No. 18-

IN THE

Supreme Court of the United States

RETIREMENT PLANS COMMITTEE OF IBM, *et al.*,

Petitioners,

v.

LARRY W. JANDER, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Fifth Third Bancorp v. Dudenhoeffer*, this Court unanimously held that to state a claim under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, for breach of the fiduciary duty of prudence based on inside information, a plaintiff must "plausibly allege[] that a prudent fiduciary in the defendant's position could not have concluded that [an alternative action] would do more harm than good to the fund." 573 U.S. 409, 429–30 (2014); *accord Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016). The Court designed this "context specific" standard to deter the kind of meritless suits lower courts had eliminated through a presumption of prudence (which the Court rejected) and to "readily divide the plausible sheep from the meritless goats" at the pleading stage. 573 U.S. at 425.

In the decision below, the Court of Appeals subverted that pleading standard and opened a circuit split by relying on boilerplate allegations that the harm of an eventual disclosure of an alleged fraud typically increases the longer the fraud continues. Those allegations "always" can be, and routinely are, pleaded in support of a *Fifth Third* claim. Other courts of appeals have rejected the same allegations as insufficient as a matter of law, in order to avoid undermining the pleading standard imposed by *Fifth Third* and *Amgen* and to deter meritless ERISA suits. The question presented is:

Whether *Fifth Third*'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.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following are all of the parties before the United States Court of Appeals for the Second Circuit:

Petitioners (Defendants-Appellees below) are Retirement Plans Committee of IBM, Richard Carroll, Martin Schroeter, and Robert Weber.

Respondents (Plaintiffs-Appellants below) are Larry W. Jander and Richard J. Waksman.

Before the district court, Respondents initially named International Business Machines Corporation ("IBM" or the "Company") as a defendant, but dropped IBM from their second amended complaint. Therefore, IBM is listed solely as "defendant" in the Court of Appeals' case caption and did not participate in the proceedings before that court.

CORPORATE DISCLOSURE STATEMENT

No Petitioner is a corporation. IBM, which was dropped as a defendant before the district court, has no parent corporation or publicly held corporation owning 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

In *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), this Court recognized the potential for meritless ERISA litigation to be initiated against plan fiduciaries overseeing an employee stock ownership plan ("ESOP") whenever there was a drop in the company's stock price. While lower courts had protected against this possibility by adopting a "presumption of prudence," this Court rejected that atextual presumption in favor of a demanding and "context specific" pleading standard. In particular, under *Fifth Third*, a plaintiff must "plausibly allege[] that a prudent fiduciary in the defendants' position could not have concluded that [an alternative action] would do more harm than good to the fund." 573 U.S. at 429–30; *accord Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016). The Second Circuit's decision below vitiates that demanding standard and allows an ERISA plaintiff to survive a motion to dismiss simply by alleging that the costs of eventual corrective disclosures increase over time such that disclosure sooner rather than later is prudent. That decision renders this Court's "more harm than good" standard toothless to "weed out" meritless duty of prudence claims on the pleadings and opens the floodgates for "meritless, economically burdensome lawsuits." 573 U.S. at 424–25.

The decision below opens up a circuit split with other courts of appeals that have correctly rejected, as a matter of law, generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time. *See Martone v. Robb*, 902 F.3d 519 (5th Cir. 2018); *Graham v. Fearon*, 721 F. App'x 429 (6th Cir. 2018). The split is particularly stark as both *Martone* and *Graham* involved similar allegations by the same lawyers, a point the Fifth Circuit expressly noted in concluding that deeming such allegations sufficient would allow plaintiffs to routinely satisfy a pleading standard meant to be demanding. *See* 902 F.3d at 526 & n.25. There is simply no denying that allegations deemed sufficient here would not suffice in the Fifth and Sixth Circuits.

The decision below conflicts with the thrust of this Court's decision in *Fifth Third* and is plainly mistaken. This Court recognized the threat of meritless ERISA suits against ESOP fiduciaries and developed a pleading standard designed for the "important task" of separating "the plausible sheep from the meritless goats." 573 U.S. at 425. The Second Circuit has now announced a test that allows plaintiffs to convert every goat into a sheep through the simple expedient of alleging that the costs of undisclosed fraud only grow over time.

The stakes are high as the decision below reopens the door to lawyer-driven class actions that spring up after every stock drop. In the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, Congress curbed some of the worst abuses of the federal securities laws by private plaintiffs. But the PSLRA's reforms caused lawyers to shift their sights to ERISA claims against ESOP fiduciaries. Courts have consistently recognized the need for some mechanism to deter this migration of meritless suits. The lower courts seized on a presumption, while this Court adopted a demanding pleading standard, but now the Second Circuit, the center of the financial markets, has rendered that pleading standard toothless. This case well illustrates the inevitable result as this ERISA suit was authorized to proceed even as parallel securities litigation was dismissed. The need for this Court's review is clear.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 910 F.3d 620 (2d Cir. 2018). App. 1a–24a. The decision of the United States District Court for the Southern District of New York is reported at 272 F. Supp. 3d 444 (S.D.N.Y. 2017). App. 25a–44a.

