No. 18-1165

In The

Supreme Court of the United States

RETIREMENT PLANS COMMITTEE OF IBM, et al.,

Petitioners,

v.

LARRY W. JANDER, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

SAMUEL E. BONDEROFF
Counsel of Record
ZAMANSKY LLC
50 Broadway, 32nd Floor
New York, NY 10004
(212) 742-1414
samuel@zamansky.com

QUESTION PRESENTED

This Court in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), held that, when a plaintiff alleges that the fiduciary of an employee stock plan breached his fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA") by "failing to disclose [inside] information to the public so that the [employer's] stock would no longer be overvalued," the plaintiff must satisfy certain pleading conditions. *Dudenhoeffer*, 573 U.S. at 429. Specifically, courts should consider whether the proposed disclosure "could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws." *Id.* (citations omitted). Courts "should also consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that . . . publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." *Id.* at 429-30. The facts supporting this plausibility "should appear in the [plaintiff's] complaint." *Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016).

In this case, Respondents brought such a duty-of-prudence claim. The Second Circuit, following this Court's directive in *Dudenhoeffer*, engaged in "careful, context-sensitive scrutiny" of Respondents' allegations—those that could be alleged in other cases, and those that were plainly unique to the facts of this

QUESTION PRESENTED—Continued

case—and determined that Respondents' allegations, particularly their case-specific ones, had plausibly stated a claim. The question presented is:

Whether there is any basis to review the Second Circuit's determination that no prudent fiduciary could conclude that, in light of Respondents' case-specific and more general allegations, public corrective disclosure of the concealed information that artificially inflated the employer stock in which Respondents were invested would do "more harm than good" to Respondents and other ERISA plan participants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES–Continued

Page

STATUTES

STATEMENT

I. Factual Background

Petitioners served as ERISA fiduciaries of the IBM 401(k) Plus Plan (the "Plan"), including its employee stock option plan ("ESOP"), which was invested primarily in IBM's publicly traded stock. From January 21, 2014 through October 20, 2014, IBM's stock traded at an artificially high level because IBM concealed from the public the true value of its beleaguered Microelectronics business. Thus, during that time, the IBM ESOP became an imprudent retirement investment. Respondents, participants in the Plan who bought and held shares of the ESOP, brought claims alleging that Petitioners' failure to effectuate truthful, corrective disclosure to return IBM's stock price to its real value and thus end the imprudence of the ESOP was a breach of their fiduciary duties under Section 404(a) of ERISA.

1. Under Section 404(a)(1)(B), Petitioners were obliged to manage Plan participants' investments, including the ESOP, "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[.]" Pet. App. 47a. As this Court held in *Dudenhoeffer*, this "same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that an ESOP fiduciary is under no duty to diversify the ESOP's holdings." *Dudenhoeffer*, 573 U.S. at 419. In

evaluating claims for breach of the fiduciary duty of prudence against ESOP fiduciaries, where the fiduciaries are alleged to be corporate insiders aware of material information about employer stock that has not been disclosed to the public, thus causing the stock to trade at an artificially inflated price, district courts are obliged to determine whether the plaintiff "has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that . . . publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." *Id.* at 429-30.

2. The ESOP was a popular investment choice in the Plan. Petitioner Retirement Plans Committee of IBM (the "Committee") was a fiduciary for the Plan with discretionary authority and control over the management of the Plan's assets, including those in the ESOP. Petitioners Martin Schroeter and Robert Weber were members of the Committee and also the Chief Financial Officer and General Counsel, respectively, of IBM. Petitioner Richard Carroll was IBM's Chief Accounting Officer and the Plan Administrator. CA2 Dkt. 33 (Joint Appendix, Vol. I) at A-63-65.

3. IBM is a global information technology company. Its Microelectronics business operated within its Systems and Technology Segment. In 2013 and 2014, Microelectronics incurred annual losses of nearly $1 billion, its long-lived assets had suffered significant deterioration, but IBM continued to assign a carrying value to Microelectronics of approximately $2.4 billion.

