American University Business Law Review

Volume 10 | Issue 2 Article 4

2021

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I. INTRODUCTION

In 1974, Congress sought to encourage a form of a retirement fund known as an employee stock ownership plan ("ESOP").[1] The statutory mandates of these plans are outlined in the Employee Retirement Income Security Act

1. *See* 29 U.S.C. § 1001 (explaining the Congressional findings and policy aims of the Employee Retirement Income Security Act of 1974).

("ERISA").[2] ESOPs are invested in stock of the company in which the employee works.[3] In this way, ESOP planners' ("plan fiduciaries") obligations are necessarily unique.[4] Whereas most fiduciaries are required to prudently diversify investments to protect their beneficiaries, ESOP planners are not similarly mandated.[5] Further, Congress allows ESOP planners to concurrently be officers of the corporation in which the stock was invested.[6] This exception makes it much more likely that a plan fiduciary will, at some point, have access to insider information pertinent to the fund.[7]

Issues arise when a plan fiduciary is also an officer of the corporation that the ESOP is primarily invested in.[8] If that corporate officer/plan fiduciary knows the corporation is engaged in fraud, courts have struggled to determine what duties the plan fiduciary acquires relative to ESOP plan beneficiaries.[9] Plaintiffs have suggested the plan fiduciary must divest the fund, diversify the fund, and/or disclose the fraud.[10]

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2. *See id.*

3. *E.g.*, *Employee Stock Ownership Plan (ESOP) Facts*, NAT'L CTR. FOR EMP. OWNERSHIP, https://www.esop.org/ (last visited Sept. 29, 2021) (discussing the advantages of ESOPs, such as increased wages and retirement assets for employees and higher growth rates for companies that offer ESOPs).

4. *See generally The Fiduciary's Guide to Conflict of Interest Claims*, RMO LLP, https://rmolawyers.com/fiduciarys-guide-conflict-of-interest-claims/ (last visited Sept. 29, 2021) (noting that most fiduciaries are obligated to protect beneficiaries' interests above their own at all times, in all situations).

5. *See* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 416–17 (2014) (acknowledging that the nature of ESOPs absolves plan fiduciaries of an obligation to diversify because the duty to diversify necessarily contradicts the nature of ESOPs).

6. *See In re* Wells Fargo ERISA 401(K) Litig., 331 F. Supp. 3d 868, 877 (D. Minn. 2018) (stating that ERISA does not prohibit corporate insiders from serving as plan fiduciaries of ESOPs). *See generally* Daniel L. Rotenberg, *Congressional Silence in the Supreme Court*, 47 U. MIAMI L. REV. 375 (1992) (noting the principle of statutory interpretation that when Congress knows how to legislate in an area and chooses not to, Congressional silence should not be interpreted as unintentional).

7. *See generally* COREY ROSEN, ET AL., THE INSIDE ESOP FIDUCIARY HANDBOOK (Nat'l Ctr. for Emp. Ownership, 4th ed. 2020) (detailing the inherent increased risk of serving as an ESOP fiduciary and corporate officer concurrently).

8. *See* Will Kenton, *Insider Information*, INVESTOPEDIA, https://www.investopedia.com/terms/i/insiderinformation.asp (last updated Mar. 21, 2020) (summarizing how corporate officers may obtain insider information and what liabilities can arise from using such information).

9. *Compare* Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 632 (2d Cir. 2018) (finding there may be a duty to disclose the insider information), *with* Martone v. Robb, 902 F.3d 519, 528 (5th Cir. 2018) (finding a duty to disclose insider information implausible), *and* Whitley v. BP, P.L.C., 838 F.3d 523, 529 (5th Cir. 2016) (finding a duty to stop future stock purchases implausible).

10. *See Jander*, 910 F.3d at 623; Allen v. Wells Fargo & Co., 967 F.3d 767, 771 (8th Cir. 2020).

