Docket No. 16-56418

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-Appellants,

v.

JACLYN SANTOMENNO, KAREN POLEY and BARBARA POLEY, all individually and on behalf of all others similarly situated,
Plaintiffs-Appellees.

Appeal from a Decision of the United States District Court for the Central District of California, Case No. 2:12-cv-02782-DDP-MAN · Honorable Dean D. Pregerson, District Judge

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

Regulations

ARGUMENT

I. TRANSAMERICA WAS NOT A FIDUCIARY AS TO THE AMOUNT OR MANNER OF WITHDRAWING ITS FEES

Plaintiffs do not dispute that they must demonstrate, as a prerequisite to all their claims, that TLIC acted as a fiduciary under ERISA (29 U.S.C. § 1002(21)(A)), and that to sustain a class action, they must do so on a class-wide basis. TLIC Br. 24-25. It is not enough for plaintiffs to show that TLIC acted as a fiduciary for *some* purposes. Rather, the "threshold question is ... whether [TLIC] was acting as a fiduciary (that is, was performing a fiduciary function) *when taking the action subject to complaint*." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000) (emphasis added).

Plaintiffs allege that TLIC (and TIM, and TAM) violated ERISA's fiduciary-duty provisions in two respects. *First*, they allege that TLIC and its affiliates negotiated unreasonably high fees for their services in violation of their duties of loyalty and prudence, ERISA § 404, 29 U.S.C. § 1104. *Second*, they contend that TLIC engaged in prohibited self-dealing transactions precluded by ERISA § 406(b), 29 U.S.C. § 1106(b), by withdrawing agreed-upon fees from plan assets. TLIC Br. 3-4; Pls. Br. 13.

While Plaintiffs do not dispute that the amount of TLIC's fees and the manner of their withdrawal was negotiated with independent plan fiduciaries,[1] and memorialized in a group annuity contract ("GAC") (TLIC Br. 13-14), they argued below—and the district court agreed—that the act of negotiating fees *itself* was a fiduciary function. Remarkably, though, plaintiffs do not defend the district court's holding now, effectively conceding that the court erred in concluding that TLIC acted in a fiduciary capacity when negotiating its fees. As discussed below, that should end this case. Certainly, it should end this case as a class action, because there is no other basis for class-wide adjudication of TLIC's fiduciary status. TLIC Br. 25.

Plaintiffs do argue that TLIC is a fiduciary under various GAC provisions. But this argument misunderstands ERISA's fiduciary provision, and misreads the contract terms on which plaintiffs rely. In any event, none of plaintiffs' contract-based fiduciary arguments could demonstrate on a class-wide basis that TLIC acted as a fiduciary with respect to its own fees, because those arguments would require plaintiffs to show that TLIC actually *exercised* contractual authority to change its

[1] Both named plaintiffs' plans here had an independent advisor in addition to the plan sponsor—that is, two fiduciaries independent of TLIC—working on behalf of the plan. Plaintiffs misleadingly refer to these advisors as "brokers," *e.g.*, Br. 69, but the record shows that they worked on behalf of the plans, not TLIC. FER34.

fees—a showing that could only be made individually across each of thousands of plans.

Plaintiffs' claims, in other words, fail at the threshold. The classes should be decertified, and plaintiffs' claims dismissed.[2]

A. Plaintiffs Do Not Defend the District Court's Holding That Plan Service Providers Are Fiduciaries With Respect to the Negotiation of Their Own Compensation Terms

There is uniform agreement among appellate courts to have considered the issue that "a service provider does not act as a fiduciary with respect to the terms in the service agreement if it does not control the named fiduciary's negotiation and approval of those terms." *Hecker v. Deere & Co.*, 556 F.3d 575, 583 (7th Cir. 2009)[3]; *accord McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998, 1003 (8th Cir. 2016); *Santomenno v. John Hancock Life Ins. Co.*, 768 F.3d 284, 293 (3d

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[2] Plaintiffs do not allege that TIM/TAM are fiduciaries regarding separate account fees. TLIC Br. 39. Because the claims against TIM/TAM are predicated on TLIC's fiduciary status, the classes involving TIM/TAM must be decertified, and the claims against them dismissed.

[3] Plaintiffs argue in passing that TLIC's negotiation with plan sponsors was not at arm's length, citing only the district court's statement at the pleadings stage that "*[i]f [it] is true*" that the plan sponsors and TLIC were not adverse when negotiating TLIC's engagement, then the negotiation would not be at arm's length. *See* Br. 33 (emphasis added). But the undisputed evidence demonstrates that TLIC won contracts with the plans at issue because it offered the best prices for services provided in a highly competitive market. *See, e.g.*, ER318; ER394; FER61-64. And regardless, plaintiffs do not suggest that TLIC "control[led] the named fiduciary's negotiation and approval" of the terms of its retention, which is the relevant standard. *Hecker*, 556 F.3d at 583.

Cir. 2014); *Renfro v. Unisys Corp.*, 671 F.3d 314, 324 (3d Cir. 2011). Despite the foregoing precedents, the district court concluded that TLIC was a fiduciary when negotiating its fees because "TLIC is negotiating to become a fiduciary and negotiating for the fees that, as a fiduciary, it will assess on the employees' retirement accounts." ER196.