Under Generally Accepted Accounting Principles ("GAAP"), IBM should have done impairment testing and recognized an impairment loss to Microelectronics once it saw that the carrying cost of Microelectronics would not be recoverable and exceeded its fair value, but it did not do so. Instead, IBM began to search for a buyer for Microelectronics, seeking more than $2 billion for the business. No buyer was interested, although Goldman Sachs was hired to find buyers, and companies such as GlobalFoundries, Intel and Taiwan Semiconductor Manufacturing Company all took a look. Eventually, GlobalFoundries agreed to acquire Microelectronics, but IBM had to pay GlobalFoundries $1.5 billion to accept the business. CA2 Dkt. 33 at A-68-78.

4. Because IBM did not disclose the impairment of Microelectronics between January 21 and October 20, 2014 (when the GlobalFoundries acquisition was announced), IBM's stock traded at an artificially high price during that time. In announcing the GlobalFoundries acquisition, Petitioner Schroeter acknowledged that IBM would be taking a one-time after-tax charge of $3.3 billion in connection with the transaction. IBM subsequently admitted in its Form 10-Q for the third quarter of 2014 that a pre-tax charge of $4.7 billion would be taken, $2.4 billion of which was attributable to impairment to the long-lived assets of the Microelectronics business. Microelectronics, previously valued at $2.4 billion by IBM, was now deemed worthless. In response to this news, IBM's stock price declined more than $12 per share in one day of heavy

trading. Meanwhile, during the period of artificial inflation, Plan participants purchased over $100 million of ESOP shares at artificially high prices. Moreover, IBM's stock failed to recover from these losses and remains well below its 2014 high point to this day. CA2 Dkt. 33 at A-78-82, 85, 88.

5. Petitioners knew or should have known that Microelectronics was overvalued and that IBM's failure to disclose this information to the public had caused IBM's stock price to trade at an artificially high level. As the Chief Financial Officer, Chief Accounting Officer and General Counsel of IBM, Petitioners were closely involved in the effort to sell Microelectronics as well as in the effort to ensure that disclosures made under the federal securities laws regarding Microelectronics complied with GAAP. Petitioners were also directly involved in the preparation of those disclosures and thus were well-situated to try to effectuate corrective disclosures, as part of the regular reporting mechanisms under the securities laws, to return IBM's stock price to its real value and render the ESOP once again a prudent investment for Plan participants.

6. No prudent fiduciary could have concluded that trying to effectuate such corrective disclosure would do more harm than good to the Plan and its participants. Particularly in light of the pending sale of Microelectronics, disclosure of the business's real, impaired value was inevitable. With such disclosure inevitable, Petitioners had a choice. They could make an earlier disclosure, ensuring that fewer Plan participants would purchase artificially inflated ESOP

shares and that less damage to IBM's reputation would likely be done when the truth came out, which, in turn, would mean a softer landing for IBM's stock price and a swifter recovery from the price correction. Or they could do nothing and wait for the truth to emerge on its own, which would mean a longer period of artificial inflation and, therefore, a greater number of artificially inflated purchases by Plan participants as well as a greater likelihood of a harsher price correction and more tepid recovery. Given that choice, no prudent fiduciary could conclude that earlier action would do more harm than good and that inaction would be preferable.

II. Procedural Background

1. Respondents brought a claim against Petitioners in the United States District Court for the Southern District of New York for breach of the fiduciary duty of prudence under ERISA. Respondents' first complaint was dismissed by the District Court without prejudice for failing to satisfy the "more harm than good" pleading standard articulated in *Dudenhoeffer*. Respondents pleaded an amended complaint that was also dismissed by the District Court on similar grounds, this time with prejudice. The District Court held that Respondents' amended complaint lacked "context specific allegations" and that it "suffers from the failure to consider how a prudent fiduciary, when confronted with the inevitability of disclosing the impending sale of its Microelectronics business, would

have accounted for the potential ill-effects resulting from a premature disclosure." Pet. App. 37a.