In *Fifth Third Bancorp. v. Dudenhoeffer*,[11] the Supreme Court established that plaintiffs who claim the plan fiduciary knew of fraud are required to propose a plausible alternative action that the plan fiduciary could have taken that could not have been viewed as more likely to harm the fund.[12] Since *Dudenhoeffer*, the Circuit Courts have disagreed on whether plaintiffs satisfy that burden when alleging that a plan fiduciary should have disclosed the fraud.[13]

In 2020, in *Allen v. Wells Fargo & Co.*,[14] the Eighth Circuit sided with the Fifth Circuit, holding that a plaintiff suing under 29 U.S.C. § 1104's standard of "care, skill, prudence, and diligence under the circumstances" cannot plausibly allege a fiduciary duty arises to disclose the company's own fraudulent behavior to correct the inflated value of stock in the ESOP.[15] Contrarily, in *Jander v. Retirement Plans Committee of IBM*[16] the Second Circuit is the only Circuit to find that plaintiffs can plausibly plead earlier disclosure of the fraud is required by the fiduciary's duty-of-prudence.[17]

Part II of this Comment establishes that *Dudenhoeffer* directed the Circuits to determine whether the duty-of-prudence describes: (1) a plan fiduciary who discloses their company's own fraudulent behavior; or (2) a plan fiduciary who protects the ESOP from the damage public knowledge of the fraudulent behavior would cause.[18] Part III analyzes how the Second Circuit is more faithful to the *Dudenhoeffer* inquiry. More specifically, Part III argues that *Jander* better conforms with *Dudenhoeffer*'s balance inquiry, that general economic principles provide appropriate support for *Jander*'s conclusion, and that the health of retirement funds, like ESOPs, cannot be evaluated on short-term time scales. Part IV recommends the Supreme Court resolve the disagreement between the circuits. First, the Court should side with the Second Circuit's finding that plaintiffs can plausibly plead the duty-

11. 573 U.S. 409 (2014).

12. *See id.* at 429–30.

13. *Compare Jander*, 910 F.3d at 623 (holding that plaintiffs did plausibly plead disclosure, satisfying the standard), *with Allen*, 967 F.3d at 774 (holding that plaintiffs failed to meet the standard when proposing disclosure was an available alternative).

14. 967 F.3d 767 (8th Cir. 2020).

15. *See Allen*, 967 F.3d at 772, 774 (following *Martone* and criticizing the Second Circuit for finding the opposite); *see also Martone*, 902 F.3d at 527 (concluding that plaintiffs failed to meet *Dudenhoeffer*'s test).

16. 910 F.3d 620 (2d Cir. 2018).

17. *See Jander*, 910 F.3d at 630 (finding that plaintiffs who allege that disclosure is inevitable can plausibly allege that earlier disclosure was the more prudent course of action).

18. *See Dudenhoeffer*, 573 U.S. at 429–30 (instructing the lower courts to consider the plausibility of the disclosure alternative and whether freezing future stock purchases is consistent with existing insider trading laws); *see also* 29 U.S.C. § 1104.

of-prudence is breached by a failure to disclose fraud. Alternatively, like in *Jander* and *Allen*, where discovery of the fraud is inevitable, plaintiffs should be allowed to plausibly plead earlier disclosure is required.

II. THE CIRCUITS CANNOT AGREE WHAT IS PLAUSIBLE UNDER DUDENHOEFFER

At the heart of the circuit's varying applications of the Court's *Dudenhoeffer* decision lies a fundamental disagreement over how courts should analyze the plaintiff's burden to prove that the plan fiduciary was obligated to disclose the fraud. Resolving this disagreement requires analyzing *Dudenhoeffer*'s underlying considerations, identifying where the circuit courts have disagreed, and examining popular arguments defendants in *Dudenhoeffer* cases use.

