No. 13-

IN THE
Supreme Court of the United States

AMGEN INC., *et al.*,
Petitioners,

v.

STEVE HARRIS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding that respondents, in seeking to prove their claims under ERISA, could invoke the presumption of class-wide reliance approved by this Court for securities claims in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988).

2. Whether the Ninth Circuit erred in holding that a fiduciary of a company's employee-retirement plan must act—with respect to publicly-traded securities—on non-public information about the company in order to avoid liability under ERISA.

3. Whether the Ninth Circuit erred in holding that the "presumption of prudence," which protects ERISA fiduciaries from liability in certain circumstances, applies only if the relevant retirement-plan language requires or encourages a fiduciary to invest in the employer's own stock.

PARTIES TO THE PROCEEDINGS

Defendants-appellees in the court of appeals, who are petitioners here, are Amgen Inc.; Amgen Manufacturing, Limited; Jacqueline Allred; David Baltimore; Charles Bell; Frank J. Biondi, Jr.; Raul Cermeno; Jerry D. Choate; Jackie Crouse; Frederick W. Gluck; Frank C. Herringer; Michael Kelly; Lori Johnston; Gilbert S. Omenn; Judith C. Pelham; Leonard D. Schaeffer; Kevin W. Sharer; the Amgen Plan Fiduciary Committee; and the AML Plan Fiduciary Committee.

Plaintiffs-appellants in the court of appeals, who are respondents here, are: Steve Harris, Albert Cappa, Donald Hanks, Dennis Ramos, and Jorge Torres.

CORPORATE DISCLOSURE STATEMENT

Amgen Inc. does not have a parent corporation, and no publicly-held company owns ten percent or more of Amgen Inc.'s stock. Amgen Manufacturing, Limited is a wholly owned subsidiary of Amgen Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Amgen Inc. et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-41a) is not yet published but is available at 2013 WL 5737307. That opinion replaced a prior one, which was reported at 717 F.3d 1042. The opinion of the district court dismissing the operative complaint (App. 43a-74a) is unreported but available at 2010 WL 744123.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2013. The court filed a revised opinion and denied petitioners' timely request for rehearing on October 23, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001 *et seq.*), are reproduced in the Appendix.

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA) sets standards for pension plans that are established by private companies, including standards regarding participation, vesting, benefit accrual, and funding. *See Varity Corp.* v. *Howe*, 516 U.S. 489, 496 (1996). The law also "establish[es] standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." 29 U.S.C. § 1001(b). In particular, ERISA imposes duties of loyalty and prudence on plan fiduciaries. *See id.* § 1104(a). A fiduciary must "discharge his duties with respect to a plan solely in the interest of [its] participants and beneficiaries" and act "with the care, skill, prudence, and diligence … that a prudent man … familiar with such matters would use." *Id.* § 1104(a)(1), (a)(1)(B). The statute authorizes plan participants to sue a fiduciary who breaches these duties. *See id.* § 1132(a)(2)-(3).

ERISA normally requires a fiduciary, as part of the statutory obligation to act prudently, to "diversify[] the investments of [a] plan so as to minimize the risk of

large losses." 29 U.S.C. § 1104(a)(1)(C). However, the law provides an exception to this diversification requirement "[i]n the case of an eligible individual account plan," or EIAP. *Id.* § 1104(a)(2). An individual account plan, also known as a defined-contribution plan, "promises the participant the value of an individual account at retirement, which is largely a function of the amounts contributed to that account and the investment performance of those contributions." *LaRue* v. *DeWolff, Boberg & Assocs.*, 552 U.S. 248, 250 n.1 (2008). ERISA provides that with EIAPs, "the diversification requirement … and the prudence requirement (only to the extent that it requires diversification)" are "not violated by [the] acquisition or holding of … qualifying employer securities." 29 U.S.C. § 1104(a)(2).[1]

Consistent with ERISA's diversification exception—and in recognition of the tension between Congress's competing goals of increasing employees' ownership and safeguarding their retirement benefits—several circuits have adopted a "presumption of prudence" that limits the circumstances in which a fiduciary can be held liable. Under this presumption, which is also known as the *Moench* presumption after the case that first adopted it, an EIAP fiduciary who offers a stock fund as an investment option enjoys a rebuttable presumption that that investment is consistent with the fiduciary's duties under ERISA. *See Moench* v. *Robertson*, 62 F.3d 553, 571 (3d Cir. 1995).[2]

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[1] With EIAPs (unlike other retirement plans), participants decide how they wish to invest their retirement savings, and may do so in whatever proportions they see fit.

[2] *Moench* involved a common type of EIAP known as "an employee stock ownership plan," or ESOP. 29 U.S.C. § 1107(d)(3)(A). An ESOP is a plan that "is designed to invest primarily in qualify-

2a. Petitioner Amgen Inc. is the world's largest independent biotechnology company. Amgen discovers, develops, manufactures, and delivers innovative human therapeutics that are used to treat patients suffering from a number of serious illnesses. Amgen spends billions of dollars on research and development to develop these therapies.

Other petitioners include the Amgen committees that oversee the company retirement plans and six individuals who served on those committees during the class period. None of these six was on the Amgen board. Petitioners also include eight outside directors of Amgen. The remaining petitioners (besides Amgen itself) are Amgen's former CEO and an Amgen subsidiary, Amgen Manufacturing, Ltd. (AML).

Respondents are former Amgen and AML employees who participated in Amgen-sponsored retirement plans during their employment. These plans—which Amgen voluntarily established both to help its employees save for retirement and to provide them with an opportunity to have ownership in their company—allow employees to contribute a portion of their income to individual investment accounts. Employees later receive retirement benefits from the accounts based on their contributions and any gain or loss realized thereon. Employees can opt to invest their contributions in any of a number of funds, including one that holds only Amgen stock. The provisions of ERISA regarding EIAPs apply to the Amgen plans because the plans in-

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ing employer securities," among other characteristics. *Id.* § 1107(d)(6)(A). Courts have applied the presumption of prudence not to just ESOPs but to other EIAPs as well. *See, e.g.*, *In re Citigroup ERISA Litig.*, 662 F.3d 128, 137-138 (2d Cir. 2011) (citing *Edgar* v. *Avaya, Inc.*, 503 F.3d 340, 347-348 (3d Cir. 2007)).

clude an employee stock ownership plan component. *See* App. 3a.

b. In 2007, following a decline in the price of Amgen's stock, respondents brought this putative class action under sections 409 and 502(a)(2) of ERISA, 29 U.S.C. §§ 1109 and 1132(a)(2). Respondents alleged that Amgen had concealed negative results from clinical studies of its anemia drug Aranesp®, and had marketed Aranesp and a second anemia drug, Epogen®, for "off-label" use, despite knowing that such use was unsafe. Respondents asserted that when these test results and alleged off-label marketing activities became public, Amgen's stock declined in value, causing the value of their retirement plans to fall as well.[3]

Respondents charged that petitioners had breached their fiduciary duty of care under ERISA by permitting plan participants to continue investing in Amgen stock despite knowing—in light of the negative test results and alleged off-label marketing activities—that such investment was imprudent. They also charged that petitioners (every one of whom is alleged to be a plan fiduciary) had breached a duty of candor by making material omissions and misrepresentations to plan participants, specifically in SEC filings that were then incorporated into the summary plan descriptions that ERISA mandates, *see* 29 U.S.C. § 1022(a).

3. The district court, which had subject matter jurisdiction under 29 U.S.C. § 1132(e)(1), dismissed respondents' first amended complaint for failure to state

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[3] Respondents' allegations mirror those made in a securities case that was previously brought against Amgen (and that this Court considered last Term, *see Amgen Inc.* v. *Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013)). App. 14a, 45a n.5.

a viable claim. App. 43a-74a. (The court had previously dismissed the original complaint on standing and other threshold grounds, but the Ninth Circuit reversed. *See Harris* v. *Amgen, Inc.*, 573 F.3d 728, 737-738 (9th Cir. 2009).) With respect to the duty-of-care claim, the district court first analyzed respondents' allegations under the *Moench* presumption of prudence. The court held that respondents had failed to rebut the presumption because they had not adequately alleged that Amgen's condition was "seriously deteriorating," nor that it was "on the brink of collapse or undergoing serious mismanagement." App. 63a. The court reasoned that although Amgen's stock price had declined, the decline was gradual and thus unlike the precipitous drop held sufficient in a prior case to overcome the presumption of prudence. App. 64a-65a.

The district court then explained that respondents had failed to state a claim even absent the presumption of prudence. Observing that "[i]f [petitioners] had eliminated the investment option, they would have been subject to lawsuits if the price of Amgen stock later rose, the court declined to put petitioners "'in the untenable position of having to predict the future of the company stock's performance.'" App. 68aa (quoting *Kirschbaum* v. *Reliant Energy, Inc.*, 526 F.3d 243, 256 (5th Cir. 2008)). The court also noted that if the fiduciaries had eliminated Amgen stock as an investment option based on their alleged knowledge of non-public information concerning the safety or marketing of Amgen products, they might have violated federal securities laws that prohibit insider trading. *Id.*

Finally, with respect to the misrepresentation portion of respondents' duty-of-candor claim—i.e., "that [petitioners] misrepresented the 'off label' marketing of the drugs," App. 70a—the district court held that re-

spondents had failed to allege the required element of detrimental reliance. App. 70a-71a.

4. The Ninth Circuit reversed. App. 1a-41a.[4] The court first ruled that the *Moench* presumption of prudence—which another panel of the court had adopted after the district court's decision, *see Quan* v. *Computer Scis. Corp.*, 623 F.3d 870 (9th Cir. 2010)—did not apply to respondents' claims. App. 19a-23a. The court held that the presumption applies only when the terms of the relevant plan "require or encourage the fiduciary to invest primarily in employer stock." App. 19a. The court concluded that the Amgen plans did neither. App. 19a-23a.

Having thus deemed the presumption of prudence inapplicable, the court of appeals analyzed respondents' claims under the "prudent man" standard of care. 29 U.S.C. § 1104(a)(1)(B). The court cited circuit precedent holding that a "'myriad of circumstances' surrounding investment in company stock could support a violation of the prudence requirement." App. 23a (quoting *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1102 (9th Cir. 2009)). And disregarding the question whether Amgen's 33 percent stock decline was too minor and gradual to suggest an imprudent investment, the court held that petitioners' purported knowledge of and participation in the alleged misrepresentations and omissions that led to the stock decline sufficed to state a claim under ERISA. App. 25a-26a.

In response to petitioners' argument that such a ruling would force fiduciaries to act on non-public com-

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[4] The panel's initial opinion in this appeal was withdrawn after petitioners sought rehearing. The opinion cited and discussed herein is the one that was substituted for the initial opinion.

pany information, possibly in violation of securities laws that prohibit insider trading, the court agreed that fiduciaries were not required to make actual trades on inside information. *See* App. 28a. It insisted, however, that the fiduciaries did have to take other steps based on it. These steps, the panel said, could include disallowing further investment in the company's stock by plan participants or unilaterally disclosing the relevant information to the general public. *See* App. 28a-29a.

Finally, with respect to the duty-of-candor claim, the court of appeals rejected the district court's conclusion that respondents had fatally failed to plead detrimental reliance on the alleged misrepresentations and omissions. By way of explanation, the court observed that "[i]t is well established under Section 10(b) [of the Securities Exchange Act, 15 U.S.C. § 78j(b)] that a defrauded investor need not show actual reliance on the particular omissions or representations of the defendant." App. 31a. Rather, the court continued, this Court has allowed securities-fraud plaintiffs to invoke a rebuttable presumption of indirect reliance, based on the "fraud-on-the-market" theory. *See Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). And, the court of appeals reasoned, "[w]e 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." App. 31a. Respondents—none of whom is alleged to have bought or sold shares in the Amgen fund during the class period—had not argued at any prior point in the litigation that the *Basic* presumption should be extended from the securities context to the ERISA context.

On petitioners' motion, the Ninth Circuit stayed the issuance of its mandate pending the filing and disposition of this petition. App. 75a-76a.

REASONS FOR GRANTING THE PETITION

The court of appeals committed three fundamental errors in deciding this case. Two relate to issues now before this Court—in *Halliburton Co.* v. *Erica P. John Fund, Inc.*, No. 13-317, and *Fifth Third Bancorp* v. *Dudenhoeffer*, No. 12-751—while the third implicates an established conflict in the circuits on an important issue regarding the interpretation of ERISA. As elaborated below, the petition should be held pending the Court's decisions in *Halliburton* and *Fifth Third*. It should then either be granted and the case remanded (following vacatur of the decision below) so that the Ninth Circuit can reconsider the issues in light of *Halliburton* and *Fifth Third*, or instead be granted for plenary review on all three questions presented.

I. THE NINTH CIRCUIT ERRED IN HOLDING THAT THE PRESUMPTION OF RELIANCE ADOPTED IN *BASIC INC.* V. *LEVINSON* APPLIES IN ERISA CASES

A. The Petition Should Be Held For *Halliburton Co.* v. *Erica P. John Fund, Inc.*

To prevail on their claim for breach of duty of candor, respondents would have to prove that they detrimentally relied on petitioners' alleged misrepresentations and omissions. *See, e.g.*, *Bell* v. *Pfizer, Inc.*, 626 F.3d 66, 75 (2d Cir. 2010); *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 579 F.3d 220, 228-229 (3d Cir. 2009); *Pfahler* v. *National Latex Prods. Co.*, 517 F.3d 816, 830 (6th Cir. 2007). As the district court concluded, respondents did not plead facts sufficient to establish this element. App. 70a-71a. The Ninth Circuit

did not disagree with that conclusion. Instead, it held—on its own initiative—that respondents could invoke the fraud-on-the-market presumption of reliance approved by this Court for securities class actions in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). App. 31a.

On November 15, 2013, this Court granted review in *Halliburton Co.* v. *Erica P. John Fund, Inc.*, No. 13-317. The first question presented there is whether this Court should overrule the portion of *Basic* that adopts a presumption of classwide reliance based on the fraud-on-the-market theory. For the reasons articulated by *Halliburton* and its amici (including Amgen), the Court should indeed discard the presumption. In brief, the notion of market efficiency that underlies the decision in *Basic* is deeply flawed; the presumption conflicts with more recent decisions of this Court that require putative class plaintiffs to demonstrate actual—not presumed—compliance with the requirements of Federal Rule of Civil Procedure 23; and *Basic* harms U.S. business (and thus consumers) by encouraging the filing of meritless-but-costly-to-defend class actions.

If the Court does overrule or significantly modify *Basic*, then it should grant this petition, vacate the decision below, and remand for further consideration. The Ninth Circuit's sole rationale for rejecting petitioners' argument that respondents had fatally failed to plead detrimental reliance was the availability of the *Basic* presumption. *See* App. 31a. If this Court rejects or alters the presumption, therefore, the decision below cannot stand. This petition should thus be held pending the Court's decision in *Halliburton*.

B. If The Court Does Not Modify Or Overrule *Basic*, Review Should Be Granted Here Because The *Basic* Presumption Is Inapplicable To ERISA Cases

If this Court's decision in *Halliburton* does not warrant a remand here, then the Court should grant the petition and set the case for plenary review. The Ninth Circuit's sua sponte extension of *Basic* to the ERISA context was a grave error with far-reaching implications.

The four-Justice majority in *Basic* held that although "reliance is an element of a [securities-fraud] cause of action," plaintiffs in a securities class action need not prove "individual[] reliance from each member of the proposed plaintiff class." 485 U.S. at 242, 243. Instead, "an investor's reliance on any public material misrepresentations … may be presumed." *Id.* at 247. The Court's justification for this presumption was the fraud-on-the-market theory, which posits that "in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business…. Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements." *Id.* at 241-242 (internal quotation marks omitted); *accord id.* at 247. *Basic*'s presumption, in other words, is that all investors who traded a security in a developed market during the relevant period indirectly relied on any material public misstatements, through their common reliance on the integrity of a market price that was distorted by those misstatements.

The Ninth Circuit here offered no affirmative justification for extending *Basic*'s presumption from the se-

curities to the ERISA context, stating only, "[w]e see no reason" not to make such an extension. App. 31a. There are, in fact, several reasons—which likely explains why, in the 25 years since *Basic*, no other appellate court has invoked its presumption in an ERISA case. *See In re Cardinal Health, Inc. ERISA Litig.*, 424 F. Supp. 2d 1002, 1046 & n.47 (S.D. Ohio 2006) ("To date, no appellate courts have declared that the [fraud-on-the-market] theory applies outside the context of securities fraud.").

To begin with, plaintiffs bringing a securities-fraud claim must show that they relied on the challenged statement or omission *when they bought or sold securities*. *See Basic*, 485 U.S. at 247; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975) ("[T]he plaintiff class for purposes of a private damage action under § 10(b) and Rule 10b-5 [i]s limited to actual purchasers and sellers of securities."). *Basic* holds that such reliance may be shown on a classwide basis by means of a presumption that all class members relied on market price. *See* 485 U.S. at 246-247. Here, however, the operative complaint does not allege that any of the five named plaintiffs bought or sold Amgen stock during the class period. On the contrary, it states that "during the Class Period, Plaintiffs *held* Amgen Stock in the Plans." First Am. Compl. ¶ 22 (emphasis added); *see also id.* ¶¶ 17-21 (making similar statements about each named plaintiff). In the absence of purchases or sales, there is nothing for the *Basic* presumption invoked by the Ninth Circuit to attach to. It is simply inapplicable when the plaintiffs did not "'buy[] or sell[]'" stock during the class period. *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) (quoting *Basic*, 485 U.S. at 247).

Even with regard to plan participants who did buy or sell during the class period, there is substantial reason to doubt that another key assumption in *Basic*—that individuals rely on market prices to make investment decisions—holds true in the ERISA context, especially where company stock is one of the investment options. Empirical research indicates that reliance on price information is reduced when investment options are limited, as is often true with participant-directed ERISA plans (and as was certainly true here, *see, e.g.*, App. 19a. Instead of relying primarily on price versus value at the moment of a trade, employees investing in stock of their own companies are influenced by long-range attitudes toward their employer. *See* Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. Rev. 71, 87 (2002). Studies show that employees tend to over-invest in their employers' stock, even in the face of pricing indications to the contrary, out of a sense of loyalty and confidence in their companies. *See id.* at 90-92; *see also* Benartzi et al., *The Law and Economics of Company Stock in 401(k) Plans*, 50 J.L. & Econ. 45, 68 (2007) ("[E]mployees do not correctly understand the economic value of [their] company stock."). So where retirement plans offer company stock as an investment option, as Congress encouraged, it is not accurate to assume that employees based their investment decision primarily on the company stock price. Finally, employers often provide incentives for employees to invest in company stock (such as employer matches), and the tax code does as well, *see* Benartzi et al., *supra*, at 50-51. These incentives further dilute the relevance of price in many employees' retirement-investment decisions. In short, *Basic*'s assumption that individuals rely on market prices when making investment decisions is significantly more dubious (if not wholly unwarranted) in the ERISA context.

