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, BARBARA POLEY, all individually and on behalf of all others similarly situated,

Plaintiffs-Appellees.

ON APPEAL 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-MAN

BRIEF FOR AARP AND AARP FOUNDATION AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES REQUESTING AFFIRMANCE

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DISCLOSURE STATEMENT OF AMICI CURIAE

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

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INTEREST OF AMICI CURIAE[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families with a focus on health security, financial stability and personal fulfillment. AARP Foundation — AARP's charitable affiliate — works to ensure that low-income older adults have nutritious food, affordable housing, a steady income, and strong and sustaining bonds. AARP Foundation collaborates with individuals and organizations who share our commitment to innovation and our passion for problem solving. Supported by vigorous legal advocacy, including through participation as amicus curiae in state and federal courts,[2] AARP Foundation creates and advances effective solutions that help struggling older adults transform their lives. Among other things, AARP

[1] Pursuant to Fed. R. App. P. 29(c)(5), amici state that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or any person or entity other than AARP, AARP Foundation, AARP's members, and their counsel, contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

[2] Amici either singly or jointly have participated as amicus curiae in numerous cases to protect the rights of workers and their beneficiaries under ERISA. *See, e.g.*, *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008); *Rollins v. Dignity Health*, 830 F.3d 900 (9th Cir. 2016); *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004).

and AARP Foundation seek to increase the availability, security, equity, and adequacy of public and private pension, health, disability, and other employee benefits that countless members and older individuals receive or may be eligible to receive.

One of amici's main objectives is to ensure that participants and beneficiaries in private employer-sponsored employee benefit plans can rely on promised pension and welfare benefits as the quality of these workers' lives in retirement depends substantially on their ability to obtain those benefits that they have been promised. As longevity and, as a result, the amount of money needed to live comfortably in retirement increases, retirement and welfare plans become more crucial to individuals' retirement security. Indeed, outside of Social Security, employee benefit plans are the main source of retirement income for many people.[3]

Accordingly, amici work to ensure that fiduciaries prudently and loyally manage and administer participants' plans and plan assets. The determination of who is a fiduciary is a fundamental question for participants, employee benefit plans, and the courts, with benefits and liabilities flowing from this determination. Because Congress's goal was to provide more protection for participants than state

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[3] *See* Emp. Benefit Res. Inst., Sudipto Banerjee, *Income Composition, Income Trends, and Income Shortfalls of Older Households*, EBRI ISSUE BRIEF NO. 383, Feb. 2013, at 5, https://goo.gl/k4LeVA (pensions and annuities are the second-most important source of income for most older households).

and federal law did at the time of ERISA's enactment, Congress contemplated a standard based on the actions of the person, 29 U.S.C. § 1002(21)(A), not her title or designation. Designation as a service provider does not tell participants, the plans, or the courts whether she is acting as a fiduciary.

How the Court decides this case will significantly impact the integrity of the administration of employee benefit plans and participants' ability to protect their pension plans from mismanagement and to obtain redress for such mismanagement, if it occurs. In light of the significance of the issues presented by this case, which directly bears on the retirement security of millions of Americans, including AARP members, amici respectfully submit this brief.

SUMMARY OF ARGUMENT

Under ERISA's broad, functional definition of fiduciary, *see Parker v. Bain*, 68 F.3d 1131, 1139 (9th Cir. 1995), persons are fiduciaries to the extent they (1) exercise discretion in managing the plan or exercise authority or control with respect to plan assets, (2) provide investment advice for a fee, or (3) administer the plan. 29 U.S.C. § 1002(21)(A). In order to determine whether and to what extent service providers are fiduciaries, a court must engage in a fact intensive inquiry that generally cannot be determined at the pleading stage. *See Pipefitters Local 636 Ins. Fund v. Blue Cross & Blue Shield of Mich.*, 722 F.3d 861, 866 (6th Cir. 2013); *Board of Trs. of Bricklayers & Allied Craftsmen Local 6 of N.J. Welfare Fund v.*

Wettlin Assocs., Inc., 237 F.3d 270, 275 (3d Cir. 2001); *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995).

Service providers of all types are fiduciaries if they fit into one of the three categories of fiduciary conduct. This court, and others, has engaged in detailed analysis of the conduct of service providers to determine if they have crossed the line into fiduciary conduct. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993) (service providers may become liable for damages when they cross the line from adviser to fiduciary).

