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12 D.L. MARKHAM, DDS, MSD, INC. 401(K) PLAN
13 and D.L. MARKHAM, DDS, MSD, INC., as plan administrator

14
15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE EASTERN DISTRICT OF CALIFORNIA

17 D.L. MARKHAM, DDS, MSD, INC. 401(K) PLAN;
18 1101 Maidu Drive,
19 Auburn, California, 95603,

20 D.L. MARKHAM, DDS, MSD, INC., as plan
21 administrator;
22 1101 Maidu Drive,
23 Auburn, California, 95603, on behalf of themselves
24 and others similarly situated,

25 Plaintiffs,

26 vs.

27 THE VARIABLE ANNUITY LIFE INSURANCE
28 COMPANY (VALIC); VALIC FINANCIAL
ADVISORS, INC.; VALIC RETIREMENT
SERVICES COMPANY; 2929 Allen Parkway,
Houston, Texas, 77019,

Defendants.

Case No.

CLASS ACTION

COMPLAINT

(1) Knowing Participant in a Prohibited Transaction

(2) Self-Dealing Prohibited Transaction

1 BRIEF STATEMENT OF CASE

2 1. This is an action brought by the plan and plan administrator of an employee
3 pension benefit plan to recover and otherwise seek redress, on a class-wide basis, for fees
4 improperly withheld from plan assets by a life insurance company that had been retained to
5 administer and manage those assets. Fundamentally, this class action seeks to right
6 Defendants' wrongs of targeting and exploiting unsophisticated small employers seeking to
7 provide benefits to their employees.

8 JURISDICTION AND VENUE

9 2. This action arises under the Employee Retirement Income Security Act of 1974
10 ("ERISA"), as amended, 29 U.S.C. §§1001, et seq., against fiduciaries of and service providers
11 to the plans.

12 3. This Court has subject matter jurisdiction over this action pursuant to Section
13 502(e)(1) of ERISA, 29 U.S.C. §1132(e)(1).

14 4. Venue with respect to this action lies in the United States District Court for the
15 Eastern District of California, pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. §1132(e)(2),
16 because Plaintiff's Plan was and is administered in Auburn, California.

17 PARTIES

18 5. The D.L. Markham, DDS, MSD, INC. 401(k) Plan ("Plan") is an employee
19 pension benefit plan within the meaning of Section 2(A) of ERISA, 29 U.S.C. §1001(A). D.L.
20 Markham, DDS, MSD, INC., ("Markham") is a dental practice in the form of a California
21 corporation located in Auburn, California, owned by David Markham, D.D.S. and Luminita
22 Markham D.D.S., who are married to each other. The Plan and Markham are collectively
23 referred to as "Plaintiffs." Markham is the sponsor of the Plan, and established the Plan
24 effective January 1, 2017, to provide pension benefits to its employees. Markham is also the
25 "administrator" of the Plan within the meaning of Section 3(16)(A) of ERISA, 29 U.S.C.
26 §1002(16)(A), and the Plan's "named fiduciary" within the meaning of Section 402(a)(2) of
27 ERISA, 29 U.S.C. §1102(a)(2).

28 6. The Variable Annuity Life Insurance Company ("VALIC") is an insurance

1 corporation headquartered in Houston, Texas, that specializes in, among other things, tax-
2 qualified retirement plans. VALIC is a subsidiary of American International Group, Inc.
3 (“AIG”). Subsidiaries of VALIC include VALIC Financial Advisors, Inc. and VALIC
4 Retirement Services Company. Each of the three VALIC-branded entities described in this
5 paragraph (collectively, the “Defendants”) provided services to the Plan, and any reference to
6 VALIC herein is generally a reference to one or more of those three entities.

