No. 10-56014

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVE HARRIS, *et al*.,
Plaintiffs – Appellants,

v.

AMGEN, INC., *et al*.,
Defendants – Appellees.

On Appeal from the United States District Court
for the Central District of California
No. CV 07-05442-PSG
The Honorable Philip S. Gutierrez

OPPOSITION TO PETITION FOR PANEL REHEARING
OR REHEARING *EN BANC*

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TABLE OF CONTENTS

Page(s)

Table of Authorities ii

1. Standards for Panel and *En Banc* Rehearing 1

2. Because the Panel's Decision Was Correct In All Respects, A Rehearing Is Not Warranted under FRAP 35 04 FRAP 40.........................2

   (a) No Question Has Been Raised Regarding the Panel's Central Holding Concerning Breach of the Duty of Prudence 2

   (b) The Duty of Candor Claim Was Correctly Decided 3

   (c) Incorporation of Misleading SEC Filings Into Fiduciary Communications May Be Actionable under ERISA............6

3. The Panel's Invocation of the "Fraud-on-the-Market" Doctrine Does Not Warrant Rehearing 9

TABLE OF AUTHORITIES

CASES **Page(s)**

Alvidres v. Countrywide Financial Corp.,
No. 07-05810-RGK (CTx), 2008 U.S. Dist. LEXIS 27431
(C.D. Cal. Mar. 18, 2008) 7

Braden v. Walmart Stores, Inc.,
588 F.3d 585 (8th Cir. 2009) 4

Brieger v. Tellabs, Inc.,
245 F.R.D. 345 (N.D. Ill. 2007)....................11

In re Citigroup ERISA Litigation,
662 F.3d 128 (2d Cir. 2011)....................8

Dudenhoefer v. Fifth Third Bancorp,
692 F.3d 410 (6th Cir. 2012) 4, 7

Erica P. John Fund, Inc. v. Halliburton Co.
131 S. Ct. 2179 (2011)....................10

In re First American Corp. ERISA Litigation,
No. SACV 07-01357-JVS (RNBx), 2008 U.S. Dist. LEXIS 83832
(C.D. Cal. July 14, 2008) 4, 7

In re First American Corp. ERISA Litigation,
No. SACV 07-01357-JVS (RNBx), 2009 U.S. Dist LEXIS 72188
(C.D. Cal. July 27, 2009) 10

Gearren v. McGraw-Hill Companies,
660 F.3d 605 (2d Cir. 2011)....................8

In re General Motors ERISA Litigation,
No. 05-71085, 2006 U.S. Dist. LEXIS 16782 (E.D. Mich. Apr. 6, 2006) 11

In re JDS Uniphase Corp. ERISA Litigation,
No. 03-CV-4742, 2005 WL 1662131
(N.D. Cal. July 14, 2005)....................11

Jones v. NovaStar Financial, Inc.,
257 F.R.D. 181 (W.D. Mo. 2009) 11

Kirschbaum v. Reliant Energy, Inc.,
526 F.3d 243 (5th Cir. 2008) 3, 9

Lanfear v. Home Depot, Inc.,
679 F.3d 1267 (11th Cir. 2012) 9

In re Marsh ERISA Litigation,
No. 04 Civ. 8157 (SWK), 2006 WL 3706169
(S.D.N.Y. Dec. 14, 2006) 11

Moench v. Robertson,
62 F.3d 553 (3d Cir. 1995) 3

Morrison v. MoneyGram International,
607 F. Supp. 2d 1033 (D. Minn. 2009) 11

Narayan v. EGL, Inc.,
616 F.3d 895 (9th Cir. 2010) 6

Page v. Impac Mortgage Holdings, Inc.,
No. SACV 07-1447 AG (MGLx),
2009 WL 890722 (C.D. Cal. Mar. 31, 2009) 7

