a fiduciary if that discretion is sufficiently limited by a pre-existing framework of policies, practices and procedures.'")

Plaintiffs' final argument asks this Court to find VALIC is a fiduciary because it purportedly exercised authority and control respecting the management or disposition of plan assets based on allegations found nowhere in the Complaint. ECF No. 58 at 31-32. "As a general rule, claims and allegations that are not raised in the complaint, but raised for the first time in a response to a motion to dismiss are not properly before the court." *Middaugh v. InterBank,* 528

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[2] In *Hi-Lex*, the Sixth Circuit found that the plan's third-party administrator exercised discretion because it did not uniformly apply the disputed fees. *Hi-Lex*, 751 F.3d at 744. Here, Plaintiffs cannot allege any lack of uniformity. *See supra,* n. 4. The opinion in *Charters* has been called into question as the minority view. *Santomenno v. John Hancock Life Ins. Co.*, No. 2:10-cv-01655, 2013 WL 3864395 at *8 (D.N.J. July 23, 2013). Lastly, in *Rozo*, the service provider unilaterally calculated the "Composite Crediting Rate" each six months as opposed to having a specific contractual term regarding the rate's calculation. *Rozo*, 949 F.3d at 1073. Again, the Annuity in this case states how the surrender charge should be calculated; thus, *Rozo* is inapplicable. *See* ECF No. 55 at 20-21.

F.Supp.3d 509, 535 (N.D. Tex. 2021); *see also Gallier v. Woodbury Fin. Servs., Inc.*, No. H-14-888, 2015 WL 3404934, at *8 (S.D. Tex. 2015) (Rosenthal, C.J.) (refusing to consider new allegations raised in the plaintiffs' response to a motion to dismiss when the allegations did not appear in the plaintiffs' amended complaint). Thus, the Court must disregard Plaintiffs' false allegations regarding the purported "transition agreement."

B. Count I Fails Because VALIC was not a "Party in Interest" to a Prohibited Transaction and Plaintiffs Fail to Seek Appropriate Equitable Relief

To plead a § 502(a)(3) claim, Plaintiffs must allege facts showing: (1) VALIC was a "party in interest" when it entered the SPA and Annuity with Markham DDS; (2) Markham DDS, as plan fiduciary, and VALIC each had knowledge of the facts satisfying the elements of a § 406(a) transaction; and (3) Plaintiffs seek appropriate equitable relief. Plaintiffs fail each step.

As to the first requirement, Plaintiffs urge this Court to adopt the minority view that a service provider is a party in interest when contracting with a plan. ECF No. 58 at 20-23 (relying on *Comerica Bank for DALRC Retiree Benefit Trust v. Voluntary Emp. Benefits Assocs., Inc.*, No. 1:09-cv-1164 (WSD), 2012 WL 12948705 (N.D. Ga. Jan. 11, 2012) and *Ronches v. Dickerson Emp. Benefits, Inc.*, No. 2:09-cv-4279 (MMM) (PJWx), 2009 WL 10669571 (C.D. Cal. Oct. 30, 2009)).[3] However, accepting Plaintiffs' view would "effectively unravel" the public policy that ERISA does not impose a duty on plan fiduciaries negotiating for their compensation. *See Sellers*, 316 F.Supp.3d at 36. Classifying service providers as "parties in interest" would allow a plan to "claw back [a] fiduciaries' compensation under Section 406(a)(1)" when upset

[3] Plaintiffs also rely on *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 600-01 (8th Cir. 2009); however, *Braden* only addressed fiduciary liability, not the circumstances under which a service provider could be held liable in a nonfiduciary capacity. Moreover, the *Sellers* court noted that *Braden* "involved 'kickback' payments alleged not to have been bona fide compensation for services rendered" which is different from a service provider's "receipt of bargained-for consideration." *Sellers*, 316 F.Supp.3d at 37 and n.5.

with a contract to which they initially agreed (as is the case here). *Id.*[4] To avoid this nonsensical outcome, the majority view confirms a "plaintiff cannot allege a prohibited transaction merely by claiming the defendant provided services to an ERISA plan in exchange for bargained-for-consideration." *Id.*

As to the second requirement, Plaintiffs must allege facts demonstrating that both Markham DDS and VALIC had actual or constructive knowledge that the subject transaction is unlawful. *See Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 251, 120 S.Ct. 2180 (2000). Plaintiffs fail to plead Markham DDS's actual or constructive knowledge. ECF No. 58 at 24. Instead, they punt this issue as a "question for trier of fact." *Id.* This is absurd – Plaintiffs cannot create a question of fact as to their knowledge by not taking a position on what they knew or should have known. This is a Motion to Dismiss, and Plaintiffs flatly refuse to allege a fact necessary to meet an element of their cause of action. The outcome of this failure is not a delay in consideration but a dismissal of Count I.

