

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

KESTRA INVESTMENT SERVICES,
LLC,

Plaintiff,

v.

THE OHIO NATIONAL LIFE
INSURANCE COMPANY; OHIO
NATIONAL LIFE ASSURANCE
CORPORATION; and OHIO NATIONAL
EQUITIES, INC.,

Defendants.

A19CV0687 RP
Case No. _____

FILED

JUL 8 2019

CLERK, U.S. DISTRICT CLERK
WESTERN DISTRICT OF TEXAS
BY DEPUTY

COMPLAINT

Plaintiff, Kestra Investment Services, LLC (“Kestra”), f/k/a NFP Advisor Services, LLC, f/k/a NFP Securities, Inc., by and through its undersigned counsel, brings this action for declaratory relief and damages arising out of Defendants’ termination of their selling agreement with Kestra, and their subsequent wrongful withholding of monies due and payable to Kestra thereunder.

PARTIES

1. Plaintiff, Kestra is a Texas limited liability company with a principal place of business at 5707 Southwest Parkway, Building 2, Suite 400, Austin, Texas 78735. Kestra’s sole member is Kestra Financial, Inc., a Delaware corporation, with its principal place of business in Austin, Texas. Kestra is a securities broker-dealer regulated by the Financial Industry Regulatory Authority (“FINRA”). Kestra has a network of more than 1,300 independent registered representatives who provide investment brokerage and financial advisory services to their clients.

2. Kestra was previously known as NFP Advisor Services, LLC, and prior thereto, as NFP Securities, Inc. At all relevant times Kestra (including NFP Advisor Services, LLC and NFP Securities, Inc.) maintained its principal place of business in Austin, Texas.

3. Defendant, The Ohio National Life Insurance Company, is a corporation organized under the laws of Ohio, with a principal place of business at One Financial Way, Cincinnati, Ohio 45242. The Ohio National Life Insurance Company is a wholly-owned subsidiary of Ohio National Financial Services, Inc., which has the same principal place of business.

4. Defendant Ohio National Life Assurance Corporation is a corporation organized under the laws of Ohio, with a principal place of business at One Financial Way, Cincinnati, Ohio 45242. Ohio National Life Assurance Corporation is a wholly-owned subsidiary of The Ohio National Life Insurance Company.

5. Defendant Ohio National Equities, Inc. is a corporation organized under the laws of Ohio, with a principal place of business at One Financial Way, Cincinnati, Ohio 45242. Ohio National Equities, Inc. is a broker dealer registered with FINRA. Upon information and belief, Ohio National Equities, Inc. is a wholly-owned subsidiary of The Ohio National Life Insurance Company.

JURISDICTION AND VENUE

6. Federal diversity jurisdiction exists pursuant to 28 U.S.C. § 1332. Defendants are corporations incorporated under the laws of Ohio with principal places of business in Ohio. Kestra is a Texas limited liability company with its principal place of business in Texas. The amount in controversy exceeds \$75,000.

7. This Court has jurisdiction over Defendants as they presently, and at all relevant times herein, conduct and solicit business in Texas, engage in a persistent course of conduct in

Texas, and/or derive substantial revenues from goods or services used in the Texas. Further, Defendants' conduct caused foreseeable injuries to Plaintiff, a Texas resident.

8. Defendants purposefully and deliberately participated in wrongful conduct that inflicted predictable injury in Texas to Plaintiff, and Texas is the geographic focus of the injury suffered by Plaintiff.

9. Defendants are also subject to the jurisdiction of Texas courts based on their continuous and systematic activity within Texas. Defendants Ohio National Life Insurance Company and Ohio National Life Assurance Company are actively licensed with the Texas Department of Insurance and have been so since 1921 and 1979, respectively. Further, it is stated on Ohio National's public website (www.ohionational.com): "Tracing its corporate origins to 1909, Ohio National markets a variety of insurance and financial products in 49 states (all except New York), the District of Columbia, Puerto Rico and through affiliated operations in South America." (Emphasis added.). Thus, Defendants sell products to, and enter into contracts with, Texas residents, including the sale of variable insurance contracts/policies to Texas residents.

10. By carrying out regular business transactions with Texas businesses and consumers, Defendants purposefully availed themselves of the privilege of conducting activities within Texas, thus invoking the benefits and protections of its laws. For these reasons, and those further detailed herein, Defendants cannot avoid the jurisdiction of this Court.

11. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b)(1)-(2) and 28 U.S.C. § 1391(c)(2). Defendants have the capacity to sue and be sued in their common names under applicable law, and are subject to this Court's personal jurisdiction with respect to this civil action. As such, Defendants are deemed residents of Texas and the Western District of Texas for purposes of venue, and venue is therefore proper in this Court. Further, a substantial part of the events

giving rise to the claims set forth herein, including but not limited to the execution of the selling agreement at issue, and the notification of termination of said agreement, occurred in the Western District of Texas.

BACKGROUND FACTS

12. Defendants, The Ohio National Life Insurance Company, Ohio National Life Assurance Corporation, and Ohio National Equities, Inc. (collectively hereinafter, “Ohio National” or “Defendants”), and Kestra entered into a Selling Agreement (the “Selling Agreement”) concerning certain variable insurance contracts/policies to be sold by Kestra’s registered representatives to their customers (the “Annuity Contracts”). A true and correct copy of the Selling Agreement is attached hereto as **Exhibit A**.

13. Kestra’s compensation for selling the Annuity Contracts is governed by the “Commission Payable” section of the Selling Agreement and the applicable “Commission Schedule,” which was incorporated by reference into the Agreement. *See* Ex. A at ¶¶ 9, 25. An example of one such Commission Schedule is attached hereto as **Exhibit B**.

14. The SEC describes variable annuities as follows:

A variable annuity is a contract between you and an insurance company, under which the insurer agrees to make periodic payments to you, beginning either immediately or at some future date. You purchase a variable annuity contract by making either a single purchase payment or a series of purchase payments.

A variable annuity offers a range of investment options. The value of your investment as a variable annuity owner will vary depending on the performance of the investment options you choose. The investment options for a variable annuity are typically mutual funds that invest in stocks, bonds, money market instruments, or some combination of the three.

Variable Annuities – What You Should Know, U.S. Securities and Exchange Commission Office of Investor Education and Advocacy, at p. 3 (available at <https://www.sec.gov/investor/pubs/sec->

[guide-to-variable-annuities.pdf](#)). “Purchase payments” are also commonly referred to as “premium payments.”

15. Premium payments made by Kestra customers for the purchase of Annuity Contracts issued by Ohio National were made to Defendant Ohio National Insurance Company and/or Defendant Ohio National Life Assurance Corporation. To the extent Kestra acted as an intermediary for the payment, it immediately transferred 100% of the premium payment to Ohio National, per the Selling Agreement.

16. Kestra was compensated in the form of commissions paid to it by Ohio National for each Annuity Contract sold by Kestra. Commissions were either paid up-front as a percentage of initial/add-on premiums, or as a “trail” commission paid periodically until the Annuity Contract was surrendered or annuitized. A trail commission is a commission structure where commissions are paid on a regular basis – usually monthly or quarterly – after the annuity contract is issued. Trail commissions are usually offered in addition to some form of up-front commission. The Annuity Contracts at issue offered a number of trail commission options, each with a different combination of up-front and trail commissions. Logically, larger up-front percentage options were paired with smaller trail percentages, and vice versa. *See* Ex. B.

17. Some of the Annuity Contracts sold by Plaintiff under the Selling Agreement contained an add-on provision, or rider, known as the Guaranteed Minimum Income Benefit Rider (Annuity Contracts with this rider are hereinafter referred to as “GMIB Contracts”). The GMIB Contracts provide a certain guaranteed retirement income for life, regardless of the performance or value of the contract’s underlying investments.

18. Upon information and belief, in or about 2017, Ohio National determined that the GMIB Contracts were unprofitable and began a series of efforts to convince GMIB Contract owners to surrender their contracts in favor of alternative products offered by Defendants.

19. Largely unsuccessful, Ohio National made the decision to terminate all selling agreements with Kestra and other similarly situated broker-dealers. Kestra was notified of this decision by letter dated September 20, 2018. A true and correct copy of this letter is attached hereto as Exhibit C.

20. The following day, on September 21, 2018, Ohio National sent another letter to Kestra, notifying Kestra of a proposed “servicing agreement” through which Kestra would be able to continue servicing in-force Annuity Contracts issued by Ohio National, even though the Selling Agreement had been terminated. A true and correct copy of the September 21, 2018 letter is attached hereto as Exhibit D.

21. The September 21, 2018 letter stated that while Ohio National would continue to pay trail commissions consistent with the Selling Agreement for group variable annuities. However, all individual variable annuity trail commission payments would cease as of December 12, 2018.

