No. ____

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 Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
C. HARKER RHODES IV
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

LAWRENCE PORTNOY
MICHAEL S. FLYNN
DAVID B. TOSCANO
ZACHARY A. KAUFMAN
DAVIS POLK & WARDWELL LLP
450 Lexington Ave.
New York, NY 10017

Counsel for Petitioners

September 1, 2020

QUESTION PRESENTED

In *Retirement Plans Committee of IBM v. Jander*, 140 S.Ct. 592 (2020), this Court granted certiorari to resolve an entrenched circuit split as to whether the "more harm than good" standard of *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), for ERISA claims against fiduciaries of employee stock ownership plans can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time. On the merits, the parties extensively briefed that question presented but also provided other arguments regarding the viability of plaintiffs' complaint. Without addressing the question presented, this Court vacated the Second Circuit's decision and remanded for that court "to decide whether to entertain" those other arguments. On remand, following briefing, the Second Circuit declined and "reinstat[ed] … [its] initial opinion," thus reestablishing the same circuit split that led this Court previously to grant certiorari, a split that has only deepened in light of a recent Eighth Circuit decision expressly rejecting the Second Circuit's minority view.

The questions presented are:

1. Whether *Dudenhoeffer*'s "more harm than good" standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time and thus plan fiduciaries should have made earlier disclosures through regular securities-law filings.

2. Whether ERISA imposes a duty on a plan fiduciary who is also a corporate officer to use inside information for the benefit of plan participants.

PARTIES TO THE PROCEEDING

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.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii):

Ret. Plans Comm. of IBM v. Jander, No. 18-1165 (U.S. opinion issued Jan. 14, 2020; judgment issued Feb. 18, 2020).

Jander v. Ret. Plans Comm. of IBM, No. 17-3418 (2d Cir. opinion and judgment issued Dec. 10, 2018; order denying rehearing issued Jan. 18, 2019; opinion and judgment on remand issued June 22, 2020).

Jander v. Ret. Plans Comm. of IBM, No. 15-cv-3781 (S.D.N.Y. judgments issued Sept. 7, 2016 and Sept. 29, 2017; proceedings on remand pending).

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

STATEMENT OF RELATED PROCEEDINGS iv

TABLE OF AUTHORITIES viii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 3

JURISDICTION 4

STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 4

A. Legal Background 4

B. Respondents' Suit and the District Court's Decisions 7

C. The Second Circuit's Initial Decision 12

D. This Court's *Per Curiam* Decision 14

E. The Second Circuit's Decision on Remand 16

REASONS FOR GRANTING THE PETITION 17

I. The Court Should Grant Certiorari To Resolve The Question It Previously Agreed To Review But Did Not Resolve 19

A. The Courts of Appeals Remain Split as to Whether *Dudenhoeffer*'s Standard Can Be Satisfied Using Generalized Allegations Like Those Here 19

B. The Decision Below Remains Incorrect 25

C. The Question Presented Remains Exceptionally Important 32

II. The Court Should Grant Certiorari To Determine Whether ERISA Imposes A Duty On A Plan Fiduciary To Act On Inside Information Learned In A Corporate Capacity 35

CONCLUSION 38

APPENDIX

Appendix A

Order, United States Court of Appeals for the Second Circuit, *Jander v. Ret. Plans Comm. of IBM*, No. 17-3518 (June 22, 2020) App-1

Appendix B

Opinion, Supreme Court of the United States, *Ret. Plans Comm. of IBM v. Jander*, No. 18-1165 (Jan. 14, 2020)......................... App-4

Appendix C

Opinion, United States Court of Appeals for the Second Circuit, *Jander v. Ret. Plans Comm. of IBM*, No. 17-3518 (Dec. 10, 2018) App-13

Appendix D

Order, United States Court of Appeals for the Second Circuit, *Jander v. Ret. Plans Comm. of IBM*, No. 17-3518 (Jan. 18, 2019) App-37

Appendix E

Opinion & Order, United States District Court for the Southern District of New York, *Jander v. Ret. Plans Comm. of IBM*, No. 15-cv-3781 (Sept. 29, 2017) App-39

Appendix F

Opinion & Order, United States District Court for the Southern District of New York, *Jander v. Ret. Plans Comm. of IBM*, No. 15-cv-3781 (Sept. 7, 2016) App-58

Appendix G

Relevant Statutory Provisions App-75

29 U.S.C. §1104(a) App-75

29 U.S.C. §1107 (a), (b), (d) App-76

29 U.S.C. §1108(c)(3) App-80

29 U.S.C. §1109(a) App-80

29 U.S.C. §1132(a)(2)-(3) App-80

TABLE OF AUTHORITIES

Cases

Allen v. Wells Fargo & Co.,
967 F.3d 767 (8th Cir. 2020)...................... 21, 22, 23

Amgen Inc. v. Conn. Ret. Plans & Tr. Funds,
568 U.S. 455 (2013).. 34

Amgen Inc. v. Harris,
136 S.Ct. 758 (2016).. 10

Dormani v. Target Corp.,
2020 WL 4289987 (8th Cir. July 28, 2020)..... 22, 23

Fentress v. Exxon Mobil Corp.,
2019 WL 426147 (S.D. Tex. Feb. 4, 2019)............ 24

Fifth Third Bancorp v. Dudenhoeffer,
573 U.S. 409 (2014)....................................... *passim*

Graham v. Fearon,
721 F.App'x 429 (6th Cir. 2018) 15, 21

Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers Local #6 Pension Fund v. Int'l Bus. Mach. Corp.,
205 F.Supp.3d 527 (S.D.N.Y. 2016) 8, 9, 34

Kirschbaum v. Reliant Energy, Inc.,
526 F.3d 243 (5th Cir. 2008).................................. 31

Lanfear v. Home Depot, Inc.,
679 F.3d 1267 (11th Cir. 2012).............................. 31

Martone v. Robb,
902 F.3d 519 (5th Cir. 2018)...................... 15, 20, 23

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993).. 4

Pegram v. Herdrich,
530 U.S. 211 (2000).. 10, 30

Ret. Plans Comm. of IBM v. Jander,
140 S.Ct. 592 (2020) 1

Ret. Plans Comm. of IBM v. Jander,
139 S.Ct. 2667 (2019) 15

Tellabs, Inc. v. Makor Issues & Rts., Ltd.,
551 U.S. 308 (2007) 33, 34

Wilson v. Edison Int'l, Inc.,
315 F.Supp.3d 1177 (C.D. Cal. 2018) 26

Statutes

15 U.S.C. §78u-4(b) 14

29 U.S.C. §1104(a) 4, 5, 21

29 U.S.C. §1107(b) 5

29 U.S.C. §1107(d) 4

29 U.S.C. §1108(c) 5, 33

29 U.S.C. §1109(a) 4

29 U.S.C. §1132(a) 4

29 U.S.C. §1132(e) 33

Other Authorities

Am. Compl., *Martone v. Robb*, No. 1:15-cv-
877 (W.D. Tex. Oct. 14, 2016), ECF No.41...... 24, 28

