

Case Nos. 09-56190, 09-56248

United States Court of Appeals
for the
Ninth Circuit

FREDERICO QUAN, et al.,
Plaintiffs-Appellants, Cross-Appellees,

-v-

COMPUTER SCIENCES CORPORATION, et al.,
Defendants-Appellees/Cross-Appellants,

and

VAN B. HONEYCUTT and HAYWARD D. FISK,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Master File No. CV 08-02398 SJO (JWJx)

**MOTION OF PENSION RIGHTS CENTER AND AARP FOR LEAVE TO
FILE AMICI CURIAE BRIEF IN SUPPORT OF PANEL REHEARING
AND/OR REHEARING EN BANC**

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Pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Rule 29.1, the Pension Rights Center and AARP, through their counsel, respectfully move for leave to file a brief as amici curiae in support of panel rehearing and/or rehearing en banc. In support of this motion, the Pension Rights Center and AARP declare:

1. Established in 1976, only two years after the enactment of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (“ERISA”), the Pension Rights Center is a Washington, D.C. non-profit consumer organization which has as its mission the protection and promotion of the pension rights of workers, retirees, and their families. For the past 34 years, the Center has represented the interests of pension plan participants and beneficiaries before Congress, the federal administrative agencies, and the courts. It has also provided legal representation, informal assistance, and information to tens of thousands of participants and beneficiaries seeking to recover benefits and ensure that their plans are prudently managed.

2. As part of its advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries in private employer-sponsored employee benefit plans receive the benefits and protections of ERISA, the Pension Rights Center has participated as amicus curiae in numerous ERISA cases, including *Conkright v. Frommert*, 130 S. Ct. 1640 (2010), and *LaRue v. DeWolff, Boberg & Associates*, 552 U.S. 248 (2008).

3. AARP is a non-partisan, non-profit organization which for over fifty years has dedicated itself to representing the needs and interests of people age fifty and older. AARP directs its advocacy through legislative, administrative and adjudicative channels, including participation in federal court litigation when the court's decision may substantially affect the interests of older people. A substantial portion of AARP's legal efforts is devoted to filing amicus briefs in the United States Supreme Court and in federal appellate courts in cases presenting ERISA issues.

4. Nearly half of AARP's members are employed full or part-time, with many working for employers which provide health, pension and disability benefit plans covered by ERISA. Participants and beneficiaries in private, employer-sponsored employee benefit plans rely on ERISA to protect their rights under those plans. In particular, ERISA's protections, and the ability to enforce these protections, are of vital concern to older workers and retirees, since the quality of their lives in retirement depends heavily on their eligibility for and the amount of their pension and welfare benefits.

5. This appeal involves an issue substantially affecting the Pension Rights Center's and AARP's ability to help employees and retirees enforce their rights under ERISA within the Ninth Circuit. According to recent Department of Labor data, an estimated 41 million participants in 401(k) plans are permitted to direct the investment of all or a portion of their plan accounts. Barbara D.

Bovbjerg, U.S. Gov't Accountability Office, *Private Pensions: 401(k) Plan Participants and Sponsors Need Better Information on Fees 2* (2007). If the Court's opinion as it is currently written is permitted to stand, it will be extremely difficult for these participants to challenge fiduciaries that improperly select and monitor investments in employer stock in defined-contribution plans.

6. Counsel for the Pension Rights Center and AARP requested consent from all parties to the granting of this Motion. Plaintiffs-Appellants have consented, as have the following Defendants-Appellees: Computer Sciences Corporation ("CSC"), CSC Retirement Plans Committee, Leon J. Level, Irving W. Bailey, II, F. Warren McFarlan, Thomas H. Patrick, Frederick E. Vollrath, Donald G. DeBuck, Michael E. Keane, and Nathan Siekierka. The remaining Defendants-Appellees, Van B. Honeycutt and Hayward D. Fisk, have been contacted but have not stated whether they consent.

7. Accordingly, the Pension Rights Center and AARP respectfully request leave to file a brief as amici curiae in support of panel rehearing and/or rehearing en banc to facilitate a full consideration by the Court of the issues this appeal presents.

Dated this November 1, 2010. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on November 1, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants.

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AARP'S CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation; AARP Services, Inc.; Legal Counsel for the Elderly; AARP Financial; AARP Global Network; and Focalyst.

AARP has no parent corporation, nor has it issued shares or securities.

