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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 17-3518

LARRY W. JANDER, and all other individuals similarly situated, RICHARD J. WAKSMAN,

Plaintiffs-Appellants,

v.

RETIREMENT PLANS COMMITTEE OF IBM, RICHARD CARROLL, ROBERT WEBER, MARTIN SCHROETER,

Defendants-Appellees,

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

Argued: Sept. 7, 2018
Decided: Dec. 10, 2018
Vacated: Jan. 14, 2020
Reinstated: June 22, 2020
Filed: June 22, 2020

Before: Katzmann, *Chief Judge*, Sack and Raggi, *Circuit Judges*.

ORDER

PER CURIAM:

In this case, plaintiffs, participants in IBM's employee stock option plan, allege that the plan's fiduciaries breached their duty of prudence under the Employee Retirement Income Security Act of 1974 ("ERISA"). The district court granted defendants' motion to dismiss, *Jander v. Ret. Plans Comm. of IBM*, 272 F. Supp. 3d 444 (S.D.N.Y. 2017), and this Court reversed and remanded, *Jander v. Ret. Plans Comm. of IBM*, 910 F.3d 620 (2d Cir. 2018). The Supreme Court then granted defendants' petition for certiorari, *Ret. Plans Comm. of IBM v. Jander*, 139 S. Ct. 2667 (2019) (mem.), which presented the question whether a plaintiff can state a duty-of-prudence claim based on "generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time," Petition for Writ of Certiorari at *i*, *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592 (2020) (No. 18-1165). The Supreme Court also granted the government's motion to participate in oral argument as an amicus curiae in support of neither party, so that it could present the views of the Department of Labor and the Securities and Exchange Commission. *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 398 (2019) (mem.).

After hearing oral argument, the Supreme Court vacated the judgment of this Court and remanded for further proceedings. *See Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020) (per curiam). In its opinion, the Supreme Court explained that defendants' and the government's post-certiorari arguments primarily addressed matters that fell beyond the question presented to the Supreme Court,

and that had not been raised before this Court. So that this Court could "have an opportunity to decide whether to entertain these arguments in the first instance," the Supreme Court "le[ft] it to the Second Circuit whether to determine their merits, taking such action as it deems appropriate." *Id.*

On remand, we invited the parties to submit supplemental briefs regarding the appropriate disposition of this appeal, including whether we should consider any arguments not previously raised before this Court. We also invited the government to submit a supplemental brief as an amicus curiae. The parties and the government have now submitted supplemental briefs, as have amici curiae the Chamber of Commerce of the United States of America, the Securities Industry and Financial Markets Association, the ERISA Industry Committee, and the American Benefits Council.

Having reviewed the submissions from the parties and amici, we now reinstate the judgment entered pursuant to our initial opinion. The arguments raised in the supplemental briefs either were previously considered by this Court or were not properly raised. To the extent that the arguments were previously considered, we will not revisit them. To the extent that they were not properly raised, they have been forfeited, and we decline to entertain them. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs . . . normally will not be addressed on appeal."). Accordingly, the judgment of the district court is reversed, and the case is remanded for further proceedings consistent with our initial opinion.

Appendix B

SUPREME COURT OF THE UNITED STATES

No. 18-1165

RETIREMENT PLANS COMMITTEE OF IBM, et al.,
Plaintiffs-Appellants,

v.

LARRY W. JANDER, et al.,
Defendants-Appellees,

Argued: Nov. 6, 2019
Decided: Jan. 14, 2020

OPINION PER CURIAM

Per Curiam.

In *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), we held that "[t]o state a claim for breach of the duty of prudence" imposed on plan fiduciaries by the Employee Retirement Income Security Act of 1974 (ERISA) "on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." *Id.*, at 428. We then set out three considerations that "inform the requisite analysis." *Ibid.*

First, we pointed out that the "duty of prudence, under ERISA as under the common law of trusts, does not require a fiduciary to break the law." *Ibid.* Accordingly, "ERISA's duty of prudence cannot require" the fiduciary of an Employee Stock Ownership Plan (ESOP) "to perform an action—such as divesting the fund's holdings of the employer's stock on the basis of inside information—that would violate the securities laws." *Ibid.*

We then added that, where a complaint "faults fiduciaries for failing to decide, on the basis of the inside information, to refrain from making additional stock purchases or for failing to disclose that information to the public so that the stock would no longer be overvalued, additional considerations arise." *Id.*, at 429. In such cases, "[t]he courts should consider the extent to which an ERISA-based obligation either to refrain on the basis of inside information from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws." *Ibid.* We noted that the "U.S. Securities and Exchange Commission ha[d] not advised us of its views on these matters, and we believe[d] those views may well be relevant." *Ibid.*

Third, and finally, we said that "lower courts faced with such claims should also consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases—which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment—or 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 429-430.

The question presented in this case concerned what it takes to plausibly allege an alternative action "that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." *Id.*, at 428. It asked whether *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." Pet. for Cert. i.

In their briefing on the merits, however, the petitioners (fiduciaries of the ESOP at issue here) and the Government (presenting the views of the Securities and Exchange Commission as well as the Department of Labor), focused their arguments primarily upon other matters. The petitioners argued that ERISA imposes no duty on an ESOP fiduciary to act on inside information. And the Government argued that an ERISA-based duty to disclose inside information that is not otherwise required to be disclosed by the securities laws would "conflict" at least with "objectives of " the "complex insider trading and corporate disclosure requirements imposed by the federal securities laws . . . ." *Dudenhoeffer*, 573 U.S., at 429.

The Second Circuit "did not address the[se] argument[s], and, for that reason, neither shall we." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004) (citation omitted); see *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005) ("[W]e are a

court of review, not of first view"). See also 910 F.3d 620 (CA2 2018). Nevertheless, in light of our statement in *Dudenhoeffer* that the views of the "U.S. Securities and Exchange Commission" might "well be relevant" to discerning the content of ERISA's duty of prudence in this context, 573 U.S., at 429, we believe that the Court of Appeals should have an opportunity to decide whether to entertain these arguments in the first instance. For this reason we vacate the judgment below and remand the case, leaving it to the Second Circuit whether to determine their merits, taking such action as it deems appropriate.

It is so ordered.

JUSTICE KAGAN, with whom JUSTICE GINSBURG joins, concurring.

Today's *per curiam* vacates and remands so that the Court of Appeals for the Second Circuit can decide whether to consider two arguments that occupied most of the briefing in this Court even though the lower courts had not addressed them. I join the Court's opinion with two further notes.

First, the Court of Appeals may of course determine that under its usual rules of waiver or forfeiture, it will not consider those arguments. The *per curiam* is clear that the Second Circuit is to "decide whether to entertain" the arguments in the first instance. *Ante*, at 3. If the arguments were not properly preserved, sound judicial practice points toward declining to address them. See, *e.g.*, *Wood v. Milyard*, 566 U.S. 463, 473 (2012) ("For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved"). That is so, contrary to JUSTICE GORSUCH'S suggestion, whether or not the issue will come back in the future. See *post*, at 2 (concurring opinion).

Second, if the Court of Appeals chooses to address the merits of either argument, the opening question must be whether it is consistent with this Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014). I cannot see how. The petitioners argue that ERISA "imposes no duty on an ESOP fiduciary to act on insider information." *Ante*, at 3. But *Dudenhoeffer* makes clear that an ESOP fiduciary at times has such a duty; the decision sets out exactly what a plaintiff must allege to state a claim that the fiduciary breached his duty of prudence by "failing to

act on inside information." 573 U. S., at 423; see *id.*, at 428; *ante*, at 1. For its part, the Government argues that (absent extraordinary circumstances) an ESOP fiduciary has only the duty to disclose inside information that the federal securities laws already impose. See *ante*, at 3. But *Dudenhoeffer* characterizes the relationship between ERISA's duty of prudence and the securities laws differently. It recognizes that a fiduciary can have no obligation to take actions "violat[ing] the securities laws" or "conflict[ing]" with their "requirements" or "objectives." 573 U.S., at 428-429; see *ante*, at 1-2. At the same time, the decision explains that when an action does not so conflict, it might fall within an ESOP fiduciary's duty—even if the securities laws do not require it. See 573 U.S., at 428. The question in that conflict-free zone is whether a prudent fiduciary would think the action more likely to help than to harm the fund. See *id.*, at 428, 430; see *ante*, at 1-2. The Government candidly acknowledges that its approach would mostly wipe out that central aspect of the *Dudenhoeffer* standard. See Brief for United States as *Amicus Curiae* 22. That too does not accord with the decision.[*]

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[*] JUSTICE GORSUCH essays still another argument, but it also conflicts with *Dudenhoeffer*. He claims that an ESOP fiduciary can never have a duty under ERISA to make disclosures "in their capacities as corporate officers." *Post*, at 1. But *Dudenhoeffer* spells out when ERISA forecloses such a duty—when making the disclosure would conflict with the requirements and objectives of the securities laws. See 573 U.S., at 429. Absent a conflict of that kind, there is no categorical exclusion: The question, stated once again, is whether a prudent fiduciary would think the disclosure more likely to benefit than to harm the fund. See *id.*, at 429-430.

JUSTICE GORSUCH, concurring.

The gist of respondents' sole surviving claim is that certain ERISA fiduciaries should have used their positions as corporate insiders to cause the company to make an SEC-regulated disclosure. But merely stating the theory suggests a likely flaw: In ordering up a special disclosure, the defendants necessarily would be acting in their capacities as corporate officers, not ERISA fiduciaries. Run-of-the-mill ERISA fiduciaries cannot, after all, order corporate disclosures on behalf of their portfolio companies. Nor do even all corporate insiders have that authority. These defendants (allegedly) had the opportunity to make a corrective disclosure only because of the positions they happened to hold within the organization. So while respondents are correct to note that insider fiduciaries are subject to the "same duty of prudence that applies to ERISA fiduciaries in general," *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 412 (2014), at bottom they seek to impose an even *higher* duty on fiduciaries who have the authority to make or order SEC-regulated disclosures on behalf of the corporation. Because ERISA fiduciaries are liable only for actions taken while "acting as a fiduciary," it would be odd to hold the same fiduciaries liable for "alternative action[s they] could have taken" *only* in some other capacity. Compare *Pegram v. Herdrich*, 530 U.S. 211, 225-226 (2000), with *Dudenhoeffer*, 573 U.S., at 428.

Despite its promise, this argument seemingly wasn't considered by lower courts before the case arrived in our Court. In these circumstances, I agree with the Court's *per curiam* that the better course is

to remand the case to allow the lower courts to address these matters in the first instance. But the payout of today's remand is really about timing: By remanding rather than dismissing, we give the lower courts the chance to answer this important question sooner rather than later. To be sure, on remand respondents might try to say this argument was waived or forfeited in earlier motions practice. See *ante*, at 1 (KAGAN, J., concurring). But following respondents down that path would do no more than briefly delay the task at hand. The argument before us involves a pure question of law, raised in the context of a motion to dismiss. If it isn't addressed immediately on remand, it will only prove unavoidable later, not just in other suits but at later stages in this very litigation.

Of course, today's remand would be pointless if the argument before us were already foreclosed by *Dudenhoeffer*, as JUSTICE KAGAN suggests. *Ante*, at 2-3, n. But I do not believe our remand is a wasted gesture, because I do not read *Dudenhoeffer* so broadly. *Dudenhoeffer* held that an ERISA plaintiff must plausibly allege "an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary . . . would not have viewed as more likely to harm the fund than to help it." 573 U.S., at 428. Put differently, the Court held the plaintiff's ability to identify a helpful action that the defendant could have taken consistent with the securities laws is a *necessary* condition to an ERISA suit. But nowhere did *Dudenhoeffer* hold this is also a *sufficient* condition to suit, promising that a case may proceed anytime a plaintiff is able to conjure a hypothetical helpful action that would've been consistent with the securities laws.