Compl., *Graham v. Fearon*, No. 1:16-cv-2366
(N.D. Ohio Sept. 23, 2016), ECF No.1............. 24, 28

Steven F. Freeman, *Effects of ESOP Adoption and Employee Ownership: Thirty Years of Research and Experience* (Univ. of Penn. Organizational Dynamics Program, Working Paper No. 07-01, 2007), *available at* https://bit.ly/2ZrbHDp 6

How an Employee Stock Ownership Plan Works, Nat'l Ctr. for Emp. Ownership (Apr. 10, 2018), https://bit.ly/2Kh5Bix. 5

Second Am. Compl., *Allen v. Wells Fargo & Co.*, No. 16-cv-03405 (D. Minn. Oct. 27, 2017), ECF No.186 .... 25, 28

PETITION FOR WRIT OF CERTIORARI

In *Retirement Plans Committee of IBM v. Jander*, 140 S.Ct. 592 (2020), this Court granted certiorari to resolve a clear circuit split as to whether the "more harm than good" pleading standard of *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), for stating duty-of-prudence claims against fiduciaries of employee stock ownership plans (ESOPs) under the Employee Retirement Income Security Act of 1974 (ERISA) can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time. On the merits, the parties (and the United States) briefed that question but also advanced other arguments regarding the viability of plaintiffs' complaint. Without resolving the question presented, this Court vacated the Second Circuit's decision (thus temporarily eliminating the circuit split) and remanded for that court "to decide whether to entertain" those other arguments. App.3. On remand, following supplemental briefing, the Second Circuit declined and "reinstat[ed] … [its] initial opinion," App.3, thus reestablishing the same circuit split that led this Court previously to grant certiorari. That split has subsequently deepened, as the Eighth Circuit recently affirmed the dismissal of materially identical allegations and expressly rejected the Second Circuit's minority view.

Certiorari is once again warranted. By reinstating its prior decision, the Second Circuit re-established the same split that this Court previously agreed to review. Three courts of appeals have now correctly rejected as legally insufficient generalized

allegations that the harm from inevitable disclosure only increases over time and thus earlier disclosure is always prudent, while the Second Circuit has doubled down on its contrary view. Indeed, the split is unusually stark: The Fifth, Sixth, and now Eighth Circuits have rejected the same ERISA claims, premised on the same allegations, *brought by the same counsel*. The Eighth Circuit, moreover, had the benefit of the Second Circuit's reinstated opinion and expressly rejected its reasoning.

The Second Circuit's minority position is just as mistaken as last time around. By allowing ERISA duty-of-prudence claims to proceed based on generalized allegations that could be pleaded in any case (a reality the Second Circuit acknowledged), the decision conflicts with *Dudenhoeffer*. If the harm from undisclosed fraud only grows over time and no fraud lasts forever, then disclosure is always inevitable and earlier disclosure is always the prudent course. *Dudenhoeffer* was designed to focus on the circumstances of individual cases to separate "the plausible sheep from the meritless goats," 573 U.S. at 425, not to simply require plaintiffs to incant generic allegations that can (and will) be leveled in every stock-drop case.

This Court's *per curiam* decision eliminated the circuit split by vacating the Second Circuit's erroneous decision. But by reinstating its previous decision, the Second Circuit has reestablished the circuit split—which has only grown since its decision—and reintroduced all of these flaws. For all of the reasons certiorari was previously warranted, the Court should

again grant review and definitively resolve the question that it did not resolve the first time around.

If the Court is inclined to go further, it could grant the second question presented and address the broader questions previously addressed by the parties and the government. It is now clear that the Second Circuit will not address these questions at this juncture, with the net result that the circuits are now definitively split on the first question presented. Whether the Court prefers to address the first question alone or the broader questions, it should not leave the circuit split on the first question unaddressed. The same basic allegations by the same lawyer have been dismissed as legally insufficient by the Fifth, Sixth, and now Eighth Circuits, while allowed to proceed in the Second Circuit. That untenable situation should be addressed whether or not the Court examines the broader problems with a complaint that the Second Circuit alone has deemed sufficient.

OPINIONS BELOW

The Second Circuit's opinion reinstating its initial opinion is reported at 962 F.3d 85 and reproduced at App.1-3. The Second Circuit's initial opinion is reported at 910 F.3d 620 and reproduced at App.13-36. The district court's opinion dismissing the second amended complaint is reported at 272 F.Supp.3d 444 and reproduced at App.39-57. The district court's opinion dismissing the amended complaint is reported at 205 F.Supp.3d 538 and reproduced at App.58-74.

JURISDICTION

The Second Circuit issued its opinion on June 22, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth in the appendix.

STATEMENT OF THE CASE

A. Legal Background

1. ERISA is a “comprehensive and reticulated statute” that imposes numerous federal requirements on employee retirement plans established by private companies. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993). Among other things, ERISA requires plan fiduciaries to act “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.” 29 U.S.C. §1104(a)(1)(B). ERISA authorizes plan participants to sue fiduciaries who breach this duty of prudence and makes those fiduciaries personally liable for any losses to the plan resulting from any such breach. *Id.* §§1109(a), 1132(a)(2)-(3).

One important type of retirement plan covered by ERISA is an ESOP, which is a retirement plan that “invests primarily in the stock of the company that employs the plan participants.” *Dudenhoeffer*, 573 U.S. at 412; *see* 29 U.S.C. §1107(d)(6). Congress recognized that ESOPs “solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate

employees," while promoting increased retirement savings and improving employee morale and productivity. *Dudenhoeffer*, 573 U.S. at 412.

"Congress sought to encourage the creation of ESOPs," *id.* at 424, and adjusted ERISA's basic requirements and common-law trust principles to accommodate their unique characteristics. In particular, although ERISA usually requires plan fiduciaries to "diversify[] the investments of the plan," 29 U.S.C. §1104(a)(1)(C), because an ESOP's whole purpose is to facilitate investment in a single stock (*viz.*, the employer's), Congress excepted ESOPs from that diversification requirement, *see id.* §§1104(a)(2), 1107(b)(1). Moreover, while common-law trust principles would generally prohibit having corporate officers serve as plan fiduciaries, Congress has expressly allowed companies to appoint senior management officials to serve as ERISA plan fiduciaries, both generally and as to ESOPs. *See id.* §1108(c)(3); *Dudenhoeffer*, 573 U.S. at 423 (noting that "ESOP fiduciaries often are company insiders").

ESOPs are now the most common form of employee stock ownership in the United States; they hold some $1.3 trillion in Americans' retirement savings. *How an Employee Stock Ownership Plan Works*, Nat'l Ctr. for Emp. Ownership (Apr. 10, 2018), https://bit.ly/2Kh5Bix. Research has shown that companies with ESOPs "are more productive and profitable, survive longer, and [have] better shareholder returns," while the effects on employees of ESOP adoption are "almost entirely positive." Steven F. Freeman, *Effects of ESOP Adoption and Employee Ownership: Thirty Years of Research and*

Experience 6-10 (Univ. of Penn. Organizational Dynamics Program, Working Paper No. 07-01, 2007), *available at* https://bit.ly/2ZrbHDp.