2. Respondents appealed the District Court's decision to the Second Circuit Court of Appeals, which reversed the judgment and remanded the case to the District Court. The Second Circuit considered whether to adopt Petitioner's proposed interpretation of *Dudenhoeffer*'s "more harm than good" pleading standard, which it characterized as "a restrictive test" that had already been adopted by the Fifth and Sixth Circuits in *Whitley v. BP, P.L.C.*, 838 F.3d 523 (5th Cir. 2016), and *Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855 (6th Cir. 2017), respectively. Pet. App. 14a. The Second Circuit also considered whether to adopt instead the application of *Dudenhoeffer* for which Respondents advocated, which would impose a less "heavy burden" on plaintiffs at the pleading stage. Pet. App. 14a. Ultimately, the Second Circuit stated that it "need not here decide which of the two standards the parties champion is correct . . . because we find that [Respondents] plausibly plead[ ] a duty-of-prudence claim even under the more restrictive 'could not have concluded' test." Pet. App. 15a.

3. The Second Circuit was persuaded by five factors in Respondents' complaint: (1) that "the Plan defendants allegedly knew that IBM stock was artificially inflated through accounting violations"; (2) that, by virtue of their senior position and responsibility for IBM's financial disclosures, Petitioners could have effectuated corrective disclosure "within IBM's quarterly

SEC filings" and thus ameliorated the concern articulated by the District Court that "an unusual disclosure outside the securities laws' normal reporting regime could spook the market, causing a more significant drop in price than if disclosure were made through the customary procedures" (quoting Pet. App. 37a); (3) that Petitioners' "failure promptly to disclose the value of IBM's microelectronics division 'hurt management's credibility and the long-term prospects of IBM as an investment' because the eventual disclosure of a prolonged fraud causes 'reputational damage' that 'increases the longer the fraud goes on'" (quoting CA2 Dkt. 33 at A-87) (internal brackets omitted); (4) "that 'IBM stock traded in an efficient market,' such that 'correcting the Company's fraud would reduce IBM's stock price only by the amount by which it was artificially inflated'" (quoting CA2 Dkt. 33 at A-51); and, most important, (5) that Petitioners "allegedly knew that disclosure of the truth regarding IBM's microelectronics business was inevitable, because IBM was likely to sell the business and would be unable to hide its overvaluation from the public at that point" (citing CA2 Dkt. 33 at A-88). Pet. App. 15a-19a.

4. The Second Circuit held that the fifth factor was "particularly important." Pet. App. 19a. It distinguished between "the normal case, when the prudent fiduciary asks whether disclosure would do more harm than good" and "the fiduciary is making a comparison only to the status quo of non-disclosure[,]" and this case, in which "the prudent fiduciary would have to compare the benefits and costs of earlier disclosure to

those of later disclosure—non-disclosure is no longer a realistic point of comparison." Pet. App. 19a. While the District Court expressed concern that "a prudent fiduciary could think that disclosure might 'spook potential buyers[,]'" the Second Circuit reasoned that "any potential purchaser would surely conduct its own due diligence of the business prior to purchasing it." Pet. App. 19a-20a. Accordingly, "[t]he allegations regarding the sale of the microelectronics business, far from undermining [Respondents'] duty-of-prudence claim, instead tip the scales toward plausibility." Pet. App. 20a.

5. Thus, the facts alleged in this case by Respondents differed from those of "the normal case" where a prudent fiduciary must choose between disclosure or non-disclosure; the specific facts of IBM's imminent sale of Microelectronics alleged here presented a choice between earlier disclosure or later disclosure, and the "more harm than good" analysis thus had a different outcome. But the pleading standard under *Dudenhoeffer* applied by the Second Circuit was the same as that applied by the Fifth and Sixth Circuits.

6. Petitioners sought a panel rehearing, or, in the alternative, rehearing *en banc*. Their request was denied with no judge dissenting. Pet. App. 46a. Petitioners then filed a motion seeking a stay of the issuance of the mandate so that they could petition this Court for a writ of certiorari. CA2 Dkt. 84. That motion was denied as well. CA2 Dkt. 93. The case is now proceeding in the District Court.