There is simply no *per se* rule that service providers can never be fiduciaries. Whether service providers are fiduciaries depends on their actions and to what extent their actions implicate fiduciary conduct. In this case, Plaintiffs allege, among other claims, that Transamerica Life Insurance Company (TLIC) exercised authority or control to remove fees out of plan assets in TLIC's separate accounts; had or exercised authority or control concerning the amount and/or removal of fees from plan assets in those accounts under TLIC's control; and had discretionary authority or control to alter the investment roster, which in turn affects fees, particularly on funds affiliated with TLIC. The district court correctly held that these allegations are sufficient to withstand a motion to dismiss. The district court's decision should be affirmed.

ARGUMENT

I. CONGRESS INTENDED PERSONS TO BE LIABLE AS FIDUCIARIES BASED ON THEIR ACTIONS, NOT THEIR TITLES.

Congress enacted ERISA over 40 years ago against the backdrop of "more than a decade of Congressional investigation into looting and other abuses of plans."[4] Accordingly, Congress specifically stated that ERISA's purpose was to "protect . . . participants in employee benefit plans and their beneficiaries, by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans." 29 U.S.C. § 1001(b); *see Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15 (1987) ("ERISA's fiduciary standards 'will prevent abuses of the special responsibilities borne by those dealing with plans.'"). To achieve this goal, Congress imposed a federal fiduciary regime applicable to the management of both pension and welfare benefit plans in order to eliminate abuses. 29 U.S.C. §§ 1104 & 1106; *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985) ("[T]he crucible of congressional concern was misuse and mismanagement of plan assets by plan administration and that ERISA was

[4] John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 210 (1991); *see* JAMES A. WOOTEN, ERISA: A POLITICAL HISTORY at n.17 (2004) accompanying text at pages 5 & 158 (citing examples such as the collapse of the Studebaker pension plan; Jimmy Hoffa's receipt of loans from Central States Funds made for his benefit; the diversion of several million dollars from pension and welfare funds to Liberia and Puerto Rico by a union officer and "trustee for life;" Tony Boyle's alleged abuse of position of United Mine Workers Funds trustee).

designed to prevent these abuses in the future). Thus, within this fiduciary scheme, Congress also provided a list of "prohibited transactions" which "categorically barr[ed] certain transactions deemed 'likely to injure the pension plan.'" *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241 (2000) (citation omitted).

ERISA imposes stringent standards on fiduciaries that have the authority to manage or control plan assets. Indeed, the number of entities that may have such authority can be wide-ranging as ERISA also permits the dispersion of fiduciary functions among multiple fiduciary service providers. *See* JOHN H. LANGBEIN, DAVID A. PRATT, & SUSAN J. STABILE, PENSION AND EMPLOYEE BENEFIT LAW 548 (Robert C. Clark et al. eds., 5th ed.). Thus, in order to reach these service providers and ensure further protections for plan participants, ERISA utilizes a broad and functional definition of fiduciary. *See Bain*, 68 F.3d at 1139 ("ERISA's definition of 'fiduciary' is functional rather than formal."); *Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.*, 809 F.2d 617, 625 (9th Cir. 1987) (ERISA's fiduciary definition is "broad"). A person can acquire fiduciary status in three ways: (1) exercising discretionary authority or control over management of the plan or exercising control over disposition or management of plan assets; (2) rendering investment advice for a fee; or (3) exercising discretionary authority in

plan administration. 29 U.S.C. § 1002(21)(A).[5] As the Supreme Court recognized: "ERISA [] defines 'fiduciary' not in terms of formal trusteeship, but in *functional terms* of control and authority over the plan, *see id*., thus expanding the universe of persons subject to fiduciary duties." *Mertens*, 508 U.S. at 262 (emphasis added); *see* LANGBEIN et al., PENSION AND EMPLOYEE BENEFIT LAW, *supra* p. 9, at 543 ("The multifaceted definition of 'fiduciary' . . . reflects the expectation that a large cast of characters may be at work in administering a pension or welfare benefit plan. The definition directs attention away from labels and toward the function of each actor.").