22. The September 21, 2018 letter further stated that the proposed servicing agreement would provide for a “service fee” to be paid to Kestra for individual Annuity Contracts, **except for GMIB Contracts.**

23. Under the Selling Agreement, however, Defendants were obligated to continue paying trail commissions to Kestra on in-force GMIB Contracts until those contracts were surrendered or annuitized.

24. Per the Selling Agreement, “Commissions payable in connection with the [Annuity Contracts] shall be paid to [Kestra], or its affiliate insurance agency, according to the Commission Schedule(s) relating to this Agreement....” *See* Ex. A at ¶ 9.

25. Trail commission payments due and payable to Kestra by Defendants since December 12, 2018 have not been paid. Defendants’ refusal to pay commissions constitutes a material breach of the Selling Agreement and incorporated Commission Schedule.

26. The Commission Schedule provided Kestra up to five different up-front/trail commission combinations for the various types of Annuity Contracts included in the Commission Schedule.

27. With respect to the trail commissions specifically, for each type of Annuity Contract, the Commission Schedule stated:

Trail commissions will continue to be paid to broker dealer of record while the Selling Agreement remains in force and will be paid on a particular contract until the contract is surrendered or annuitized.

See Ex. B at p. 2-5.

28. The payment of trail commissions survives the termination of the Selling Agreement because trail commissions are essentially deferred up-front commissions. Kestra is just as entitled to its commission in Year 5, for example, as it was at the time of the annuity contract was sold.

29. If annuity issuers could unilaterally end the payment of trail commissions at their discretion, no broker-dealer would take that risk, and all commissions would be paid up-front as a maximum percentage of initial premium.

30. Kestra’s position is further supported by the Selling Agreement, which states:

The terms of compensation shall survive this Agreement unless the Agreement is terminated for cause by [Ohio National], provided that

[Kestra] remains a broker-dealer in good standing with [FINRA] and other state and federal regulatory agencies and that [Kestra] remains the broker-dealer of record for the account.

See Ex. A at ¶ 9. Kestra satisfied its obligations for all accounts for which it remains broker-dealer of record.

31. Yet, Defendants, without cause, ceased paying all trail commissions on GMIB Contracts.

32. It is not happenstance that among all of the fixed annuities, group variable annuities, and individual variable annuities issued by Defendants, and sold by Kestra, the only products for which Defendants unconditionally stopped compensating Kestra were the GMIB Contracts.

33. Defendants were so intent on getting out of their obligations under the GMIB Contracts that Ohio National notified Kestra that it would be offering a buyout opportunity for GMIB Contract owners that would allow the GMIB Contract owners to surrender their GMIB Contracts for an “enhanced” value.

34. The only reason for Defendants to single out the GMIB Contracts is that Ohio National sought to make it harder and more expensive for Kestra to service the GMIB Contracts. This – Defendants’ hoped – would encourage Kestra to recommend that its customers accept the buyout offer, and move into another product for which Kestra could be compensated.

35. Upon information and belief, therefore, it was Defendants’ expectation that they may be able to lower their exposure on certain Annuity Contracts by causing brokerage firms to recommend that their customer prematurely surrender their contracts in favor of alternative (more expensive) products...

36. Plaintiff seeks a declaratory judgment concerning the disputed rights and obligations under the Selling Agreement, as well as specific performance and/or monetary remedies for breach of contract.

CAUSES OF ACTION

COUNT I

Declaratory Judgment Relief (28 U.S.C. §§ 2201-2202)

37. Plaintiff repeats, realleges and incorporates by reference the allegations contained in the preceding paragraphs as if fully stated herein.

38. Plaintiff requests that this Court declare that: both prior to, and after the termination of the Selling Agreement, Defendants are obligated to pay all trail commissions to Plaintiff on all GMIB Contracts until any contract is surrendered or annuitized.

39. There is an actual and justiciable controversy between the parties with regard to these issues.

COUNT II

Breach of Contract

40. Plaintiff repeats, realleges and incorporates by reference each and all of the allegations contained in the preceding paragraphs as if fully stated herein.

41. Ohio National and Plaintiff are parties to the Selling Agreement, which is a binding and enforceable contract.

42. Plaintiff has at all times fulfilled its obligations, if any, under the Selling Agreement.

43. Ohio National is contractually required to pay commissions, including trail commissions, to Plaintiff after the termination of the Selling Agreement.