7 FACTUAL ALLEGATIONS

8 7. Plaintiffs hereby allege on behalf of themselves and all similarly situated plans
9 and plan administrators:

10 8. Over the course of several months in early 2018, Mr. Justin Ozeroff, a VALIC
11 sales representative, marketed the retirement plan services of VALIC to Markham. VALIC
12 targets smaller employers/plan administrators, as shown, *inter alia*, by Markham’s
13 experiences, VALIC’s reputation, and the insurance products marketed that are not
14 competitive in the large plan market.

15 9. Mr. Ozeroff, and VALIC generally, was recommended to Markham as a service
16 provider for the Plan by Ms. Ruth Jackson. Ms. Jackson, who had previously dealt with Mr.
17 Ozeroff and VALIC while working for a prior employer, had recently been hired by Markham
18 as the office manager. The plan was only recently established in 2017, and this was Luminita
19 Markham’s initial hire of a benefit plan service provider. Therefore, Luminita Markham
20 placed significant reliance on Ms. Jackson’s expressed favorable experience with VALIC and
21 the representations by Mr. Ozeroff.

22 10. Effective May 18, 2018, Markham hired VALIC to maintain the Plan on
23 VALIC’s retirement platform by entering into an agreement with VALIC whereby VALIC
24 would provide generally three types of services and products – pension administration,
25 individual services, and investment products. VALIC, of course, charged fees for its services.
26 The Annual Administrative Service Fee in these contracts was between \$2,500 and \$12,000.
27 Additional services resulted in additional fees that were either charged directly to the plan
28 administrator or to participant accounts. Markham paid fees of these types to VALIC. This

1 action concerns all fees associated with the service provider arrangement, including the
2 imposition of a cash surrender or withdrawal fee of 5% of Plan assets subject to the fee.

3 11. The annuity contract selected by Markham for the Plan was the Portfolio
4 Director Group Fixed and Variable Deferred Annuity Contract (policy form # UITG-194) (the
5 “PD Contract”), a fully allocated group fixed and variable deferred annuity contract where
6 VALIC serves as the issuer and contract record-keeper of the assets invested under the PD
7 Contract.

8 12. In or around January 2020, Markham determined that the investment returns
9 and quality of services provided by Markham were insufficient to justify the high fees imposed
10 by VALIC through the investment funds VALIC made available to Plan participants.
11 Markham informed VALIC that it intended to terminate the Plan’s contract with VALIC and
12 select a successor Plan service provider. After several futile discussions with VALIC
13 representatives over several months regarding the terms that VALIC would impose on the Plan
14 for leaving VALIC, Ms. Shellie Cherry, a Manager with AIG Retirement Services, emailed
15 Luminita Markham on April 30, 2020, providing information relating to the Plan’s
16 deconversion from the VALIC system. In that email, Ms. Cherry pointed out that the PD
17 Contract provided for a 5% surrender charge on transfers out of the contract on amounts
18 contributed in the previous 60 months, which would effectively cover all assets to be
19 transferred by the Plan. Ms. Cherry also pointed out that Section 4.06 of the PD Contract
20 contained exceptions to the imposition of the surrender charge. The only exception that is
21 referenced in Section 4.06 in the PD Contract that might apply to the Plan in the context of the
22 termination of VALIC’s services states the following:

23 “The surrender charge may be waived or reduced uniformly on all
24 Participant Accounts for contracts issued under certain plans or
25 arrangements which are expected to result in administrative cost savings.
26 No reduction of waiver will be made that is unfairly discriminatory to any
27 person. We may waive any withdrawal or surrender charge attributable to
28 Purchase Payments received during specific periods of time, and under

1 conditions and limitations set by Us. Any such waiver will be made by
2 Resolution of the Board of Directors. Notice of the right to surrender
3 without charge will be mailed to the Contract Owner when such waiver is
4 declared by the Board of Directors.”

5 13. Markham did not have actual knowledge of the surrender fee until these
6 communications with VALIC in 2020. Moreover, plan administrators would not have
7 understood that VALIC applies the surrender charge to the termination of a plan’s relationship
8 with VALIC because its disclosures state only that the surrender fee provision would be
9 imposed on participants who chose to withdraw funds from their account.

