No. 16-80073

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRANSAMERICA LIFE INSURANCE COMPANY, an Iowa corporation TRANSAMERICA INVESTMENT MANAGEMENT, LLC, a Delaware limited liability company; and TRANSAMERICA ASSET MANAGEMENT, INC., a Florida corporation

Defendants-Petitioners,

v.

JACLYN SANTOMENNO; KAREN POLEY; BARBARA POLEY, all individually and on behalf of all others similarly situated,

Plaintiffs-Respondents.

INTERLOCUTORY APPEAL SOUGHT FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE DEAN D. PREGERSON, DISTRICT JUDGE
CASE NO. 2:12-CV-02782-DDP (MANX)

AMICUS CURIAE AMERICAN BENEFITS COUNCIL'S MOTION FOR LEAVE TO FILE AN AMICUS BRIEF IN SUPPORT OF PETITIONERS TRANSAMERICA LIFE INSURANCE COMPANY, TRANSAMERICA INVESTMENT MANAGEMENT, LLC. AND TRANSAMERICA ASSET MANAGEMENT, INC.

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American Benefits Council

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, The American Benefits Council (the "Council") respectfully moves for leave to file an amicus curiae brief in support of Petitioner's Motion for Leave to Appeal.

1. The Council is a nonprofit trade association that is composed of more than 400 organizations, primarily large plan sponsors, that either sponsor or provide services to privately sponsored employee benefit plans.

2. Collectively, the Council's members either directly sponsor or provide services to retirement and welfare plans that grant benefits to over 100 million Americans.

3. The Council often participates as amicus curiae in appellate cases that have the potential to affect the design and administration of benefits plans. Its motion for leave is usually granted because of the Council's experience in benefits matters.

4. The Petition arises from a District Court's decision holding that a service provider acted in a fiduciary capacity before undertaking any discretionary duties, that its actions in withdrawing contracted agreed upon fees with a plan fiduciary violated the prohibited transaction rules and that no exception to the prohibited transaction rules is permitted. As the Council demonstrates in its amicus brief, asset-based fee arrangements where the fees are paid from the assets

of the plan are ubiquitous. All investment management fees are asset-based arrangements. No court has ever held that a service provider was a fiduciary before undertaking any fiduciary discretionary acts or that the withdrawal of fiduciary contracted fees pursuant to a written agreement constituted a prohibited transaction.

5. The Council's brief will assist the Court in understanding the industry and market structure and the implications of the District Court decision on the market.

6. This brief was drafted by the Council; attorneys and no party or party's counsel contributed any funds to the preparation of the brief.

The Council attempted to obtain leave from all parties prior to filing this brief. Defendants have consented, but Plaintiffs have not stated on May 27, 2016, that they do not consent to this request.

WHEREFORE, this Court should enter an order granting leave to file the amicus brief.

Dated: May 31, 2016

/s/ Christopher J. Rillo
Christopher J. Rillo
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PROOF OF SERVICE BY FEDEX/OVERNIGHT DELIVERY

I am a citizen of the United States and employed in San Francisco County, California, at the office of a member of the bar of this Court at whose direction this service was made. I am over the age of eighteen years and not a party to the within action. My business address is 600 Montgomery Street, Suite 2600, San Francisco, CA 94111. On May 31, 2016, I served the following:

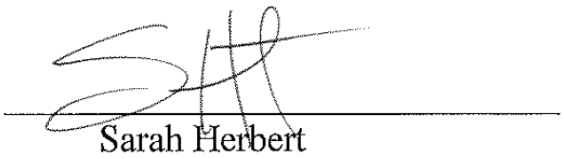
Amicus Curiae American Benefits Council's Motion For Leave To File An Amicus Brief In Support Of Petitioners Transamerica Life Insurance Company, Transamerica Investment Management, Llc. And Transamerica Asset Management, Inc.

by putting a true and correct copy thereof together with an unsigned copy of this declaration, in a sealed envelope, with delivery fees paid or provided for, for delivery the next business day to:

Please see attached Service List.

and by placing the envelope for collection today by the overnight courier in accordance with the firm's ordinary business practices. I am readily familiar with this firm's practice for collection and processing of overnight courier correspondence. In the ordinary course of business, such correspondence collected from me would be processed on the same day, with fees thereon fully prepaid, and deposited that day in a box or other facility regularly maintained by FedEx, which is an overnight carrier.

