No. 24-188

IN THE

Supreme Court of the United States

MENORAH MIVTACHIM INSURANCE LTD., *et al.*,

Petitioners,

v.

JOHN D. SHEEHAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES:

STATUTES AND OTHER AUTHORITIES:

REPLY BRIEF FOR THE PETITIONERS

This case raises two issues of exceptional importance under federal law. *First*, in this case neither the trial court nor the appellate court *ever* provided *any* explanation for dismissing Plaintiffs'[1] principal claim—that Defendants misrepresented the *rebate rate* for EpiPen—on summary judgment. Accordingly, Federal Rule of Civil Procedure 56(a), which requires such an explanation, cannot have been satisfied. The bald conclusion by the appellate court, void of any citation to the trial court's opinion or other explanation, that the district court had done so, only compounded that failure. To permit the district court's holding to stand would be to permit district courts *entirely to ignore* claims properly and centrally presented, and so would violate the principle that courts must provide explanations for disposing of cases, and certainly for disposing of multi-billion dollar class actions like this one.

Second, the Court must make clear that proof of loss causation is not impossible in securities cases where the revelation of the truth occurred on a date on which additional information concerning the company or the subject matter was also revealed, as is usually the case. In requiring more than (1) disaggregation by expert testimony of the company-specific impact of the news revelations from the industry-wide impact of that news, and (2) clear, specific evidence that sophisticated

1. Unless otherwise defined, all capitalized terms have the same meanings as set forth in the Petition for a Writ of Certiorari filed August 19, 2024 (the "Petition"). Internal citations and quotations are omitted and emphasis is added unless otherwise noted. Citations to the Appendix filed with the Petition are designated "App." with the appropriate page references.

investors found that the company-specific price declines on those dates were due primarily to the revelation of fraud-related news, the Second Circuit's decision renders any disaggregation requirement found in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346 (2005) an impossible standard to meet.

Defendants present no convincing reason why the Court should deny review. *First*, Defendants assert that the lower courts explained their reasons for dismissing Plaintiffs' central claim. Yet Defendants still fail to point to a single statement anywhere in the district or appellate opinions that explains why these courts dismissed Plaintiffs' claim that Defendants *misrepresented the rebate rate for EpiPen*. The only reason for dismissal that Defendants reference concerns a *wholly separate* claim based on the allegation that Defendants *misclassified EpiPen*, but Plaintiffs did not appeal any such claim. Defendants hope that this Court, like the district court and the court of appeals, will mistakenly conflate Plaintiffs' claim that Defendants misrepresented the rebate rate for EpiPen with Plaintiffs' prior claim (no longer at issue) that Defendants misclassified EpiPen, and so read an explanation for dismissal of the latter claim as an explanation for dismissal of the former. That would be error. With respect to Plaintiffs' Government Investigation Claim, Defendants similarly point to language from the district court addressing materiality and argue that it is a holding on scienter.

Defendants' argument as to loss causation is similarly without merit. Defendants fail to provide any indication of what more than expert testimony on disaggregation could reasonably be shown in order to disaggregate fraud

from non-fraud related losses. Therefore, Defendants fail to explain how the Second Circuit's interpretation of the loss causation standard under *Dura* imposed in this case could be met.

The petition for writ of certiorari should be granted.

A. This Court Should Provide the Lower Courts With Guidance On the Requirements Under Fed. R. Civ. P. 56(a)

Federal Rule of Civil Procedure 56(a) directs that, when deciding a motion for summary judgment, the court should "state on the record the reasons for granting or denying the motion."

1. The Courts Provided No Explanation for Dismissing Plaintiffs' Rebate Rate Claim

As Plaintiffs have previously explained, in this case, neither the district court nor the Second Circuit *ever* provided *any explanation* for why Plaintiffs' claim that Defendants misrepresented the rebate rate for EpiPen should be dismissed on summary judgment. Defendants summarily claim this assertion is "wrong," (Opp. 10), yet they themselves *still* fail to point to a single sentence in which the district court provided any reasoning for dismissing the Rebate Rate Claims.

In arguing that the lower courts explained their dismissal of the claim, Defendants first point to the only sentence in the district court brief that mentions the Rebate Rate Claim:

> Plaintiffs challenge certain statements and communications by Mylan considered together. Mylan at various points made claims to the effect of, "If ANDA, then 13%." . . . This is said to be misleading because Mylan failed to also disclose that the EpiPen, according to Plaintiffs but contested by Defendants, was also rebated at 13% but was not approved pursuant to an ANDA.

Opp. 11 (quoting App. 58a). Yet that sentence merely notes that Plaintiffs are asserting the Rebate Rate Claim. The sentence in no way provides any explanation as to why that the court dismissed that claim.