Perhaps recognizing that the district court's conclusion regarding TLIC's fiduciary status was wrong, plaintiffs make no effort to defend it. Instead, they attempt to distinguish the appellate decisions cited above on the ground that the applicable contracts in those cases had materially different terms from the GAC at issue here. Br. 36-40. The contracts in at least *Santomenno*, however, are materially identical to those here. TLIC Br. 31-39; *infra* at 15. More important, for present purposes, the terms of the contracts are irrelevant. The district court's erroneous conclusion (and plaintiffs' theory below) was that TLIC was a fiduciary *before it entered into any contract* because the contract negotiations *themselves* were fiduciary acts. ER195-96. Each one of the above-cited cases rejects that legal theory outright, TLIC Br. 26-28, and plaintiffs have now abandoned the argument.

Plaintiffs are correct when they argue that a contract with an independent fiduciary cannot lawfully declare that a service provider is not a fiduciary *when it is in fact acting as a fiduciary*. Br. 32. Plaintiffs are also correct that if a service

provider negotiates for itself fiduciary authority, the service provider would still be acting as a fiduciary when exercising that authority, even if the contract granting the authority was negotiated at arm's length. *Id.* TLIC disputes none of that. But the question here is whether TLIC was acting as a fiduciary when it *negotiated* the amount and manner of withdrawal of its fees, and the answer is no.

B. Plaintiffs' Remaining Theories For TLIC's Fiduciary Status Are Wrong And Cannot Be Adjudicated On A Class-Wide Basis

Plaintiffs have other theories for why TLIC is an ERISA fiduciary, but those theories are likewise wrong, and in any event do not support class certification. As explained above, to satisfy their burden, plaintiffs must show that TLIC "was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram*, 530 U.S. at 226. The actions subject to complaint here are that (i) TLIC withdrew fees from plan assets, and (ii) the fees were too high. Thus, plaintiffs must show that TLIC was performing a fiduciary function when it withdrew its fees from plan assets, and when it calculated their amount.

Plaintiffs attempt to show that TLIC was a fiduciary as to both these actions under 29 U.S.C. § 1002(21)(A)(i) & (iii), which provide that

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of [the] plan or exercises any authority or control respecting management or disposition of its assets … or (iii)

> he has any discretionary authority or discretionary responsibility in the administration of such plan.

Plaintiffs' attempt fails for three reasons.

First, subsection (iii) does not apply at all because the fees at issue have nothing to do with the "administration of a plan," so it is not enough for plaintiffs to show that TLIC "has" discretion as to fees. Rather, plaintiffs must rely on subsection (i), and thus must demonstrate that TLIC "exercises" discretion or control as to the amount of its fees and the manner for collecting them. *Id.* § 1002(21)(A)(i).

Second, TLIC exercises no discretion (and has no discretion) in withdrawing its fees from plan assets because independent plan fiduciaries—not TLIC—contractually directed how and when fees are to be collected (*i.e.*, in prorated amounts daily, from plan assets).

Third, TLIC exercises no discretion (and has no discretion) in the amount of fees it collects, because the GAC directs TLIC to collect fees in precise amounts. Even if TLIC proposes a fee change to a Plan, each independent plan fiduciary has final authority whether to accept or reject that change.

And because any purported exercise of the discretion to change fees would impact each plan differently, TLIC's fiduciary status as to its fees cannot be adjudicated on a class-wide basis.

1. Plaintiffs Must Show That TLIC "Exercised" Discretionary Authority As To Fees, Not Just That It "Had" Such Discretion

The fees that plaintiffs challenge relate to TLIC's management and administration of pooled investment accounts that it offers to each plan sponsor, and from which each sponsor chooses a subset to offer its plan participants. TLIC Br. 12. In other words, these are fees "respecting management of [the] plan or … of [plan] assets." 29 U.S.C. § 1002(21)(A)(i). Thus, TLIC would be a fiduciary as to the fees only "to the extent … [it] *exercises* any discretionary authority or discretionary control respecting management of [the] plan" or "*exercises* any authority or control respecting management … of its assets" in determining the amount of those fees and the manner of their collection. *Id.* (emphasis added).

Plaintiffs argue, however, that they need to show only that TLIC "has" discretion as to fees. *E.g.*, Br. 26. Plaintiffs rely on subsection (iii) of § 1002(21)(A), which deems a person a fiduciary "to the extent … he *has* any discretionary authority or discretionary responsibility *in the administration of [the] plan*." 29 U.S.C. § 1002(21)(A)(iii) (emphasis added).

The problem for plaintiffs is that the fees at issue in this case have nothing to do with *plan administration*, but rather with management of plan assets pooled across plans, *see* TLIC Br. 12-13, meaning that subsection (iii) does not apply. As the Supreme Court has explained, "administration" of a plan is akin to

administration of a trust—"to act as an administrator is to perform the duties imposed, or exercise the powers conferred, by the trust [i.e., plan] documents." *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996). Plan administration, in other words, is specific to each plan document, and involves exercising the powers and duties conferred by the particular plan. Here, as the district court correctly recognized, TLIC's fees had nothing to do with plan administration: "the IM/Admin Fee is *not plan-specific*, but investment specific; it is charged uniformly to each separate account, *regardless of plan*." ER65 (emphasis added).