2. Cognizant that Congress "has written into law its interest in encouraging [ESOPs]," *Dudenhoeffer*, 573 U.S. at 416, and that corporate insiders frequently serve as plan fiduciaries, federal courts have long recognized the need to ensure that a drop in a company's stock price does not automatically entail costly litigation, which could threaten the viability of ESOPs. Before this Court's decision in *Dudenhoeffer*, the lower courts countered that threat by erecting a "presumption of prudence" that strictly limited the circumstances in which an ESOP fiduciary could be held liable for investing plan assets in employer stock. *See* App.19. In *Dudenhoeffer*, this Court rejected that presumption as atextual, but also credited the weighty concerns that prompted its adoption and suggested that they could be better accommodated through other means. In particular, *Dudenhoeffer* recognized that meritless and economically burdensome lawsuits would "unduly discourage employers from offering [such] plans in the first place," 573 U.S. at 425, and emphasized the need for a mechanism to "divide the plausible sheep from the meritless goats," *id.* As the Court concluded, "[t]hat important task can be better accomplished through careful, context-sensitive scrutiny of a complaint's allegations" to determine whether those allegations state a plausible claim. *Id.*

The Court emphasized that in the ERISA context, a motion to dismiss "requires careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently." *Id.* That

determination "will necessarily be context specific." *Id.* *Dudenhoeffer* nonetheless outlined three important considerations to guide lower courts adjudicating duty-of-prudence claims based on inside information. First, a fiduciary with adverse inside information need not break the law by trading on that information. *Id.* at 428-29. Second, "where a complaint faults fiduciaries … for failing to disclose [inside] information to the public," courts should consider, *inter alia*, whether mandating disclosure under ERISA could conflict with the objectives of the complex "corporate disclosure requirements" imposed by the securities laws. *Id.* at 429. Third, the Court emphasized that "courts faced with such claims should also consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that [the proposed alternative action] would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." *Id.* at 429-30.

B. Respondents' Suit and the District Court's Decisions.

1. IBM offers its employees an ESOP, which is an investment option in IBM's defined-contribution 401(k) Plus Plan (the "Plan"). App.40. IBM has designated senior corporate officials, including several of the petitioners here, to serve as fiduciaries for the overall Plan, including for the ESOP offered as part of that Plan. App.14-15.

In 2015, in the wake of an announcement that caused IBM's stock price to drop by approximately seven percent, two putative class actions were filed

against IBM and its officers, one under the federal securities laws and one under ERISA. Both actions asserted, based on materially identical allegations, that IBM had made public misrepresentations that artificially inflated the price of its common stock before the announcement and corresponding price drop.

In each case, the allegations focused on the treatment of IBM's former Microelectronics assets. App.15-16, 40-41. According to the complaints, IBM began making plans to sell those assets in 2013 but had difficulty finding a buyer. App.40-41. In the meantime, IBM continued to own and utilize the Microelectronics assets and allegedly made materially inaccurate public disclosures regarding their value in 2014. App.15, 41. Then, on October 20, 2014, IBM announced a transfer of the Microelectronics assets to GlobalFoundries, which would receive $1.5 billion and title to the assets in exchange for entering a long-term agreement to use the assets to supply IBM with semiconductors. IBM recorded a $4.7 billion pre-tax charge, reflecting in part the impairment in Microelectronics' stated value. App.15. IBM's stock price subsequently declined by 7.11% (over $12 per share). App.15, 41-42.

In the securities class action, the plaintiffs asserted that IBM and certain senior IBM officers had fraudulently concealed Microelectronics' impaired value, and thereby artificially inflated IBM's stock price. *Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers Local #6 Pension Fund v. Int'l Bus. Mach. Corp.* (*Insulators*), 205 F.Supp.3d 527, 530-32 (S.D.N.Y. 2016); *see* App.15-16. The district court

dismissed that case, holding that the plaintiffs had failed to plead a viable securities fraud claim. In particular, the district court found, the plaintiffs had failed to allege facts showing either that the need to write down Microelectronics' value was so apparent that the failure to take an earlier write-down amounted to fraud, or that the defendants knew that IBM's earnings-per-share projections lacked a reasonable basis. *Insulators*, 205 F.Supp.3d at 537-38; *see* App.15-16. That decision was not appealed.

2. Meanwhile, respondents filed this putative ERISA class action on behalf of ESOP participants who purchased IBM stock between January and October 2014, asserting that the same purported fraud made IBM stock an imprudent investment for the IBM ESOP. *See* App.60 (noting the "substantially similar factual allegations" in the two complaints); App.15-16. In their first amended complaint, respondents asserted that petitioners violated their duty of prudence by continuing to invest the ESOP's funds in IBM stock notwithstanding their insider knowledge, as IBM corporate officials, that IBM's market price was artificially inflated by the overvaluation of the Microelectronics assets. App.61-62; App.15-16. Respondents alleged two purportedly more prudent alternatives: Petitioners should have either disclosed inside information regarding the true value of Microelectronics, or frozen further Plan investments in IBM stock. App.61; App.16.

Petitioners moved to dismiss the complaint as failing to satisfy the pleading standards set forth in *Dudenhoeffer*. Among other things, petitioners explained that prudent fiduciaries could reasonably

reject either proposed course and, citing this Court's decision in *Pegram v. Herdrich*, 530 U.S. 211 (2000), that the plan fiduciaries had no obligation to take actions in a corporate capacity (such as SEC filings) for the benefit of plan participants. *See* Dct.Dkt.20 at 12-13; Dct.Dkt.23 at 3-4.

The district court dismissed respondents' ERISA complaint on the same day it dismissed the parallel securities action. *See* App.16. The district court carefully evaluated respondents' complaint and held that their "rote recitation of proposed remedies" failed to allege any facts plausibly showing that a prudent fiduciary "'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." App.70, 72. The district court explained that respondents needed to put forward specific "facts and allegations" explaining why "a prudent fiduciary in the same position '*could not have concluded*'" that disclosing that negative information "would do more harm than good." App.69 (emphasis in original) (quoting *Amgen Inc. v. Harris*, 136 S.Ct. 758, 760 (2016)). Respondents' generic allegation that "delay in disclosing an alleged fraud always harms investors in the Plan" was insufficient because that allegation 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." App.71.

3. The district court gave respondents leave to amend, and they filed a second amended complaint adding some detail and a third purported alternative action: that petitioners could have purchased hedging products to offset any decline in IBM stock. App.17,

44. The district court again dismissed the case, explaining that the amended complaint, while "longer," was still "adorned with conclusory allegations" and "bereft of context-specific details." App.46. Once again, respondents relied on the generic assertion that "the longer a fraud goes on, the harsher the correction," and "attempt[ed] to buttress that proposition with various academic articles and studies." App.47. Those studies, however, "only underscore[d] the general," non-case-specific nature of respondents' allegations. App.47.