JURISDICTION

The Court of Appeals entered judgment on December 10, 2018, and denied a timely petition for rehearing en banc on January 18, 2019. App. 45a–46a. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, are set forth in Appendix D. App. 47a–48a.

STATEMENT OF THE CASE

I. Background

A. The Employee Retirement Income Security Act and Employee Stock Ownership Plans

ERISA governs the use and administration of employee retirement and welfare benefit plans. One form of retirement plan that an employer can make available to its employees under ERISA is an ESOP, which is a defined-contribution plan that invests primarily in the sponsoring employer's stock.[1] ESOPs are the most common form of employee stock ownership in the United States,[2] and ESOPs hold approximately $1.3 trillion in retirement savings on behalf of 14.4 million Americans.[3]

Through ERISA, Congress sought to encourage the use of ESOPs as a "bold and innovative method of strengthening the free private enterprise system." *Fifth Third*, 573 U.S. at 416 (quoting Tax Reform Act of 1976, Pub. L. No. 94-455, § 803(h), 90 Stat. 1583, 1590). "Congress intended ESOPs to help 'secur[e] capital funds for necessary capital growth and . . . brin[g] about stock ownership by all corporate employees.'" *Id.* at 422 (same).

ERISA imposes a prudent person standard of care on the fiduciaries of ERISA plans, including ESOPs. *See* 29 U.S.C. § 1104(a)(1). This standard generally requires ERISA fiduciaries to diversify plan investments to reduce

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1. *See generally* Rob Brown et al., *Overview of Employee Stock Ownership Plans*, 31 J. Comp. & Benefits, Nov./Dec. 2015, at 18.

2. *How an Employee Stock Ownership Plan Works*, Nat'l Ctr. for Emp. Ownership, www.nceo.org/articles/esop-employee-stock-ownership-plan (last visited Mar. 4, 2019).

3. *ESOPs by the Numbers*, Nat'l Ctr. for Emp. Ownership, www.nceo.org/articles/esops-by-the-numbers (last visited Mar. 4, 2019). Notably, "companies on average contribute 50% to 100% more to ESOPs than non-ESOP companies do to 401(k) plans." *Are ESOPs Good Retirement Plans?*, Nat'l Ctr. for Emp. Ownership, www.nceo.org/articles/esops-too-risky-be-good-retirement-plans (last visited Mar. 4, 2019).

the risk of large losses. *See id.* § 1104(a)(1)(C). To promote the use of ESOPs, however, Congress explicitly exempted ESOP fiduciaries from this diversification requirement. *See id.* § 1104(a)(2).

B. IBM's ESOP

IBM has offered an ESOP to its employees since 1983, including as an option for investing through the Company's 401(k) Plus Plan (the "Plan"). The Plan is a defined contribution benefit plan sponsored by IBM, through which eligible employees may invest a portion of their compensation. The Plan offers participants multiple investment options, including mutual funds, index funds, and the IBM Stock Fund (the "Fund"), which, as the Company's ERISA-qualified ESOP, invested predominantly in IBM common stock.

The Plan's documents name Petitioner Retirement Plans Committee of IBM as a fiduciary. Petitioners Martin Schroeter, the Company's CFO, and Robert Weber, its General Counsel, were members of the Committee. Petitioner Richard Carroll, the Company's Chief Accounting Officer, was appointed by the Committee to serve as one of the Plan's administrators and was a fiduciary in this context.

II. Proceedings Below

A. The District Court

In 2015, two separate but related actions were filed against IBM and some of its officers, one under the securities laws and the other under ERISA. Both actions asserted, based on substantively similar allegations of fraud, that the market price of IBM's common stock was artificially inflated during 2014.

First, certain plaintiffs filed a federal securities fraud action, alleging that the defendants fraudulently concealed impairment of the Company's microelectronics unit, thereby artificially inflating IBM's reported value. *See Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers Local #6 Pension Fund v. IBM Corp.*, No. 1:15-cv-2492 (S.D.N.Y.) (hereinafter "*Insulators*"). The securities plaintiffs argued that the "fraud" was revealed when IBM transferred the microelectronics unit and $1.5 billion to an acquirer in exchange for the acquirer's promise to continue supplying IBM the proprietary chips at the heart of IBM's core product lines for ten years. IBM recorded a $4.7 billion pre-tax charge as a result of the transaction, including a write-down of the microelectronics unit and the $1.5 billion payment.

Second, Respondents filed this ERISA action asserting that the same "fraud" alleged by the securities plaintiffs made IBM stock an imprudent investment for the Company's ESOP. Respondents argued that the ESOP's fiduciaries breached their duty of prudence under Section 404 of ERISA by continuing to invest the ESOP's funds in IBM stock despite allegedly knowing that its market price was artificially inflated by undisclosed impairment of the microelectronics unit. Seeking to plead a claim under *Fifth Third*, Respondents alleged that when Petitioners learned that the Company's stock price was artificially inflated, they should have either made corrective disclosures about the microelectronic unit's true value or frozen further investments in IBM stock.

