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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JACLYN SANTOMENNO; KAREN	)	Case No. CV 12-02782 DDP (MANx)
POLEY; BARBARA POLEY,	)	
	)	<b>ORDER DENYING DEFENDANTS' MOTION</b>
Plaintiffs,	)	<b>FOR RECONSIDERATION AND</b>
	)	<b>CERTIFYING QUESTIONS FOR</b>
v.	)	<b>INTERLOCUTORY REVIEW UNDER 28</b>
	)	<b>U.S.C. § 1292(b)</b>
TRANSAMERICA LIFE INSURANCE	)	
COMPANY; TRANSAMERICA	)	[Dkt. No. 395]
INVESTMENT MANAGEMENT, LLC;	)	
TRANSAMERICA ASSET	)	
MANAGEMENT INC.,	)	
	)	
Defendants.	)	
_____	)	

Presently before the Court is Defendants' Motion for Reconsideration. (Dkt. No. 395.) After hearing oral argument and considering the parties' submissions, the Court adopts the following Order.

**I. BACKGROUND**

The facts of this case are well-known to the Court and the parties as recounted in the Court's Order Granting Class Certification. (Order, Dkt. No. 393.) After the Court certified two classes in this case, Defendants have filed this Motion for Reconsideration.

1 **II. LEGAL STANDARD**

2 Under Federal Rule of Civil Procedure 60(b), a party may seek  
3 reconsideration of a final judgment or court order for any reason  
4 that justifies relief, including:

- 5 (1) mistake, inadvertence, surprise, or excusable neglect;
- 6 (2) newly discovered evidence that, with reasonable  
7 diligence, could not have been discovered in time to  
move for a new trial under Rule 59(b);
- 8 (3) fraud (whether previously called intrinsic or  
9 extrinsic), misrepresentation, or misconduct by an  
opposing party;
- 10 (4) the judgment is void;
- 11 (5) the judgment has been released or discharged; it is  
12 based on an earlier judgment that has been reversed or  
vacated; or applying it prospectively is no longer  
13 equitable; or
- 14 (6) any other reason that justifies relief.

15 Fed. R. Civ. P. 60(b)(1)-(6).<sup>1</sup>

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18  
19 <sup>1</sup> In their Motion, Defendants raise the standards of FRCP  
20 59(e) and 54(b), which are not applicable here because there is no  
judgment in this case. (See Mot. Reconsideration at 2.) The Court  
21 construed the Motion under FRCP 60(b)(6) in reaching the merits of  
the Motion.

22 A party can request a true interlocutory appeal from the Court  
of Appeals when a district court issues an order granting or  
denying class certification. Fed. R. Civ. P. 23(f). The party  
23 must file such a request for an appeal within fourteen days of the  
district court's Order. Id.

24 Further, the district court on its own motion or as requested  
can certify an interlocutory appeal to the Court of Appeals under  
25 28 U.S.C. § 1292(b). This is appropriate where the district judge  
finds the civil order "involves a controlling question of law as to  
26 which there is substantial ground for difference of opinion and  
that an immediate appeal from the order may materially advance the  
27 ultimate termination of the litigation." Id. The district court  
states such a finding in the order and the Court of Appeals has the  
28 discretion to permit the appeal "if application is made to it  
within ten days after the entry of the order." Id.

1 Central District of California Local Rule 7-18 further  
2 explains that reasons to support a motion for reconsideration  
3 include:

4 (a) a material difference in fact or law from that  
5 presented to the Court . . . that . . . could not have been  
6 known to the party moving for reconsideration at the time  
7 of such decision, or (b) the emergence of new material  
8 facts or a change of law occurring after the time of such  
9 decision, or (c) a manifest showing of a failure to  
10 consider material facts presented to the Court before such  
11 decision.

12 C.D. Cal. L.R. 7-18. A motion for reconsideration may not,  
13 however, "in any manner repeat any oral or written argument made in  
14 support of or in opposition to the original motion." Id.