The district court also faulted respondents for "fail[ing] to consider how a prudent fiduciary … would have accounted for the potential ill-effects resulting from a premature disclosure." App.50-51. In particular, as to respondents' allegation that petitioners should have disclosed the alleged fraud, the district court explained that a prudent fiduciary could have concluded that such an "unusual disclosure outside the securities laws' normal reporting regime could spook the market," doing net harm to the plan. App.51.

Similarly, while respondents had alleged that "according to IBM's public filings," the plan "was a net buyer of IBM stock" during the class period, Dct.Dkt.38 at 37, the district court explained that respondents had misread the filings, which actually showed that the plan purchased $111 million in IBM stock in 2014 and *sold* $391 million in the same period—making the plan a net seller by a substantial margin, and meaning that precipitating an earlier stock drop would have *hurt* the plan as a whole, App.48. Respondents later conceded that their

allegation that the plan was a net buyer was "erroneous[]." C.A.Dkt.36 at 36 n.3.

C. The Second Circuit's Initial Decision

On appeal, respondents abandoned their other proposed alternative actions, choosing to rely solely on the theory that a prudent fiduciary would have disclosed earlier that Microelectronics was overvalued. Unlike the district court, the Second Circuit found respondents' generalized allegations sufficient.

The Second Circuit determined that "[s]everal allegations in the amended complaint, considered in combination … plausibly establish" that a prudent fiduciary "could not have concluded that corrective disclosure would do more harm than good." App.27 (citation omitted). The Second Circuit began by citing general allegations that the stock traded in an efficient market, that petitioners knew the stock was overvalued, and that petitioners "had the power to disclose the truth to the public and correct the artificial inflation." *See* App.27, 30. The court acknowledged the district court's concern that "an unusual disclosure outside the securities laws' normal reporting regime could spook the market." App.27. But, the Second Circuit concluded, "[t]his reasoning assumes that any disclosure would have to have been outside the securities laws' normal reporting regime." App.27 (quotation marks omitted). Instead, the Second Circuit read the complaint to "plausibly

allege[] that disclosures could have been included within IBM's quarterly SEC filings." App.28.[1]

The court then addressed respondents' generic allegation that the "eventual disclosure of a prolonged fraud causes reputational damage that increases the longer the fraud goes on." App.28. Although recognizing "the possibility of similar allegations in other ERISA cases," the panel held that their general nature "does not undermine their plausibility here (or, for that matter, elsewhere)." App.29. Finally, the court emphasized respondents' allegation that disclosure of the inside information was "inevitable." App.30. According to the court, when a drop in stock price is "inevitable," it "is far more plausible that a prudent fiduciary would prefer to limit the effects [of that drop] through prompt disclosure." App.31 (quoting *Dudenhoeffer*, 573 U.S. at 430).

Based on these allegations, the panel held that respondents had sufficiently pleaded that "no prudent fiduciary in [petitioners'] position could have concluded that earlier disclosure would do more harm than good." App.32. The panel acknowledged that "allowing [respondents'] ERISA claim to go forward on essentially the same facts" as the failed securities fraud suit could "lead to an end run around the

[1] Before the Second Circuit, respondents made only a passing suggestion that the district court erred in construing their complaint as requiring disclosure outside regular SEC reporting. Petitioners reiterated their earlier argument that any disclosure had to occur outside regular SEC reporting because regular reporting is undertaken in petitioners' corporate, rather than fiduciary, capacities, and thus cannot form the basis of an ERISA duty-of-prudence claim. C.A.Dkt.52 at 35-36 n.10.

heightened pleading standards for securities fraud suits set out in the" Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. §78u-4(b), and deemed that concern "not without merit." App.33. Nevertheless, that danger "d[id] not provide a basis to affirm the district court's dismissal of Jander's duty-of-prudence claim." App.33.

Petitioners sought *en banc* rehearing. Among other things, petitioners explained that in solving the district court's concern with "spook[ing] the market" by construing the second amended complaint to allege that the fiduciaries should have made the earlier disclosure through regular corporate reporting channels—*i.e.*, "IBM's quarterly SEC filings," App.27-28—the panel had ignored that under *Pegram* and its progeny, a fiduciary has no obligation to take action in a corporate capacity for the exclusive benefit of plan participants. C.A.Dkt.77 at 9-15. Accordingly, plaintiffs had failed to allege action that could be undertaken in a fiduciary capacity that satisfied *Dudenhoeffer*. The Second Circuit nevertheless denied rehearing.

D. This Court's *Per Curiam* Decision

Petitioners sought this Court's review. The petition noted that the Second Circuit's decision created a circuit split with other courts of appeals that have rejected, as a matter of law, generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time. The petition emphasized that the split was particularly stark, as other circuits had rejected materially identical complaints filed by the same attorney who filed the complaint here. *See Martone v. Robb*, 902

F.3d 519 (5th Cir. 2018); *Graham v. Fearon*, 721 F.App'x 429 (6th Cir. 2018). This Court granted certiorari. *See* 139 S.Ct. 2667 (2019) (mem.).

On the merits, the parties extensively briefed the sufficiency of the generic allegations made here and in *Martone* and *Graham*. *See* Br. for Pet'rs 33-61; Br. for Resp'ts 12-36, 45-57; Reply Br. for Pet'rs 11-20. Petitioners also argued that ERISA does not impose a duty on insider ESOP fiduciaries in the first place to use inside information gained in a corporate capacity for the benefit of ESOP participants. *See* Br. for Pet'rs 22-32; Reply Br. for Pet'rs 3-11; *see also* Br. for Resp'ts 37-45 (addressing this argument). The United States filed an *amicus* brief in support of neither party arguing that ERISA requires an ESOP fiduciary to publicly disclose inside information only when the securities laws require such a disclosure. Br. for United States 13-33.

In a *per curiam* opinion, the Court vacated the Second Circuit's judgment and remanded for further proceedings. App.4-7. The Court noted that the question presented in the petition for certiorari asked whether *Dudenhoeffer's* "more harm than good" standard "can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time." App.6. It then remarked that "[i]n their briefing on the merits," petitioners and the United States "focused their arguments primarily upon other matters"—*viz.*, that "ERISA imposes no duty on an ESOP fiduciary to act on inside information" and that ERISA imposes no "duty to disclose inside information that is not otherwise required to be disclosed by the securities

laws." App.6. Without addressing the question on which it had granted certiorari, the Court observed that "the Second Circuit did not address" those other arguments. App.6. Stating that the Second Circuit "should have an opportunity to decide whether to entertain" those other arguments "in the first instance," the Court vacated the judgment and remanded the case, "leaving it to the Second Circuit whether to determine the[] merits" of those arguments. App.7.

