No. 13-888

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

BRIEF IN OPPOSITION

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INTRODUCTION

This case involves claims that fiduciaries of an employee benefit plan violated their duties of loyalty and prudence under 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.*), ("ERISA") by continuing to allow plan participants to invest in the stock of their employer, petitioner Amgen Inc. ("Amgen"), despite their knowledge of information demonstrating that such investments were imprudent in light of misleading statements Amgen had made about its financial condition.

Amgen's petition for a writ of certiorari should be denied. The questions presented by Amgen's petition do not independently merit plenary review by this Court, because there is no disagreement over their proper resolution among the lower courts and there is no other substantial reason why this Court should address them.

To begin with, review by this Court is unwarranted as to Amgen's first question presented, which asks whether the United States Court of Appeals for the Ninth Circuit ("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)." Pet. at *i*. However, as Amgen concedes, the decision below is the only federal appellate decision that invokes *Basic* in an ERISA case, and there is no pressing need for review by this Court of such a question of first impression. In addition, under well-settled law, ERISA plaintiffs need not allege individual reliance in a case such as this, making the *Basic* presumption of reliance unnecessary in any event, and rendering it unlikely that the issue will

frequently recur or that it will become the source of disagreement among the lower courts. And the particular issues as to *Basic*'s application that are present in *Halliburton*[1]—such as whether price impact must be shown to invoke the presumption, and the extent to which the issue must be litigated at the class certification stage in a securities class action—are not remotely presented by this case.

Likewise, review by this Court is unwarranted as to Amgen's second question presented, which asks 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." Pet. at *i*. Amgen posits a conflict between the decision below and decisions of other courts holding that plan fiduciaries may not be compelled by their fiduciary obligations to trade on insider information, but the conflict is illusory because, as the Ninth Circuit correctly held, on the particular facts of this case, the ERISA fiduciaries could have satisfied their duties under *both* ERISA and the federal securities laws by making timely disclosure of material adverse information, and could also have satisfied their ERISA duties in other ways that would not have violated the federal securities laws (such as by halting future purchases of company stock).

Finally, Amgen properly concedes that the Plans at issue here merely *permit* a company stock option, and that no federal appellate court has held that a presumption of prudence applies to fiduciaries

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1 *See Halliburton Co. v. Erica P. John Fund, Inc., fka Archdiocese of Milwaukee Supporting Fund, Inc.*, 718 F.3d 423 (5th Cir. 2012), *cert. granted*, 134 S. Ct. 636 (U.S. Nov. 15, 2013) (No. 13-317) (filed March 5, 2014).

of such plans. Nonetheless, Amgen's third question presented asks this Court to consider 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." Pet. at *i*. Because the lower courts are in agreement on this point (and because, as discussed below, the Ninth Circuit's ruling is correct), review by this Court is not warranted.

Amgen asks the Court to hold their petition pending the decision in *Dudenhoefer v. Fifth Third Bancorp*, 692 F.3d 410 (6th Cir. 2012), *limited cert. granted*, 134 S. Ct. 822 (U.S. Dec. 13, 2013) (No. 12-751) (argument set for April 2, 2014) (hereafter "*Fifth Third Bancorp*"), where issues relating to the existence, nature, and procedures applicable to that presumption are currently at issue. But because, as Amgen concedes, *no* court of appeals has held that the presumption applies to fiduciaries of plans (like the one in this case), that neither require nor encourage investment in the employer's stock, it is unlikely that the Court will reach this issue in *Fifth Third Bancorp*. Therefore, the Court should not accommodate Amgen's request to hold this petition pending the resolution of *Fifth Third Bancorp*.

Amgen also asks this Court to hold this petition pending its decision in *Halliburton* (argued and filed March 5, 2014), which concerns the "fraud-on-the-market" approach to securities claims under Securities and Exchange Commission ("SEC") Rule 10b-5, 17 C.F.R. § 240.10b-5, pioneered by this Court in *Basic*,, 485 U.S. at 224. While the court of appeals cited *Basic* in support of its holding that the plaintiffs in this case could establish reliance on Amgen's misrepresentations, the case otherwise does not

present the issues concerning *Basic* that are involved in *Halliburton*, including what facts must be shown to invoke or rebut *Basic*'s presumption of reliance, and the extent to which the issue must be resolved at the class certification stage. Therefore, the Court need not hold this petition pending the resolution of *Halliburton*.