Pegram v. Herdrich,
530 U.S. 211 (2000) 5

Quan v. Computer Sciences Corp.,
623 F.3d 870 (9th Cir. 2010) .... *passim*

Rankin v. Rots,
220 F.R.D. 511 (E.D. Mich. 2004) 11

In re Schering-Plough Corp ERISA Litigation,
420 F.3d 231 (3d Cir. 2005), *amended by*, No. 04-3073,
2005 U.S. App. LEXIS 19826 (3d Cir. Sept. 15, 2005) 2, 5

Taveras v. UBS AG,
107 F.3d 436 (2d Cir. 2013) 2

United States v. Doss,
630 F.3d 1181 (9th Cir. 2011) 6

Varity Corp. v. Howe,
516 U.S. 489 (1996)..8

Washington v. Bert Bell/Pete Rozelle NFL Player Retirement Plan,
504 F.3d 818 (9th Cir. 2007) 3

In re Washington Mutual, Inc. Securities Derivative & ERISA Litigation,
No 2:08-md-1919 MJP, 2009 U.S. Dist. LEXIS 109961
(W.D. Wash. Oct. 5, 2009) 4, 7

In re Xcel Energy, Inc. Securities, Derivative & ERISA Litigation,
312 F. Supp. 2d 1165 (D. Minn. 2004)...11

STATUTES & RULES

11 U.S.C. § 1104(a)(1)(A) 4
11 U.S.C. § 1104(a)(1)(B) 4

Fed. R. App. P. 35...3
Fed. R. App. P. 35(a) 2
Fed. R. App. P. 35(b)(1)(A)..2
Fed. R. App. P. 35(b)(1)(B) 2
Fed. R. App. P. 40...2, 3, 7

On June 18, 2013, Appellees herein filed a Petition for Panel Rehearing or Rehearing *En Banc* (the "Petition"). On June 26, 2013, the Court directed Appellants to submit this response to the Petition by July 17, 2013.[1]

1. Standards for Panel and *En Banc* Rehearing

Federal Rules of Appellate Procedure ("FRAP") 35(a) provides that "***[a]n en banc hearing or rehearing is not favored and ordinarily will not be ordered unless*:** (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decision; or (2) the proceeding involves a question of exceptional importance." Under FRAP 35(b)(1)(A) and (B), the petition must begin with a statement that "the panel decision conflicts with a decision of the United States Supreme Court" or "the court to which the petition is addressed," or with "the authoritative decisions of other United States Courts of Appeals that have addressed the issue." *Id.* (emphasis added). That statement has not been – and cannot be – made by Petitioners in this case.

Meanwhile, FRAP 40(a)(4) provides for a rehearing by the Panel when there is reason to believe that the Panel has "overlooked" or "misapprehended" a point of law or fact. In such a case, the Panel may "(A) make

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[1] This response is also submitted in response to the *amici curiae* brief filed on June 28, 2013, by the American Benefits Counsel and the Chamber of Commerce of the United States ("ABC/COC"), to the extent that the Panel grants ABC/COC's motion to file that brief. The ABC/COC's brief is limited to the same issues raised by Petitioners.

a final disposition of the case without reargument; (B) restore the case to the calendar for reargument or resubmission; or (C) issue any other appropriate order." FRAP 40(a)(4)(A)-(C). The Petition does not demonstrate that the Panel overlooked or misapprehended any point of law.

2. Because the Panel's Decision Was Correct In All Respects, A Rehearing Is Not Warranted Under FRAP 35 or FRAP 40

a) No Question Has Been Raised Regarding the Panel's Central Holding Concerning Breach of the Duty of Prudence