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on May 31, 2016, at San Francisco, California.



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BRIEF OF AMICUS CURIAE AMERICAN BENEFITS COUNCIL IN SUPPORT OF PETITIONERS TRANSAMERICA LIFE INSURANCE COMPANY, TRANSAMERICA INVESTMENT MANAGEMENT, LLC. AND TRANSAMERICA ASSET MANAGEMENT, INC.'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292 (b), FEDERAL RULE OF CIVIL PROCEDURE 23(f) AND FEDERAL RULES OF APPELLATE PROCEDURE 5.

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RULE 26.1 DISCLOSURE

The American Benefits Council is a non-profit association incorporated under the laws of Connecticut. It is registered as a 501(c)(6) organization with the Internal Revenue Service. It has no parent corporation and does not issue shares of stock.

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I
INTEREST OF AMICUS CURIAE

The American Benefits Council (the "Council") is a broad based non-profit organization dedicated to protecting and fostering privately sponsored employee benefits plans. The Council is primarily composed of large employers that sponsor employee benefits plans, but also includes organizations that provide services to such plans. Collectively, the Council's members either directly sponsor or provide services to retirement and welfare plans that grant benefits to over 100 million Americans. The Council frequently participates as *amicus curiae* in appellate cases that have the potential to affect the design and administration of benefit plans. Many Council members sponsor retirement plans and also provide services and investment products to those plans that, like the plan at issue, are defined contribution arrangements permitting participants the opportunity to save, on a tax deferred basis, for retirement. Participant claims for fiduciary liability are among the most significant liabilities faced by private pension plans.[1]

II
PRELIMINARY STATEMENT

This case arises from standard plan fee arrangements long sanctioned by Congress and the U.S. Department of Labor ("DOL"). Plaintiffs are a class of

[1] Pursuant to Fed. R. App. P. 29(c)(5), this brief was drafted by the Council's attorneys and no party contributed financially to the preparation of the brief.

participants who invested in various 401(k) retirement plans. Pursuant to statutory requirements, plaintiffs' employers, which sponsored the plans and are not parties to this action, appointed plan fiduciaries, who contracted with Petitioner Transamerica Life Insurance Company ("TLIC") to provide services to the plans. In accordance with the statute, TLIC negotiated written agreements with plan sponsors that, *inter alia*, set forth the amount of fees, including how such fees would be calculated, and when and how those fees would be paid, including whether they would be taken out of plan assets. The fees challenged by plaintiffs here were asset based and the relevant agreements provided that the service provider would compensate itself under the agreement by taking fees out of plan assets. Such contractual provisions are consistent with long standing industry practice and the DOL's panoply of regulatory authority.

Plaintiffs filed a putative class action asserting that (1) the fees agreed upon were excessive and (2) TLIC's withdrawal of the agreed upon fees from plan assets violated ERISA. The District Court held that (1) TLIC and its officials may be considered to be fiduciaries when they negotiated with plan fiduciaries the agreement that conferred fiduciary status *after* it was executed; and (2) the withdrawal of agreed upon fees constituted a self-dealing or prohibited transaction.

III
ARGUMENT

1. The District Court's Fiduciary Status Holding Would Disrupt The Industry By Putting ERISA Service Providers In The Conflicted Position Of Wearing A Fiduciary Hat When Negotiating Their Own Fees And Service Terms

The fundamental issue is the Court's holding that TLIC was a fiduciary when it negotiated the agreement with plan fiduciaries setting fee levels and permitting the payment practices at issue. As the District Court recognized, "[w]ithout a fiduciary duty, none of the ERISA claims survive.[2]" The Court held that TLIC was a fiduciary when it negotiated the terms of its retention in a fiduciary role, including agreed upon fees and the manner in which those fees would be taken from plan assets. (Doc. No. 137, Order dated 2/19/03 at 12).