PENSION RIGHTS CENTER'S CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that Pension Rights Center (PRC) is organized and operated exclusively for charitable or educational purposes pursuant to section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. PRC is also organized and operated as a non-profit corporation under the laws of the District of Columbia.

PRC has no parent corporation, nor has it issued shares or securities.

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I. STATEMENT OF INTEREST

1. Established in 1976, only two years after the enactment of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (“ERISA”), the Pension Rights Center is a Washington, D.C. non-profit, consumer organization which has as its mission the protection and promotion of the pension rights of workers, retirees, and their families. For the past 34 years, the Center has represented the interests of pension plan participants and beneficiaries before Congress, the federal administrative agencies, and the courts. It has also provided legal representation, informal assistance, and information to tens of thousands of participants and beneficiaries seeking to recover benefits and ensure that their plans are prudently managed.

2. AARP is a non-partisan, non-profit organization which for over fifty years has dedicated itself to representing the needs and interests of people aged fifty and older. Nearly half of AARP’s members are employed full- or part-time, with many working for employers which provide pension plans covered by ERISA.

Through education, advocacy, and service, AARP seeks to enhance the quality of life for older Americans by promoting independence, dignity, and purpose. To promote these goals, AARP attempts to foster the economic security of individuals as they age. Through educational and advocacy efforts, AARP

seeks to increase the availability, security, equity, and adequacy of public and private pension, group, health, and other employee benefits. AARP therefore has a strong interest in protecting older working people from breaches of fiduciary duty that will wrongfully prevent them from receiving the benefits to which they are entitled.

II. PRELIMINARY STATEMENT

When Congress enacted ERISA, most workers fortunate enough to be covered by a retirement plan participated in a traditional defined-benefit pension plan. In the last two decades, there has been a dramatic shift from defined-benefit plans to defined-contribution plans. As the Supreme Court recently noted in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 401(k) plans like the plan at issue here have become—aside from Social Security—the primary vehicle for providing retirement income in America. 552 U.S. 248, 255 & n.5 (2008).

If the panel’s opinion¹ as currently written remains unchanged, it will be unduly and unfairly difficult for pension plan participants to challenge fiduciaries who improperly select and manage investments in employer securities in ERISA plans. This will undermine one of the primary goals of ERISA and Amici: protecting the assets of pension plans from “misuse and mismanagement of plan

¹ *Quan v. Computer Scis. Corp.*, --- F.3d ----, 2010 WL 3784702 (9th Cir. Sept. 30, 2010).

assets by plan administrators.” *LaRue*, 552 U.S. at 254 (quotation marks and citation omitted).

III. ARGUMENT

A. Rehearing Is Warranted to Correct the Panel’s Unnecessary and Unduly Restrictive Formulation of a Presumption of Prudence.

Plaintiffs, employees of Computer Sciences Corporation (“CSC”) and participants in the CSC Matches Asset Plan (the “Plan”), argue that Defendants breached their ERISA-imposed fiduciary duties by, *inter alia*, imprudently investing Plan assets in CSC stock. Over the last ten years, many courts have wrestled with the legal and factual issues presented by “ERISA company stock cases” such as this one.

Two factual circumstances are common to all of these cases: (1) a defined-contribution plan has a portion of its assets invested in the stock of the sponsoring employer; and (2) some event allegedly has caused that stock to lose value. Usually, though not always, the fiduciaries of the plan are themselves company insiders (or the company itself). But beyond this basic outline, the cases vary enormously. On one extreme are cases such as *In re Enron Corp. Sec., Derivative & “ERISA” Litigation*, 284 F. Supp. 2d 511 (S.D. Tex. 2003), or *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745 (S.D.N.Y. 2003). In those cases, the plans were heavily invested in company stock, while the company and its personnel,

including fiduciaries, were engaged in criminal conduct that led to the company's collapse—and the loss of the entire investment in company stock.

On the other extreme are cases in which plans held modest percentages of company stock, the stock lost little value, and the plaintiffs allege minor corporate misconduct (if any). Between these extremes are cases involving scores of factual patterns, with variations as to such matters as the language in the plan documents, the degree of concentration in the sponsoring employer's stock, the structure of the plans, the role of the fiduciaries, and the nature of the corporate misconduct. Common to all the cases, however, is the statute that governs the courts' decision: ERISA.