A. Dudenhoeffer: SCOTUS Tells the Circuit Courts to "work it out amongst themselves"

Three cases define the disagreement.[19] In 2014, the Supreme Court in *Dudenhoeffer*, established a higher pleading requirement for plaintiffs proceeding under ERISA's duty-of-prudence standard, which resulted from the *Twombly*/*Iqbal* paradigm shift.[20] However, the Court entrusted the lower courts with defining "plausible pleading" under ERISA.[21]

In *Dudenhoeffer*, the plaintiffs were participants in an ESOP.[22] The participants sued their employer and various officers under ERISA for allegedly breaching their fiduciary duty by continuing to invest the ESOP in assets — the employer's stock — the defendants knew to be risky and overvalued because the company was engaged in fraud.[23] The plaintiffs alleged the defendants "knew or should have known" of the risk and the inflated value of the investments based on the defendants' access to non-public information.[24] Initially, plaintiffs suggested ESOP planners may have

19. *See generally Dudenhoeffer*, 573 U.S. at 409 (defining the inquiry for the lower courts); *Jander*, 910 F.3d at 620 (finding plaintiffs satisfied the test); *Allen*, 967 F.3d at 767 (finding plaintiffs did not satisfy the test).

20. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (marking a shift from the pleading standard of "merely possible" to "plausible"); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (requiring a pleading be "plausible").

21. *See Dudenhoeffer*, 573 U.S. at 429–30 (articulating the "plausible pleading" test for the lower courts).

22. *Id.* at 413.

23. *Id.* (noting that Fifth Third Bancorp engaged in subprime mortgage lending practices leading up to the 2008 housing market collapse).

24. *Id.*

a duty to divest or diversify the ESOP.[25] However, the Court unequivocally stated that whatever fiduciary obligations ESOP planners may have, the duty cannot plausibly be to violate insider trading laws specifically or securities regulations generally.[26]

Under "the *Dudenhoeffer* standard," plaintiffs may still claim a breach of the duty-of-prudence if plaintiffs allege an alternative action could have been taken, which was consistent with insider trading and securities regulations.[27] This alternative course of action, however, must "plausibly allege an alternative action that [the fiduciary] could have taken that would have been consistent with [insider trading] laws and that a prudent fiduciary in the same circumstances *would* [/could] not have viewed as more likely to harm the fund than to help it."[28] Clearly, the "could" standard is a demanding requirement.[29] The Circuits disagree on whether disclosure of fraudulent behavior fulfills the "could" standard.[30]

B. Other Considerations in Dudenhoeffer Reveal the Attitudes of the Court Towards ERISA

While *Dudenhoeffer* left the disclosure question open, the unanimous opinion written by Justice Breyer definitively foreclosed two arguments, which may hint at the philosophical attitudes of the Supreme Court in ERISA suits generally.[31] First, the Court summarily eliminated the argument that

25. *Id.* (suggesting that the plan fiduciaries should have sold the stock before it decreased in value).

26. *See id.* at 414–25 (noting several of the express exceptions made between general laws of trusts and ESOP fiduciary duties because of the unique nature of ESOP funds).

27. *See id.* at 428–30 (defining plaintiff's options as confined by insider trading laws).

28. *Id.* at 428 (emphasis added) ("[A] plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances *would* not have viewed as more likely to harm the fund than to help it."); *id.* at 429–30 (emphasis added) ("[L]ower courts faced with such claims should also consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position *could* not have concluded that stopping purchases . . . or publicly disclosing . . . would do more harm than good . . . .").

29. *See* Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 626 (2d Cir. 2018) (noting that *Dudenhoeffer*'s "could" language suggests not what an average fiduciary would do, but what any reasonable fiduciary does).

30. *Compare id.* at 630–31 (finding that fraud, which will inevitably be disclosed, ought to be disclosed earlier), *with* Allen v. Wells Fargo & Co., 967 F.3d 767, 773–74 (8th Cir. 2020) (finding that any disclosure of fraud is subject to a reasonable concern that the stock will drop in value).