Collecting agreed-upon fees from pooled investment funds bears no resemblance to the traditional plan administrative functions at issue in cases where subsection (iii) applied. Plaintiffs rely on *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415 (9th Cir. 1997) (Br. 26), but there a plan administrator was held to have had discretion over plan administration when it was authorized to interpret the plan and determine whether benefits were available under the plan, 107 F.3d at 1420—the very type of plan-specific administration not at issue here. And in *Varity* itself, a plan administrator was held to have performed a fiduciary function in "[c]onveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation" in the particular plan. 516 U.S. at 502. Because TLIC's separate account fees are not plan-specific and are unrelated to plan administration, TLIC's possession of

contractual authority to alter those fees does not make it a fiduciary as to those fees under subsection (iii). Instead, plaintiffs must show that TLIC *exercised* a power to collect fees in a manner or amount different than what was approved by independent fiduciaries.

In any event, as shown in the next sections, even if plaintiffs could rely on subsection (iii), none of the contractual provisions on which they rely demonstrate that TLIC either had or exercised discretion or control "when taking the action subject to complaint." *Pegram*, 530 U.S. at 226.

2. TLIC Did Not Exercise Fiduciary Authority In Withdrawing Its Fees From Plan Assets

Plaintiffs assert that TLIC acquired fiduciary status simply by "paying itself and TIM and TAM fees from plan assets." Br. 24 (capitalization altered). But TLIC's contracts with plan sponsors *directed* TLIC to withdraw its fees from plan assets on a daily basis. TLIC Br. 14; *see also* ER65, ER350. It is well-established that collecting fees pursuant to an agreed-upon contract neither confers fiduciary status nor constitutes a fiduciary act. *See McLemore v. Regions Bank*, 682 F.3d 414, 424 (6th Cir. 2012) ("We reject the Trustee's argument that Regions' collection of fees rendered it subject to liability as an ERISA fiduciary."); *accord Seaway Food Town, Inc. v. Med. Mut. Of Ohio*, 347 F.3d 610, 619 (6th Cir. 2003); *Ed Miniat, Inc. v. Globe Life Ins. Grp., Inc.*, 805 F.2d 732, 737 (7th Cir. 1986).

Relying on the second clause of § 1002(21)(A)(i), plaintiffs argue that because TLIC's fees relate to management of plan assets, they do not have to show the exercise of *discretion* but only the exercise of *control* as to its fees. Br. 21. But that distinction makes no difference because "withdrawal of routine contractual fees constitutes no more an exercise of control than any other account holder's request effectuated by a depositary bank." *McLemore*, 682 F.3d at 424. "Such transactions amount to 'control respecting management or disposition of [plan] assets,' in only the hollowest sense of 'control,'" and do not confer fiduciary status under ERISA. *Id.* TLIC does not act as a fiduciary through the automatic, daily agreed-upon fee withdrawals directed by its contracts with plan sponsors. *See id*.

Plaintiffs cite the GAC provision applicable to Investment Management fees, which states that "[f]or each Separate Account …, an Investment Management Charge may be withdrawn daily and will belong to [TLIC]," and which further provides that "[t]he daily charge is the product of" a preset formula specified in the GAC. ER35; *see* Br. 10, 25. Each time plaintiffs cite this provision, they emphasize the word "may," as if that word signifies TLIC's special control or discretion over how its fees are withdrawn. But plaintiffs never argued below that this language granted TLIC any discretion or control over how fees are withdrawn, and they never attempt to explain it here. Plaintiffs' failure is

understandable because the only plausible reading of this GAC provision is that it *directs* TLIC to collect its agreed-upon fees from the separate accounts where such fees are applicable. It provides TLIC no discretion or control about *how* or *when* those fees are collected—*i.e.*, through daily withdrawal from the separate accounts—since the GAC provides no other option for the manner in which fees are to be collected. If an employee were told that she "may" collect her paycheck each Friday at company headquarters, no one would suggest that she had control or discretion over where or when to collect the paycheck. So too with TLIC's fees, which are to be withdrawn daily according to a set formula.

Indeed, the GAC specifies that these fees "belong to" TLIC, confirming that TLIC has no discretion or control over the matter. *Cf. Seaway Food Town*, 347 F.3d at 619 (no fiduciary authority when group contract authorizes insurer to retain funds for its "sole benefit"). That reading is confirmed by an adjacent GAC provision defining the "value of each Investment Account Class of each Separate Account on each [business day] [as] the value of its share of the applicable Separate Account *reduced by the applicable Investment Management Charge and Administrative Charge described above*." ER351 (quoting GAC § B.11) (emphasis added). The GAC would not define the daily value of each investment account *net of fees* if TLIC had any control over whether to withdraw those fees daily from plan assets.

