No. 10-56014

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVE HARRIS *et al.*,
Plaintiffs-Appellants

v.

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

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

BRIEF OF *AMICI CURIAE* THE AMERICAN BENEFITS COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(c)(1) of the Federal Rules of Appellate Procedure:

The American Benefits Council (the "Council") states that it is a non-profit, tax-exempt organization. The Council has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

The Chamber of Commerce of the United States of America (the "Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10 percent or greater ownership in the Chamber.

DATED: June 28, 2013

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BRIEF OF *AMICI CURIAE* THE AMERICAN BENEFITS COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

INTEREST OF *AMICI CURIAE*

The American Benefits Council is an organization of large U.S. employers that provide employee benefits to active and retired workers. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering more than 100 million Americans.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

This is a case of great significance for businesses that—as they are expressly encouraged to do by Federal law—include their stock as an investment option in their employer-maintained retirement programs. The use of company stock in retirement plans has been threatened by a recent tidal wave of fiduciary lawsuits that are generally filed after a decline in the price of the company's stock, typically alleging that the offering of company stock as an investment option was imprudent. Increasingly, these lawsuits are simply securities lawsuits in disguise. The unjustified costs associated with litigating these claims can cause great harm to retirement plan participants, particularly because the costs of these suits undermine

employers' commitments to their plans. Accordingly, it is critical that the courts clearly articulate standards that appropriately weed out these unwarranted lawsuits.

For these reasons, and others discussed herein, this case is of significant interest to *amici* and their members. [1]

SUMMARY OF ARGUMENT

Federal law strongly favors employee stock ownership. Unfortunately, plan investments in company stock are threatened by lawsuits filed anytime the employer's stock price declines or performs below expectations. To *amici*'s knowledge, not a single ERISA "stock drop" case has been won by a plaintiff on a motion or trial. Despite the lack of merit of stock drop claims, companies feel intense pressure to settle these cases for large sums because these cases can be extremely expensive to litigate, generally involve exorbitant claims for damages, and are very disruptive and intrusive to the company's business.

Accordingly, these ERISA stock drop lawsuits are undermining employers' commitment to the voluntary employment-based retirement

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[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

system—and particularly to offering company stock as an investment option. If fiduciaries will be sued no matter what action they take, so long as the stock price drops, and if companies continue to face million-dollar settlements (or legal bills) from these cases, then employers may stop offering company stock as an investment option and, even more concerning, may scale back their plan benefits.

The panel's decision here exacerbates these trends. By blurring ERISA's fiduciary lines and removing important protections granted to defendants against meritless securities claims masquerading as ERISA claims, the panel's decision undermines the vitality of the employer-sponsored retirement system. The actions taken by Defendants-Appellees described in the panel's recitation of the facts involve corporate officials merely running their business and communicating with shareholders. The decision suggests an employer must both operate its business effectively and *at all times* act "solely" in the interest of plan participants, which reduces the incentives to offer company stock as an option in a retirement plan. The panel's decision also encourages frivolous lawsuits that are merely securities fraud cases cloned for ERISA by taking away one of the few protections available to defendants in ERISA lawsuits, namely that the plaintiffs must show that they relied to their detriment on any alleged misrepresentations.

For these reasons and others noted herein, *amici* respectfully urge the Court to grant rehearing or rehearing *en banc* to consider the detrimental effect that the panel's opinion will have on the voluntary employment-based system.[2]

ARGUMENT

Despite Congress's demonstrated support for permitting plan investments in company stock, lawsuits filed by plan participants after an employer's stock price declines or falls below expectations have undermined the public policy favoring these investments. More recently, these lawsuits have been filed to avoid important protections for defendants against meritless suits that must be met by plaintiffs in securities lawsuits advancing similar allegations. This case, which the district court rightly noted appears to be "a securities case posing as an ERISA case," *Harris v. Amgen, Inc.*,

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[2] Although the issue was not raised by the Defendants-Appellees in their petition for rehearing, *amici* do not agree that the *Moench* presumption does not or should not apply in this case. *See Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995). Since *Moench*, a number of courts expanded the holding beyond the employee stock ownership plan ("ESOP") context, applying the *Moench* presumption to what are known as "eligible individual account plans," or "EIAPs", which are defined in ERISA as plans that do not necessarily require investment in employer securities but "explicitly provide[] for" investment in employer securities. *See Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1098 n.3 (9th Cir. 2004); *In re Syncor ERISA Litig.*, 351 F. Supp. 2d 970, 979 n.5 (C.D. Cal. 2004); *In re Honeywell Int'l ERISA Litig.*, 2004 WL 3245931 at *11 n.5 (D.N.J. June 14, 2004).