10 14. Markham delayed implementing its decision to terminate VALIC’s services
11 while it retained counsel. Markham then requested a waiver of the surrender fee as it was
12 instructed by VALIC to do, and since VALIC is expressly authorized in the PD Contract to
13 waive the surrender fee. On June 15, 2020, Markham engaged counsel to represent the Plan in
14 its attempt to terminate VALIC’s services without having to pay the 5% surrender fee.
15 Counsel sent Ms. Cherry a letter on June 23, 2020, alerting VALIC to the prohibition on
16 penalty charges imposed by service providers under the necessary services prohibited
17 transaction exemption set forth in ERISA Regulation §2550.408b-2(c). Ms. Cherry indicated to
18 Markham on June 24, 2020, via email that the matter would be reviewed by VALIC’s
19 Executive Review Committee (the “Committee”). Approximately six weeks later, on August
20 7, 2020, after the Committee’s deliberation, Ms. Kim Gilvin, a consultant in AIG’s Retirement
21 Services division, informed Markham that the Committee had decided to impose the surrender
22 fee upon the transfer of Plan assets.

23 15. On or about August 19, 2020, all Plan assets were transferred from the VALIC
24 platform to the successor service provider’s platform. A surrender fee of \$20,703 was retained
25 by VALIC, representing approximately 4.5% of the pre-fee account balances.

26 16. Because VALIC was a service provider to the Plan, VALIC was a party-in-
27 interest with respect to the Plan and similar plans. ERISA §3(14)(B), 29 U.S.C. §1002(14)(B).
28 The furnishing of services to a plan by a party-in-interest constitutes a prohibited transaction,

1 absent an exemption. ERISA §406(a)(1)(C), 29 U.S.C. §1106(1)(C). Thus, the agreement
2 with VALIC was a prohibited transaction unless a prohibited transaction exemption applied.
3 No exemption applied. A contract for services is exempt from the prohibited transaction rules
4 if the contract is for services necessary for the operation of the plan and no more than
5 reasonable compensation is paid by the plan. ERISA §408(b)(2), 29 U.S.C. §1108(b)(2). A
6 contract for services is not reasonable unless it permits the plan to terminate the contract
7 without penalty on reasonably short notice. ERISA Regulation §2550.408b-2(c)(3). An early
8 surrender fee does not reasonably compensate for loss if it provides for payment in excess of
9 actual loss. VALIC's early surrender fee, which provides for payment in excess of any actual
10 loss, is prohibited by ERISA.

11 17. VALIC knew that the PD Contract contained the surrender fee because VALIC
12 drafted the contract that contained the fee, along with the contractual provision that reserved to
13 itself the discretion to waive the fee based on whatever conditions and limitations VALIC
14 itself established. VALIC also knew that imposing the surrender fee would constitute a
15 prohibited transaction because VALIC was expressly alerted by Plan counsel that imposition
16 of the fee was prohibited because it was an invalid termination provision and because its
17 imposition was affirmed only after VALIC had exercised discretion conferred under the PD
18 Contract to waive the fee. VALIC actually exercised that discretion by determining that
19 Markham did not satisfy whatever unspecified conditions VALIC might have applied when
20 determining whether to waive the termination fee.

21 **CLASS ACTION ALLEGATIONS**

22 18. Plaintiffs bring their causes of action on behalf of the following Class and Subclass
23 pursuant to Federal Rule of Civil Procedure 23. Plaintiffs reserve the right to refine the definition
24 of the proposed Class based on further investigation and discovery.

25 a. The Class, is defined as "All ERISA covered plan administrators/plans that
26 entered an agreement with VALIC in which VALIC had discretion to impose a surrender charge
27 on outgoing transfers and which paid VALIC a fee of any kind since January 4, 2018."

28 b. The Self-Dealing Subclass, is defined as: "All ERISA covered plan

1 administrators/plans that entered an agreement with VALIC in which VALIC imposed the
2 surrender charge on outgoing transfers since January 4, 2018.”