"Fiduciary status under ERISA is to be construed liberally, consistent with ERISA's policies and objectives." *Arizona Carpenters Pension Tr. Fund v. Citibank*, 125 F.3d 715, 720 (9th Cir. 1997) (citing *John Hancock Mut. Life Ins. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 96 (1993)). The legislative history unambiguously indicates that Congress anticipated fiduciary status to encompass

[5] The statutory language is as follows:

> Except as otherwise provided in subparagraph (B), 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 such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan . . . .

consultants and advisors, whose special expertise leads them to formulate and act on discretionary judgments while performing administrative functions not otherwise contemplated as fiduciary. H.R. CONF. REP. NO. 93-1280 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 5038, 5103 ("[T]he definition includes persons who have authority and responsibility with respect to the matter in question, regardless of their formal title."). "Thus, whether or not an individual or an entity is an ERISA fiduciary must be determined by focusing on the function performed, rather than on the title held." *Blatt v. Marshall & Lassman*, 812 F.2d 810, 812 (2d Cir. 1987);[6] *see, e.g., IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1419 (9th Cir. 1997) ("The issue [for determining whether a person is a fiduciary] is not just how the duties are characterized, but what they are."); *Bain*, 68 F.3d at 1140 ("A person's actions determine whether he is a fiduciary, even if the plan documents do not assign fiduciary duties to the person."); *Acosta v. Pacific Enters*., 950 F.2d 611, 617-18 (9th Cir. 1991) (stating the statutory language "makes clear that a person's actions, not the official designation of his role, determine whether he enjoys fiduciary status.").

Notwithstanding the category of fiduciary activity in which a person engages — investment management, investment advice or plan administration — a person

[6] In finding that a defendant was acting as a fiduciary, one circuit court remarked: 'if it talks like a duck . . . and walks like a duck . . . , it is a duck.' *Donovan v. Mercer,* 747 F.2d 304, 308, 309 (5th Cir. 1984).

is considered a fiduciary only to the extent of the responsibilities, authority or activities that make the person a fiduciary. 29 C.F.R. § 2509.75-8, Q&A D-4; *Pegram v. Herdrich*, 530 U.S. 211, 225-26 (2000) (in cases concerning a fiduciary's obligations under ERISA, the threshold question is whether some person "was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint."); *Johnson v. Couturier*, 572 F.3d 1067, 1076 (9th Cir. 2009) (relying on 29 C.F.R. § 2509.75-8, Q&A D-4, "we have accordingly recognized that where members of an employer's board of directors have responsibility for the appointment and removal of ERISA trustees, those directors are themselves subject to ERISA fiduciary duties, albeit only with respect to trustee selection and retention.") (citing *Batchelor v. Oak Hill Med. Grp.*, 870 F.2d 1446, 1448-49 (9th Cir. 1989)).

Whether a person is a fiduciary — and to what extent — is a highly fact intensive inquiry and generally cannot be determined at the pleading stage. *See, e.g., Wettlin Assocs.*, 237 F.3d at 275 (overturning the grant of a 12(b)(6) motion because more development was required to determine fiduciary status); *Concha*, 62 F.3d at 1503 ("Where a fiduciary exercises discretionary control over a plan . . . the victim of his misconduct often will not, at the time he files his complaint, be in a position to describe with particularity the events constituting the alleged misconduct."); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 86 F. Supp. 2d 481, 491

(E.D. Pa. 2000) (finding it premature at the pleading stage to determine Defendant could not have acted as a fiduciary). In short, "the inquiry in each case is granular, 'ask[ing] whether [a person] is a fiduciary with respect to the particular activity in question.'" *Blue Cross & Blue Shield of Mich.*, 722 F.3d at 866 (citations omitted).

II. SERVICE PROVIDERS MAY BE FIDUCIARIES IF THEY FUNCTION LIKE A FIDUCIARY AND THUS MEET ERISA'S DEFINITION.

A. The Categories Of Service Providers Are Wide-Ranging.

Employee benefit plans use the Form 5500 Series to file their annual information return with the Department of Labor (Department). Schedule C pertains to the disclosure of service providers and requires plans "to report persons who rendered services to or who had transactions with the plan . . . during the reporting year if the person received, directly or indirectly, $5,000 or more in [] compensation in connection with services rendered or their position with the plan." United States Department of Labor, *Instructions for Form 5500*, *Annual Return/Report of Employee Benefit Plan,* Schedule C at 24 (2016), https://www.dol.gov/sites/default/files/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500/2016-instructions.pdf. To this end, the Department provides a comprehensive list of categories of service providers for which compensation may be received that fits the Department's definition of service provider. *Id*. at 27. These service providers

include, but are not limited to, accountants, attorneys, banks, claims administrators, insurers, investment advisers, pharmacy benefit managers, plan administrators, record keepers, and trustees. *Id*.