Plaintiffs also fail to allege facts showing that VALIC, as the alleged party in interest, knew of the circumstances that rendered the subject transaction unlawful.[5] *See Harris Trust*, 530 U.S. at 251. Simply pleading "VALIC drafted the contract that contained the fee" is insufficient to show that the surrender charge was unreasonable compensation or was in excess of VALIC's

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[4] In *Sellers*, the court explains that there are some unpublished district court opinions supporting Plaintiffs' theory, such as *Ronches* and *Comerica*. Yet, the clear weight of authority supports that a service provider is not a party in interest when contracting with a plan. *Patrico v. Voya Fin., Inc.*, No. 16-cv-7070 (LGS), 2018 WL 1319028, at *7 (S.D.N.Y. Mar. 13, 2018); *Cunningham v. Cornell Univ.*, No. 16-cv-6525 (PKC), 2017 WL 4358769, at *10 (S.D.N.Y. Sept. 29, 2017); *Sweda v. Univ. of Pa.*, No. 16-cv-4329, 2017 WL 4179752, at *11 (E.D. Pa. Sept. 21, 2017); *Sacerdote*, 2017 WL 3701482, at *13–14; *Fite v. Merrill Lynch & Co*, No. 8:10-cv-008 DOC, 2010 WL 11556808, at *7 C.D. Cal. Nov. 2, 2010; *UFCW Local 56 Health & Welfare Fund v. Brandywine Operating P'ship, L.P.*, No. 05-cv-2435, 2005 WL 3555390, at *2–4 (D.N.J. Oct. 28, 2005).

[5] In its Motion, VALIC did not cite to ERISA Regulation § 2550.408b-2(c)(3) as an affirmative defense, but rather to illustrate that Plaintiffs' Complaint fails to show that the transaction was unlawful; therefore, VALIC could not have knowledge of the circumstances that rendered the transaction unlawful.

reasonable start-up costs with respect to the Plan. ECF No. 58 at 24. Further, allegations pertaining to VALIC's knowledge after the subject transaction was entered into are irrelevant for determining whether VALIC had knowledge at the time of entering the transaction. *Id.* Plaintiffs simply leap to the conclusion that the surrender fees amount to a prohibited penalty. But it is Plaintiffs' obligation to plead facts to make a plausible claim for relief–specifically, that VALIC was paid unlawfully excessive fees and that it knew or should have known that those fees were excessive at the time of contracting.[6] *See Harris Trust*, 530 U.S. at 251. Because Plaintiffs fail to do so, they fail to plausibly state a claim under § 502(a)(3) for violations of § 406(a).[7]

Even if Plaintiffs sufficiently alleged a prohibited transaction, Plaintiffs must seek appropriate equitable relief to satisfy the last requirement for Count II. *Mertens v. Hewitt Associates*, 508 U.S. 248, 253 (1993); *see also Montanile v. Bd. Of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 142 (2016). To properly assert a claim for equitable relief, Plaintiffs must plead facts showing "specifically identifiable funds" that are "within the possession and control" of VALIC—not seek monetary damages from VALIC's "assets

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[6] Plaintiffs cite—without any analysis—to *St. Jude Heritage Med. Group v. Integrated Wealth Mgmt., Inc.*, 2019 WL 4419003, at *13 (C.D. Cal. Aug. 20, 2019) for the proposition that an annuity is an "unreasonable arrangement" because it "locked" the plan into an arrangement it could not escape without incurring a surrender charge. ECF No. 58 at 25. But, in *St. Jude*, the service provider that issued the annuity was not a defendant. The named defendant, a plan fiduciary, purchased the annuity *for the plan* and *without knowledge of the plan sponsor. St. Jude*, 2019 WL 4419003 at *13. Here, Markham DDS is the plan sponsor and purchased the Annuity for the plan.