44. As noted above, Ohio National has clearly and unequivocally informed Plaintiff that it will not pay any further GMIB Contract trail commissions.

45. Defendants' actions constitute a breach of the express terms of the contract and the duty of good faith and fair dealing implied in every contract.

46. As a direct and proximate result of Ohio National's breach and wrongful conduct, Plaintiff has been, and will continue to be, damaged and Ohio National is therefore liable to Plaintiff in an amount to be determined by the Court, together with costs, interest and attorneys' fees as allowable by law.

COUNT III

Breach of Implied Covenant of Good Faith and Fair Dealing

47. Plaintiff repeats, realleges and incorporates by reference each and all of the allegations contained in the preceding paragraphs as if fully stated herein.

48. All contracts include an implied covenant of good faith and fair dealing, which requires that neither party take any action that will deprive the other of the benefit of the contract between them. The Selling Agreement contains an implied covenant of good faith and fair dealing.

49. Ohio National acted, and continues to act, as set forth above, without good faith and/or in bad faith in connection with their termination of trail commissions on the GMIB Contracts.

50. Plaintiff has been and continues to be damaged as a proximate result of Ohio National's breaches of the covenant of good faith and fair dealing.

51. By virtue of the foregoing, Defendants are liable to Plaintiff for damages in an amount to be determined by the Court, together with costs and interest to the extent permitted by law.

COUNT IV
Tortious Interference with Plaintiff's Actual
and or Prospective Contractual and/or Business Relations

52. Plaintiff repeats, realleges and incorporates by reference the allegations contained in the preceding paragraphs as if fully stated herein.

53. Plaintiff has contractual and/or prospective business relations with its clients and prospective clients.

54. Plaintiff has contractual and/or prospective business relations with its registered representatives.

55. Ohio National is and was aware of those contractual and/or prospective business relationships.

56. Without justification, Ohio National has purposefully and intentionally interfered with, and is continuing to interfere with, those relationships through improper means and/or with improper motive.

57. Ohio National's tortious interference with Plaintiff's contractual and/or prospective business relationships has caused and/or will cause damage to Plaintiff.

58. As a consequence thereof, Defendants are liable to Plaintiff in an amount to be determined by the Court, together with interest, costs and attorneys' fees as allowable by law.

COUNT V
Unjust Enrichment

59. Plaintiff repeats, realleges and incorporates by reference the allegations contained in the preceding paragraphs as if fully stated herein.

60. Plaintiff conferred a benefit on Ohio National by selling Ohio National's Annuity Contracts to Plaintiff's customers.

61. Defendants encouraged Plaintiff to invest its time and financial resources, and were aware of Plaintiff's actions in this regard, and knowingly accepted the benefits flowing therefrom.

62. Defendants have retained and/or will retain that benefit, to Plaintiff's detriment, in a manner where the result is unconscionable.

63. Due to their actions, as described above, Defendants have been or will be unjustly enriched at the expense of Plaintiff.

64. Defendants are therefore required to make restitution to Plaintiff for such unjust enrichment.

65. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff has suffered and/or will suffer damages.

66. By virtue of the foregoing, Defendants are liable to Plaintiff in an amount to be determined by the Court, together with interest, costs and attorneys' fees to the extent permitted by law, and injunctive relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests :

1. That the Court award money damages.
2. That the Court declare Plaintiff has rights to ongoing trail commissions under the Selling Agreement.
3. That the Court award prejudgment and post-judgment interest.
4. That the Court award punitive damages and attorneys' fees as may be permitted by law.
5. That the Court award such other relief as may be permitted by law and equity.
6. That the Court order Defendants to pay the costs of this action.

JURY DEMAND

Plaintiff demands a trial by jury on all claims.

Dated: July 3, 2019

Respectfully submitted,

D'AMURA & Z Aidman, PLLC

/s/ Richard A. D'Amura

RICHARD A. D'AMURA

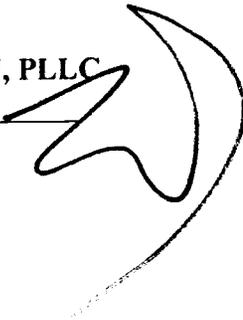
State Bar No. 24107507

609 Josephine Street

Austin, Texas 78704

(310) 945-5306

rdamura@dz-llc.com



ATTORNEYS FOR PLAINTIFF

Signature on file with the U.S. District Clerk