The GAC, in short, simply authorizes the "withdrawal of routine contractual fees," which cannot reasonably be understood as the exercise of a fiduciary function. *McLemore*, 682 F.3d at 424. This Court should thus "reject [plaintiffs'] argument that [TLIC's] collection of fees rendered it subject to liability as an ERISA fiduciary." *Id.*

3. TLIC Did Not Exercise Fiduciary Authority In Determining The Amount Of Its Fees

Plaintiffs also offer three reasons for why TLIC was a fiduciary as to the amount of its fees: (a) TLIC may alter its fees on at least 30 days' notice, (b) TLIC may alter the investment menu available to plans on six-months' notice, and (c) TLIC used some fees to defray plan-level costs. As discussed below, each of these arguments is wrong, and none is subject to class-wide adjudication in any event.

a. TLIC's right to adjust separate account fees on advance notice did not create fiduciary status

Plaintiffs contend that the GAC provision authorizing TLIC to "change" its fees "upon advance written notice to [the relevant plan sponsor] of at least 30 days," ER351, rendered TLIC a fiduciary as to the amount of its fees. Br. 28-29; 51-55. That argument is incorrect in multiple respects.

First, plaintiffs principally contend that this provision rendered TLIC a fiduciary as to fees under subsection (iii) because "TLIC 'had discretion' to alter investment option fees," and thus (plaintiffs say) "TLIC was a fiduciary with

regard to the magnitude of those fees." Br. 29. But as explained above, subsection (iii) does not apply. *See supra* at 7-8. Thus, plaintiffs must show that TLIC actually *"exercise[d]"* discretionary authority. 29 U.S.C. § 1002(21)(A)(i) (emphasis added). But plaintiffs nowhere contend that TLIC actually exercised its authority to alter fees on just 30 days' notice, much less allege that TLIC did so on a class-wide basis affecting all plans and their investment selections. TLIC Br. 33-34.

Instead, plaintiffs appear to argue that TLIC "exercised" its authority under this provision through its "*decision* to maintain a constant fee, rather than to increase or decrease the fee." Br. 53. In other words, plaintiffs argue that TLIC exercised its discretion to alter its fees by not altering its fees. This through-the-looking-glass construction of § 1002(21)(A)(i) makes nonsense of the provision's requirement that fiduciary authority must be exercised to be actionable, and collapses the distinction between subsection (i)'s requirement that discretion or control be "exercised" with subsection (iii)'s requirement that a fiduciary merely "have" discretion over plan administration.

Plaintiffs attempt to evade this obvious problem by citing *Tibble v. Edison International*, 135 S. Ct. 1823 (2015), which held that a fiduciary's duties include monitoring plan fees. Br. 54. Nothing in *Tibble*, however, implies a duty on the part of a service provider to monitor its *own* fees where they have been negotiated

with, and approved by, an independent fiduciary; this responsibility belongs to the fiduciary that approved them—here, the plan's fiduciary and independent adviser. *See Santomenno*, 768 F.3d at 295 n.6. The amount of TLIC's fees was negotiated and preset by contract, and *Tibble* does not disturb the rule that collecting agreed-upon fees preset by contract is not a fiduciary function. *See supra* at 9.

Second, plaintiffs are in any event wrong that TLIC's mere possession of the contractual power to change fees on advance notice would make it a fiduciary as to the amount of its fees. As the Third Circuit explained in a nearly identical action brought by the same lawyers against another insurer, plaintiffs "do not allege that [the insurer] breached a fiduciary duty by … altering [its] fees." *Santomenno*, 768 F.3d at 296. "Rather, their claim is that the fees [the insurer] charged (which … the Plan sponsors were free to accept or reject) were excessive." *Id.* "Lacking this nexus, [the insurer's] alleged ability to alter … fees cannot give rise to a fiduciary duty in this case." *Id.* at 297.

Plaintiffs' position appears to be that TLIC "has" discretion over the amount of fees charged because it *could have* lowered its fees at any time. But *any* service provider always has discretion to lower its fees simply by waiving them, so the ability to *lower* fees cannot be enough to create fiduciary status. Indeed, plaintiffs themselves describe TLIC's discretion as "the unilateral discretion to *raise* its IM/Admin Fees upon 30 days advanced notice." Br. 52-53 (emphasis added).

Plaintiffs obviously do not complain that TLIC failed to *raise* its fees. At the very least, charging the exact fees agreed to with an independent plan fiduciary at arm's length rather than unilaterally lowering them cannot be a *breach* of any fiduciary duty TLIC may have as to its fees.

Third, and independently, TLIC's right to alter fees does not grant fiduciary status under ERISA because TLIC must provide at least 30 days' notice before altering its fees, ER351, and each plan sponsor could terminate without penalty if it did not accept the change, ER346. The same was true in *Santomenno*. *See* 768 F.3d at 296. Thus, in this case, as in *Santomenno*, "ultimate authority still resided with the trustees, who had the choice whether to accept or reject [the insurer's] changes." *Id.* at 297.