The Court didn't consider whether *other* necessary conditions to suit might exist because the question wasn't before it. *Dudenhoeffer* did discuss some "additional considerations" that might arise when a plaintiff tries to plead as "alternative action[s]" either "refrain[ing] from making additional stock purchases" or "disclos[ing] inside information to the public." *Id.*, at 428-429. But the Court singled out these circumstances only because of their obvious potential to "conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws." *Id.*, at 429. So *Dudenhoeffer* made plain that suits requiring fiduciaries to violate the securities laws cannot proceed. But only the most unabashed optimist could read *that* as guaranteeing all other suits may.

The truth is, *Dudenhoeffer* was silent on the argument now before us for the simple reason that the parties in *Dudenhoeffer* were silent on it too. No one in that case asked the Court to decide whether ERISA plaintiffs may hold fiduciaries liable for alternative actions they could have taken only in a nonfiduciary capacity. And it is beyond debate that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 17-3518

LARRY W. JANDER, and all other individuals similarly situated, RICHARD J. WAKSMAN,

Plaintiffs-Appellants,

v.

RETIREMENT PLANS COMMITTEE OF IBM, RICHARD CARROLL, ROBERT WEBER, MARTIN SCHROETER,

Defendants-Appellees,

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

Argued: Sept. 7, 2018
Decided: Dec. 10, 2018

Before: Katzmann, *Chief Judge*, Sack and Raggi, *Circuit Judges.*

OPINION

Katzmann, Chief Judge:

The Employee Retirement Income Security Act ("ERISA") requires fiduciaries of retirement plans to manage the plans' assets prudently. 29 U.S.C. § 1104(a)(1)(B). One form of retirement plan, the

employee stock option plan ("ESOP"), primarily invests in the common stock of the plan participant's employer. This case asks what standard one must meet to plausibly allege that fiduciaries of an ESOP have violated ERISA's duty of prudence.

The plaintiffs here, IBM employees who were participants in the company's ESOP, claim that the plan's fiduciaries knew that a division of the company was overvalued but failed to disclose that fact. This failure, the plaintiffs allege, artificially inflated IBM's stock price, harming the ESOP's members. To state a duty-of-prudence claim, plaintiffs must plausibly allege that a proposed alternative action would not have done more harm than good. The parties disagree about how high a standard the plaintiffs must meet to make this showing. However, we need not resolve this dispute today, because we find that the plaintiffs have plausibly alleged an ERISA violation even under a more restrictive interpretation of recent Supreme Court rulings. We therefore **REVERSE** the district court's judgment dismissing this case and **REMAND** for further proceedings.

BACKGROUND

Plaintiffs-appellants Larry Jander and Richard Waksman, along with other unnamed plaintiffs (collectively, "Jander"), are participants in IBM's retirement plan. They invested in the IBM Company Stock Fund, an ESOP governed by ERISA. During the relevant time period, defendants-appellees the Retirement Plans Committee of IBM, Richard Carroll, Robert Weber, and Martin Schroeter (collectively, "the Plan defendants") were fiduciaries charged with overseeing the retirement plan's management. The

individual defendants were also part of IBM's senior leadership: Carroll was the Chief Accounting Officer, Schroeter the Chief Financial Officer, and Weber the General Counsel.

Jander alleges that IBM began trying to find buyers for its microelectronics business in 2013, at which time that business was on track to incur annual losses of $700 million. Through what Jander deems accounting legerdemain, IBM failed to publicly disclose these losses and continued to value the business at approximately $2 billion. It is further alleged that the Plan defendants knew or should have known about these undisclosed issues with the microelectronics business. On October 20, 2014, IBM announced the sale of the microelectronics business to GlobalFoundries Inc. The announcement revealed that IBM would pay $1.5 billion to GlobalFoundries to take the business off IBM's hands and supply it with semiconductors, and that IBM would take a $4.7 billion pre-tax charge, reflecting in part an impairment in the stated value of the microelectronics business. Thereafter, IBM's stock price declined by more than $12.00 per share, spawning two pertinent lawsuits.

The first is *International Ass'n of Heat & Frost Insulators & Asbestos Workers Local #6 Pension Fund v. International Business Machines Corp.*, 205 F. Supp. 3d 527 (S.D.N.Y. 2016) ("*Insulators*"), a securities fraud class action that was dismissed on September 7, 2016. The district court found that the investor plaintiffs had "plausibly plead[ed] that Microelectronics' decreased value, combined with its operating losses, may have constituted an impairment

indicator under" Generally Accepted Accounting Principles ("GAAP"). *Id.* at 535. The district court nevertheless dismissed the claims because the plaintiffs "fail[ed] to raise a strong inference that the need to write-down Microelectronics was so apparent to Defendants before the announcement, that a failure to take an earlier write-down amount[ed] to fraud," *id.* at 537 (internal quotation marks and alterations omitted), or that the defendants knew that IBM's earnings-per-share projections "lacked a reasonable basis when they were made," *id.* at 537-38. That decision has not been appealed.

The second action is this case. Here, Jander alleges that the Plan defendants continued to invest the ESOP's funds in IBM common stock despite the Plan defendants' knowledge of undisclosed troubles relating to IBM's microelectronics business. In doing so, Jander alleges, the Plan defendants violated their fiduciary duty of prudence to the pensioner plaintiffs under ERISA. The plaintiffs also pleaded that "once Defendants learned that IBM's stock price was artificially inflated, Defendants should have either disclosed the truth about Microelectronics' value or issued new investment guidelines that would temporarily freeze further investments in IBM stock." *Jander v. Int'l Bus. Mach. Corp.*, 205 F. Supp. 3d 538, 544 (S.D.N.Y. 2016) ("*Jander I*").

The district court first dismissed Jander's case on the same day it decided the securities fraud lawsuit. *See id.* at 540-41. As an initial matter, the district court relied on the reasoning set forth in its securities fraud decision to find that the pensioner plaintiffs had "plausibly pled that IBM's Microelectronics unit was

impaired and that the Plan fiduciaries were aware of its impairment." *Id.* at 542. The court noted that knowledge was a sufficient level of scienter because ERISA plaintiffs need not meet the heightened pleading standards that apply in securities actions. *Id.* But the district court nevertheless dismissed the action because Jander had "fail[ed] to plead facts giving rise to an inference that Defendants 'could not have concluded' that public disclosures, or halting the Plan from further investing in IBM stock, were more likely to harm than help the fund." *Id.* at 545 (citing *Fifth Third*, 134 S. Ct. at 2472).

Rather than dismiss the action with prejudice, however, the district court granted Jander an opportunity to file a second amended complaint. *Id.* at 546. Jander availed himself of that opportunity, adding further details and alleging a third alternative by which the Plan defendants could have avoided breaching their fiduciary duty: by purchasing hedging products to mitigate potential declines in the value of IBM common stock. The district court again found lacking the allegations concerning the three alternatives available to the Plan defendants, determining that each might have caused more harm than good. *Jander v. Ret. Plans Comm. of IBM*, 272 F. Supp. 3d 444, 451-54 (S.D.N.Y. 2017) ("*Jander II*"). This appeal followed.

DISCUSSION

I. Standard of Review

"To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must allege sufficient facts, taken as true, to state a plausible claim for relief. We review *de novo* a dismissal for failure to state a claim,

accepting as true all material factual allegations in the complaint and drawing all reasonable inferences in plaintiffs' favor." *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 275 (2d Cir. 2013) (citation omitted).

II. Duty of Prudence

"The central purpose of ERISA is to protect beneficiaries of employee benefit plans . . . ." *Slupinski v. First Unum Life Ins. Co.*, 554 F.3d 38, 47 (2d Cir. 2009). Among the "important mechanisms for furthering ERISA's remedial purpose" are "private actions by beneficiaries seeking in good faith to secure their rights." *Salovaara v. Eckert*, 222 F.3d 19, 28 (2d Cir. 2000) (internal quotation mark omitted) (quoting *Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 128-29 (7th Cir. 1991)). Such private actions include claims against a fiduciary for breach of the statutorily imposed duty of prudence. *See* 29 U.S.C. § 1104(a)(1) ("[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . ."). The sole question at issue in this appeal is whether Jander has plausibly pleaded that the Plan defendants violated this duty.

A. ERISA's Duty-of Prudence Standard

The parties disagree first and most fundamentally about what the plaintiffs must plead to state a duty-of-prudence claim under ERISA. Their arguments are premised on competing readings of two recent decisions by the United States Supreme Court

and differing views of how they interact with the decisions of our sister circuits. Some background is therefore in order.

Prior to 2014, a consensus had formed that ESOP fiduciaries were entitled to a presumption that their fund management was prudent. This view was first articulated by the Third Circuit, which reasoned that "an ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision" because "when an ESOP is created, it becomes simply a trust under which the trustee is directed to invest the assets primarily in the stock of a single company," a function that "serves a purpose explicitly approved and encouraged by Congress." *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995). As adopted by this Court, the presumption held that "only circumstances placing the employer in a dire situation that was objectively unforeseeable by the [plan] settlor could require fiduciaries to override plan terms" by ceasing investment in the employer, a standard that would "serve as a substantial shield that should protect fiduciaries from liability where there is room for reasonable fiduciaries to disagree as to whether they are bound to divest from company stock." *In re Citigroup ERISA Litig.*, 662 F.3d 128, 140 (2d Cir. 2011) (internal quotation marks and citations omitted). Other circuits agreed, although the precise formulation and application of the presumption in favor of fiduciaries differed.[2]

[2] *See, e.g.*, *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 989 (7th Cir. 2013) ("[P]laintiffs . . . must allege . . . that the company faced impending collapse or dire circumstances that could not

In 2014, the Supreme Court definitively rejected the presumption of prudence in *Fifth Third Bancorp v. Dudenhoeffer*, which held that "the law does not create a special presumption favoring ESOP fiduciaries." 134 S. Ct. 2459, 2467 (2014). The Court recognized that there is a "legitimate" concern that "subjecting ESOP fiduciaries to a duty of prudence without the protection of a special presumption will lead to conflicts with the legal prohibition on insider trading," given that "ESOP fiduciaries often are company insiders" subject to allegations that they "were imprudent in failing to act on inside information they had about the value of the employer's stock." *Id.* at 2469. Nevertheless, the Court reasoned that "an ESOP-specific rule that a fiduciary does not act imprudently in buying or holding company stock unless the company is on the brink of collapse (or the like) is an ill-fitting means of addressing" that issue. *Id.*

Similarly, the Court "agree[d] that Congress sought to encourage the creation of ESOPs"; the Court thus "recognized that 'ERISA represents a careful

have been foreseen by the founder of the plan." (internal quotation marks omitted)); *Quan v. Comput. Sci. Corp.*, 623 F.3d 870, 882 (9th Cir. 2010) ("[P]laintiffs must . . . make allegations that clearly implicate the company's viability as an ongoing concern or show 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." (internal quotation marks and alterations omitted)); *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995) ("A plaintiff may . . . rebut th[e] presumption of reasonableness by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision.").

balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.'" *Id.* at 2470 (quoting *Conkright v. Frommert*, 559 U.S. 506, 517 (2010)). Still, it concluded that the presumption of prudence was not "an appropriate way to weed out meritless lawsuits or to provide the requisite 'balancing.'" *Id.* The correct standard must "readily divide the plausible sheep from the meritless goats," a task that is "better accomplished through careful, context-sensitive scrutiny of a complaint's allegations." *Id.* Notably, the Court criticized the presumption of prudence as "mak[ing] 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.*

After rejecting the pro-fiduciary presumption, *Fifth Third* "consider[ed] more fully one important mechanism for weeding out meritless claims, the motion to dismiss for failure to state a claim." *Id.* at 2471. The Court first determined that a duty-of-prudence claim may lie against ESOP fiduciaries only where it is alleged that fiduciaries "behaved imprudently by failing to act on the basis of *nonpublic* information that was available to them because they were [corporate] insiders." *Id.* at 2472. To plead such a claim, plaintiffs must "plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." *Id.*

In analyzing any proposed alternative action, three considerations are to "inform the requisite analysis." *Id. First*, the "duty of prudence cannot require an ESOP fiduciary to perform an action—such as divesting the fund's holdings of the employer's stock on the basis of inside information—that would violate the securities laws." *Id. Second*, "where a complaint faults fiduciaries for failing to decide, on the basis of the inside information, to refrain from making additional stock purchases or for failing to disclose that information to the public so that the stock would no longer be overvalued, . . . courts should consider" whether such actions "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.* at 2473. And *third*, courts assessing these same alternatives "should also consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded" that those alternatives "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.*

This last consideration is the source of the parties' dispute here. The Court first set out a test that asked whether "a prudent fiduciary in the same circumstances *would* not have viewed [an alternative action] as more likely to harm the fund than to help it." *Id.* at 2472 (emphasis added). This formulation suggests that courts ask what an average prudent fiduciary might have thought. But then, only a short while later in the same decision, the Court required judges to assess whether a prudent fiduciary "*could* not have concluded" that the action would do more

harm than good by dropping the stock price. *Id.* at 2473 (emphasis added). This latter formulation appears to ask, not whether the *average* prudent fiduciary would have thought the alternative action would do more harm than good, but rather whether *any* prudent fiduciary could have considered the action to be more harmful than helpful. It is not clear which of these tests determine whether a plaintiff has plausibly alleged that the actions a defendant took were imprudent in light of available alternatives.