No. CV 07-5442 PSG at 12 (C.D. Cal. June 8, 2010), is a stark example of these trends. Bending ERISA's fiduciary rules to litigate what is in essence a securities cases endangers the continued viability of company stock investment options.

I. MERITLESS ERISA STOCK DROP LAWSUITS THREATEN THE CONTINUED VIABILITY OF COMPANY STOCK INVESTMENT OPTIONS.

Employer-sponsored retirement plans are a core element of our nation's retirement system. They successfully assist millions of American families in accumulating retirement savings. Congress has time and time again demonstrated the importance it places on the ability of workers to save for retirement through employer-sponsored plans by adopting rules that facilitate employer sponsorship of plans, encourage employee participation, promote prudent investing, allow operation of plans at reasonable cost, and safeguard plan assets and participant interests through intensive regulatory oversight.

The ability to invest in company stock through a retirement plan has been encouraged by Congress and is prized by employees.[3] Congress has

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[3] The offering of company stock as an investment option is widespread. *See* Jack VanDerhei et al., *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2011*, Employee Benefit Research Inst. Issue Brief, No. 380, 26 (2012), http://www.ebri.org/pdf/briefspdf/EBRI_IB_12-2012_No380.401k-eoy2011.pdf (noting that 38% of all participants in the

consistently facilitated plan investments in company stock by providing those investments with favorable regulatory treatment under ERISA. *See, e.g.*, 29 U.S.C. §§ 1104(a)(2), 1107(b)(1), 1108(b)(3), (e)(3). Congress has even provided preferential tax treatment for plans that include, and participants who invest in, company stock. *See, e.g.*, 26 U.S.C. §§ 72(t)(2)(A)(vi), 402(e)(4), 404(k). In addition, Congress has enacted additional protections for participants in plans that offer employer stock as an investment option. *See* 26 U.S.C. § 401(a)(35); 29 U.S.C. § 1021(m). Courts have also recognized that employer stock funds within individual account plans have the salutary effect of promoting investment in company stock to encourage economic growth. *See Edgar v. Avaya*, *Inc.,* 503 F.3d 340, 347 (3d Cir. 2007). As this Court further acknowledged in *Quan v. Computer Sciences Corp.*, "[p]lans that tie employee compensation to the company's success are widely believed to be good for employee productivity and loyalty." 623 F.3d 870, 881 (9th Cir. 2010). To accomplish this end, "Congress has granted favored status to ESOPs and other EIAPs by exempting them from certain ERISA requirements." *Id.*

Employee Benefit Research Institute's 2011 database, which represents approximately 46% of the universe of active 401(k) plan participants, are in a plan with a company stock investment option). When offered, employees commonly invest in company stock. *See id.* (finding that for plans that offer company stock, the average asset allocation was 19.7% of the account balance in 2011).

Consistent with Congress's decision to encourage employee ownership of company stock, it is important that courts establish minimum standards of pleading that discourage lawsuits filed reactively any time a company's stock value declines. Otherwise, fiduciaries might well feel pressure to divest plan investments in company stock—undermining Congress's stated intention to encourage benefit plans that offer employer equity and eroding employers' commitment to retirement plans generally. *See Quan,* 623 F.3d at 881 ("Congress has also expressed concern that 'regulations and rulings which treat employee stock ownership plans as conventional retirement plans…block the establishment and success of these plans.'") (quoting *Moench*, 62 F.3d at 569, in turn quoting Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1520 (1976); *accord Grindstaff v. Green*, 133 F.3d 416, 421-22 (6th Cir. 1998); *Kuper v. Iovenko*, 66 F.3d 1447, 1458 (6th Cir. 1995).

Unfortunately, company stock investments are currently threatened by lawsuits filed without regard to the merits. Plan fiduciaries have increasingly found themselves the targets of class action lawsuits alleging that they have violated their fiduciary duties under ERISA by imprudently investing in company stock, and there is no sign that the lawsuits will let up. *See, e.g.*, Frances Denmark, *ERISA Class-Action Suits Shape U.S.*

Retirement Future, Institutional Investor, Feb. 16, 2011 ("In less than a decade, 800 of the largest U.S. corporations … have been sued by classes of employees.").