Panel rehearing, or in the alternative en banc rehearing, is warranted here. The panel's current decision creates an unnecessary conflict with *In re Syncor ERISA Litig.*, 516 F.3d 1095 (9th Cir. 2008), by engaging in far more judicial lawmaking than is necessary to decide this case. *See* Fed. R. App. P. 35(a)(1). The panel's decision also establishes a legal standard at odds with the plain language of ERISA and the policy underlying it. The centrality of ERISA and defined-contribution plans to Americans' retirement security renders this appeal exceptionally important. *See id.* R. 35(a)(2).

More specifically, rehearing is advisable for two reasons. First, the panel's decision in this case adopts the so-called *Moench* presumption, which provides that

“fiduciaries of ESOPs are presumed to have acted consistently with ERISA in their decisions to invest assets in employer stock.” *Syncor*, 516 F.3d at 1102 (citing *Moench v. Robertson*, 62 F.3d 553, 571 (3rd Cir. 1995)). Prior to the panel decision, this Court had twice declined to adopt the *Moench* presumption. *See id.*; *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1098 n.3 (9th Cir. 2004). The Department of Labor has consistently opposed the *Moench* presumption. *See, e.g.*, Br. of Amicus Curiae Sec’y of Labor in Supp. of Appellant at 16-24, *In re Citigroup ERISA Litig.*, No. 09-3804 (2d Cir. Dec. 28, 2009). Plaintiffs’ Petition for Rehearing En Banc and the Department of Labor’s amicus brief both discuss why the *Moench* presumption is incompatible with the statutory language. We agree with their arguments, but will not repeat them.

Instead, we first explain why this is a particularly inappropriate case to adopt the *Moench* presumption. Based on the facts as recounted by the panel,² the ordinary doctrine of prudence—embraced by this Court just two years ago in another ERISA company stock case, *Syncor*, 516 F.3d at 1102-03—is sufficient to decide this case. It was therefore unnecessary to issue a decision directly at odds with *Syncor*.

² As Amici, we express no opinion on the underlying facts in the case, and rely on the panel’s characterization of the facts.

Even if the Court were now to decide that the *Moench* presumption should become the law in this circuit, the panel's formulation of the presumption is far more severe than any other circuit's. Thus, the second reason rehearing is advisable is an alternative one. If the Court is inclined to adopt some version of the *Moench* presumption, we urge it to do so with more care, limiting itself to features of the presumption necessary to decide this case. As is explained below, the panel's version of the presumption is essentially irrebuttable. It would immunize fiduciary misconduct concerning company stock in virtually every case; indeed, under the panel's analysis even the fiduciaries in *Enron* and *WorldCom* would not be liable for their spectacular misconduct.

This of course was not the panel's intention, but by having reached far beyond the facts to state the law, it is the result. As then-Judge Roberts stated, "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs, Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment). That, at bottom, is our theme.

B. Because the *Moench* Presumption Was Unnecessary to Decide This Case, the Panel Created an Unnecessary Conflict with This Court's Decision in *Syncor*.

In *Syncor*, the employer was involved in an illegal scheme, and the stock price "dropped, losing almost half its value," when the scheme was disclosed to the public. 516 F.3d at 1098. In deciding *Syncor*, the Court explicitly "decline[d]" to

adopt the *Moench* presumption, and instead applied the “prudent man” standard set forth in the text of the statute. *Id.* at 1102. The Court held:

We find that genuine issues of material fact exist regarding whether Defendants breached the “prudent man” standard set forth in 29 U.S.C. § 1104(a). The “prudent man” standard of care requires a fiduciary to discharge his duties with respect to a plan solely in the interest of participants “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 with like aims.” 29 U.S.C. § 1104(a)(1)(B). Here, 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.

Even though *Syncor* applied the normal prudence standard rather than the more deferential *Moench* presumption, the panel in this case attempted to distinguish *Syncor* by noting that *Syncor* “also declined to reject *Moench*.” *Quan v. Computer Scis. Corp.*, --- F.3d ----, 2010 WL 3784702, at *6 (9th Cir. Sept. 30, 2010). With respect, this is really no distinction at all. To embrace and apply the normal prudence standard, as *Syncor* did, simply *is* to reject *Moench*. The panel recognized as much, noting that under *Moench*, “[i]t will not be enough for plaintiffs to prove that the company’s stock was not a ‘prudent’ investment,” *id.* at *8, and going on to contrast “ERISA’s prudence requirement” with the *Moench* presumption, *id.* One cannot both *presume* that the fiduciary “acted consistently with ERISA” by investing in employer stock, *Moench*, 62 F.3d at 571, and review

a fiduciary's decision to invest in employer stock under the normal prudence standard, which requires fiduciaries to "carr[y] *their* burden of proving that they fulfilled their ERISA duties," *Howard v. Shay*, 100 F.3d 1484, 1490 (9th Cir. 1996) (emphasis added). *See also Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983) (Congress made common-law fiduciary requirements more exacting in ERISA). Just as the prudence standard and the *Moench* presumption cannot coexist, so *Quan* and *Syncor* cannot coexist.