E. The Second Circuit's Decision on Remand

On remand, the Second Circuit invited supplemental briefing "regarding the appropriate disposition of this appeal, including whether this Court should consider any arguments not previously raised before this Court." C.A.Dkt.107 at 2. The court advised that "[t]he parties should articulate such arguments, if any, and indicate how they are properly before this Court." *Id.*

The parties simultaneously submitted lengthy supplemental briefs. Both petitioners and respondents extensively addressed the merits of the "other" arguments identified in the Court's *per curiam* decision. *See* Supp. Br. for Defs.-Appellees 6-22, 30-31; Supp. Br. for Pls.-Appellants 6-18. Petitioners also argued that, regardless, respondents' generalized allegations did not satisfy *Dudenhoeffer*'s pleading standard, and that the panel should not reimpose its circuit-splitting decision and instead should align itself with the Fifth and Sixth Circuits. The Securities and Exchange Commission and the Department of Labor each filed letters with the court asking the court

to "adopt the positions articulated in the Government's amicus curiae brief" filed in this Court and indicating the Office of the Solicitor General would represent the government at any oral argument. C.A.Dkt.116; C.A.Dkt.117.

Barely three weeks later, without holding any argument, the Second Circuit issued a *per curiam* decision in which it "reinstate[d] the judgment entered pursuant to [its] initial opinion." App.3. According to the court, "[t]he arguments raised in the supplemental briefs either were previously considered by this Court or were not properly raised" (without indicating which were which). App.3. As for "arguments … previously considered," the court would "not revisit them." App.3. As for arguments "not properly raised," the court "decline[d] to entertain them." App.3. The court reversed the district court's judgment dismissing the second amended complaint and remanded for further proceedings.

REASONS FOR GRANTING THE PETITION

The case for certiorari here is as straightforward as it was last time around; indeed, the split has deepened in the interim. This Court previously granted certiorari to review the Second Circuit's initial decision in this case, and for good reason. The decision created a clear split with decisions of the Fifth and Sixth Circuits over whether *Dudenhoeffer*'s pleading standard can be satisfied by generic allegations that fraud should be disclosed sooner rather than later. The split was clear and undeniable, as the Fifth and Sixth Circuit had dismissed materially identical allegations made by the same counsel as here. The Second Circuit was also on the

wrong side of the split, as its acceptance of generalized allegations that could be made in any stock-drop case conflicted with *Dudenhoeffer*'s articulation of a standard designed to "divide the plausible sheep from the meritless goats" and its admonition that lower courts apply "careful, context-sensitive scrutiny" to duty-of-prudence complaints. 573 U.S. at 425. And the decision was important, as it provided a blueprint for imposing costly discovery in every stock-drop case, even when a parallel securities claim would be dismissed, and it did so in the epicenter of the financial markets.

In granting certiorari and vacating the Second Circuit's decision, this Court eliminated the circuit split and vacated the Second Circuit's erroneous and consequential precedent. Now, however, the Second Circuit has reinstated that decision, re-establishing the circuit split and reiterating the same legal errors with the same far-reaching, pernicious consequences. Indeed, the circuit split is now deeper still, because the Eighth Circuit recently joined the Fifth and Sixth Circuits and expressly rejected the Second Circuit's reasoning in holding that generic allegations that fraud should be disclosed sooner rather than later—brought, again, by the same counsel—do not satisfy *Dudenhoeffer*. For all of the reasons the Court granted certiorari the first time around, the Court should grant certiorari again, this time definitively resolving whether *Dudenhoeffer*'s "more harm than good" standard can be satisfied by the kind of generalized allegations that suffice in the Second Circuit but not in the Fifth, Sixth, and Eighth Circuits.

This petition also gives the Court the express option of granting certiorari to address the broader question of whether ERISA imposes a duty on a plan fiduciary who is also a corporate officer to act on inside information in the first place. Respondents' claim is premised on the theory that petitioners violated their ERISA duty of prudence by failing to use inside information that they learned in their *corporate* capacities when making plan-related decisions in their *fiduciary* capacities. But, properly understood, there is no such duty. ERISA expressly allows employers to appoint their corporate officers as plan fiduciaries, but there is no obligation on an insider-fiduciary to use inside information gathered in her corporate capacity for the exclusive benefit of plan participants. If the Court would welcome briefing on this broader defect with ERISA stock-drop claims, it can grant review of both questions presented. If the Court would prefer to simply resolve the existing circuit split, it can limit the grant to the first question presented. Either way, the Court should not allow the clear circuit split that the Second Circuit has reestablished and the Eighth Circuit has deepened to persist.

I. The Court Should Grant Certiorari To Resolve The Question It Previously Agreed To Review But Did Not Resolve.

A. The Courts of Appeals Remain Split as to Whether *Dudenhoeffer*'s Standard Can Be Satisfied Using Generalized Allegations Like Those Here.

As before, the Second Circuit's reinstated decision squarely conflicts with decisions of the Fifth and Sixth

Circuits holding that generalized allegations regarding the harm of deferring an eventual corrective disclosure—allegations materially identical to those here, leveled by the same counsel—fail to satisfy *Dudenhoeffer*'s pleading standard. Indeed, the conflict is even deeper than last time around, because the Eighth Circuit recently joined the Fifth and Sixth Circuits in holding that the same allegations—once again made by the same counsel—do not satisfy *Dudenhoeffer*, and squarely rejected the Second Circuit's reinstated decision.

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. The plaintiff in *Martone* was a former employee of Whole Foods, who alleged that the insider-fiduciaries of the company's ESOP breached their duty of prudence under ERISA by not making an earlier disclosure revealing alleged fraudulent overpricing at Whole Foods stores. *Id.* at 521-22. Relying on generalized allegations that no fraud lasts forever and harm only increases over time, the plaintiff attempted to satisfy *Dudenhoeffer*'s "more harm than good" standard by arguing that earlier disclosure of the alleged fraud would have "reduce[d] the damage." *Id.* at 526. The Fifth Circuit rejected that argument, holding 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.*

The Second Circuit's reinstated decision similarly 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 continuing to invest in the company's stock after an alleged fraud had artificially inflated the stock's price. *See* 721 F.App'x at 435. The complaint alleged that "no fraud lasts forever," "the longer a securities fraud goes on, the more harm it causes to shareholders," and Eaton Corporation's stock suffered a "reputational penalty" because the fraud was "prolong[ed]." *Id.* at 436. Thus, the plaintiffs argued, earlier disclosure of the fraud would have satisfied *Dudenhoeffer*'s "more harm than good" standard. *Id.* at 433, 436. The Sixth Circuit rejected that argument, noting that "ERISA imposes the duty to act in a prudent manner 'under the circumstances then prevailing,'" and that the duty of prudence "requires prudence, not prescience." *Id.* at 437 (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.*

Recently, the Eighth Circuit joined the Fifth and Sixth Circuits in holding that the same allegations, made by the same counsel, do not satisfy *Dudenhoeffer*. *See Allen v. Wells Fargo & Co.*, 967 F.3d 767 (8th Cir. 2020). *Allen* arose out of an alleged "unauthorized-accounts scandal at Wells Fargo." *Id.* at 770. After public disclosure of the practice caused the bank's stock price to drop, the *Allen* plaintiffs brought suit alleging breach of the ERISA duty of prudence, contending that insider-fiduciaries of the bank's ESOP knew years beforehand that the bank's incentive structure was inducing unauthorized

practices and that government regulators were investigating possible misconduct. *Id.* at 770-71. The plaintiffs alleged that the fiduciaries should have publicly disclosed that information earlier, and that this alternative course of conduct satisfied *Dudenhoeffer* because "public disclosure of the fraud was inevitable and … based on general economic principles, the longer the fraud is concealed, the greater the harm to the company's reputation and stock price." *Id.* at 773.