### 15 **III. DISCUSSION**

16 Defendants raise four arguments in their Motion for  
17 Reconsideration:

18 (1) The Court committed clear error in ignoring Department of  
19 Labor ("DOL") regulations and binding case law holding  
20 that a prohibited transaction under 29 U.S.C. § 1106(b)  
21 only occurs when a fiduciary "uses the authority that  
22 makes it a fiduciary to cause the transaction at issue."  
23 (Mot. Reconsideration, Dkt. No. 395, at 1 (emphasis  
24 removed).) As Defendants state, "the Court erred in  
25 concluding that TLIC engaged in [prohibited transactions]  
26 by honoring its clients' directions to place plan assets  
27 in pooled separate accounts and to withdraw agreed-upon  
28 annual fees." (Id.)

(2) The court committed clear error in holding that, for  
purposes of class certification, the "reasonable

1 compensation" exemption in 29 U.S.C. § 1108(b)(8) does  
2 not apply when a fiduciary withdraws such compensation  
3 from assets placed in investment vehicles even where  
4 independent plan fiduciaries agree to such an  
5 arrangement. (Id.) Further, Defendants claim that the  
6 Court "neglected ample record evidence that no pooled  
7 investment vehicle in the industry levies its fees in any  
8 other fashion." (Id.)

9  
10 (3) The Court committed clear error and manifestly failed to  
11 consider material facts that show that the determination  
12 of profits that TLIC gained from each plan is plan-  
13 specific. Thus, individual issues predominate in  
14 determining damages, which cuts against class  
15 certification because Plaintiffs seek disgorgement of  
16 profits as a remedy for the prohibited transaction  
17 classes. (Id.)

18  
19 (4) The Court committed clear error and manifestly failed to  
20 consider material facts in certifying the TIM and TAM  
21 classes because the Court did not consider the  
22 predominance requirement or the facts in the record that  
23 any fees – whether charged by TLIC or TIM and TAM – are  
24 charged as a total, bundled product offering and thus are  
25 subject to individualized defenses. (Id. at 1-2.) When  
26 examined as a total fee, "there is overwhelming evidence  
27 in the record establishing that such defenses are  
28

1 dependent on plan-specific proof" and thus fail the  
2 predominance analysis. (Id.)

3 **1. Court's Holding that 29 U.S.C. § 1106 Forbids TLIC from**  
4 **Directly Withdrawing its Fees from Plan Assets**

5 The Court's prior Order held that the Prohibited Transaction  
6 classes were certifiable because 29 U.S.C. § 1106(b), as applied in  
7 the Ninth Circuit cases Patelco and Barboza, forbids a fiduciary  
8 from taking the fiduciary's fee from the assets over which it  
9 exercises its fiduciary duties – even where an independent  
10 fiduciary accepts or contracts to allow such a taking. (Order,  
11 Dkt. No. 393, at 23-34.) The Court noted that causation did not  
12 appear to be a requirement in the § 1106(b) part of the statute, in  
13 contrast to § 1106(a) that explicitly states a causation  
14 requirement. (Id. at 24-25.) The Ninth Circuit in Barboza also  
15 did not discuss causation in its analysis of a fiduciary  
16 administrator's practice of taking agreed-upon fees directly from  
17 the plan assets it was administering. Barboza v. Cal. Ass'n of  
18 Prof'l Firefighters, 799 F.3d 1257, 1269-70 (9th Cir. 2015).

19 Defendants argue that the Court failed to address 29 C.F.R. §  
20 2550.408b-2(e)(2) in its Order and that this regulation shows that  
21 causation is required for a § 1106(b)(1) prohibited transaction:

22 **(2) Transactions not described in section 406(b)(1).** A  
23 fiduciary does not engage in an act described in section  
24 406(b)(1) of the Act if the fiduciary does not use any of  
25 the authority, control or responsibility which makes such  
26 person a fiduciary to cause a plan to pay additional fees  
27 for a service furnished by such fiduciary or to pay a fee  
28 for a service furnished by a person in which such fiduciary  
has an interest which may affect the exercise of such  
fiduciary's best judgment as a fiduciary.

This may occur, for example, when one fiduciary is  
retained on behalf of a plan by a second fiduciary to  
provide a service for an additional fee.

However, because the authority, control or  
responsibility which makes a person a fiduciary may be

1 exercised "in effect" as well as in form, mere approval of  
2 the transaction by a second fiduciary does not mean that  
3 the first fiduciary has not used any of the authority,  
4 control or responsibility which makes such person a  
5 fiduciary to cause the plan to pay the first fiduciary an  
6 additional fee for a service. See paragraph (f) of this  
7 section.