31. *See Dudenhoeffer*, 573 U.S. at 424–30 (noting the Court rejected a presumption of prudent investing because it was too defense-friendly and violated plan beneficiaries' ability to exercise their rights under ERISA).

defendants were obligated to attempt to "outperform" the market based purely on public information.[32] In the Court's view, individual fiduciaries cannot be expected to be more skilled at valuing a stock than the aggregate knowledge of the entire stock market, which produces public stock evaluations.[33] Simply put, given the same information, a single plan fiduciary cannot be expected to better evaluate a stock than the collective wisdom of the entire market combined, absent special circumstances.[34]

Second, the Court rejected the argument that defendants' investment decisions in ERISA-ESOP, breach of duty-of-prudence cases are entitled to a "presumption of prudence."[35] This holding, while not directly at issue in the current disagreement, nonetheless illuminates the attitudes of the Court. The holding supports the use of general economic principles to support a court's analysis in an ESOP stock-drop case.[36] Moreover, the second foreclosed argument was deemed too "defense-friendly" and violative of the "careful balancing" of ERISA between encouraging ESOP use and enforcing the rights of ESOP beneficiaries.[37] Specifically, in rejecting the "presumption of prudence," the Court noted that granting such a presumption would foreclose virtually all ESOP plan beneficiaries' claims against fiduciaries, which was a step too far in the Court's view.[38]

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32. *See id.* at 426 (spending only three paragraphs rejecting the argument that ESOP fiduciaries were not entitled to rely on public information of stocks' market values and further characterizing the argument as "implausible as a general rule, at least in the absence of special circumstances").

33. *See id.* (citing Halliburton Co. v. Erica P. John Fun, Inc., 573 U.S. 258, 273 (2014)) (relying on what "many investors" think about trying to outperform the market).

34. *See* Hutch Ashoo & Chris Snyder, *Why Trying to 'Beat the Market' Doesn't Work and Is the Wrong Question*, PILLAR WEALTH MGMT. CO., https://pillarwm.com/how-to-outperform-the-stock-market-100-foolproof-guide/ (last visited Sept. 29, 2021) (noting the inherently speculative nature of trying to outperform markets with active day trading).

35. *See Dudenhoeffer*, 573 U.S. at 418–19 (contrasting the loosened standard for diversification for ESOP, which is grounded in the statute, with the presumption of prudence which is not grounded in the statute).

36. *See id.*; *see also, e.g.*, Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 445 (2013) (discussing market theory throughout the opinion). *See generally* David D'Alessandro et al., *Stock Drop Litigation Cases Are On The Rise: Will Your Retirement Plan Be A Target?*, JDSUPRA (July 23, 2020), https://www.jdsupra.com/legalnews/stock-drop-litigation-cases-are-on-the-78743/ (explaining that stock-drop cases are those that result from a sudden drop in the price of an investor's stock).

37. *Dudenhoeffer*, 573 U.S. at 424 (acknowledging that the concern to uphold Congress's intent to encourage ESOP creation was valid, but that the presumption was too defense-friendly to overcome competing concerns of Congress's desire to uphold the rights of plan beneficiaries).

38. *See id.* (finding that the presumption "makes 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" and that the better approach is a context specific analysis of

C. Dudenhoeffer Suggested Just Two Avenues to Recovery for ESOP Plaintiffs

The *Dudenhoeffer* Court set forth a three-part analysis for lower courts to consider, which both the Second and Eighth Circuits later employed.[39] First, courts must remember that a duty-of-prudence, under both ERISA and the common law of trusts, does not require fiduciaries to take illegal action; for example, violating insider trading laws.[40]

Second, where a complaint proposes a plan fiduciary should have stopped purchasing the employer's stock or should have publicly disclosed the fraud, courts should consider what implication this may have on other bodies of law.[41] The Court noted that the U.S. Securities and Exchange Commission ("SEC") had not filed amici or otherwise made its views known.[42] And while the SEC's precise view of the law remains unknown,[43] in 2020, the SEC filed a letter supporting foreclosing plaintiff's arguments in *Jander*, but did not elaborate further.[44] Third, courts must consider whether the complaint plausibly alleges: (1) stopping purchases; or (2) publicly disclosing, in the eyes of any reasonable fiduciary, could not have been viewed as likely to cause more harm than good.[45] At a minimum, if a plan fiduciary could articulate any reasonable hypothetical which would make the proposed action more harmful, plaintiffs cannot recover.[46]

In effect, *Dudenhoeffer* leaves plaintiffs only two avenues to recovery,

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the complaint's allegations).