Companies feel intense pressure to settle these cases—notwithstanding their lack of merit—because they can be extremely expensive to litigate, generally involve exorbitant claims for damages, and are very disruptive to business. *See* Samuel Estreicher & Kristina Yost, *Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment* (NYU Sch. of Law Pub. Law & Legal Theory Working Paper No. 08-03, Law & Econ. Working Paper No. 08-06, 2009) (finding that the mean gross settlement in ERISA stock drop cases from 1993 through 2007 was more than $31.6 million); Fiduciary Counselors Inc., *ERISA Class Action Settlements & Attorney Fees* (2010), http://www.erisasettlements.com/press/ERISA-Chart.pdf (compiling data on settlements of stock drop class actions involving some 100 different plan sponsors; in 2009 alone, at least 17 stock drop cases were settled for amounts ranging from $300,000 to $75 million). Plaintiffs know that companies are willing to settle because the company has moved beyond the unusual event that caused the stock to drop and the stock has recovered, yet the lawsuit continues to distract the organization. Notably, although many

of these stock drop class actions have been settled and many have been won by defendants (often on summary judgment and a few at trial), *amici* are not aware of a single one that has been won by plaintiffs on a motion or at trial.

These stock drop cases are having a detrimental effect on retirement plan participants. *Amici* are aware of large employers that have dropped or are considering dropping company stock as an investment option in their retirement plans because of large fiduciary liability exposure, which is contrary to the clear congressional intent to encourage greater employee stock ownership.

The basis for the claims in this case is that the price of Amgen stock gradually declined over a period of one and a half years based on publicly reported concerns over the safety of Amgen's products. Participants could *at any time* during that period have decided to sell their investment in Amgen stock and instead invested in a wide range of non-company stock investment options. This is exactly the sort of case that undermines the employer-based retirement system.

II. REHEARING OR REHEARING *EN BANC* SHOULD BE GRANTED BECAUSE THE PANEL DID NOT ADEQUATELY ADDRESS THE LINE BETWEEN ACTING IN AN ERISA FIDUCIARY CAPACITY AND ACTING IN A NON-FIDUCIARY CORPORATE CAPACITY.

It is very common that persons who serve as fiduciaries of ERISA plans wear multiple "hats." Many ERISA fiduciaries are also senior employees of the company that sponsors the plan. A person is an ERISA fiduciary "to the extent" he exercises discretionary authority or discretionary control respecting management of a plan or exercises any authority or control respecting management or disposition of its assets. 29 U.S.C. § 1002(21)(A). The phrase "to the extent" in ERISA's fiduciary definition is fundamental to proper administration of the law. The distinction between actions taken as a fiduciary and those taken in a corporate capacity is important to weed out claims of improper conduct that have nothing to do with fiduciary responsibility.

As the Supreme Court has recognized, although Congress integrated some of trust law's principles, ERISA does not require that every act of a corporate employer be solely to benefit those employees that participate in its benefit plans.

> Employers, for example, can be ERISA fiduciaries and still take actions to the disadvantage of employee beneficiaries, when they act as employers (*e.g.,* firing a beneficiary for reasons unrelated to the ERISA plan), or even as plan sponsors (*e.g.,*

> modifying the terms of a plan as allowed by ERISA to provide less generous benefits).

Pegram v. Herdrich, 530 U.S. 211, 225 (2000). Thus, it is well established that although "ERISA's definition of fiduciary is 'to be broadly construed,' an individual cannot be liable as an ERISA fiduciary solely by virtue of her position as a corporate officer, shareholder or manager …. Instead [ERISA] defines an administrator, for example, as a fiduciary only "to the extent" that he acts in such a capacity in relation to the plan." *In re WorldCom, Inc.,* 263 F. Supp.2d 745, 757 (S.D.N.Y 2003) (internal citations omitted) (granting defendant's motion to dismiss in an ERISA stock drop case); *accord Wright*, 360 F.3d at 1101-02 (concluding that activities involving plan design or settlor functions do not trigger fiduciary status).