Although this Court has not addressed the issue, several circuits have squarely held that a service provider is not a fiduciary when it negotiates with plan fiduciaries a contract that sets fee levels. See e.g., Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009), cert. denied, 558 U.S. 1148 (2010); McCaffree Fin. Corp. v. Principal Life Ins. Co., 811 F.3d 998 (8th Cir. 2016); Santomenno ex rel. John Hancock Trust v. John Hancock Life Ins., 768 F.3d 288 (3d Cir. 2014). The District Court's opinions acknowledged that existing law supported TLIC's

[2] Plaintiff filed claims under the Investment Advisors Act. The District Court dismissed all such claims.

arguments, but reasoned that since TLIC became a fiduciary after signing the contract, it must have such status when it negotiated the agreement. (Doc. 137 at 12-13). Citing no precedent, the District Court simply held that any distinction between pre-fiduciary conduct and post fiduciary actions constituted "formalistic line drawing." (Doc. 137 at 13). In addition, the District Court also flatly rejected the long settled concept that there could be "limited" fiduciary duties, meaning it was not required to examine a defendant's actions to determine whether they were fiduciary in nature. (Id. at 12, n.2).

This issue meets all of the statutory tests for 1292(b) certification. More importantly, the District Court's holding is an outlier that threatens to disrupt well settled industry expectations among plan sponsors, plan fiduciaries and service providers by shifting fiduciary responsibility over the retention terms of service providers from the plan's appointed fiduciaries to the same service providers. Fiduciary status and its corollary fiduciary liability are two of the largest issues facing plan sponsors and service providers. Thus, any decision, such as this one, which expands fiduciary exposure beyond prior precedent, should be promptly reviewed.

Under ERISA, pension arrangements are voluntary. Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996). An employer need not establish any plan or

retirement savings program. Thus, it was Congressional intent to encourage employers to offer plans by lowering costs and reducing the regulatory maze. See Varity Corp. v. Howe, 516 U.S. 489, 497 (1996) (Congress sought "to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.")

It is critical therefore that both employees and service providers understand the parameters of fiduciary liability, including when they must act as fiduciaries with undivided loyalties to plan participants and beneficiaries and when they are free to wear a proprietary hat and make decisions according to their proprietary interest. ERISA's fiduciary liability provisions are stark. A fiduciary who breaches his or her duties is personally liable to restore all losses to a plan. ERISA § 409.

Before this decision, it was understood that a bright line demarked fiduciary status for a service provider in undertaking some discretionary activity with respect to plan assets. The act of contracting to be hired in the first instance is not discretionary for the service provider because an independent fiduciary, working on behalf of the plan sponsor, is setting the service provider's fees. Those plan fiduciaries are free to turn to other providers in the market if they do not believe the provider's offer is competitive. For this reason, the Third Circuit expressly

rejected the District Court's holding that service providers like TLIC act in a fiduciary capacity when negotiating the contract with plan fiduciaries. Santomenno, 768 F.3d at 293-94.

As the Third Circuit observed in Santomenno, participants are not deprived of a remedy if the service provider lacks fiduciary status, because plan fiduciaries, who obviously are acting in a fiduciary capacity when contracting, would be liable. Santomenno, 768 F.3d at 295, n.6.

2. The District Court Erred When It Held That A Service Provider Who Withdrew An Agreed Fee From Plan Assets May Be Liable For A Prohibited Transaction

The District Court also held that TLIC, which entered into a written contract with plan fiduciaries providing for asset-based fees and authorizing TLIC to withdraw these fees from plan assets, may be liable for a prohibited transaction under ERISA § 406 et seq. Again, this unprecedented ruling is in the teeth of industry practice, as well as settled precedent and clear regulatory authority. And it threatens to disrupt, to the detriment of plan participants, long settled expectations of the service provider industry.

DOL regulations provide that a fiduciary does not commit a prohibited transaction so long as the fiduciary "does not use any of the authority, control or responsibility which makes such a person a fiduciary to cause a plan to pay

additional fees for service performed by such fiduciary." 29 CFR § 2550.408b-2(c)(2). Prior to this decision, no court had ever suggested that a service provider's withdrawal of fees, pursuant to agreement, constituted a prohibited transaction.

In the class certification opinion, the District Court reasoned that Patelco Credit Union v. Sahni, 262 F.3d 897 (9th Cir. 2015) and Barboza v. California Ass'n of Professional Firefighters, 799 F.3d 1257 (9th Cir. 2015) compelled this result. (Doc. No. 393 at 31). But the Court misread this precedent, missing a critical element in both cases, which is that the service providers never entered into written agreements with plan fiduciaries authorizing the fees in question. Patelco, 262 F.3d at 911 ("viewing the evidence in the light most favorable to Sahni, it is undisputed that at the very least he determined his own administrative fees and collected them himself from the plan's funds..."); Barboza, 799 F.3d at 1270 (no mention that the service provider agreement specifically authorized set fees or the timing on payment of such fees).