8 29 C.F.R. § 2550.408b-2(e)(2) (paragraphing added). Paragraph (f)  
9 provides examples of prohibited and acceptable transactions.

10 Defendants also cite Wright v. Oregon Metallurgical Corp., 360  
11 F.3d 1090, 1100-01 (9th Cir. 2004) in support, quoting the Ninth  
12 Circuit quoting Lockheed Corp. v. Spink, 517 U.S. 882, 888 (1996):  
13 "Lockheed specifically states that to establish liability under §  
14 1106, a party must prove that 'a fiduciary caused the plan to  
15 engage in the allegedly unlawful transaction.'" The Ninth Circuit  
16 in Wright then held that the party at issue in that case was not a  
17 fiduciary, which defeated the prohibited transaction claim.  
18 Wright, 360 F.3d at 1101. In Lockheed, the Court was only  
19 analyzing § 1106(a), which was also the primary focus in Wright.

20 Defendants also cite Acosta v. Pacific Enterprises, 950 F.2d  
21 611, 621 (9th Cir. 1991), which did address a § 1106(b)(1) claim.  
22 There, the Ninth Circuit held that the plaintiff had not alleged  
23 sufficient facts at summary judgment to support a claim that the  
24 defendant had committed a prohibited transaction. Id. The holding  
25 that Defendants here focus on is:

26 All fiduciaries have the inherent power that would enable  
27 them to deal with the assets of ERISA plans for their own  
28 benefit or account. However, we know of no rule that  
permits a plaintiff to bootstrap a claim for the actual  
commission of a wrong merely by alleging that the defendant  
has the power to commit it. In order to state a claim for  
self-dealing under ERISA, [Plaintiff] Acosta must  
demonstrate that [Defendant] Pacific Enterprises actually  
used its power to deal with the assets of the plan for its  
own benefit or account.

1 Id. The plaintiff in Acosta had argued that the defendant's  
2 "inherent power to use the participant-shareholder list to its  
3 benefit" was the self-dealing transaction "because such a power  
4 'has a continuing deterrent effect on anyone considering whether to  
5 oppose management in corporate elections.'" Id. The facts in  
6 Acosta did not involve the question of whether a fiduciary paying  
7 itself fees from the assets over which it exercises its fiduciary  
8 control is a self-dealing transaction.

9 This case does not involve § 1106(a), which is why the Court  
10 did not find Wright or Lockheed to provide the answer regarding  
11 causation in its prior analysis. However, the Court did not  
12 consider the regulation or Acosta in its Order. Considering them  
13 now, the Court finds that as alleged in the Complaint and argued in  
14 the certification briefing, TLIC used the "authority, control [and]  
15 responsibility" over plan assets that makes it a fiduciary "to  
16 cause [the] plan[s] to pay additional fees for a service furnished  
17 by such fiduciary," namely, the allegedly excessive fees charged  
18 for TLIC's services as well as the allegedly excessive fees charged  
19 by TIM and TAM for their services through TLIC. Further, TLIC used  
20 the "authority, control [and] responsibility" that made it a  
21 fiduciary to pay itself out of the plan assets over which it  
22 exercises that authority, control, and responsibility, which is a  
23 per se prohibited transaction.

24 Defendants also argue that beyond the causation issue, the  
25 Court committed clear error in its understanding of § 1106(b)  
26 transactions. Defendants argue this in a footnote, stating:

27 This Court's broad reading of Patelco . . . and Barboza .  
28 . . . could only be accurate if those decisions were intended  
to abrogate the existing regulations and case law on §

1 406(b) transactions, but nothing in either decision  
2 suggests such a radical result.

3 (Mot. Reconsideration at 4 n.1 (citations omitted).) The Court  
4 would welcome an analysis of Patelco and Barboza as well as an  
5 indication of what case law on § 406(b) transactions the Court's  
6 reading abrogates, but Defendants' briefing does not explain that  
7 argument and therefore the Court does not find clear error in its  
8 analysis of the cases.<sup>2</sup>

9 Lastly, the Court did examine the Department of Labor advisory  
10 opinions raised by Defendants in their Motion but did not find any  
11 of them warrant a change to the above analysis or the analysis in  
12 the second class certification order. See DOL Adv. Op. No. 2003-  
13 09A, 2003 WL 21514170 (June 25, 2003); DOL Adv. Op. No. 99-03A,  
14 1999 WL 64919 (Jan. 25, 1999); DOL Adv. Op. No. 97-15A, 1997 WL  
15 277980 (May 22, 1997). The Court also took into consideration the  
16 parties' supplemental briefing as to Judge Hatter's recent decision  
17 in Perez v. City National Corp., -F. Supp. 3d- , 2016 WL 1397872  
18 (C.D. Cal. Apr. 5, 2016).