Syncor seemed to briefly suggest that, on the facts of that case, the Plaintiffs may have been able to rebut the *Moench* presumption. *See* 516 F.3d at 1102 ("In any event, the district court's determination that the Class did not rebut the *Moench* presumption based solely upon Syncor's financial viability (as shown by evidence that Syncor stock outperformed both the NASDAQ and S & P 500) is not an appropriate application of the prudent man standard set forth in either *Moench* or 29 U.S.C. § 1104."). But that passing statement is literally *obiter dictum*. It certainly cannot obviate the conflict with *Syncor* by turning *Syncor*'s application of the prudence standard into dictum. *See Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit . . ." (quotation marks and citation omitted)).

The conflict with *Syncor* was unnecessary because the panel could have reached the same result using the normal prudence standard. Here, according to the panel's statement of the facts, there is simply no evidence that Defendants failed to use "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). Plaintiffs pointed only to a one-day 12% drop in the stock price, followed by a quick rebound surpassing the pre-drop price. 2010 WL 3784702, at *2. CSC "followed a common practice" in valuing stock options, and, after the SEC clarified the "widespread confusion" on how to value stock options, CSC began repricing its stock options. *Id.* There was no evidence that the drop in the stock price was related to the stock option practices at issue. *Id.* at *11. Nor did the company's financial restatements have any effect on stock price or CSC's financial health. *Id.* Thus, the panel could have affirmed the district court's grant of summary judgment by following *Syncor*, applying the prudent man standard, and not adopting the *Moench* presumption.

That course, Amici submit, would have been far more consistent with principles of judicial restraint. There was simply no need to decide more. *See PDK Labs.*, 362 F.3d at 799 (Roberts, J., concurring in part and concurring in judgment); *see also Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12

(1992) (federal courts have no power to decide “abstract propositions” of law (quotation marks and citation omitted)).

C. The Panel’s Formulation of the *Moench* Presumption Sweeps Far Too Broadly.

Alternatively, the panel could have adopted a version of *Moench* more closely tied to the facts of the case, as those facts are stated in the panel’s opinion. In particular, the panel’s explication of the *Moench* standard and its discussion of insider trading are deeply problematic and largely unnecessary.

1. To overcome the presumption, the panel said, pension participants must present evidence “that clearly implicate[s] the company’s viability as an ongoing concern or show[s] a precipitous decline in the employer’s stock . . . combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement.” 2010 WL 3784702, at *8 (quotation marks and citation omitted). This version of *Moench* is both unjustifiably demanding and too rigid.

The panel’s version of *Moench* is unjustifiably demanding because a company need not be on the brink of bankruptcy (“clearly implicate[s] the company’s viability”) or have lost almost all value (“a precipitous decline in the employer’s stock”) before any reasonable fiduciary would stop investing in company stock. As noted by a district court on which the panel heavily relied:

It is entirely possible that a company built on high speculation—for instance, one with no clear path to profitability, but with possibly tremendous potential—could, without fraud, attract a huge amount of

capital from highly risk-tolerant investors, and thus be in no danger of imminent collapse despite being extraordinarily risky.

In re Ford Motor Co. ERISA Litig., 590 F. Supp. 2d 883, 892 (E.D. Mich. 2008).

More broadly, a company's business model may simply be so risky that no reasonable fiduciary would invest *money intended for retirement* in its stock.³

Indeed, *Moench* itself is best characterized as that kind of situation. *See* 62 F.3d at 557, 572. In such a situation, it would be irrational for a fiduciary to sit on its hands until the company's value has collapsed or bankruptcy is looming. As the Seventh Circuit, which has adopted a more deferential standard of review for ESOPs, has stated, "selling [company stock] when bankruptcy is declared will almost certainly be too late." *Summers v. State St. Bank & Trust Co.*, 453 F.3d 404, 411 (7th Cir. 2006).