ARGUMENT

The question presented by Petitioners—"[w]hether [*Dudenhoeffer*'s] 'more harm than good' pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time"—does not arise in this case. Pet. App. i. The Second Circuit did not find that Respondents' allegations were plausible because of one factor; it was a combination of allegations—some unique to this case, some potentially applicable to other cases—that persuaded the Second Circuit that *Dudenhoeffer* had been satisfied. The Second Circuit focused particularly on allegations from which it reasonably could be inferred that disclosure of the underlying information regarding the value of IBM's Microelectronics business was inevitable. IBM was aggressively seeking a buyer for Microelectronics; this impending sale meant that, one way or another, IBM was going to have to disclose the deterioration in Microelectronics's value sooner or later. Such unique factual allegations distinguished this case from other duty-of-prudence cases alleged in the Fifth and Sixth Circuits, where the information alleged to have been concealed from the public was not necessarily going to come out, or at least not before the fiduciary defendants investigated to determine the contours of the undisclosed information and whether disclosure was appropriate.

But the Second Circuit did not hold that even where disclosure is "inevitable," plausibility under *Dudenhoeffer* is automatically achieved. Rather, considering the factual allegations that disclosure of Microelectronics's real value was inevitable here, combined with Respondents' other allegations about the market for IBM stock, the knowledge of Petitioners regarding the concealed information about the value of Microelectronics, the ability of Petitioners to make disclosures through reporting under the securities laws, and the increased risk of reputational harm to IBM resulting in a greater stock-price correction and more sluggish stock-price recovery, the Second Circuit concluded that, under the unique circumstances of this case, the pleading requirements of *Dudenhoeffer* and *Amgen* were met.

Accordingly, the Second Circuit's opinion below did not conflict with those of other Circuits, nor did it contravene this Court's holding in *Dudenhoeffer*. There is no basis, therefore, for certiorari to be granted.

I. The Petition Should Be Denied Because There Is No Circuit Split

Petitioners contend that the Second Circuit's opinion "conflicts with decisions of the Fifth and Sixth Circuits holding that the rigorous pleading standard set forth in *Fifth Third* and *Amgen* is not satisfied by generalized allegations that the costs of undisclosed fraud grow over time and thus it was prudent to disclose sooner rather than later." Pet. App. 9-10. Petitioners misstate the Second Circuit's holding to manufacture a phony conflict with the Fifth and Sixth Circuits.

The Second Circuit's decision did not turn on Respondents' "generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time." Pet. App. 1 (citations omitted). Rather, the "particularly important" factual allegations for the Second Circuit were those concerning IBM's efforts to sell Microelectronics; those efforts made disclosure of the value of Microelectronics inevitable in a way unique to the facts of this case that could not simply be replicated in another duty-of-prudence action. Pet. App. 19a-20a. Those specific allegations, combined with Respondents' more general allegations concerning the increased risks posed by a prolonging of a public stock's artificial inflation, were sufficient to satisfy *Dudenhoeffer*'s "more harm than good" requirement. Pet. App. 15a-20a. The Second Circuit went out of its way to make clear that it had reached this conclusion by applying the "more restrictive" pleading standard endorsed by the Fifth and Sixth Circuits. Pet. App. 14a-15a. Thus, there is no circuit split.

Petitioners argue that the Second Circuit's decision conflicts with the Fifth Circuit's opinion in *Martone v. Robb*, 902 F.3d 519 (5th Cir. 2018), and with the Sixth Circuit's nonprecedential opinion in *Graham v. Fearon*, 721 F. App'x 429 (6th Cir. 2018). Pet. App. 1-2. They claim that, in each of these cases, "generalized allegations that the costs of undisclosed fraud only grow over time" were deemed insufficient to satisfy *Dudenhoeffer*. Pet. App. 15. The Second Circuit, Petitioners assert, reached the opposite conclusion and thereby "upended the carefully calibrated balance that this Court struck in [*Dudenhoeffer*]." Pet. App. 17.