Lower courts have struggled with how to apply the Court's decision in the ensuing years, and the high court has yet to resolve the interpretive difficulties. In the wake of *Fifth Third*, the Ninth Circuit reversed a district court's dismissal of ERISA claims based, in part, on alleged breaches of the duty of prudence in light of the fiduciaries' inside information. *Harris v. Amgen, Inc.*, 770 F.3d 865 (9th Cir. 2014), *amended and superseded*, 788 F.3d 916 (9th Cir. 2015), *rev'd*, 136 S. Ct. 758 (2016). The court rejected Amgen's argument that removing the ESOP fund as an investment option would have risked causing the employer's stock price to drop. Though the Ninth Circuit acknowledged that removing the fund "would have sent a negative signal to investors if the fact of the removal had been made public," the court determined that it would do so by implicitly disclosing that the company was experiencing problems; thus, "the ultimate decline in price would have been no more than the amount by which the price was artificially inflated." *Id.* at 878. The court also rejected Amgen's argument that defendants could not legally remove the fund based on inside information, finding that declining to allow additional investments "would not

thereby have violated the prohibition against insider trading, for there is no violation absent purchase or sale of stock." *Id.* at 879. Moreover, the court explained, this supposed conundrum could have been easily resolved "[i]f defendants had revealed material information in a timely fashion to the general public (including plan participants)," which "would have simultaneously satisfied their duties under both the securities laws and ERISA." *Id.* at 878-79.

The Supreme Court summarily reversed the Ninth Circuit, holding that it failed to adequately scrutinize the plaintiffs' pleadings. *Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016) (per curiam). The Court did not reject the Ninth Circuit's reasoning outright. Rather, it found a mismatch between that reasoning and the allegations in the "current form" of the complaint regarding whether "a prudent fiduciary in the same position 'could not have concluded' that the alternative action 'would do more harm than good.'" *Id.* (quoting *Fifth Third*, 134 S. Ct. at 2473). The Court stated:

> The Ninth Circuit's proposition that removing the Amgen Common Stock Fund from the list of investment options was an alternative action that could plausibly have satisfied *Fifth Third*'s standards may be true. If so, the facts and allegations supporting that proposition should appear in the stockholders' complaint. Having examined the complaint, the Court has not found sufficient facts and allegations to state a claim for breach of the duty of prudence.

Id. "*Amgen*'s analysis, however, neglects to offer any guidance about what facts a plaintiff must plead to state a plausible claim for relief." *Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 865 (6th Cir. 2017). This is in part because the complaint in *Amgen* included no allegations regarding proposed alternative actions beyond the bare assertion that they were available.[3] Accordingly, *Amgen*'s import could be interpreted in multiple ways. It might clarify what was implicit in *Fifth Third*: that allegations about why an alternative action would do more good than harm must appear in the complaint itself, not merely in a court's opinion. Or it might instead confirm that the "could not have concluded" language from *Fifth Third* created a separate standard that must independently be satisfied to plead a duty-of-prudence claim.

The parties spar over which of these two interpretations is correct. The Plan defendants urge us to view *Fifth Third* and *Amgen* as setting out a restrictive test, noting that at least two of our sister

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[3] The relevant allegations in the *Amgen* complaint are found in a single paragraph that is repeated twice *verbatim*:

> Defendants had available to them several different options for satisfying this duty, including: making appropriate disclosures as necessary; divesting the Plan of Company Stock; precluding additional investment in Company Stock; consulting independent fiduciaries regarding appropriate measures to take in order to prudently and loyally serve the participants of the Plan; or resigning as fiduciaries of the Plan . . . .

Harris v. Amgen, Inc., No. 07 Civ. 5442, Dkt. No. 168, ¶¶ 290, 344 (C.D. Cal. Mar. 23, 2010). These alternatives were not fleshed out in any further detail and the complaint was never amended following *Fifth Third*.

circuits have adopted that interpretation. *See Saumers*, 853 F.3d at 864-65; *Whitley v. BP, P.L.C.*, 838 F.3d 523, 529 (5th Cir. 2016). Jander notes that no duty-of-prudence claim against an ESOP fiduciary has passed the motion-to-dismiss stage since *Amgen*, and he asserts that the courts—and the Plan defendants—have misread that decision. According to Jander, imposing such a heavy burden at the motion-to-dismiss stage runs contrary to the Supreme Court's stated desire in *Fifth Third* to lower the barrier set by the presumption of prudence. Our sole precedential post-*Amgen* duty-of-prudence opinion does not explicitly take a side in this dispute. *See Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 68 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1067 (2017).

We need not here decide which of the two standards the parties champion is correct, however, because we find that Jander plausibly pleads a duty-of-prudence claim even under the more restrictive "could not have concluded" test.

B. The Plaintiffs' Duty-of-Prudence Claim

The district court held that Jander failed to state a duty-of-prudence claim under ERISA because a prudent fiduciary could have concluded that the three alternative actions proposed in the complaint—disclosure, halting trades of IBM stock, or purchasing a hedging product—would do more harm than good to the fund. We respectfully disagree. Jander has limited the proposed alternative actions on appeal to just one: early corrective disclosure of the microelectronics division's impairment, conducted alongside the regular SEC reporting process. Several allegations in the amended complaint, considered in combination

and "draw[ing] all reasonable inferences in plaintiff's favor," *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012) (citation omitted), plausibly establish that a prudent fiduciary in the Plan defendants' position could not have concluded that corrective disclosure would do more harm than good.

First, the Plan defendants allegedly knew that IBM stock was artificially inflated through accounting violations. As the district court found, Jander has plausibly alleged a GAAP violation, and "in view of the lower pleading standards applicable to an ERISA action, [he has] plausibly pled that IBM's Microelectronics unit was impaired and that the Plan fiduciaries were aware of its impairment." *Jander I*, 205 F. Supp. 3d at 542.

Second, the Plan defendants allegedly "had the power to disclose the truth to the public and correct the artificial inflation." App. 85. Two of the Plan defendants "were uniquely situated to fix this problem inasmuch as they had primary responsibility for the public disclosures that had artificially inflated the stock price to begin with." *Id.* The district court thought that the complaint failed to account for the risks that "an unusual disclosure outside the securities laws' normal reporting regime could spook the market, causing a more significant drop in price than if the disclosure were made through the customary procedures." *Jander II*, 272 F. Supp. 3d at 451 (citation omitted). This reasoning assumes that any disclosure would have to have been "outside the securities laws' normal reporting regime." *Id.* Yet the class period here runs from January through October

2014. The amended complaint therefore plausibly alleges that disclosures could have been included within IBM's quarterly SEC filings and disclosed to the ESOP's beneficiaries at the same time in the Plan defendants' fiduciary capacity. *See* App. 60-61.

Third, Jander alleges that the defendants' 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[]." App. 87. The district court dismissed this allegation as an "argument [that] rests on hindsight," which "says nothing about what a prudent fiduciary would have concluded under the circumstances then prevailing." *Jander II*, 272 F. Supp. 3d at 450. But Jander's argument is not retrospective. A reasonable business executive could plausibly foresee that the inevitable disclosure of longstanding corporate fraud would reflect badly on the company and undermine faith in its future pronouncements. Moreover, Jander bolsters this inference by citing economic analyses that show that reputational harm is a common result of fraud and grows the longer the fraud is concealed, translating into larger stock drops.

The court below rejected the argument that an earlier disclosure would have minimized the eventual stock price correction, on the ground that it was "not particular to the facts of this case and could be made by plaintiffs in any case asserting a breach of ERISA's duty of prudence." *Jander II*, 272 F. Supp. 3d at 449 (quoting *Jander I*, 205 F. Supp. 3d at 546); *see also id.*

at 450 & n.2. (criticizing plaintiffs for not "retaining an expert to perform a quantitative analysis to show more precisely how Plan participants are harmed . . . by purchasing Fund shares at artificially high prices" but further noting that "even that may not be enough" to state a claim). And although Jander cited a number of economic studies to support his argument, the court said that this evidence "only underscores the general, theoretical, and untested nature of [the] allegations." *Id.* at 449.

However, the possibility of similar allegations in other ERISA cases does not undermine their plausibility here (or, for that matter, elsewhere), nor does it mean that the district court should not have considered them. To the contrary, in evaluating the defendants' motion to dismiss, the district court was required to accept the complaint's well-pleaded allegations as true. Assertions grounded in economic studies of general market experience cannot be dismissed as merely "theoretical," and the fact that they are "untested" at this early stage of the litigation does not necessarily render them implausible. Moreover, as Jander points out, there are a number of other determinations that must be made in a fact-specific way before these allegations come into play: whether there was an ongoing act of concealment, for instance, and whether that concealment was known by the fiduciaries such that further investigation would not be needed and disclosure would not be premature. Courts would also have to assess whether the circumstances would nevertheless have made immediate disclosure particularly dangerous, such that the generalized economic analyses put forward here would not apply. *See, e.g.*, *Rinehart*, 817 F.3d at

68 ("A prudent fiduciary could have concluded that divesting Lehman stock, or simply holding it without purchasing more, would do more harm than good. Such an alternative action in the summer of 2008 could have had dire consequences." (citation and internal quotation marks omitted)). While these economic analyses 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.

Fourth, the complaint alleges 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." App. 51. It is well established that "the market price of shares traded on well-developed markets reflects all publicly available information." *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988). Accordingly, Jander plausibly alleges that a prudent fiduciary need not fear an irrational overreaction to the disclosure of fraud.[4]

Fifth and finally, the defendants 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. *See* App. 88. This allegation is particularly important. In the normal case, when the prudent fiduciary asks whether disclosure would do more harm than good, the fiduciary is making a comparison only

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[4] This is not inconsistent with the prior allegation regarding reputational harm. Rational investors could well conclude that companies that allow fraud to continue longer are more poorly run, for example.

to the status quo of non-disclosure. In this case, however, 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. Accordingly, when a "drop in the value of the stock already held by the fund" is inevitable, *Fifth Third*, 134 S. Ct. at 2473, it is far more plausible that a prudent fiduciary would prefer to limit the effects of the stock's artificial inflation on the ESOP's beneficiaries through prompt disclosure.