The district court dismissed both lawsuits on the same day. The district court dismissed the securities fraud action for failure to meet the heightened pleading standard for such actions introduced by the PSLRA. *See Insulators*, 205 F. Supp. 3d 527 (S.D.N.Y. 2016). The court also granted Petitioners' motion to dismiss this ERISA action for failure to state a claim. *See Jander v. IBM*, 205 F. Supp. 3d 538 (S.D.N.Y. 2016).[4] The court reasoned that Respondents failed to plead, as required by *Fifth Third* and *Amgen,* facts showing that Petitioners "could not have concluded" that publicly disclosing the alleged "fraud" or halting further investments in IBM stock would be more likely to harm the Fund than to help it. *Id.* at 545–46 (citing *Fifth Third*, 573 U.S. at 428; *Amgen*, 136 S. Ct. at 760).

In an amended complaint, Respondents added generic allegations that disclosure of the alleged fraud was "inevitable" and that the magnitude of the stock price correction resulting from a delayed disclosure would increase over time. Respondents also added a third theory for how the ESOP fiduciaries could have avoided doing more harm than good by alleging that Petitioners could have purchased a "low-cost" hedging product.

In dismissing Respondents' amended complaint, the district court again held that Respondents' allegations failed to satisfy *Fifth Third* and *Amgen*. App. 32a, 42a–43a. Most relevantly, the district court held that a "prudent fiduciary could very easily conclude" that Respondents' proffered alternative action of an early

4. The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1).

corrective disclosure "would do more harm than good." App. 37a (quoting *Graham v. Fearon*, 2017 WL 1113358, at *5 (N.D. Ohio Mar. 24, 2017)).

B. The Court of Appeals

On appeal, Respondents abandoned two of their three proffered "alternative actions," and advanced only an "early corrective disclosure of the microelectronics division's impairment, conducted alongside the regular SEC reporting process." App. 15a.

The Second Circuit reversed the dismissal of Respondents' duty of prudence claim. App. 24a. The court concluded that Respondents had "sufficiently pleaded that no prudent fiduciary in the Plan defendants' position could have concluded that earlier disclosure would do more harm than good." App. 21a. The court relied on generic allegations that delayed "disclosure of a prolonged fraud causes 'reputational damage' that 'increases the longer the fraud goes on'" and that disclosure of the truth was inevitable. App. 15a–21a.

The Second Circuit noted that Respondents "cit[ed] economic analyses that show that reputational harm is a common result of fraud and grows the longer the fraud is concealed." App. 17a. Although the district court believed that citation to these analyses "'only underscores the general, theoretical, and untested nature of [the] allegations,'" the Second Circuit concluded that "the possibility of similar allegations in other ERISA cases does not undermine their plausibility here (or, for that matter, elsewhere)." *Id.* (quoting App. 34a).

The Second Circuit deemed the allegation that disclosure was inevitable to be "particularly important." App. 19a. The court reasoned that "when a 'drop in the value of the stock already held by the fund' is inevitable, 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."[5] *Id.* (quoting *Fifth Third*, 573 U.S. at 430).

Petitioners timely petitioned for rehearing en banc. That petition was denied on January 18, 2019. App. 45a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because the decision below creates a square conflict with the decisions of other courts of appeals, undermines this Court's decision in *Fifth Third*, and opens the floodgates for meritless ERISA suits that would be promptly dismissed under the securities laws. The decision below conflicts with decisions of the Fifth and Sixth Circuits holding that the

5. The Second Circuit argued that *Fifth Third* presents "interpretive difficulties" because 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'" and "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." App. 11a (quoting *Fifth Third*, 573 U.S. at 428, 430). The court also argued that *Amgen* "neglects to offer any guidance about what facts a plaintiff must plead to state a plausible claim for relief," App. 13a (quotation omitted), and, like *Fifth Third*, "could be interpreted in multiple ways." App. 13a–14a.

rigorous pleading standard set forth in *Fifth Third* and *Amgen* is not satisfied by generalized allegations that the costs of undisclosed fraud grow over time and thus it was prudent to disclose sooner rather than later. The conflict is particularly stark, as the ERISA claims here were brought by the same attorney as in the Fifth and Sixth Circuit cases alleging the same theories for pleading around *Fifth Third*, as the Fifth Circuit expressly noted. *See* 902 F.3d at 526 & n.25. Thus, the same corrective disclosures/sooner-rather-than-later theory that the Fifth and Sixth Circuits dismissed on the pleadings will go forward in the Second Circuit absent this Court's review.

The decision below also conflicts with the entire thrust of this Court's decision in *Fifth Third.* This Court recognized the threat posed by meritless ERISA litigation against ESOP fiduciaries in the wake of a stock price drop. While lower courts initially responded to that threat by crafting a presumption of prudence, this Court rejected that atextual presumption in favor of a heightened pleading standard designed to protect ESOP fiduciaries from "the threat of costly duty-of-prudence lawsuits [that] will deter companies from offering ESOPs to their employees." 573 U.S. at 423. The decision below eviscerates that decision by providing a road map for surviving a motion to dismiss. By alleging that the costs of undisclosed fraud grow over time and that revelation of the fraud is inevitable, ERISA plaintiffs will routinely satisfy a pleading standard designed to be rigorous, context-specific and protective of fiduciaries of companies who have responded to Congress's policy preferences by establishing ESOP plans.