As an initial matter, Petitioners do not contend that a Panel or *en banc* rehearing is warranted as to the Panel's central holdings on this appeal: (i) a "presumption of prudence" does not apply to the breach of duty of prudence claim alleged in the Amended Complaint ("AC") because company stock was not required by the Plans at issue, and (ii) the AC sufficiently states a claim under ERISA for a violation of the fiduciary duty of prudence. Op. 19-22, 32. The Panel's holding in this regard is fully consistent with virtually every appellate court that has had occasion to address the issue of whether a presumption of prudence applies when, as here, company stock is ***not required*** by the plan, as was the case with the Plans here. *See Taveras v. UBS AG*, 107 F.3d 436, 446 (2d Cir. 2013); *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 238 n.5 (3d Cir. 2005), *amended by* No. 04-3073, 2005 U.S. App. LEXIS 19826 (3d Cir. Sept. 15, 2005). In contrast, *see Quan v. Computer Scis. Corp.*, 623 F.3d 870, 875 (9th Cir. 2010)

(Ninth Circuit held that a presumption of prudence will apply to the pleading when the company stock offered by the plan "was a mandatory investment offering."). *See also Kirschbaum v. Reliant Energy, Inc.* 526 F.3d 243, 249-50 (5th Cir. 2008) (same); *Moench v. Robertson*, 62 F.3d 553, 558 (3d Cir. 1995).

b) <u>The Duty of Candor Claim Was Correctly Decided</u>

Petitioners take aim solely at the Panel's decision regarding Count III of the AC, which alleges that they "violated their duty of loyalty and care under 11 U.S.C. §§ 1104(a)(1)(A) and (B) by failing to provide material information to plan participants about investment in the Amgen common stock fund." Op. at 32. However, by holding that the AC adequately states a claim for breach of the duty of loyalty and care by alleging that Petitioners failed to provide material information to plan participants, the Panel was merely following clear Ninth Circuit precedent. As the Panel stated:

> We have recognized "[ERISA] fiduciaries breach their duties if they mislead plan participants or misrepresent the terms or administration of a plan. . . . A fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even when a beneficiary has not specifically asked for the information." *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995) (internal citations omitted). "[T]he same duty applies to 'alleged material misrepresentations made by fiduciaries to participants regarding the risks attendant to fund investment.'" *Edgar v. Avaya,* 503 F.3d 340, 350 (3d Cir. 2007).

Op. at 33, citing *Quan*, 623 F.3d at 886. *See also Washington v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 504 F.3d 818, 823 (9th Cir. 2007) ("The duty of loyalty is one of the common law trust principles that apply to ERISA fiduciaries and it encompasses a duty to disclose. Trustees must deal fairly and communicate to the beneficiary all material facts the trustee knows or should know in connection with the transaction.") (citations omitted).[2]

With respect to this holding, Petitioners argue that the Panel ignored Supreme Court precedent when it stated that it did not matter "whether defendants' statements were made in their corporate capacity, their fiduciary capacity, or some other capacity." Petition at 10 (citing Opinion at 33). But Petitioners are taking the Panel's words out of context and mischaracterizing the Panel's decision. The

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[2] Numerous appellate courts are in accord. In addition to the Third Circuit's ruling in *Avaya*, cited by the *Quan* Court, *see Dudenhoefer v. Fifth Third Bancorp.*, 692 F.3d 410, 420 (6th Cir. 2012) (recognizing an affirmative duty "under ERISA to inform when the trustee knows that silence might be harmful") (citation omitted); *Braden v. Walmart Stores, Inc.*, 588 F.3d 585, 599 (8th Cir. 2009) ("in some circumstances fiduciaries must on their own initiative "'disclose any material information that could adversely affect a participants' interest'") (citations omitted). Recent district court decisions within the Ninth Circuit are also in accord. *See*, *e.g.*, *In re Washington Mutual, Inc. Sec., Derivative & ERISA Litig.*, No. 2:08-md-1919 MJP, 2009 U.S. Dist. LEXIS 109961, at *36 (W.D. Wash. Oct. 5, 2009) ("*WAMU*") ("Ninth Circuit recognizes that 'ERISA imposes upon fiduciaries a *general duty to disclose facts material to investment issues*'") (citation omitted, emphasis added); *In re First Am. Corp. ERISA Litig.*, No. SACV 07-01357-JVS (RNBx), 2008 U.S. Dist. LEXIS 83832, at *16 (C.D. Cal. July 14, 2008) ("An ERISA fiduciary has both a duty not to make misrepresentations to plan participants, and an affirmative duty to inform when the [fiduciary] knows that silence might be harmful.").