39. *See id.* at 428–30 (stating the requisite analysis and three important considerations accompanying the analysis); *see also* Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 622, 626 (2d Cir. 2020); Allen v. Wells Fargo & Co., 967 F.3d 767, 772 (8th Cir. 2020).

40. *See Dudenhoeffer*, 573 U.S. at 428–29 (articulating that whatever duty fiduciaries may have, it cannot be to "break the law").

41. *See id.* at 429 (noting that while Congress anticipated a "common law of ERISA" would emerge, courts should not impose upon areas of law that concern the purview of other agencies, like the SEC).

42. *Id.*

43. *See* SEC, https://secsearch.sec.gov/search?utf8=%3F&affiliate=secsearch&query=Dudenhoeffer (last visited Mar. 25, 2021) (searching "Dudenhoeffer" on the SEC's website and locating no formal opinion or comment).

44. *See* Brief for Petitioner at 16–17, Ret. Plans Comm. of IBM v. Jander, No. 20-289 (petition for cert. filed Sept. 1, 2020), 2020 WL 5785563 (noting the SEC's view that defendants should prevail but abstaining from setting forth a proposed rule).

45. *See Dudenhoeffer*, 573 U.S. at 428–29 (implying that, by foreclosing all other plaintiff theories of stock-drop cases, these two avenues are likely plaintiff's last remaining viable arguments).

46. *See* Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 622–23 (2d Cir. 2020) (employing the "more restrictive test" even though the parties disagreed about the proper standard).

absent special circumstances not defined by the current case law.[47] Plaintiffs can either propose that fiduciaries should have: (1) stopped purchasing employer stock; or (2) publicly disclosed the fraud.[48] Thus far, all other avenues to recovery presented to the circuit court in breach of duty-of-prudence cases have been rejected.[49]

D. The Second Circuit, Leader in Finance Cases, Holds the Door Open for Plaintiffs

In 2018, the Second Circuit, in *Jander*, engaged in the *Dudenhoeffer* analysis.[50] In *Jander*, plaintiffs alleged that defendants — IBM's corporate officers and ESOP plan fiduciaries — knew or should have known that IBM was overvaluing its microelectronics department through *creative* accounting.[51] Employing the *Dudenhoeffer* analysis, plaintiffs proposed two alternative courses of action prudent IBM fiduciaries should have taken: (1) stop investing in IBM stock; and/or (2) publicly disclose the overvaluation problem.[52] To bolster their public disclosure argument, Jander further alleged that because IBM intended to sell the microelectronics department soon, discovery of the overvaluation was inevitable and should have been disclosed earlier to mitigate harm to the stock.[53] On appeal, Jander dropped the halting IBM stock purchases argument and limited the appeal to the proposed alternative of disclosure.[54]

The *Jander* court expanded on the analysis *Dudenhoeffer* left open.[55]

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47. *See Dudenhoeffer*, 573 U.S. at 426 (foreclosing plaintiff's proposed alternatives, but leaving open possible exceptions if "special circumstances" are present).

48. *See id.* at 425–28 (implying these two avenues are the only likely arguments available to plaintiffs, given that all other ones presented in the circuit courts have been expressly rejected).

49. *See, e.g.*, Amgen Inc. v. Harris, 577 U.S. 308 (2016) (per curiam); *see also* Laffen v. Hewlett-Packard Co., 721 F. App'x 642 (9th Cir. 2018).

50. *Jander*, 910 F.3d at 622–23.

51. *Id.* at 623 (suggesting that this overvaluation was evidenced by their willingness to offload the microelectronics department by paying GlobalFoundries to take the microelectronics department from IBM).

52. *Id.*

53. *See id.* at 629 (bolstering this claim by noting that if the fraud were discovered later, the protracted nature of the fraud would undermine faith in future IBM pronouncements).

54. *Id.* at 628–29 (citing economic analyses that suggest protracted fraud incurs a reputational impact that fraud over shorter periods of time and/or self-disclosed does not).