Finally, the issues here are important and the stakes are high. Between the concentration of the nation's securities markets in New York and ERISA's liberal venue provision, the decision below will make the Second Circuit the forum of choice for *Fifth Third* claims that would be dismissed in other circuits. The predictable result will be routine ERISA claims in circumstances where a securities claim would be readily dismissed, as this case concretely illustrates. This Court's decisions in *Fifth Third* and *Amgen* were designed to avoid just such a result. This Court's intervention is needed to resolve a circuit split and restore the ability of the *Fifth Third* pleading standard to separate cases involving actual imprudence from reflexive, lawyer-driven suits that could follow every stock drop.

I. The Courts of Appeals Are Split as to Whether *Fifth Third*'s Pleading Standard Can Be Satisfied Using Generalized Allegations

The Second Circuit's decision below conflicts with decisions of the Fifth Circuit and the Sixth Circuit that declined, as a matter of law, to rely on generalized allegations regarding the harm of deferring an eventual corrective disclosure to satisfy the *Fifth Third* pleading standard. *See Martone v. Robb*, 902 F.3d 519 (5th Cir. 2018); *Graham v. Fearon*, 721 F. App'x 429 (6th Cir. 2018).

In *Martone*, the Fifth Circuit rejected allegations, derived from "general economic principles," that "in virtually every fraud case, the longer the fraud persists, the harsher the correction tends to be." 902 F.3d at 526 (quotation omitted). The plaintiff in *Martone* was a former employee of Whole Foods, who alleged that the company and the fiduciaries of its ESOP breached their duty of prudence under ERISA by not earlier disclosing alleged fraudulent overpricing at Whole Foods stores. *Id.* at 521–22. Relying on his generalized allegations about harm increasing over time, the plaintiff attempted to satisfy *Fifth Third*'s "more harm than good" standard by arguing earlier disclosure of the alleged fraud would have "reduce[d] the damage." *Id.* at 526.

The Fifth Circuit rejected that argument, agreeing with the district court's reasoning that "this type of generalized allegation is not the sort of specific factual allegation that can distinguish this case, but an alleged economic reality." *Id.* (quotation omitted). "Put another way, if this principle applies 'in virtually every fraud case,' as Martone alleges, then it would have been true in *Whitley* [*v. BP, P.L.C.*, 838 F.3d 523 (5th Cir. 2016)], where the Fifth Circuit nevertheless found that a prudent fiduciary could easily conclude that taking an action that might expose fraudulent conduct might do more harm than good."[6] 902 F.3d at 526 (quotation omitted).

6. In *Whitley*, the plaintiffs alleged that BP's ESOP fiduciaries breached their duty of prudence by failing to disclose that the company's stock was overvalued before the Deepwater Horizon blowout due to "numerous undisclosed safety breaches." 838 F.3d at 529. The district court recognized that the plaintiffs' proffered early disclosure alternative "would be available in almost any case" and expressed concern that accepting the plaintiffs' allegations "would turn the filter of [*Fifth Third*] into a tap, forcing [ESOP] fiduciaries to wait until summary judgment for relief from meritless lawsuits." *In re BP p.l.c. Sec. Litig.*, 2015 WL 1781727, at *17 (S.D. Tex. Mar. 4, 2015). But the district court nonetheless declined to dismiss the *Fifth Third* claim. *Id.* The Fifth Circuit reversed, rejecting the plaintiffs' reliance on generic, "conclusory statements" as insufficient to meet *Fifth Third*'s standard, and holding that early disclosure was not a plausible alternative action. 838 F.3d at 529.

The conflict with the Fifth Circuit is particularly stark because the claims in *Martone* and here were brought by the same attorney. Not surprisingly, both cases advanced three different actions the ESOP fiduciaries could take that would satisfy *Fifth Third*'s "more harm than good" standard: (1) early corrective disclosures; (2) halting investments in the company stock; or (3) a "low-cost" hedging strategy. *Compare* Second Am. Compl. ("SAC") ¶¶ 3, 7 , *Jander v. Ret. Plans Comm. of IBM*, No. 1:15-cv-3781 (S.D.N.Y. Oct. 21, 2016), ECF No. 38, *with Martone*, 902 F.3d at 525–26, 527–28. Moreover, in both cases, the plaintiffs alleged that failing to follow the early disclosure strategy was imprudent because the harms from undisclosed fraud only grow over time, such that disclosure sooner rather than later would be the only prudent course. *Compare*, *e.g.*, SAC ¶¶ 26, 109, 114, *with Martone*, 902 F.3d at 526. Indeed, the Fifth Circuit expressly noted that "Martone's counsel has made essentially the same argument for early disclosure in ERISA actions against other companies in other jurisdictions." 902 F.3d at 526. The court then cited the *Jander* litigation as a specific example, *id.* at 526 n.25, and concluded that the ease with which this generic allegation could be made in multiple cases underscored that it was insufficient to satisfy prior circuit precedent applying *Fifth Third*. *See id.* at 527.