Panel did not hold that ***a claim*** under ERISA could be based on a statement made by an ERISA fiduciary while acting solely in a corporate capacity, a holding that would indeed be at odds with Supreme Court precedent.[3] Rather, the Panel was merely explaining that ERISA fiduciaries who knowingly make misstatements in their corporate capacity cannot forget what they knew when they later make statements as ERISA fiduciaries:

> Defendants' final contention is that statements made by defendants to the Securities and Exchange Commission were not made in their fiduciary capacity, and therefore cannot be considered in an ERISA suit for breach of fiduciary duty. We do not think it matters whether defendants' statements were made to the SEC in their corporate capacity, their fiduciary capacity, or some other capacity. Irrespective of the capacity in which the misleading statements were made, defendants made them, and they were factored into the price of Amgen stock. ***They may therefore be used to show that defendants knew or should have known that the price of Amgen shares was artificially inflated***, and to show that plaintiffs presumptively detrimentally relied on defendants' statements under the fraud-on-the market theory.

Op. at 34-35 (emphasis added).

In any event, if the Panel believes that it would be desirable to clarify that an actionable misstatement under ERISA must be made in a fiduciary rather than corporate capacity, then it may do so through a simple modification to its Opinion

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[3] As the Supreme Court has stated, in a case cited by Petitioners, "[i]n every case charging breach of ERISA fiduciary duty, the threshold question is whether th[e] person 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, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000).

pursuant to FRAP 40. *See, e.g., In re Schering Plough Corp ERISA Litig.*, No. 04-2073, 2005 U.S. App. LEXIS 19826, at *1-2 (granting petition for panel rehearing "for the limited purpose" of adding footnote to clarify when presumption of prudence applies); *United States v. Doss*, 630 F.3d 1181, 1183 (9th Cir. 2011) (granting petition for panel rehearing for the limited purpose of amending footnote); *Narayan v. EGL, Inc.*, 616 F.3d 895, 896-97 (9th Cir. 2010) (granting petition for panel rehearing for the limited purpose of amending the opinion).

c) Incorporation of Misleading SEC Filings Into Fiduciary Communications May Be Actionable under ERISA

Petitioners argue that the Panel's decision is at odds with three out of four other appellate courts with respect to whether a breach of fiduciary duty claim can be brought based on "misrepresentations in SEC filings that are incorporated by reference in ERISA plan disclosures." Petition at 2. However, the Panel's holding in this regard (a holding that was, at most, *sub silentio*) is perfectly consistent with the law of the Ninth and other Circuits that a misleading statement made in an SEC filing may give rise to a claim under ERISA if the statement is later expressly incorporated by reference into a fiduciary communication.

Petitioners fail to cite *Quan*, 623 F.3d at 886, the Ninth Circuit's most recent pronouncement on the issue, in which the Court stated: "[W]e assume, without deciding, that alleged misrepresentations in SEC disclosures that were incorporated

into communications about an ERISA plan are 'fiduciary communications' on which an ERISA misrepresentation claim can be based." *Id.* (citations omitted) (upholding the dismissal of the disclosure claims, but only after a thorough examination of the facts and circumstances of the alleged omissions and misrepresentations in the context of summary judgment).[4]

Other Circuits have also recognized such a claim. In *Dudenhoefer*, 692 F.3d at 423, Sixth Circuit stated:

> ERISA requires the issuance of an SPD, but does not require the incorporation of a company's SEC filings into the SPD. Defendants exercised discretion in choosing to incorporate the filings into the Plan's SPD as a direct source of information for Plan participants about the financial health of [the Company] and the value of its stock, an investment option in the Plan. . . . The SPD is a fiduciary communication to plan participants and selecting the information to convey through the SPD is a fiduciary activity. Moreover, whether the fiduciary states information in the SPD itself or incorporates by reference another document containing that information is of no moment.