3 19. Plaintiffs’ claims should be resolved on a class-wide basis, and there is a well-
4 defined community of interest with respect to the litigation.

5 20. The Class and Subclass are sufficiently numerous and joinder of all putative
6 members is impracticable. Indeed, VALIC’s Audited Statutory Financial Statements ending on
7 December 31, 2019, show that it held \$3,945,000,000 in group annuities that include a surrender
8 charge of five percent or more. Based on that amount there would be well over 8,000 Class
9 Members if they are all comparably sized to the Plaintiff Plan.

10 21. The Class and Subclass are ascertainable. VALIC has records showing the names
11 of the plans and plan administrators with whom it entered into the at-issue agreements.

12 22. Plaintiffs’ claims are typical and/or similar to the claims of the Class and Subclass
13 they seek to represent. Plaintiffs paid a surrender fee when the plan assets were transferred away
14 from VALIC. Plaintiffs also paid VALIC other fees during the time before it sought to transfer
15 out funds. The waiver discretion reserved in the PD Contract for the surrender fee applied to the
16 entire book of business (i.e. all Class and Subclass Members), and was exercised with respect to
17 that book of business, which utilized this or any similar annuity contract.

18 23. Plaintiffs will fairly and adequately represent and protect the interests of the Class
19 and Subclass. Plaintiffs do not have interests which are adverse to the interests of absent Class or
20 Subclass Members.

21 24. Class counsel is experienced, qualified and capable. They have litigated numerous
22 class and collective action cases and cases arising under ERISA.

23 25. There are common questions of law and fact. These include:

24 a. Should the fees collected by VALIC pursuant to agreements with Class
25 Members that include surrender fees be disgorged?

26 b. Is VALIC a party-in-interest with respect to the Class’s plans, pursuant to
27 ERISA §3(14)(B), 29 U.S.C. §1002(14)(B)?
28

1 c. Does Class Members' contracting with VALIC to furnish services to their
2 plans constitute prohibited transactions under ERISA §406(a)(1)(C), 29 U.S.C. §1106(1)(C)?

3 d. Does any prohibited transaction exemption apply to VALIC's services
4 provided pursuant to the alleged contracts?

5 e. Do VALIC's services meet the necessary services exemption under ERISA
6 Regulation §2550.408b-2(c)(3)?

7 f. Does VALIC's surrender fee constitute reasonable compensation paid by
8 the plans, per ERISA §408(b)(2), 29 U.S.C. §1108(b)(2)?

9 g. Does VALIC's surrender fee constitute a penalty under ERISA Regulation
10 §2550.408b-2(c)(3)?

11 h. Did VALIC draft the contract with the Class Members that included the
12 surrender fee?

13 i. Does VALIC constitute an ERISA fiduciary to Class Members' plans
14 because it has reserved and/or exercised discretionary authority to waive the surrender fee under
15 the PD Contract and/or related agreements?

16 j. Did VALIC know that the PD Contract contained the surrender fee?

17 k. Did VALIC fail to loyally discharge its fiduciary duties, in violation of
18 ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A), by imposing the surrender fee?

19 l. Did VALIC deal with assets of the Class Members' plans in its own interest
20 or for its own account, in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1), by imposing the
21 surrender fee?

22 m. Does VALIC exercise discretion in determining whether to waive the
23 surrender fee pursuant to the considerations in its agreement?

24 26. A class action is the superior way of resolving these claims. Class treatment will
25 permit a large number of similarly situated persons to prosecute their claims in a single forum and
26 without unnecessary duplication, and without fear of retaliation. Denying certification of the
27 class would result in either (i) extraordinary cost to the court system of individualized litigation or
28 (ii) the failure of deserving benefit plans who need their retirement savings to be made whole for

1 fees improperly paid to VALIC.

