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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

THE WEST VIRGINIA INVESTMENT
MANAGEMENT BOARD, a public body
corporate, and THE WEST VIRGINIA
CONSOLIDATED PUBLIC RETIREMENT
BOARD, a public agency,

Plaintiffs,

v.

Civil Action No. 09-C-2104
Honorable James C. Stucky

THE VARIABLE ANNUITY LIFE INSURANCE
COMPANY, a Texas corporation,

Defendant.

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AGAINST PLAINTIFF THE WEST VIRGINIA CONSOLIDATED PUBLIC
RETIREMENT BOARD**

Pending before the Court is a Motion for Summary Judgment filed by Defendant The Variable Annuity Life Insurance Company ("VALIC") against Plaintiff The West Virginia Consolidated Public Retirement Board ("CPRB").¹

Upon review of the memoranda and oral argument of counsel, the Court GRANTS VALIC's Motion for Summary Judgment against CPRB and issues the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

The Court finds no genuine issues as to the following material facts:

1. West Virginia's teachers' pension plan—the TRS—was created in 1941 to provide retirement benefits for the State's public school teachers and other school service personnel.²

¹ VALIC has concurrently filed a separate motion for summary judgment as to the claims asserted by Plaintiff The West Virginia Investment Management Board ("IMB").

2. IMB, as trustee for the investment of funds in the TRS and the other state pension plans, is responsible for selecting and managing the investments used to fund the plans.³

3. CPRB, as administrator of the TRS and the other state retirement plans, is responsible for collecting the contributions invested in the retirement plans and overseeing the payment of benefits to plan participants.⁴

4. In 1990, as a result of funding problems with the TRS, the West Virginia legislature created a defined contribution plan for public teachers and other school service personnel—the DCP—which allows participating teachers to allocate their retirement funds to various investment options.⁵

5. Under the legislation, as of July 1, 1991, the TRS was closed to new participants, new teachers were automatically enrolled in the DCP, and participants in the TRS could elect to transfer from the TRS into the DCP.⁶

6. CPRB, as both the administrator of and the trustee for the investment of funds held in the DCP, is responsible for overseeing the collection of contributions and payout of benefits under the DCP, as well as selecting and managing the investment options available to DCP participants.⁷

² Pls.' First Am. Compl. ("FAC") ¶ 9; Ex. 1 (TRS Plan Description). All references to « Ex. » herein refer to the exhibits filed in support of VALIC's Motions for Summary Judgment.

³ FAC ¶ 5; W. Va. Code §§ 12-6-3(a), 12-6-9a(a); VALIC MSJ Ex. 2 (Dep. Ex. 45); VALIC MSJ Ex. 3 (Lambright Dep.) at 26:17-27:23; Ex. 5 (Jones Dep.) at 26:7-14.

⁴ FAC ¶ 3; W. Va. Code §§ 5-10D-1(a), (f)(1), (g), 18-7B-5; VALIC MSJ Ex. 3 (Lambright Dep.) at 26:17-27:23; VALIC MSJ Ex. 4 (Slaughter Dep. (Vol. 1)) at 23:11-24:15; VALIC MSJ Ex. 5 (Jones Dep.) at 26:2-19.

⁵ FAC ¶ 10; W. Va. Code § 18-7B-3; Ex. 9 at ¶¶ 8, 13 (Affidavit of Terasa Miller).

⁶ FAC ¶ 10; W. Va. Code §§ 18-7B-7(a), 18-7B-8; Ex. 9 at ¶ 9 (Affidavit of Terasa Miller).

⁷ FAC at ¶ 3, 14; W. Va. Code §§ 5-10D-1(a), (f)(1), (g); Ex. 9 at ¶ 14 (Affidavit of Terasa Miller).