The implications of the Ninth Circuit's decision underscore the need for review. Relieving ERISA plaintiffs of the need to prove rather than presume reliance would likely cause an enormous increase in ERISA class litigation, just as *Basic* has caused an enormous increase in securities class litigation, *see, e.g.*, Comolli et al., *Recent Trends in Securities Class Action Litigation: 2012 Full-Year-Review* 3 (2013); Mahoney, *Precaution Costs and the Law of Fraud in Impersonal Markets*, 78 Va. L. Rev. 623, 663 (1992). Such an increase could dissuade qualified individuals from agreeing to serve as fiduciaries or even deter employers from establishing retirement plans in the first place—or at least from offering company stock as an investment option, in derogation of Congress's efforts to encourage such investment by employees. These developments would hurt employees throughout the country.

Finally, allowing the decision below to stand would encourage other courts to follow the Ninth Circuit's example by either extending *Basic* to ERISA claims or perhaps even applying it in still other areas of the law without adequately considering the propriety of such extensions. If the Court does not reject the *Basic* presumption, it should grant review here so as to make clear that that decision is limited to securities claims.[5]

[5] Given the clarity of the Ninth Circuit's error in applying *Basic* to an ERISA claim—again, even respondents did not make such a request, and in 25 years no other appellate court has done so—the Court may deem this part of the decision below suitable for summary reversal.

II. THE NINTH CIRCUIT'S HOLDING THAT ERISA REQUIRES FIDUCIARIES TO ACT WITH RESPECT TO PUBLICLY TRADED SECURITIES ON NON-PUBLIC INFORMATION WARRANTS THIS COURT'S REVIEW

In dismissing respondents' duty-of-care claim, the district court explained that respondents' theory would require fiduciaries of publicly-traded companies to act on non-public information about their companies—potentially in violation of laws against insider trading—in order to fulfill their duties under ERISA. *See* App. 68a ("[E]liminating the Amgen investment option may have violated federal securities laws because the decision would have been based on inside information."). The Ninth Circuit rejected that conclusion, on the ground that petitioners could have "revealed material information … to the general public," satisfying their ERISA duties without running afoul of the securities laws. App. 28a-29a. Alternatively, the court asserted, petitioners could have "simply not allowed additional investments in the Fund while the price of Amgen stock was artificially inflated," and thus avoided trading altogether. App. 29a.

The Ninth Circuit's ruling on this point is wrong and departs from decisions from other circuits. This Court's review is therefore warranted.

A. The Ninth Circuit's Holding Deepens An Established Circuit Conflict

In contrast to the Ninth Circuit, three courts of appeals have held that ERISA fiduciaries, in carrying out their fiduciary duties, are not required to act on non-public information about their companies. For example, in *Rinehart* v. *Akers*, 722 F.3d 137 (2d Cir. 2013), *petition for cert. filed*, No. 13-830 (U.S. Jan. 8, 2014), the Second Circuit considered ERISA claims brought by

former employees of Lehman Brothers. The plaintiffs there argued that the plan fiduciaries knew or should have known about private conversations between company executives and the Treasury Secretary, and that a "reasonable investigation would have revealed material, nonpublic information sufficient to confirm that Lehman was on the verge of collapse." *Id.* at 146. The court rejected this theory of liability, stating flatly—and in direct conflict with the decision below—that "[f]iduciaries are under no obligation to … act upon inside information in the course of fulfilling their duties under ERISA." *Id.* at 147.

The Seventh and Eleventh Circuits have also rejected the approach that the Ninth Circuit took here. In *Lanfear* v. *Home Depot, Inc.*, 679 F.3d 1267 (11th Cir. 2012), the Eleventh Circuit explained (again in conflict with the decision below) that "plan participants have no right to insist that … fiduciaries who are corporate insiders use inside information to the advantage of the participants," *id.* at 1282; *see also White* v. *Marshall & Ilsley Corp.*, 714 F.3d 980, 992 (7th Cir. 2013) (rejecting a theory of ERISA liability that "would require insiders to engage in investment transactions on the basis of material nonpublic information, which would violate federal securities laws").

The Fifth Circuit, however, has adopted the same view as the court of appeals here. Though agreeing in one case that "[f]iduciaries may not trade for the benefit of plan participants based on material information to which the general shareholding public has been denied access," *Kirschbaum* v. *Reliant Energy, Inc.*, 526 F.3d 243, 256 (5th Cir. 2008), the court subsequently held that an ERISA fiduciary can be held liable for failing to act in other ways (i.e., besides trading) on the basis of non-public information, *see Kopp* v. *Klein*, 722 F.3d 327,

340 (5th Cir. 2013), *petition for cert. filed*, No. 13-578 (U.S. Nov. 7, 2013).[6]

The extent of fiduciaries' duties under ERISA—and their potential liability—thus varies depending on where they happen to be sued. This disuniformity is particularly pernicious because ERISA claims that are brought in federal court may be filed in any of several different venues, specifically "the district where the plan is administered, where the breach took place, or where a defendant resides or may be found." 29 U.S.C. § 1132(e)(2). Hence, a fiduciary who, for example, lives in California but whose plan is administered in New York faces conflicting legal obligations as to the very same conduct. That is untenable.

B. The Decision Below Is Wrong

The Ninth Circuit erred in holding that ERISA fiduciaries must act on non-public material information in order to avoid liability. Such a requirement places inappropriate burdens on fiduciaries.

As an initial matter, the court of appeals (like the Fifth Circuit) rightly disavowed any requirement that fiduciaries violate the securities laws by *trading* on non-public information that suggests continued investment in company stock would be imprudent. *See* App. 28a; *see also Quan*, 623 F.3d at 883 n.8 ("[F]iduciaries are under no obligation to violate securities laws in order to satisfy their ERISA fiduciary duties."). That

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[6] District courts in other circuits are likewise divided on the question. *Compare, e.g.*, *Rankin* v. *Rots*, 278 F. Supp. 2d 853, 873-878 (E.D. Mich. 2003) (finding a duty under ERISA for fiduciaries to act on non-public information), *with Hull* v. *Policy Mgmt. Sys. Corp.*, 2001 WL 1836286, at *9 (D.S.C. Feb. 9, 2001) (finding no such duty).

view is consistent with the canon that statutes must be construed so as not to conflict with each other if at all possible. *See FCC* v. *NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 304 (2003) (citing cases). It is certainly possible to do so here, as nothing in ERISA requires fiduciaries to violate the securities laws. Indeed, ERISA's "prudent man" duty-of-care standard can easily be harmonized with federal prohibitions against insider trading: As the Second Circuit put it, "[t]he prudent man does not commit insider trading." *Rinehart*, 722 F.3d at 147.

The Ninth Circuit did construe ERISA, however, as requiring fiduciaries to take other steps based on non-public information—on pain of being held liable in an action like this one. The court stated, for example, that fiduciaries might need to disclose material information to the public. *See* App. 28a-29a. But as several circuits have recognized, "ERISA does not place a general duty on plan administrators to disclose all adverse inside information to the public." *Kopp*, 722 F.3d at 340. "Such a requirement would improperly transform fiduciaries into investment advisors." *In re Citigroup ERISA Litig.*, 662 F.3d 128, 143 (2d Cir. 2011) (internal quotation marks omitted); *accord id.* ("We decline … to create a duty to provide participants with nonpublic information pertaining to specific investment options."). And it would be particularly inappropriate for courts to create such a duty given that ERISA already contains "a comprehensive set of 'reporting and disclosure' requirements." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995).

Moreover, compelling plan fiduciaries to disclose material, non-public company information would upset the carefully balanced disclosure obligations established by Congress in the securities laws. As Judge

Boudin explained recently, "the securities laws forbid false or misleading statements in general but impose more specific disclosure obligations only in particular circumstances." *In re Boston Scientific Corp. Sec. Litig.*, 686 F.3d 21, 28 (1st Cir. 2012). The reason for this, i.e., "[w]hy companies do not have to disclose immediately all information that might conceivably affect stock prices[,] is apparent: the burden and risks to management of an unlimited and general obligation would be extreme and could easily disadvantage shareholders in numerous ways." *Id.* at 27; *accord*, *e.g.*, *Starkman* v. *Marathon Oil Co.*, 772 F.2d 231, 239 (6th Cir. 1985) (excessive disclosure obligations "would place target management under the highly unpredictable threat of huge liability for the failure to disclose, perhaps inducing the disclosure of mountains of documents and hourly reports …, a deluge of information which would be more likely to confuse than guide the reasonable lay shareholder and which could … actually reduce the likelihood that a shareholder will benefit" (citing *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 948 (2d Cir. 1969) (Friendly, J.))). The Ninth Circuit's imposition of additional disclosure obligations under ERISA thus not only lacks any basis in the text of that statute but also interferes with the calibrated disclosure requirements that Congress deemed appropriate in adopting the securities laws.[7]

[7] In addition, companies' retirement-benefit committees ordinarily include individuals who are not part of the company's top leadership. These individuals are rarely if ever authorized to unilaterally reveal non-public information about the company, and it is unclear how the Ninth Circuit envisioned they would balance their supposed legal obligations under ERISA with their role in

Finally, a fiduciary who revealed adverse non-public information might well *harm* beneficiaries, in violation of the fiduciary obligation to act in their best interests. The disclosure of the adverse information, after all, would likely cause the company's stock price to fall. *Cf. Kirschbaum*, 526 F.3d at 256 ("[F]rom a practical standpoint, compelling fiduciaries to sell off a plan's holdings of company stock may bring about precisely the result plaintiffs seek to avoid: a drop in the stock price."). ERISA should not be construed to require fiduciaries, on pain of civil liability, to impose such deleterious consequences on their beneficiaries.

Alternatively, the Ninth Circuit suggested, fiduciaries in these circumstances could "simply not allow[] additional investments in" company stock "while the price of [the] stock was artificially inflated." App. 29a. As a practical matter, however, such a step would usually be no different from disclosing the non-public information. A sudden and unexplained freeze on investments by employees in their own company's stock, effected by an insider fiduciary, would surely be understood by the market as a sign that there was undisclosed adverse information about the company, which would lead to a decline in the company's stock price. Indeed, the uncertainty (and resulting speculation) about what exactly the undisclosed information was might well precipitate a decline greater than if the information had actually been disclosed. In any event, courts would again be forcing fiduciaries to take steps that would harm their beneficiaries (and perhaps their own job security).

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the company—or, relatedly, how corporate counsel would advise them to proceed if consulted about their obligations.

Furthermore, even if simply freezing investment in company stock would not violate the letter of securities laws, it would surely violate their spirit. Those laws are designed to prevent the unfairness and market distortion that result when one class of investors benefits from their knowledge about the value of a stock because the rest of the investing public does not have access to such knowledge. *See In re Cady, Roberts & Co.*, 40 S.E.C. 907, 1961 WL 60638, at *4 (1961); *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 235 (2d Cir. 1974) (noting that the purpose of securities laws is to "protect the investing public and to secure fair dealing in the securities markets by promoting full disclosure of inside information so that an informed judgment can be made by all investors who trade in such markets"). If the Amgen fiduciaries had frozen investment in company stock, then in the interval between when plan members learned of the freeze and when the market more generally did so (whereupon, as noted, the stock would likely plummet), plan members would have had an unfair advantage over others because they would be spared from purchasing shares of Amgen stock at an artificially high price. A freeze would thus gainsay the purpose of the securities laws by creating the market distortion and perpetrating the inequity that those laws are designed to prevent.

Finally, requiring fiduciaries to take steps based on their opinion about the effect that non-public information would, if disclosed, have on a company's stock price could expose them to liability if their opinion turned out to be wrong, i.e., if the stock price turned out not to be inflated and thus the eventual disclosure of the information did not cause the price to drop. As several circuits have recognized, "courts must be aware of the risks that 'if the fiduciary, in what it regards as

an exercise of caution, does not maintain the investment in the employer's securities, it may face liability for that caution, particularly if the employer's securities thrive.'" *Kirschbaum*, 526 F.3d at 256 n.13 (quoting *Moench*, 62 F.3d at 572).

Ultimately, the dilemma faced by ERISA fiduciaries who acquire adverse non-public information about their companies is one for which "[t]here is no happy solution." *Rinehart*, 722 F.3d at 147. But it is surely wrong to interpret ERISA as exposing fiduciaries to liability for not divulging their companies' non-public information.

Refusing to place such a burden on fiduciaries would not mean that plaintiffs who were legitimately harmed by the inflation of a stock price would have no recourse. As this case illustrates, *see supra* n.3, such plaintiffs can seek relief under the securities laws for failure to disclose the type of information at issue in this suit. The lack of any need to expose fiduciaries to liability underscores the impropriety of doing so. The Court should grant review to correct the Ninth Circuit's error.

III. The Ninth Circuit Erred In Holding That The Presumption Of Prudence Applies Only If The Relevant Plan Language Requires Or Encourages Investment In Company Stock

A. The Petition Should Be Held For *Fifth Third Bancorp* v. *Dudenhoeffer*

The Ninth Circuit held in this case that the *Moench* presumption of prudence, which protects ERISA fiduciaries from liability in certain circumstances, did not apply because the Amgen plans did not (in the court's

view) "require[] or encourage[]" investment in company stock. App. 19a-23a.

On December 13, 2013, this Court granted review in *Fifth Third Bancorp* v. *Dudenhoeffer*, No. 12-751, another case involving the presumption of prudence. The question presented there concerns what plaintiffs must plead and prove in order to rebut the presumption. *See* Pet. i, *Fifth Third Bancorp*, No. 12-751 (U.S. Dec. 14, 2012) ("Whether the Sixth Circuit erred by holding that Respondents were not required to plausibly allege in their complaint that the fiduciaries of an [ESOP] abused their discretion by remaining invested in employer stock, in order to overcome the presumption that their decision to invest in employer stock was reasonable[.]").[8]

Although the issue in this case is whether the presumption applies at all, rather than what must be pled and proved to rebut it, this case should be held for *Fifth Third* because the Court's decision there may nevertheless bear on the question here. This Court has never addressed the presumption of prudence, and in considering it for the first time the Court may deem it appropriate to go beyond the precise issues presented by the parties there. In particular, after receiving full briefing and argument, the Court may conclude that in determining when in litigation the presumption applies and what is required to rebut it, the Court should discuss the scope or application of the presumption more generally. Any such discussion would likely be relevant to the Ninth Circuit's ruling here.

[8] The Court denied review on a second question presented.

B. If The Decision In *Fifth Third* Does Not Warrant A Remand, Then The Petition Should Be Granted

If this Court's decision in *Fifth Third* does not address the circumstances that trigger the presumption of prudence, then the Court should grant review here. Although other courts of appeals have taken a similar position, *see, e.g.*, *Taveras* v. *UBS AG*, 708 F.3d 436, 445-446 (2d Cir. 2013), the Ninth Circuit's holding that the presumption applies only if the plan language requires or encourages investment in company stock is wrong, as it puts plan fiduciaries in the same unsustainable situation that gave rise to the presumption in the first place.

1. In the 1970s and 1980s, Congress "enacted a number of laws designed to encourage employers to set up" ESOPs. *Donovan* v. *Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983); *see also id.* at 1466 n.23 (listing several such laws). Indeed, Congress itself stated in 1976 that "in a series of laws …, [it] has made clear its interest in encouraging employee stock ownership plans." Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520, 1590. And ESOPs still enjoy favorable tax treatment today. *See* 26 U.S.C. § 404(k) (allowing a deduction for dividends paid with respect to employer stock held in an ESOP); *id.* § 1042 (providing favorable tax treatment for sales of certain qualified employer securities to ESOPs).

Congress's rationale for encouraging ESOPs was manifestly not to minimize investment risk or maximize retirement benefits for plan participants. To the contrary, because it inherently reduces diversification, "an ESOP places employee retirement assets at much greater risk than does the typical diversified ERISA

plan." *Martin* v. *Feilen*, 965 F.2d 660, 664 (8th Cir. 1992); *see also Taveras*, 708 F.3d at 443 ("Employee Stock Ownership Plans …, unlike pension plans, are not intended to guarantee retirement benefits." (internal quotation marks omitted)). "ESOPs are [instead] intended to reward and motivate employees by making them stakeholders in the success of the companies that employ them. Linking worker pay to company performance is thought to increase worker productivity and company loyalty[.]" *Quan*, 623 F.3d at 879 n.7; *see also Donovan*, 716 F.2d at 1458 ("The ESOP … [i]s a device for expanding the national capital base among employees—an effective merger of the roles of capitalist and worker.").

This "concept of employee ownership constituted a goal in and of itself." *Moench*, 62 F.3d at 568. But it is a goal that is in substantial tension with the "stringent" duties imposed on fiduciaries by ERISA. *Id.* at 569. As the Fifth Circuit elaborated:

> On the one hand, Congress has repeatedly expressed its intent to encourage the formation of ESOPs …, and has warned against judicial and administrative action that would thwart that goal. Competing with Congress' expressed policy to foster the formation of ESOPs is the policy expressed in equally forceful terms in ERISA: that of safeguarding the interests of participants in employee benefit plans by vigorously enforcing standards of fiduciary responsibility.

Donovan, 716 F.2d at 1466 (footnotes omitted). Or as another court of appeals put it more recently, "ERISA requires diversification to further the goal of protecting employee benefits while at the same time permitting

concentration in the employers' stock in order to further the goal of employee ownership." *Lanfear*, 679 F.3d at 1278. "ESOP fiduciaries must, then, wear two hats, and are expected to administer ESOP investments consistent with the provisions of both a specific employee benefits plan and ERISA." *Moench*, 62 F.3d at 569 (internal quotation marks omitted). More bluntly, "ESOP trustees … must satisfy the demands of Congressional policies that seem destined to collide." *Id.* (internal quotation marks omitted); *see also White*, 714 F.3d at 990 ("ERISA's simultaneous demands to comply with plan documents and to exercise prudence in choosing investment options for plan participants can place fiduciaries on a razor's edge.").