19 Essentially, the Court cannot see where its previous analysis  
20 committed clear error. Section 1106(b)(1) prohibits self-dealing,  
21 or dealing with the assets of the fund in the fiduciary's own  
22 interest. 29 U.S.C. § 1106(b)(1) ("A fiduciary with respect to a  
23 plan shall not - (1) deal with the assets of the plan in his own  
24 interest or for his own account[.]"). Plaintiffs argue, based on  
25 Ninth Circuit precedent in Barboza and Patelco, that Defendant

26 \_\_\_\_\_  
27 <sup>2</sup> See also John L. Utz, Trusts, Unfunded Plans, and Self-  
28 Doubt: Barboza v. California Ass'n of Prof'l Firefighters, 24 No. 1  
ERISA Litig. Rep. NL 2 (Feb. 2016) (discussing the holding in and  
potential impacts of the Ninth Circuit's Barboza case).



1 TLIC, as a fiduciary, dealt with assets of the plans in TLIC's own  
2 interest by paying TLIC's fees out of the assets of the plans over  
3 which TLIC was exercising its fiduciary control – even if those  
4 fees were reasonable compensation for services rendered to the  
5 plans.<sup>3</sup> The Court understands Defendants' argument to be that TLIC  
6 paying itself is not dealing with the plans' assets in its own  
7 self-interest. That is, by taking the money TLIC alleges it is  
8 properly owed from the plan assets, Defendants claim that that  
9 action – the taking of money from the funds – is not an action that  
10 deals with the plans' assets in TLIC's interest.

11 But the Court cannot understand the argument that getting paid  
12 is not in one's interest. Paying oneself from the plans' assets is  
13 dealing with those assets for one's own interest. That is the  
14 point – to benefit from providing the services for which you are  
15 charging. It is acceptable for a fiduciary to be paid for such  
16 services and a fiduciary can contract in advance to set its fees.  
17 However, those fees have to be continually monitored for  
18 reasonableness and the fiduciary cannot pay itself directly.

19 The logic of these requirements – that compensation be  
20 reasonable and not be taken directly out of plan assets by a  
21 fiduciary – can be illustrated as follows. The context is the  
22 management of a retirement plan for a business, which contains the  
23 retirement savings of the employees. A plan fiduciary, A, may hire  
24 another fiduciary, B, to administer the plan. A and B may agree at  
25 the start of that relationship that the second fiduciary, B, can

26 \_\_\_\_\_

27 <sup>3</sup> Of course, Plaintiffs do not concede that the fees were  
28 reasonable, as argued they argue TLIC's fees are excessive in their  
Motion to Correct TLIC Excessive Fee Class Definition. (See Dkt.  
No. 391.)

1 take \$100 out of the fund per month for payment of B's reasonable  
2 compensation for the services B is performing. B has essentially  
3 exclusive control over the fund and is the holder of the fund's  
4 assets. And every month, B takes the \$100 out of the fund's assets  
5 by simply withdrawing \$100 from the fund and moving it to another  
6 account – B's own account. Without the requirement that the  
7 fiduciary not pay itself directly, what is to ensure that only \$100  
8 is withdrawn each time?

9 The nub of the issue for the Court is that the fiduciary,  
10 because it is a fiduciary, has elevated duties, and that means that  
11 getting paid appears to require additional burdens than exist in  
12 ordinary commercial transactions. But because this is a  
13 controlling issue of law and one where there is substantial ground  
14 for difference of opinion, as shown by the vigorous briefing in  
15 this case, the Court does certify its decision under 28 U.S.C. §  
16 1292(b), incorporating the discussion and briefing from the Court's  
17 Order Granting Class Certification. (Dkt. No. 393.)