Plaintiffs assert that a plan sponsor's ability to terminate without penalty does not give the plan sponsor final authority to reject any change, Br. 35, but they do not even mention the Third Circuit's contrary holding in *Santomenno*, let alone attempt to explain why it is legally erroneous. Plaintiffs also suggest that the 30-day window would not have given plan sponsors sufficient time to react to a proposed change, Br. 35, but plaintiffs have adduced no evidence in class discovery on this point as to any single plan, and certainly offer no basis for concluding that it is true *as a matter of law* across all circumstances. At the very

least, the need for specific findings under thousands of plans on the issue renders class-wide adjudication impossible.

b. TLIC's right to alter the menu of investment options it brings to market did not create fiduciary status

Plaintiffs also rely on a GAC provision allowing TLIC to alter the investment options available to plan sponsors on six-months' notice. This provision does not establish TLIC's fiduciary status as to its fees for many of the same reasons just discussed.

Plaintiffs argue that TLIC "has" discretion to alter investment options and is thus a fiduciary under subsection (iii). Br. 29. But subsection (iii) does not apply, *see supra* at 7-9, and plaintiffs do not argue that TLIC violated a fiduciary duty by actually *exercising* its discretion to alter investment options. And to the extent TLIC *did* ever exercise that discretion, this sporadic conduct would not apply across all plans in the class, and so could not support class-wide adjudication. TLIC Br. 34.

In any event, TLIC's ability to alter investment options has nothing to do with "the action subject to complaint," *Pegram*, 530 U.S. at 226, because plaintiffs "do not allege that" TLIC "breached a fiduciary duty by altering an investment option." *Santomenno*, 768 F.3d at 296. Thus, TLIC's "alleged ability to alter its funds … cannot give rise to a fiduciary duty in this case." *Id.* at 297.

Finally, with six-months' advance notice of such changes, any plan sponsor could easily avoid the proposed alteration by selecting another investment or obtaining a new service provider. TLIC Br. 32-33. Unlike with the 30-day notice provision, plaintiffs do not even attempt to argue that six months is not enough time for a plan sponsor to evaluate and reject a proposed change in investment options. Thus, TLIC exercised no fiduciary function, since "ultimate authority still resided with the [plan sponsors], who had the choice whether to accept or reject [the] changes." *Santomenno*, 768 F.3d at 297.

c. TLIC's use of fees to pay for plan-level services did not confer fiduciary status

Finally, plaintiffs contend that TLIC "exercised its discretion to … devote much of the IM/Admin Fee, intended for investment management, to defray plan-level costs," Br. 26, 30, and that this somehow demonstrates fiduciary status as to the *amount* of the fees. This contention is meritless.

As an initial matter, the record demonstrates that TLIC's bundled-service arrangement—under which TLIC would provide a package of products and services in exchange for a mix of investment- and contract-level fees—was fully disclosed to (and based on direction from) plan sponsors, and not an exercise of discretion. *See* FER47; FER58-59. Moreover, because such disclosures are plan-specific, individualized inquiry would be required to confirm that the independent plan fiduciaries received and understood these disclosures, precluding a class-wide

finding of fiduciary status, as many, if not all, plan sponsors would have understood the bundled fee arrangement to be a beneficial feature of the GAC, and not a basis for liability, as plaintiffs now assert without support.

Even more important, however, the manner in which TLIC *used* its fees once collected has nothing to do with the *amount* of its fees. Plaintiffs did not sue TLIC because it used fees to defray plan-level servicing costs, but because they contend the fees were unreasonably high. How TLIC used these fees once it lawfully received them has nothing to do with "the action subject to complaint" and thus cannot demonstrate TLIC's fiduciary status with respect to the magnitude of those fees. *Pegram*, 530 U.S. at 226.

II. WITHDRAWING FEES FROM PLAN ASSETS AS DIRECTED BY INDEPENDENT PLAN FIDUCIARIES IS NOT A PROHIBITED TRANSACTION

Because plaintiffs have failed to demonstrate TLIC's fiduciary status, their prohibited-transaction claim fails at the threshold. *See supra* Part I. But even if TLIC were a fiduciary as to its fees, plaintiffs could not demonstrate that TLIC engaged in a prohibited transaction under § 406(b) by withdrawing fees from plan assets unless TLIC *used its fiduciary authority* to withdraw its fees. Unlike the district court, plaintiffs now appear to acknowledge this legal requirement. Yet, they cannot possibly satisfy that requirement here because TLIC did not use any fiduciary authority to withdraw its fees from plan assets. Rather, TLIC withdrew

fees from plan assets because this is how its contracts with independent plan fiduciaries instructed TLIC to receive payment.

A. Plaintiffs Agree That A Fiduciary Engages In A Prohibited Transaction Only When It Uses Its Fiduciary Control Or Authority Over Plan Assets To Extract Its Own Fees, And TLIC Did Not Use Fiduciary Control Or Authority To Withdraw Fees From Plan Assets

TLIC argued below that a fiduciary does not engage in a prohibited transaction unless the transaction is caused by—*i.e.*, results from—an exercise of fiduciary authority. The district court disagreed, holding that a fiduciary violates § 406(b) whenever it pays "itself out of the plan assets over which the fiduciary exercises its fiduciary duties," even where the fiduciary acted precisely in accordance with the direction of an independent fiduciary in doing so. ER93-94.