Although the tension between these congressional goals is ameliorated by ERISA's exception to the general diversification requirement for cases involving EIAPs, *see* 29 U.S.C. § 1104(a)(2), that exception does not by itself adequately protect fiduciaries. For example, absent the protection provided by the presumption, "a fiduciary 'could be sued for not selling if he adhered to the plan [and the company stock dropped], but also sued for deviating from the plan [and selling] if the stock rebounded.' Moreover, the 'long-term horizon of retirement investing' requires protecting fiduciaries from pressure to divest when the company's stock drops." *Quan*, 623 F.3d at 881-882 (alterations in original) (quoting *Kirschbaum*, 526 F.3d at 254, 256). The liability that fiduciaries would face without the presumption would "risk transforming ESOPs into ordinary pension benefit plans," because no employer would create an ESOP if compliance with such a plan would expose it to ERISA liability. *Moench*, 62 F.3d at 571. That outcome, in turn, would "frustrate Congress' desire to encourage employee ownership." *Id.*

2. The presumption of prudence is thus a sound judicial effort to accommodate conflicting congressional desires. But as the foregoing discussion shows, the rationale for applying the presumption does not depend on whether the plan at issue requires, encourages, or simply permits investment in company stock. In all three cases, fiduciaries are put in the same position of having to predict the future course of their company stock, and risk being "exposed to liability based on 20-20 hindsight for mere swings in the market," *White*, 714 F.3d at 990.

It is no answer to say that whenever a plan merely permits investment in company stock, the fiduciary can simply decline to give special consideration to that stock, and be guided entirely by her views of what investments would be most prudent. Precisely the same is true with regard to plans that merely encourage (or even "strongly encourage[]," *Taveras*, 708 F.3d at 438) investments in company stock. The same is not true, of course, with plans that actually require investment in company stock. But no court has restricted the presumption to such plans—likely because even when a plan does not require such investment, the fiduciary still confronts two conflicting congressional policies: fostering employee investment in company stock and safeguarding retirement benefits. Again, that is equally true of plans that encourage such investment and those that just permit it.

A rule that the presumption does not apply unless the relevant plan terms at least "encourage" investment in company stock also creates tremendous uncertainty for fiduciaries. There is no clear standard regarding what constitutes "encouragement" by a plan to invest in company stock. And as the Ninth Circuit's decision here illustrates, a court can almost always find

reasons to conclude that particular terms were not sufficiently "encouraging." *See* App. 20a-21a (finding no encouragement even though Amgen stock funds were the *only* investment option to which the plans specifically referred). As a result, a plan fiduciary will not know in advance whether she would, if sued, enjoy the benefit of the presumption, i.e., whether her decisions would be evaluated after the fact with appropriate deference—or instead whether a judge would assess her actions with the benefit of hindsight, and hence with insufficient appreciation for both the conflicting congressional goals she had to pursue and the substantial uncertainty she faced in pursuing them. Fiduciaries in that situation will inevitably tend to act in ways that minimize the chances of them being sued in the first place, even if that meant taking or not taking certain steps that could benefit their beneficiaries. Congress could not have intended that result.

Applying the presumption irrespective of specific plan terms would not immunize fiduciaries from liability. The presumption is just that, a presumption, and every circuit to adopt it has held that it may be rebutted by a sufficient showing of misconduct. The Ninth Circuit, for example, has stated that the presumption can be overcome where fiduciaries "abused [their] discretion," such as when there is a "precipitous decline in the employer's stock," "the company is on the brink of collapse or is undergoing serious mismanagement." *Quan*, 623 F.3d at 882 (internal quotation marks omitted). This approach properly balances the need to give fiduciaries wide latitude with the need to ensure that some recourse exists for instances of genuine malfeasance.[9]

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[9] The courts of appeals are not in complete agreement regarding the showing required to rebut the presumption. *See, e.g.*,

3. Although the courts of appeals are in general agreement regarding the "require or encourage" limitation, they have adopted the limitation with very little analysis (and apply it inconsistently). Most have justified its adoption simply by citing to *Moench*, which first drew the distinction in adopting the presumption. But the *Moench* court's reasoning on this point was unsound. The court looked to the law of trusts in crafting the presumption, and on this particular point it cited section 228 of the *Restatement (Third) of Trusts*. *See Moench*, 62 F.3d at 571. As the court itself pointed out, however, that section "distinguishe[d] between two types of directions: the trustee either may be mandated or permitted to make a particular investment." *Id.* That distinction corresponds to a distinction between ESOPs that require investment in company stock and those that do not (whether because they just encourage it or just permit it). But the *Moench* court rejected that distinction, choosing instead to extend the presumption to fiduciaries of plans that do not require but do encourage such investment, while denying it to fiduciaries of plans that simply permit it. The Third Circuit gave no rationale for that distinction—i.e., for not also applying the presumption to plans that permit the investment. Nor, to Amgen's knowledge, has any court since.[10] This Court should grant review to correct the circuits' entrenched error in this regard.

U.S. Pet.-Stage Br. 14-15, *Fifth Third*, No. 12-751 (U.S. Nov. 12, 2013). The question presented in *Fifth Third* fairly includes that issue, so the Court's decision in that case will likely address it.

[10] The Second Circuit recently sought to justify the requires-or-encourages rule by stating that the "tension" that led to adoption of the presumption—i.e., "between the competing ERISA values of protecting retirement assets and encouraging investment in employer stock"—"exists primarily in instances where a fiduci-

CONCLUSION

This petition should be held pending this Court's decisions in *Halliburton Co.* v. *Erica P. John Fund, Inc.*, No. 13-317, and *Fifth Third Bancorp* v. *Dudenhoeffer*, No. 12-751. Following those decisions, the Court should either grant the petition, vacate the judgment below, and remand for reconsideration in light of *Halliburton* or *Fifth Third* (or both), or else grant the petition for plenary review on all three questions presented.

Respectfully submitted.

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ary has an explicit obligation to … offer[] employer stock to participants." *Taveras*, 708 F.3d at 446 (internal quotation marks omitted). That is true; the tension is surely starkest with plans that require investment in company stock. But that does not justify denying the presumption in the case of plans that permit such investment while applying the presumption in the case of plans that encourage it, since the tension is present in either event.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Steve HARRIS; Dennis F. Ramos, aka Dennis Ramos; Donald Hanks; Jorge Torres; Albert Cappa, On Behalf of Themselves and All Others Similarly Situated,
Plaintiffs-Appellants,

v.

AMGEN, INC.; Amgen Manufacturing, Limited; Frank J. Biondi, Jr.; Jerry D. Choate; Frank C. Herringer, Gilbert S. Omenn; David Baltimore; Judith C. Pelham; Kevin W. Sharer; Frederick W. Gluck; Leonard D. Schaffer; Charles Bell; Jacqueline Allred; Amgen Plan Fiduciary Committee; Raul Cermeno; Jackie Crouse; Fiduciary Committee Of The Amgen Manufacturing Limited Plan; Lori Johnston; Michael Kelly,
Defendants-Appellees,

Dennis M. Fenton; Richard Nanula; The Fiduciary Committee; Amgen Global Benefits Committee; Amgen Fiduciary Committee,
Defendants.

No. 10-56014.

Argued and Submitted Feb. 17, 2012.
Filed Oct. 23, 2013.

Appeal from the United States District Court for the Central District of California,
Philip S. Gutierrez, District Judge, Presiding,
D.C. No. 2:07-cv-05442-PSG-PLA

Before Jerome Farris and William A. Fletcher, Circuit Judges, and Edward R. Korman, Senior District Judge.[FN*]

ORDER

***1** The opinion filed on June 4, 2013, and published at 717 F.3d 1042 (9th Cir. 2013), is withdrawn and replaced by the attached opinion.

With the filing of the new opinion, the panel has voted unanimously to deny the petition for rehearing. Judge Fletcher has voted to deny the petition for rehearing en banc, and Judges Farris and Korman so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed June 18, 2013, are **DENIED.**

OPINION

W. FLETCHER, Circuit Judge:

Plaintiffs, current and former employees of Amgen, Inc. ("Amgen") and its subsidiary Amgen Manufacturing, Limited ("AML"), participated in two employer-sponsored pension plans, the Amgen Retirement and Savings Plan (the "Amgen Plan") and the Retirement and Savings Plan for Amgen Manufacturing, Limited

[FN*] The Honorable Edward R. Korman, Senior United States District Judge for the Eastern District of New York, sitting by designation.

(the "AML Plan") (collectively, "the Plans"). The Plans were employee stock-ownership plans that qualified as "eligible individual account plans" ("EIAPs") under 29 U.S.C. § 1107(d)(3)(A). All of the plaintiffs' EIAPs included holdings in the Amgen Common Stock Fund, one of the investments available to plan participants. The Amgen Common Stock fund held only Amgen common stock.

After the value of Amgen common stock fell, plaintiffs filed an ERISA class action against Amgen, AML, Amgen's board of directors, and the Fiduciary Committees of the Plans (collectively, "defendants"), alleging that defendants breached their fiduciary duties under ERISA. The district court dismissed Amgen as a defendant from the suit on the ground that it was not a fiduciary. It dismissed the complaint against the other defendants, who were fiduciaries, after applying the "presumption of prudence" articulated in *Quan v. Computer Sciences Corp.*, 623 F.3d 870 (9th Cir. 2010). Alternatively, even assuming the absence of the presumption, it dismissed on the ground that defendants did not violate their fiduciary duties.

We reverse. We conclude that the presumption of prudence does not apply, and that, in the absence of the presumption, plaintiffs have sufficiently alleged violation of the defendants' fiduciary duties. We further conclude that Amgen is an adequately alleged fiduciary of the Amgen Plan.

I. Background

The following narrative is taken from the complaint and documents that provide uncontested facts. On a motion to dismiss, we assume the allegations of the complaint to be true. *See Tellabs, Inc. v. Makor Issues*

& Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007).

Amgen is a global biotechnology company that develops and markets pharmaceutical drugs. AML, a wholly owned subsidiary of Amgen, operates a manufacturing facility in Puerto Rico. To provide retirement benefits to their employees, Amgen set up the Amgen Plan on April 1, 1985. AML set up the AML Plan in 2002 and it became effective on January 1, 2006.

The Plans are covered by the Employee Retirement Income Security Act ("ERISA"). Both qualify as "individual account plans." *See* 29 U.S.C. § 1002(34). Plan participants contribute a portion of their pre-tax compensation to individual investment accounts. They receive benefits based solely upon their contributions, adjusted for any gains and losses in assets held by the Plans. Participants may contribute up to thirty percent of their pre-tax compensation. They may select from a number of investment funds offered by the Plans. One of those is the Amgen Common Stock Fund, which holds only Amgen stock. Amgen stock constituted the largest single asset of both Plans in 2004 and 2005.

***2** This litigation arises out of a controversy concerning Amgen drugs used for the treatment of anemia. Anemia is a condition in which blood is deficient in red blood cells or hemoglobin. Causes of anemia include an iron-deficient diet, excessive bleeding, certain cancers and cancer treatments, and kidney or liver failure. In the early 1980s, Amgen scientists discovered how to make artificial erythropoietin, a protein formed in the kidneys that stimulates erythropoiesis, the formation of red blood cells. After this discovery, Amgen commercialized the manufacture of a class of drugs known as

erythropoiesis-stimulating agents ("ESAs") to treat anemia.

In 1989, the Federal Drug Administration ("FDA") approved Amgen's first commercial ESA, epoetin alfa, for the treatment of anemia associated with chronic kidney failure. Amgen marketed epoetin alfa for approved uses under the brand name EPOGEN ("Epogen"), and licensed patents to Johnson & Johnson ("J & J") to develop additional marketable uses. J & J obtained FDA approval between 1991 and 1996 to market epoetin alfa under the brand name PROCRIT ("Procrit") for anemia associated with chemotherapy and HIV therapies, for chronic kidney diseases, and for pre-surgery support of anemic patients. J & J had exclusive marketing rights for Procrit under its licensing agreement with Amgen.

Sometime before 2001, Amgen developed a new ESA, darbepoetin alfa, whose sales by Amgen were not restricted by J & J's exclusive marketing rights for Procrit. Darbepoetin alfa, marketed as Aranesp, lasts longer in the bloodstream than epoetin alfa. The FDA approved Aranesp for treatment of anemia associated with chronic kidney failure and cancer chemotherapy. Aranesp has taken significant market share from J & J's Procrit. At the time the complaint was filed, Aranesp "control[led] half the market" for non-dialysis ESA. Sales of EPOGEN and Aranesp have been "core to [Amgen's] survival and success," making up roughly half of Amgen's $14.3 billion in revenue in 2006.

In the late 1990s and early 2000s, several clinical trials raised safety concerns regarding the use of ESAs for particular anemic populations. In 1998, the Normal Hematocrit Study tested the efficacy of ESAs on anemia patients with pre-existing heart disease. The study

was terminated because the test group experienced statistically significant higher rates of blood clotting. In 2003 and early 2004, two trials—ENHANCE and BEST—tested ESAs on cancer patients in Europe. The ENHANCE trial showed shorter progression-free survival and shorter overall survival of head and neck cancer patients for the ESA group than the placebo group. The BEST trial was terminated after four months because breast cancer patients in the group taking epoetin alfa had a higher rate of death than those in the placebo group.

ENHANCE and BEST did not test the safety of ESAs for the specific uses and doses for which they had been approved in the United States. In March 2004, the FDA published notice in the Federal Register that the Oncology Drug Advisory Committee ("ODAC"), an FDA-sponsored group of oncology experts, would convene in May 2004 to discuss safety concerns about Aranesp. In April, before the ODAC meeting, an Amgen spokesperson stated during a conference call with investors, analysts, and plan participants that "the focus [of the ODAC meeting] was not on Aranesp" and that "the safety for Aranesp has been comparable to placebo."

***3** During its two-day meeting with ODAC, the FDA urged Amgen to conduct further clinical trials to test the safety of ESAs for uses that had already been approved by the FDA. Amgen made a presentation at the meeting outlining what it called the "Amgen Pharmacovigilance Program," consisting of five ongoing or planned clinical trials testing Aranesp "in different tumor treatment settings." Amgen's Vice President for Oncology Clinical Development described the Amgen program as the "responsible and credible approach to

definitively resolv[e] the questions raise[d]" by the FDA.

One of the trials under Amgen's program was the Danish Head and Neck Cancer Group (DAHANCA) 10 Trial. The DAHANCA 10 Trial tested whether high doses of Aranesp could help shrink tumors in patients receiving radiation therapy for head and neck cancer. On October 18, 2006, DAHANCA investigators temporarily halted the study "due to information about potential unexpected negative effects." Amgen was informed of the temporary halt of the study on or near that day. Amgen did not disclose that the DAHANCA 10 Trial had been temporarily halted.

An analysis of the halted DAHANCA 10 Trial was completed on November 28, 2006. The principal investigator reported that "[b]ased on these outcome results the DAHANCA group concluded that the likelihood of a reverse outcome, i.e. that Aranesp would be significantly better that in control[,] was almost nonexisting." The DAHANCA 10 Trial was permanently terminated on December 1, 2006. DAHANCA investigators concluded that "there is a small but significant poor outcome in the patients treated with Aranesp" in that tumor growth was worse for patients who took Aranesp compared to patients who did not. Amgen was informed in December 2006 that the study had been permanently terminated.

Another clinical trial, CHOIR, raised additional safety concerns about ESAs. The CHOIR trial investigated the safety of epoetin alfa (EPOGEN) when used to treat chronic kidney disease patients. The safety monitoring board for CHOIR terminated the trial when a higher incidence of death and cardiovascular hospitalization was observed among epoetin alfa users. Yet an-

other clinical trial, CREATE, tested the benefit provided by Roche Pharmaceuticals's ESA in raising hemoglobin levels in patients with chronic kidney disease. On November 16, 2006, Roche announced that the results of the CREATE trial "clearly show that there is no additional cardiovascular benefit from treating to higher hemoglobin levels in this patient group."

On November 20, Amgen posted a public statement responding to the CHOIR and CREATE trials. Amgen wrote, "A very substantial body of evidence, developed over the past 17 years, demonstrates that anemia associated with chronic kidney disease can be treated safely and effectively with EPOGEN and Aranesp when administered according to the Food and Drug Administration (FDA)-approved dosing guidelines." Two weeks later, Amgen issued a press release to correct "what the company believes are misleading and inaccurate news reports regarding the use of its drugs." Amgen reiterated, "EPOGEN and Aranesp are effective and safe medicines when administered according to the Food and Drug Administration (FDA) label."

***4** Amgen also conducted its own clinical trial, the "103 Study." 103 Study tested Aranesp in 939 patients with anemia secondary to cancer. The FDA later described the 103 Study as "demonstrat[ing] significantly shorter survival rate[s] in cancer patients receiving ESAs as compared to th[o]se receiving transfusion support." However, during a January 2007 conference call, an Amgen representative described the 103 Study as not demonstrating a "statistically significant adverse [e]ffect of Aranesp on overall mortality in this patient population." He said that "the risk benefit ratio for Aranesp in these extremely ill patients with anemia secondary to malignancy is, at best, neutral and perhaps negative." During what may have been the same

conference call, discussing Amgen's fourth-quarter earnings on January 25, an Amgen representative stated, in response to concerns expressed about the 103 Study, that "we have a well established risk benefit profile."

During a February 16, 2007, investor conference call, defendant Kevin Sharer, Amgen's President, Chief Executive Officer, and Chairman of the Board, stated, "We strongly believe, as we have consistently stated, that Aranesp and EPOGEN are safe and effective medicines when used in accordance with label indications." During a March conference call, defendant Sharer reiterated, "When we look at the totality of data, we believe our products are safe and effective when used on-label." On March 9, 2007, Amgen posted a statement on the company website available to plan participants under the title "Amgen's Statement on the Safety of Aranesp (darbepoetin alfa) and EPOGEN (Epoetin alfa)":

> Aranesp (darbepoetin alfa) and EPOGEN (Epoetin alfa) have favorable risk/benefit profiles in approximately four million patients with chemotherapy-induced anemia or CKD when administered according to the FDA-approved dosing guidelines.

Amgen engaged in extensive marketing, encouraging both on- and off-label uses of its ESAs. Amgen trained its sales representatives to ask questions that steered doctors to discussions about off-label uses. In an Amgen sales personnel manual, Amgen gave an "expanded list" of "excellent questions" to ask doctors in order to move the discussions toward off-label uses. Examples include, "What is keeping you from using Aranesp in all your MDS/HIV/CIA patients?" MDS is

myelodysplastic syndrome, an illness often resulting in anemia. The FDA has never approved Aranesp to treat MDS or HIV patients.

Amgen created a speakers program in which Amgen paid for dinners at which "expert" speakers talked to physicians and other providers about off-label uses for Aranesp. Speakers program events were not accredited as continuing medical education seminars conducted by an independent medical association. Amgen paid not only the speakers but also the doctors and other medical providers who attended the events. The $1,000 payments to physician attendees were "paid from [Amgen's] marketing budget."