This case arises out of a series of alleged acts undertaken by Defendants-Appellees serving as directors and managers of a company that develops and sells pharmaceutical drugs. Each action taken by Defendants-Appellees described in the panel's recitation of the facts involve corporate officials simply running their business and communicating with shareholders. "The central problem in this case," the panel's decision states, "is that Amgen officials, many of whom are defendants here, made material misrepresentations and omissions in violation of the federal securities laws." Op. at 31. These allegations, if proven true, could lead to recovery for

shareholders—including the plan and its participants—under the federal securities laws. But that does not mean that these actions were taken by Defendents-Appellees in their fiduciary capacity or in any way involved administration of the plans or any other fiduciary function to which ERISA's standard of care applies.

In fact, in response to Defendants-Appellees' contention that removing the Amgen common stock fund would have essentially amounted to trading on inside information, the panel responded that the proper action for Defendants-Appellees to have taken was to "reveal[] material information to the general public." *Id.* This would have been a corporate action taken in the interests of all shareholders, and not, by definition, an action taken "solely" in the interest of plan participants. *Amici* do not dispute that employers have certain obligations under the federal securities laws; we simply contend that those responsibilities must be judged by those laws and not judged as ERISA fiduciary actions subject to ERISA's duties of loyalty and prudence.[4] *Amici* respectfully urge rehearing or rehearing *en banc* so that the Court may avoid the significant confusion the panel's

[4] Courts have refused to create additional disclosures beyond ERISA's explicit requirements. *See, e.g.*, *Varity Corp. v. Howe,* 516 U.S 489, 489 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 84 (1995); *Hecker v. Deere & Co.*, 496 F. Supp.2d 967, 974 (W.D. Wis. 2007), *aff'd,* 556 F.3d 575 (7th Cir. 2009); *Ames v. Am. Nat'l Can Co.*, 170 F.3d 751, 759 (7th Cir. 1999).

opinion could generate among employers that sponsor retirement plans offering investment in their own publicly traded employer securities.

III. THE COURT SHOULD GRANT REHEARING TO DETER THE GROWING TREND OF SECURITIES LAWSUITS DISGUISED AS ERISA CLAIMS.

It has become commonplace in securities fraud cases to add an ERISA lawsuit to the proceedings, which dramatically increases the cost of litigation and thus the pressure to settle. It is the general consensus that, in light of the distinctions between ERISA and securities fraud cases, such cases should be neither consolidated nor tried together. *See* Robert Rachal et al., *Fiduciary Duties Regarding 401(k) and ESOP Investments in Employer Stock*, ERISA LITIGATION (BNA 2d ed. 2005), http://www.asppa.org/Document-Vault/Docs/Conferences/Los%20Angeles%20Benefits%20Conference/2008/Wrkshp4-Shapiro_Howard.pdf.aspx. Courts have also declined to transfer ERISA fiduciary breach cases where securities lawsuits were pending based on the same misrepresentations and nondisclosures. *See Shanehchian v. Macy's Inc.*, 251 F.R.D. 287, 292 (S.D. Ohio 2008). These factors, among others, make it difficult for defendants to litigate essentially mirror cases efficiently, increasing the pressure to settle these cases regardless of their merits.

A. This case is nothing but a securities fraud case disguised as an ERISA case, a tactic used to avoid important hurdles Congress has placed on securities lawsuits.

The panel's decision repeatedly uses alleged securities law violations to justify reversing the District Court's well-reasoned dismissal.[5] Thus, the panel confirms the District Court's observation that "[t]his appears to be a securities case posing as an ERISA case." *Amgen, Inc.*, No. CV 07-5442 PSG at 12.

Indeed, *amici* and their members have seen a growing trend of plaintiffs disguising what are class action securities law allegations in terms of ERISA fiduciary duty violations. There are reasons that plaintiffs often clone their securities lawsuit as an ERISA lawsuit, including that the hurdles that apply to a claim under Rule 10b-5 under the Securities Exchange Act of 1934 do not apply in an ERISA fiduciary breach case. *See* Christopher J.

[5] *See* Op. at 28 ("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."); *id.* at 30 ("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."); *id.* at 34-35 ("We do not think it matters whether defendants' statements were made to the SEC in their corporate capacity, their fiduciary capacity, or some other capacity. Irrespective of the capacity in which the misleading statements were made, defendants made them, and they were factored into the price of Amgen stock.").