As explained in TLIC's opening brief, the district court was wrong on this point as a matter of law. The district court's position is inconsistent with the way ERISA generally treats fiduciary breaches—ERISA recognizes that a person can be a fiduciary for some purposes, but is not liable for a fiduciary breach unless he "was performing a fiduciary function … when taking the action subject to complaint." *Pegram*, 530 U.S. at 226; *see* TLIC Br. 41-43. The district court's decision is also inconsistent with general principles of trust law, which allow trustees to withdraw fees from the trust estate when the trust document so instructs. TLIC Br. 43-44. And, significantly, the decision below cannot be reconciled with

DOL regulations, which make clear that a "fiduciary *does not* engage in an act described in section 406(b)(1) of [ERISA] if the fiduciary does not *use* any of the authority, control or responsibility which makes such person a fiduciary to *cause* a plan to pay *additional fees* for a service furnished by such fiduciary ... ." 29 C.F.R. § 2550.408b-2(e)(2) (emphasis added).

Plaintiffs, for their part, spend several pages rebutting a "causation" argument that TLIC does not make, Br. 47-48, and arguing that § 406 rejects the general trust rule allowing trustees to withdraw fees from the estate at the trust document's direction, Br. 46-47, though they do not explain why. In the end, however, plaintiffs *agree* with TLIC—and, thus, disagree with the district court—that a fiduciary *does not* engage in a prohibited transaction anytime it withdraws fees from plan assets. Rather, plaintiffs admit that a fiduciary violates § 406(b) only when it "*uses* its control or authority over plan assets to extract its own fees from plan assets." Br. 50 (emphasis added).

This first-time concession dooms plaintiffs' § 406(b) claim. TLIC cannot be liable for a prohibited transaction unless its withdrawal of fees from plan assets resulted from an *exercise* of its fiduciary authority over those plan assets. As explained earlier, the contention that TLIC uses any fiduciary authority or control to withdraw fees from plan assets is meritless. TLIC's daily, routine withdrawal of pre-approved, preset fees from plan assets is dictated by its contract with plan

sponsors that directs it to withdraw fees in this manner. *See supra* at 9. Because withdrawing fees precisely according to contractual terms is not an exercise of fiduciary authority, *see supra* at 9, TLIC cannot be liable under § 406(b).

B. Plaintiffs Misread *Barboza,* Which Merely Confirms That A Fiduciary Engages In A Prohibited Transaction When It Uses Its Fiduciary Authority To Withdraw Fees From Plan Assets

Plaintiffs, like the district court, rely on *Barboza v. California Ass'n of Professional Firefighters*, 799 F.3d 1257 (9th Cir. 2015). But *Barboza* does not contradict the well-established principles discussed above, nor alter this Court's prior precedent affirming that a fiduciary does not engage in a prohibited transaction unless it uses its fiduciary authority to engage in the transaction. *See* TLIC Br. 47 (citing *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1100-01 (9th Cir. 2004), and *Acosta v. Pac. Enters.*, 950 F.2d 611, 621 (9th Cir. 1991)).

The defendant (CAISI) in *Barboza* was the plan's administrator, and its officers were "the signatories" of the Wells Fargo account into which all plan assets were deposited. 799 F.3d at 1263. CAISI made benefits determinations under the plan, and would "issue[] a check drawn on the Wells Fargo account for the appropriate amount." *Id.* CAISI also paid "Plan expenses from the Wells Fargo account, including its own administrative service fees." *Id.*

CAISI, in other words, had full control and discretion over plan assets, including over how and when to pay its own fees, and used that fiduciary authority

to pay itself. Indeed, the plaintiffs in *Barboza* argued to this Court that CAISI "*actually used its fiduciary authority and control* over the Plan's operating account at Wells Fargo to determine the amount and timing of payments of its own fees and expenses, by writing checks on the Plan account to itself without prior approval." Appellant's Opening Br. at 33, *Barboza v. Cal. Ass'n of Prof'l Firefighters*, 2012 WL 3151679, at *33 (emphasis added). Plaintiffs cite the (reversed) district court's opinion finding that the plan sponsor had agreed in advance to the *amount* of CAISI's fees, Br. 44, but they do not dispute that CAISI had full control over the plan's Wells Fargo account and used that control to determine when it would be paid, a crucial factor that is absent here.

Plaintiffs also rely on this Court's footnoted statement that "it is irrelevant that CAISI was authorized to pay its own fees and expenses from Plan assets pursuant to its administrative services agreement with" the plan sponsor. 799 F.3d at 1270 n.5. But this statement was in response to a factual dispute over whether CAISI's payment of administrative expenses to itself was authorized or ultra vires. *E.g.*, Appellant's Opening Br., *Barboza*, 2012 WL 3151679, at *37 n.12. The Court correctly determined that CAISI's *authority* to pay itself from plan assets did not matter under § 406(b), since CAISI had and *used* fiduciary control over the Wells Fargo account to determine *when* to do so. The facts here are indisputably different. TLIC withdrew fees in the manner directed by each GAC, *i.e.*, daily, and

automatically, from plan assets according to a preset formula. *See supra* at 10-11. This is not an exercise of fiduciary authority, *see supra* at 11-12, and it is thus not a prohibited transaction.