***5** Amgen educated medical providers about the profit they could obtain by prescribing its ESAs. Before January 1, 2005, Medicare calculated drug reimbursement rates based on the average wholesale price ("AWP") of drugs. Medical providers could purchase Amgen's ESAs at a price lower than the AWP, but could charge Medicare the AWP. Amgen created spreadsheets and other tools to help providers calculate the profit. Amgen also encouraged doctors to use its ESAs inefficiently. For example, it encouraged doctors to deliver Epogen intravenously rather than subcutaneously, because an intravenous delivery of the drug requires a substantially larger dose to achieve the same effect.

Amgen marketing efforts were successful. For example, Amgen's worldwide sales of Aranesp increased fourteen percent during the first quarter of 2007 compared to the same quarter in 2006. Amgen told investors on several occasions that its marketing practices were proper. In public SEC filings, Amgen stated that it marketed its products only for on-label uses. In De-

cember 2006, in response to negative publicity about off-label uses, Amgen issued a press release "intended to clarify Amgen's position on the use of EPOGEN and Aranesp and to correct what the company believes are misleading and inaccurate news reports regarding the use of its drugs." The company clarified that "Amgen only promotes the use of EPOGEN and Aranesp consistent with the FDA label." On a January 2007 conference call, Amgen stated that "our promotion [of EPOGEN] has always been strictly according to our label, we do not anticipate a major shift in clinical practice."

In February 2007, *The Cancer Letter* published an article entitled "Amgen Didn't Tell Wall Street About Results of [DAHANCA] Study." The article reported that the DAHANCA trial had been temporarily halted due to the "significantly inferior therapeutic outcome from adding Aranesp to radiation treatment of patients with head and neck cancer." On February 23, the Associated Press announced that the USP DI, an influential drug reference guide, had delisted Aransep as a treatment for anemia in cancer patients not undergoing chemotherapy. On February 27, the *New York Times* published an article stating:

> New studies are raising questions about whether drugs that have been used by millions of cancer patients might actually be harming them. The drugs, sold by Amgen, Roche, and Johnson & Johnson, are used to treat anemia caused by chemotherapy and meant to reduce the need for blood transfusions and give patients more energy. But the new results suggest that the drugs may make the cancer itself worse.... [S]ome cancer specialists and securities analysts say the new information may

> make doctors more cautious in using the drugs, which have combined sales for the three companies exceeding $11 billion and have been heavily promoted through efforts that include television commercials.

On March 9, the FDA mandated a "black box" warning for off-label use of Aranesp and Epogen. A black box warning is the strongest warning the FDA can require. *Cf.* 21 C.F.R. § 201.57(c)(1) (2012). The black box warning read:

> ***6** Recently completed studies describe an increased risk of death, blood clots, strokes, and heart attacks in patients with kidney failure where ESAs were given at higher than recommended doses. In other studies, more rapid tumor growth occurred in patients with head and neck cancer who received these higher doses. In studies where ESAs were given at recommended doses, an increased risk of death was reported in patients with cancer who were not receiving chemotherapy and an increased risk of blood clots was observed in patients following orthopedic surgery.

On March 21, 2007, two House of Representatives subcommittees opened an investigation into the safety profile of Aranesp and Epogen as well as into Amgen's off-label marketing practices. The Chairs of those two subcommittees "ordered" Amgen to halt direct-to-consumer advertising and physician incentives pending further FDA action. On May 8, the FDA noted on its website that Aranesp and Epogen "were clearly demonstrated to be unacceptable" in high doses. On May 10, ODAC reconvened and voted to restrict the

use of ESAs, to expand existing warnings, and to require ESA manufacturers to conduct further studies.

Defendant Sharer, Amgen's President and CEO, told a Wall Street Journal reporter in an interview that 2007 was the "most difficult [year] in [Amgen's] history." According to Sharer, there was an "unexpected $800 million to $1 billion hit to operating income due to safety concerns" about Aranesp. Sales of Aranesp decreased by fifty percent.

Amgen stock, and thus the Amgen Common Stock Fund, lost significant value as a result of these safety concerns. The class period runs from May 4, 2005, to March 9, 2007. Amgen common stock was at its high of $86.17 on September 19, 2005. On February 16, 2007, when *The Cancer Letter* published its article revealing that Amgen had not been forthcoming about the result of the DAHANCA 10 Trial, Amgen stock sold for $66.73. When ODAC voted to restrict the use of ESA drugs, on or shortly after May 10, the price of Amgen stock dropped to $57.33, the class period low. Between September 19, 2005 and the ODAC vote, the price of Amgen stock dropped $28.83, or thirty-three percent.

On August 20, 2007, plaintiffs Steve Harris, a participant in the Amgen Plan, and Dennis Ramos, a participant in the AML Plan, filed a complaint alleging that defendants breached their fiduciary duties under ERISA. The district court dismissed Harris's claims for lack of standing, on the ground that Harris no longer owned assets in the Amgen Plan on the date he filed his complaint. *Harris v. Amgen, Inc.*, 573 F.3d 728, 731 (9th Cir. 2009). The court dismissed Ramos's claims without leave to amend on the ground that he had failed to identify the proper fiduciaries of the AML Plan. *Id.* We reversed, holding that Harris had stand-

ing as a "participant" of the Amgen Plan during the Class Period, and that Ramos should have been allowed to amend the complaint. *Id.*

***7** The complaint now at issue is the First Amended Class Action Consolidated Complaint ("FAC"), filed on March 23, 2010, by five plaintiffs, including Harris and Ramos. The FAC alleges six counts of violation of fiduciary duty under ERISA against Amgen, AML, nine Directors of the Amgen Board ("the Directors"), and the Plans' Fiduciary Committees and their members. The district court dismissed the FAC against Amgen on the ground that it was not a fiduciary. It dismissed the FAC against the remaining defendants under Rule 12(b)(6) for failure to state a claim.

In a separate class action simultaneously pending before the same district judge, investors in Amgen common stock claimed violations of federal securities laws based on the same alleged facts as in the ERISA action now before us. In a careful thirty-five page order, the district court concluded that the investors had sufficiently alleged material misrepresentations and omissions, scienter, reliance, and resulting economic loss to state claims under Sections 10(b) and 20(a) of the 1934 Exchange Act. *See* 15 U.S.C. §§ 78j(b), 78t(a). The district court certified a class based on the facts alleged in the complaint. We affirmed the district court's class certification in *Conn. Ret. Plans & Trust Funds v. Amgen, Inc.*, 660 F.3d 1170 (9th Cir. 2011). The Supreme Court affirmed in *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, — U.S. —, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013).

For the reasons that follow, we reverse the district court's decision in the ERISA case before us.

II. Standard of Review

"We review *de novo* the district court's grant of a motion to dismiss under Rule 12(b)(6), accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party." *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012). "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc.*, 551 U.S. at 322, 127 S. Ct. 2499. We then determine whether the allegations in the complaint and information from other permissible sources "plausibly suggest an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 681, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (quoting *Iqbal*).

III. Discussion

Congress enacted ERISA to provide "minimum standards ... assuring the equitable character of [employee benefit] plans and their financial soundness." 29 U.S.C. § 1001(a). These minimum standards regulate the "conduct, responsibility, and obligation for fiduciaries of employee benefit plans...." *Id.* § 1001(b). "Congress painted with a broad brush, expecting the federal courts to develop a 'federal common law of rights and obligations' interpreting ERISA's fiduciary standards." *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042, 1047 (9th Cir. 2000) (en banc) (citation omitted).

***8** The Supreme Court has established certain interpretive rules specific to ERISA's fiduciary duties. These duties, including those governing fiduciary status, "draw much of their content from the common law

of trusts, the law that governed most benefit plans before ERISA's enactment." *Varity Corp. v. Howe*, 516 U.S. 489, 496, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996). ERISA reflects a "congressional determination that the common law of trusts did not offer completely satisfactory protection." *Id.* at 497, 116 S. Ct. 1065. The law of trusts "often ... inform[s]" but does "not necessarily determine the outcome of" an interpretation of ERISA's fiduciary duties. *Id.* The common law of trusts offers "only a starting point" that must yield to the "language of the statute, its structure, or its purposes," if necessary. *Id.*

We first address the sufficiency of the FAC against each properly named fiduciary. We then address whether the plaintiffs have adequately alleged that Amgen is a fiduciary.

A. Sufficiency of the FAC

The district court dismissed all six counts of the FAC under Rule 12(b)(6). Plaintiffs have appealed only the dismissal of Counts II through VI.

1. Count II

Plaintiffs allege in Count II that defendants acted imprudently, and thereby violated their duty of care under 29 U.S.C. § 1104(a)(1)(B), by continuing to provide Amgen common stock as an investment alternative when they knew or should have known that the stock was being sold at an artificially inflated price. Defendants contend that they are entitled to a "presumption of prudence" under *Quan v. Computer Sci. Corp.*, 623 F.3d 870 (9th Cir. 2010). They contend that if this presumption is applied, their action in continuing to provide Amgen stock as an investment alternative was prudent. Defendants contend, further, that their

action was prudent even if the presumption of prudence does not apply.

a. Presumption of Prudence

In *Quan*, we agreed with several of our sister circuits that the "presumption of prudence" applies to certain investment decisions by ERISA fiduciaries. *See* 623 F.3d at 880-81 (citing *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995)); *see also In re Citigroup ERISA Litig.*, 662 F.3d 128, 138 (2d Cir. 2011); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 254 (5th Cir. 2008); *Kuper v. Iovenko*, 66 F.3d 1447, 1457 (6th Cir. 1995). The question presented in *Quan* was whether the prudent investor standard that is normally applicable to ERISA fiduciaries should apply to fiduciaries of plans that invest in stock of an employee's company.

The basic problem may be seen in the text of ERISA itself. In relevant part, it provides:

> (a) Prudent man standard of care
>
> (1) fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> ***9** (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so ...
>
> …

> (2) In the case of an eligible individual account plan ..., the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities....

29 U.S.C. § 1104. On the one hand, Congress desired to protect plan investments of employees. It therefore specified that the prudent man standard of care requires a fiduciary to diversify investments held by a plan. *See id.* § 1104(a)(1)(B) and (C). On the other hand, Congress desired to permit employers to provide loyalty incentives to their employees. It therefore specified that the prudent man diversification requirement is not violated when an employer's stock is acquired or held in an employee's individual account plan. *See id.* § 1104(2). However, Congress did not specify that anything other than a failure to diversify is exempt from the prudent man standard of care.

For reasons we explained in detail in *Quan*, we adopted the presumption of prudence, first articulated by the Third Circuit in *Moench*, to reconcile the tension between Congress' two desires. We held that a fiduciary is entitled to a presumption that he has been a prudent investor "when plan terms *require or encourage* the fiduciary to invest primarily in employer stock." *Quan*, 623 F.3d at 881 (emphasis added). We applied the *Moench* presumption of prudence to ERISA stock ownership plans, whether they are "eligible individual account plans" ("EIAPs") or "employee stock ownership plans" ("ESOPs"). *Id.*; *see also* 29 U.S.C. § 1107(d)(3)(A), (d)(6). We held that the terms of the plan at issue in *Quan* satisfied the "required or encouraged" criterion of *Moench* because the plaintiffs had not

shown "that the Committee had discretion to halt purchases of [the employer's] common stock or to invest Plan assets that were required to be invested in the [employer's] stock fund in other assets instead." 623 F.3d at 884.

The Amgen and AML Plans are EIAPs. The parties agree that the question before us is whether the Plans "required or encouraged" the fiduciaries to invest in Amgen stock. To answer that question, we look to the written terms of the Plans. Because the terms of the Plans differ in only immaterial respects, we quote only from the Amgen Plan.

Article 6.1 of the Amgen Plan provides:

> All contributions to the Plan made pursuant to Articles 4 and 5 shall be paid to the Trust fund established under the Plan. All such contributions shall be invested as provided under the terms of the Trust Agreement, which *may* include provision for the separation of assets into separate Investment Funds, including a Company Stock Fund.

***10** (emphasis added). The Summary Plan Description specifies twenty-five separate "Investment Funds" in which participants can invest their money. The twenty-fourth fund on the list is a "Company Stock Fund," referred to in the Plan Description as the "Amgen Common Stock Fund." The Amgen Common Stock Fund holds only Amgen common stock. Article 6.2 of the Plan provides that plan participants may invest no more than fifty percent of their funds in the Company Stock Fund. If a plan participant fails to designate a fund, the default is an investment in "the Fidelity Freedom Fund that is appropriate based on the Participant's date of birth."

There is no language in the Plans requiring that a Company Stock Fund be established as an available investment for plan participants. *Cf.* Restatement (Second) of Trusts, § 227 cmt. t ("If [a trustee] is merely authorized to make certain investments, he has a privilege but not a duty to make such investments."). Nor is there language in the Plans requiring that a Company Stock Fund, once established, be continued as an available investment. Defendants therefore do not contend that the Plans require them to provide a Company Stock Fund as an investment alternative. They contend only that the Plans encourage them to do so. If defendants are right that the terms of the Plans encourage them to invest in a Company Stock Fund, they are entitled under *Quan* to a presumption of prudence.

Defendants make four arguments. None is persuasive. First, defendants point out that the Plans specifically refer to a Company Stock Fund as a permissible investment, but specifically refer to no other company's stock. Defendants are correct in their description of the Plans. But an explicit statement that plan fiduciaries *may* offer a Company Stock Fund as an investment to participants does not tell us that they were encouraged to do so within the meaning of the presumption of prudence. Under the common law of trusts, "[a]n authorization by the terms of the trust to invest in a particular type of security does not mean that any investment in securities of that type is proper. The trustee must use care and skill and caution in making the selection." Restatement (Second) of Trusts, § 227 cmt. v. We agree with the Second Circuit, which recently concluded that almost identical plan language does not give rise to the presumption of prudence. In *Taveras v. UBS AG*, 708 F.3d 436 (2d Cir. 2013), the court wrote:

> [I]t is likely that many EIAPs will, when possible, provide their fiduciaries a discretionary means by which to offer plan participants the ability to invest in the employer's stock. If the presumption of prudence was triggered in every instance where the EIAP plan document, as here, simply (1) named and defined the employer's stock in the plan document's terms, and (2) allowed for the employer's stock to be offered by the plan's fiduciaries on a discretionary basis to plan participants, then we are hard pressed to imagine that there exists *any* EIAP that merely offered the option to participants to invest in their employer's stock whose fiduciaries would not be entitled to the presumption of prudence.

***11** *Id.* at 445 (emphasis in original).

Second, defendants point out that the Plans contain provisions regulating the purchase, transfer, and distribution of Amgen stock, as well as providing voting rights to plan participants holding such stock. Here, too, defendants are correct in their description of the Plans, but incorrect in the conclusion they draw. Some of the provisions to which defendants point discourage rather than encourage investment in Amgen stock. For example, a participant's holding in the Amgen Common Stock Fund may not exceed fifty percent of a participant's total holdings. Holdings in other funds are not subject to any maximum percentage. Plans also restrict the frequency and timing of the sale of Amgen stock in order to comply with Section 16(b) of the Securities Exchange Act of 1934. The remaining provisions on which Amgen relies are simply irrelevant to the issue before us.

Third, defendants state in their brief that the record "clearly indicates that it was the company's 'longstanding practice and intent that the inclusion of Amgen Inc. common stock is part of the Plan design.'" The language quoted by defendants comes from a summary description of an amendment to the AML Plan that took effect in 2008, after this lawsuit was filed. Defendants do not quote in their brief the actual language of the amendment which they contend "clearly indicates" the "longstanding practice and intent" of the Plans. The language of the 2008 amendment is:

> The Company Stock Fund *will be* an Investment Fund under the Plan. The Fiduciary Committee shall designate other Investment Funds from time to time for investment of Participant's Accounts, provided that the Fiduciary Committee *may not eliminate the Company's Stock Fund as an Investment Fund.*

(emphasis added). As we noted above, the earlier language (in effect during the class period) provides only that a Company Stock Fund "may" be included as an available investment. The language in the 2008 amendment provides that a Company Stock Fund "will be" an available investment, and further specifies that this Fund "may not [be] eliminate[d]." This new language hardly reflects a "longstanding practice and intent."

Fourth, defendants contend that the Plans would have to have been amended in order to make Amgen stock unavailable to plan participants. We see nothing in the Plans to support defendants' contention.

We conclude that defendants were neither required nor encouraged by the terms of the Plans to invest in Amgen stock, and that they are not entitled to a pre-

sumption of prudence. The normal prudent man standard therefore applies to defendants' investment decisions as fiduciaries under the Plans.

b. Prudent Man Standard of Care

ERISA requires that a fiduciary perform duties under a plan "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). This standard governs a fiduciary's decision to allow investment of plan assets in employer stock. *Quan*, 623 F.3d at 878-79. "This is true, even though the duty of prudence may be in tension with Congress's expressed preference for plan investment in the employer's stock." *Id.* at 879 (internal quotation marks omitted). A "myriad of circumstances" surrounding investments in company stock could support a violation of the prudence requirement. *In re Syncor*, 516 F.3d at 1102. "'A court's task in evaluating a fiduciary's compliance with this standard is to inquire whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment.'" *Quan*, 623 F.3d at 879 (quoting *Wright*, 360 F.3d at 1097) (alterations and quotation marks omitted).

***12** In *Syncor*, we held that "[a] violation [of the prudent man standard] may occur where a company's stock ... was artificially inflated during that time by an illegal scheme in which the fiduciaries knew or should have known, and then suddenly declined when the scheme was exposed." *In re Syncor*, 516 F.3d at 1102. In *Syncor*, the company was a fiduciary that knowingly

made cash bribes to doctors in Taiwan in violation of the Foreign Corrupt Practices Act. Upon disclosure of these illegal payments, Syncor's stock price lost nearly half its value. "Despite these illegal practices, the [fiduciaries] allowed the Plan to hold and acquire Syncor stock when they knew or had reason to know of Syncor's foreign bribery scheme." *Id.* at 1098. We held on appeal from summary judgment that "there is a genuine issue whether the fiduciaries breached the prudent man standard by knowing of, and/or participating in, the illegal scheme while continuing to hold and purchase artificially inflated Syncor stock for the ERISA Plan." *Id.* at 1103.

Count II alleges that defendants knew or should have known about material omissions and misrepresentations, as well as illegal off-label sales, that artificially inflated the price of the stock while, at the same time, they continued to offer the Amgen Common Stock Fund as an investment alternative to plan participants. The district court held that, even without the assistance of the presumption of prudence, defendants were entitled to dismissal of Count II under Rule 12(b)(6).