COUNTERSTATEMENT OF THE CASE

A. Background

1. *The Parties*

Amgen Inc., a global biotechnology company, is the "named fiduciary," "administrator," and "sponsor" of the Amgen Plan. Petitioner Amgen Manufacturing, Inc. ("AML"), a wholly owned subsidiary of Amgen, is the "named fiduciary," "administrator," and "sponsor" of the AML Plan. Other petitioners include the committees at Amgen that oversee Amgen's retirement plans, as well as the six individuals who served on those committees during the alleged class period (May 4, 2005 to March 9, 2007). All of the petitioners collectively will be referred to herein as "Amgen."

Respondents are former employees of Amgen or AML who held individual retirement accounts in either the Amgen Plan or the AML Plan (collectively, the "Plans") and held a stock fund consisting largely of Amgen common stock (the "Amgen Stock Fund") in their accounts. Respondents bring this action under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (App. 86a), to recover damages to the Plans caused by petitioners' breaches of their fiduciary duties, as authorized by ERISA § 409(a), 29 U.S.C. § 1109(a) (App. 85a).

Section 404 of ERISA, 29 U.S.C. § 1104 (App. 77a), imposes strict duties of loyalty and prudence on fiduciaries of employee benefit plans, requiring those

fiduciaries to discharge their duties "solely in the interest of the participants and beneficiaries" (*id.* at § 1104(a)(1)) of the plan, 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." *Id. at* § 1104(a)(1)(B). ERISA plan participants may seek judicial redress against a fiduciary for breaches of those duties. *See* App. 86a (29 U.S.C. §§ 1132(a)(2)-(3)); *Varity Corp. v. Howe*, 516 U.S. 489, 507-15 (1996).

2. *The Plans*

The Plans are "defined contribution plans" within the meaning of ERISA,[2] and were established by Amgen to provide retirement benefits to its employees subject to the provisions of ERISA. Throughout the class period, the Plans permitted, but did not require, Amgen to offer the Amgen Stock Fund as one of 25 different "investment alternatives." Specifically, Section 6.1 of both Plans provided that the investment options "*may* include provision for the separation of assets into separate Investment Funds, including a Company Stock Fund." App. 19a (*citing* Article 6.1 of the Amgen Plan). However, the Plans favored investment in another fund, the Fidelity Freedom Fund, which was designated as the "default" investment if the Plans' participants failed to direct their retirement investments. *See id.* In addition, throughout the class period, the Plans expressly required the fiduciaries to review periodically the

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[2] In a "defined contribution plan," retirement benefits are based solely on the amount contributed to the participant's individual account, and any income, expenses, gains or losses are allocated in turn to each such participant's account. 29 U.S.C. § 1002(34).

performance of all the allowed investment funds, including the Amgen Stock Fund, and expressly gave the fiduciaries broad discretion to eliminate ***any*** investment option, including the Amgen Stock Fund. Only in May 2008, more than one year after the class period ended, and after the litigation commenced, were the Plans amended prospectively to require, for the first time, that the Amgen Stock Fund be an investment option in the Plans.

3. *The Proceedings Below*

In August 2007, respondents filed the initial complaint in this proceeding under sections 409 and 502(a)(2) of the ERISA, 29 U.S.C. §§ 1109 and 1132(a)(2), respectively. The complaint, as amended on March 23, 2010,[3] asserts two counts under ERISA §§ 404(a)(1) and (a)(1)(B), 29 U.S.C. §§ 1104(a)(1), (a)(1)(B) (App. 77a), that are relevant to Amgen's petition: Count II, which alleges that the Plans' fiduciaries breached their statutory fiduciary duty of care by allowing participants to invest in the Amgen Stock Fund when such an investment was imprudent;[4] and Count III, which alleges that the Plans' fiduciaries breached their ERISA duty of candor (a component of the fiduciary duties of loyalty and prudence) by providing materially misleading information regarding

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[3] The district court dismissed the original complaint on standing and other threshold grounds, but the Ninth Circuit reversed the dismissal. *See Harris v. Amgen Inc.*, 573 F.3d 728, 737-738 (9th Cir. 2009).