Even those circuits that have adopted the *Moench* presumption have rejected the notion that plaintiffs may overcome the presumption only by showing an imminent collapse or the like. *See Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 256 (5th Cir. 2008) ("We do not hold that the *Moench* presumption applies

³ *See also, e.g., Taylor v. KeyCorp*, 678 F. Supp. 2d 633, 640 (N.D. Ohio 2009) (noting that "[w]hile Plaintiffs d[id] not allege that Key was on the verge of failure," they did allege that fiduciaries knew of the company's "high risk conduct, . . . requiring a government bailout and a huge dividend reduction"); *Morrison v. MoneyGram Int'l, Inc.*, 607 F. Supp. 2d 1033, 1053 (D. Minn. 2009) (holding presumption overcome by company's "pursuit of an extraordinarily speculative and unnecessary investment strategy that involved borrowing money and investing it in risky mortgage-backed securities").

only in the case of investments in stock of a company that is about to collapse.”); *Edgar v. Avaya, Inc.*, 503 F.3d 340, 349 n.13 (3d Cir. 2007) (the circuit that decided *Moench* “do[es] not interpret *Moench* as requiring a company to be on the brink of bankruptcy before a fiduciary is required to divest a plan of employer securities”). The panel’s formulation of the presumption is not a presumption, except in vanishingly rare cases; rather, it is simply a bar to any challenge to fiduciary behavior concerning company stock.

Besides being too demanding, the panel’s statement of the presumption is also too rigid. It effectively creates what the panel did not want to create: a “bright-line rule.” 2010 WL 3784702, at *9. There are many different circumstances in which a fiduciary may abuse its discretion by investing in employer stock. *See Moench*, 62 F.3d at 571 (stating that the presumption creates an abuse-of-discretion standard). As this Court observed in *Syncor*:

A prudent man standard based only upon a company’s alleged financial viability does not take into account the myriad of circumstances that could violate the standard. A violation may occur where a company’s stock did not trend downward over time, but was artificially inflated during that time by an illegal scheme about which the fiduciaries knew or should have known, and then suddenly declined when the scheme was exposed.

516 F.3d at 1102.

In particular, the panel’s rigid version of *Moench* ignores artificial inflation in the stock price resulting from the company’s—and often the fiduciaries’—

misrepresentations or concealment of material information. Many courts, and the Department of Labor, have held that it is *always* an abuse of discretion to pay more for stock than it is worth. *See, e.g., Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992) (“pa[ying] too much” for employer stock is a breach of duty); *cf. Howard*, 100 F.3d at 1488-90 (holding that selling stock for less than it is worth, as a result of an inadequate investigation of the facts, is a breach of the duty of prudence).

According to the panel, however, artificial inflation alone is not sufficient to establish a fiduciary breach. The panel seems to hold that buying stock artificially inflated “by an illegal scheme” might overcome the *Moench* presumption, but buying stock artificially inflated by misrepresentation or nondisclosure of material facts would not. 2010 WL 3784702, at *10. Without explanation, the panel foreclosed an important area of judicial inquiry. Perhaps there are circumstances in which knowingly purchasing inflated stock is not a fiduciary breach, but it is far from clear what they would be. The panel has immunized plan fiduciaries who invest in company stock even though they know the stock is artificially inflated—even if *they*, as the company’s top executives, inflated the stock with misrepresentations or concealment.

Not only is the panel wrong in removing inflation from the fiduciary calculus, there was also no reason to even address the issue. According to the panel itself, no genuine inflation issue is presented by the case. *See id.*

Further, the court's formulation of *Moench* does not recognize that, before a fiduciary may invoke *Moench*'s abuse-of-discretion standard as a shield, there must first be evidence the fiduciary actually deliberated. *See Moench*, 62 F.3d at 567. Absent deliberation, it does not make sense for the court to adopt a presumption that a fiduciaries' decision is appropriate. *See Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733-34 (7th Cir. 2006) (holding that "a discretionary judgment cannot be upheld when discretion has not been exercised," and noting that an ESOP fiduciary who "simply ignores" circumstances that pose a risk to participants "is imprudent"); Restatement (Second) of Trusts § 187 cmt. h (1959) ("[I]f the trustee without knowledge of or inquiry into the relevant circumstances and merely as a result of his arbitrary decision or whim exercises or fails to exercise a power, the court will interpose."); *see also Moench*, 62 F.3d at 572 ("[I]f the fiduciary cannot show that he or she impartially investigated the options, courts should be willing to find an abuse of discretion.").