The district court thought that the potential sale of the microelectronics business cut the other way. *Jander II*, 272 F. Supp. 3d at 451 (theorizing that a prudent fiduciary could think disclosure might "spook potential buyers"). But we think any potential purchaser would surely conduct its own due diligence of the business prior to purchasing it. In that context, it makes little sense to fear "spooking" a potential buyer by publicly disclosing what that buyer would surely discover on its own. Accordingly, a prudent fiduciary would have known that a potential purchaser's due diligence would likely result in discovery of the business's problems in any event. Indeed, that is precisely what appears to have occurred, as IBM paid $1.5 billion to GlobalFoundries as part of its sale of the microelectronics business, the announcement of which constituted corrective disclosure to the public markets in this action. The allegations regarding the sale of the microelectronics business, far from undermining Jander's duty-of-prudence claim, instead tip the scales toward plausibility.

The Plan defendants have one arrow left in their quiver. According to the district court, Jander's corrective disclosure theory did not sufficiently account for the effect of disclosure on "the value of the stock already held by the fund." *Fifth Third*, 134 S. Ct. at 2473. Specifically, the court found that the complaint failed to satisfy *Fifth Third* in part because "even if the stock price dropped marginally as a result of a corrective disclosure, the net effect of that drop on more than $110 million purchased by Plan participants could have been substantial." *Jander II*, 272 F. Supp. 3d at 450. But, as described above, nondisclosure of IBM's troubles was no longer a realistic option, and a stock-drop following early disclosure would be no more harmful than the inevitable stock drop that would occur following a later disclosure. Thus, contrary to the district court's conclusion, the effect of disclosure on "the value of the stock already held by the fund," *Fifth Third*, 134 S. Ct. at 1473, does not point in defendants' favor.

To be sure, further record development might not support findings so favorable to Jander and adverse to the Plan defendants. But drawing all reasonable inferences in Jander's favor, as we are required to do at this stage, and keeping in mind that the standard is plausibility—not likelihood or certainty—we conclude that Jander has sufficiently pleaded that no prudent fiduciary in the Plan defendants' position could have concluded that earlier disclosure would do more harm than good. We therefore hold that Jander has stated a claim for violation of ERISA's duty of prudence.

III. The Interplay Between the ERISA and Securities Fraud Suits

One issue remains for us to address: the relevance, if any, of the parallel securities fraud suit against IBM. As already noted, the district court dismissed that case, and the plaintiffs did not appeal. The district court found that the plaintiffs had "fail[ed] to raise a strong inference that the need to write-down Microelectronics was so apparent to Defendants before the announcement, that a failure to take an earlier write-down amounts to fraud," or that the Plan defendants knew that IBM's earnings-per-share projections "lacked a reasonable basis when they were made." *Insulators*, 205 F. Supp. 3d at 537-38 (internal quotation marks and alterations omitted). The plaintiffs therefore could not plausibly plead scienter. *Id.* at 535, 537-38. The Plan defendants assert that allowing Jander's ERISA claim to go forward on essentially the same facts would lead to an end run around the heightened pleading standards for securities fraud suits set out in the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b). While this concern is not without merit, it does not provide a basis to affirm the district court's dismissal of Jander's duty-of-prudence claim.

The *Insulators* holding is not preclusive as to this case, because the PSLRA does not apply to ERISA actions. "No heightened pleading standard applies [to duty-of-prudence claims]; it is enough to provide the context necessary to show a plausible claim for relief." *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 674 (7th Cir. 2016); *see also Rogers v. Baxter Int'l, Inc.*, 521 F.3d 702, 705 (7th Cir. 2008) (holding that the PSLRA does

not apply to ERISA claims). This is clear from the text of the PSLRA itself, which is limited to actions under the securities laws. *See* Pub. L. No. 104-67, tit. I, § 101(b) (codified as amended at 15 U.S.C. § 78u-4(a)(1)) ("The provisions of this subsection shall apply in each private action arising under this title [Title 15] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure."); 15 U.S.C. § 78u-4(a)(1) (limiting the PSLRA's reach to any "private action arising under this chapter [the Securities Exchange Act of 1934] that is brought as a plaintiff class action"). Additionally, the legislative history of the PSLRA indicates that Congress heightened the pleading requirements for fraud because the securities fraud laws were being abused and "[u]nwarranted fraud claims can lead to serious injury to reputation for which our legal system effectively offers no redress." H.R. Conf. Rep. 104-369, at 41 (1995), 1995 U.S.C.C.A.N. 730, 740; *see Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 (2007) (noting that the PSLRA was "[d]esigned to curb perceived abuses of the § 10(b) private action"). In ERISA cases such as this, however, plaintiffs are not accusing defendants of fraud. They are accusing defendants only of violating a fiduciary duty of prudence, which does not carry the same stigma.

Nor have we applied other, similar heightened pleading standards to ERISA claims. Only when plaintiffs invoke the fraud exception to ERISA's usual statutes of limitations, for instance, have we required them to follow the heightened pleading standards for fraud laid out in Federal Rule of Civil Procedure 9(b). *See Janese v. Fay*, 692 F.3d 221, 228 (2d Cir. 2012); *see also Concha v. London*, 62 F.3d 1493, 1502 (9th Cir.

1995) (holding that Rule 9(b) does not apply to ERISA fiduciary-duty claims).

"ERISA and the securities laws ultimately have differing objectives pursued under entirely separate statutory schemes designed to protect different constituencies—ERISA plan beneficiaries in the first instance and purchasers and sellers of securities in the second." *In re Lehman Bros. Sec. & ERISA Litig.*, 113 F. Supp. 3d 745, 768 (S.D.N.Y. 2015), *aff'd sub nom. Rinehart*, 817 F.3d 56; *accord In re: BP Sec., Derivative & Emp't Ret. Income Sec. Act (ERISA) Litig.*, 734 F. Supp. 2d 1380, 1382 (J.P.M.L. 2010). Congress has chosen different structures to handle different claims; it is not our role to tie together what Congress has chosen to keep separate. If plaintiffs do begin to abuse ERISA in the way Congress felt they have abused the securities laws, then Congress can amend ERISA accordingly.

Just because the dismissal of the parallel securities suit is not preclusive, however, does not mean that it is irrelevant. Our recognition of a plausible ERISA duty-of-prudence claim assumes—consistent with the *Insulators* ruling—that the Plan defendants did *not* commit securities fraud but, nevertheless, that Jander plausibly alleges that the Plan defendants had the requisite knowledge of overvaluation to raise fiduciary responsibilities consistent with the standard identified in *Fifth Third*. Since the *Insulators* suit was dismissed and not appealed, Jander may not allege directly or indirectly that the Plan defendants committed securities fraud. However, he may of course allege (and attempt to prove) that the Plan defendants knew about the

microelectronics division's overvaluation and failed to disclose it.

CONCLUSION

For the foregoing reasons, we **REVERSE** the judgment below and **REMAND** this matter to the district court for further proceedings consistent with this opinion.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 17-3518

LARRY W. JANDER, and all other individuals similarly situated, RICHARD J. WAKSMAN,

Plaintiffs-Appellants,

v.

RETIREMENT PLANS COMMITTEE OF IBM, RICHARD CARROLL, ROBERT WEBER, MARTIN SCHROETER,

Defendants-Appellees,

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

Filed: Jan. 18, 2019

ORDER

Appellees, Retirement Plans Committee of IBM, Richard Carroll, Robert Weber and Martin Schroeter, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe

Appendix E

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 15-cv-3781

LARRY W. JANDER, RICHARD J. WAKSMAN, and all other individuals similarly situated,

Plaintiffs,

v.

RETIREMENT PLANS COMMITTEE OF IBM, et al.,

Defendants,

Filed: Sept. 29, 2017

OPINION & ORDER

WILLIAM H. PAULEY III, United States District Judge:

The Retirement Plans Committee of IBM, Richard Carroll, Martin Schroeter, and Robert Weber (together, the "Defendants") move to dismiss the Second Amended Class Complaint (the "Complaint"). For the following reasons, the Defendants' motion is granted.

BACKGROUND

This stock-drop action arises from IBM's October 2014 announcement regarding the sale of its Microelectronic business and a concomitant $2.4

billion write-down of its assets.[1] Plaintiffs, as members of IBM's 401(k) Plus Plan (the "Plan") who invested in the IBM Stock Fund (the "Fund"), allege that Defendants violated their fiduciary duties when they failed to mitigate the foreseeable drop in IBM's stock and protect Plan members from losing millions of dollars in retirement savings.

I. Relevant Allegations

For purposes of this motion, the factual allegations in the Complaint are accepted as true. The Plan is a defined contribution benefit plan sponsored by IBM toward which eligible employees may defer up to 10% of their compensation. (Complaint ("Compl."), ECF No. 38, ¶ 44.) Under the Plan's governing documents, the Retirement Plans Committee ("Committee") is a named fiduciary under the Employee Retirement Income Security Act ("ERISA"). (Compl. ¶ 40.) Defendants Schroeter and Weber, as members of the Committee, along with Carroll, the Plan Administrator, are also named fiduciaries. The Plan offered a suite of investment options that Plan participants could choose from, including the Fund, an employee stock option plan ("ESOP") that primarily invested in IBM stock.

In 2013, IBM began searching for a buyer to purchase its Microelectronics business, a division of its Systems and Technology Segment responsible for designing and producing microchips. (Compl. ¶¶ 55,

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[1] Familiarity with this Court's prior Opinions and Orders in *Int'l Assoc. of Heat & Frost Insulators & Asbestos Workers Local #6 Pension Fund v. Int'l Bus. Machs. Corp.*, 205 F. Supp. 3d 527 (S.D.N.Y. 2016) and *Jander v. Int'l Bus. Machs. Corp.*, 205 F. Supp. 3d 538 (S.D.N.Y. 2016), is presumed.

59.) IBM hired an investment bank to solicit offers from potential suitors but had difficulty finding a buyer. (Compl. ¶¶ 59-60.) While IBM was engaged in the search for a buyer, it continued to operate the Microelectronics business, making periodic disclosures to the market about its financial condition.

From January 21, 2014 to October 20, 2014 (the "Class Period"), IBM reported positive news and figures regarding the value of its Microelectronics business. (Compl. ¶¶ 64-76). In reality, however, IBM and Defendants concealed the truth—that the Microelectronics business was "a massive money-loser" whose continued operation had a "substantial negative impact" on the Systems and Technology Segment's overall business. (Compl. ¶ 69.) For nearly a year as IBM searched for a buyer, the Microelectronics business hemorrhaged money. (Compl. ¶ 17.)

The effect of these misrepresentations—and IBM's failure to disclose the truth—had a dramatic, artificial impact on the value of IBM stock. During the Class Period, the stock price reached as high as $196 per share. (Compl. ¶ 18.) On October 20, 2014, IBM announced the sale of its Microelectronics business, startling the markets with news that it would pay the buyer $1.5 billion to take the asset off its hands. (Compl. ¶ 80.) The announcement also revealed that IBM had assigned a carrying value of approximately $2.4 billion to the Microelectronic business even though it knew the assets were worth significantly less. (Compl. ¶ 95.) On the heels of this news, IBM's stock price fell by 7.11% from $182.05 per share on

Friday, October 17, 2014 to $169.10 on Monday, October 20, 2014. (Compl. ¶ 18.)

II. Procedural History

In September 2016, this Court dismissed Plaintiffs' claims on grounds that their complaint failed to state a claim for breach of the duty of prudence. More specifically, Plaintiffs "fail[ed] to plead facts giving rise to an inference that Defendants could not have concluded that public disclosures, or halting the Plan from further investing in IBM stock, were more likely to harm than help the fund." *Jander*, 205 F. Supp. 3d at 545 (internal citations and quotations omitted).