55. *See id.* at 628 (acknowledging the conflict between the "would" burden and the "could" burden, allowing plaintiffs to rely on economic theories to establish plausible alternatives, and rejecting defendants' arguments that *Dudenhoeffer* cases invoke the heightened pleading standard for a fraud claim).

First, *Jander* highlighted an important balance acknowledged by Congress and the Supreme Court between the fair enforcement of the rights of ESOP participants and beneficiaries against the encouragement of the creation and use of ESOPs.[56] Second, *Jander* highlighted a tension between the demanding "could not have" test and the implied desire of the *Dudenhoeffer* court to allow plaintiffs to plead their claims.[57] Third, *Jander* noted that the heightened pleading standard of Federal Rule of Civil Procedure 9(b) is only activated when a plaintiff either directly alleges fraud as a cause of action or invokes the fraud exception under ERISA to the statute of limitations.[58]

i. *Jander Followed Dudenhoeffer's Balancing Consideration*

Jander acknowledged the balance between participant rights and ESOP encouragement.[59] *Jander* highlights precisely what the lower courts have struggled with post-*Dudenhoeffer*.[60] Saddling fiduciaries with an uncomfortable duty to disclose fraud based on insider information could disincentivize the creation of ESOPs, which Congress explicitly sought to encourage.[61] Contrarily, labeling disclosure as an "implausible" proposed alternative action could foreclose plaintiffs from ever enforcing their rights as participants and beneficiaries of ESOPs.[62] The tension between these considerations is foundational to the post-*Dudenhoeffer* divergence.[63] The Fifth and Eighth Circuits find that the balance between beneficiary rights and ESOP creation would be violated because *Jander*'s ruling would discourage ESOP creation because of liability risks.[64] Contrarily, *Jander* argues that a

56. *See id.* at 625–26 (noting that the presumption of prudence struck down in *Dudenhoeffer* was a poor means of addressing concerns that frivolous suits would discourage the creation of ESOPs).

57. *See id.* at 627–28 (explaining the "could not" formulation is a more demanding standard).

58. *See id.* at 632 (noting that the heightened pleading standard, which exists to protect defendants from the stigma of being accused of fraud, is not applicable in stock-drop cases where plaintiffs are not alleging fraud but are alleging imprudent investing, which has no such stigma).

59. *See id.* at 625–26 (explaining the requisite balancing interests of Congress).

60. *See* Allen v. Wells Fargo & Co., 967 F.3d 767, 774 (8th Cir. 2020) (disagreeing with *Jander* without distinguishing the facts but criticizing the use of "general economic principles," which could apply in every ESOP stock-drop case).

61. *See* 29 U.S.C. § 1001 (listing the findings that led Congress to enact ERISA).

62. *See* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 427–29 (2014) (foreclosing all of plaintiffs' proposed alternatives except disclosure, and perhaps, the halting of future stock purchases).

63. *Cf. Jander*, 910 F.3d at 626 (arguing that a fact-specific inquiry best balances the encouragement of ESOP creation and use, while not making all plaintiffs' recovery impossible).

64. *See Allen*, 967 F.3d at 767; Martone v. Robb, 902 F.3d 519 (5th Cir. 2018).

sufficiently context-specific approach quells these concerns while not foreclosing all plaintiffs from recovering.[65]

ii. Jander Highlights the Need for Clarification of Which Dudenhoeffer Standard Should Prevail

The parties in *Jander* "fundamentally" disputed the standard for a plaintiff's pleading in a duty-of-prudence case under ERISA.[66] The dispute arose from a discrepancy in Justice Breyer's original opinion in *Dudenhoeffer*.[67] Early in the opinion, the test for a plaintiff's plausible pleading is stated as a proposed alternative action that a fiduciary "would not" have viewed as more likely to harm the fund than benefit it.[68] This formulation suggests a test of what the average fiduciary would do.[69] Later in *Dudenhoeffer*, the Court rephrases the test as requiring plaintiffs to plead an alternative course of action that a reasonably prudent fiduciary "could not" have viewed as more likely to harm the fund than to help it.[70] This formulation suggests a stricter test similar to rational basis review.[71] Where a plaintiff in a rational basis test has to prove there is no rational basis for government action, *Dudenhoeffer* plaintiffs have to prove no prudent fiduciary would find the proposed alternative action objectionable.