[4] The amended complaint alleges that the fiduciaries knew or should have known that Amgen was engaged in unsustainable business practices, that there was serious safety and efficacy concerns regarding its two most important drugs, and that the Amgen Stock Fund was trading at artificially inflated prices because material adverse information had been withheld from the investing public.

the financial condition of Amgen to the Plans' participants. As alleged in the amended complaint, as a result of Amgen's fiduciary breaches, the Amgen Plan lost more than $102 million of the Amgen Plan participants' retirement savings and the AML Plan lost $6.6 million of the AML Plan participants' retirement savings.

On June 18, 2010, the district court ruled that the allegations of the amended complaint did not state a plausible claim that the fiduciaries of the Plans breached their statutory fiduciary duties under ERISA.[5] *See* Order Grant'g Defs. Mot. to Dismiss, *Harris v. Amgen Inc.*, No. 07-5442, ECF No. 183 (C.D. Cal. June 18, 2010) (*unpublished*). On appeal, the Ninth Circuit held that the petitioners here "are not entitled to a presumption of prudence under *Quan*, *infra*, that [respondents] have stated claims under ERISA in Counts II through VI, and that Amgen is a properly named fiduciary under the Amgen Plan." App. 41a.

With respect to the duty of care claim in Count II, the Ninth Circuit held that the presumption of prudence did not apply because the terms of the Plans did not "require or encourage the fiduciary to invest

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5 The petition erroneously attaches as Appendix B (App. 43a-76a), the district court's *prior* order granting the petitioners' motion to dismiss, but also granted respondents' request for leave to amend. App. 75a-76a (attaching *Harris v. Amgen Inc.*, No. 07-5442, 2010 U.S. Dist. LEXIS 26283 (C.D. Cal. Mar. 2, 2010)). However, Respondents filed their First Amended Consolidated Class Action Complaint on March 23, 2010, pursuant to the district court's March 2, 2010 Order, which was the operative complaint on review below by the Ninth Circuit after the order of dismissal without leave to amend by the district court on June 18, 2010. *See* App. 14a.

primarily in employer stock." App. 22a-23a. Significantly, the Ninth Circuit's decision in this case followed *Quan v. Computer Scis. Corp.*, 623 F.3d 870 (9th Cir. 2010), in which the Ninth Circuit expressly *adopted* the presumption of prudence "when plan terms require or encourage the fiduciary to invest primarily in employer stock." *Id.* at 881. Analyzing respondents' claims without a presumption of prudence, i.e., under ERISA's "prudent man" standard of care, 29 U.S.C. § 1104(a)(1)(B), the Ninth Circuit found that respondents sufficiently alleged a viable claim for breach of the duty of care. App. 29a.

Regarding the district court's comment that the fiduciaries could not have taken action to protect the Plans without violating the federal securities laws, the Ninth Circuit held that the fiduciaries—who were also senior managers of Amgen—could have avoided liability by complying with their disclosure obligations under the federal securities laws in the first instance, and that they could also have acted in a variety of ways without engaging in prohibited insider trading (*e.g.*, disallowing further investment in the company's stock by plan participants, or disclosing the relevant information to the general public). App. 28a-29a.

With respect to the duty of candor claim, the Ninth Circuit rejected the district court's conclusion that respondents failed to plead detrimental reliance. Citing *Basic*, 485 U.S. at 224, the Ninth Circuit stated, "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." App. 31a.

REASONS FOR DENYING THE WRIT

I. THE APPLICATION OF *BASIC* TO THE ERISA CLAIMS AT ISSUE HERE DOES NOT INDEPENDENTLY WARRANT THIS COURT'S REVIEW

Count III of the amended complaint alleges that the fiduciaries violated their duty of loyalty and care under ERISA § 404(a)(1) and § 404(a)(1)(B), 29 U.S.C. §§ 1104(a)(1) & (a)(1)(B), by failing to provide material information to plan participants about investment in the Amgen Stock Fund. Amgen does not dispute that making or incorporating false or misleading statements in ERISA communications to plan participants may be actionable, nor does it suggest there is any conflict among the circuits on the viability of such a claim. *See Varity Corp.*, 516 U.S. at 506 ("'lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1)'" (*quoting Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (Cal. App. 7th 1983)).[6] Rather, Amgen seeks

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[6] As the Ninth Circuit stated:

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

review on the question whether the "fraud-on-the-market" presumption of reliance, established by the Court in *Basic*, 485 U.S. at 224, may be used to establish reliance in an ERISA case.