Defendants make five arguments in favor of dismissal. Again, none is persuasive. First, defendants contend that investments in Amgen stock during the class period were not imprudent "because Amgen was not even remotely experiencing severe financial difficulties during that time, and remains a strong, viable, and profitable company today." This argument is beside the point. Amgen was not "experiencing severe financial difficulties" during the relevant time period in part because of the very actions about which plaintiffs are now complaining, that were producing large but unsustainable profits. Further, Amgen may now be a "strong, viable, and profitable company," but that does

not mean that the price of Amgen stock was not artificially inflated during the class period.

Second, defendants contend that the decline in price in Amgen stock was insufficient to show an imprudent investment by the fiduciaries. They write, "[A]s the District Court correctly held, this 'relatively modest and gradual decline in the stock price' does not render the investment imprudent." As an initial matter, we note that the proper question is not whether the investment results were unfavorable, but whether the fiduciary used "'appropriate methods'" to investigate the merits of the transaction. *Quan*, 623 F.3d at 879 (quoting *Wright*, 360 F.3d at 1097); *see also Kirschbaum*, 526 F.3d at 254 (explaining that the "test of prudence is one of conduct, not results"); *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7 (1st Cir. 2009) (same). But defendants' argument fails even on its own terms. Their argument is foreclosed by the district court's decision in the federal securities class action against Amgen based on the same alleged sequence of events. *See Conn. Ret. Plans & Trust Funds v. Amgen, Inc.*, 660 F.3d 1170 (9th Cir. 2011), *aff'd Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, — U.S. —, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013). If the alleged misrepresentations and omissions, scienter, and resulting decline in share price in *Connecticut Retirement Plans* were sufficient to state a claim that defendants violated their duties under Section 10(b), the alleged misrepresentations and omissions, scienter, and resulting decline in share price in this case are sufficient to state a claim that defendants violated their more stringent duty of care under ERISA.

***13** Third, quoting *Kirschbaum*, 526 F.3d at 253, 256, defendants contend that

> [w]hen, like here, retirement plans are at issue, courts must be mindful of "the longterm horizon of retirement investing, as well as the favored status Congress has granted to employee stock investments in their own companies." ... [H]olding fiduciaries liable for continuing to offer the option to invest in declining stock would place them in an "untenable position of having to predict the future of the company stock's performance. In such a case, [a fiduciary] could be sued for not selling if he adhered to the plan, but also sued for deviating from the plan if the stock rebounded."

Defendants' reliance on *Kirschbaum* is misplaced. The court wrote in that case, "The Plan documents, considered as a whole, compel that the Common Stock Fund be available as an investment option for employee-participants." *Kirschbaum*, 526 F.3d at 249. The concerns expressed in *Kirschbaum* have little bearing on the case before us. Here, unlike in *Kirschbaum*, the fiduciaries of the Amgen and AML Plans were under no such compulsion. They knew or should have known that the Amgen Common Stock Fund was purchasing stock at an artificially inflated price due to material misrepresentations and omissions by company officers, as well as by illegal off-label marketing, but they nevertheless continued to allow plan participants to invest in the Fund.

Fourth, quoting *In re Computer Sciences Corp., ERISA Litig.*, 635 F. Supp. 2d 1128, 1136 (C.D. Cal. 2009), *aff'd* 623 F.3d 870 (9th Cir. 2010), defendants contend that if the Amgen Fund had been "remove[d] ... as an investment option," this action "may have brought about 'precisely the result [P]laintiffs seek to avoid: a drop in the stock price.'" It is unclear how much the

price of Amgen stock would have declined if the Amgen Common Stock Fund had been removed as an investment option during the period when the price was artificially inflated. Removing the Fund as an investment option would not have meant liquidation of the Fund. It would have meant only that while the share price was artificially inflated, plan participants would not have been allowed to invest additional money, and that the Fund would therefore not have purchased additional shares at the inflated price. Given the relatively small number of Amgen shares that would not have been purchased by the Fund in comparison to the enormous number of actively traded shares, it is extremely unlikely that this decrease in the number of shares purchased, considered alone, would have had an appreciable negative impact on the share price.

It is true that removing the Amgen Common Stock Fund as an investment option would have sent a negative signal to the wider investing public, and that such a signal may well have caused a drop in the share price. But several factors mitigate this effect. The efficient market hypothesis ordinarily applied in stock fraud cases suggests that the ultimate decline in price would have been no more than the amount by which the price was artificially inflated. Further, once the Fund was removed as an investment option, employees would have been prevented from making additional investments in the Fund while the price remained artificially inflated. Finally, the fiduciaries' obligation to remove the Fund as an investment option was triggered as soon as they knew or should have known that the share price was artificially inflated. That is, defendants violated their fiduciary duties under ERISA at more or less the same time some of them violated their duties under the federal securities laws. If the defendants had

timely complied with their duties under ERISA, there would have been little or no artificial increase in the share price before the Fund was removed as an investment option. In the actual event, however, defendants continued to authorize the Fund as an investment option for a considerable time after they knew or should have known that the share price was artificially inflated.

***14** Fifth, defendants argue that "they could not have removed the Amgen Stock Fund based on undisclosed alleged adverse material information—a potentially *illegal* course of action." (emphasis in original). Defendants misunderstand the nature of their duties under federal law. As we noted in *Quan*, "[F]iduciaries are under no obligation to violate securities laws in order to satisfy their ERISA fiduciary duties." *Quan*, 623 F.3d at 882 n. 8. The central problem in this case is that Amgen officials, many of whom are defendants here, made material misrepresentations and omissions in violation of the federal securities laws. Compliance with ERISA would not have required defendants to violate those laws; indeed, compliance with ERISA would likely have resulted in compliance with the securities laws. If defendants had revealed material information in a timely fashion to the general public (including plan participants), thereby allowing informed plan participants to decide whether to invest in the Amgen Common Stock Fund, they would have simultaneously satisfied their duties under both the securities laws and ERISA. *See Cal. Ironworkers Field Pension Trust v. Loomis Sayles & Co.*, 259 F.3d 1036, 1045 (9th Cir. 2001) ("ERISA imposes upon fiduciaries a general duty to disclose facts material to investment issues."); *Acosta v. Pac. Enter.*, 950 F.2d 611, 619 (9th Cir. 1991) (holding that a fiduciary is affirmatively required to

"inform beneficiaries of circumstances that threaten the funding of benefits"). Alternatively, if defendants had made no disclosures but had simply not allowed additional investments in the Fund while the price of Amgen stock was artificially inflated, they would not thereby have violated the prohibition against insider trading, for there is no violation absent purchase or sale of stock.

We therefore conclude that plaintiffs have sufficiently alleged that defendants have violated the duty of care they owe as fiduciaries under ERISA.

2. Count III

Plaintiffs allege in Count III that defendants 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. Defendants contend that they have limited obligations under ERISA to disclose information to plan participants, and that their disclosure obligations do not extend to information that is material under the federal securities laws. Defendants contend, further, that plaintiffs have not alleged detrimental reliance by plan participants on defendants' omissions and misrepresentations. Finally, defendants contend that their omissions and misrepresentations, if any, were not made in their fiduciary capacity. For the reasons that follow, we disagree.

To some extent, the analysis for Count II overlaps with the analysis for Count III. We have already established that we must analyze defendants' duty of care without resort to the presumption of prudence under *Quan*. We have also established that there is no contradiction between defendants' duty under the federal

securities laws and ERISA. Indeed, properly understood, these laws are complementary and reinforcing.

***15** Defendants' first contention is that they owe no duty under ERISA to provide material information about Amgen stock to plan participants who must decide whether to invest in such stock. In other words, defendants contend that their fiduciary duties of loyalty and care to plan participants under ERISA, with respect to company stock, are less than the duty they owe to the general public under the securities laws. Defendants are wrong, as we made clear in *Quan*:

> We have recognized [that] ... "[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)]. "[T]he same duty applies to 'alleged material misrepresentations made by fiduciaries to participants regarding the risks attendant to fund investment.'" *Edgar* [*v. Avaya Inc.*, 503 F.3d 340, 350 (3d Cir. 2007)].

Quan, 623 F.3d at 886. We specifically endorsed the Third Circuit's definition of materiality in *Quan*. We wrote, "[A] misrepresentation is 'material' if there was a substantial likelihood that it would have misled a reasonable participant in making an adequately informed decision about whether to place or maintain monies in a particular fund." *Id.* (quoting *Edgar*, 503 F.3d at 350) (internal quotation marks omitted).

Defendants' second contention is that plaintiffs have failed to show that they relied on defendants' material omissions and misrepresentations. Defendants contend that plaintiffs must show that they actually re-

lied on the omissions and misrepresentations. It is well established under Section 10(b) that a defrauded investor need not show actual reliance on the particular omissions or representations of the defendant. Instead, as the Supreme Court explained in *Erica P. John Fund, Inc. v. Halliburton Co.*, — U.S. —, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011), the investor can rely on a rebuttable presumption of reliance based on the "fraud-on-the-market" theory:

> According to that theory, "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." [*Basic, Inc. v. Levinson*, 485 U.S. 224, 246, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988)]. Because the market "transmits information to the investor in the processed form of a market price," we can assume, the Court explained [in *Basic*], that an investor relies on public misstatements whenever he "buys or sells stock at the price set by the market." *Id.* [ ] at 244, 247, 108 S. Ct. 978.

Erica P. John Fund, 131 S. Ct. at 2185; *see also Conn. Ret. Plans & Trust*, 133 S. Ct. 1184 (2013). 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.

***16** Defendants' final contention is that statements made to the Securities and Exchange Commission in documents required by the federal securities laws were not made in a fiduciary capacity, and that these state-

ments therefore cannot be considered in an ERISA suit for breach of fiduciary duty. Although our circuit has not decided the issue, defendants might be correct if these documents had only been filed and distributed as required under the securities laws, for such acts would have been performed in a corporate capacity. *See Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1285 (11th Cir. 2012) ("When the defendants in this case filed the Form S–8s and created and distributed the stock prospectuses, they were acting in their corporate capacities and not in their capacity as ERISA fiduciaries."); *Kirschbaum*, 526 F.3d at 257 ("REI was discharging its corporate duties under the securities laws, and was not acting as an ERISA fiduciary."). However, defendants did more than merely file and distribute the documents as required by the securities laws. *See Varity Corp.*, 516 U.S. at 504, 116 S. Ct. 1065 (fiduciary may be "communicating with [plan participants] *both* in its capacity as employer *and* in its capacity as plan administrator") (emphasis in original).

As they were required to do under ERISA, defendants prepared and distributed summary plan descriptions ("SPDs") to Plan participants. *See* 29 U.S.C. § 1022(a) (requiring fiduciaries to provide a summary plan description). In the SPDs for both the Amgen and the AML Plans, defendants explicitly incorporated by reference Amgen's SEC filings, including "The Company's Annual Report on Form 10-K for the year ending December 31, 2006," and "The Company's Current Reports on Form 8-K filed on January 19, 2007, February 20, 2007, March 2, 2007, and March 12, 2007, respectively." Plaintiffs allege that the defendants knew or should have known that statements contained in these filings, incorporated by reference into the SPDs, were materially false and misleading.

We hold that defendants' preparation and distribution of the SPDs, including their incorporation of Amgen's SEC filings by reference, were acts performed in their fiduciary capacities. In so holding, we agree with the Sixth Circuit, which has held that such incorporation by reference is an act performed in a fiduciary capacity:

> Defendants exercised discretion in choosing to incorporate the [SEC] 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 under 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. To hold otherwise would authorize fiduciaries to convey misleading or patently untrue information through documents incorporated by reference, all while safely insulated from ERISA's governing reach. Such a result is inconsistent with the intent and stated purposes of ERISA ... and would create a loophole in ERISA large enough to devour all its protections.

***17** *Dudenhoefer v. Fifth Third Bancorp*, 692 F.3d 410, 423 (6th Cir. .2012) (internal citation omitted); *see also In re Citigroup ERISA Litigation*, 662 F.3d 128, 144-45 (2d Cir. 2011) (noting that SEC filings had been incorporated in the Plans' SPDs, but dismissing ERISA claim on the ground that plaintiffs had not sufficiently alleged that the defendant fiduciaries knew or should

have known that the filings contained false information); *Quan*, 623 F.3d at 886 (assuming, "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.") (citations omitted). The statements made in Amgen's SEC filings and incorporated in the Plans' SPDs may therefore be used under ERISA 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.

3. Counts IV and V

The district court correctly concluded that Counts IV and V are derivative of Counts II and III. Because we reverse the district court's dismissal of Counts II and III, we also reverse its dismissal of Counts IV and V. *See In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

4. Count VI

Count VI alleges that defendants caused the Plans directly or indirectly to sell or exchange property with a party-in-interest, in violation of 29 U.S.C. § 1106(a). Specifically, Count VI alleges that Amgen and AML are parties-in-interest that concealed material information in order to inflate the price of Amgen stock sold to the Plans. In relevant part, 29 U.S.C. § 1106(a)(1) provides,

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he

> knows or should know that such transaction constitutes a direct or indirect—
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest; ...
>
> (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan[.]

A party in interest includes "any fiduciary" of a plan or "an employer" of the plan beneficiaries. 29 U.S.C. § 1002(14).

Defendants did not argue in the district court that Count VI fails to state a prohibited transaction claim under § 1106(a)(1). Nor do they raise this argument on appeal. Instead, defendants argue that 29 U.S.C. § 1108(e) exempts the sale of employer stock from the restrictions of § 1106(a)(1).

Section 1108(e) specifies that § 1106 does not prohibit the purchase or sale of employer stock if, as relevant here, (1) the sale price was the "price ... prevailing on a national securities exchange"; (2) no commission is charged for the transaction, and (3) the plan is an EIAP. 29 U.S.C. §§ 1107(d)(5), (e)(1), 1108(e).

In *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996), we held that because § 1108(e) is an affirmative defense, a defendant has the burden to prove its applicability. We explained, "A fiduciary who engages in a self-dealing transaction pursuant to 29 U.S.C. § [1106(a)] has the burden of proving that he fulfilled his duties of care and loyalty and that the ESOP received adequate consideration [under § 1108(e)]." *Id.; see also Marshall v. Snyder*, 572 F.2d 894, 900 (2d Cir. 1978) ("The settled law is that in [prohibited self-dealing transactions] the burden of proof is always on the party to the self-dealing transaction to justify its

fairness [under a statutory exception].”). Citing *Howard*, the Eighth Circuit has held that a plaintiff need not plead in his complaint that a transaction was not exempt under § 1108(e). *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 600-01 (8th Cir. 2009); *see also Jones v. Bock*, 549 U.S. 199, 211-12, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007) (holding that a plaintiff need not plead the absence of an affirmative defense, even a defense like exhaustion of remedies, which is “mandatory”).

***18** Because the existence of an exemption under § 1108(e) is an affirmative defense, we can dismiss Count VI based on the § 1108(e) exemption only if the defense is “clearly indicated” and “appear[s] on the face of the pleading.” 5B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1357 (3d ed. 2004); *see also Jones*, 549 U.S. at 215, 127 S. Ct. 910 (citing Wright & Miller for rule that affirmative defense must appear on the face of the complaint). Here, we cannot say that the face of the complaint clearly indicates the availability of a § 1108(e) defense.

B. Amgen as Properly Pled Fiduciary

Amgen argues that it is not a fiduciary under the Plan because it has delegated its discretionary authority. “To be found liable under ERISA for breach of the duty of prudence and for participation in a breach of fiduciary duty, an individual or entity must be a ‘fiduciary.’” *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1101 (9th Cir. 2004). In defining a fiduciary, ERISA says,

> 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 au-

> thority or control respecting management or disposition of its assets ... or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). "We construe ERISA fiduciary status 'liberally, consistent with ERISA's policies and objectives.'" *Johnson v. Couturier*, 572 F.3d 1067, 1076 (9th Cir. 2009) (quoting *Ariz. State Carpenters Pension Trust Fund v. Citibank*, 125 F.3d 715, 720 (9th Cir. 1997)). Whether a defendant is a fiduciary is a question of law we review de novo. *See Varity Corp. v. Howe*, 516 U.S. 489, 498, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996).

Under ERISA, a "named fiduciary" is "a fiduciary who is named in the plan instrument." 29 U.S.C. § 1102(a)(2). The Amgen Plan provides that Amgen is "the 'named fiduciary,' 'administrator[,]' and 'plan sponsor' of the Plan (as such terms are used in ERISA)." ERISA grants a named fiduciary broad authority to "control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1). "Generally, if an ERISA plan expressly provides for a procedure allocating fiduciary responsibilities to persons other than named fiduciaries under the plan, the named fiduciary is not liable for an act or omission of such person in carrying out such responsibility." *Ariz. State Carpenters*, 125 F.3d at 719-20 (citing 29 U.S.C. § 1105(c)(2)).

Amgen argues that it delegated authority to trustees and investment managers. Section 15.1 of the Plan provides, "To the extent that the Plan requires an action under the Plan to be taken by the Company [Amgen], the party specified in this Section 15.1 shall be authorized to act on behalf of the Company." Section 15.1 says nothing about delegation to trustees and

investment managers. Rather, it explains that the Fiduciary Committee has the authority, on behalf of the Company, to "review the performance of the Investment Funds ... and make recommendations" and to "otherwise control and manage the Plan's assets." In the absence of a Fiduciary Committee, the Global Benefits Committee will perform these tasks. Section 14.2 of the Plan governs the relationship between Amgen ("the Company") and the trustees and managers. It provides:

> ***19** The Trustee shall have the exclusive authority and discretion to control and manage assets of the Plan it holds in trust, except to the extent that ... the Company directs how such assets shall be invested [or] the Company allocates the authority to manage such assets to one or more Investment Managers. Each Investment Manager shall have the exclusive authority to manage, including the authority to acquire and dispose of, the assets of the Plan assigned to it by the Company, except to the extent that the Plan prescribes or the Company directs how such assets shall be invested. Each Trustee and Investment Manager shall be solely responsible for diversifying, in accordance with Section 404(a)(1)(C) of ERISA, the investment of the assets of the Plan assigned to it by the Committee, except to the extent that the plan prescribes or the Committee directs how such assets shall be invested.

ERISA requires that a trustee hold plan assets in trust for plan participants. 29 U.S.C. § 1103(a). A trustee has "exclusive authority and discretion to manage and control the assets of the plan" subject to two exceptions. *Id.* The first exception is that a plan may

"expressly provide [ ] that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee." *Id.* §1103(a)(1). Under this exception, a named fiduciary with the power to direct trustees is a fiduciary with authority to manage plan assets. The second exception is that an "investment manager," duly licensed as an investment adviser under federal or state law, may also be appointed to manage plan assets in lieu of the trustee. *Id.* §§ 1002(38)(B), 1103(a)(2).