If the District Court's decision is upheld, service provider's collection of essentially any asset-based fee would be prohibited, raising plan costs and severely limiting investment options. Asset-based fees are ubiquitous and constitute virtually the only way plans pay for investment services. Asset-based fees also

facilitate employees with very small account balances to join larger plans; flat fees would often be prohibitive for the newer and lower-paid employees.

The Plan Sponsor Council of America's 58th Annual Survey of Profit Sharing and 401(k) Plans estimates that 68.4% of all defined contribution use asset-based fees with 42% of plans solely using such fee arrangements for non-investment services. http://www.psca.org/56th-annual-survey-report**.** Every investor that has owned a mutual fund, whether in a 401(k) plan or not, has paid asset-based fees. This Court's judges and employees are paying asset-based fees in their own 401(k) plan right now – the Thrift Savings Plan's investment options report an expense ratio (of asset-based fees) to federal employees.

Balanced against the deleterious impacts of the ruling, it is difficult to see any significant safeguard or advantage for participants.[3] See Cooper v. IBM Personal Pension Plan, 457 F.3d 636, 642 (7th Cir. 2006) ("It is possible, though, for litigation about pension plans to make everyone worse off"). The District Court

[3] Although the District Court does not address the issue, one safeguard is provided by the fee disclosure regulations. Since 2009, service providers must disclose to fiduciaries, all fees charged to a plan, including soft fees such as revenue sharing (asset-based fees). 29 CFR § 2550.408 b-2. Plans, in turn, must disclose fees and expenses to participants in a format that is understandable. 29 CFR § 2550.404 a-5. Thus, the fees collected by TLIC were not secretive, but were required to be disclosed to plan fiduciaries.

seemed to hold that ERISA requires the plan fiduciaries or independent fiduciaries to bless each and every withdrawal by the service provider as consistent with the fee agreement. That structure only adds a layer of burden and cost. One could always imagine that another fiduciary would make fee withdrawal errors less likely, but Congressional intent, as Varity indicates, was not to burden employers with costs. A written agreement, like the one here that is blessed by plan fiduciaries and sets 1) fee levels, 2) timing of payments and 3) amounts of withdrawals, should be sufficient. Normally, such agreements also contain audit rights permitting plan fiduciaries to review all payments and plan fiduciaries have a fiduciary obligation to recoup overpayments to the plan service providers. The Council's members repeatedly report that they take very seriously the obligation to monitor service providers' fees and performance.

Respectfully submitted,

Dated: May 31, 2016

MAYNARD COOPER & GALE LLP
CHRISTOPHER J. RILLO

/s/ Christopher J. Rillo
Christopher J. Rillo

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 5(c) and 29(d) because this brief does not exceed 10 pages, excluding the parts of the brief exempted by Fed. R. App. P. 5(c).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Respectfully submitted,

Dated: May 31, 2016

/s/ Christopher J. Rillo

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PROOF OF SERVICE BY FEDEX/OVERNIGHT DELIVERY

I am a citizen of the United States and employed in San Francisco County, California, at the office of a member of the bar of this Court at whose direction this service was made. I am over the age of eighteen years and not a party to the within action. My business address is 600 Montgomery Street, Suite 2600, San Francisco, CA 94111. On May 31, 2016, I served the following:

Brief of Amicus Curiae American Benefits Council in Support of Petitioners Transamerica Life Insurance Company, Transamerica Investment Management, LLC and Transamerica Asset Management, Inc.'s Petition for Permission to Appeal Pursuant to 28 USC. § 1292 (b), Federal Rule of Civil Procedure 23 (f) and Federal Rules of Appellate Procedure 5

by putting a true and correct copy thereof together with an unsigned copy of this declaration, in a sealed envelope, with delivery fees paid or provided for, for delivery the next business day to:

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and by placing the envelope for collection today by the overnight courier in accordance with the firm's ordinary business practices. I am readily familiar with this firm's practice for collection and processing of overnight courier correspondence. In the ordinary course of business, such correspondence collected from me would be processed on the same day, with fees thereon fully prepaid, and

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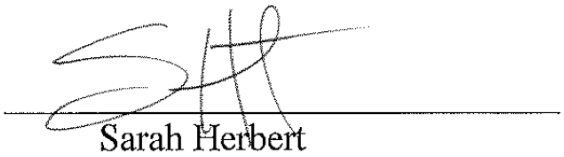

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