No. 24-224

IN THE

Supreme Court of the United States

PLUMBERS LOCAL 290
PENSION TRUST FUND,

Petitioner,

v.

ROOT, INC., *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where a risk factor was forward-looking, was accompanied by meaningful cautionary language and warned of a risk that had not materialized, was it error to find the risk factor not actionable?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

1. Root, Inc., is a publicly held corporation. It has no parent corporation, and no publicly held company owns 10% or more of the common stock of Root, Inc.

2. Goldman Sachs & Co. LLC is a wholly-owned subsidiary of The Goldman Sachs Group Inc., except for de minimis non-voting, non-participating interests held by unaffiliated broker-dealers.

3. Morgan Stanley & Co. LLC is a limited liability company whose sole member is Morgan Stanley Capital Management, LLC, a limited liability company whose sole member is Morgan Stanley. Morgan Stanley is a publicly held corporation that has no parent corporation. Based on Securities and Exchange Commission Rules regarding beneficial ownership, Mitsubishi UFJ Financial Group, Inc. 7-1 Marunouchi 2-chome, Chiyoda-ku, Tokyo 100-8330, beneficially owns greater than 10% of Morgan Stanley's outstanding common stock.

4. Barclays Capital Inc. is an indirect, wholly-owned subsidiary of Barclays PLC.

5. Wells Fargo Securities, LLC, is a wholly-owned subsidiary of EVEREN Capital Corporation. EVEREN Capital Corporation is a wholly-owned subsidiary of WFC Holdings, LLC. WFC Holdings, LLC is a wholly owned subsidiary of Wells Fargo & Company.

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INTRODUCTION

Petitioner, Plumbers Local #290 Pension Trust Fund, Inc. ("Plumbers Local"), seeks a purely advisory opinion from this Court. Plumbers Local's question presented mirrors the question presented in the *Facebook* case, and asks whether a risk warning is misleading when it fails to disclose that the risk about which it warns has transpired. However, this case is entirely different from *Facebook* and the decision below is not a proper vehicle to consider that question. Any remand would be futile, because the Sixth Circuit held that the risk warning at issue was ***not*** a sham warning and that the risk warned of had ***not*** already materialized. The Petition does not challenge that determination, which is not worthy of a grant of certiorari. As a result, regardless of how the Court decides the *Facebook* case, the outcome in this case would not change and any remand would be a waste of court time and resources. Accordingly, there is no reason to hold this petition pending the disposition of *Facebook*. The petition should be denied.

STATEMENT OF THE CASE

1. This Petition relates to a single risk warning in a Registration Statement issued by Root, Inc. ("Root") in connection with an initial public offering: "As we grow, we may struggle to maintain cost-effective marketing strategies, and our customer acquisition costs could rise substantially." Pet. App. 54a.

2. Founded in 2015, Root is a technology and insurance company that takes an innovative approach to automobile insurance services. *Id.* 2a, 53a. While traditional insurance companies typically group people into risk pools and rely on aggregated data, Root often measures risk at the individual level to predict risk more accurately, which promotes fairness to the consumer. *Id.*

In October 2020, Root executed an IPO and became a publicly traded company. *Id.* In connection with the IPO, Root filed a Registration Statement containing Form S-1 and the accompanying prospectus, effective on October 27, 2020. *Id.* 3a; Pet. 4 n.3. Root executed its IPO on October 28, 2020, when Root Class A common stock began trading on the NASDAQ. Pet. App. 2a-3a. Goldman Sachs & Company LLC, Morgan Stanley & Company LLC, Barclays Capital Inc., and Wells Fargo Securities, LLC acted as underwriters for the IPO. *Id* 2a.