C. Plaintiffs' Interpretation Of § 406(b) Would Provide No Benefit To Plan Participants And Would Adversely Impact All Stakeholders in Retirement Services

Finally, holding TLIC liable under § 406(b) would upend the investment industry without providing any benefit to plan participants. TLIC Br. 49-52. The asset-based fee arrangements here are industry-standard, and adopting plaintiffs' interpretation would instantly render every plan service provider and investment advisor liable under § 1106(b). *See* Am. Council of Life Insurers' Mot. for Leave to File Br. as Amicus Curiae at 2.

Plaintiffs do not dispute this. Nor do plaintiffs explain how this ubiquitous fee arrangement hurts anyone, since it is efficient for all parties, and there is no possible harm to plan participants from automatic daily fee withdrawals from plan assets as agreed to by independent plan fiduciaries who are obligated to act in the best interests of plan participants. Indeed, plaintiffs *admit* that there would be no problem if "an outside fiduciary, appointed to protect the interest of the Separate Accounts, could evaluate, approve and pay TLIC's fees." Br. 68. Yet this is exactly what happened here. The only difference is that, here, the independent fiduciary approved and directed the arrangement in advance. Plaintiffs, in contrast,

would require independent plan fiduciaries, having already approved the fees and their method of collection when entering into the GAC, to reaffirm that decision *daily*. ER55-56. There is no reason to introduce such inefficiencies, other than to allow plaintiffs and their counsel to collect damages in this case.

Plaintiffs also make generalized assertions that ERISA compliance is the intent of Congress and that TLIC should seek a legislative solution to maintain the well-established practice at issue. Br. 63-68. But the whole question, obviously, is whether TLIC is complying with ERISA. There is no reason to believe that Congress intended the utterly senseless result plaintiffs press, upending an entire industry without any resulting benefit. It is plaintiffs, in other words, who should seek a legislative solution if they want to introduce pointless inefficiencies into ERISA plan service arrangements.

In short, automatic withdrawal of asset-based fees from plan assets per the advance approval of plan fiduciaries—the industry status quo—makes sense for everyone, whereas plaintiffs' proposed interpretation of § 406(b) makes no sense for anyone. Plaintiffs' interpretation should be rejected.

III. ERISA EXEMPTS INSURERS FROM PROHIBITED-TRANSACTION LIABILITY WHERE THEY RECEIVE REASONABLE COMPENSATION IN CONNECTION WITH MANAGING A SEPARATE ACCOUNT INVESTMENT

Even if TLIC's contractually mandated fee withdrawal constituted a prohibited transaction—and it did not—ERISA enumerates a number of

exemptions from its prohibited-transaction requirements, including an exemption allowing an insurance company to receive "reasonable compensation" for managing its pooled investment funds. Specifically, ERISA excepts from prohibited-transaction liability any "transaction between a plan and ... a pooled investment fund of an insurance company" like TLIC when the transaction (i) "is a sale or purchase of an interest in the fund," (ii) is approved by an independent fiduciary, and (iii) the insurance company "receives not more than reasonable compensation." 29 U.S.C. § 1108(b)(8). Thus, even if plaintiffs' prohibited-transaction theory had any validity, this exemption would permit TLIC's conduct so long as its fees are reasonable—a question all agree could not be adjudicated on a class-wide basis. TLIC Br. 52-57. Plaintiffs' two contentions to the contrary are meritless.

A. Section 408(b)(8) Applies To § 406(b) Transactions

Plaintiffs first contend that the exemption for pooled investments does not apply to the fiduciary self-dealing transactions described in § 406(b), but instead applies only to prohibited party-in-interest transactions under § 406(a). Br. 55-58. The district court correctly rejected this argument. The argument flies in the face of the statutory text, which states that *all* the "prohibitions provided in section [4]06"—without limitation—"*shall not apply* to any of the following transactions," including the pooled investment exemption at issue here. 29 U.S.C. § 1108(b)

(emphasis added). This is why both courts and the DOL have uniformly concluded that the exemption for pooled investment funds applies to nominally self-dealing transactions. *See, e.g.*, *Dupree v. Prudential Ins. Co. of Am.*, 2007 WL 2263892, at *43 (S.D. Fla. Aug. 10, 2007) ("ERISA § 408(b)(8) exempts potential violations of both § § 406(a) and 406(b)"); DOL Adv. Op. No. 96-15A, 1996 ERISA LEXIS 27, at *8 n.3 (Aug. 7, 1996) (same).

Plaintiffs' contrary argument is based on inapposite precedent. Plaintiffs cite *Barboza*, which construed *subsection (c)* of § 408, *see* 799 F.3d at 1269—not subsection (b), which, as just discussed, by its terms creates exemptions from § 406 prohibited transactions generally. Plaintiffs also cite *Patelco Credit Union v. Sahni* and DOL regulations holding that § 408(b)(2) is limited to party-in-interest transactions under § 406(a). *See* 262 F.3d 897, 910 (9th Cir. 2001); 29 C.F.R. § 2550.408b-2(e)(1). But that is because § 408(b)(2) is *itself* limited to "[c]ontracting or making reasonable arrangements with a *party in interest*," 29 U.S.C. § 1108(b)(2) (emphasis added), and thus can apply only to party-in-interest transactions under § 406(a). The pooled investment exception at issue here is not so limited, as even the district court correctly concluded. ER88.