7. On October 8, 1991, VALIC issued a fixed annuity contract to the DCP (the "1991 Contract").⁸

8. From 1991 to the present, VALIC, through the 1991 Contract, has provided a fixed annuity investment option for DCP participants.⁹

9. The 1991 Contract includes an endorsement that deletes the contract's surrender charge provision and adds a provision that restricts participants' rights "in the case of withdrawal for transfer to another funding entity."¹⁰

10. The withdrawal restriction is found in the West Virginia Optional Retirement Program Endorsement (the "Endorsement"), which provides, in relevant part:

Section 2.03 (Surrender Value) is amended by adding the following:

A) Except as provided in (B) below, in the case of withdrawal for transfer to another funding entity only 20% of the Surrender Value may be withdrawn once a year.

A Participant may choose to have the Surrender Value withdrawn for transfer in one of the following ways:

(1) Five Year Equal Annual Installment Method. The interest rate during the five year payout period will be declared in advance by VALIC. No other withdrawals may be made once payments begin.

(2) Decreasing Balance Method. 1/5 of the account balance the first year. 1/4 of the remaining balance the second year. 1/3 of the remaining balance the third year. 1/2 of the remaining balance the fourth year. The entire remaining balance the fifth year. Interest under this method will be credited at a rate determined by VALIC. Withdrawals may be made under this method.

B) The 20% a year restriction does not apply if:

(1) The Surrender Value remaining would be less than \$500, or;

⁸ Ex. 11 (1991 Contract).

⁹ Ex. 3 (Lambright Dep.) at 24:8-19, 34:4-7; Ex. 10 at CPRB 002624 (August 29, 1991 CPRB Meeting Minutes); Ex. 12 (Dep. Ex. 113 (VALIC's Annuity Proposal)); Ex. 13 (Oct. 15, 1991 Letter of Understanding); Ex. 17 (Miller Dep.) at 36:18-22, 50:3-11.

¹⁰ Ex. 11 (1991 Contract) at CPRB 004169.

(2) The withdrawal is for transfer to the funding entity for the West Virginia ORP Common Stock Fund or the West Virginia ORP Bond Fund.

Section 3.02 is deleted. There will be no surrender charges under this Contract. The account Surrender Value is equal to the Annuity Value.¹¹

11. The 1991 Contract provides that the contract will “terminate when performance by VALIC of its duties and obligations hereunder have been completed.” The contract also permits the DCP, as the contract owner, to suspend the contract, and “[e]ffective with such suspension no new Participants will be accepted”¹²

12. On March 16, 2008, the West Virginia legislature passed House Bill 101x, which permitted DCP members to voluntarily transfer their retirement accounts to the TRS effective July 1, 2008, so long as at least 65 percent of actively-contributing DCP members elected to transfer.¹³

13. As of June 3, 2008, 78.3 percent of DCP participants had elected to transfer from the DCP to the TRS. As a result, CPRB began the process of transferring the electing members’ accounts to the TRS for investment by the IMB.¹⁴

14. CPRB did not demand immediate cash surrender of the electing teachers’ assets in June 2008 or thereafter. CPRB did not claim that the withdrawal restriction in the 1991 Contract was inapplicable to the transfer to the TRS prior to the filing of this lawsuit.¹⁵

¹¹ Ex. 28 (2008 Contract) at WVIMB001616.

¹² Ex. 11 (1991 Contract) § 6.07.

¹³ W. Va. Code §§ 18-7D-3, 18-7D-5(a).

¹⁴ Ex. 14 at CPRB 003334 (Dep. Ex. 12 (June 3, 2008 CPRB Meeting Minutes)); Ex. 3 (Lambright Dep.) at 115:12-116:7.

¹⁵ Ex. 40 (Coppedge Dep.) at 132:4-133:3; see also Ex. 3 (Lambright Dep.) at 283:18-286:2; Ex. 4 (Slaughter Dep. (Vol. 1)) at 204:16-20; Ex. 6 (Watson Dep. (Vol. 1)) at 184:24-185:16; Ex. 17 (Miller Dep.) at 42:10-44:18, 56:14-57:8, 119:18-121:24, 126:15-127:3, 147:19-148:23; Ex. 18 (Dep. Ex. 65); Ex. 20 (Dep. Ex. 66); Ex. 40 (Coppedge Dep.) at 19:24-23:20, 29:6-30:10; Ex. 51 (Gutierrez Dep.) at 48:4-50:11, 53:24-55:13, 68:1-6.