Among many other disclosures about the nature of Root's business, the Registration Statement described Root's *historical, long-term* customer acquisition cost ("CAC"). CAC, the sum of marketing expenditure for a period, divided by customers acquired for the period, is "a simple calculation" that

measures "the cost of acquiring new customers". *Id.* 3a, 53a n.1. Root also disclosed in its Registration Statement that it would embark on a nationwide marketing campaign that would increase costs substantially, could make it harder to attract new customers rapidly and cost-effectively, and might not be successful. *Id.* 5a-6a. Root warned that past results should not be taken as indication of future results. *Id.* 6a. Among other risks, Root also warned: **"As we grow, we may struggle to maintain cost-effective marketing strategies, and our customer acquisition costs could rise substantially**." *Id.* 24a, 65a-66a (emphasis added). According to Petitioner itself, it was also apparent, based on the disclosures, that *short-term* CAC would necessarily increase as Root spent more on marketing—the numerator in the simple CAC calculation. Petitioner itself states: "CAC increases [were] virtually certain to occur given Root's commitment to 'invest in [its] national brand' due to its efforts to 'expand [its] licensed footprint to 50 states'." Pet. 11.

3. Petitioner admits, "as of the time of the IPO, Root ***intended*** to grow its business to a national scope". *Id.* 5 (emphasis added). Notwithstanding that the risk factor refers to the possible consequences of ***future*** growth and that the Registration Statement referred to long-term, not short-term, CAC throughout, Petitioner alleges that the "adverse effects the warning portended had already transpired"

in the form of a CAC above historical average. *Id.*[1] Petitioner asserts that the risk factor "'was an inaccurate statement of material fact,' as it implied that Root faced a hypothetical, not extant, risk of increasing CAC, and a misleading omission, inasmuch as 'the hypothetical risk recited in the Registration Statement had already materialized as of the IPO, but was not disclosed to investors in the IPO'".[2] *Id.* 6.

A. The District Court Proceedings

1. Petitioner challenged various statements in the Registration Statement as allegedly being materially false or misleading under the Securities Act of 1933 and the Securities Exchange Act of 1934. The district court dismissed all claims and ruled in particular that the risk warning about potential future increases in customer acquisition costs was inactionable because it was "forward-looking and accompanied by meaningful cautionary language" and Petitioner "failed to allege that the challenged statement was false or misleading". Pet. App. 25a-26a.

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[1] The Sixth Circuit also affirmed the dismissal of two claims premised on an alleged omission about a spike in monthly CAC relative to historical figures because the disclosures were "historically accurate", "Root had no duty to update [] even if less favorable results might have been predictable" and it had, nevertheless, disclosed the spike at a roadshow. Pet. 5a, 63a-65a. Petitioner does not challenge those holdings in this Court.

[2] In its Amended Complaint, Petitioner challenged the statement as an inaccurate statement of material fact. Only on appeal did Petitioner first allege the statement was misleading by omission. It was impermissible for Petitioner to amend its complaint on appeal.

The district court concluded that the statement was "a forward-looking statement concerning Root's future", rather than implying any current state of affairs at the time of the IPO. *Id.* 25a. "As Root grows, Root certainly could struggle to maintain cost-effective marketing strategies and its CAC could increase substantially—but this prediction about Root's future could not have materialized as of the IPO." *Id.* Relatedly, the district court found claims that a long-term increase in Root's CAC had already materialized to be "particularly weak" where they relied on an increase in a single month. *Id.* 23a n.1.

Petitioner explains: "the court apparently reasoned that the purported risk warning did not convey any present information to investors—it held the risk warning 'is a forward-looking statement concerning Root's future CAC,' and 'this prediction about Root's future could not have materialized as of the IPO'". Pet. 13.

B. The Sixth Circuit Decision Below

1. The Sixth Circuit affirmed. The Sixth Circuit considered Plumbers Local's "argu[ment] that the [Bespeaks Caution] doctrine will not shield Root from liability because the risk that Root warned of had already occurred, *i.e.*, the warning was a sham." Pet. App. 66a. The Circuit expressly held, however, that the risk warning "[wa]s not a sham warning, and a reasonable investor would understand as much". *Id.* 70a. Thus, the Sixth Circuit affirmed the district court's conclusion below that no risk had materialized. *Id.*

The Sixth Circuit concluded that the risk warning was "forward-looking" and therefore would not be subject to the same analysis as "statements of past performance or historical data". *Id.* 66a. It explained that "when companies such as Root make forward-looking statements contained in a registration statement or in connection with an initial public offering, the Bespeaks Caution doctrine would shield those companies from liability when the forward-looking statements are accompanied by meaningfully cautionary language so that a reasonable investor would understand the statements". *Id.* 69a. The Sixth Circuit held that Root's "warning was accompanied by meaningfully cautionary language, and a reasonable investor would understand the warning". *Id.* 66a.