2 **COUNT I**

3 **(Alleged by the Class against Defendants)**

4 **Knowing Participant in a Prohibited Transaction – ERISA §§ 406(a)(1)(C); 502(a)(3)**

5 27. Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, Plaintiffs adopt
6 and incorporates by reference the averments and allegations of paragraphs 1 through 26
7 inclusive.

8 28. By the conduct alleged in paragraphs 1 through 26 above, VALIC understood
9 that it would receive additional compensation from the Plan and Class Members' plans by
10 inserting a substantial surrender penalty in its contract documents either by discouraging Class
11 Members' from terminating their relationships with VALIC (regardless of the merits of a
12 termination decision by the responsible plan administrator) or by collecting a surrender fee
13 (*i.e.*, penalty) having no relationship, express or implied, to any costs it incurred on-boarding
14 the plan. Either way, it was guaranteed substantial income regardless of whether Markham or
15 any other responsible fiduciary determined that VALIC deserved the business.

16 29. Because the Plan's contractual arrangement with VALIC contained a penalty
17 provision, the necessary services exemption contained in ERISA Regulation §2550.408b-
18 2(c)(3) was unavailable, and the arrangement thus constituted a prohibited transaction under
19 ERISA §406(a)(1)(C), 29 U.S.C. §1106(a)(1)(C). Because VALIC knew, or should have
20 known, that the penalty provision rendered the exemption unavailable, VALIC was a knowing
21 participant in a prohibited transaction and is liable to each plan for other equitable relief
22 specified in ERISA §502(a)(3), 29 U.S.C. §1132(a)(3). The amount of such relief requested is
23 an amount equal to all fees paid by the Class Members' plans to VALIC (including its
24 affiliates) in connection with the arrangement during the applicable statute of limitations.
25 Those fees have been retained by VALIC, and should be returned to the Class Members' plans
26 on the basis of either equitable disgorgement or an accounting.

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COUNT II

(Alleged by the Self-Dealing Subclass against Defendants)

Self-Dealing Prohibited Transaction – ERISA §§ 404(a)(1)(A); 406(b); 409(a)

30. Pursuant to the terms of the PD Contract, VALIC deliberated on whether to waive the surrender fee and thus exercised fiduciary control and authority over the disposition of Plaintiffs’ assets. Pursuant to the terms of its agreement, it has the discretion to do so with all Class Members’ plans. The result of VALIC’s deliberation was the decision to deny a fee waiver resulting in the payment of plan assets to itself as compensation. By the conduct alleged in paragraphs 1 through 26, VALIC received compensation from the Subclass Members’ plans as a result of its own fiduciary discretion, and thereby:

- a. Failed to loyally discharge its fiduciary duties, in violation of ERISA §404(a)(1)(A), 29 U.S.C. §1104(a)(1)(A);
- b. Dealt with assets of Subclass Members’ plans in its own interest or for its own account, in violation of ERISA §406(b)(1), 29 U.S.C. §1106(b)(1); and
- c. Received consideration for its own interest or for its own account in violation of ERISA §406(b)(3), 29 U.S.C. §1106(b)(3).

As a result of its conduct described above, VALIC caused Subclass Members’ plans to suffer losses for which it is liable, and received unjust profits which it must disgorge to each plan, pursuant to ERISA §409(a), 29 U.S.C. §1109(a).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court enter an Order:

- 1. Requiring VALIC to provide an accounting for, and to disgorge, all losses caused to Class Members’ plans — including all fees retained — as a result of their knowing participation in a prohibited transaction as a nonfiduciary; and
- 2. Requiring VALIC to restore all losses caused to the Subclass Members’ plans as a result of their self-dealing prohibited transaction as a fiduciary in imposing the surrender fee.

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3. Awarding plaintiffs reasonable attorneys' fees and costs of suit incurred herein pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g).

4. Awarding such other appropriate equitable relief as the court sees fit.

Dated: January 4, 2021

BAKER CURTIS & SCHWARTZ, P.C.

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