15. When Great West, the third-party administrator for the DCP, called VALIC in June 2008 to discuss logistics regarding the transfer to the TRS, VALIC forwarded a form for CPRB's use to designate its preferred method of withdrawal, consistent with the terms of the 1991 Contract.¹⁶

16. CPRB did not submit the requested form to VALIC and instead directed its agent, Great West, to effectuate a transfer of the funds to the American Funds' Bond Fund of America (the DCP "Bond Fund"), so that it could avoid application of the withdrawal restrictions under the 1991 Contract.¹⁷

17. VALIC agreed to transfer the electing teachers' assets to the Bond Fund pursuant to CPRB's request.¹⁸

18. However, American Funds refused to accept transfer of the funds.¹⁹

19. After American Funds refused to accept the transfer, to effectuate the transfer of the DCP participants' funds invested with VALIC under the 1991 Contract from the DCP to the

¹⁶ Ex. 16 (Dep. Ex. 13) (June 25, 2008 letter from VALIC to Great West providing Transition Information Form)); Ex. 51 (Gutierrez Dep.) at 48:4-50:11; Ex. 18 (Dep. Ex. 65); *see also* Ex. 41 (Pfeifle Dep.) at 26:17-31:2.

¹⁷ Ex. 3 (Lambright Dep.) at 72:22-73:7, 130:14-131:12, 132:14-19, 134:16-21, 153:23-156:6; Ex. 19 (Dep. Ex. 16 (June 30, 2008 Letter from CPRB to Great West)); Ex. 20 (Dep. Ex. 66 (July 2, 2008 emails from CPRB to VALIC requesting that VALIC permit transfer of the electing teachers' funds to the Bond Fund)); Ex. 41 (Pfeifle Dep.) at 32:22-35:8; Ex. 58 (Dep. Ex. 17) (June 30, 2008 email from CPRB noting that the VALIC funds will be "placed in the WV ORP Bond Fund (which is and always has been American) to comply with the Endorsement"); Ex. 59 (Dep. Ex. 18 (June 30, 2008 email from CPRB to Great West noting, "[T]he endorsement allows the withdrawal to go to the bond fund (or the stock fund)."))..

¹⁸ Ex. 3 (Lambright Dep.) at 72:22-73:7, 159:19-161:24, 162:20-164:4, 186:23-187:3, 190:12-191:20; Ex. 20 (Dep. Ex. 66); Ex. 21 (Dep. Ex. 70); Ex. 22 (Dep. Ex. 67); Ex. 40 (Coppedge Dep.) at 74:22-75:8, 76:3-5; Ex. 41 (Pfeifle Dep.) at 42:18-21.

¹⁹ Ex. 23 (Dep. Ex. 19); Ex. 24 (Dep. Ex. 69); Ex. 61 (Dep. Ex. 31); Ex. 40 (Coppedge Dep.) at 76:3-5.

TRS, VALIC agreed to transfer the electing-teachers' assets in the 1991 Contract to a new annuity contract that VALIC would issue to IMB.²⁰

20. VALIC never denied any request by CPRB to transfer or surrender funds held in the 1991 Contract.

21. On November 6, 2008, VALIC issued a new fixed annuity contract to IMB (the "2008 Contract").²¹

22. The 2008 Contract includes terms and conditions nearly identical to those contained in the 1991 Contract, including a withdrawal restriction that is identical to the restriction included in the 1991 Contract.²²

23. On December 10, 2008, Plaintiffs submitted a request to VALIC to transfer \$248,345,458.77 from the 1991 Contract to the 2008 Contract, and VALIC complied with this request by executing the transfer.²³

24. On December 18, 2008, IMB requested withdrawal of all funds held under the 2008 Contract on or before December 31, 2008.²⁴