This Court further held that in order to prevail on an ERISA claim, Plaintiffs must satisfy a "highly demanding pleading standard"—one under which a "rote recitation of proposed remedies without the necessary facts and allegations supporting Plaintiffs' proposition" would not suffice. *Jander*, 205 F. Supp. 3d at 546 (internal citation and quotation marks omitted). Plaintiffs argued that the Supreme Court's holding in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), set "an impossibly high barrier for ERISA breach-of-fiduciary duty cases concerning ESOPs," but this Court recognized that *Dudenhoeffer* merely sought to "clarif[y] the standard by which courts need to evaluate such cases, [and] did not necessarily ease the standard." *Jander*, 205 F. Supp. 3d at 546.

Notwithstanding dismissal of the first complaint, this Court afforded Plaintiffs another opportunity to re-plead their claims after "undertak[ing] the necessary due diligence to provide facts [with] greater

specificity." *Jander*, 205 F. Supp. 3d at 546. Shortly after Plaintiffs filed their Complaint, Defendants again moved to dismiss.

DISCUSSION

I. Standard

On a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A pleading that offers "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 677. Nor does a complaint suffice if it offers "naked assertion[s]" devoid of "further factual enhancement." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). The "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (internal citations and quotations omitted).

Nevertheless, this Court must accept as true all well-pleaded allegations—including documents attached to the Complaint or incorporated by reference, and matters subject to judicial notice—and draw all reasonable inferences in Plaintiffs' favor. *N.Y. Pet Welfare Assoc., Inc. v. City of N.Y.*, 850 F.3d 79, 86 (2d Cir. 2017); *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (courts may consider "legally required public disclosure documents filed with the SEC" and documents relied on by plaintiff "in bringing suit").

II. Analysis

Plaintiffs offer three alternative actions that Defendants could have taken to mitigate the deleterious effects on IBM's stock price following the divestiture announcement. In their previous complaint, Plaintiffs alleged two alternative actions—that Defendants (i) could have made an earlier corrective disclosure to the market and (ii) could have halted all purchases and sales of IBM stock. They reiterate those alternatives and add a third in this Complaint, namely that Defendants could have purchased a hedging product to offset any losses to the Plan.

Under ERISA, an ESOP fiduciary owes the duty to act prudently "under the circumstances then prevailing." 29 U.S.C. § 1104(a)(1)(B). In other words, the duty of prudence is not evaluated from the "vantage point of hindsight." *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994). Therefore, to determine whether a fiduciary has acted prudently, courts must focus on the "fiduciary's conduct in arriving at an investment decision, not on its results, and ask whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." *Pension Benefit Guar. Corp. ex rel. St. Vincent v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 716 (2d Cir. 2012) (internal citations and quotation marks omitted). In doing so, "the duty of prudence turns on the circumstances prevailing at the time the fiduciary acts, [and] the appropriate inquiry will necessarily be context specific." *Dudenhoeffer*, 134 S. Ct. at 2471 (citing 29 U.S.C. § 1104(a)(1)(B)).

When a duty of prudence claim is alleged on the basis of nonpublic information, *Dudenhoeffer* dictates that "a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." 134 S. Ct. at 2472. *Dudenhoeffer* signaled a sea change in ERISA law, namely because it eliminated the presumption of prudence previously afforded ESOP fiduciaries. 134 S. Ct. at 2467. Recognizing that removing this special presumption could open the doors to "meritless, economically burdensome lawsuits," the Supreme Court fashioned a pleading standard designed to "divide the plausible sheep from the meritless goats," which requires courts to undertake a "careful, context-sensitive scrutiny of a complaint's allegations." *Dudenhoeffer*, 134 S. Ct. at 2470.

A mere two years after *Dudenhoeffer*, the Supreme Court validated this exacting standard, directing lower courts to scrutinize the "facts and allegations supporting" a duty of prudence claim. *Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016). *Dudenhoeffer* did not impose a pleading standard different than that set forth in *Twombly* and *Iqbal*, but plaintiffs in ESOP duty of prudence cases have nonetheless struggled to satisfy it. The inherent nature of a duty of prudence claim—looking back to the relevant period to ascertain what a prudent fiduciary would have concluded—is necessarily context specific. Taking direction from *Dudenhoeffer* and *Amgen*, courts across the country have recognized that plaintiffs in ESOP prudence cases bear "the

significant burden of proposing an alternative course of action so clearly beneficial that a prudent fiduciary *could not conclude* that it would be more likely to harm the fund than to help it." *Whitley v. BP, P.L.C.*, 838 F.3d 523, 529 (5th Cir. 2016) (emphasis original); *Jander*, 205 F. Supp. 3d at 545 (noting the "highly demanding" and "highly exacting standard which is difficult to satisfy").

Here, the allegations in the Complaint fall short of the standard set forth in *Dudenhoeffer* and *Amgen*. The Complaint is longer than its previous iteration, but much of it is adorned with conclusory allegations aimed at advancing the general theory that Plaintiffs' proposed alternative actions would have protected the Plan from its losses. Beyond a rote explanation of how those alternative actions would have mitigated the harm, the Complaint is bereft of context-specific details to show that a prudent fiduciary would not have viewed the proposed alternatives as more likely to do more harm than good. *Amgen*, 136 S. Ct. at 760. This Court turns to an analysis of each of Plaintiffs' proposed alternative actions.

A. Issuing Earlier Corrective Disclosure

Plaintiffs allege that Defendants "could have issued truthful or corrective disclosures much earlier to cure the fraud and to make its stock a prudent investment again for the Plan." (Compl. ¶ 104.) Employing this alternative could have "ended the artificial inflation in IBM's stock price, which was damaging all purchasers through the Plan who paid excessive, fraudulent prices for the stock." (Compl. ¶ 105.) That is all the more true, Plaintiffs claim, since

the Plan was a net buyer of approximately $111 million worth of IBM stock in 2014. (Compl. ¶ 106).

While these allegations are plausible on a theoretical basis, they fail to shed any light on whether a prudent fiduciary in Defendants' position under circumstances then prevailing believed that a corrective disclosure would not have done more harm than good to the Fund. As an initial matter, "courts have routinely rejected the allegation that the longer a fraud goes on, the harsher the correction as support for corrective disclosure as a plausible alternative." *Graham v. Fearon*, 2017 WL 1113358, at *5 (N.D. Ohio Mar. 24, 2017) (internal quotation marks and citations omitted); *JPMorgan Chase & Co. ERISA Litig.*, 2016 WL 110521, at *4 (S.D.N.Y Jan. 8, 2016), *aff'd sub nom. Loeza v. John Does 1-10*, 659 F. App'x 44 (2d Cir. 2016); *Jander*, 2016 WL 4688864, at *5 ("Plaintiffs' argument that delay in disclosing an alleged fraud always harms investors in the Plan is not particular to the facts of this case and could be made by plaintiffs in any case asserting a breach of ERISA's duty of prudence."). Plaintiffs' attempt to buttress that proposition with various academic articles and studies theorizing that the gap between a stock's true price and its artificial price—and the reputational damage to the stock's long-term investment value—continues to grow as the misrepresentations inflating the stock remain uncorrected. (Compl. ¶¶ 107, 109.) But offering these studies only underscores the general, theoretical, and untested nature of Plaintiffs' allegations.

Plaintiffs allege that the failure of IBM's share price to rebound in the aftermath of the company's

October 2014 divestiture announcement validates the viability of making a corrective disclosure. Specifically, they assert that IBM's stagnant stock price two years after the divestiture announcement is evidence of the lingering reputational damage to IBM's stock as a long-term investment. (Compl. ¶ 27.) But aside from a number of intervening factors that could have contributed to a lethargic stock price, this argument rests on hindsight. Even if this Court credited this point, it says nothing about what a prudent fiduciary would have concluded under the circumstances then prevailing. *See In re Target Corp. Sec. Litig.*, 2017 WL 3267708, at *19 (D. Minn. July 31, 2017) (theory as to duty of prudence based on hindsight is "insufficient to state a breach of the duty of prudence claim under ERISA, let alone meet *Dudenhoeffer*'s standards.").

Plaintiffs advance one additional allegation that is remotely context specific—that the Fund was a net buyer of IBM stock, purchasing approximately $111 million in 2014. (Compl. ¶ 106.) A prudent fiduciary, they argue, would have saved unwitting buyers from a steeper decline in the value of their stock even if certain "Plan participants who managed to sell at inflated prices" ultimately benefited. (Compl. ¶ 106.) And based on that, a prudent fiduciary would have concluded that "more harm than good to the Plan could not possibly be done by continuing to let the artificial inflation go uncorrected." (Compl. ¶ 106.) But this allegation omits sales of approximately $391 million of IBM stock during the same period that Plan participants purchased $111 million of stock. That turns the Fund into a net seller for the year. (Declaration of Lawrence Portnoy in Support of

Motion to Dismiss, ECF No. 45, Ex. H, SEC Form 11-K for FY 2014.) This context-specific fact radically changes the analysis regarding what a prudent fiduciary would have concluded. With net sales eclipsing net purchases, it is entirely conceivable that a prudent fiduciary *could have* concluded that issuing an early corrective disclosure would do more harm than good.

Moreover, Plaintiffs' allegations merely track the theory of corrective disclosure—that releasing news of the fraud earlier would mitigate a precipitous drop in stock price following the divestiture announcement. (*See* Compl. ¶¶ 114-115, 118-119.) Plaintiffs offer no insight into how far the stock price would have dropped if disclosure was made earlier. More importantly, "*Dudenhoeffer* expressly instructs courts to consider whether 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." *In re BP P.L.C. Sec. Litig.*, 2017 WL 914995, at *5 (S.D. Tex. Mar. 8, 2017) (internal citation omitted and emphasis original). Thus, even if the stock price dropped marginally as a result of a corrective disclosure, the net effect of that drop on more than $110 million purchased by Plan participants could have been substantial.

Pleading these concepts requires more substance, which is why this Court, in allowing Plaintiffs to file the Complaint, presumed that they would "undertake the necessary due diligence to provide facts of this greater specificity, including those data regarding the Fund's Class Period purchases . . . and possibly

retaining an expert to perform a quantitative analysis to show more precisely how Plan participants are harmed in the short and long term by purchasing Fund shares at artificially high prices."[2] *Jander*, 205 F. Supp. 3d at 546. But the Complaint offers no such analysis.

Beyond the absence of context specific allegations, however, the Complaint suffers from the failure to consider how a prudent fiduciary, when confronted with the inevitability of disclosing the impending sale of its Microelectronic business, would have accounted for the potential ill-effects resulting from a premature

[2] But even that may not be enough. In *BP P.L.C.*, to "quantify the hypothetical effect of making an [earlier disclosure]," the plaintiffs hired a financial markets expert who surmised a "3 to 5% decline from an early disclosure," which was substantially less than the 50% drop that actually occurred when BP's undisclosed safety risks materialized. 2017 WL 914995, at *5. Plaintiffs relied on this analysis to substantiate their contention that no prudent fiduciary could conclude that such a drop would be more harmful than "a late disclosure and/or catastrophic event, such as the Deepwater Horizon explosion and spill, that [ ] nearly eliminate[d] [their] investments." *BP P.L.C.*, 2017 WL 914995, at *5. However, the *BP P.L.C.* court characterized those allegations as a "half-bubble off plumb" which "undervalue[d] the negative effects of early disclosure and overstat[ed] its benefit" because they failed to account for "a drop in the stock price *and a concomitant drop* in the value of the stock already held by the fund." *BP P.L.C.*, 2017 WL 914995, at *5 (emphasis original). Notwithstanding a projected modest decline in the stock price resulting from early disclosure, the court found that "a 5% decline" applied to the value of stock already held by the fund would result in a concomitant loss of "approximately $110 million in value." *BP P.L.C.*, 2017 WL 914995, at *5. But here, Plaintiffs fail to articulate any numeric or comparative basis from which a prudent fiduciary could not conclude that early disclosure would do more harm than good.

disclosure. "[G]iven the negative impact of disclosure, a prudent fiduciary could very easily conclude that such an action would do more harm than good." *Graham*, 2017 WL 1113358, at *5 (internal citation, emphasis, and alterations omitted); *BP P.L.C.*, 2017 WL 914995, at *5 (plaintiffs "arguably underestimate[] the extent of the stock drop" because they fail to consider whether "an unusual disclosure by ERISA fiduciaries could 'spook' the market, causing a more significant drop in price."); *Wilson v. Edison Int'l, Inc.*, 2016 WL 7469601, at *11 (C.D. Cal. July 6, 2016) (A "prudent fiduciary may consider that, if he erred in sparking market fears the decline could be far worse than what was actually warranted, and a prudent fiduciary would not so act."). "This is particularly true where an unusual disclosure outside the securities laws' normal reporting regime could spook the market, causing a more significant drop in price than if the disclosure were made through the customary procedures." *Graham*, 2017 WL 1113358, at *5. And in the context of this case, a prudent fiduciary may have considered whether a significant stock drop and its attendant publicity could spook potential buyers, especially during a time when IBM was struggling to attract serious offers for its Microelectronics business. (Compl. ¶ 60.)