Notably, by Amgen's own account, there is no conflict among the court of appeals' circuits on this issue. Indeed, as Amgen states, "in the 25 years since *Basic*, no other appellate court has invoked its presumption in an ERISA case." Pet. at 12. By the same token, Amgen cites no appellate court that has held the *Basic* presumption *inapplicable* to a case involving ERISA fiduciaries' misrepresentations about securities traded in an efficient public market. Indeed, Amgen admits it is asking for review only because "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." *Id.* at 14. But such prophylaxis is not an appropriate ground for Supreme Court review, especially in the absence of any indication that an issue is either recurrent or has caused division among the lower courts. *See* U.S. Sup. Ct. R. 10.

Moreover, the question whether the fraud-on-the-market presumption applies to an ERISA case is

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App. 30a (quoting *Quan*, 623 F.3d at 886 (second alteration added)). *See also Fifth Third Bancorp*, 692 F.3d at 420 (recognizing an "affirmative duty [under ERISA] to inform when the trustee knows that silence might be harmful") (internal quotations omitted); *Braden v. Walmart Stores, Inc.*, 588 F.3d 585, 599 (8th Cir. 2009) ("in some circumstances fiduciaries must on their own initiative disclose any material information that could adversely affect a participant's interests") (internal quotations omitted).

neither necessary to resolution of this case in respondents' favor, nor likely to arise with frequency in ERISA cases, because individual reliance *is not a necessary element of an ERISA duty of candor claim*. Rather, as courts addressing this issue have consistently held, the relevant "reliance" in such a claim for breach of the duty of candor is that *of the plan*, not of any individual plan participant. *See, e.g.*, *In re First Am. ERISA Litig.*, No. 07–1357, 2009 U.S. Dist. LEXIS 72188, at *22-23 n.7 (C.D. Cal. July 27, 2009); *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 191 (W.D. Mo. 2009) ("Because ERISA § 502(a)(2) focuses on plans, rather than individuals, the Court finds persuasive those cases which have held that plaintiffs need not establish individual reliance in order to prevail."); *In re Marsh ERISA Litig.*, No. 04-8157,2006 U.S. Dist. LEXIS 90631, at *7-10 (2006 WL 3706169, at *7) (S.D.N.Y. Dec. 14, 2006); *Rankin v. Rots*, 220 F.R.D. 511, 522-23 (E.D. Mich. 2004) (rejecting reliance argument where plaintiffs' "claims relate[d] to defendants['] unitary actions with regard to the Plan. Defendants treated the entire class identically"); *Brieger v. Tellabs, Inc.*, 245 F.R.D. 345, 354 (N.D. Ill. 2007) ("Because defendants do not dispute that they distributed information in a Plan-wide and broad manner, the Court finds that individual determinations as to plaintiffs' reliance on this information likely will be unnecessary.").

Therefore, to allege "reliance" in an ERISA case, a complaint need only allege that the "losses result from the breach." *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 312 F. Supp. 2d 1165, 1182-83 (D. Minn. 2004) (citation omitted); *see also In re JDS Uniphase Corp. ERISA Litig.*, No. 03-4743, 2005 U.S. Dist. LEXIS 17503, at *43-44, 2005 WL 1662131, at *13 (N.D. Cal. July 14, 2005) (same); *Morrison v. MoneyGram Int'l*, 607 F. Supp. 2d 1033, 1056 (D. Minn. 2009) (same); *In re General Motors*

ERISA Litig., No. 05-71085, 2006 U.S. Dist. LEXIS 16782, at *42-44 (E.D. Mich. Apr. 6, 2006) (same).[7]

Because the Ninth Circuit's use of the "fraud-on-the-market" doctrine was unnecessary, review of this question is not warranted. The ultimate outcome on the underlying issue of whether respondents have