B. Section 408(b)(8) Precludes Plaintiffs' Prohibited-Transaction Claim, So Long As TLIC's Fees Are Reasonable

Plaintiffs also argue that the pooled investment fund exemption does not apply because the transactions that plaintiffs think are at issue—*i.e.*, withdrawal of

fees—do not involve "the sale or purchase of an interest in the fund." Br. 58-60 (quoting 29 U.S.C. § 1108(b)(8)). But the relevant transactions here are not fee withdrawals—rather, the relevant transaction occurs when the plan's independent fiduciary directs TLIC to include the particular investment option (*i.e.*, the pooled "separate account") in the investment lineup, which gives the plan an interest in the pooled fund. TLIC Br. 54-55.

In these circumstances, the exemption for pooled investment funds allows the insurer to receive compensation in a manner that would otherwise be a prohibited transaction so long as the compensation is "reasonable." 29 U.S.C. § 1108(b)(8). Legislative history and DOL regulations confirm that the exemption permits reasonable compensation "paid by the plan for investment management of [pooled] assets." DOL Adv. Op. No. 2005-09A, 2005 WL 1208696, at *5 (May 11, 2005); *accord* H.R. Rep. No. 9301289, pt. 1, at 316 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5096; TLIC Br. 55-56.

Plaintiffs argue that this legislative history and DOL guidance do not apply when a fiduciary "*unilaterally extract[s]*" compensation from plan assets or when it has "retained *discretion over the amount of its fees*." Br. 60. Neither premise is true, of course, but it is no matter: *the whole point* of the pooled investment fund exemption is to create an *exception* to the prohibited-transaction provisions, which only apply in the first place when a fiduciary uses its fiduciary authority in a

manner that would otherwise be prohibited. The pooled investment fund exemption, in other words, *permits* an insurer to use its fiduciary authority to withdraw pooled-asset-management compensation from plan assets so long as the compensation is "reasonable," and the other elements of the exemption are met.

Thus, even if the Court concludes that ERISA's prohibited-transaction requirements otherwise apply to TLIC's withdrawal of fees, there can be no liability so long as TLIC's fees are reasonable. Plaintiffs do not dispute that a reasonableness determination cannot be made on a class-wide basis. Therefore, the Court should order the prohibited-transaction classes decertified. TLIC Br. 56-57.

IV. INDIVIDUAL ISSUES PREDOMINATE WITH RESPECT TO THE TIM/TAM EXCESSIVE-FEE CLAIM

Finally, this Court should order the TIM/TAM class decertified with respect to plaintiffs' excessive-fee claim. TLIC Br. 57-61. An excessive-fee class is impossible because TIM/TAM's services and fees are bundled with TLIC's, so the individualized, plan-by-plan inquiries that would be necessary to determine whether the TIM/TAM fees are excessive would predominate over common questions. TLIC Br. 58-60. Plaintiffs do not dispute that a class would be inappropriate under these circumstances, but instead assert that defendants have not "submitt[ed] evidence indicating that TLIC's, TIM's, and TAM's fees and services are bundled." Br. 63.

Plaintiffs are wrong. Defendants have introduced undisputed evidence that TIM and TAM provided portfolio management services and charged the corresponding fees with respect to the plans at issue only as part of a bundle of services offered in conjunction with TLIC's services. *See, e.g.*, ER396-397; ER60-61; TLIC Br. 58. Neither plaintiffs' brief nor the district court's class certification order address this evidence. If the district court *had* addressed it, it would have been compelled to deny class certification, as it did for this exact reason as to a proposed TLIC-only excessive-fee class. TLIC Br. 59-60.

Indeed, the district court decision included no predominance analysis at all, *see* ER98-99; ER49-50, and certainly provided no explanation as to why the TIM/TAM excessive-fee class satisfied the predominance requirement while the identical class as to TLIC—challenging exactly the same fees—failed. TLIC Br. 60. The district court's certification of the TIM/TAM class constitutes an abuse of discretion and should be reversed.[4]

[4] Plaintiffs contend that defendants do not challenge the district court's certification of the TIM/TAM prohibited-transaction class. Br. 61. To the contrary, each claim as to TIM and TAM is derivative of TLIC's alleged fiduciary acts, TLIC Br. 39; Pls. Br. 4, so each argument presented in Parts I through III above would require decertification (not to mention outright dismissal) of both TLIC and TIM/TAM classes, as TLIC explained in its opening brief, TLIC Br. 39, and as the district court recognized below, *e.g.*, ER97.

CONCLUSION

Defendants respectfully request that this Court decertify the classes certified by the district court and remand with instructions to dismiss this action.

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Respectfully submitted,

/s/ Brian D. Boyle

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Circuit Rule 32-1 and Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 6,974 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 using in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: May 19, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 19, 2017.

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