The Eighth Circuit affirmed the dismissal of the complaint, holding that the plaintiffs had "failed to plausibly allege that a prudent fiduciary in [the defendants'] position could not have concluded that earlier disclosure would do more harm than good." *Id.* at 774. Citing *Martone* and *Graham*, and specifically declining to follow the Second Circuit's reinstated decision here—as the plaintiffs had urged—the Eighth Circuit concluded that the plaintiffs' allegations were "too generic to meet the requisite pleading standard" and that "a prudent fiduciary—even one who knows disclosure is inevitable and that earlier disclosure may ameliorate some harm to the company's stock price and reputation—could readily conclude that it would do more harm than good to disclose [adverse] information" earlier. *Id.* at 774-75.

Subsequently, the Eighth Circuit rejected another duty-of-prudence claim brought by different lawyers but again premised on allegations materially similar to those here. *See Dormani v. Target Corp.*, 2020 WL 4289987, at *3 (8th Cir. July 28, 2020) (addressing allegations that a "drop in stock price was inevitable and the earlier the fiduciaries disclosed … the less"

stock price would be inflated). The Eighth Circuit observed that "a reasonably prudent fiduciary … could still believe disclosure was the more dangerous of the two routes," and it singled out the Second Circuit's reinstated decision in this case as the lone court of appeals to conclude otherwise. *Id.*

The conflict between the Second Circuit's now-reinstated decision, on the one hand, and the Fifth, Sixth, and now Eighth Circuits' decisions, on the other hand, is particularly stark because all four suits were brought by the same counsel—and, unsurprisingly, the relevant allegations are materially identical. In all four cases, the plaintiffs alleged that no fraud lasts forever, the harms from undisclosed fraud only grow over time, and thus disclosure sooner rather than later would be the only prudent course. *Compare, e.g.*, Second Am. Compl. ¶¶26, 109, 114 (Dct.Dkt.38), *with Martone*, 902 F.3d at 526. Indeed, in *Martone*, 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," and it specifically identified the *Jander* and *Graham* cases, among others. 902 F.3d at 526 & n.25; *see also Allen*, 967 F.3d at 773 (noting that *Martone* involved "allegations and arguments similar to those [here]"). As the Fifth Circuit correctly observed, the ease with which the generic allegations could be made (and have been made) in multiple cases underscored that they are generic and insufficient to satisfy *Dudenhoeffer*. *See Martone*, 902 F.3d at 527. Yet the Second Circuit has now (twice) relied on those same generic allegations to conclude that respondents satisfied *Dudenhoeffer* even while acknowledging they could be readily replicated "elsewhere." App.29. As

other courts have noted, the Second Circuit's decision "directly contradicts" the Fifth Circuit's decision in *Martone* (and thus *Graham* and *Allen* as well). *Fentress v. Exxon Mobil Corp.*, 2019 WL 426147, at *5 (S.D. Tex. Feb. 4, 2019). Moreover, the Eighth Circuit, which had the benefit of all three decisions, embraced the reasoning of the Fifth and Sixth Circuits and specifically declined to follow the Second Circuit's reinstated decision.

There is nothing superficial about the split in authority given the parallel nature of the allegations. The Second Circuit viewed respondents' allegation that disclosure was inevitable as "particularly important." App.30. 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." App.31 (quoting *Dudenhoeffer*, 573 U.S. at 430). But the same lawyer made literally identical allegations in *Martone* and *Graham*. *Compare* Dct.Dkt.38 ¶8 ("[D]efendants knew, or should have known, that no fraud lasts forever."), *and id.* ¶112 ("[N]o corporate fraud lasts forever; there is always a day of reckoning."), *with* Am. Compl. ¶8, *Martone v. Robb*, No. 1:15-cv-877 (W.D. Tex. Oct. 14, 2016), ECF No.41 ("Defendants knew, or should have known, that no fraud lasts forever."), *and id.* ¶89 ("[N]o corporate fraud lasts forever; there is always a day of reckoning."); *see also* Compl. ¶¶8, 86, *Graham v. Fearon*, No. 1:16-cv-2366 (N.D. Ohio Sept. 23, 2016), ECF No.1 (same). The plaintiffs in *Allen*, again through the same counsel, made substantively similar allegations. *See* Second Am. Compl. ¶285, *Allen v.*

Wells Fargo & Co., No. 16-cv-03405 (D. Minn. Oct. 27, 2017), ECF No.186 (alleging that "the ongoing fraud was going to inevitably be unearthed"), ¶280 (alleging that "the longer fraud persists … the harsher the correction, and the slower the price recovery"). In *Martone*, *Graham*, and *Allen*, those allegations were correctly deemed generic and insufficient, while the decision below treats them as viable and "particularly important."

In short, as the Court recognized in previously granting certiorari, the circuit split is clear and undeniable—and now deeper still. By placing virtually dispositive weight on allegations that can be—and have been—pleaded in practically any stock-drop case, the Second Circuit has departed from the Fifth, Sixth, and now Eighth Circuits, which have properly rejected substantively identical allegations as a matter of law. Although this Court's *per curiam* decision eliminated the split created by the Second Circuit's initial decision, the Second Circuit has reinstated it and made clear that no alternative arguments will change its mind. Now, more than ever, certiorari is warranted.

B. The Decision Below Remains Incorrect.

Like its initial decision, the Second Circuit's reinstated decision contradicts this Court's decision in *Dudenhoeffer* and turns the pleading standard this Court developed to prevent meritless ERISA suits against ESOP fiduciaries into a mere recitation exercise. The Second Circuit relied on concededly generic allegations that no fraud lasts forever, the harm caused by concealment only increases over time, and so sooner-rather-than-later disclosure is always

prudent, while downplaying case-specific facts (like IBM's status as a net seller) that underscore why a prudent fiduciary could have followed petitioners' course. The court put particular emphasis on the inevitability of disclosure, when the relevant complaint alleged only that the disclosure-precipitating asset sale was "likely," and even though plaintiffs can and do routinely allege that disclosure is inevitable because no fraud lasts forever. The Second Circuit's analysis is plainly wrong, which explains why it stands in growing isolation, even as to materially identical allegations by the same lawyer.