The resulting square conflict between the decision below and the Fifth Circuit has not been lost on the lower courts. As one district court recently observed, the Second Circuit's decision below "directly contradicts" the Fifth Circuit's decision in *Martone*. *Fentress v. Exxon Mobil Corp.*, 2019 WL 426147, at *5 (S.D. Tex. Feb. 4, 2019).[7]

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7. The parallels between the pleadings here and in *Martone* are truly striking, right down to the addition of a third "low-cost"

The Second Circuit's decision also conflicts with the Sixth Circuit's decision in *Graham*. The *Graham* plaintiffs claimed that the fiduciaries of the Eaton Corporation's ESOP had breached their duty of prudence under ERISA by investing in the company's stock after an alleged fraud had artificially inflated the stock's price, making it an imprudent investment. *See* 721 F. App'x at 435. The plaintiffs alleged that "the longer a securities fraud goes on, the more harm it causes to shareholders." *Id.* at 436. Thus, the plaintiffs argued, an earlier disclosure of the fraud would have satisfied *Fifth Third*'s "more harm than good" standard. *Id.* at 433, 436.

The Sixth Circuit rejected that argument, observing that this Court had implicitly rejected the same argument in *Fifth Third* after the United States had advanced it as an amicus curiae. *See id.* at 436. Further, the Sixth Circuit dismissed, as a matter of law, the allegation that Eaton Corporation's stock suffered a "reputational penalty" because the fraud was "prolong[ed]." *Id.* The court reasoned that "recognizing ERISA imposes the duty to act in a prudent manner 'under the circumstances then prevailing,' courts have noted the 'duty . . . requires prudence, not prescience.'" *Id.* at 437 (quoting *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 63–64 (2d Cir. 2016) (quoting 29 U.S.C. § 1104(a)(1))). The Sixth Circuit concluded that earlier disclosure "was not so clearly beneficial that a prudent fiduciary could not conclude that it would be more likely to harm the fund than to help it." *Id.*

hedging alternative added in an amended complaint after the initial complaint was dismissed under *Fifth Third*. *See* 902 F.3d at 527–28.

Once again, the conflict between the Sixth Circuit in *Graham* with the decision below is particularly stark, as the complaints were filed by the same counsel. The Fifth Circuit in *Martone* pointed to essentially identical allegations in a number of cases, including specifically *Jander* and *Graham*. *See* 902 F.3d at 526 n.25. Thus, it is no exaggeration to say that allegations that were insufficient in both the Fifth and Sixth Circuits have carried the day in the Second Circuit.

The split is undeniable. Whereas the Fifth Circuit and the Sixth Circuit rejected as insufficient as a matter of law generalized allegations that the costs of undisclosed fraud only grow over time, the Second Circuit relied on substantively identical allegations by the same lawyers to conclude that Respondents satisfied *Fifth Third*'s "more harm than good" standard. Specifically, as to the forward-looking allegation that harm from nondisclosure of a fraud increases over time, the Sixth Circuit dismissed it because ERISA imposes a duty of prudence "under the circumstances then prevailing." *Graham*, 721 F. App'x at 437 (quoting *Rinehart*, 817 F.3d at 63–64 (quoting 29 U.S.C. § 1104(a)(1))). In contrast, the Second Circuit embraced that allegation, and rejected the district court's reasoning that the allegation "'rests on hindsight,' which 'says nothing about what a prudent fiduciary would have concluded under the circumstances then prevailing.'" App. 16a (quoting App. 34a). The Second Circuit determined that a "reasonable business executive" plausibly could foresee that an inevitable disclosure of fraud would harm the Company's reputation. App. 17a.

The Second Circuit added that the foreseeability of harm was reinforced by Respondents' citation to economic analysis showing that "reputational harm is a common result of fraud" that increases "the longer the fraud is concealed."[8] *Id.* Based on that reasoning, the Second Circuit reached a conclusion diametrically opposite to the Fifth Circuit's determination that the allegation of increasing harm is "an alleged economic reality" and "not the sort of specific factual allegation that can distinguish this case." *Martone*, 902 F.3d at 526 (quotation omitted).

The Second Circuit viewed the allegation that disclosure was inevitable as "particularly important." App. 19a. The court reasoned that "when a 'drop in the value of the stock already held by the fund' is inevitable, 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." *Id.* (quoting *Fifth Third*, 573 U.S. at 430). But Respondents expressly concede in their complaint that the allegation that disclosure was inevitable is "always" available. *See* SAC ¶ 112 ("[N]o corporate fraud lasts forever; there is always a day of reckoning."); *see also id.* ¶ 8 ("[D]efendants knew, or should have known, that no fraud lasts forever. The federal securities laws, if nothing else, would eventually have forced IBM to come clean with the