[7] Plaintiffs also falsely argue that the surrender charge is always five percent of a plan participant's retirement savings. ECF No. 58 at 10. This is not supported by the Annuity's terms: "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.* (emphasis added). Further, to the extent Plaintiffs contend the fee violates ERISA, Markham DDS would be liable to the plan participants for agreeing to such fee. *See Santomenno*, 768 F.3d at 295 (noting that "any plan sponsor who agreed to a 99% fee arrangement would *itself* be liable for breaching its fiduciary duty. The employer has the express duty under § 1104(a)(1)(A)(ii) of defraying reasonable expenses of administering the plan, and, absent some sort of conduct not alleged in plaintiffs' complaint, claims that fully disclosed fee arrangements are unreasonable lie against the employer, not the service provider") (cleaned up).

generally." *Coop. Ben. Adm'rs, Inc. v. Ogden*, 367 F.3d 323, 332 (5th Cir. 2004). The Complaint alleges none of these things, and Plaintiffs concede as much by asserting new facts and attaching documents in their Response. ECF No. 58 at 26-27; Ex. 1 and Ex. 2 to Plaintiffs' Request for Judicial Notice. As discussed below, these facts and documents cannot be considered in ruling on VALIC's Motion. Thus, Count II fails as a matter of law and must be dismissed.

C. The Court Should Dismiss Portions of the Class Allegations

VALIC's Motion demonstrates that Plaintiffs cannot pursue relief on behalf of plans and plan administrators who paid fees under the SPA because Markham DDS did not contract for VALIC to perform fee-based administrative duties. In response, Plaintiffs claim the SPA supports that "Markham paid a set up fee, annual per participant fees, and plan document maintenance fees." ECF No. 58 at 32. Plaintiffs sole support for this allegation is Section V ("Service Fees") of the SPA which lists various fees that VALIC *may* charge for the administrative services listed in Section III ("Administrative Services General Provisions"), *if elected* by Markham DDS. *Id.* (citing ECF No. 55-1 at 53-54). Plaintiffs gloss over the portion of the SPA which expressly states that Markham DDS did not elect such services under the SPA[8]:

☒ Employer has retained the Third Party Administrator (TPA) listed below to perform the applicable Administrative Services listed in Section III. Changes to this information can be provided to VALIC in writing by an authorized Employer representative.

Name of TPA: America's Best - Account Services Team

Mailing Address: 3400 College Blvd City: Leaward State: KS ZIP: 66211

Phone: (833) 225-4015

[8] Plaintiffs argue, in a footnote, that the Court cannot consider the SPA attached to VALIC's Motion to Dismiss [ECF No. 55-1] because Plaintiffs may (or may not) have a different version in their possession with a different execution date. ECF No. 58 at 9, n.1. Plaintiffs offer no substantive argument that the SPA is inauthentic or improperly considered on VALIC's Motion to Dismiss nor do Plaintiffs offer the purportedly correct version. Thus, the Court should disregard Plaintiffs' unsubstantiated request to defer this issue.

ECF No. 55-1 at 54. Because the SPA makes clear that Markham DDS did not contract for VALIC to perform fee-based administrative duties, the Court should strike Plaintiffs' class action claim to pursue relief on behalf of plans and plan administrators who paid fees under the SPA. *See Free v. Allstate Indem. Co.*, 541 F. Supp. 3d 767, 770 (E.D. Tex. 2021) (finding that a court should strike class allegations prior to discovery when "the complaint itself demonstrates that the requirements for maintaining a class action cannot be met").

II. The Court May Not Consider Allegations Outside the Complaint and Any Such Allegations Do Not Raise a Plausible Claim

Conceding the Complaint's insufficiency, Plaintiffs assert numerous arguments based on allegations not pled in the Complaint despite being on notice for more than a year of the defects with the Complaint. Aside from Plaintiffs' unexplained delay in asserting new allegations known to them before filing this case, these allegations are not appropriately considered in deciding VALIC's Motion to Dismiss. *See Gallier*, 2015 WL 3404934, at *8 (refusing to consider new allegations raised in the plaintiffs' response to a motion to dismiss when the allegations did not appear in the plaintiffs' amended complaint). Thus, "[w]hen deciding, under Rule 12(b)(6), whether to dismiss for failure to state a claim, the court considers, of course, only the allegations in the complaint." *Sw. Bell Tel., LP v. City of Hous.*, 529 F.3d 257, 263 (5th Cir. 2008).