18 **2. Court's Holding that the Exception in 29 U.S.C. §**  
19 **1108(b)(8) Does Not Apply in This Case**

20 Defendants argue that the Court erred by failing to realize  
21 that 29 U.S.C. § 1108(b)(8) does apply to this case and allow TLIC  
22 to collect its fees from the plan assets that it holds. (Mot.  
23 Reconsideration at 8-11.) Defendants state the issue as:

24 The Court correctly recognized in its order certifying the  
25 PT classes that ERISA § 408(b)(8), 29 U.S.C. § 1108(b)(8),  
26 may exempt regulated insurers from PT liability in  
27 connection with client investments in pooled separate  
28 accounts when they receive no more than reasonable  
compensation and either the plan permits such investments  
or the investment are approved by a fiduciary independent  
of the insurer. Nevertheless, the Court erred when it held  
that payment of fees out of plan assets as compensation for  
the aforementioned permissible conduct was itself a

1 separate PT that is not sheltered by the exemption. (Dkt.  
2 393 at 28.) Such a holding – that § 408(b)(8) permits  
'reasonable compensation,' while prohibiting a party from  
3 collecting that compensation, is clear error.

4 (Id. at 8-9.) Thus, Defendants understand this exemption as not  
5 only permitting "reasonable compensation" for the transaction with  
6 the fund, but also allowing the fiduciary to collect that  
7 reasonable compensation by taking the reasonable compensation out  
8 the plan assets that the fiduciary holds. (See id. at 9.)

9 The Court first corrects a misunderstanding Defendants have of  
10 the Court's prior Order. The Court did not hold that a fiduciary  
11 can receive reasonable compensation but not collect that  
12 compensation. Instead, the Court held that a fiduciary can receive  
13 reasonable compensation but cannot pay itself that reasonable  
14 compensation out of the plan assets over which the fiduciary  
15 exercises its fiduciary control – whether for the type of  
16 transaction referenced in § 1108(b)(8) or for some other activity  
17 for which a fiduciary is entitled to reasonable compensation.  
18 (Order, Dkt. No. 393, at 27-34.)

19 The Court starts with the language of the statute:

20 **(b) Enumeration of transactions exempted from section  
21 1106 prohibitions**

22 The prohibitions provided in section 1106 of this title  
23 shall not apply to any of the following transactions:

- 24 (8) Any transaction between a plan and (i) a common  
25 or collective trust fund or pooled investment  
26 fund maintained by a party in interest which is  
27 a bank or trust company supervised by a State  
28 or Federal agency or (ii) a pooled investment  
fund of an insurance company qualified to do  
business in a State, if -  
(A) the transaction is a sale or purchase of  
an interest in the fund,

1 (B) the bank, trust company, or insurance  
2 company receives not more than reasonable  
compensation, and

3 (C) such transaction is expressly permitted by  
4 the instrument under which the plan is  
5 maintained, or by a fiduciary (other than  
6 the bank, trust company, or insurance  
company or an affiliate thereof) who has  
authority to manage and control the assets  
of the plan.

7 29 U.S.C. § 1108(b)(8).

8 The main problem here is that the issue of the prohibited  
9 transaction alleged by Plaintiffs and analyzed by the Court in the  
10 second class certification Order is *not* a "transaction" that fits  
11 under § 1108(b)(8)(A): "a sale or purchase of an interest in the  
12 fund." Neither Plaintiffs nor the Court state that Defendants  
13 cannot make such a transaction. That is not the question before  
14 the Court. Instead, the question is whether TLIC can pay itself  
15 even reasonable compensation from the plan assets over which it is  
16 exercising its fiduciary duties no matter what reason for that  
17 reasonable compensation – i.e., no matter what transaction that  
18 incurs a fee by TLIC or what service TLIC provides for which it is  
19 entitled to reasonable compensation as a fiduciary. Put simply,  
20 it's not that you can't do it, it's **how** you do it that's at issue  
21 here.

22 Thus, Defendants do not provide an argument on how this  
23 statutory exemption – which is not about fees or how fees are  
24 properly collected – applies here so as to make the Court's  
25 decision clearly erroneous as a matter of law in holding that a  
26 fiduciary cannot pay itself from plan assets over which it is  
27 exercising that control that makes it a fiduciary. This is what  
28 the Court held in the previous Order:

1 Defendants explain that this exemption "expressly allows  
2 regulated insurers to invest client assets in pooled  
3 separate accounts like TLIC's separate accounts here –  
4 even in circumstances involving alleged self-dealing –  
5 where the insurer receives no more than reasonable  
6 compensation, and either the plan document permits such  
7 investments or the investment is approved by fiduciary  
8 independent of the insurer." (Dkt. No. 385, Def. Supp.  
9 Brief, at 1.)