B. Service Providers Also May Be Fiduciaries If Their Actions Fit Within The Definition Of Fiduciary.

The Supreme Court has recognized that service providers can be fiduciaries as well. *See Mertens*, 508 U.S. at 262 (service providers may become liable for damages when they cross the line from adviser to fiduciary). In particular, when providers, because of their special expertise, have or exercised discretionary authority or control with respect to the management or administration of such plan, or exercised some authority or control regarding its assets, they are to be regarded as having assumed fiduciary obligations within the meaning of 29 U.S.C. § 1002(21)(A). H.R. CONF. REP. NO. 93-1280 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 5038, 5103.

To determine whether a service provider is acting as a fiduciary, the legislative history "seems to … contemplate[] a … fact-intensive inquiry that looks to whether the professional transcended her 'ordinary functions.'" *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 537 (7th Cir.1991); *accord*, 29 C.F.R. § 2509.75-5; *Donovan v. Mercer,* 747 F.2d 304, 309 (5th Cir.1984) ("[A] person who is repeatedly referred to as a trustee of an employee benefit plan, and who signs documents and takes actions regarding the Plan in an official capacity, is, as a

matter of law, a fiduciary….”). Department of Labor regulations imply that attorneys, accountants, actuaries or consultants are fiduciaries if their conduct indicates “control respecting the management of the plan,” or the “plan’s assets,” “investment advice for a fee,” or “discretionary responsibility in the administration of the Plan.” 29 C.F.R. § 2509.75-8, D-1.

The regulations and case law foreclose a *per se* rule classifying service providers as non-fiduciaries. The discussion below demonstrates the necessary fact-intensive inquiry in which courts must engage to determine whether and to what extent service providers are fiduciaries.

1. A person that exercises any discretionary authority or control respecting management of a plan or exercises any authority or control respecting management or disposition of the plan’s assets is a fiduciary.

a. A person that exercises any discretionary authority or control respecting management of the plan is a fiduciary.

ERISA provides that a person is a fiduciary if that person has discretionary authority or control regarding the management of the plan. 29 U.S.C. § 1002(21)(A)(i); *see Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1101-1102 (9th Cir. 2004) (“[A]n individual or entity can still be found liable as a ‘de facto’ fiduciary if it lacks formal power to control or manage a plan yet exercises informally the requisite ‘discretionary control’ over plan management and administration.”); *Briscoe v. Fine*, 444 F.3d 478, 490-491 (6th Cir. 2006)

("[ERISA] imposes fiduciary duties . . . on entities or companies that exercise *any* authority or control over the covered assets.") (emphasis in original) (quotations omitted).

For example, in *Martin v. Feilen*, 965 F.2d 660, 669 (8th Cir. 1992), the court found that two accountants provided services to the plan that exceeded usual professional accounting services. Instead, they recommended transactions, structured deals, and provided investment advice to such an extent that they exercised effective control over the plan's assets. This was not surprising inasmuch as none of the other corporate insiders had the expertise in accounting and employee benefits law to structure the complicated transactions at issue. Therefore, in evaluating the accountants' conduct, the court concluded that they had clearly moved from being mere accountants to fiduciaries. *Accord*, *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303 (8th Cir. 1984) (finding in-house comptroller exercised discretionary authority with respect to the administration or management of the retirement plan because he was responsible for informing employees about benefit plans and was the liaison with company's independent accountant consulting on plan investments and discussing payment to corporate officers, which lowered amount available for profit-sharing).

Moreover, in *Pipefitters Local 636 Ins. Fund v. Blue Cross & Blue Shield of Mich.*, 722 F.3d 861, 866 (6th Cir. 2013), the court found that Blue Cross was a

fiduciary in that it unilaterally imposed hidden administrative fees paid by the plan. In doing so, Blue Cross exercised discretion over self-funded plan assets and acted as a fiduciary. In a similar case against Blue Cross, a court found that the insurer exercised discretion by deciding which plans would be charged for disputed fees. *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield*, 751 F.3d 740, 744 (6th Cir. 2014) (noting that the disputed fees were not part of the standard pricing arrangement for the company, and "individual underwriters for [Blue Cross] had the 'flexibility to determine' how and when [these] fees were charged"). Additionally, Blue Cross held funds "wired by Hi-Lex 'in trust' for the purpose of paying plan beneficiaries' health claims and administrative costs." *Id*. at 747. Since these funds constituted plan assets, Blue Cross functioned as a fiduciary by holding them in trust. For both of these reasons, the court affirmed the lower court in finding that Blue Cross functioned as a fiduciary. *Id*. Another court found that a plan administrator breached its fiduciary duties by recommending and investing plan assets in an insurance product from which it would receive commissions. However, the administrator was not a fiduciary with regard to plan assets paid to an insurer's general account because it did not exercise discretion or control over the assets. *See National Sec. Sys. v. Iola*, 700 F.3d 65, 96-98 (3d Cir. 2012).