To the extent the Court considers the new facts and exhibits in Plaintiffs' Response to determine whether leave should be granted, any leave should be denied because the new allegations do not help Plaintiffs to state a plausible claim.[9]

[9] Plaintiffs also proffer new "theories" they could add if granted leave to amend. ECF No. 58 at 32-33. Plaintiffs' undue delay in seeking leave to amend and forcing VALIC to engage in multiple rounds of motion to dismiss briefing just to amend based on evidence available to Plaintiffs prior to initiating the lawsuit would be highly prejudicial. *See U.S. ex rel. Willard v. Humana Health Plan of Texas Inc.,* 336 F.3d 375, 387 (5th Cir. 2003) (holding leave to amend may be denied where there is undue delay, bad faith or dilatory motive on the part of the movant, or undue prejudice to the opposing party).

A. Receipt of Surrender Fees

In the Complaint, Plaintiffs allege the "prohibited transaction" is when the parties entered into the Annuity. Compl. at ¶¶ 27-29. Despite this, Plaintiffs' Response includes a new argument that VALIC's "receipt of surrender charges" is a prohibited transaction.[10] ECF No. 58 at 23-24. This argument is simply not supported by the case law. Paying fees to satisfy a contractual obligation does not constitute a "transaction." *See Chavez*, 2018 WL 6220119, at 3 ("[T]he crux of a transaction under both [§ 406 and § 408] is the act of contracting that establishes the legal rights and obligations between the parties."). Instead, it was the implementation of an existing contractual right under the Annuity, which is not governed by § 406(a).

B. Knowing Participation in Markham's Fiduciary Breach

Plaintiffs' Response also seeks to add allegations regarding VALIC's "knowing participation" in Markham's fiduciary breach. ECF No. 58 at 32-33. These allegations would be futile because Plaintiffs fail to establish that the subject transaction was unlawful or that Markham DDS or VALIC had knowledge that the subject transaction was unlawful. Further, Plaintiffs do not seek appropriate equitable relief. As such, leave to amend should be denied.

Notwithstanding this, Plaintiffs' alternative theories are futile. As discussed above, the SPA makes clear that Plaintiffs elected **not** to have VALIC perform any administrative services under the SPA (and, thus, no fees were paid) and binding case law makes clear that the ability to waive fees does not equate to the "exercise" of discretion where the service provider imposed the fee as agreed. Thus, no amount of amendment could save Plaintiffs' class allegations regarding the SPA or Count II from dismissal. Further, any state law claims based on VALIC's disclosures would fail as the surrender charge was plainly disclosed on the first page of the Annuity. ECF No. 55 at 11.

[10] Plaintiffs briefly cite to *Peters v. Aetna Inc.*, 2 F.4th 199 (4th Cir. 2021) to support their proposition that the surrender charge was a transaction distinct from the performance of services. ECF No. 58 at 23-24. *Peters* is easily distinguishable from this case. In *Peters*, the claims administrator buried a fee within the claims submitted by its subcontractor and hid this fee from the employer, plan, and its participants. 2 F.4th at 210-211. Here, the surrender charge was plainly disclosed to Plaintiffs before they agreed to enter the Annuity. Compl. at ¶¶ 12, 14 and 17.

C. <u>Transition Agreement</u>

In their Response, Plaintiffs allude to a "transition agreement" which purportedly demonstrates VALIC's decision to hold the Plan's assets ransom. ECF No. 58 at 33. This new argument is not supported by any factual allegations in the Complaint and cannot be considered when ruling on VALIC's Motion. Further, there is a reason Plaintiffs did not attach the purported "transition agreement" to their Response—it does not support their allegations.

D. <u>Equitable Relief</u>

Lastly, Plaintiffs grasp at straws in an attempt to state a claim for appropriate equitable relief as required by § 502(a)(3). Despite Plaintiffs' stretch of the imagination on VALIC's "Separate Account A," Plaintiffs simply fail to nudge Plaintiffs equitable claim "across the line from conceivable to plausible." *See* Ex. 1 and Ex. 2 to Plaintiffs' Request for Judicial Notice; *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007).