There is no question that Amgen appointed a trustee. However, nothing in the record indicates that Amgen appointed an investment manager. Neither ERISA nor the Plan requires that an investment manager be appointed. Even if Amgen had appointed an investment manager, the Plan makes clear that the trustee and any investment manager do not have complete control over investment decisions. *See* 29 U.S.C. § 1002(21)(A)(i) (defining a person with "*any* authority or control" over plan assets to be a fiduciary) (emphasis added); *cf. Gelardi v. Pertec Comp. Corp.*, 761 F.2d 1323, 1325 (9th Cir. 1985) (finding delegation where defendant "retained no discretionary control") (emphasis added), *overruled on other grounds in Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1207 (9th Cir. 2011).

Section 15.1 of the Plan, which authorizes the Fiduciary Committee to take action on behalf of Amgen, does not preclude fiduciary status for Amgen. In *Madden v. ITT Long Term Disability Plan for Salaried Empl.*, 914 F.2d 1279, 1284 (9th Cir. 1990), we held that the company had delegated authority to an administration committee where the plan provided that the Committee had "'responsibility for carrying out all phases of the administration of the Plan'" and had the "'exclusive right ... to interpret the Plan and to decide any and all

matters arising hereunder.'" (emphasis omitted). This language contains two features absent from the language in the Amgen Plan. First, it delegates responsibility for all phases of administering the plan, rather than responsibility "to the extent that the Plan requires an action ... to be taken by the Company." Second, and more important, it provides the Committee the exclusive right to make decisions under the plan. The Amgen Plan merely authorizes the Fiduciary Committee to act on behalf of Amgen. It neither provides exclusive authority to the Committee, nor precludes Amgen from acting on its own behalf.

***20** Other courts have found a company's grant of exclusive authority to a delegate and an express disclaimer of authority to be critical. In *Maher v. Massachusetts General Hospital Long Term Disability Plan*, 665 F.3d 289 (1st Cir. 2011), the First Circuit held that a hospital had delegated its fiduciary duties when the plan stated, "'The Hospital shall be fully protected in acting upon the advice of any such agent ... and shall not be liable for any act or omission of any such agent, the Hospital's only duty being to use reasonable care in the selection of any such agent." *Id.* at 292. In *Costantino v. Washington Post Multi-Option Benefits Plan*, 404 F.Supp.2d 31 (D.D.C. 2005), the district court for the District of Columbia found delegation when the plan granted the plan administrator "'sole and absolute discretion'" to carry out various Plan duties. *Id.* at 39 n. 8. Given that ERISA allows fiduciaries to have overlapping responsibilities under a plan, a clear grant of exclusive authority is necessary for proper delegation by a fiduciary. *See* 29 U.S.C. § 1102(a)(1) ("[O]ne or more named fiduciaries ... jointly or severally ... have authority to control and manage the operation and administration of the plan"); *see also* 1 ERISA Practice

and Litigation § 6:5 ("Those who wish to avoid liability exposure through allocation of plan responsibilities to others must therefore take pains to ensure that their documents fully authorize the contemplated delegation.").

Because the Plan contains no clear delegation of exclusive authority, we reverse the district court's dismissal of Amgen from the case as a non-fiduciary.

Conclusion

We conclude that defendants are not entitled to a presumption of prudence under *Quan*, that plaintiffs have stated claims under ERISA in Counts II through VI, and that Amgen is a properly named fiduciary under the Amgen Plan. We therefore reverse the decision of the district court and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Steve HARRIS, *et al.*

v.

AMGEN, INC., *et al.*

No. CV 07-5442 PSG (PLAx).
March 2, 2010

* * *

Proceedings: (In Chambers) Order Granting Defendants' Motion to Dismiss

The Honorable PHILIP S. GUTIERREZ, District Judge.

***1** Wendy K. Hernandez, Deputy Clerk.

Pending before the Court is Defendants' Motion to Dismiss. A hearing on the motion was held on February 11, 2010. After considering the moving and opposing papers and arguments presented at the hearing, the Court GRANTS Defendants' motion.

I. Background

On August 20, 2007, Plaintiffs Steve Harris ("Harris") and Dennis Ramos ("Ramos") filed a complaint against Amgen, Inc. ("Amgen") and other defendants under § 502(e)(1) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(e)(1). Harris and Ramos sought to represent a class of current and

former employees of Amgen and Amgen's subsidiaries who participated in the Amgen Retirement and Savings Plan ("the Amgen Plan") and the Retirement and Savings Plan for Amgen Manufacturing, Ltd. ("the AML Plan")[1] (collectively, "the Plans").

On February 1, 2008, the Court dismissed Harris' claims for lack of standing as a "plan participant" as well as the balance of the complaint for failure to name the proper plan fiduciaries. *See* Order Granting Defendants' Motion to Dismiss (Dkt.# 48). The Court denied Harris' and Ramos' request for leave to amend. *See id.* at 11. However, the Ninth Circuit reversed, holding that (1) subsequent case law conferred standing on individuals who have received the full distribution from a plan and (2) Harris and Ramos should be granted leave to amend "to challenge the proper defendants and to present any viable claim." *Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir. 2009).

On November 12, 2009, Plaintiffs Harris, Ramos, Jorge Torres, and Albert Cappa (collectively, "Plaintiffs") filed a Class Action Consolidated Complaint ("Complaint") against (1) Amgen and AML ("the Entity Defendants")[2], (2) members of the Amgen Board of Di-

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[1] Amgen Manufacturing, Ltd. ("AML") is a wholly-owned subsidiary of Amgen. *See Compl.* ¶ 25.

[2] The Court notes that Plaintiffs do not identify AML as a defendant on the caption page of the Complaint. *See* Fed. R. Civ. P. 10(a) (requiring that the title page of a complaint "name all the parties"). However, Plaintiffs do include AML in the discussion of the parties. *See Compl.* ¶ 25; *see also* Opp. (including AML on the cover sheet of Plaintiffs' Opposition). Thus, it is clear that Plaintiffs intended to assert claims against AML, and the Court will treat AML as a defendant in the action. *See Silvis v. Cal. Dept. of Corrs.*, No. 07-0332, 2009 WL 806870, at * 1 (E.D. Cal. Mar.26, 2009).

rectors ("the Director Defendants")[3], (3) Amgen officers ("the Individual Defendants")[4], (4) the Global Benefits Committee ("GBC") of the Amgen Plan, and (5) and the Fiduciary Committee (collectively, "Defendants").[5]

The Amgen Plan is an employee pension benefit plan for Amgen employees pursuant to §§ 3(2)(A) and 3(3) of ERISA, 29 U.S.C. §§ 1002(2)(A), (3), and is an eligible individual account plan ("EIAP") under § 407(d)(3)(A) of ERISA, 29 U.S.C. § 1107(d)(3) (A). *See Compl.* ¶¶ 71, 79. Similarly, the AML Plan is an employee pension benefit plan for AML employees pursuant to §§ 3(2)(A) and 3(3) of ERISA, 29 U.S.C. §§ 1002(2)(A), (3), and is also an EIAP. *See id.* ¶¶ 71, 84. The Plans permit plan participants to select from various investment options, including an option to invest in the Amgen Inc. Common Stock Fund. *See id.* ¶¶ 2, 76.

Plaintiffs allege that from May 4, 2005 to March 9, 2007 ("the Class Period"), Defendants concealed the negative results of clinical studies of the Amgen drug Aranesp®, including a study by the Danish Head and Neck Cancer Group ("DAHANCA"). *See id.* ¶¶ 110-147. During this time, Defendants also allegedly marketed Aranesp® and another Amgen drug, Epogen®,

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[3] The Director Defendants are Frank J. Biondi, Jerry D. Choate, Frank C. Herringer, Gilbert S. Omenn, David Baltimore, Judith C. Pelham, Kevin W. Sharer, Frederick W. Gluck, and Leonard D. Shaeffer.

[4] The Individual Defendants are Robert A. Bradway, Dennis M. Fenton, Richard Nanula, and Charles Bell.

[5] The Complaint alleges facts similar to those alleged in the original complaint and those alleged in a parallel securities class action (CV 07-2536 PSG).

for "off-label" uses that they allegedly knew were risky while at the same time they purported to market the drugs for uses consistent with the FDA label. *See id.* ¶¶ 148-175. Eventually, the negative results of the DAHANCA study were published in *The Cancer Letter* on February 16, 2007, *see id.* ¶ 179, and Amgen subsequently revealed that the Securities and Exchange Commission had opened an inquiry into the DAHANCA trial, *see id.* ¶ 237. Finally, on March 9, 2007, the FDA mandated a "black box" warning concerning the risks of "off label" uses of Aranesp® and Epogen®. *See id.* ¶ 238. As a result of the alleged misconduct, Amgen stock "lost a significant amount of its value." *Id.* ¶ 244-45.

***2** Plaintiffs claim that Defendants are liable for these losses as fiduciaries of the Plans. Defendants allegedly breached numerous fiduciary duties by permitting plan participants to continue investing in the Amgen Inc. Common Stock Fund when Defendants knew of the health risks associated with Aranesp® and marketed Aranesp® and Epogen® for "off label" uses. In the Complaint, Plaintiffs assert claims for (1) breach of the fiduciary duty of loyalty, (2) breach of the fiduciary duty of care, (3) breach of the fiduciary duty to provide complete and accurate information, (4) breach of the fiduciary duty to monitor, (5) co-fiduciary liability, and (6) "partyin-interest" liability. On December 16, 2009, Defendants filed a motion to dismiss for failure to state a claim under Rule 12(b)(6).

II. Legal Standard

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss a cause of action if the plaintiff fails to state a claim upon which relief can be granted. In evaluating the sufficiency of a

complaint under Rule 12(b)(6), courts must be mindful that the Federal Rules of Civil Procedure require that the complaint merely contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although detailed factual allegations are not required to survive a Rule 12(b)(6) motion to dismiss, a complaint "that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, --- U.S. ---, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

In resolving a Rule 12(b)(6) motion, the Court must engage in a two-step analysis. *See id.* at 1950. The Court must first accept as true all non-conclusory, factual allegations made in the complaint. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993). Based upon these allegations, the Court must draw all reasonable inferences in favor of the plaintiff. *See Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 949 (9th Cir. 2009). To further the inquiry, the Court may consider extrinsic documents that are either subject to judicial notice, or are referred to or necessarily relied upon in the complaint and where their authenticity has not been questioned. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."); *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of*

Santa Clara, 307 F.3d 1119 (9th Cir. 2002); *see also Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998), *superseded by statute on other grounds.*

***3** After accepting as true all non-conclusory allegations and drawing all reasonable inferences in favor of the plaintiff, the Court must then determine whether the complaint alleges a plausible claim to relief. *See Iqbal*, 129 S. Ct. at 1950. In determining whether the alleged facts cross the threshold from the possible to the plausible, the Court is required "to draw on its judicial experience and common sense." *Id.* "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.*

III. Discussion

Defendants move to dismiss the Complaint under Rule 12(b)(6) for failure to state a claim. On January 15, 2010, Plaintiffs filed a timely Opposition to the motion, and Defendants filed a timely Reply on January 29, 2010. The Court will (1) decide whether to grant Defendants' request for judicial notice, (2) determine whether Plaintiffs have identified the proper Defendants, and (3) address each count asserted in the Complaint.

A. The Court Considers Defendants' Exhibits

Defendants request that the Court take judicial notice of 15 exhibits attached to the Request for Judicial Notice. *See* RJN 1-2. Plaintiffs filed an objection to the request in its entirety on the grounds that all exhibits are not properly subject to judicial notice, contain inadmissible hearsay, and have not been authenticated. *See* Pls.' Obj. to Defs.' Request for Judicial Notice and

Mot. to Strike ("Obj."), at 1:12-14. Furthermore, Plaintiffs specifically object to Exhibits 1, 2, 3, 5, 6, 9, 11, 12, 13, and 15 on the grounds that these exhibits were not explicitly referenced in the Complaint. *See id.* at 1:8-12. In the Objection, Plaintiffs also include a Motion to Strike Unsupported Factual Allegations. *See id.* at 9:27-10:20.

Defendants counter that the Court has already taken judicial notice of Exhibits 1-11 (in the February 1, 2008 Order) and that the Court should simply take judicial notice of these documents again. *See* Response to Pls.' Obj. to Defs.' Request for Judicial Notice and Mot. to Strike ("Response") 1:16-4:2. Defendants also argue that the remaining Exhibits 12-15 are properly subject to judicial notice. In the Objection, Plaintiffs do not argue that the documents are inaccurate in any respect. For the reasons that follow, the Court overrules Plaintiffs' objections and considers Exhibits 1-15 when necessary.

1. The Court Has Taken Judicial Notice of Exhibits 1-3 and 10-11

In the Court's February 1, 2008 Order granting Defendants' motion to dismiss, the Court took judicial notice of Exhibits 1-4[6] and 10-11 because they were "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see* Dkt. # 48, at 3 (citing Fed. R. Evid. 201(b)). Plaintiffs did not object to the earlier request for judicial notice and, thus, waived any objections to the Court taking judicial notice of these

[6] Defendants concede that Exhibit 4 is not identical to the exhibit that the Court previously judicially noticed. *See* Response 3 n. 3. Thus, Plaintiffs did not waive objection to Exhibit 4.

exhibits. *See* Fed. R. Evid. 201(e) (allowing an opportunity to object to a request or taking of judicial notice upon a "timely request"); *see also* Response 2:20-27 (arguing that Plaintiffs' objections to Exhibits 1-11 constitute "a disguised motion for reconsideration of the Court's February [1], 2008 Order"). As Plaintiffs have waived objection, the Court takes judicial notice of Exhibits 1-3 and 10-11: the Aranesp® label from the FDA website (Ex. 1), the Epogen® label from the FDA website (Ex. 2), a LexisNexis report of Amgen's daily stock price between April 1, 2004 and October 31, 2007 (Ex. 3), *The Cancer Letter* (Ex. 10), and the September 28, 2007 analyst report by Bernstein Research (Ex. 11).

2. The Court Considers Exhibits 5-9 and 13-14 Under the Doctrine of Incorporation by Reference

***4** Defendants ask the Court to take judicial notice of Exhibits 5-9 and 13-14 ("the plan documents"). In the prior Order, the Court considered documents identical to Exhibits 5-9 because Plaintiffs relied upon the plan documents in the Complaint and did not question their authenticity. *See* Dkt. # 48, at 2-4. Defendants attempt to apply the waiver argument discussed above to these exhibits. *See* Response 1:17-18. However, the Court did not take judicial notice of the plan documents in the prior Order; rather, the Court considered the exhibits under the doctrine of incorporation by reference. *See* Dkt. # 48 (citing *Parrino*, 146 F.3d at 706). Therefore, although Plaintiffs did not object to Exhibits 5-9 during the Court's consideration of the prior motion to dismiss, Plaintiffs did not waive objection under Fed. R. Evid. 201(e).

In the prior Order, the Court considered Exhibits 5-9 because Plaintiffs did not question their authenticity. However, now facing a second motion to dismiss,

Plaintiffs claim that "Defendants fail to authenticate these documents by anyone with knowledge that they are indeed what they purport to be." Obj. 4:7-9. Plaintiffs also include the plan documents in their blanket hearsay and authentication objections. *See id.* 1:12-14 ("Plaintiffs also object to Exs. 1-15 on the grounds that they are not properly subject to judicial notice, contain inadmissible hearsay, have not been authenticated and their accuracy and reliability have not been established."). Despite Plaintiffs' objections, the plan documents are not hearsay because they are being offered to establish the terms of the Plans. *See Stuart v. UNUM Life Ins. Co. of Am.*, 217 F.3d 1145, 1154 (9th Cir. 2000) (finding that a contract constitutes a "verbal" act that is "excluded from the definition of hearsay and is admissible evidence because it is a legally operative document that defines the rights and liabilities of the parties"). Furthermore, the Court has sufficient information "to support a finding that [each plan document] is what its proponent claims." *See* Fed. R. Evid. 901(a). Defendants' counsel signed the RJN and attests that the "documents attached herein are true and correct copies." *See* RJN 1:7, 6:14. Indeed, at the hearing on the motion, Plaintiffs' counsel conceded that the plan documents are not inaccurate. Accordingly, the Court considers the plan documents under the doctrine of incorporation by reference.

3. The Court Takes Judicial Notice of Exhibits 4, 12, and 15

Pursuant to Fed. R. Evid. 201(b), the Court takes judicial notice of portions of Amgen's SEC Form 10-K filings (Ex. 4), a LexisNexis report of Amgen's daily stock price from January 2, 2008 to December 31, 2008 (Ex. 12), and BrightScope's 2009 Top 30 401k Plans List ("the BrightScope List") (Ex. 15). The Court takes ju-

dicial notice of Exhibit 4 (a slightly altered version of an exhibit judicially noticed in the prior motion) because the exhibit contains SEC filings. *See Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n. 2 (9th Cir. 2006) (noting that courts "may consider documents referred to in the complaint or any matter subject to judicial notice, *such as SEC filings*"). The Court also takes judicial notice of Exhibit 12—the report of Amgen's stock price during the Class Period—because this document is capable of ready determination. *See Plevy v. Haggerty*, 38 F. Supp. 2d 816, 821 (C.D. Cal. 1998) (noting that "the stock price of a publicly-traded company is proper subject matter for judicial notice"). Finally, the Court takes judicial notice of the BrightScope List (Ex. 15) because it is capable of ready determination by consulting BrightScope's website. For these reasons, the Court takes judicial notice of all the exhibits contained in the Request for Judicial Notice. Plaintiffs' motion to strike is DENIED insofar as the motion pertains to factual allegations substantiated by Exhibits 1-15.

B. Allegations of Defendants' Fiduciary Status

***5** Only fiduciaries can be held liable for breach of fiduciary duty under ERISA. *See Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1101 (9th Cir. 2004). In granting Defendants' prior motion to dismiss, the Court found that Harris and Ramos failed to allege that certain defendants were fiduciaries of the AML Plan. *See* Dkt. # 48, at 8-11. In the Ninth Circuit opinion reversing the dismissal, the court stated:

> Plaintiffs' remaining claims were dismissed because they misidentified the proper fiduciary defendants. Although Plaintiffs did not name the Fiduciary Committee as a defendant, they did name a Retirement Benefits Committee,

> which they thought served the same fiduciary functions. Also, Plaintiffs identified Amgen as the named fiduciary of the Manufacturing Plan, when in fact Amgen Manufacturing is the named fiduciary of that plan. In both cases, Plaintiffs would have sued the proper fiduciary but for a misidentification of the correct defendant, and their claims against Amgen Manufacturing and the Fiduciary Committee can be saved by amendment.