25. On April 23, 2009, IMB elected to withdraw funds from the 2008 Contract pursuant to the contract's equal installment method.²⁵

26. In accordance with IMB's instructions, VALIC transferred the first distribution of \$55,058,102.037 to IMB's Short Term Fixed Income Pool, a pool that is structured as a money market fund and that funds the TRS, on May 5, 2009. For each of the four years thereafter,

²⁰ Ex. 3 (Lambright Dep.) at 75:10-76:13, 190:12-191:20; Ex. 4 (Slaughter Dep. (Vol. 1)) at 99:3-11, 205:1-207:5; Ex. 18 (Dep. Ex. 65 (July 2, 2008 emails between VALIC and CPRB discussing bond fund transfer)).

²¹ Ex. 11 (1991 Contract) at CPRB 004169.

²² Ex. 4 (Slaughter Dep.) at 55:4-19; Ex. 25 (Dep. Ex. 46); Ex. 40 (Coppedge Dep.) at 133:4-18; *compare* Ex. 11 (1991 Contract) *with* Ex. 28 (2008 Contract).

²³ Ex. 29 (WVIMB 001599 (Dec. 10, 2008 Instruction to Confirm Transfer Annuity Values)).

²⁴ Ex. 30 (Dep. Ex. 74).

²⁵ Ex. 33 (Dep. Ex. 87 (April 23, 2009 letter attaching executed Transition Information Form)).

VALIC transferred the requisite funds to IMB's Short Term Fixed Income Pool. The fifth and final transfer occurred in May 2013.²⁶

II. CONCLUSIONS OF LAW

The Court issues the following conclusions of law:

Standard Of Review

1. Summary judgment is proper when the record demonstrates “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Mack-Evans v. Hilltop Healthcare Center, Inc.*, 226 W. Va. 257, 261 (2010) (quoting W. Va. R. Civ. P. 56(c)).

2. “Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, *such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Thus, if one element fails, there is no possibility for recovery[.]*” *Belcher v. Wal-Mart Stores, Inc.*, 211 W. Va. 712, 719 (2002) (citation omitted) (emphasis in original); *see also Chafin v. Gibson*, 213 W. Va. 167, 174 (2003) (affirming summary judgment where plaintiff failed to establish essential element).

3. Where, as here, “the record could not lead a rational trier of fact to find for the non-moving party,” a court should grant summary judgment in favor of the moving party. *Armor v. Lantz*, 207 W. Va. 672, 677 (2000).

²⁶ Ex. 5 (Jones Dep.) at 40:9-43:19; Ex. 6 (Watson Dep. (Vol. 1)) at 202:23-203:10; Ex. 7 (Watson Dep. (Vol. 2)) at 7:17-23; Ex. 34 (Dep. Ex. 75); Ex. 42 (IMB 2008 Annual Report) at 15 (describing the Short Term Fixed Income Pool as a fund “structured as a money market fund, where the goal is a stable dollar value per share, thus preserving principal.”); Ex. 53 (Daily Cash Management Reported dated May 5, 2010); Ex. 54 (Daily Cash Management Reported dated May 6, 2011); Ex. 55 (Daily Cash Management Reported dated May 7, 2012).

CPRB Is Not Entitled To Declaratory Relief Or Damages Under The 1991 Contract Because CPRB Has Not Been Denied Any Right Under The 1991 Contract

4. “Before a circuit court can grant declaratory relief pursuant to the provisions of the Uniform Declaratory Judgment Act . . . , West Virginia Code §§ 55-13-1 to -16 (1994), there must be an actual, existing controversy.” *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W. Va. 55, 61 (1996) (citations omitted).

5. An actual, justiciable controversy exists where “a legal right is claimed by one party and denied by another” *Dolan v. Hardman*, 126 W. Va. 480 (1944) (citation omitted).

6. Where a plaintiff fails to invoke a right under contract provision on which it seeks declaratory relief, summary judgment is warranted. *See State Farm Mut. Auto. Ins. Co. v. Schatken*, 230 W. Va. 201, 238-9 (2012) (reversing Circuit Court’s entry of summary judgment on insurance contract provision that was not affirmatively invoked by the plaintiffs).