There is clearly no *per se* rule that service providers can never be fiduciaries, for the case law plainly concludes the contrary. In particular, service providers can

be fiduciaries to the extent they have discretionary authority or control respecting management of a plan. In this case, Plaintiffs plausibly pleaded that TLIC acted as a fiduciary because it exercised control or authority over plan assets when it withdrew its own and its affiliates' investment management fees. TLIC also had and exercised discretion to determine the amount of those fees. More specifically, TLIC withdrew its investment management fees and those of Transamerica Investment Management (TIM) and Transamerica Asset Management (TAM), from Separate Accounts. In addition, TLIC determined its fees and devoted much of the investment management and administrative fees, intended for investment management, to defray plan-level costs. In doing so, TLIC exercised and had discretion over the management of the Plans' Separate Accounts, within the meaning of 29 U.S.C. § 1002(21)(A)(i). Plaintiffs also plausibly pleaded that TLIC is a fiduciary with regard to Plaintiffs' excessive fees claims because TLIC had the discretion to set and lower its fees, or to eliminate excessively priced investment options from the investment menu; TLIC exercised its discretion or authority when it used part of the investment management and administrative fees to pay plan-level costs; and when, after undertaking monitoring of investment option expenses, TLIC chose to retain high priced options on the investment menu.

b. A person that has the authority or control to dispose of a plan's assets is a fiduciary.

ERISA recognizes that a person is a fiduciary if that person has the authority or control to "dispose" of the plan's assets. 29 U.S.C. § 1002(21)(A)(i). Any control a person has over the disposition of plan assets makes that person a fiduciary, *see IT Corp.*,107 F.3d at 1421, without respect to whether the person has discretion or has exercised its discretion. This strict coverage of persons who have *any* control over the disposition of plan assets is a direct result of Congress's intent to prohibit self-dealing by fiduciaries. *Iola*, 700 F.3d at 96 ("One facet of plan misuse particularly troubling to Congress was self-dealing by fiduciaries."). Disposing of plan assets is so intrinsically tied to the fiduciary duty of loyalty, which requires fiduciaries to act "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1)(A), that Congress required persons with this authority to be subject to ERISA's fiduciary obligations, independent of whether they exercise any discretionary authority or control respecting management of the plan. As a result, many cases have found service providers to be fiduciaries on this basis including accountants, banks, insurers, corporate officer, and plan administrators.

In *IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir. 1997), Plaintiffs claimed that the insurer breached its fiduciary duty to participants by paying more than $600,000 on a non-eligible claim, thereby depleting the amount

available for proper claims. On a motion to dismiss, the district court held that the insurer was not a fiduciary. However, the Ninth Circuit reversed and stated that the insurer might be a fiduciary for two reasons. First, the insurer might have discretionary authority and control respecting management of the plan; and second, the insurer might have authority and control over plan assets. In any event, the court concluded that the insurer was not entitled to judgment as a matter of law and remanded the case for further proceedings. *Accord, Briscoe*, 578 F.3d at 485 (insurer exercised a degree of authority over the disposition of the Plan's assets); *Mogel v. UNUM Life Ins. Co. of Am.*, 547 F.3d 23, 27 (1st Cir. 2008) (finding that an insurer was a fiduciary where instead of making lump-sum payments under policy terms, it improperly retained the use of the funds); *Chao v. Day*, 436 F.3d 234, 236-237 (D.C. Cir. 2006) (finding that head of insurance agency had authority or control over the disposition of the plans' assets due to the control over the plan account into which plan funds were deposited and from which he was to pay insurance premiums, which he instead embezzled); *David P. Coldesina, D.D.S., P.C., Empl. Profit Sharing & Tr. v. Estate of Simper*, 407 F.3d 1126, 1132-35 (10th Cir. 2005) (holding an accountant is a "fiduciary" where he wrongfully disbursed the plans' funds); *Srein v. Frankford Tr. Co.*, 323 F.3d 214, 220-22 (3d Cir. 2003) (holding a bank is a "fiduciary" where it wrongfully disbursed the plans' funds); *LoPresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997) (holding that president of

employer corporation acted as a fiduciary when he failed to separate insurance premiums deducted from employees' paychecks from corporate assets and used those employer deductions to pay company creditors).