10 Perhaps this reading of the exemption is correct,  
11 but it seems that Defendants are missing Plaintiffs'  
12 allegation, which is not that TLIC invested client assets  
13 in pooled separate accounts, but rather that TLIC paid  
14 its fees – which TLIC had the discretion to change at  
15 thirty days notice – out of the plan assets that TLIC was  
16 holding. Thus, it is not clear to the Court how the  
17 (b)(8) exemption, assuming it applies to § 1106(b) based  
18 on the plain reading of § 1108 described above, clears  
19 Defendants from the prohibited transaction at issue in  
20 this case.

21 Subsection (b)(8) appears concerned with exempting  
22 transactions that are "a sale or purchase in the fund"  
23 for which "the bank, trust company, or insurance company  
24 receives not more than reasonable compensation," and if  
25 "such transaction is expressly permitted by the  
26 instrument under which the plan is maintained, or by a  
27 fiduciary (other than the bank, trust company, or  
28 insurance company or an affiliate thereof) who has

1 authority to manage and control the assets of the plan.”  
2 Id. § 1108(b)(8)(A)-(C). The transaction Plaintiffs  
3 challenge is not “a sale or purchase in the fund,” but  
4 instead the act of TLIC taking its own fees out of the  
5 plan assets over which TLIC exercises fiduciary  
6 management. Therefore, the Court finds § 1108(b)(8) does  
7 not apply to the prohibited transaction Plaintiffs are  
8 alleging in this case, even if it can in theory apply to  
9 other prohibited transactions under § 1106(b).

10 (Order, Dkt. No. 393, at 28-29.)

11 At no point do Defendants explain how their cited legislative  
12 history or DOL advisory opinions require a different holding or  
13 understanding in this case than that discussed in the Court’s  
14 Order.

15 First, the Court has examined the cited Committee Report that  
16 Defendants argue stands for the proposition that “otherwise  
17 prohibited transactions were permissible so long as ‘no more than  
18 reasonable compensation may be **paid by the plan** in the purchase (or  
19 sale) and no more than reasonable compensation may be **paid by the**  
20 **plan** for investment management by the pooled fund.’” (Mot.  
21 Reconsideration at 9 (citing H.R. Rep. No. 93-1280, pt. 1, at 316  
22 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5096 (emphasis  
23 added)).) Defendants’ argument is that the emphasized language  
24 means not just “paid by the plan,” but “paid by the plan by the  
25 fiduciary taking the reasonable compensation out of the plan’s  
26 assets over which it exercises fiduciary control.” Defendants  
27 state as much in their Motion. (Id. at 9-10.) However, the Court  
28 does not understand the legislative history to say that a fiduciary

1 can take its reasonable compensation directly out of the plan's  
2 assets even if the fiduciary can be paid by the plan. That is, the  
3 Court does not understand Defendants' argument that "[i]f Congress  
4 did not intend for 'reasonable compensation' to be paid from plan  
5 assets under the exemption, the Committee Report's inclusion of the  
6 phrase 'paid by the plan' would be superfluous." How is that the  
7 case? How would saying that a fiduciary can be paid reasonable  
8 compensation by the beneficiary (the plan) be the same as saying  
9 that the fiduciary can pay itself reasonable compensation for the  
10 services it provides to the beneficiary out of the beneficiary's  
11 assets over which the fiduciary exercises its control?

12 Second, Defendants cite several DOL advisory opinions. (Mot.  
13 Reconsideration at 10-11 (citing DOL Adv. Op. No. 2005-09A, 2005 WL  
14 1208696 (May 11, 2005); DOL Adv. Op. No. 82-22A, 1982 WL 21206 (May  
15 12, 1982).) The Court did not find that any of these opinions  
16 state anything controversial – the Court agrees that reasonable  
17 compensation may be paid by the plan, the question is **how** the plan  
18 pays those fees. This latter question is not addressed in the DOL  
19 advisory opinions.