Plaintiffs contend that no prudent fiduciary could have concluded that earlier disclosure would have done more harm than good, and urge this Court to take them at their word at this juncture in the litigation. But the whole point of *Dudenhoeffer* was to weed out meritless claims based on nothing more than Plaintiffs' *ipse dixit* assertions, and to encourage "careful judicial consideration" of alternative actions

predicated on context-specific allegations that a prudent fiduciary under circumstances then prevailing would have weighed. Here, Plaintiffs give short shrift to *Dudenhoeffer*'s demands, only alleging in conclusory fashion that "in weighing harm versus good, [Defendants] should have concluded that [ ] a disclosure . . . would, in this case, be less harmful than waiting for the disclosure to happen through some other mechanism." (Compl. ¶ 118.)

B. Halting Trading of IBM Stock

Plaintiffs proffer a second alternative—that Defendants, who had the authority to issue new investment guidelines for the Plan, should have restricted new purchases and sales in the Fund. (Compl. ¶¶ 120-130.) While the Complaint sets forth a plausible reason as to why this alternative was consistent with the securities laws (and would not constitute insider trading), it fails to allege that a prudent fiduciary could not have concluded that freezing stock purchases or sales would do more harm than good.

Plaintiffs gloss over the context-specific factors at play during the Class Period that a prudent fiduciary could have considered in determining whether halting the trading of IBM stock would do more harm than good. They reference on multiple occasions that the divestiture announcement caused a 7% decline in the stock value, and that Defendants were well-positioned to protect Plan participants from overpaying or provide them the opportunity to allocate their money toward other prudent alternative investment options under the Plan. (Compl. ¶¶ 129-130.) But these are the type of "naked assertions [ ] analogous to those the

Supreme Court found insufficient in *Amgen*. *Target*, 2017 WL 3267708, at *17.

Moreover, the Complaint overlooks the possibility that halting trades "could send mixed signals," such as diminished confidence in IBM stock, "causing a drop in stock price" that could have done more harm than good to the Fund. *Target*, 2017 WL 3267708, at *17; *In re Idearc ERISA Litig.*, 2016 WL 7189980, at *5 (N.D. Tex. Feb. 26, 2016) (complaint "does not address whether a prudent fiduciary might be concerned about other, more indirect effects" such as the possibility that the market "might take a plan's freeze of stock purchases as a sign that insider fiduciaries viewed the employer's stock as a bad investment."); *In re Pilgrim's Pride Stock Inv. Plan ERISA Litig.*, 2016 WL 8814356, at *4 (E.D. Tex. Aug. 19, 2016) ("[S]imply terminating the Plaintiffs' option to invest in company stock would likely have signaled the market."). The Complaint does not clearly articulate a counter narrative as to why a prudent fiduciary would not have viewed this alternative as doing more harm than good.

C. Purchasing a Hedging Product

Finally, the Complaint asserts that purchasing a low-cost hedging product to offset any losses resulting from precipitous decline in stock price would not have done more harm than good. Plaintiffs allege that, in January 2013, Defendants were offered the option to "provide protection to Plan participants who were invested in IBM stock against the risk of an IBM stock price decline," but they rejected such a proposal after "virtually no consideration." (Compl. ¶ 131.) The Complaint also describes these "available hedging products" as low-cost alternatives "requir[ing] annual

cash deposits of 1-2%." (Compl. ¶ 134.) Absent any losses triggering the hedge, "refunds of over half of the amount of annual contributions" would put the "cost of participation down to 0.10% per year." (Compl. ¶ 134.)

Beyond those allegations, however, the Complaint adds only surplusage to the contention that a hedging product would have been a better option than doing nothing. Defendants, as ESOP fiduciaries, have no duty to diversify since ESOPs, by their very nature, are intended to encourage stock ownership in one company. *See Dudenhoeffer*, 134 S. Ct. at 2467. But even if they chose to diversify through a hedging product, the Complaint alleges nothing about the specific parameters of such a hedge. At least some quantum of detail regarding the type, term length, and conditions of the hedging product is required to ascertain whether a prudent fiduciary during the Class Period would have determined that it could not do more harm than good to the Fund. *Graham*, 2016 WL 1113358, at *6 (finding allegations insufficient where no details about whether the hedging product was "a short position in [IBM] stock, an insurance product, or something else").

Plaintiffs give no consideration to the costs—and harm to the Fund—that could have been incurred from purchasing this generic hedging product. First, depending on its parameters, the expense of obtaining a hedge may have outweighed its benefit. There is no telling how much the Fund would have been reimbursed, or protected, had a devastating disclosure such as the divestiture announcement triggered the hedge. The point of highlighting these deficiencies,

however, is not that Plaintiffs were required to account for every detail and contingency. It is to underscore the need for some detail about an alternative action that a prudent fiduciary necessarily would have had to weigh and explore in making the ultimate determination that such action would not have done more harm than good to the Fund. The Complaint offers little from which this Court could conceive of such a result.

Second, like the other alternative actions, obtaining a hedging product may have required disclosure. Even if this Court accepted Plaintiffs' assurances that such a purchase would not require disclosure through a filing with the SEC or Department of Labor, Section 404 of ERISA mandates the Plan Administrator to provide Plan participants with notice of any "qualified change in investment options." *See* 29 U.S.C. § 1104(c)(4)(C). That would include investing in a hedging product on behalf of a Fund otherwise comprised of IBM stock. Such notice could have prompted questions about why a hedging product was necessary in the first place, "rais[ing] concerns in the broader market regarding the health of the Company or hasten the ultimately disclosure of the alleged" misrepresentations. *Martone v. Robb*, 2017 WL 3326966, at *4 (W.D. Tex. Aug. 2, 2017).

More troubling, this alternative may have invited Defendants to defraud a counterparty. If, for example, an insurer required Defendants to submit information about IBM, Defendants might have misrepresented the value of the Microelectronics business to conceal the reason they were seeking a hedge. That places a prudent fiduciary in a Catch-22. On the one hand,

Plaintiffs complain that a prudent fiduciary should not have concealed the purported fraud for as long as it did; on the other, they suggest a hedge should have been obtained under false pretenses to mitigate the inevitable harm resulting from the concealed fraud. This point further suggests that purchasing a hedge during the circumstances then prevailing may not have been a real possibility at all. And if it was—assuming a counterparty agreed to provide the hedge in spite of knowing about IBM's impending disclosure—a prudent fiduciary may have wondered whether it had just purchased a product whose benefits were illusory. These are all critical considerations that would have factored into a prudent fiduciary's calculus.

Fidelity to *Dudenhoeffer*'s standard—to allege that a prudent fiduciary could not conclude that the alternative action would do more harm than good—requires a balancing of the countervailing outcomes to an alternative action under the circumstances. "In other words, in weighing the 'harm' and 'good' that would result from Plaintiffs' propos[ed] [alternative action]" such as early corrective disclosure, "a prudent fiduciary would have considered the harmful prospect of a stock drop that was imminent, substantial, and likely to occur." *BP P.L.C.*, 2017 WL 914995, at *5. The ultimate burden is on the plaintiff to give some consideration to "other, more indirect effects" or the risks attendant to taking any given alternative action. *Idearc*, 2016 WL 7189980, at *6. Courts should not be left guessing "whether a prudent fiduciary might have perceived such a risk in this case." *Idearc*, 2016 WL 7189980, at *6. And while Plaintiffs should not be required to allege every conceivable positive or

negative outcome to the alternative, they may "not simply allege that because a stock price drop was inevitable, *ipso facto* almost any legal alternative action aimed at softening losses to participants would do more good than harm." *Target*, 2017 WL 3267708, at *18.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is granted. The Clerk of Court is directed to terminate the motion pending at ECF No. 43, and mark this case as closed.

Dated: September 29, 2017
New York, New York

SO ORDERED:
/s/ William H. Pauley III
William H. Pauley III, U.S.D.J.

Appendix F

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 15-cv-3781

LARRY W. JANDER, RICHARD J. WAKSMAN, and all other individuals similarly situated,

Plaintiffs,

v.

RETIREMENT PLANS COMMITTEE OF IBM, et al.,

Defendants,

Filed: Sept. 7, 2017

OPINION & ORDER

WILLIAM H. PAULEY III, District Judge:

In October 2014, International Business Machines Corp. ("IBM") announced that it was taking a $2.4 billion write-down in connection with transferring its microelectronics business to another company. Following that announcement—which coincided with the disclosure of disappointing third-quarter operating results—IBM's share price dropped by approximately 17%. Two separate cases pending before this Court allege that Generally Accepted Accounting Principles ("GAAP") required IBM and its corporate officers to record an earlier impairment of

its microelectronics assets, and that IBM's stock price was overvalued and fell as a result of the divestiture announcement.

Jander and Waksman, on behalf of participants in IBM's 401(k) Plus Plan (the "Plan") who invested in the IBM Company Stock Fund (the "Fund") between January 21, 2014 and October 20, 2014, bring this action under Section 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132. The Amended Complaint names IBM as a defendant, along with the Retirement Plans Committee of IBM, Richard Carroll (IBM's Chief Accounting Officer) Martin Schroeter (IBM's CFO), and Richard Weber (IBM's general counsel).

Defendants move to dismiss the Amended Complaint for failure to state a claim. Defendants' motion to dismiss is granted with leave to replead.

BACKGROUND

The Plan is a defined-contribution benefit plan, sponsored by IBM that permits employees to defer some of their compensation into a number of various investment options. One of those options is the Fund, which is predominantly invested in IBM common stock. (AC ¶¶ 3, 26.) Such plans are known as employee stock ownership plans (or "ESOPs"). Throughout the class period, both Schroeter and Weber were members of the Retirement Plans Committee; thus, each was a "named fiduciary" under ERISA. (AC ¶¶ 22, 24-25.) As the Plan Administrator, Defendant Carroll was also a named fiduciary. Plaintiffs allege that IBM was a *de facto* fiduciary because it had ultimate oversight and was empowered to amend the Plan. (AC ¶¶ 21, 27-33.)