Finally, the panel erred when it stated that "the burden to rebut the presumption varies directly with the strength of a plan's requirement that fiduciaries invest in employer stock." 2010 WL 3784702, at *9. The panel did not base that principle—nor could it have based that principle—on the statutory language of 29 U.S.C. § 1104. Rather, allowing a plan to relax fiduciary duties would violate the provision of ERISA that invalidates any plan provision which

would “relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under” ERISA fiduciary law. 29 U.S.C. § 1110(a). In any case, the panel did not have to reach this issue, since the plan in this case plainly gave fiduciaries the discretion to divest from company stock. *See* 2010 WL 3784702, at *5 n.6 (trustee may divest “if such action is deemed by it to be in the best interest of the Participants”).

2. According to the panel, fiduciaries investing in employer stock can rely only on “publicly known facts.” *Id.* at *8; *see also id.* at *8 n.8. This means that fiduciaries with specific knowledge of the corporate problems that should lead *at least* to halting further purchases of the stock, and perhaps also to divestiture of existing holdings, should act in a manner contrary to what any other prudent fiduciary would do.

This proposition is unprecedented. No case, until the panel’s decision here, has ever held that a fiduciary who knows something in his corporate capacity is entitled to forget it, much less that he *must* forget it, when he enters the fiduciary committee meeting. The law on the subject is quite to the contrary. *See, e.g., WorldCom*, 263 F. Supp. 2d at 765 (“[P]otential liability to employees who invested in WorldCom stock through the Plan for violations of the federal securities laws cannot shield [a fiduciary] from suit over his alleged failure to perform his quite separate and independent ERISA obligations. . . . When a

corporate insider puts on his ERISA hat, he is not assumed to have forgotten adverse information he may have acquired while acting in his corporate capacity.”).⁴ Under the panel’s ruling, the Enron and WorldCom fiduciaries, who knew of their companies’ rampant misconduct, would not have been liable for continuing to invest in company stock.

And if, as the panel seemed to imply, the federal securities laws created an exception to ERISA’s fiduciary duties and required an insider fiduciary to act imprudently, *see* 2010 WL 3784702, at *8 n.8, then the securities laws and ERISA would clash unnecessarily. For, in fact, an insider fiduciary may obey both ERISA and the federal securities laws. The fiduciary may, for example, cause the employer to make immediate public disclosure of the inside information. *Enron*, 284 F. Supp. 2d at 566 (quoting Am. Br. of Sec’y of Labor as Amicus Curiae at 26-27, *Enron*, 284 F. Supp. 2d 511 (No. MDL 1446)). As long as investing in the employer stock was not otherwise imprudent, the fiduciary will not be liable for any resulting drop in stock price; a fiduciary is not “an insurer of the value of plan assets.” *Id.* at 565. Or a fiduciary may simply prevent further investment in employer stock; it is not a violation of the securities laws to *abstain* from trading

⁴ Moreover, the standards the panel set for insider fiduciaries are effectively the same as those imposed on outside directed trustees, who have access only to public information. *See Wright*, 360 F.3d at 1102. There is no warrant for this limitation in the text of the statute.

based on inside information. *Id.* at 566; *see also Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”).

Most fundamentally, all of the panel’s speculation about what sort of inside information a fiduciary may act on, and what he must do with it, was entirely unnecessary. On the facts of this case, no such issue was even remotely presented. There was no genuine issue of fact as to whether the stock price was artificially inflated due to undisclosed information. *See* 2010 WL 3784702, at *10 (“That one-day drop also does not generate a genuine issue of material fact as to imprudence of continued investment in CSC stock on the basis of allegations of wrong-doing short of illegal conduct, where the price of the stock rebounded to more than its trading price within a reasonably short time frame.”).

IV. CONCLUSION

For the foregoing reasons, the Court should grant either panel rehearing or rehearing en banc.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that the foregoing brief complies with the applicable type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 29-2(c)(2). The brief contains 4,146 words, from the Statement of Interest through the Conclusion, as determined by Microsoft Office Word 2003. This brief has been prepared using Microsoft Office Word 2003 in 14-point Times New Roman font.

The undersigned further certifies that a virus scan was performed on the Brief using ESET NOD32 Antivirus, and that no viruses were detected.

DATED this November 1, 2010.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on November 1, 2010.

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