2. Petitioner's assertion in its Petition that there "is no question that the ***materialized*** risk here—increased CAC at the time of the IPO—posed a business threat" Pet. 3 n.2 (emphasis added); *see also id.* 2, is wrong. Both courts considered Petitioner's argument that the risk had already materialized and expressly held that the operative complaint had not alleged facts to support such a conclusion. Pet. App. 23a n.1, 69a.

REASON FOR DENYING THE PETITION

1. The question presented, by Petitioner here and in *Facebook*, has no bearing on the outcome in this case. Both petitions rely on alleged sham warnings related to risks that have already materialized. However, here the district court and Sixth Circuit ruled the complaint had failed to plausibly allege any real "sham warning" at all. Petitioner does not challenge that ruling. Thus, even if Petitioner is correct that there is a circuit split related to sham warnings, that is not a basis to grant a writ of certiorari or to remand in this case. Indeed, there is no split among the circuits that a warning of a potential future risk accompanied by cautionary language is not actionable where, as here, a plaintiff fails to plausibly plead that a risk already materialized. Accordingly, this case does not present the same question as *Facebook*, and any decision in the *Facebook* case would not change the outcome of this case and would be purely advisory. The Court should decline to grant or hold this petition.

I. A DECISION ON THE QUESTION PRESENTED WOULD BE PURELY ADVISORY.

1. Petitioner's question presented, and much of its petition, assumes that it has plausibly pleaded a materialized risk. Pet. i, 2, 3 n.2, 18. Both courts below expressly concluded otherwise. The Sixth Circuit rejected that very argument—that "the risk that Root warned of had already occurred, *i.e.*, the warning was a sham". Pet. App. 66a. In so doing, the Circuit thereby affirmed the district court's decision, which held that the "prediction about Root's future

could not have materialized as of the IPO" and that the claim that a long-term increase in Root's CAC had already materialized was "particularly weak". *Id.* 23a n.1, 25a. Absent a well-pleaded, and materialized risk—which Petitioner lacks and on which issue Petitioner has not sought review—any opinion, regardless of the way the Court decides the question presented here or in the *Facebook* case, would not change the outcome of this case. In short, any such decision would be purely advisory, and any remand would be futile and waste judicial resources.

Indeed, the very question as Petitioner frames it in this case, and the question in *Facebook*, is premised on there being a materialized risk. The alleged circuit split presented by *Facebook* does not extend to a situation such as this one, where the disclosed risk factor had ***not*** materialized. When confronted with a complaint that fails to adequately plead a materialized risk, the very circuits that Petitioner says are on the correct side of the alleged circuit split find no actionable misleading statement. Pet. 16 (citing *Karth v. Keryx Biopharmaceuticals, Inc.*, 6 F.4th 123, 138 (1st Cir. 2021) (a risk warning was not actionable where plaintiff had not adequately pleaded that the risk had occurred); *Williams v. Globus Med., Inc.*, 869 F.3d 235, 242 (3d Cir. 2017) (same)); *see also Rombach v. Chang*, 355 F.3d 164, 173 (2d Cir. 2004) (same).

Were the Court to grant the Petition or to hold it in abeyance pending a resolution in *Facebook*, the decision below that no risk materialized would be the same. The courts and the parties would improperly expend further time and resources on a "purely artificial and hypothetical issue" which would lead

only to "rendering an advisory opinion". *Conway v. Adult Authority*, 396 U.S. 107, 110 (1969).

CONCLUSION

This Court should deny the Petition.

September 30, 2024

Respectfully submitted,

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