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[7] The decisions cited by Petitioners, Pet. at 9, do not support the need for allegations of individual reliance. In *Bell v. Pfizer, Inc.*, 626 F.3d 66, 75 (2d Cir. 2010), the misinformation concerned an employee stock option plan which was not governed by ERISA and thus no breach of fiduciary duty under ERISA was involved. In *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 579 F.3d 220, 228-229 (3d Cir. 2009), the misrepresentations were made by the defendant in a fiduciary capacity in face-to-face meetings with retiring employees about ERISA benefits to which they were entitled. Those misrepresentations were half-truths which conflicted with written materials also provided to the employees. *Id.* The Third Circuit held that in those circumstances, the employees needed to prove that they detrimentally relied upon the face-to-face misrepresentations. *Id.* In *Pfahler v. National Latex Prods. Co.*, 517 F.3d 816, 830 (6th Cir. 2007), plaintiffs properly brought a derivative action on behalf of an ERISA plan under § 502(a)(2) in connection with the failure of the fiduciaries to ensure that employee contributions to their healthcare benefit plan were properly sent to the plan or held in trust. The court, in *dicta,* mentioned reliance in passing, but never applied the concept of detrimental reliance to the facts of that case. *Id.* Instead the court of appeals simply found that there were numerous genuine issues of material fact, including whether the fiduciaries made material misrepresentations in correspondence to the plaintiffs. *Id.*

None of these three cases cited by Amgen focus on whether reliance is appropriate in the context of material misstatements concerning a publicly traded security and the fraud-on-the-market doctrine pronounced by *Basic.*

adequately alleged a breach of candor claim against petitioners would be unchanged by the Court's resolution of any other issues.

Of course, in the *Halliburton* case, the Court is considering issues including whether the *Basic* presumption should be abandoned altogether, even in SEC Rule 10b-5 cases. However, the other issues in *Halliburton*—which emerged at oral argument as the ones most likely to be decisive—are not present here. Specifically, such issues include whether price impact must be shown to invoke the presumption, and, if not, whether defendants must be permitted to contest at the class certification stage whether the absence of price impact rebuts the presumption, but none such issues are presented here. Neither question has been addressed by the lower court, nor could they have been addressed given that this case has not proceeded beyond the "motion-to-dismiss" stage. It is highly doubtful that *Halliburton* will any effect or control over the outcome here (especially given that, as discussed above, individual reliance is not a necessary element of an ERISA breach-of-fiduciary duty claim even absent the *Basic* presumption). And in any event, there is no need for review of the question whether the *Basic* presumption (assuming it is not jettisoned entirely) applies to an ERISA case in light of the complete absence of any appellate authority on the point other than the decision below. Accordingly, neither a hold nor a grant of certiorari is warranted on Amgen's first question presented.

II. THIS COURT SHOULD NOT REVIEW THE NINTH CIRCUIT'S HOLDING THAT THE FIDUCIARY DUTY CLAIMS IN THIS CASE ARE CONSISTENT WITH THE SECURITIES LAWS

A. There Is No Established Circuit Conflict

Amgen asserts that the Ninth Circuit ruled that fiduciaries of publicly traded companies are required "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." Pet. at 15 (erroneously citing App. 68a). In fact, however, the Ninth Circuit's holding is far narrower than that. The Ninth Circuit held only that when the ERISA fiduciaries are also alleged violators of the federal securities laws, those ERISA fiduciaries are not relieved of their duty under ERISA to protect the interests of plan beneficiaries in light of material, non-public information:

> Compliance with ERISA would not have required defendants to violate [the federal securities] 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. . . . 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.

App. 28a-29a (internal citations omitted).

There is no conflict among the circuits with respect to this narrow holding. The three decisions Amgen cites[8] do not hold that violators of the securities laws can rely on their own unlawful nondisclosures and misrepresentations to excuse their violations of ERISA. As the Ninth Circuit explained, that would be exactly the consequence if the claims against the fiduciaries here were dismissed because they possessed—and failed to disclose in violation of both ERISA *and* the securities laws—material, nonpublic information that contradicted their public disclosures.