Where the status of benefit plan insurers have been at issue, the majority of courts have held that these entities are fiduciaries when they are given the discretion to manage plan assets or to determine claims made against the plan. *See Aetna Life Ins. Co. v. Bayona*, 223 F.3d 1030, 1033 (9th Cir. 2000) ("When an insurance company administers claims for an employee welfare benefit plan and has authority to grant or deny the claims, the company is an ERISA fiduciary."); *Pacificare v. Martin*, 34 F.3d 834, 837-838 (9th Cir. 1993) (holding discretion to approve or deny claims makes insurer a fiduciary); *Libbey-Owens-Ford Co. v. Blue Cross & Blue Shield Mut*., 982 F.2d 1031, 1035 (6th Cir. 1993) (noting "result is the same whether the insurance company is the carrier administering claims under an insurance policy or whether the insurance company is administering claims for a fee under a self-insured plan"); *Peoria Union Stock Yards Co. Ret. Plan v. Penn Mut. Life Ins*. Co., 698 F.2d 320, 327 (7th Cir. 1983) (insurance company is a fiduciary because it managed assets of pension plan with full investment discretion); *cf. Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996) (illustrating conduct by a plan administrator in denying benefit claims amounts to a breach of fiduciary duty).

Insurance companies issuing life insurance policies and group annuity contracts have also been found to be fiduciaries. In *Ed Miniat, Inc. v. Globe Life Ins. Grp., Inc*., 805 F.2d 732, 737 (7th Cir. 1986), Globe issued retirement life reserve insurance policies to plaintiffs, participating employers. When plaintiffs withdrew their accumulated contributions, Globe retained more than one-half of the premiums the plaintiffs paid. Although the policy gave Globe the unilateral right to change the rate of return and annual premiums, the power to amend the policy and alter its value constituted the requisite authority over a plan asset to subject Globe to ERISA's fiduciary obligations. Similarly, in *Chicago Bd. Options Exch.*, *Inc. v. Conn. Gen. Life Ins. Co.*, 713 F.2d 254, 258-260 (7th Cir. 1983), the insurer was a fiduciary because of its ability to amend a group annuity contract and alter its value. Plaintiffs had entered into a group annuity contract with the insurer that was designed to fund retirement benefits for the plaintiffs' employees. When the insurer informed the plaintiffs of its intent to amend certain provisions of the contract, the plaintiffs sought to discontinue the contract and withdrew the funds deposited under the contract. The court concluded that the insurer was a fiduciary because the group annuity contract was an asset of the plan and the insurer's ability to alter its value constituted discretionary "control respecting . . . disposition of [plan] assets." The court recognized that the "ability to amend [the policy], and thereby alter its value, is not qualitatively different from the ability to choose

investments." *Id*. at 260. *See also Midwest Cmty. Health Serv. v. Am. United Life Ins. Co.*, 255 F.3d 374 (7th Cir. 2001) (holding that insurer, who issued a group annuity contract to members of a hospital association, was a fiduciary because it had discretionary authority over the contract by its ability to amend the value of the contract).[7]

Likewise, when a pharmacy benefit manager chooses "whether to fill a prescription or shift a participant to a different drug, it exercises discretion over the plans' assets," and thus, is a fiduciary. *Glanton v. AdvancePCS, Inc.*, 465 F.3d 1123, 1124 (9th Cir. 2006) (noting ERISA's statutory language makes no distinction between named and unnamed fiduciaries).

The case law, and especially congressional intent, indicates that there is no *per se* rule that service providers can never be fiduciaries. Thus, service providers can be fiduciaries to the extent they have the authority or control to dispose of a plan's assets. In this case, Plaintiffs plausibly allege that TLIC is a fiduciary because TLIC exercised authority and control over management and disposition of plan assets within the meaning of 29 U.S.C. § 1002(21)(A)(i). Indeed, when TLIC removed its fees and those of TIM and TAM from the plan assets invested in the TLIC Separate Accounts, it exercised sufficient authority and control to fit with

[7] As these cases demonstrate, the court's analysis frequently does not neatly separate the facts into the "discretionary authority and control" and "disposition" prongs of 29 U.S.C. § 1002(21)(A)(i).