20 The Court also looked at cases explaining or applying this  
21 exemption, of which it found few. See, e.g., Adedipe v. U.S. Bank  
22 N.A., 62 F. Supp. 3d 879 (D. Minn. 2014); Krueger v. Am. Fin. Inc.,  
23 No. 11-cv-02781 (SRN/JSM), 2012 WL 5873825 (D. Minn. Nov. 20,  
24 2012); Martin v. Nat'l Bank of Alaska, 828 F. Supp. 1427 (D. Alaska  
25 1992). The court in Krueger explained what the § 1108(b)(8)  
26 exemption is for:

27 In support of their argument, Defendants cite ERISA §  
28 408(b)(8), codified at 29 U.S.C. § 1108(b)(8), which

1 permits plans under certain circumstances to invest in  
2 affiliated funds.

3 Specifically, ERISA § 408(b)(8) exempts a plan's  
4 purchase or sale of an interest in a common or collective  
5 trust fund maintained by a regulated bank or trust company  
6 or a pooled investment fund of an insurance company  
7 maintained by a party in interest if the transaction is  
8 expressly permitted by the plan's governing documents and  
9 the bank, trust company, or insurance company receives no  
10 more than reasonable compensation.

11 ERISA § 408(b)(8) was enacted to allow "banks, trust  
12 companies and insurance companies" to continue their  
13 "common practice" of investing their plans' assets in their  
14 own pooled investment funds. See H.R. Conf. Rep. No.  
15 93-1280 (Aug. 12, 1974), reprinted in 1974 U.S.C.C.A.N.  
16 5038, 5096; see also U.S. Dep't of Labor Adv. Op. 82-022 A,  
17 1982 ERISA LEXIS 47 (May 12, 1982) (§ 408(b)(8) exempts  
18 fees charged for managing investments in pooled separate  
19 accounts and collective trusts).

20 As the Department of Labor has recognized, it would be  
21 "contrary to normal business practice for a company whose  
22 business is financial management to seek financial  
23 management services from a competitor." Notice of Proposed  
24 Rulemaking, Participant Directed Individual Account Plans,  
25 56 Fed. Reg. 10724 (Mar. 13, 1991).

26 Krueger, No. 11-cv-02781 (SRN/JSM), 2012 WL 5873825, at \*14  
27 (paragraphing added). Thus, the House Report clarifies that  
28 § 1108(b)(8) is meant to permit the transaction that is investing  
plan assets in a fiduciary's own pooled investment fund, which  
otherwise would be a prohibited transaction. This type of  
transaction is not at issue in this case.

Defendants have not provided persuasive support for its  
position that this exemption is applicable in this case, although  
it is conceivable that the answer is as Defendants argue and a  
fiduciary can, in fact, pay itself directly out of plan assets  
without violating the self-dealing prohibition in 29 U.S.C. §  
1104(b)(1). Thus, the Court also certifies this issue for appeal  
under 29 U.S.C. § 1292(b) as a controlling question of law.



1           **3. Court's Holding that Individualized Damages Do Not**  
2           **Prevent Class Certification in This Case**

3           Defendants argue the Court committed clear error in failing to  
4 consider the individualized evidence that would be necessary to  
5 determine the profits to disgorge from the alleged prohibited  
6 transactions. (Mot. Reconsideration at 11-12.) According to  
7 Defendants, "[t]he question whether TLIC, TI[M], or TA[M] retained  
8 any profits from the alleged prohibited transactions is decidedly a  
9 plan-specific inquiry." (Id. at 12.) Defendants state that the  
10 answer would require looking at every single plan over time and  
11 determining when TLIC would earn a profit over servicing the plan  
12 as a whole and how much that profit is, after considering the plan-  
13 specific costs incurred by TLIC. (Id. at 12.)

14           However, merely disgorging profits is not the standard. The  
15 statute says:

16           (a) Any person who is a fiduciary with respect to a plan  
17 who breaches any of the responsibilities, obligations, or  
18 duties imposed upon fiduciaries by this subchapter **shall be**  
19 **personally liable to make good to such plan any losses to**  
20 **the plan resulting from each such breach, and to restore to**  
21 **such plan any profits of such fiduciary which have been**  
22 **made through use of assets of the plan by the fiduciary,**  
23 **and shall be subject to such other equitable or remedial**  
24 **relief as the court may deem appropriate,** including removal  
25 of such fiduciary. A fiduciary may also be removed for a  
26 violation of section 1111 of this title.