Respondents recognize that arguments about asserted tensions between the securities laws and fiduciary duties under ERISA are among the considerations that various parties and *amici curiae* have brought to bear on the resolution of the issues in *Fifth Third Bancorp*. However, it is unlikely that any observations the Court may make in the course of addressing the fundamentally different issue in *Fifth Third Bancorp* (i.e., potential application of a presumption of prudence to fiduciaries of plans that, unlike the ones in this case, may require or encourage investment in employer stock) will be controlling on the issue of the claimed breach of the fiduciary duty of

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8 Pet. at 15-17 (citing *Rinehart v. Akers*, 722 F.3d 137, 151 (2d Cir. 2013), *petition for cert. filed*, 2014 U.S. S. Ct. Briefs LEXIS 101 (U.S. Jan. 8, 2014) (No. 13-830), *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267 (11th Cir. 2012), and *White v. Marshall & Ilsley Corp.*, 714 F.3d 980 (7th Cir. 2013)).

candor in the different, fact-specific circumstances of this case. Moreover, plenary review of this fact-specific issue, over which there is no direct inter-circuit conflict, is unwarranted.

B. The Decision Below Is Correct

Amgen next tries to argue that the Ninth Circuit's decision was simply wrong in reminding fiduciaries that they are not supposed to lie to their wards, *see Varity Corp.*, 516 U.S. at 489, and that the fiduciaries could have complied with both the securities laws and ERISA had they simply told the truth.

However, the Ninth Circuit's ruling is correct. If ERISA fiduciaries put themselves in a conflicted position where action is impossible to take because of insider trading restrictions, the ERISA fiduciaries should nonetheless be held liable to the plan in damages. Indeed, Congress enacted ERISA, which creates fiduciary duties long considered "the highest known to the law," *LaScala v. Scrufari*, 479 F.3d 213, 219 (2d Cir. 2007), forty years after the federal securities laws were passed.

Had the defendant fiduciaries, who were also the officers and directors with disclosure obligations under the securities laws, simply told the truth to the market, they would have also simultaneously satisfied their duties under ERISA. App. 28a. Thus, the Ninth Circuit did not hold that the fiduciaries had to disclose material information to the public because ERISA required it, App. 28a-29a, but rather because the same fiduciaries were also officers subject to the securities laws and it was the securities laws which required them to disclose the material information. App. 28a. Thus, Amgen's worry that the Ninth Circuit's decision will "upset the carefully balanced disclosure

obligations established by Congress in the securities laws," Pet. at 18, does not ring true. The Ninth Circuit did not impose any additional disclosure obligations under ERISA.

Amgen's further speculative ruminations as to what might happen to company stock prices if fiduciaries tell the truth, Pet. at 20, when the fiduciaries are also the same people governed by the securities laws and thus required to make truthful disclosures of material information, is just that, speculation. The securities laws require that material information be disclosed to the investing public. When the same persons who have that duty under the securities laws are also fiduciaries under ERISA, they satisfy both laws by being truthful. The Ninth Circuit's opinion makes no new law and imposes no new duties on ERISA fiduciaries.

The last argument advanced by Amgen, Pet. at 21, is that somehow plan participants would gain an unfair advantage over public market investors if their fiduciaries simply froze new purchases of company stock. Even though Amgen concedes freezing new purchases is neither a violation of the securities laws nor ERISA, Amgen's argument really translates to a desire by Amgen to be able to dupe both their own wards and public investors equally and escape liability to both. Surely this cannot be the law under either ERISA or the securities laws. The petition for certiorari should thus be denied as to the second question presented.

III. THE CIRCUITS' COURTS OF APPEALS UNANIMOUSLY AGREE THAT NO PRESUMPTION OF PRUDENCE APPLIES IN THE CIRCUMSTANCES OF THIS CASE

Beginning with *Moench v. Robertson*, 62 F.3d 553, 558 (3d Cir. 1995), a number of the circuits' courts of appeals have held that where the terms of either an "employee stock ownership plan" (ESOP) or an "eligible individual account plan" (EIAP) require or encourage the fiduciary to invest primarily in employer stock, the fiduciary who continues to allow investment in employer stock is entitled to a presumption that he has acted prudently. *See In re Citigroup ERISA Litig.*, 662 F.3d 128, 138 (2d Cir. 2011); *Edgar*, 503 F.3d at 348-49; *Kirschbaum v. Reliant Energy Inc.*, 526 F.3d 243, 253-56 (5th Cir. 2008); *Quan*, 623 F.3d at 881; *Lanfear*, 679 F.3d at 1279; *White*, 714 F.3d at 988-91; *Kuper v. Iovenko*, 66 F.3d 1447 1459 (6th Cir. 1995); *Fifth Third Bancorp*, 692 F.3d at 410 (accepting the existence of a form of the presumption, but declining to apply it at the pleading stage).