But Petitioners are wrong about what the Second Circuit actually held here. The Second Circuit discussed the "restrictive" application of *Dudenhoeffer* promulgated by the Fifth and Sixth Circuits in *Whitley* and *Saumer*—which were, in turn, confirmed by those courts in *Martone* and *Graham*. *See Martone*, 902 F.3d at 527 (applying "the requirements of *Dudenhoeffer* and *Whitley* to the plaintiff's claims); *Graham*, 721 F. App'x at 435-36 (applying *Saumer* in evaluating plausibility of the plaintiff's claims under *Dudenhoeffer*). The Second Circuit specifically noted that its finding that Respondents had satisfied *Dudenhoeffer* had been reached using the same application of *Dudenhoeffer* as that used by the Fifth and Sixth Circuits. Pet. App. 14a-15a. Three Circuit Courts applied the same test under *Dudenhoeffer*; there is no conflict to resolve. The Second Circuit happened to reach a different conclusion than did the Fifth and Sixth Circuits, but then again, the Second Circuit was presented with a different set of factual allegations.

Nor did the Second Circuit rely exclusively on any one set of allegations from Respondents' complaint; rather, the Second Circuit held that "[s]everal allegations in the amended complaint, considered in combination" were sufficient to persuade the Second Circuit of the plausibility of Respondents' claims. Pet. App. 15a.

In particular, the Second Circuit was persuaded by Respondents' specific factual allegations regarding the proposed sale of Microelectronics, which made disclosure of its impaired value "inevitable." Pet. App. 19a. By contrast, in *Martone*, the plaintiff had alleged that Whole Foods' stock price had become artificially inflated by Whole Foods' concealment from the public of a program of "systemic, illegal overcharging of its customers by regularly misstating the weight of prepackaged food on which prices were based." *Martone*, 902 F.3d at 521 (internal quotation marks and brackets omitted). The Fifth Circuit credited the defendants' argument in that case "that a prudent beneficiary could have believed that [disclosure] would do more harm to the fund than good because [disclosure] would result in a public disclosure depressing the stock price . . . before a full investigation [of the underlying misconduct] had concluded." *Id.* at 526-27 (internal quotation marks omitted). Disclosure of the alleged wrongdoing was not "inevitable" in *Martone*; per the Fifth Circuit, a prudent fiduciary could have concluded that a more thorough investigation was required, meaning that disclosure might not be warranted at all. Or, disclosure might be premature before the fiduciaries had all the facts. A prudent fiduciary could therefore determine that the negative impact such a potentially premature disclosure could have on Whole Foods' stock price would do more harm than good to ESOP participants.

Similarly, *Graham* concerned a duty-of-prudence claim based on alleged artificial inflation of Eaton's public stock price because Eaton had allegedly concealed from the public that, following an acquisition of another company, Eaton was precluded from spinning off its vehicle business without incurring severe tax consequences. *Graham*, 721 F. App'x at 431-32. In analyzing the plaintiff's claims under *Dudenhoeffer*, the Sixth Circuit pointed out that, notwithstanding whatever ambiguous statements Eaton may have made about its ability to spin off its vehicle business without a tax penalty, Eaton executives "repeatedly stated that Eaton had no plans to spin off its vehicle business, so a reasonably prudent fiduciary may have determined that disclosing the tax consequences of such unplanned actions would do more harm than good." *Id.* at 437. There was nothing inevitable about the likelihood of Eaton's disclosing the tax consequences of spinning off its vehicle business—quite the contrary, inasmuch as Eaton repeatedly represented that it had no intention of doing such a spin-off. A prudent fiduciary could conclude that disclosing the possibility of those tax consequences for a spin-off that Eaton had no plan to do would do more harm than good to ESOP participants.

Both *Martone* and *Graham* deal with allegations more like what the Second Circuit called "the normal case," where a prudent fiduciary must weigh potential harm against potential good in choosing between making a proposed disclosure or making no disclosure (or at least waiting to disclose). But the analysis applied in *Martone* and *Graham* uses the same standard that the Second Circuit applied here; the Circuits just reached different conclusions because they were faced with different factual allegations.

Petitioners largely ignore the Second Circuit's discussion of the allegations supporting the inevitability of disclosure in this particular case, focusing instead of those allegations made by Respondents that were also made in *Martone* and *Graham* that the longer a stock price remains artificially inflated, the greater risk of reputational damage to the company, and thus the greater the risk of a harsher price correction and slower price recovery. Pet. App. 13-14. Petitioners actually advanced a similar argument before the Second Circuit, which responded with two points: first, "the possibility of similar allegations in other ERISA cases does not undermine their plausibility here . . . nor does it mean that the district court should not have considered them"; and second, while such allegations "will usually not be enough on their own to plead a duty-of-prudence violation, they may be considered as part of the overall picture." Pet. App. 17a-18a. The Second Circuit was careful to note that, where "circumstances would nevertheless have made immediate disclosure particularly dangerous," allegations regarding possible reputational damage "would not apply." Pet. App. 18a (citing *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 68 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1067 (2017)).