Defendants then point to language in the district court opinion expressly addressing Plaintiffs' (now abandoned) claim based on the allegation that Mylan *misclassified* EpiPen, specifically whether "Mylan *knowingly* made misleading statements about its *classification* of EpiPen":

> Much of Plaintiffs' argument turns on construing the MDRP. But even if Plaintiffs are correct in their reading of the statutory text, liability could only exist if they established the clarity of textual meaning sufficiently to also impute knowledge (scienter) to Defendants.[] The record supports no such inference; rather, it is replete with evidence tending to significant confusion or disagreement among and within the regulatory agencies. There simply was not a single, clear interpretation of the MDRP statute rendering all the rest unreasonable. Even if Defendants' view of the MDRP was

> unreasonable, that would not support a reasonable inference of scienter – requiring evidence of 'extreme' recklessness, not mere negligence or unreasonableness . . . .
>
> The Court concludes that this degree of regulatory uncertainty and confusion, overla[i]d with the existing factual record, is insufficient to permit a reasonable juror *to infer that Mylan knowingly made misleading statements about its classification of the EpiPen.*

Opp. 11-12 (quoting App. 59a-60a) (emphasis added).

As the emphasized language makes clear, this paragraph, in form and substance, refers to the claim that "Mylan knowingly made misleading misstatements about its classification of the EpiPen." Yet Plaintiffs' Rebate Rate Claim—the claim that Mylan misinformed the market that it was rebating EpiPen at the maximum statutory rate of 23%, when in fact it was applying a dramatically lower 13% rate—in no way requires proof that Mylan misclassified the EpiPen under the MDRP. Mylan misstated the rates at which it rebated EpiPen *regardless* of whether EpiPen was misclassified and *regardless* of whether Defendants believed that EpiPen was misclassified—Defendants told the market they were applying a rebate rate that they were not in fact applying. Accordingly, this paragraph offers no explanation whatsoever for why the district court dismissed Plaintiffs' Rebate Rate Claim.

Perhaps recognizing that the district and appellate opinions contain no explanation for dismissing the Rebate Rate Claim, Defendants try to fabricate one.

Defendants argue that "it necessarily follows" from the Court's holding that "Mylan . . . reasonably thought it was in the right regarding how it classified EpiPen" that Mylan reasonably thought it was in the right in how it rebated EpiPen. Opp. 12 (quoting App. 78a-79a). Yet even Defendants' manufactured explanation, not found in the actual opinions, fails to explain the courts' dismissal of Plaintiffs' Rebate Rate Claim: whether Defendants reasonably believed that they were properly classifying and rebating EpiPen has *no bearing whatsoever* on whether they knowingly stated that they were rebating EpiPen at one rate, yet actually rebating it at another rate. Even if Defendants reasonably believed that they were entitled to rebate EpiPen at a lower rate, they knowingly misled the public when they stated that they were rebating EpiPen at the higher rate.

2. The Courts Provided No Explanation for Dismissing Plaintiffs' Government Investigation Claim for Lack of Scienter

Similarly, Plaintiffs have explained that the district court never provided any explanation for why it purportedly dismissed Plaintiffs' Government Investigation Claim *for lack of scienter*, and the Second Circuit compounded the district courts' error by failing itself to provide any explanation of why Plaintiffs' Government Investigation Claim should be dismissed for lack of scienter, or to cite to a single sentence of the opinion providing such an explanation.

In their brief, Defendants point to the following statement in the district court opinion to argue that the district court dismissed Plaintiffs' Government Investigation Claim for lack of scienter:

> [A]ll of the reasons that Mylan may well have thought it was—and, indeed, reasonably thought it was—in the right regarding how it classified the EpiPen are also reasons why no one at Mylan would have had reason to think the subpoena material. That is, if, as the Court has held, Mylan acted reasonably in its reliance on CMS statements and other communications in determining how to rebate the EpiPen, then there is no reasonable basis for Mylan to have regarded the subpoena material.

Opp. 14 (quoting App. 78a-79a) (citation omitted).

As an initial matter, the district court's opinion referred only to the "material[ity]" of the Government Investigation misstatements, and never used a term such as "scienter" or "knowledge" in discussing them.