1. The central allegation on which the Second Circuit relied was respondents' allegation that earlier disclosure of negative information is always preferable because "the eventual disclosure of a prolonged fraud causes 'reputational damage' that 'increases the longer the fraud goes on.'" App.28 (brackets omitted). But by its very terms, that sooner-rather-than-later allegation is applicable in every duty-of-prudence case asserting that an ESOP fiduciary should have disclosed negative information earlier. *See* App.47 (district court noting that "[p]laintiffs' 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"); *accord Wilson v. Edison Int'l, Inc.*, 315 F.Supp.3d 1177, 1193 (C.D. Cal. 2018) (allegations that "the longer a fraud goes on, the harsher the correction" "could apply to any" claim and so "do not withstand the 'context-sensitive scrutiny' under [*Dudenhoeffer*]"). Indeed, as the district court observed, respondents' reliance on economic journals

and law review articles to back up their theory only underscores its generic nature. Perplexingly, the Second Circuit *agreed* that the allegation "could be made by plaintiffs in any case." App.28. Yet it nevertheless accepted it as sufficient, turning the *Dudenhoeffer* pleading standard into nothing more than a requirement to incant certain universally applicable allegations.

The inadequacy of those generic allegations is even more obvious here, where the plan indisputably was a net seller during the class period. App.48. Particularly given the certainty that would-be sellers will be harmed by the market's predictable reaction to the earlier disclosure of negative information, and the relative uncertainty of the market's reaction to eventual disclosure down the line, a prudent fiduciary for an ESOP that is a net seller could quite reasonably conclude that immediate disclosure would do "more harm than good to the fund" overall. *Dudenhoeffer*, 573 U.S. at 430. Generic allegations about "reputational damage" from delayed disclosure, whether or not backed up with citations to academic journals, are hardly an answer to the dilemma faced by a plan fiduciary in that situation and are hardly sufficient to differentiate sheep from goats.

The Second Circuit also emphasized respondents' book-end allegation that the disclosure here was "inevitable," which it deemed "particularly important." App.30. According to the court, when the eventual disclosure of an alleged fraud is inevitable, "it is far more plausible that a prudent fiduciary would prefer to limit the effects of the stock's artificial inflation … through prompt disclosure." App.31. But

the inevitability of disclosure is just the corollary of the sooner-rather-than-later allegation. After all, if the eventual disclosure of fraud were not inevitable, and there were a realistic prospect that the market would never learn of the negative information, then voluntary disclosure sooner-rather-than-later would rarely be the prudent course. That is precisely why the plaintiffs here, in *Martone*, in *Graham*, and in *Allen* all linked the allegation that early disclosure is always the prudent course to allegations that "no fraud lasts forever." *See* Dct.Dkt.38 ¶8; Am. Compl. ¶¶8, 89, *Martone*, No. 15-cv-877; Compl. ¶¶8, 86, *Graham*, No. 16-cv-2366; Second Am. Compl., *Allen*, ¶249, No. 16-cv-03405.

Disclosure-is-inevitable allegations thus add nothing to disclosure-sooner-rather-than-later-is-better allegations, and suffer all the same problems. They do nothing to distinguish one stock-drop case from another. Since every stock-drop complaint will follow a drop in the stock price associated with an actual disclosure, it will always be easy to allege that the disclosure that did in fact occur was inevitable. Indeed, respondents' own complaint underscores the generic nature of the allegations by averring that the eventual disclosure of any fraud is "always" inevitable. Dct.Dkt.38 ¶112 ("[N]o corporate fraud lasts forever; there is always a day of reckoning.").

Finally, the specific allegations here actually undermine the notion that disclosure was "inevitable." The Second Circuit's view that disclosure was inevitable was premised on the view that the true value of the Microelectronics assets would be revealed when they were sold. But even assuming that a sale

of the Microelectronics assets would inevitably disclose their alleged overvaluation, any actual sale itself was far from inevitable. IBM would only sell the assets to a buyer willing to enter a long-term supply agreement with IBM. After long and uncertain negotiations, IBM eventually found a purchaser willing to enter such an agreement, but that was no mean feat and far from inevitable. Indeed, the relevant complaint itself alleged that the sale was only "more likely than not" to occur—not that it was "inevitable." Dct.Dkt.38 ¶111; *see also id.* at ¶118. But "likely" is not "inevitable," and disclosure that will automatically occur only if some "likely" future event takes place is far from inevitable. Particularly because ERISA requires looking to the information available to the fiduciary at the time, the uncertainty regarding a sale of the Microelectronics assets (and the possibility that the sale and any attendant disclosure would never occur) provides one more reason a prudent fiduciary could have decided to avoid the immediate harm to the fund from disclosure.

2. The Second Circuit's decision does not satisfy *Dudenhoeffer* for yet another reason: the only more-good-than-harm course identified by the Second Circuit depended on petitioners' failure to make additional disclosures through IBM's regular securities-law filings to the SEC. The district court noted that an early disclosure of negative information could "spook the market." App.51. The Second Circuit's response was that petitioners could avoid spooking the market by making disclosures through IBM's regular corporate SEC disclosures. But as other courts of appeals have recognized, an ERISA fiduciary is under no obligation to take actions in a corporate

capacity for the exclusive benefit of plan participants, and imposing such an obligation would be inconsistent with this Court's decision in *Pegram*. When *Dudenhoeffer* required the plaintiff to identify a proposed course of conduct for a fiduciary that a prudent fiduciary could not reject as doing more harm than good to the plan as a whole, presumably this Court had in mind an action taken in a fiduciary capacity. By nonetheless crediting a proposed course of conduct of disclosure through regular SEC filings, the decision below runs afoul of both *Dudenhoeffer* and *Pegram*.[2]

This Court explained in *Pegram* that although an ERISA trustee "may wear different hats," one as a corporate officer and one as a plan fiduciary, ERISA requires that "the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions." 530 U.S. at 225. Consequently, "[i]n every case charging breach of ERISA fiduciary duty," the "threshold question" 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. If not, then ERISA liability cannot attach.

The courts of appeals have applied this reasoning to hold that regular SEC filings are made in a corporate, rather than fiduciary, capacity and thus an allegation that plan fiduciaries should have made disclosures through SEC filings cannot support an

[2] Petitioners repeatedly raised this argument below, including in the district court, in their Second Circuit briefing, and in their Second Circuit petition for rehearing. *See* pp.9-10, 12-14 & n.1, *supra*.

ERISA fiduciary duty claim. For instance, in *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243 (5th Cir. 2008), retirement plan participants asserted that the defendants had breached their ERISA duties by making misrepresentations in SEC filings later incorporated into documents distributed to plan participants. *Id.* at 257. Citing *Pegram*, the Fifth Circuit held that defendants "were acting in … a corporate capacity in making these statements" in the SEC filings. *Id.* Accordingly, "any remedy for these statements lies under the securities laws, not ERISA." *Id.*

The Eleventh Circuit followed *Kirschbaum* in *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267 (11th Cir. 2012), which likewise involved alleged misrepresentations in SEC filings incorporated into distributed documents. *Id.* at 1283. The Eleventh Circuit held that those facts failed to state an ERISA fiduciary duty claim because the defendants "were acting in their corporate capacity and not in their capacity as ERISA fiduciaries; they were conducting business that was regulated by securities law and not by ERISA." *Id.* at 1284 (citation omitted). "Because they were not acting as fiduciaries when they took those actions, any misrepresentations in those documents did not violate ERISA." *Id.*

The same logic applies here. Under *Dudenhoeffer*, plaintiffs must identify an alternative course of action that a prudent fiduciary could not have concluded would do more harm than good to the plan. 573 U.S. at 429-30. After abandoning two of the three alternative actions they suggested below, respondents narrowed their case to the theory that defendants

should have disclosed the alleged fraud to the market earlier. As the district court found, however, "an unusual disclosure outside the securities laws' normal reporting regime could spook the market," causing the price of the stock to drop precipitously, and so a prudent fiduciary could readily conclude that such a disclosure would cause the plan more harm than good. App.51.