7. There is no actual, justiciable controversy between VALIC and CPRB related to the 1991 Contract because CPRB has not invoked, and VALIC has not denied, any right or breached any obligation under the 1991 Contract.

CPRB Cannot Establish That It Is Entitled To Declaratory Relief Or Damages Related To The 1991 Contract Because It Has Not Suffered Any Damages Under The 1991 Contract

8. To establish a claim for damages under the 1991 Contract, CPRB must prove the “existence of a valid, enforceable contract, that the plaintiff has performed under the contract, that the defendant has breached or violated its duties or obligations under the contract, *and that the plaintiff has been injured as a result.*” *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 688, 693 (N.D. W. Va. 2010) (citation omitted) (emphasis in original).

9. “It is a rather well settled principle of the law that more is necessary to maintain a civil action than a simple breach of the duty. There must also be an injury. A breach of duty, without an injury . . . is not actionable.” *Absure, Inc. v. Huffman*, 213 W. Va. 651, 655 (2003).

10. Plaintiffs' claimed lost investment income resulting from alleged breaches of the 1991 Contract and the 2008 Contract are not the same.

11. CPRB cannot establish that it has suffered any harm related to the 1991 Contract because VALIC agreed to issue a new contract to IMB to permit CPRB to transfer assets from the electing-teachers' accounts in the 1991 Contract *without restriction*.²⁷ CPRB bore no responsibility for investing the transferred assets or for the performance of the TRS investments.²⁸

12. CPRB also cannot establish that it has suffered any harm related to the 1991 Contract because Plaintiffs' expert has not calculated damages related to the 1991 Contract, and IMB has not otherwise claimed harm resulting from the 1991 Contract.²⁹

CPRB Cannot Establish That It Is Entitled To Declaratory Relief Or Damages Related To The 2008 Contract Because It Does Not Have Standing To Enforce 2008 Contract

13. Summary judgment is required where a party lacks standing to seek a declaration of rights under or to enforce a contract. *See, e.g., Raines Imports, Inc. v. Am. Honda Motor Co.*, 223 W. Va. 303, 311 (2009) (affirming trial court's grant of summary judgment where plaintiff lacked standing to bring declaratory judgment action).

²⁷ Ex. 3 (Lambright Dep.) at 75:10-76:13; Ex. 4 (Slaughter Dep. (Vol. 1)) at 99:3-15, 205:1-207:5; Ex. 25 (Dep. Ex. 46 (Sept. 25, 2008 email from Coppedge to Lambright and Slaughter indicating that VALIC can accommodate the State's request to issue a new annuity contract to IMB)); Ex. 28 (2008 Annuity Contract).

²⁸ Ex. 3 (Lambright Dep.) at 26:17-27:23; Ex. 4 (Slaughter Dep. (Vol. 1)) at 49:19-51:21; Ex. 5 (Jones Dep.) at 26:2-19; Ex. 6 (Watson Dep. (Vol. I)) at 56:6-57:18; Ex. 17 (Miller Dep.) at 55:13-56:13; Ex. 49 (Slaughter Dep. (Vol. 2)) at 173:16-174:174:20.

²⁹ Ex. 35 (Coffman Dep.) at 94:8-14; Ex. 38 (Dep. Ex. 108 (Plaintiffs' expert report)); Ex. 8 (Dep. Ex. 1 (CPRB's Answers to VALIC's First Set of Interrogatories and Requests for Production) at 6 (identifying Coffman's report as containing all facts supporting CRPB's claim that VALIC's refusal to release the funds has caused CPRB to lose the opportunity to invest the funds and earn higher returns), 12 (identifying Coffman's report as describing "all income and/or losses recognized by the WVCPRB as a result of the investment options in the DCP."), 22 (identifying Coffman's report as the only document "supporting WVCPRB's claim for damages"); Ex. 17 (Miller Dep.) at 93:8-11.