8. Respondents advance more specific allegations that directly contradict their boilerplate allegations that the stock price impact of disclosing an alleged fraud increases over time. *See, e.g.*, SAC ¶ 4 ("[Petitioners] would have known that correcting the Company's fraud would reduce IBM's stock price only by the amount by which it was artificially inflated *to begin with*.") (emphasis added); *id.* ¶ 24 ("When the fraud was revealed, IBM's stock fell by more than 7%, or $12.95 per share. The Plan participants who purchased IBM stock were damaged by overpaying *this amount* . . . .") (emphasis added).

public.").[9] In fact, the plaintiffs in *Martone* and *Graham*—represented by the same counsel as Respondents—made substantively identical allegations.[10]

By placing virtually dispositive weight on allegations that can be pleaded in support of any *Fifth Third* claim, the Court of Appeals has upended the carefully calibrated balance that this Court struck in *Fifth Third*. In doing so, the Second Circuit's reliance on Respondents' ever-ready allegations conflicts with decisions in which the Fifth and Sixth Circuits have properly rejected substantively identical allegations as a matter of law.

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9. The Second Circuit also determined that to avoid "spook[ing] the market" with an "unusual" disclosure, Petitioners could have included a corrective disclosure in IBM's regular SEC filings. App. 16a. That reasoning conflicts with *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000), which holds that only conduct *in a fiduciary capacity* can result in a fiduciary breach under ERISA. An ERISA fiduciary "may wear different hats," but ERISA requires that "the fiduciary with two hats wear only one at a time." *Id.* at 225. Thus, the "threshold question" in an ERISA fiduciary breach case is whether the defendant "was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Id.* at 226. Other courts of appeals have correctly held that disclosures in SEC filings are made in a corporate capacity, rather than as a fiduciary, and thus cannot provide the basis for an ERISA claim. *See Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1284 (11th Cir. 2012); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 257 (5th Cir. 2008).

10. *See* Am. Compl. ¶¶ 8, 89, *Martone v. Robb*, No. 1:15-cv-877 (W.D. Tex. Oct. 14, 2016), ECF No. 41; Compl. ¶¶ 8, 86, *Graham v. Fearon*, No. 1:16-cv-2366 (N.D. Ohio Sept. 23, 2016), ECF No. 1.

II. The Decision Below Cannot Be Reconciled with This Court's Decision in *Fifth Third*

The Second Circuit's decision fundamentally contradicts this Court's decision in *Fifth Third* and vitiates the pleading standard this Court developed to protect against meritless ERISA suits against ESOP fiduciaries. This Court recognized that the threat of "meritless, economically burdensome lawsuits" against companies that have established ESOPs in response to Congress's incentives, and then suffered a stock drop, is real. 573 U.S. at 424. At the same time that the Court rejected the presumption of prudence that lower courts had crafted to protect against such meritless suits, this Court fashioned a pleading standard specifically designed to ameliorate that threat and "weed out meritless lawsuits." *Id.* at 425. By accepting as sufficient readily made generic allegations that undisclosed fraud gets more costly over time and should prudently be disclosed sooner rather than later, the decision below eviscerates the whole point of that pleading standard.

The Second Circuit expressly dismissed the concern that Jander's allegations could be readily replicated in other cases. While the Fifth Circuit recognized that the ease with which such allegations could be made in every stock-drop case rendered them insufficient under *Fifth Third*, the Second Circuit was unmoved. Although the Second Circuit acknowledged that the allegation is grounded in "generalized economic analyses," App. 18a, it nonetheless concluded that "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." App. 17a.[11]

The Second Circuit's breezy conclusion that as long as generally applicable allegations are minimally plausible they suffice cannot be reconciled with *Fifth Third*. If allegations can be repeated in every case, then they cannot "divide the plausible sheep from the meritless goats." *Fifth Third*, 573 U.S. at 425. Rather, under the Second Circuit's approach, every goat becomes a sheep as long as the plaintiff alleges that undisclosed frauds only get worse over time and disclosure is inevitable. And those allegations can be plausibly made in every case involving a publicly traded stock, even in cases like this where

11. Recently dismissed ERISA fiduciary breach actions illustrate the prevalence of those boilerplate allegations, both in cases filed by Respondents' counsel and cases which were not. *See*, *e.g.*, *Wilson v. Edison Int'l, Inc.*, 315 F. Supp. 3d 1177, 1190, 1193 (C.D. Cal. 2018) ("[G]eneric" allegations that "the longer [a] fraud went on, the more damage would be done to the Company's reputation when the truth emerged," and that harm from an undisclosed fraud was "inevitable," "could apply to any similar ERISA claim."); *Fentress v. Exxon Mobil Corp.*, 304 F. Supp. 3d 569, 583 (S.D. Tex. 2018) ("[The] [t]heory that the earlier [a] disclosure was made the less harm the stock price would experience. . . . [is] a general principle, not one that is unique to this case."); *Price v. Strianese*, 2017 WL 4466614, at *7–8 (S.D.N.Y. Oct. 4, 2017) (rejecting allegation that early corrective disclosure would be less harmful than later disclosure as "not particular to the facts of any case," as well as related allegation that "public disclosure was inevitable" (internal quotation marks and citation omitted)); *In re Target Corp. Sec. Litig.*, 275 F. Supp. 3d 1063, 1087 (D. Minn. 2017) ("Plaintiffs 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.").