In a separate Opinion & Order, filed simultaneously, this Court addressed substantially similar factual allegations brought by shareholders under Section 10(b) of the Securities Exchange Act. *See Int'l Assoc. of Heat and Frost Insulators and Asbestos Workers Local #6 Pension Fund v. International Business Machines Corporation*, 15cv2492 (S.D.N.Y.) ("the *Insulators* Securities Action"). Familiarity with that Opinion & Order is presumed, and the allegations concerning Microelectronics' alleged impairment are not repeated here.[1]

LEGAL STANDARD

To withstand a motion to dismiss, pleadings "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Courts must accept as true all well-pleaded factual allegations. *See Hooks v. Forman, Holt, Eliades & Ravin, LLC*, 717 F.3d 282, 284 (2d Cir. 2013). Additionally, courts may consider "legally required public disclosure documents filed with the SEC" as well as documents "incorporated into the complaint by reference" or relied upon by the plaintiff "in bringing suit." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). However, "[t]hreadbare recitals of the elements of a cause of

[1] Unlike the *Insulators* Securities Action, the Amended Complaint in this case does not incorporate allegations from confidential witnesses concerning IBM's manufacturing plants.

action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

DISCUSSION

Pursuant to 29 U.S.C. § 1104(a)(1)(B), "ERISA imposes an obligation on fiduciaries to 'act in a prudent manner under the circumstances then prevailing,' a standard that eschews hindsight and focuses instead on the 'extent to which plan fiduciaries at a given point in time reasonably could have predicted the outcome that followed.'" *In re Lehman Bros. Sec. & ERISA Litig.*, 113 F. Supp. 3d 745, 754 (S.D.N.Y. 2015) (quoting *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt., Inc.*, 712 F.3d 705, 716 (2d Cir. 2013)). Plaintiffs allege that Defendants failed to prudently and loyally manage the Plan's assets, and failed to adequately monitor the Plan's fiduciaries. Specifically, they argue that once Defendants learned that IBM's stock price was artificially inflated, Defendants should have either disclosed the truth about Microelectronics' value or issued new investment guidelines temporarily freezing further investments by the Fund in IBM stock.

In support of their motion to dismiss, Defendants argue, among other things, that: (1) Plaintiffs fail to plead that the Microelectronics assets were impaired; (2) IBM was not a fiduciary; (3) Plaintiffs' proposed alternative actions fail to satisfy the standard set forth in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014) and its progeny; and (4) the "duty to monitor" claim is derivative of Plaintiffs' underlying claims.

I. Impairment of Microelectronics' Assets

Both parties incorporate the arguments made in the *Insulators* Securities Action concerning Defendants' alleged obligation to write-down Microelectronics' value under GAAP. In *Insulators*, this Court found that plaintiffs had plausibly alleged a GAAP violation, but failed to sufficiently allege scienter as required by the Private Securities Litigation Reform Act and Federal Rule of Civil Procedure 9(b). However, "allegations similar to fraud do not implicate Rule 9(b) where 'the gravamen of the claim is grounded in ERISA.'" *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 470 (S.D.N.Y. 2005) (quoting *Rankin v. Rots*, 278 F. Supp. 2d 853, 866 (E.D. Mich. 2003)); *see also In re Bear Stearns Companies, Inc. Secs., Derivative, & Employee Ret. Income Sec. Act (Erisa) Litig.*, No. 08-md-1963 (RWS), 2009 WL 50132, at *4 (S.D.N.Y. Jan. 5, 2009) (noting that unlike securities fraud cases, ERISA cases are not governed by the PSLRA). Thus, for purposes of evaluating the Amended Complaint in this action, this Court need not consider whether Plaintiffs have alleged, with particularity, that "the failure to take a write-down amounted to highly unreasonable conduct which represents an extreme departure from the standards of ordinary care." *Plumbers & Steamfitters Local 773 Pension Fund v. Canadian Imperial Bank of Commerce*, 694 F. Supp. 2d 287, 301 (S.D.N.Y. 2010) (quotations, citations, and alterations omitted).

Plaintiffs allege that the Plan fiduciaries "knew that IBM's stock price had been artificially inflated by undisclosed material facts," namely that the "Microelectronics business was hemorrhaging money

and that IBM could not sell it without having to pay another company $1.5 billion to take the failing business off its hands." (AC ¶¶ 8, 10.) Specifically, Plaintiffs allege that: (1) Schroeter, as CFO, was a Sarbanes-Oxley co-signatory of IBM's SEC filings and made many of the allegedly misleading statements; (2) Weber played a central role in preparing IBM's financial reporting; and (3) Carroll was the most senior accounting officer at IBM with intimate knowledge of Microelectronics' financial condition. While such allegations are insufficient to allege scienter under the PSLRA, in view of the lower pleading standards applicable to an ERISA action, Plaintiffs have plausibly pled that IBM's Microelectronics unit was impaired and that the Plan fiduciaries were aware of its impairment.

II. IBM as Fiduciary

In ERISA cases, "[a] threshold question is whether each defendant acted as a plan fiduciary." *In re Bank of Am. Corp. Sec., Derivative, & Employee Ret. Income Sec. Act (ERISA) Litig.*, 756 F. Supp. 2d 330, 346 (S.D.N.Y. 2010) (citing *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000)). Fiduciaries include both "named fiduciaries" as well as "anyone else who exercises discretionary control or authority over the plan's management, administration, or assets." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (internal citations omitted). Fiduciaries of the latter type are referred to as "*de facto* fiduciaries." *See In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02-cv-08853, 2005 WL 563166, at *4 n.5 (S.D.N.Y. Mar. 10, 2005).

Plaintiffs allege that IBM was a *de facto* fiduciary because it had ultimate oversight and was empowered to amend the Plan. But courts routinely reject "[s]uch bare legal conclusions" as "insufficient to state a claim against a purported ERISA fiduciary." *In re JPMorgan Chase & Co. ERISA Litig.*, No. 12-cv-04027 (GBD), 2016 WL 110521, at *3 (S.D.N.Y. Jan. 8, 2016) ("Plaintiffs have pleaded no facts to support the allegation that JPMorgan was a *de facto* Plan fiduciary. They have made only the conclusory allegation that JPMorgan was such a fiduciary because it has discretionary authority and control regarding the administration and management of the Plan[] and its assets."). *See also In re Bank of Am. Corp. Secs., Derivative, & Employee Ret. Income Sec. Act (ERISA) Litig.*, 756 F. Supp. 2d 330, 346-48 (S.D.N.Y. 2010) (rejecting as insufficient allegations that the defendant created the ESOP, selected its terms, executed the trust documents, exercised control over the members of the plan committee, and appointed the trustee); *In re Citigroup ERISA Litig.*, No. 07-cv-9790, 2009 WL 2762708, at *15 (S.D.N.Y. Aug. 31, 2009) ("[T]he allegation that [a defendant] had the authority to hire and fire some of its named fiduciaries . . . is insufficient to show that [the defendant] exerted control over its employees' fiduciary responsibilities."), *aff'd*, *In re Citigroup ERISA Litig.*, 662 F.3d 128 (2d Cir. 2011). Plaintiffs therefore do not sufficiently plead that IBM was a *de facto* fiduciary.

III. Alleged Alternative Actions in view of *Dudenhoeffer* and its Progeny

In *Dudenhoeffer*, the Supreme Court rejected the presumption—previously applied by the Second Circuit—that ESOP fiduciaries who invested their plans' assets in the employer's stock were acting in accord with ERISA. *See Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 64 (2d Cir. 2016) (citing *Dudenhoeffer*, 134 S. Ct. at 2463). The Court then explained that "allegations that a fiduciary should have recognized from *publicly available information* alone that the market was over- or undervaluing a stock" were "implausible as a general rule." *Dudenhoeffer*, 134 S. Ct. at 2471 (emphasis added). Defendants attempt to frame this action as falling into that category, citing publicly available news articles indicating that Microelectronics was unprofitable and that IBM was having difficulty selling it. But these arguments about what the market "knew" are not derived from the Amended Complaint. Moreover, they are essentially indistinguishable from Defendants' loss causation arguments, which courts have held are generally inappropriate for resolution on a motion to dismiss. *See In re Bear Stearns Companies, Inc. Secs., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 507 (S.D.N.Y. 2011) ("[A]t the motion to dismiss stage, [a c]omplaint need not rule out all competing theories for the drop in . . . stock price; that is an issue to be determined by the trier of fact on a fully developed record."). Regardless, Plaintiffs' allegations clearly focus on *nonpublic* information allegedly known by Defendants. (*See, e.g.*, AC ¶ 79 ("Throughout the Class Period, defendants were aware of these misleading statements and IBM's failures to disclose the truth

about its Microelectronics business. Yet defendants did nothing to act upon that knowledge to protect the retirement savings of the Plan participants to whom they owed their fiduciary duties.")).

Dudenhoeffer also set forth the pleading standard for cases in which fiduciaries allegedly "behaved imprudently by failing to act on the basis of nonpublic information that was available to them because they were . . . insiders." *Dudenhoeffer*, 134 S. Ct. at 2471-72. For such claims, "[p]laintiffs must satisfy two requirements to state a claim for breach of the duty of prudence on the basis of inside information." *In re JPMorgan Chase & Co. Erisa Litig.*, No. 12 CIV. 04027 (GBD), 2016 WL 110521, at *3 (S.D.N.Y. Jan. 8, 2016). Thus, plaintiffs must plausibly allege: (1) "an alternative action that the defendant could have taken that would have been consistent with the securities laws," and (2) "that a prudent fiduciary in the same circumstances [as Defendants] would not have viewed [the alternative action] as more likely to harm the fund than to help it." *Dudenhoeffer*, 134 S. Ct. at 2472.

A. Alternative Actions

Plaintiffs allege that once Defendants learned that IBM's stock price was artificially inflated, Defendants should have either disclosed the truth about Microelectronics' value or issued new investment guidelines that would temporarily freeze further investments in IBM stock. Defendants argue that the former proposed alternative action—the issuance of "corrective disclosures"—would conflict with the securities laws.

"The securities laws create a system of periodic rather than continual disclosures." *Higginbotham v.*

Baxter Int'l, Inc., 495 F.3d 753, 760 (7th Cir. 2007); *see also In re Turkcell Iletisim Hizmetler A.S. Secs. Litig.*, 202 F. Supp. 2d 8, 13 (S.D.N.Y. 2001) ("The disclosure structure set out by the SEC and the case law recognizes how unworkable and potentially misleading a system of instantaneous disclosure out[side] the normal reporting periods would be."). In *Dudenhoeffer*, the Court recognized the possibility that the issuance of corrective disclosures (or the decision to alter trading strategies in view of inside information) could be inconsistent with the securities laws, explaining that courts should consider: (1) "that the duty of prudence, under ERISA as under the common law of trusts, does not require a fiduciary to break the law"; and (2) "the extent to which an ERISA-based obligation either to refrain on the basis of inside information from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws." *Dudenhoeffer*, 134 S. Ct. at 2472-73. The Second Circuit has also expressly "reject[ed] the argument that fiduciaries have a duty to disclose nonpublic information about the expected performance of the employer's stock." *Gearren v. The McGraw-Hill Companies, Inc.*, 660 F.3d 605, 610 (2d Cir. 2011); *see also In re Lehman Bros. Secs. & ERISA Litig.*, 113 F. Supp. 3d 745, 768 (S.D.N.Y. 2015) (concluding that *Dudenhoeffer* did not abrogate the Second Circuit's "rejection of a duty to share nonpublic information with plan beneficiaries").

Defendants argue that the disclosure of any "real-time suspicions" that Microelectronics was overvalued

would have "conflict[ed] with a disclosure regime designed to avoid imposing unsustainable burdens on companies and to prevent investors from having to wade through a continuous torrent of disclosures that vary widely in significance and reliability." (Defs' Mem. of Law at 19.) But Plaintiffs are not suggesting "real time" disclosure of suspicions. The Amended Complaint does not imply that any of the Defendants should have engaged in immediate ad-hoc disclosures regarding the value of Microelectronics unit. Rather, the Amended Complaint catalogues a number of allegedly incorrect disclosures made under the Securities Exchange Act's disclosure regime (*see, e.g.*, AC ¶ 49 (alleging that the February 25, 2014 Form 10-K incorrectly asserted that long-lived assets are properly tested for impairment), and further alleges that the Defendants were "senior corporate officers with direct responsibility" for such disclosures (AC ¶¶ 32, 34.) Accordingly, drawing all inferences in Plaintiffs' favor, the Amended Complaint alleges that Defendants were—prior to the end of the proposed class period—in a position to have directed the issuance of corrected statements regarding the valuation of IBM's Microelectronics unit that would have been entirely consistent with their obligations under federal securities laws.