14. The Declaratory Relief Act authorizes “interested” persons to seek a determination of a “question of construction or validity arising under” a contract. W. Va. Code § 55-13-4.

15. An interested person has standing to sue for declaratory relief only when he can demonstrate that his interests are “significant” or “substantial.” *Shobe v. Latimer*, 162 W. Va. 779, 784, 790-91 (1979).

16. CPRB does not have a significant or substantial interest in IMB’s ability to withdraw funds from the 2008 Contract because IMB, not CPRB, is the trustee for investment of the funds held in the TRS.³⁰

17. CPRB’s status as a trustee of the TRS is insufficient to give CPRB standing because CPRB’s role as trustee is limited to processing payments to TRS members and beneficiaries.³¹

18. VALIC’s conduct has not affected CPRB’s ability to process payments to TRS members and beneficiaries. By statute, members and beneficiaries of the TRS are entitled to receive benefits, notwithstanding IMB’s longstanding inability to fully fund the TRS.³²

19. CPRB, therefore, does not have standing to enforce the 1991 Contract.

CPRB Cannot Establish That It Is Entitled To Declaratory Relief Or Damages Related To The 2008 Contract Because It Has Not Suffered Any Damages As A Result Of VALIC’s Enforcement Of The Withdrawal Restriction In The 2008 Contract

20. To establish a claim for damages, CPRB must prove the “existence of a valid, enforceable contract, that the plaintiff has performed under the contract, that the defendant has

³⁰ FAC ¶ 5; W. Va. Code §§ 12-6-3(a), 12-6-9a(a); Ex. 2 (Dep. Ex. 45)); Ex. 17 (Miller Dep.) at 54:12-56:13.

³¹ FAC ¶¶ 3, 5; W. Va. Code §§ 5-10D-1(a), 18-7B-5; W. Va. Code §§ 12-6-3(a), 12-6-9a(a).

³² W. Va. Code § 18-7A-25.

breached or violated its duties or obligations under the contract, *and that the plaintiff has been injured as a result.*” *Wince*, 681 F. Supp. 2d at 693 (emphasis in original) (citation omitted).

21. “It is a rather well settled principle of the law that more is necessary to maintain a civil action than a simple breach of the duty. There must also be an injury. A breach of duty, without an injury . . . is not actionable.” *Absure, Inc. v. Huffman*, 213 W. Va. 651, 655 (2003).

22. IMB, not CPRB, is the trustee of the assets in the TRS, and CPRB’s role with respect to the TRS is purely administrative.³³

23. As the TRS administrator, CPRB has no legal right to the TRS assets and bears no responsibility for investing TRS assets or for the performance of those investments.³⁴

24. Thus, whether the TRS could have earned additional returns had VALIC released the funds in December 2008 without restriction has no impact on CRPB, and CPRB has not suffered any damages related to the 2008 Contract.

Based on all of the foregoing, the Court hereby GRANTS VALIC’s Motion for Summary Judgment against CPRB.

The Clerk is ORDERED to mail certified copies of this Order to counsel of record upon its entry with the Court.

IT IS SO ORDERED.

ENTERED this 21st day of October, 2013.

James C. Stucky
Honorable James C. Stucky, Judge
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY G. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF October 2013
Cathy G. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

³³ Ex. 4 (Slaughter Dep. (Vol. 1)) at 49:4-50:10; Ex. 5 (Jones Dep.) at 26:2-19; Ex. 6 (Watson Dep. (Vol. I)) at 56:6-57:18; Ex. 27 (Dep. Ex. 73 (Dec. 10, 2008 Letter of Understanding)); FAC ¶ 3; W. Va. Code §§ 5-10D-1(a), 18-7B-5.

³⁴ Ex. 3 (Lambright Dep.) at 26:17-27:23, 30:4-19; Ex. 4 (Slaughter Dep. (Vol. 1)) at 49:19-50:21; Ex. 5 (Jones Dep.) at 26:2-19; Ex. 6 (Watson Dep. (Vol. I)) at 56:6-57:18.