The Supreme Court has explained that § 502(a)(3) embraces only "restitution [that] . . . lie[s] in equity," such as "a constructive trust or equitable lien" on "particular" funds. *Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002). "P*articular" funds means monies "retained . . . in a *separate* account," not general assets of a defendant. *Montanile*, 577 U.S. at 658 (emphasis added). Plaintiffs simply cannot identify a *separate* account of VALIC's that holds the surrender charges. Indeed, all "Separate Account A" illustrates is that Count I must be dismissed because the surrender charge assessed against Plaintiffs has been dissipated into VALIC's *general assets*.[11] *See Montanile*, 577 U.S. at 139 (explaining that "when a participant dissipates the whole settlement on nontraceable items, the fiduciary cannot bring a suit to attach

[11] As highlighted by Plaintiffs, the "contract maintenance charge" (which includes surrender fees collected by VALIC) on the "Statements of Operations and Changes in Net Assets" illustrates that surrender fees are deducted from the net assets of "Separate Account A" and is payable to VALIC's general assets. Ex. 1 to Plaintiffs' Request for Judicial Notice at p. 42.

the participant's **general assets** under § 502(a)(3) because the suit is not one for 'appropriate equitable relief'") (emphasis added); Ex. 1 to Plaintiffs' Request for Judicial Notice at p. 35.

Despite this clear principle, Plaintiffs contend that because VALIC paid the surrender charges to its general assets, the surrender charge is traceable within VALIC's general assets and enable Plaintiffs to recover under the "lowest intermediate balance" theory. ECF No. 58 at 26-27. This argument renders the equitable relief distinction meaningless.[12] Accepting Plaintiffs' theory would allow every equitable relief claim to proceed when a plaintiff points to a defendant's general assets and says "my money is somewhere there." *See Montanile*, 136 S. Ct. at 658–59 (noting that "[e]quitable remedies are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing rather than a right to recover a sum of money generally out of the defendant's assets") (internal quotation marks and ellipses omitted). The bottom line behind Plaintiffs' confusing argument is a demand that this Court order VALIC to pay back the surrender charge and VALIC could theoretically "satisfy that obligation by dipping into any pot" it likes.[13] *Id.* at 662. This is not equitable relief; it's legal damages. As such, leave to amend would be futile because Plaintiffs fail to identify "specifically identifiable funds" that are "within the possession and control" of VALIC.

Second, in a last-ditch effort to assert *any* equitable relief, Plaintiffs contend they also seek rescission and an injunction. ECF No. 58 at 27. Plaintiffs wholly fail to explain how either

[12] Further, while Plaintiffs spill much ink arguing "Separate Account A" once contained plan assets, this fact is ultimately irrelevant. ECF No. 58 at 26. Upon termination of the Annuity, VALIC transferred all plan assets to the successor service provider's platform, as pled by Plaintiffs in the Complaint. Compl. at ⁋ 15. Thus, there is no plausible basis for believing that plan assets, or the surrender fees at issue, remain in "Separate Account A."

[13] Additionally, there is a difference between a specific "amount of money" and a specific "fund." *Depot*, 915 F.3d at 662-63. The "funds" Plaintiffs point to are "simply the general assets of [VALIC], which were not received from, and have not been promised to, [Plaintiffs]. Any relief sought as restitution is not equitable." *See Cent. States Se. & Sw. Areas Health & Welfare Fund v. Health Specific Risk, Inc.*, 756 F.3d 356, 366 (5th Cir. 2014).

remedy is possible given that the contracts at issue are already terminated. Moreover, Plaintiffs lack Article III standing to seek an injunction, which is a prospective remedy, because there is no allegation of ongoing or future harm to plaintiffs from VALIC's conduct. *See Deutsch v. Annis Enterprises, Incorporated,* 882 F.3d 169, 173 (5th Cir. 2018) (holding that a plaintiff seeking an equitable injunction must show a real and immediate threat of repeated injury and a past injury is insufficient). Plaintiffs' allegations solely are based on past conduct by VALIC. As such, an injunction is not an available remedy even if amendment were permitted.

Conclusion

Plaintiffs fail to state any cognizable claim against VALIC. Based on the facts alleged, the terms of the subject contracts, and legal authority, Plaintiffs are entitled to no relief under Count I, Count II or the referenced ERISA statutes. Moreover, amendment would be futile.

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 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
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