The Second Circuit attempted to avoid that problem by reading the complaint to plausibly allege that defendants could have disclosed the alleged fraud "within IBM's quarterly SEC filings," thereby avoiding "spook[ing] the market." App.27-28. But even if that is a course that might have avoided spooking the market or minimized harm, it is not a course that a prudent fiduciary could take in a fiduciary capacity. And, as *Pegram* held, fiduciaries face liability only for actions taken or omitted in a fiduciary capacity. Thus, the proposed course of conduct that the Second Circuit relied on does not satisfy *Dudenhoeffer* and affirmatively runs afoul of *Pegram*. That is yet another reason that the Second Circuit's decision is wrong and yet another reason this Court should grant certiorari.

C. The Question Presented Remains Exceptionally Important.

The stakes here remain just as high as when the Court previously granted certiorari. First, the Second Circuit's reinstated decision (re-)opens the floodgates to meritless duty-of-prudence claims. In rejecting a "presumption of prudence" in *Dudenhoeffer,* this Court nonetheless recognized the need to protect ESOP fiduciaries from "meritless, economically burdensome

lawsuits" that could frustrate Congress' intent of "encourag[ing] the creation of ESOPs." 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 duty-of-prudence claims to proceed based on boilerplate allegations that can be advanced in any case (and were advanced in *Martone*, *Graham*, and *Allen*), the decision below short-circuits the "context-sensitive scrutiny" mandated by *Dudenhoeffer*. And given ERISA's liberal venue provision, *see* 29 U.S.C. §1132(e)(2), and New York's centrality to the nation's securities markets, future plaintiffs will easily be able to file in the Second Circuit suits that would be dismissed elsewhere.

Second, the decision below will encourage companies to hire outsiders, rather than corporate insiders, as ESOP fiduciaries or to simply drop ESOP offerings altogether (since ERISA fiduciaries generally are the same for all a company's offerings). Either outcome would be directly contrary to Congress' clear authorization of insider-fiduciaries, *see id.* §1108(c)(3), and encouragement of ESOPs, *see* pp.4-5, *supra.*

Third, allowing the decision below to stand would create an obvious end-run around the "exacting pleading requirements" that Congress enacted in the PSLRA to rein in "abusive litigation." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007). Here, as is common, two sets of plaintiffs brought two putative class actions premised on the same alleged

fraud. The district court dismissed the securities fraud action for failure to meet the requirements of the PSLRA, *see Insulators*, 205 F.Supp.3d at 537-38, and the plaintiffs did not even appeal that ruling. But the Second Circuit held that materially identical allegations were sufficient to state an ERISA duty-of-prudence claim—despite acknowledging as "not without merit" the concern that its ruling "would lead to an end run around the heightened pleading standards for securities fraud suits set out in the [PSLRA]." App.33.

By finding the generalized allegations here sufficient, the Second Circuit invited plaintiffs to reframe every unsuccessful securities fraud class action as an ERISA duty-of-prudence case. That approach reopens the door to the same "frivolous, lawyer-driven" class action strike suits that the PSLRA was designed to end. *Tellabs*, 551 U.S. at 322. Under the decision below, there is no need for plaintiffs' lawyers to brave the daunting restrictions of the PSLRA. As long as they can find a plan participant, they can simply rewrite their complaint to allege an ERISA claim. And if reframing those suits as ERISA claims will allow them to survive a motion to dismiss, discovery burdens will allow the "extraction of extortionate settlements of frivolous claims" that the PSLRA was meant to prevent. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 475-76 (2013) (brackets omitted).

II. The Court Should Grant Certiorari To Determine Whether ERISA Imposes A Duty On A Plan Fiduciary To Act On Inside Information Learned In A Corporate Capacity.

The Court could also grant certiorari on the question whether an insider-fiduciary has an obligation to use non-public information acquired in a corporate capacity for the benefit of plan participants in the first place. *Dudenhoeffer* imposed pleading requirements for ERISA claims based on a failure to disclose non-public information without expressly addressing the source of the non-public information or whether the insider-fiduciaries had an ERISA obligation to use inside information for the benefit of plan participants. The better view, based on this Court's decision in *Pegram* and general principles of fiduciary duties and corporate governance, is that there is no duty to use information obtained as a corporate officer for the benefit of plan participants. Rather, when a corporate officer obtains non-public information in the course of her ordinary corporate duties, her obligations run to all shareholders, not the subset of shareholders who happen to be plan participants. *See, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 652 (1997). That view is consistent with the reality that such a corporate officer has access to the non-public corporate information only as a result of her position of trust as a corporate officer and in that capacity owes a duty to all shareholders to act in the best interests of the corporation. That view is also consistent with the thrust of this Court's decision in *Pegram*.

To be sure, this question of whether there is a duty to use information obtained wearing a corporate hat for the exclusive benefit of plan participants was not decided below and is not necessary to resolving the circuit split on the first question presented.[3] Indeed, it is fair to say that all four circuits to squarely address the first question presented did so on the assumption that an insider-fiduciary has an obligation to use non-public information obtained in a corporate capacity to benefit plan participants, but simply differed on whether materially identical complaints satisfied the *Dudenhoeffer* standard. On the other hand, there is no obstacle to this Court's review of the second question presented. It is a purely legal question and it was pressed in the supplemental briefing below, even though the Second Circuit declined to pass on it. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (noting that the requirement that an issue be pressed or passed upon below "operates … in the disjunctive"). Thus, the Court has optionality. If the Court wishes to have merits briefing on this question (and the closely related theory advanced by the government), it should grant certiorari on both questions presented. If it prefers to address only the question that has divided the circuits, it can limit the grant of certiorari to the

[3] To be clear, the issue whether there is a duty to use inside information gathered in a corporate capacity for the benefit of plan participants is analytically distinct from the question whether, assuming such a duty exists, ESOP fiduciaries are also obligated to use corporate disclosure channels to disclose the information in a manner that does not spook the market and thus satisfies the *Dudenhoeffer* more-good-than-harm standard. The latter issue was pressed below even in the district court and is fairly included within the first question presented.

first question presented. But in either event, this Court should not leave unreviewed a circuit split that has only deepened since this Court's earlier grant of certiorari.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
C. HARKER RHODES IV
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

LAWRENCE PORTNOY
MICHAEL S. FLYNN
DAVID B. TOSCANO
ZACHARY A. KAUFMAN
DAVIS POLK &
WARDWELL LLP
450 Lexington Ave.
New York, NY 10017

Counsel for Petitioners

September 1, 2020