27           29 U.S.C. § 1109(a) (emphasis added). Thus, profits are just one  
28 part of the analysis. Any loss to the plan from the breach of duty  
would require an accounting by Defendants to Plaintiffs of the fees  
charged, the facts necessary to determine the reasonableness of  
those fees, and evidence that the fees actually removed from the  
plans' assets were what was agreed upon and were reasonable. And

1 the Court would have discretion to impose other equitable or  
2 remedial relief as is appropriate for the class.

3 But all that this analysis would require is for Defendants to  
4 account for the losses and profits related to the plans. That is,  
5 this is essentially a class definition and damages calculation that  
6 requires formulaic analysis, which does not destroy predominance.  
7 Therefore, the prohibited transaction classes are not predominated  
8 by individualized issues through the need to calculate damages.  
9 However, to the extent that further litigation demonstrates that  
10 there is no formulaic analysis to determine damages for the  
11 Prohibited Transaction classes, then Defendants may seek to  
12 decertify the classes on that basis.

13 **4. Court's Holding Regarding Predominance of the TIM and TAM**  
14 **Classes**

15 Defendants argue that the Court failed to address the  
16 predominance factor of the TIM and TAM classes. (Mot.  
17 Reconsideration at 12-13; Reply at 9-11.) However, the Court did  
18 address predominance as to both TIM and TAM subclasses. See Order,  
19 Dkt. No. 393, at 34-38 (analyzing predominance in the subheadings  
20 "(A) TIM and TAM Prohibited Transactions" and "(B) TIM and TAM  
21 Excessive Fees," both of which were under the subheading "ii. TIM  
22 and TAM Class," under the subheading "a. Predominance," after the  
23 Court analyzed predominance for "i. TLIC Prohibited Transaction  
24 Class").

25 Further, Defendants did not extensively brief these issues in  
26 the second class certification motion. Defendants relegated  
27 analysis of the TIM and TAM excessive fee class to footnote 18,  
28 where Defendants stated that this class is just an excessive fee

1 class "by another label." (Opp'n to Second Mot. Class Cert., Dkt.  
2 No. 370, at 24 n.18.) It is not clear that Defendants engaged with  
3 the TIM and TAM Prohibited Transaction subclass separately at all,  
4 but if the same analysis and arguments as Defendants made for the  
5 TLIC Prohibited Transaction class were to apply to the TIM and TAM  
6 Prohibited Transaction subclass, then the Court would still find  
7 that the class met predominance for the reasons stated in its  
8 Order. Therefore, the Court did not provide extensive analysis of  
9 the predominance factor of the TIM and TAM classes in the second  
10 class certification order, but the Court did determine that  
11 predominance was satisfied. The Court declines to reconsider that  
12 decision.

13 **IV. CONCLUSION**

14 For all the reasons discussed above, the Court DENIES  
15 Defendants' Motion for Reconsideration.

16 This case has potential industry-wide implications and the  
17 cost to the parties of proceeding further without guidance from the  
18 court of appeals will be substantial. Therefore, the Court  
19 certifies controlling questions of law for appellate review.<sup>4</sup>

20 First, the Court certifies the fundamental question of whether  
21 Defendant TLIC can be considered a fiduciary at all under the law,  
22 as the Court held in a Motion to Dismiss Order. (Order, Dkt. No.  
23 137.) The question of whether TLIC could be a fiduciary is  
24 fundamental to all other questions in the case, as no classes would

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25  
26 <sup>4</sup> The Court discussed at the last hearing the issue of  
27 interlocutory review. The Court did not find further briefing on  
28 this issue necessary. The Court did not consider Defendants'  
Motion to Certify Questions for Interlocutory Review in certifying  
these questions. (See Dkt. No. 407.) The Court hereby VACATES the  
hearing date for that Motion.

1 be certified and no legal dispute over prohibited transactions  
2 would arise if there were no fiduciary duty owed by Defendants.  
3 Thus, the Court certifies for interlocutory appeal the legal issue  
4 of fiduciary status, as well as the certification of and the  
5 specific questions regarding the prohibited transaction classes  
6 discussed above. (See Order, Dkt. No. 137 (Motion to Dismiss);  
7 Order, Dkt. No. 354 (First Class Certification); Order, Dkt. No.  
8 373 (Second Class Certification).

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IT IS SO ORDERED.



Dated: May 13, 2016

DEAN D. PREGERSON  
United States District Judge