Id. at 423.

[4] *See also WAMU*, 2009 U.S. Dist. LEXIS 109961, at *39 ("Courts have recognized that the act of incorporating SEC filings into Plan communications may give rise to ERISA liability"); *Page v. Impac Mortg. Holdings, Inc.*, No. SACV 07-1447 AG (MGLx), 2009 WL 890722, at *5 (C.D. Cal. Mar. 31, 2009) (same); *In re First Am. Corp*, 2008 U.S. Dist. LEXIS 83832, at *19 (C.D. Cal. July 14, 2008) ("'[T]hose who are ERISA fiduciaries, however, cannot in violation of their fiduciary obligations disseminate false information to plan participants, including false information contained in SEC filings.'") (citations omitted) (emphasis original); *Alvidres v. Countrywide Fin. Corp.*, No. 07-095810-RGK (CTx), 2008 U.S. Dist. LEXIS 27431, at *7-8 (holding that allegations that misleading SEC filings were incorporated by reference into the Plan's SPD sufficiently stated a claim for breach of fiduciary duty of disclosure under *Varity*.

Moreover, contrary to Petitioners' contention, neither the Second, Fifth nor Eleventh Circuits subscribe to a blanket rule that SEC filings incorporated by reference into plan documents can *never* support a claim for breach of fiduciary duty. In *Gearren v. McGraw- Hill Cos*., 660 F.3d 605, 611 (2d Cir. 2011) (Petition at 12), the Second Circuit merely held that the plaintiffs did not provide any specific allegations as to how the plan administrator, who had incorporated SEC filings into SPDs, "knew or should have known that . . . the SEC filings contained misstatements." No issue of "knowledge" is present here. *See* Op. at 28-29. Any doubt about the Second Circuit's position was resolved in *In re Citigroup ERISA Litig*., 662 F.3d 128, 144 (2d Cir. 2011), another case Petitioners fail to mention, in which the Court held that misstatements in corporate public filings can be actionable under ERISA when they are "intentionally connected . . . to the future of [p]lan benefits," namely statements made in SPDs (quoting *Varity Corp*., 516 U.S. at 504 (1996)).[5]

In *Lanfear v. Home Depot, Inc*., 679 F.3d 1267, 1283-84 (11th Cir. 2012) (Petition at 12), the Eleventh Circuit held that SEC filings incorporated into a Form S-8 registration statement and stock prospectuses were not fiduciary communications under ERISA because these documents are required filings under the securities laws rather than fiduciary communications, and because it was not

[5] The AC alleges that the SEC filings were incorporated by reference into the SPDs for both of the Plans at issue. *See* ER. 86, 95, 109, 119.

alleged that those documents had been expressly incorporated into a fiduciary communication.

Similarly, in *Kirschbaum*, 526 F.3d at 256-57 (Petition at 12), the Fifth Circuit merely held that SEC filings did not become fiduciary communications via incorporation by reference into a Form S-8 registration statement and 10a prospectus for company stock provided to plan participants. The *Kirschbaum* Court noted that the obligation to file those particular documents arises under the securities laws, and that a separate and different document was issued by the company to serve as the SPD. *See id.* at 257. The *Kirschbaum* Court distinguished a district court case in which the 10a prospectus for company stock had been specifically used as the SPD. *See id.*

In sum, the Panel's decision regarding Petitioners' duty of candor claim is fully consistent with the Ninth Circuit and other appellant precedent and does not present an issue of "exceptional importance" for either Panel rehearing or rehearing *en banc*.

3. The Panel's Invocation of the "Fraud on the Market" Doctrine Does Not Warrant Rehearing

Petitioners also argue that by applying the fraud-on-the-market doctrine to Petitioners' duty of candor claim, the Panel "essentially eliminated" the requirement that a plaintiff alleging a breach of the duty of candor under ERISA

must prove detrimental reliance on the misrepresentations. Petition at 15. Petitioners' contention is misplaced.