Rillo & Nicole S. Magaline, *ERISA "Stock Drop" Cases: Keeping Securities Fraud Litigation Company*, Bloomberg Law Reports – Securities Law, Vol. 5, No. 19 (2011). For example, fraud allegations—which is what this case boils down to—require much more specific pleading under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 9; *Beesley v. Int'l Paper Co.*, 2009 WL 260782, at *2 (S.D. Ill. Feb. 4, 2009) ("Courts generally hold that a claim for breach of fiduciary duty under ERISA [is] not subject to the heightened pleading requirements even though some of the allegations of breach of fiduciary duty under ERISA are arguably sound in fraud or deceit.") (citations omitted); *see also Rankin v. Rots*, 278 F. Supp. 2d 853, 865 (E.D. Mich. 2003). In addition, bringing a parallel ERISA lawsuit allows a plaintiff to bypass the protections afforded to defendants under the Private Securities Litigation Reform Act ("PSLRA"), including an automatic stay in discovery while a motion to dismiss is pending and a requirement that the complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u–4. Thus, the filing of a parallel ERISA action is a well-known tactic to "circumvent the discovery safeguards of the PSLRA … to exert settlement pressures." *See* Clovis Trevino Bravo, *ERISA Misrepresentation and Nondisclosure Claims: Securities Litigation under the Guise of ERISA?*,

26 HOFSTRA LAB. & EMP. L.J. 497, 508 (2008). As a result of the complexity and uncertainty surrounding the case law on ERISA disclosure duties, many cases have settled for millions of dollars. *See id*. at 512 n. 105.

B. **This panel's decision effectively eliminates a key element of an ERISA fiduciary breach case—the well-established requirement under ERISA that a plaintiff allege detrimental reliance.**

The panel's opinion, if not reconsidered, could make this problem of cloned ERISA lawsuits worse. The decision appears to take away one of the few protections available to defendants in ERISA lawsuits, namely that the plaintiffs show that they relied to their detriment on any alleged misrepresentations. The notion of detrimental reliance is a well-established element of proving that a loss to a plan "result[ed] from" a fiduciary breach. 29 U.S.C. § 1109(a). A plaintiff must plead this element in more than a conclusory way to comply with the *Twombly-Iqbal* standard set forth by the Supreme Court. *See In re Harley-Davidson, Inc. Secs. Litig.*, 660 F. Supp.2d 953, 957 (E.D.Wis. 2009) ("[T]he factual allegations [in a case brought under ERISA sections 409 and 502] must be enough to rise above the speculative level, meaning that the contentions have to state a claim that is plausible on its face.") (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

The panel adopts a "fraud on the market" theory to permit Plaintiffs-Appellants to invoke a rebuttable presumption of reliance. As Defendants-Appellees rightly point out in their petition, this novel decision deserves rehearing. As best we can tell, this issue was not even briefed by the parties, and it is contrary to recent decisions. One court has held specifically that under ERISA, there is no "fraud on the market" presumption of reliance similar to that allowed under the securities laws. *See Wright v. Medtronic*, 2011 WL 31501 (D. Minn. Jan. 5, 2011) (granting motion to dismiss); *see also Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 314 (5th Cir. 2007) ("The analogy between securities fraud and ERISA fiduciary violation plaintiffs is inexact."); *In re Cardinal Health, Inc. ERISA Litig.*, 424 F. Supp. 2d 1002, 1046 (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."); *In re Avon Prods., Inc. Sec. Litig.*, 2009 WL 848083, at *15 (S.D.N.Y. Mar. 3, 2009) (noting that applying theory to ERISA case would "incorporate into the fiduciary-responsibility provisions of ERISA a substantial part of the entire body of legal obligations created under section 10(b) and related federal securities-law provisions. As we have seen, the courts have generally been unwilling to adopt such a broad reading of ERISA."). By removing one of the few reasonable checks on ERISA clone

lawsuits, the panel's decision threatens to facilitate the filing of meritless lawsuits that exacerbate the intense pressure on employers to settle—or worse, to encourage employers to remove employer stock altogether from their plans.

CONCLUSION

For the reasons stated above, *amici* respectfully submit that this Court should grant Defendants-Appellees petition for rehearing or rehearing *en banc*.

DATED: June 28, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitations of 9th Cir. R. 29-2(c)(2) because the petition contains 4,030 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The petition complies with the typeface requirements of 9th Cir. R. 29-2(c)(1) and the type style requirements of 9th Cir. R. 29-2(c)(1) because the petition has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface.

Dated: June 28, 2013

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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 by using the appellate CM/ECF system on June 28, 2013.

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

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