The Second Circuit did not even hold that "inevitability" was, on its own, enough to satisfy *Dudenhoeffer*. Rather, it found that the inevitability of disclosure in this particular case, owing to the impending sale of Microelectronics, "considered in combination" with the other factors alleged by Respondents, including an efficient market, fiduciary knowledge, the risk of reputational damage, and the ability of the fiduciaries to effectuate disclosure through the normal securities laws' reporting mechanisms, was enough to "tip the scales toward plausibility." Pet. App. 15a, 20a.

Thus, the Second Circuit did not hold that general allegations about a prolonged disclosure inevitably leading to greater harm to Plan participants are sufficient to satisfy *Dudenhoeffer*; it held that in this particular case, under this particular set of factual allegations, such general allegations could be "considered" along with the more case-specific allegations. The Second, Fifth and Sixth Circuits all faced general allegations about the risks of prolonging a stock's artificial inflation, but they faced different allegations regarding the underlying causes of that artificial inflation. These differences resulted in different conclusions about whether disclosure of those causes was inevitable, making earlier disclosure preferable, or not, making premature disclosure the greater danger. No conflict meriting a review by this Court has arisen just because different Circuits faced with different facts applied the same legal standard to reach different conclusions.

Even if this Court were to credit Petitioners' mischaracterization of the Second Circuit's decision below and conclude that it does conflict with *Martone* and *Graham*, Petitioners at best have identified a rather shallow circuit split. The majority of the federal appellate courts have not yet had the opportunity to opine on how *Dudenhoeffer* should be applied to claims like Respondents'—or, for that matter, to claims like those asserted in *Martone* or *Graham*. *Graham* is not even a published opinion.

In fact, three Circuit Courts currently have before them duty-of-prudence claims that were dismissed by district courts for failing to satisfy the "more harm than good" standard under *Dudenhoeffer*: *In re Allergan ERISA Litigation*, No. 18-2729 (3d Cir.); *Allen, et al. v. Wells Fargo & Company, et al.*, No. 18-2781 (8th Cir.); *Wilson v. Craver, et al.*, No. 18-56139 (9th Cir.). Whatever "split" Petitioners purport to have identified should be allowed to percolate while these Circuits consider the Second Circuit's reasoning in this case as well as those of the Fifth and Sixth Circuits. To the extent that there is any ambiguity about the scope of the Second Circuit's decision, it counsels in favor of waiting to see how the Second Circuit applies this precedent in future cases.

Even with every benefit of the doubt, Petitioners have not put forth a sufficient basis for certiorari to be granted in this case.

II. The Second Circuit Correctly Applied *Dudenhoeffer*

Petitioners' assertion that the Second Circuit's decision "fundamentally contradicts" *Dudenhoeffer* rests on the same flawed premise as their assertion that a circuit split has developed—they mischaracterize the Second Circuit's opinion as holding that "generic allegations that undisclosed fraud gets more costly over time and should prudently be disclosed sooner rather than later" while ignoring the Second Circuit's discussion of the unique facts alleged in this case. Pet. App. 18. As discussed above, the Second Circuit relied not just on Respondents' allegations regarding the attendant risks of prolonged artificial inflation, but on Respondents' specific allegations regarding IBM's efforts to sell Microelectronics.