ERISA's fiduciary definition. For these reasons, the district court's decision should be affirmed.

2. A person that renders, or has the authority or responsibility to render, investment advice for a fee with respect to plan assets is a fiduciary.

ERISA identifies persons who provide or have the authority or responsibility to provide investment advice for a fee with respect to the plan's assets as fiduciaries. 29 U.S.C. § 1002(21)(A)(ii); *see* LANGBEIN et. al, PENSION AND EMPLOYEE BENEFIT LAW, *supra* p. 9, at 553 ("ERISA singles out investment advisers for special treatment. Unlike professionals who render legal, actuarial, or accounting advice, persons who render investment advice are ipso facto fiduciaries.").

In *Thomas, Head & Greisen Emps. Tr. v. Buster*, 24 F.3d 1114, 1119 (9th Cir. 1994), the court conducted an extensive review of the facts to ensure that the investment adviser met the definition of a fiduciary. Particularly, the adviser's relationship with the Trust spanned a period of more than nine years, involved an investment of more than $700,000, and affected more than 40 percent of the Trust's assets. Additionally, the parties met frequently to discuss investment strategy and diversification, as well as the criteria by which the investments would be selected. The agreement between the Trust and investment adviser required the adviser to locate suitable investments, evaluate them and make recommendations

to the Trust. The facts supported a finding that the adviser provided individualized investment advice for a fee within the meaning of ERISA, and as a result, was a fiduciary subject to ERISA's duties of loyalty and prudence.

3. A person that has any discretionary authority or responsibility in the administration of a plan is a fiduciary.

ERISA classifies those persons who have any discretionary authority or responsibility in the administration of a plan as fiduciaries. 29 U.S.C. § 1002(21)(A)(iii). To be clear, a person that is considered a fiduciary under this prong need only have the discretion or responsibility to administer the plan. More specifically, whether the person has actually exercised its discretion is inapposite under the third prong. *See Yeseta v. Baima*, 837 F.2d 380, 384-85 (9th Cir. 1988) (failure to exercise discretionary authority or responsibility does not negate fiduciary status). In *Mogel v. UNUM Life Ins. Co. of Am.*, 547 F.3d 23, 26-27 (1st Cir. 2008), the court found that an insurance company was a fiduciary where instead of making lump-sum payments as called for by the terms of the insurance policy, it deposited death benefits into an account and mailed beneficiaries a checkbook with instructions on how to access funds in the account. The insurer argued that its fiduciary function ended when it determined that the plaintiffs were entitled to benefits, and that paying the benefits was a ministerial task, rather than a fiduciary one. The court stated that its arguments rested "on quicksand." The court pointed out that the funds were improperly retained for the insurer's use instead of

actually paying the benefit. The insurance company's duty with respect to the payment that is due to the beneficiary clearly fell within the scope of plan administration.[8]

There is simply no precedence for a *per se* rule that service providers can never be fiduciaries. Instead, service providers can be fiduciaries to the extent that they have the discretion to administer a plan. Here, Plaintiffs plausibly pleaded that TLIC has discretion to administer the plan within the meaning of 29 U.S.C. § 1002(21)(A)(iii), and thus, is a fiduciary. More specifically, the Group Annuity Contract affords TLIC discretion as to the amount of its own and affiliates' fees, which TLIC could unilaterally change. In other words, TLIC had discretion to alter investment option fees, and thus is a fiduciary with regard to the magnitude of those fees. Moreover, TLIC had discretion to alter the investment menu available for the Plans' and participants' investment. As a result, TLIC had the discretion to remove expensive TIM and TAM investment options from the investment menu, including those of TIM and TAM.

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[8] Analogously, courts have found that employers can also be fiduciaries by virtue of their conduct. *See Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996) (holding that the employer acted as a fiduciary by "[c]onveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation," because doing so "would seem to be an exercise" of plan administration.); *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004); *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042 (9th Cir. 2000) (en banc).

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's decision and remand the case for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Ninth Circuit Rule 29-2(c) because this brief contains 5,660 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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.

Dated: April 12, 2017

Respectfully submitted,

/s/ Mary Ellen Signorille
Mary Ellen Signorille

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number 16-56418

BRIEF AMICI CURIAE OF AARP AND AARP FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES

I 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 April 12, 2017.

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