B. Harm of the Alternative Actions

Although Plaintiffs' proposed alternative actions would not necessarily conflict with the securities laws, the Amended Complaint fails to satisfy the second prong of *Dudenhoeffer*'s alternative-action test. *Dudenhoeffer* recognized the possibility that prudent fiduciaries could "conclude[] that stopping

purchases—which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment—or 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." *Dudenhoeffer*, 134 S. Ct. at 2473. Thus, a complaint must contain "facts and allegations" which "'plausibly allege[]' that a prudent fiduciary in the same position '*could not have concluded*' that the alternative action 'would do more harm than good.'" *Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016) (emphasis added) (quoting *Dudenhoeffer*, 134 S. Ct. at 2473.) Two recent cases in this Circuit confirm that this is a highly exacting standard which is difficult to satisfy.

In *Rinehart v. Lehman Bros. Holdings Inc.*—a case in which an ESOP invested in the stock of a company only three months away from total collapse—the Second Circuit affirmed the dismissal of ERISA claims, noting that "[a] prudent fiduciary could have concluded that divesting Lehman stock, or simply holding it without purchasing more, 'would do more harm than good.'" *Rinehart*, 817 F.3d 56, 68 (2d Cir. 2016) (quoting *Amgen*, 136 S. Ct. at 760.) As the district judge in that case recognized, "divesting the [ESOP] of Lehman stock would have accelerated Lehman's collapse and reduced the Plan's value." *In re Lehman Bros.*, 113 F. Supp. 3d at 762-63. Likewise, in *In re JPMorgan Chase & Co. Erisa Litig.*—an ERISA stock-drop case concerning JP Morgan's alleged concealment of extraordinarily risky trading by the so-called "London Whale"—the court rejected alternative remedies identical to those proposed here, finding that

Dudenhoeffer's "higher pleading standard" requires "enough facts to plausibly allege that a prudent fiduciary in Defendants' circumstances would not have believed that public disclosures of JPMorgan's purported misconduct were more likely to harm than help the fund." *In re JPMorgan*, 2016 WL 110521, at *4.

Here, Plaintiffs proposed the same remedies offered in *Rinehart* and *In re JPMorgan*. Like the plaintiffs in those cases, they fail to plead facts giving rise to an inference that Defendants "could not have concluded" that public disclosures, or halting the Plan from further investing in IBM stock, were more likely to harm than help the fund. *See Dudenhoeffer*, 134 S. Ct. at 2472.[2] Indeed, the *In re JPMorgan* court considered and rejected the argument—asserted by Plaintiffs here—that *Dudenhoeffer*'s pleading standard was not meant to apply to cases involving allegations of an underlying fraud:

> Plaintiffs' allegations of fraud do not excuse them from satisfying *Dudenhoeffer*. As here, the complaint in *Dudenhoeffer* alleged that certain ERISA fiduciaries, who were also corporate insiders, knew inside information

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[2] In *In re JPMorgan*, the court recognized that halting an ESOP from investing in the company's stock necessarily "would have required [the company] to disclose that information to the public." *In re JPMorgan*, 2016 WL 110521, at *3; *see also Harris v. Amgen, Inc.*, 788 F.3d 916, 925-26 (9th Cir. 2015) ("[W]ithdrawal of the fund . . . is the worst type of disclosure: It signals that something may be deeply wrong inside a company but doesn't provide the market with information to gauge the stock's true value) (Kozinski, J., dissenting from denial of rehearing en banc).

> indicating that the employer's officers had made material misstatements to the market that inflated the price of the employer's stock.

In re JPMorgan, 2016 WL 110521, at *4. Likewise, Plaintiffs' argument that delay in disclosing an alleged fraud always harms investors in the Plan is "not particular to the facts of this case and could be made by plaintiffs in any case asserting a breach of ERISA's duty of prudence." *In re JP Morgan*, 2016 WL 110521, at *4; *see also Higgenbotham*, 495 F.3d at 761 ("[D]elay in correcting a misstatement does not cause the loss; the injury to investors comes from the fraud, not from a decision to take the time necessary to ensure that the corrective statement is accurate.").

Plaintiffs protest that such a reading of *Dudenhoeffer* sets an impossibly high barrier for ERISA breach-of-fiduciary duty cases concerning ESOPs. This argument has some merit, as *Dudenhoeffer* purportedly sought to abrogate a nearly "impossible" pleading standard and replace it with one that would "readily divide the plausible sheep from the meritless goats." 134 S. Ct. at 270. But the Supreme Court also recognized "that 'Congress sought to encourage the creation of [ESOPs,] a purpose that . . . may come into tension with ERISA's general duty of prudence." *Amgen*, 136 S. Ct. at 759 (quoting *Dudenhoeffer*, 136 S. Ct. at 7470.) Thus, while *Dudenhoeffer* clarified the standard by which courts need to evaluate such cases, it did not necessarily ease the standard. Likewise, this Court is not convinced by Plaintiffs' argument that "[i]t cannot be that garden-variety shareholders are entitled to *more* protection than those to whom a fiduciary duty is owed." (Opp'n

Br. at 13.) To the contrary, "ERISA and the securities laws ultimately have differing objectives pursued under entirely separate statutory schemes" such that alleged securities law violations do not necessarily trigger a valid ERISA claim. *In re Lehman Bros.*, 113 F. Supp. 3d at 768-69 ("While the true objects of Plaintiffs' ire may well be the Lehman executives whom Plaintiffs allege made material misstatements regarding the financial health of the company to the detriment of participants in the securities markets, ERISA is not the statutory mechanism to pursue such claims.")

Simply put, *Dudenhoeffer* sets a highly demanding pleading standard. Because the Amended Complaint offers only a rote recitation of proposed remedies without the necessary "facts and allegations supporting [Plaintiffs'] proposition," *Amgen*, 136 S. Ct. at 760, it fails to meet that threshold.

In the alternative, Plaintiffs seek leave to file a Second Amended Complaint that "would allow plaintiffs to undertake the necessary due diligence to provide facts of this greater specificity, including those data regarding the Fund's Class Period purchases . . . and possibly retaining an expert to perform a quantitative analysis to show more precisely how Plan participants are harmed in the short and long term by purchasing Fund shares at artificially high prices." (Pls' Sur-reply (ECF No. 26-1) at 6). In view of *Amgen*'s express recognition that removing a company's stock from the list of investment options could potentially satisfy *Dudenhoeffer*, and in view of the Supreme Court's emphasis that "the stockholders are the masters of

their complaint," 136 S. Ct. at 760, such a request is entirely appropriate.

IV. Duty to Monitor

Plaintiffs' duty to monitor claim is derivative of their claims for breach of the duties of prudence and loyalty. Because Plaintiffs have failed to allege an underlying breach, the duty to monitor claim is dismissed. *See Rinehart v. Akers*, 722 F.3d 137, 154 (2d Cir. 2013) ("[W]e affirm the court's dismissal of Plaintiffs' duty to monitor claim as derivative of Plaintiffs' failed duty of prudence claim."), *abrogated on other grounds by Dudenhoeffer*, 134 S. Ct. 2459; *see also Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 68 (2d Cir. 2016) ("[N]othing in [*Dudenhoeffer*] changes our previous analysis dismissing Plaintiffs' duty to monitor and duty to inform claims [holding that] Plaintiffs cannot maintain a claim for breach of the duty to monitor . . . absent an underlying breach of the duties imposed under ERISA.").

CONCLUSION

Defendants' motion to dismiss is granted and the Amended Complaint is dismissed without prejudice. The Clerk of Court is directed to terminate any pending motions and close this case.

Plaintiffs shall advise this Court within 30 days if they intend to file a Second Amended Complaint, at which point this Court would restore this case to the docket.

Dated: September 7, 2016

New York, New York

SO ORDERED:

[handwritten: signature]

WILLIAM H. PAULEY III

U.S.D.J.

Appendix G

RELEVANT STATUTORY PROVISIONS

29 U.S.C. § 1104(a)

Fiduciary duties

(a) Prudent man standard of care

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

(A) for the exclusive purpose of:

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

(ii) defraying reasonable expenses of administering the plan;

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

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

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

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

29 U.S.C. § 1107

Limitation with respect to acquisition and holding of employer securities and employer real property by certain plans

(a) Percentage limitation

Except as otherwise provided in this section and section 1114 of this title:

(1) A plan may not acquire or hold--

(A) any employer security which is not a qualifying employer security, or

(B) any employer real property which is not qualifying employer real property.

(2) A plan may not acquire any qualifying employer security or qualifying employer real property, if immediately after such acquisition the aggregate fair market value of employer securities and employer real property held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

(3) (A) After December 31, 1984, a plan may not hold any qualifying employer securities or qualifying employer real property (or both) to

the extent that the aggregate fair market value of such securities and property determined on December 31, 1984, exceeds 10 percent of the greater of--

(i) the fair market value of the assets of the plan, determined on December 31, 1984, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

* * *

(b) Exception

(1) Subsection (a) of this section shall not apply to any acquisition or holding of qualifying employer securities or qualifying employer real property by an eligible individual account plan.

* * *

(d) Definitions

For purposes of this section--

(1) The term "employer security" means a security issued by an employer of employees covered by the plan, or by an affiliate of such employer. A contract to which section 1108(b)(5) of this title applies shall not be treated as a security for purposes of this section.

(2) The term "employer real property" means real property (and related personal property) which is leased to an employer of employees covered by the plan, or to an affiliate of such employer. For purposes of determining the time at which a plan acquires employer real property for purposes of

this section, such property shall be deemed to be acquired by the plan on the date on which the plan acquires the property or on the date on which the lease to the employer (or affiliate) is entered into, whichever is later.

(3) (A) The term "eligible individual account plan" means an individual account plan which is (i) a profit-sharing, stock bonus, thrift, or savings plan; (ii) an employee stock ownership plan; or (iii) a money purchase plan which was in existence on September 2, 1974, and which on such date invested primarily in qualifying employer securities. Such term excludes an individual retirement account or annuity described in section 408 of Title 26.

(B) Notwithstanding subparagraph (A), a plan shall be treated as an eligible individual account plan with respect to the acquisition or holding of qualifying employer real property or qualifying employer securities only if such plan explicitly provides for acquisition and holding of qualifying employer securities or qualifying employer real property (as the case may be). In the case of a plan in existence on September 2, 1974, this subparagraph shall not take effect until January 1, 1976.

(C) The term "eligible individual account plan" does not include any individual account plan the benefits of which are taken into account in determining the benefits payable

to a participant under any defined benefit plan.

* * *

(5) The term "qualifying employer security" means an employer security which is--

(A) stock,

(B) a marketable obligation (as defined in subsection (e)), or

(C) an interest in a publicly traded partnership (as defined in section 7704(b) of Title 26), but only if such partnership is an existing partnership as defined in section 10211(c)(2)(A) of the Revenue Act of 1987 (Public Law 100-203).

After December 17, 1987, in the case of a plan other than an eligible individual account plan, an employer security described in subparagraph (A) or (C) shall be considered a qualifying employer security only if such employer security satisfies the requirements of subsection (f)(1).

(6) The term "employee stock ownership plan" means an individual account plan--

(A) which is a stock bonus plan which is qualified, or a stock bonus plan and money purchase plan both of which are qualified, under section 401 of Title 26, and which is designed to invest primarily in qualifying employer securities, and

(B) which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.

*   *   *

29 U.S.C. §1108(c)(3)

Exemptions from prohibited transactions

(c) Fiduciary benefits and compensation not prohibited by section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from--

*   *   *

> (3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

29 U.S.C. §1109(a)

Liability for breach of fiduciary duty

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

29 U.S.C. §1132(a)(2)-(3)

Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

*   *   *

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

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

* * *