Harris, 573 F.3d at 737. Plaintiffs have returned with a new Complaint, asserting claims against new defendants whom Plaintiffs allege to be fiduciaries of the Plans. Again, Defendants argue that Plaintiffs have failed to sue the proper defendants and that, thus, the claims against Amgen, AML, the Director Defendants, and the Individual Defendants must be dismissed. *See* Mot. 25:20-21.

1. The Entity Defendants

A named fiduciary can delegate its fiduciary responsibilities to an administrator under ERISA and thereby limit liability for any subsequent breaches of fiduciary duties by the designee. *See* 29 U.S.C. § 1105(c); *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1325 (9th Cir. 1985) ("Although employees of [a corporate entity] serve on the Employee Benefits Committee and the Committee has a fiduciary responsibility in determining claims, this does not make the employer a fiduciary with respect to the Committee's acts. ERISA anticipates that employees will serve on fiduciary committees but the statute imposes liability on the employer *only when and to the extent that the employer himself exercises the fiduciary responsibility allegedly breached.*" (emphasis added)).

a. Amgen

Plaintiffs allege that Amgen is the "Plan Sponsor and Administrator and is a 'named fiduciary of the Plans.'" *See Compl.* ¶ 24. Defendants argue that Amgen delegated its fiduciary responsibilities under the Amgen Plan, as permitted under ERISA. *See* Mot. 24:20-23 (citing RJN, Ex. 5).[7] Under the Amgen Plan, Amgen is the "named fiduciary," but Amgen delegated its responsibilities to the GBC and the Fiduciary Committee. *See* RJN, Ex. 5, at 207 ("To the extent that the Plan requires an action under the Plan to be taken by the Company [Amgen], the party specified in this Section 15.1 shall be authorized to act on behalf of the Company."); *id.* at 208 (authorizing the GBC and the Fiduciary Committee to assume administrative responsibilities of the Plan). Thus, Amgen apparently delegated its fiduciary responsibilities under the Amgen Plan.

***6** Plaintiffs also argue in the Opposition that Amgen was a fiduciary of the Plans because its Board exercised authority over the Plans, and the actions of other fiduciaries can be imputed to Amgen under the doctrine of *respondeat superior*. *See* Opp. 7 n. 9. However, this argument is inconsistent with the core principle of ERISA that "employees will serve on fiduciary committees but [that] the statute imposes liability on the employer only when and to the extent that the em-

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[7] The Court notes that Defendants' general citations to the exhibits are unacceptable. The Amgen Plan alone is 52 pages long. *See* RJN, Ex. 5. The Court should not have to search through hundreds of pages of exhibits because, as other courts have observed, "[j]udges are not like pigs, hunting for truffles buried in briefs." *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (citation omitted).

ployer [itself] exercises the fiduciary responsibility allegedly breached." *See Gelardi*, 761 F.2d at 1325. Thus, Amgen cannot be held liable for breach of fiduciary duty under the doctrine of *respondeat superior*. *See Tool v. Nat. Employee Benefit Servs., Inc.*, 957 F. Supp. 1114, 1121 (N.D. Cal. 1996).

Additionally, Amgen is not apparently a fiduciary of the AML Plan. According to the AML Plan, only AML is designated as the "named fiduciary" of the AML Plan. *See* RJN, Ex. 7, at 312 (naming only the "Company" as the "named fiduciary" of the AML Plan); *id.* at 269 (defining the "Company" as "Amgen Manufacturing, Limited, a Bermuda corporation and any successor thereto"). Accordingly, the Court GRANTS Defendants' motion to dismiss as to Amgen without prejudice.

b. AML

Plaintiffs allege that AML was the "named fiduciary" of the AML Plan. *See* Compl. ¶ 25. Defendants cite Exhibit 7 (the AML Plan) to argue that AML delegated its fiduciary responsibilities "to trustees and investment managers, and their responsibilities as plan sponsors and named fiduciaries to the Fiduciary Committee." Mot. 24:20-23.[8] As discussed, AML is the "named fiduciary" of the AML Plan. *See* RJN, Ex. 7, at 312; *id.* at 269. The AML Plan further indicates that AML is a fiduciary "only to the extent of having the authority (a) to appoint one or more Trustees to hold assets of the Plan in trust ..., (b) to appoint one or more

[8] Defendants cite generally to Exhibit 7, a 50-page document. At the hearing, Defendants' counsel offered to provide the Court with a specific page reference. However, to date, Defendants' counsel has not provided the reference to the Court.

insurance companies ... to hold assets of the Plan ..., (c) to appoint one or more Investment Managers for any assets of the Plan ..., and (d) to direct the investment of any Plan assets not assigned ...." *Id.* at 310. It is not clear from the plan documents, however, that AML actually delegated its fiduciary responsibilities. Therefore, Plaintiffs' claims will not be dismissed as to AML on this ground.

2. The Director Defendants

Defendants argue that Plaintiffs fail to allege that the Director Defendants were fiduciaries of the Plans. *See* Mot. 24:27-25:5. Plaintiffs allege that the Director Defendants were *de facto* fiduciaries of the Plans because they "exercised discretionary authority with respect to: (i) the management and administration of the Plans; or (ii) the management and disposition of the Plans' assets." *See* Compl. ¶¶ 26-35. However, these allegations are legal conclusions that lack a sufficient factual basis. *See In re Calpine Corp. ERISA Litig.*, No. 03-1685, 2005 WL 1431506, at *3 (N.D. Cal. Mar.31, 2005) ("While plaintiff has mimicked the language of 29 U.S.C. § 1002(21)(A), he does not provide factual allegations in support of this conclusion sufficient to support a finding that the Director Defendants are *de facto* fiduciaries on this basis."); *see also Iqbal*, 129 S. Ct. at 1949. Though Plaintiffs add some factual allegations with respect to the Director Defendants' job duties, *see* Compl. ¶¶ 26-36 (noting that the Director Defendants approved an amendment to the Plans filed with the SEC), these allegations appear to pertain to their general corporate functions as opposed to any specific fiduciary responsibilities.

***7** Plaintiffs offer another argument with respect to the Amgen Plan. Plaintiffs allege that the Director De-

fendants committed an *ultra vires* act by directly appointing the Fiduciary Committee. According to Plaintiffs, the Director Defendants were obligated to appoint the GBC, which was in turn required to appoint the members of the Fiduciary Committee. *See* Opp. 8:6-83. Plaintiffs claim that in directly appointing the members of the Fiduciary Committee, the Director Defendants committed an *ultra vires* act, thereby exposing them to individual liability for breach of fiduciary duty under ERISA. *See* Opp. 8:10-14; *see also* Compl. ¶¶ 42-44. The Court, however, is not persuaded by this argument. In the Complaint, Plaintiffs offer contradictory allegations about whether the GBC was ever constituted. *Compare* Compl. ¶ 42 (alleging that the GBC "was a committee appointed by the Amgen Board of Directors or one of its duly appointed delegates"), *with id.* ¶ 87 (alleging that the Amgen Board of Directors directly appointed the Fiduciary Committee to oversee the operation of the Plans).[9] Moreover, Plaintiffs provide no authority supporting their contention that the alleged *ultra vires* act subjects the Director Defendants

[9] Plaintiffs cite to a string of paragraphs in the Complaint that purport to contain allegations that, under the Amgen Plan, the role of the Fiduciary Committee fell to the Director Defendants due to the apparent bypass of the GBC. However, the cited paragraphs do not specifically allege that the Director Defendants are individually liable for committing the alleged *ultra vires* act. *See* Compl. ¶ 87 (alleging that the Amgen Board of Directors directly appointed the Fiduciary Committee to oversee the operation of the Plans); *id.* ¶ 90 (alleging that the Individual Defendants were fiduciaries of the AML Plan); *id.* ¶ 329 (alleging that the Director Defendants appointed the Fiduciary Committee, and that the Fiduciary Committee and its members were responsible for managing the Plans' investments); *id.* at 353 (alleging that the Director Defendants breached their duty to monitor the members of the Fiduciary Committee); *id.* at 356 (same).

to individual liability for the alleged breaches. Thus, the Director Defendants are not liable under the Amgen Plan on this ground.

With respect to the AML Plan, the Board of Directors is permitted to appoint the members of the Fiduciary Committee directly. Plaintiffs claim that the Director Defendants are liable for breaches associated with the AML Plan because the Director Defendants allegedly failed to duly appoint the Fiduciary Committee. *See* Opp. 8:14-18. As with their allegations concerning the Amgen Plan, however, Plaintiffs offer conclusory allegations that the Director Defendants were fiduciaries of the AML Plan. Even assuming that Director Defendants failed to properly constitute the Fiduciary Committee, Plaintiffs do not sufficiently allege that Director Defendants would be liable individually for the specific breaches alleged in the Complaint. Thus, Plaintiffs have failed to allege that the Director Defendants were fiduciaries of the AML Plan.

Nevertheless, Plaintiffs may have sufficiently alleged that one of the Director Defendants, Kevin W. Sharer ("Sharer"), was a fiduciary of the Amgen Plan. Plaintiffs allege that "upon information and belief, [Sharer] was a member of the Defendant Plan Fiduciary Committee." Compl. ¶ 32. As Defendants note, "In this regard, the *only* Individual Defendant alleged, *upon information and belief,* to have served as a member of the Fiduciary Committee is Kevin Sharer." Opp. 5:3-5 (emphasis in original). Though Defendants claim that Sharer "never served on the Fiduciary Committee" and that Plaintiffs have known this fact for two years, the Court will not dismiss the claims against Sharer on this basis. Therefore, the Court GRANTS Defendants' motion to dismiss as to Defendants Frank J. Biondi, Jerry D. Choate, Frank C. Herringer, Gilber S. Omenn, Da-

vid Baltimore, Judith C. Pelham, Frederick W. Gluck, and Leonard D. Shaeffer without prejudice.

3. The Individual Defendants

*8 Plaintiffs fail to allege with sufficient specificity how the Individual Defendants breached their purported fiduciary duties. *See In re McKesson HBOC, Inc. ERISA Litig.*, No. 00-20030, 2002 WL 31431588, at *17 (N.D. Cal. Sept. 30, 2002) ("[P]laintiffs shall identify the breaches of fiduciary duty, identify the defendants with knowledge of the breaches, identify ... specifically how each defendant failed to take reasonable efforts to remedy the breach, and identify what acts the specific defendants took to conceal information."). Accordingly, the Court GRANTS Defendants' motion to dismiss as to the Individual Defendants without prejudice.

4. The GBC and the Fiduciary Committee

Defendants do not contest Plaintiffs' allegations that the GBC and the Fiduciary Committee were ERISA fiduciaries. Therefore, the claims remain against only AML, Sharer, GBC, and the Fiduciary Committee.

C. Plaintiffs' Claims

The Court will now evaluate the six counts against the remaining Defendants.

1. Breach of the Duty of Loyalty (Count I)

Plaintiffs assert a claim for breach of the fiduciary duty of loyalty pursuant to § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). *See* Compl. ¶¶ 304-318. Plaintiffs allege that Defendants were under a fiduciary obligation to avoid conflicts of interest, and that they violated that obligation by failing to appoint independent fiduciaries and failing to notify federal agencies that Amgen stock

was no longer a suitable investment for the Plans. *See id.* ¶¶ 308-309. Plaintiffs further allege that Defendants did not take such preventive measures because their compensation included Amgen stock, and eliminating the Amgen investment option "would have sent a negative signal to Wall Street analysts, which in turn would result in reduced demand for Amgen stock and a drop in the stock price." *Id.* ¶ 313. Finally, Plaintiffs claim that Defendants continued to market "off label" uses for Aransep® and Epogen® despite their knowledge of the health risks because Defendants' stood to gain from increased sales of the drugs. *See id.* ¶ 315.

Plaintiffs allegations all relate to the potential conflict of interest affecting plan fiduciaries who also received compensation from Amgen in the form of company stock. However, such allegations are insufficient to state a claim for beach of the fiduciary duty of loyalty under ERISA. *See In re Syncor ERISA Litig.*, 351 F. Supp. 2d 970, 987-88 (C.D. Cal. 2004) (noting that "[u]nder this theory, corporate defendants would always have a conflict of interest"); *In re Citigroup ERISA Litig.*, No. 07-9790, 2009 WL 2762708, at *26 (S.D.N.Y. Aug. 31, 2009) (holding that allegations that the defendants' compensation was "tied to the performance of Citigroup stock" were insufficient to state an actionable claim for conflict of interest); *In re WorldCom*, 263 F. Supp. 2d 745, 768 (S.D.N.Y. 2003) (holding that allegations that the defendant owned shares of WorldCom stock were insufficient to establish an actionable conflict of interest). Indeed, ERISA explicitly permits a corporate officer, employee, or agent to serve as a plan fiduciary. *See* 29 U.S.C. § 1108(c)(3) ("Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from ... serving as a fiduciary in addi-

tion to being an officer, employee, agent, or other representative of a party in interest."). Therefore, the Court GRANTS Defendants' motion to dismiss Plaintiffs' claim for breach of the fiduciary duty of loyalty without prejudice.

2. Breach of the Duty of Care (Count II)

***9** Plaintiffs assert a claim for breach of the fiduciary duty of care against all Defendants. Plaintiffs allege that continuing to provide Amgen stock as an investment option under the Plans was "imprudent" because Defendants knew of the negative studies of Aranesp® and knew that continued marketing of "off label" uses of the drugs would ultimately harm the price of Amgen stock. *See* Compl. ¶¶ 319-334. Though fiduciaries of an EIAP are exempted from ERISA's duty to diversify, *see* 29 U.S.C. § 1104(a)(2), they are still obligated to "act with care, skill, prudence, [and] diligence," *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1002 (9th Cir. 2008). When evaluating the prudence of an ERISA fiduciary's actions, courts are divided over whether to apply a presumption of prudence or a "prudent man" standard. Thus, the Court will examine Plaintiffs' claims under each standard.

a. Plaintiffs Fail to Rebut the Presumption of Prudence

Under the "*Moench* standard," plan fiduciaries are entitled to a presumption of prudence, unless the plaintiff alleges sufficient facts to rebut the presumption. Courts commonly refer to this test as the "*Moench* standard," named after the Third Circuit case that first employed a presumption of prudence in the ERISA context. *See Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995). Though the Ninth Circuit has yet to formally adopt the *Moench* standard, *see Wright*, 360 F.3d at 1098 n. 3 ("[W]e decline at this juncture to adopt whole-

sale the *Moench* standard."); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1002 (9th Cir. 2008) ("As an initial matter, this Circuit has not yet adopted the *Moench* presumption, and we decline to do so now."), the Circuit has also declined to *reject* the *Moench* standard. In fact, the two Ninth Circuit cases that declined to adopt the *Moench* standard proceeded to apply it. *See Wright*, 360 F.3d at 1098 ("Though Plaintiffs contend that the district court prematurely dismissed their claims at the motion to dismiss stage, Plaintiffs' alleged facts effectively preclude a claim under *Moench*, eliminating the need for further discovery."); *Synchor*, 516 F.3d at 1102 (holding, "in any event," that "the district court's determination that the Class did not rebut the *Moench* presumption based solely upon Synchor's financial viability ... is not an appropriate application of the prudent man standard set forth in either *Moench* or 29 U.S.C. § 1004").

To varying degrees, district courts in this Circuit have applied the *Moench* standard. *See, e.g.*, *Calpine*, 2005 WL 1431506; *In re Computer Sciences Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1133 (C.D. Cal. 2009) (applying the *Moench* presumption in addition to the "prudent man" standard). Additionally, the First, Fifth, and Sixth Circuits have followed the Third Circuit and adopted the *Moench* standard. *See Bunch v. W.R. Grace & Co.*, 532 F.Supp.2d 283, 289 (D. Mass. 2008), *aff'd by* 555 F.3d 1 (1st Cir. 2009); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 254 (5th Cir. 2008); *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995). Even in circuits that have not formally adopted the *Moench* standard, district courts have applied the presumption of prudence. *See, e.g.*, *In re Lehman Brothers Sec. & ERISA Litig.*, No. 08-5598, 2010 WL 354937, at *5 (S.D.N.Y. Feb. 2, 2010) ("ERISA requires plan fidu-

ciaries to manage plan assets prudently.... While the Second Circuit has not specifically addressed the *Moench* decision, *Moench* is persuasive, and many courts in this district have adopted it ....").

***10** Under the *Moench* standard, fiduciaries of an EIAP[10] are entitled to a presumption of prudence at the motion to dismiss stage, unless "the ERISA fiduciary could not have believed reasonably that continued adherence to the [plan's terms] was in keeping with the settlor's expectations of how a prudent trustee would operate." *See Wright*, 360 F.3d at 1097 (quoting *Moench*, 62 F.3d at 571). The presumption of prudence may be rebutted by allegations that the fiduciaries were aware that the "company's financial condition is seriously deteriorating and [that] there is a genuine risk of insider self-dealing," *id.* at 1098, or that "the company is on the brink of collapse or undergoing serious mismanagement," *id.* (quoting *LaLonde v. Textron, Inc.*, 270 F. Supp. 2d 272, 280 (D.R.I. 2003)).

In this case, it is undisputed that the Plans are EIAPs. *See* Compl. ¶¶ 79, 84. Thus, under the *Moench* standard, Defendants are entitled to a presumption of prudence. Furthermore, Plaintiffs have failed to rebut the presumption. They do not allege that Amgen was in a seriously deteriorating financial condition or was "on the brink of collapse." It is telling that Plaintiffs

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[10] While originally applied to Employee Stock Ownership Plans ("ESOPs"), the *Moench* standard applies equally to fiduciaries of EIAPs. *See Edgar v. Avaya, Inc.*, 503 F.3d 340, 347 (3d Cir. 2007) ("[The plaintiff] argues that *Moench*' s presumption of prudence does not apply here, because the Plans at issue in this case are not ESOPs. We are not persuaded.... Given the[ ] similarities [between ESOPs and EIAPs], we conclude that the underlying rationale of *Moench* applies equally here." (internal citation omitted)).

allege that "Amgen's off-label drug sales for Aranesp® and EPOGEN were *on the brink of collapse* as a result of Defendants' *serious mismanagement*," *see* Compl. ¶ 244 (emphasis added), because it appears that Plaintiffs are attempting frame their allegations in an effort to rebut the presumption of prudence. However, Plaintiffs must allege that the company—and not merely two of its products—was in a dire financial situation. *See LaLonde*, 270 F. Supp. 2d at 280 (noting that evidence of a "precipitous decline in the employer's stock" can rebut the presumption of prudence if "combined with evidence that the *company* is on the brink of collapse or undergoing serious mismanagement." (emphasis added)).