The fraud-on-the-market doctrine simply allows for a rebuttable presumption of reliance and thus eliminates the need to show individual reliance in an action alleging misrepresentations in connection with a company's securities. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 180 L. Ed. 24 (2011). The Panel recognized that there is no reason that the fraud-on-the-market doctrine should not apply with the same force to retirement plan participants who invest in company stock as it would to open market investors. As the Panel correctly held:

> We see no reason why ERISA plan participants who invested in a Company Stock Fund whose assets consisted solely of publicly traded common stock should not be able to rely on the fraud-on-the-market theory in the same manner as any other investor in publicly traded stock.

Op. at 34.

Moreover, the entire issue is a red herring since the relevant "reliance" in a claim brought under ERISA is that ***of the plan*** rather than any individual plan participant, as courts analyzing the issue have consistently held. *See*, *e.g.*, *In re First Am. ERISA Litig.*, 2009 U.S. Dist. LEXIS 72188, at *22-23 n.7 (C.D. Cal. July 27, 2009); *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 191 (W.D. Mo. 2009) ("Because ERISA § 502(a)(2) focuses on plans, rather than individuals, the Court

finds persuasive those cases which have held that plaintiffs need not establish individual reliance in order to prevail") (listing cases); *In re Marsh ERISA Litig.*, No. 04 Civ. 8157(SWK), 2006 WL 3706169, at *7, 2006 U.S. Dist. LEXIS 90631 (S.D.N.Y. Dec. 14, 2006); *Rankin v. Rots*, 220 F.R.D. 511, 522-23 (E.D. Mich. 2004) 220 F.R.D. at 522-23 (rejecting reliance argument where plaintiffs' "claims relate[d] to defendants['] unitary actions with regard to the Plan. Defendants treated the entire class identically") (citing *In re IKON Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000)); *Brieger v. Tellabs, Inc.*, 245 F.R.D. 345, 354 (N.D. Ill. 2007) ("Because defendants do not dispute that they distributed information in a Plan-wide and broad manner, the Court finds that individual determinations as to plaintiffs' reliance on this information likely will be unnecessary").[6]

Thus, there was no error in the Panel's invocation of the fraud-on-the-market doctrine. Tellingly, Petitioners do not cite a single case holding that the fraud-on-the-market doctrine should not apply to an ERISA duty of candor claim. Rather, Petitioners cite only various academic articles concerning whether fraud-on-the-

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[6] Other courts have reasoned that reliance by a plan's participants is presumed when a complaint, in compliance with Rule 8 and ERISA, simply alleges that the "alleged losses result from the breach." *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 312 F. Supp. 2d 1165, 1182-83 (D. Minn. 2004). *See also In re JDS Uniphase Corp. ERISA Litig.*, No. 03-CV-4743, 2005 WL 1662131, at *13 (N.D. Cal. July 14, 2005); *Morrison v. MoneyGram Int'l.*, 607 F. Supp. 2d 1033, 1056 (D. Minn. 2009); *In re General Motors ERISA Litig.*, No. 05-71085, 2006 U.S. Dist. LEXIS 16782, at *42-43 (E.D. Mich. Apr. 6, 2006).

market remains a viable doctrine *in general*. While Petitioners believe that the "fraud-on-the-market" doctrine, which originates in the securities laws, was wrongly decided, the doctrine is currently the law of the land (*see Halliburton*, *supra*) and hardly a question for the Panel or the full Court to review on this appeal.

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CERTIFICATE OF COMPLIANCE

1. This Opposition to Petition for Panel Rehearing or Rehearing *En Banc* complies with the type-volume limitation pursuant to the Court's Order of June 26, 2013, because the it does not exceed 15 pages, or 4200 words, excluding the pages exempted by Fed. R. App. P. 32.

2. This response to a motion 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman type style, 14-point font.

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