Petitioners suggest that an onslaught of meritless ERISA duty-of-prudence cases is in the offing and that plaintiffs will simply copy and paste generic allegations regarding "inevitable" disclosure to satisfy *Dudenhoeffer*. Pet. App. 20. But Petitioners do not explain why any district court would be persuaded by a conclusory allegation that disclosure in a particular case was "inevitable" without the specific factual allegations to back it up. Respondents' allegations were not deemed plausible by the Second Circuit simply because Respondents characterized disclosure as inevitable; it was the specific facts surrounding IBM's attempt to sell Microelectronics that provided the scaffolding for the Second Circuit's assessment. If a plaintiff alleges facts where disclosure of the underlying issue is not plausibly inevitable—like in *Martone*, where a prudent fiduciary could have concluded that further investigation of the alleged overcharging was required, or in *Graham*, where a prudent fiduciary could have concluded that disclosing the consequences of an action the company never intended to take could have confused the market—the claim will not survive, regardless of how many times the plaintiff invokes the talisman of inevitability. And, as discussed above, the

Second Circuit did not even hold that inevitable disclosure will be enough in all cases to enable a plaintiff to satisfy *Dudenhoeffer*.

Indeed, Petitioners do not really take issue with the Second Circuit's analysis of inevitability. They do not dispute that IBM's considerable effort to try to sell the Microelectronics business made it extremely likely that the true value of the business would come out, either because IBM would have to disclose the information to potential counterparties, or because those counterparties would discover it for themselves in the course of conducting due diligence. Pet. App. 19a-20a. Petitioners cannot credibly contend that the Second Circuit's considered evaluation of these facts was anything other than the "careful, context-sensitive scrutiny" that this Court prescribed in *Dudenhoeffer*.

But even if Petitioners were to argue that the Second Circuit incorrectly analyzed the facts regarding IBM's sought sale of Microelectronics and its impact on the inevitability of the disclosure of Microelectronics's loss of value, Petitioners' disagreement with how the Second Circuit assessed the plausibility of Respondents' allegations is not a proper basis for certiorari. Petitioners' attempt to secure this Court's intervention, after all, is interlocutory; discovery in the District Court is about to commence, and, as the Second Circuit observed, "further record development might not support findings so favorable to [Respondents] and adverse to [Petitioners]." Pet. App. 21a. But such a determination at the pleading stage is premature.

Lacking any basis to criticize the Second Circuit's actual application of *Dudenhoeffer*, Petitioners make a variety of bombastic claims about the parade of horribles about to descend on the federal courts because of the Second Circuit's decision here. Pet. App. 20-25. Forum-shopping and improper evasion of the PSLRA are the two purportedly "deleterious policy implications" that lurk just around the corner if this Court does not intervene.

As an initial matter, concerns over evasion of the PSLRA are not a proper basis for tightening the pleading standard under ERISA. As the Second Circuit observed, ERISA and the securities laws operate under different statutory schemes and have different aims. "Congress has chosen different structures to handle different claims; it is not our role to tie together what Congress has chosen to keep separate." Pet. App. 23a. In fact, Petitioners' argument has been made to this Court before—as a basis for preserving the "presumption of prudence" in the *Dudenhoeffer* case. *See Fifth Third Bancorp v. Dudenhoeffer*, No. 12-751, Reply Brief for Petitioners at 17 (arguing that abandoning the presumption of prudence in favor of ESOP defendants "would also enable an end-run around Congress's carefully calibrated rules for securities litigation" (citing PSLRA)). This argument did not persuade the Court then; it has not grown more persuasive since.

More important, however, Petitioners do not explain why these dreaded outcomes will eventuate if courts following the Second Circuit here engage in the same careful analysis of specific factual allegations that the Second Circuit did. Petitioners' nightmare scenario only comes to pass if one accepts as true their misstatement of the Second Circuit's holding as relating exclusively to the plausibility of "generic" or "generalized" allegations. In a recent case decided after the Second Circuit's decision here—and cited by Petitioners in their brief—a district court distinguished the duty-of-prudence claim by holding that the factual allegations in that case did not plausibly support "inevitable" disclosure, and, therefore, the Second Circuit's decision did not apply. *See Fentress v. Exxon Mobil Corp.*, No. 4:16-CV-3484, 2019 U.S. Dist. LEXIS 16934, at *13 (S.D. Tex. Feb. 4, 2019) ("The inevitability of the disclosure in *Jander* also differentiates the instant case, because there was no major triggering event that made Exxon's eventual disclosure inevitable."). Pet. App. 13.[1]

If anything, the Second Circuit erred in endorsing the Fifth and Sixth Circuit's "restrictive test" with