In the Opposition, Plaintiffs offer a district court case from New Jersey, *In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, No. 05-1151, 2009 WL 790452 (D.N.J. Mar.23, 2009), to argue that Defendants acted imprudently by continuing to offer Amgen stock during the Class Period. *See* Opp. 4:7-17. In *Merck*, plan fiduciaries allegedly failed to disclose problems regarding the safety of its popular cardiovascular drug, Vioxx. *See id.* at *3. Due to safety concerns, Merck withdrew Vioxx from the market, causing the price of Merck stock to "plunge" 27% on the day the withdrawal was announced. *See id.* at *2. The price of Merck stock continued to slide an additional 13% over the following month. *See id.* As a result, participants in several Merck employee benefit pension plans sued Merck fiduciaries for failing to manage plan investments prudently as required under ERISA. *See id.* at *3. The court in *Merck* held that the plaintiffs adequately stated a claim for imprudent investment. In applying the *Moench* standard adopted in the circuit, the court found that the plaintiffs rebutted the presumption of pru-

dence by adequately alleging that Merck was in a "dire situation." *See id.* at *4 (noting that the stock price "plunged by almost 40% following the withdrawal of Vioxx").

***11** While the *Merck* case shares some similarities with this case, *Merck* is distinguishable in several material respects. First, *Merck* involved a sudden and dramatic decline in the price of company stock (27% in a single day and 40% overall during the month following the withdrawal of Vioxx). While the price of Merck stock "plunged" during a very short period of time, the price of Amgen stock exhibited a gradual decline of 29% during a period of approximately one and a half years. *See* RJN, Ex. 3, at 101-17. Indeed, Plaintiffs allege that Amgen stock dropped by 2.3% on the day *The Cancer Letter* published the DAHANCA trial results, a relatively modest drop when compared with the 27% drop in Merck stock the day Vioxx was withdrawn. *See* Compl. ¶ 237. Second, *Merck* involved the complete withdrawal of Vioxx from the market, while Aranesp® and Epogen® remained on the market despite the DAHANCA trial results and black label warnings. In light of these distinctions, Plaintiffs fail to sufficiently allege that Amgen was in a dire financial condition to rebut the presumption of prudence.

In the Opposition, Plaintiffs also argue that Amgen was "seriously mismanaged." However, the alleged management problems relate only to Amgen's development and marketing of Aranesp® and Epogen® rather than the management of the company as a whole. Thus, Plaintiffs' allegations of mismanagement associated with Aranesp® and Epogen® are insufficient to rebut the presumption of prudence. Furthermore, it is unclear that allegations of serious mismanagement alone are sufficient to rebut the presumption of pru-

dence. *See Calpine*, 2005 WL 1431506, at *5 n. 6 ("Wright does not hold that allegations of mismanagement are sufficient to rebut the presumption of prudence."); *id.* (characterizing *LaLonde'* s addition of "serious mismanagement" to the ways in which the presumption may be rebutted as mere dictum (citing *LaLonde*, 270 F. Supp. 2d at 280)); *see also In re Fremont Gen. Corp. Litig.*, 564 F.Supp.2d 1156, 1158 (C.D. Cal. 2008) ("The Complaint in this case contains detailed and specific allegations that Fremont General was in dire financial circumstances *and* subject to serious mismanagement ...." (emphasis added)).

In contrast to Plaintiffs' allegations, Defendants have provided evidence that Amgen was in a relatively stable financial condition. *See* RJN, Ex. 4 (Amgen's 2006-2008 Form 10-K filings with the SEC); *see also Calpine*, 2005 WL 1431506, at *6 ("Plaintiff has not alleged and, given the financial statements before the Court, cannot allege facts rebutting the presumption of prudence arising under *Wright*."). In *Calpine*, the court took judicial notice of the defendant corporation's financial statements, which showed steady revenue and profitability. *See* 2005 WL 1431506, at *5. The court analogized to the Ninth Circuit's decision in *Wright*, 360 F.3d at 1098-99, and held that the plaintiffs did not rebut the presumption of prudence in light of the evidence of the company's financial viability. Similarly, Defendants have presented evidence of Amgen's stock price during the Class Period (*see* RJN, Ex. 3) and after the Class Period (*see* RJN, Ex. 12), as well as Amgen's 10-K Forms for 2006-2008 (*see* RJN, Ex. 4). Defendants note that the price of Amgen stock declined 29% from a high of $86.17 on September 19, 2005 to $60.86 at the close of the Class Period on March 9, 2007, and that decreases of far greater than 29% have been insuffi-

cient to rebut the presumption of prudence. *See Mot.* 12:5-11 (citing numerous cases).[11]

***12** Therefore, under the *Moench* standard, Plaintiffs' claim for breach of the fiduciary duty of care must be dismissed without prejudice because Plaintiffs' have not alleged sufficient plausible facts to rebut the presumption of prudence.

b. Plaintiffs Fail to Allege a Violation of the Prudent Man Standard

Even if the *Moench* standard is not applied, Plaintiffs have not sufficiently alleged that continuing to offer the Amgen investment option was imprudent. If the presumption of prudence is not applied, courts conduct a "prudent man" analysis under the statute. *See* § 1104(a)(1)(B) ("[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and ... with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims ...."); *see also Computer Sciences*, 635 F. Supp. 2d at 1134. The Ninth Circuit has observed that "a myriad of circumstances" could violate the prudent man standard, including the case of an apparently stable company that was engaged in an illegal scheme to inflate the

[11] Defendants argue that the Class Period is artificially extended to include the highest point for the price of Amgen stock on September 19, 2005, even though they claim that the first alleged act of wrongdoing occurred in October 2006. *See* Mot. 12 n. 9. Defendants claim that the price of Amgen stock declined only 20% from October 2006 (when the DAHANCA trial was suspended) to March 9, 2007 (the end of the Class Period).

price of the company's stock. *See Synchor*, 516 F.3d at 1102.

In this case, Plaintiffs have not offered sufficient allegations that the continued offering of the Amgen investment option was imprudent. If Defendants had eliminated the investment option, they would have been subject to lawsuits if the price of Amgen stock later rose. *See Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 256 (5th Cir. 2008) (noting that a "fiduciary cannot be placed in the untenable position of having to predict the future of the company stock's performance. In such a case, he could be sued for not selling if he adhered to the plan, but also sued for deviating from the plan if the stock rebounded"). Furthermore, eliminating the Amgen investment option may have violated federal securities laws because the decision would have been based on inside information. *See Wright*, 360 F.3d at 1098 n. 4 (noting that federal securities laws are inconsistent with requiring corporate officers to use "inside information for the exclusive benefit of the corporation and its employees"). The cases cited by Plaintiffs to suggest that federal securities laws did not relieve Defendants of their duty to eliminate the Amgen investment option involved allegations of criminal conduct. *See, e.g., In re Enron Corp. Sec. Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 566 (S.D. Tex. 2003); *Worldcom*, 263 F. Supp. 2d 745; *see also Syncor*, 516 F.3d at 1102. In this case, however, Plaintiffs do not provide sufficient facts to conclude that Defendants were allegedly engaged in "an illegal scheme" despite the conclusory allegations in the Complaint. *See* Compl. ¶¶ 4, 149, 177 (alleging "illegal" conduct). Indeed, Defendants note that "there have been *no* lawsuits filed against Amgen by the SEC, or any other federal agencies." Reply 6:15-16.

***13** For these reasons, Plaintiffs have not alleged sufficient facts to indicate that continuing to offer the company's stock as an investment option under its EIAPs was imprudent. Therefore, the Court GRANTS Defendants' motion to dismiss Plaintiffs' claim for breach of duty of care without prejudice.

3. Breach of the Duty to Provide Complete and Accurate Information (Count III)

Plaintiffs appear to allege both an omissions theory and a misrepresentation theory with regard to Plaintiffs' claim for breach of the duty to provide complete and accurate information. *See* Compl. ¶¶ 335-345; *see id.* ¶ 341 (noting the "misrepresentations and omissions that were fundamentally deceptive concerning the prudence of investments in Amgen stock"). As currently alleged, however, Plaintiffs do not state a claim under either theory.

With regard to Plaintiffs' omissions theory—that Defendants were obligated to inform plan participants of the negative studies associated with Aranesp®—the Ninth Circuit does not recognize a general affirmative duty to disclose investment information. *See Calpine*, 2005 WL 1431506, at *7. ERISA fiduciaries are obligated to disclose information about the plan itself and only upon written request. *See* 29 U.S.C. § 1024(b)(4) ("The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated."); *Calpine*, 2005 WL 1431506, at *7 ("An affirmative duty of disclosure arises under ERISA only when a fiduciary responds to inquiries from plan participants or promises

to keep participants updated on future developments affecting the plan."); *see also Baker v. Kinsley*, 387 F.3d 649, 661-62 (7th Cir. 2004) (noting that a general duty of disclosure under ERISA would "run the risk of disturbing the carefully delineated corporate disclosure laws"). Plaintiffs fail to allege sufficient facts to establish a duty to disclose.

With regard to Plaintiffs' misrepresentations theory—that Defendants misrepresented the "off label" marketing of the drugs—Plaintiffs fail to allege individual reliance. A misrepresentation claim under ERISA requires allegations of "(a) the status as an ERISA fiduciary acting as a fiduciary; (b) a misrepresentation on the part of the defendant; (c) the materiality of that misrepresentation; and (d) *detrimental reliance by the plaintiff on the misrepresentation.*" *Computer Sciences*, 635 F. Supp. 2d at 1140 (emphasis added). As Defendants argue in the Motion, "Plaintiffs' misrepresentation claim fails as a matter of law because Plaintiffs have not even attempted to plead sufficient facts regarding the basic elements of their misrepresentation claim." Mot. 17:23-25.

Contrary to Plaintiffs' argument, the element of detrimental reliance is not presumed. *See Thomas v. Aris Corp. of Am.*, 219 F.R.D. 338, 342 (M.D. Pa. 2003). Plaintiffs do not provide sufficient authority for the Court to conclude that reliance is presumed in ERISA breach of fiduciary duty cases. *See* Opp. 17:13-14 (citing only the Complaint). Plaintiffs cite to a Minnesota district court opinion, *Morrison v. MoneyGram Int'l, Inc.*, 607 F. Supp. 2d 1033, 1056 (D. Minn. 2009), to argue that reliance is presumed, but they only quote a passage summarizing the plaintiff's argument as opposed to the court's holding. *See id.* ("*Plaintiffs allege* ... that 'reliance is presumed in an ERISA breach of fiduciary

duty case' ...." (emphasis added)). Moreover, the misrepresentations allegedly made in SEC filings and various press releases were made in Defendants' corporate capacity rather than any fiduciary capacity. *See* Mot. 18:13-16; *see also Calpine*, 2005 WL 1431506, at *6 (finding that the complaint failed to state a misrepresentation claim because "Plaintiff does not allege that these press releases or bond prospectuses were made or issued by defendants while acting in a fiduciary capacity or that these statements were directed to Plan participants"). For these reasons, Plaintiffs have failed to state a claim under either an omission or a misrepresentation theory. Therefore, the Court GRANTS Defendants' motion to dismiss Plaintiffs' claim for breach of the duty to provide complete and accurate information without prejudice.

4. Breach of the Duty to Monitor (Count IV)

***14** A claim for breach of the fiduciary duty to monitor is derivative of other claims. *See Computer Sciences*, 635 F. Supp. 2d at 1144 ("[B]ecause Plaintiffs' prudence claim fails for the reasons stated above, their monitoring claim also fails."); *Calpine*, 2005 WL 1431506, at *6 ("The Court's holding dismissing Count One [for breach of the duty of care] accordingly moots Count Two [for breach of the duty to monitor] as well...."). Therefore, the Court GRANTS Defendants' motion to dismiss the claim for breach of the duty to monitor without prejudice.

5. Co-Fiduciary Liability (Count V)

A claim for co-fiduciary liability under ERISA requires sufficient allegations of an underlying breach. *See Calpine*, 2005 WL 1431506, at *8 ("Plaintiff cannot state a claim for co-fiduciary liability without first stating a claim for breach of fiduciary duty under ERISA."

(citing 29 U.S.C. § 1105(a)). As Plaintiffs have failed to state a claim for breach of fiduciary duty, Plaintiffs cannot state a claim that Defendants' are liable as co-fiduciaries. Therefore, the Court GRANTS Defendants' motion to dismiss the claim for co-fiduciary liability without prejudice.

6. "Party-in-Interest" Liability (Count VI)

Plaintiffs claim that Defendants engaged in prohibited party-in-interest transactions under § 406(a), 29 U.S.C. § 1106(a). Plaintiffs allege that Defendants offered Amgen stock as an investment option when Defendants knew that the stock price was inflated (due to the concealment of the DAHANCA study results and other misinformation provided to the market). *See* Compl. ¶¶ 373-375. However, the prohibited transactions provisions of § 406 do not apply if the "acquisition is for adequate consideration, if no commission is charged, and if the plan is an EIAP." *Johnson v. Radian Grp., Inc.*, No. 08-2007, 2009 WL 2137241, at *23 (E.D. Pa. July 16, 2009) (citing 29 U.S.C. § 1108(e)). A purchase of stock at the prevailing market rate qualifies as "adequate consideration" under § 408(e). *See id.* (dismissing a claim for engaging in a prohibited transaction under § 406(a) where "there is no allegation that a price other than the prevailing market price for [the defendant's] stock was paid by any Plan participant").

In this case, the only contested element under § 408 is the adequacy of consideration. Plaintiffs allege that Defendants caused Amgen stock to be purchased "at artificially inflated prices." *See* Compl. ¶ 375; *see also* Opp. 24:5-8. However, Plaintiffs do not allege that Amgen stock was ever purchased at a price other than the prevailing market price (despite the allegation that the market price was inflated). Plaintiffs argue that an

allegation that Amgen stock was traded at artificially high prices is sufficient to state a claim for engaging in a party-in-interest transaction, citing *In re Sears, Roebuck & Co. ERISA Litig.*, No. 02-8324, 2004 WL 407007, at *9 (N.D. Ill. Mar. 3, 2004). However, the *Sears* case is the only district court to have accepted an allegation of an artificially inflated price to take the transaction out of the § 408 exception. *See Johnson*, 2009 WL 2137241, at *23.

***15** Other courts have found that the purchase of a publically traded security at the prevailing market rate (even if inflated) qualifies as a transaction for adequate consideration, thereby exempting the transaction from the provisions of § 406. *See, e.g., In re CMS Energy ERISA Litig.*, 312 F. Supp. 2d 898, 917 (E.D. Mich. 2004); *Pietrangelo v. NUI Corp.*, No. 04-3223, 2005 WL 1703200, at * 13 (D.N.J. July 20, 2005) ("[I]t is undisputed that the Plans purchased the NUI securities at market price from a qualifying national securities exchange. Therefore, Plaintiff's Section 406 claims must be dismissed."). Accordingly, the Court GRANTS Defendants' motion to dismiss the § 406 claim without prejudice.

D. Plaintiffs' Request for Leave to Amend

Plaintiffs request leave to amend to "correct any pleadings defects that may be identified by the Court." Opp. 25:22-23. Defendants oppose this request because "Plaintiffs have had the benefit of *three* additional plaintiffs, the resources of *three* law firms, and *more than two years* to help refine their factual and legal allegations." Reply 12:9-11. Although this is the second motion to dismiss in this case, it is the first occasion for the Court to pass upon the sufficiency of Plaintiffs' alle-

gations. Accordingly, the Court grants Plaintiffs' request for leave to amend.

IV. Conclusion

Based on the foregoing, the Court GRANTS Defendants' motion to dismiss without prejudice. Plaintiffs may file an amended consolidated complaint with 21 days of this Order. If Plaintiffs fail to file an amended consolidated complaint by *March 23, 2010*, the consolidated complaint will be dismissed with prejudice.

IT IS SO ORDERED.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Steve HARRIS; Dennis F. Ramos, aka Dennis Ramos; Donald Hanks; Jorge Torres; Albert Cappa, On Behalf of Themselves and All Others Similarly Situated,
Plaintiffs-Appellants,

v.

AMGEN, INC.; Amgen Manufacturing, Limited; Frank J. Biondi, Jr.; Jerry D. Choate; Frank C. Herringer, Gilbert S. Omenn; David Baltimore; Judith C. Pelham; Kevin W. Sharer; Frederick W. Gluck; Leonard D. Schaffer; Charles Bell; Jacqueline Allred; Amgen Plan Fiduciary Committee; Raul Cermeno; Jackie Crouse; Fiduciary Committee Of The Amgen Manufacturing Limited Plan; Lori Johnston; Michael Kelly,
Defendants-Appellees,

Dennis M. Fenton; Richard Nanula; The Fiduciary Committee; Amgen Global Benefits Committee; Amgen Fiduciary Committee,
Defendants.

No. 10-56014.

D.C. No. 2:07-cv-05442-PSG-PLA
Central District of California
Los Angeles

ORDER

Before FARRIS and W. FLETCHER, Circuit Judges, and KORMAN, Senior District Judge.[*]

Upon due consideration of Appellees' motion to stay the mandate of this Court pending the filing of a petition for writ of certiorari, such petition to be filed within 90 days of this Order,

IT IS ORDERED that the motion for stay of mandate be GRANTED.[**]

[*] The Honorable Edward R. Korman, Senior District Judge for the U.S. District Court for the Eastern District of New York, sitting by designation.

[**] In the event that the petition for writ of certiorari is timely filed, "the stay shall continue until final disposition by the Supreme Court." Fed. R. App. P. 41(d)(2)(B).

APPENDIX D

29 U.S.C. § 1104—Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that

it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of—

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising

control over the assets in the account or annuity upon—

(A) the earlier of—

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which—

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provid-

ed under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if—

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) Default investment arrangements

(A) In general

For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant or beneficiary—

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before

the beginning of the plan year to make such designation.

(ii) Form of notice

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided undersection 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement—

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan

(B) In the case of a fiduciary of a qualified replacement plan, any requirement—

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection—

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) many reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

29 U.S.C. § 1109—Liability for breach of fiduciary duty

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

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

29 U.S.C. § 1132—Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025I of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of sub-

section I of this section or under subsection (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts; or

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor—

> **(A)** has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

> **(B)** fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan.

* * *