Where the presumption is applied, these decisions have created significant barriers for plan participants to recover against an ERISA fiduciary. Differences over the scope of the presumption, its applicability at the pleading stage, and even its existence in cases involving ESOPs and EIAPs whose terms may require or encourage investment in employer stock are currently before this Court in the *Fifth Third Bancorp* case.

Whatever disagreement may exist over the questions now before the Court in *Fifth Third Bancorp*, however, the circuits' courts of appeals are, as Amgen acknowledges, in full agreement that, as the Ninth Circuit held here, the presumption of prudence

does *not* apply where the plan merely permits a fiduciary to invest in employer stock. *See Taveras v. UBS AG*, 107 F.3d 436, 446 (2d Cir. 2013); *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 238 n.5 (3d Cir. 2005), *amended by* No. 04-3073, 2005 U.S. App. LEXIS 19826 (3d Cir. Sept. 15, 2005) (finding "our *Moench* decision inapposite because fiduciaries here were 'simply permitted to make . . . investments' in 'employer securities.'") (citation omitted); *Edgar*, 503 F.3d at 346 ("[I]f the trust merely 'permits' the trustee to invest in a particular stock, then the trustee's investment decision is subject to *de novo* judicial review") (citation omitted). *See also In re Citigroup ERISA Litig.*, 662 F.3d 128, 138 (2d Cir. 2011) ("a fiduciary's failure to divest from company stock is less likely to constitute an abuse of discretion if the plan's terms require – rather than merely permit – investment in company stock."); *Quan*, 623 F.3d at 883 (explaining that "[T]he more discretion a fiduciary has to invest in 'less risky holdings as necessary,' the more his decisions will be subject to judicial scrutiny.") (citing *Kirschbaum v. Reliant Energy, Inc.,*, 526 F.3d 243, 255 n.9 (5th Cir. 2008).

The absence of any reason for this Court to consider whether to extend a presumption of prudence to plans that neither require nor encourage ownership of employer stock is underscored by the correctness of the lower courts' reasons for not applying the presumption to such plans. As the Second Circuit explained in *Taveras*, applying a presumption of prudence where a plan merely permits investment in employer stock would "contravene[]" the reasons for creating the presumption in the first instance." 107 F.3d at 445 . As the *Taveras* Court explained:

> The presumption of prudence was applied in those cases to address the 'tension' between 'the competing ERISA values of protecting

> retirement assets and encouraging investment in employer stock' that exists primarily in instances where a fiduciary has an 'explicit obligation to act in accordance with plan provisions' by offering employer stock to participants. *In re Citigroup ERISA Litig.*, 662 F.3d at 136, 138-39; *see also Edgar v. Avaya*, 503 F.3d 340, 346 (3d Cir. 2007) (noting guiding principle in trust law that "if the trust merely permits the trustee's investment decision it is subject to de novo judicial review.") . . . . Here, the tension between these competing concerns is weak at best, if not absent entirely.

Id. at 445-46.

The agreement of the lower courts, and the sound reasoning underlying it, counsel strongly against this Court's taking up the question whether to extend a presumption of prudence to fiduciaries who permit investments in employer stock where a plan neither requires nor encourages such investments.

That the Court is currently considering, for the first time, a presumption of prudence for other types of plans in *Fifth Third Bancorp* is all the more reason for the Court *not* to immediately give plenary consideration to expanding the scope of plans that may be subject to such a presumption without allowing time for the lower courts to apply whatever principles *Fifth Third Bancorp* may announce. It is possible that the Court's decision in *Fifth Third Bancorp* may further inform the thinking of lower courts about the issue presented here, and may in time give rise to some disagreement among them about it. But there will be time to address such disagreement if and when it arises, and in the meantime rushing to consider another presumption-of-prudence issue before the

lower courts have had time to digest the possible implications of *Fifth Third Bancorp* is unnecessary. As Petitioners have conceded the unanimity of the courts below, this Court should deny certiorari on the third question presented.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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Respectfully Submitted,

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