no case of securities fraud could be plausibly pleaded. Indeed, shortly after the Second Circuit's decision, a plaintiff not represented by Respondents' counsel filed a *Fifth Third* complaint with the same boilerplate allegations and citations to the same general economic analyses. *See* Compl. at 16–17, *Varga v. GE Co.*, No. 1:18-cv-1449 (N.D.N.Y. Dec. 14, 2018), ECF No. 1 (alleging that "[d]isclosure was inevitable" and "the stock market price drop is more severe for companies that prolong a financial scandal"). Thus, a pleading standard this Court developed specifically to "weed out" meritless claims has been rendered toothless in the Second Circuit.

III. The Decision Below Will Have Far-Reaching and Deleterious Policy Implications

The decision below upends the careful balance that Congress struck in ERISA "between ensuring fair and prompt enforcement of rights under [an ESOP] and the encouragement of the creation of such plans," and subverts the ability of the *Fifth Third* pleading standard to "weed out" meritless, economically burdensome lawsuits. 573 U.S. at 424–25. What is more, if left uncorrected, the decision below not only will disrupt ERISA, but also will disrupt the federal securities laws by allowing "frivolous, lawyer-driven" securities fraud claims disguised as ERISA fiduciary breach claims to circumvent the heightened pleading standards, and other requirements, imposed by the PSLRA. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

A. The Decision Below Opens the Floodgates to Meritless *Fifth Third* Claims in the Second Circuit

In rejecting a "presumption of prudence" for ESOP fiduciaries in *Fifth Third,* this Court nonetheless recognized the need to protect ESOP fiduciaries from "meritless, economically burdensome lawsuits" that could frustrate Congress's intent of "encourag[ing] the creation of ESOPs."[12] 573 U.S. at 424–25. The Court concluded that the "important task" of "weeding out meritless claims" could be "better accomplished through careful, *context-sensitive* scrutiny of a complaint's allegations." *Id.* at 425 (emphasis added). By allowing *Fifth Third* claims to proceed in reliance on boilerplate allegations that can be advanced in any case (and were advanced in *Martone* and *Graham*), the decision below short-circuits the "context-sensitive scrutiny" mandated by this Court.

Further, because a plaintiff can now successfully plead in the Second Circuit a *Fifth Third* claim that would be dismissed on the pleadings in the Fifth Circuit and the Sixth Circuit, the decision below incentivizes plaintiffs

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12. Congress repeatedly has "made clear its interest in encouraging [ESOPs] as a bold and innovative method of strengthening the free private enterprise system which will solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees." Tax Reform Act of 1976, § 803(h), 90 Stat. 1590; *see also Steinman v. Hicks*, 352 F.3d 1101, 1103 (7th Cir. 2003) ("Congress, believing employees' ownership of their employer's stock a worthy goal, has encouraged the creation of ESOPs both by giving tax breaks and by waiving the duty . . . to diversify the assets of a pension plan.").

with meritless *Fifth Third* claims to file them in the Second Circuit.[13] As explained by Justice White:

> [B]ecause the coverage of particular ERISA plans frequently extends to beneficiaries in more than one State—and, no doubt, in more than one judicial circuit—differences in the rules governing access to federal court for the purpose of pressing a claim under ERISA may have the troubling effect of encouraging forum shopping by plaintiffs.

Mason v. Cont'l Grp., Inc., 474 U.S. 1087, 1087 (1986) (White, J., dissenting). The Circuit split over the Court's standards for "weeding out" meritless *Fifth Third* claims at the pleading stage will have that "troubling effect," especially given the centrality of New York to publicly traded securities.

In addition, the decision below is likely to have undesirable effects on companies whose ESOP fiduciaries are, under ERISA's broad venue provision, subject to suit within the Second Circuit. The decision could encourage these companies to hire outsiders, rather than corporate insiders, as ESOP fiduciaries to reduce the risk of

13. Forum-shopping ESOP plaintiffs could exploit ERISA's "liberal venue provision." *Trs. of the Plumbers & Pipefitters Nat'l Pension Fund v. Plumbing Servs., Inc.*, 791 F.3d 436, 444 (4th Cir. 2015) (quotation omitted); *see* 29 U.S.C. § 1132(e)(2) (venue is proper "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found"). Given that New York is home to the nation's securities markets, it will take little imagination to allege breaches concerning publicly traded securities occurred within the Second Circuit.

their coming into possession of nonpublic information. Requiring ESOPs to employ outside fiduciaries to reduce their risk of liability could be unduly expensive for smaller companies, causing them to discontinue offering ESOPs entirely.

B. The Decision Below Permits "Stock Drop" Plaintiffs to Evade the Private Securities Litigation Reform Act

As this Court has recognized, "[p]rivate securities fraud actions, . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs,* 551 U.S. at 313.