---

[1] Although the District Court found that claims for securities fraud were inadequately pleaded under the PSLRA, it did not hold that IBM had no duty under the securities laws to disclose the truth about Microelectronics. Pet. App. 7, 24a. GAAP required IBM to affirmatively disclose the impaired value of Microelectronics before it did so. To argue, as Petitioners do, that ERISA allows ESOP fiduciaries who also happen to have disclosure responsibilities under the securities laws to circumvent their obligations under the latter because of the protections afforded by "more harm than good" under the former would negate this Court's confirmation in *Dudenhoeffer* that "ERISA's duty of prudence cannot require an ESOP fiduciary to perform an action . . . that would violate the securities laws." *Dudenhoeffer*, 573 U.S. at 428 (citations omitted). Regardless, such allegations cannot plausibly be made in every duty-of-prudence case.

respect to *Dudenhoeffer*. The gravamen of this Court's opinion in *Dudenhoeffer*, after all, dealt with the rejection of a "presumption . . . that the plaintiff make a showing that would not be required in an ordinary duty-of-prudence case, such as that the employer was on the brink of collapse." *Dudenhoeffer*, 573 U.S. at 412. This Court held that ESOP fiduciaries were not entitled to "a defense-friendly presumption[,]" because such a "presumption makes it impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad economic circumstances." *Id.* at 424-25.

While this Court set forth the "more harm than good" standard as a means "to weed out meritless lawsuits[,]" nothing in *Dudenhoeffer* suggests that plausible duty-of-prudence claims against ESOP fiduciaries are supposed to be black swans. The ERISA statute defines the standard of care to which fiduciaries are held to as "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]" 29 U.S.C. § 1104(a)(1)(B). This standard of care is even higher than its antecedent in the common law of trusts. *Dudenhoeffer*, 573 U.S. at 422-23 (noting that, "by contrast to the rule at common law, 'trust documents cannot excuse trustees from their duties under ERISA'" (quoting *Cent. States, Southeast & Southwest Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 568 (1985))).

Prudence claims brought against other ERISA fiduciaries are not encumbered by a presumption that only one meritorious claim may be found amidst a sea of frivolous ones, so why should ESOP prudence claims be any different? If ESOP prudence claims must be pleaded according to a standard that is "more restrictive" than that of a typical ERISA prudence claim, then this Court's holding in *Dudenhoeffer* that "ESOP fiduciaries are subject to the same duty of prudence that applies to ERISA fiduciaries in general" is vitiated.[2]

[2] In a footnote, Petitioners also argue that the Second Circuit's decision "conflicts" with this Court's holding in *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). Pet. App. 17 n.9. They claim that the Second Circuit's reasoning that disclosure here could have been done through normal reporting mechanisms under the federal securities laws—in part because Petitioners happened to be senior executives responsible for those mechanisms—imposes fiduciary liability on ESOP fiduciaries for conduct undertaken in their non-fiduciary capacities as senior corporate executives. What the Second Circuit held, however, was that Petitioners should have, in their fiduciary capacities, recognized the need for disclosure to protect Plan participants; then they should have tried to use financial reporting under the securities laws to accomplish this disclosure because it would be the least disruptive way to do so. Pet. App. 16a. Petitioners are not at fault for actions they took in their non-fiduciary capacities; they are at fault for actions they should have taken, but failed to take, based on knowledge acquired in their *fiduciary* capacities. There is no conflict with *Pegram*. Moreover, Petitioners have already argued that disclosure outside the normal securities law reporting regime "could spook the market," an argument that the District Court found persuasive. Pet. App. 37a (quoting *Graham v. Fearon*, No. 1:16 CV 2366, 2017 U.S. Dist. LEXIS 43254, at *15 (N.D. Ohio Mar. 24, 2017)). If disclosure outside the securities laws is off the table, and disclosure through the securities laws is off the table, then ESOP fiduciaries effectively have immunity from liability, an outcome that turns *Dudenhoeffer* on its head.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

SAMUEL E. BONDEROFF
Counsel of Record
ZAMANSKY LLC
50 Broadway, 32nd Floor
New York, NY 10004
(212) 742-1414
samuel@zamansky.com