Yet in any event, even read as somehow addressing scienter, the opinion is at best wholly unclear as to why the Government Investigation Claim should be dismissed for want of scienter. Defendants argue in their opposition, for the first time, that "If . . . Mylan reasonably believed the subpoena was immaterial, then it could not have acted with scienter in deciding not to disclose it." That argument was never articulated by the district or appellate courts. And for good reason—the argument improperly conflates three distinct elements under Section 10(b): falsity, scienter and materiality. The Government Investigation misstatements were *false* because, contrary to Defendants' statements that Mylan was not then subject to any government investigation, Mylan was subject at the time to a government investigation concerning EpiPen. Defendants

acted with *scienter* in making those misstatements because Defendants (as several expressly *admitted* on the record) knew about the government investigation concerning EpiPen when they made those misstatements. The third element, whether the Government Investigation misstatements were *material*, is an *objective* question—it turns not on anything *Defendants* thought or believed, but rather on whether a *reasonable investor* would regard those misstatements as "significantly alter[ing] the total mix of information." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 131 S. Ct. 1309, 1312 (2011). Accordingly, even if Defendants' proposed elaboration of the district court's holding had been in that opinion (it was not), that would only mean that the district court's opinion was internally confused and unclear. Such unclarity in a summary judgment opinion cannot satisfy the requirement of Rule 56 that a district court give reasons for granting summary judgment—if that Rule is to have any meaning, it must require that district courts give an *articulable* reason for granting summary judgment. That the Second Circuit itself was unable to articulate or even to cite to the district court's reasons for purportedly finding that scienter had not been adequately shown underlines that the district court's opinion on this point failed to provide an articulable explanation that could satisfy Rule 56.

B. The Court Should Provide The Lower Courts With Guidance On The Loss Causation Standard

Plaintiffs disaggregated fraud-related losses from other losses in two (typical) ways. *First*, Plaintiff's economic expert conducted extensive statistical analyses for each of the loss causation dates at issue, and disaggregated the company-specific impact of the news

revelations on those dates from the industry-wide impact of that news. CA.538.[2] *Second*, Plaintiffs, through their expert, reviewed all analyst commentary regarding the new revelations on those dates, and presented clear evidence that the company-specific price declines on those dates were due primarily to the revelation of fraud-related news. CA.553.

If *Dura* requires plaintiffs to disaggregate fraud-related losses from non-fraud related losses, the Second Circuit's interpretation of that disaggregation requirement in this case renders the requirement effectively impossible to meet. If evidence of the sort outlined above is insufficient even to create a triable issue of fact on loss causation, it is hard to see what evidence would be sufficient.

Indeed, neither the district court nor the Second Circuit provided any clarification of what sort of evidence, beyond the typical expert evidence disaggregating fraud from non-fraud related information, would satisfy their disaggregation requirement. Likewise, in their brief, Defendants fail even to attempt to explain what evidence would satisfy the disaggregation requirements the district and appellate courts in this case have imposed.

Defendants also claim that the law is clear as to the standard for loss causation, and therefore does not require guidance. Opp. 15. However, again, Defendants do not point to any other case in which a court has held that the PLSRA's loss causation requirement requires more than

2. Citations to the Confidential Joint Appendix filed in the Appeal below are designated "CA." with appropriate page references.

was shown in this case. Therefore, this case does not follow the supposedly "clear terms" of the standard. Opp. 16.

Without such guidance to securities plaintiffs, the Second Circuit's decision effectively eliminates liability for securities fraud claims wherever the revelation of the truth occurred on a date on which any additional information concerning the Company or the subject matter was also revealed.

C. The Second Circuit Decision Has Far Reaching Implications Which Require Review

Defendants argue that because the Second Circuit acted by non-precedential summary order, the implications of the order are limited. Opp. 25. Not so. The Second Circuit's opinion makes clear that lower courts lack guidance on the issues of law detailed in this petition. Without such guidance, lower courts will continue to make problematic rulings along the same lines, regardless of whether those rulings have precedential effect.

Moreover, certiorari remains appropriate when "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." *Kalamazoo Cnty. Rd. Comm'n v. Deleon*, 574 U.S. 1104, 1104 (2015) (Alito, J., dissenting from denial of certiorari) (alterations in original) (quoting Sup. Ct. R. 10(a)); *Plumley v. Austin*, 574 U.S. 1127, 1130 (2015) (Thomas, J., dissenting) (dissenting from denial of review of unpublished decision in "tension" with Supreme Court precedent). In failing even to address Plaintiffs' central claims or remand to the district court to do so, the decision

of the Second Circuit is in direct conflict with Rule 56(a) and decisions of the Second Circuit and other circuits. In requiring a standard for disaggregation that effectively renders any disaggregation requirement expressed in this Court's opinion in *Dura* a virtually impossible standard to meet, it conflicts with that holding, which did not aim to impose such unreasonable requirements for proof of loss causation. Disregard of federal rules and this Court's precedent is an extreme departure from the usual course of judicial proceedings.

CONCLUSION

For the foregoing additional reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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