To rein in abusive securities litigation by private plaintiffs, Congress enacted the PSLRA. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 475 (2013) (observing that the PSLRA was enacted in response to abuse of private securities fraud class actions, "including the 'extract[ion]' of 'extortionate "settlements"' of frivolous claims") (quoting H.R. Conf. Rep. No. 104-369, at 31–32 (1995)). Under the PLSRA, private plaintiffs must satisfy "[e]xacting pleading requirements" by "stat[ing] with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, *i.e.*, the defendant's intention to deceive, manipulate, or defraud." *Tellabs*, 551 U.S. at 313 (quotation omitted). When private plaintiffs evaded the PSLRA by bringing securities fraud class actions under state law in state court, Congress passed the Securities Litigation Uniform Standards Act of 1998 to "curtail[]" that abuse. *Amgen*, 568 U.S. at 476.

Because *Fifth Third* claims can be, and are, brought based on the same allegations that prompt federal securities fraud claims, they present the same potential for abuse. Indeed, absent a meaningful pleading standard to "weed out" meritless claims, these claims would allow stock-drop plaintiffs to end-run the PSLRA's heightened pleading standard. They also would allow plaintiffs to circumvent other provisions of the PSLRA, such as the mandatory stay of discovery during the pendency of a motion to dismiss. *See* 15 U.S.C. § 78u-4(b)(3)(B).

This case amply demonstrates this danger. Separate plaintiffs brought a companion case—*Insulators*—asserting federal securities claims resting on the same allegations of fraud and same stock drop that underlie Respondents' ERISA duty of prudence claim in this case. The district court dismissed the securities fraud action for failure to meet the PSLRA's pleading standard, *see Insulators*, 205 F. Supp. 3d at 535–38, and dismissed the ERISA action for failure to satisfy the *Fifth Third* pleading standard, *see* App. 25a–44a.

The hurdles erected by the PSLRA are sufficiently daunting and well established that the federal securities fraud plaintiffs did not even bother to appeal. *See id.* at 4a. But Respondents appealed the dismissal of their ERISA duty of prudence claim. The Second Circuit rejected Petitioners' argument that "allowing Jander's ERISA claim to go forward on essentially the same facts" as *Insulators* "would lead to an end run" around the PSLRA's heightened pleading standards. App. 22a. The court acknowledged that "this concern is not without merit." *Id.* But it reasoned that ERISA and the federal securities laws have "differing objectives," and ultimately concluded that it was the role of Congress, and not the court, to address the concern. App. 23a–24a.[14]

The Second Circuit's conclusion ignores that this Court already recognized the dangers of unmeritorious stock-drop suits migrating from the securities bar to ERISA. Indeed, *Fifth Third* expressly directs courts to consider the "requirements imposed by the federal securities laws [and] the objectives of those laws" when imposing obligations under ERISA. 573 U.S. at 429. The Fifth and Sixth Circuits followed that direction and applied the *Fifth Third* pleading standard to dismiss complaints crafted by the same attorney, including the same sooner-rather-than-later theory. The Second Circuit, by contrast, eviscerated the critical function of the *Fifth Third* standard in providing a mechanism to screen out "meritless," lawyer-driven lawsuits. 573 U.S. at 425. That decision sets a dangerous precedent and fully merits this Court's review and reversal.

14. Because "the *Insulators* suit was dismissed and not appealed," the Second Circuit did rule that "Jander may not allege directly or indirectly that the Plan defendants committed securities fraud." App. 24a. The court made no attempt to reconcile that ruling with its reliance on Jander's allegation that "the eventual disclosure of a prolonged fraud causes reputational damage that increases the longer the fraud goes on." App. 16a (quotation omitted).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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March 4, 2019

APPENDIX

Appendix A — Opinion of the Court of Appeals (December 10, 2018)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 17-3518

LARRY W. JANDER, AND ALL OTHER INDIVIDUALS SIMILARLY SITUATED, RICHARD J. WAKSMAN,

Plaintiffs-Appellants,

-v.-

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

Defendants-Appellees,

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

September 7, 2018, Argued
December 10, 2018, Decided

Before: KATZMANN, *Chief Judge*, SACK and RAGGI, *Circuit Judges*.

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.[1]

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

1. *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 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.").

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 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.[2] Accordingly, *Amgen*'s

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2. 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 . . . .

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 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).

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*.

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.[3]

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 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

3. 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.

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, non-disclosure 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.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

15cv3781

LARRY W. JANDER, RICHARD J. WAKSMAN, AND ALL OTHER INDIVIDUALS SIMILARLY SITUATED,

Plaintiffs,

-against-

RETIREMENT PLANS COMMITTEE OF IBM, *et al.*,

Defendants.

September 29, 2017, Decided

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

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.

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, 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.

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

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 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

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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.

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 C — Order of the Court of Appeals Denying Panel Rehearing and Rehearing *En Banc* (January 18, 2019)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 17-3518

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of January, two thousand nineteen.

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.

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 D — Relevant Statutory Provisions

The Employee Retirement Income Security Act of 1974, Pub. L. No. 93–406, 88 Stat. 829, as amended and codified at 29 U.S.C. § 1001 *et seq*., provides in relevant part:

§ 1104. 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).

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