The *Jander* court declined to decipher which test was the "correct" test and found that plaintiffs even satisfied the stricter "could not" test.[72] A likely factor in the *Jander* court's decision to ignore the "would not" test was the Supreme Court's reversal of a Ninth Circuit case, *Amgen Inc. v. Harris*,[73] in which the Court remanded the case with instructions to engage in *Dudnehoeffer*'s analysis, citing the "could not" test.[74] When remanding *Amgen*, the Supreme Court cited the portion of *Dudenhoeffer* which used the

65. *See Jander*, 910 F.3d at 626.

66. *See id.* at 625–26 (noting that *Dudenhoeffer* considered the "correct standard" to be the one that filtered out frivolous claims, which defendants argued was a stringent "any prudent fiduciary standard").

67. *Compare Dudenhoeffer*, 573 U.S. at 428 (suggesting a standard invoking an average fiduciary), *with id.* at 430 (suggesting a standard invoking whether any reasonable fiduciary would find disclosure more harmful).

68. *Id.* at 426–27.

69. *See Jander*, 910 F.3d at 626.

70. *Dudenhoeffer*, 573 U.S. at 429–30.

71. *See generally* Lochner v. New York, 198 U.S. 45 (Holmes, J., dissenting) (establishing the rational basis test is satisfied if any single rational basis could exist for Congressional action).

72. *See Jander*, 910 F.3d at 631.

73. 577 U.S. 308 (2016) (per curiam).

74. *Id.* at 309–11; *see Jander*, 910 F.3d at 627–28 (citing *Amgen* at length before ultimately finding plaintiffs satisfied both tests).

"could not" language, suggesting that test was the "correct" test.[75]

iii. Jander Rejects Defendants' Attempts to Impose FRCP 9(b) on Plaintiffs' Pleadings

Finally, and most definitively, the *Jander* court summarily rejected a common argument by defendants in stock-drop cases, that FRCP 9(b) applies the heightened pleading standard to these cases.[76] Although *Dudenhoeffer* cases allege a fiduciary had knowledge of fraud, the allegations are of fiduciary imprudence; and thus, do not merit the heightened pleading standard under FRCP 9(b).[77] An allegation of imprudent investing does not carry the stigma of fraud — one of the rationales behind 9(b)'s heightened pleading requirement.[78] The *Jander* court cabined 9(b)'s reach in duty-of-prudence cases to those using the fraud exception to ERISA's statute of limitations.[79]

E. The Eighth Circuit Finds Plaintiffs' Arguments Unconvincing Without Engaging the Full Dudenhoeffer Analysis

In 2020, the Eighth Circuit decided *Allen v. Wells Fargo & Co.*,[80] where plaintiffs sued Wells Fargo and plan fiduciaries for breach of ERISA's duty-of-prudence.[81] Plaintiffs claimed that Wells Fargo engaged in aggressive sales quotas, which necessarily pressured employees to open over 3.5 million unauthorized accounts using existing customers' confidential information.[82] Plaintiffs further claimed that disclosure of the fraud was inevitable because federal banking regulators had been investigating the matter for several years.[83] Plaintiffs' claims stem from the resulting stock-drop.[84]

The *Allen* court partially employed the three-part analysis set forth in *Dudenhoeffer* and followed by *Jander*.[85] The *Allen* court quickly decided to

75. *See Amgen*, 577 U.S. at 311 (citing *Dudenhoeffer*'s "could not" language but not explicitly resolving its apparent contradiction).

76. *See Jander*, 910 F.3d at 632 (noting the stigma rationale applicable to a fraud accusation is not applicable to a breach-of-duty accusation).

77. *Id.*

78. FED. R. CIV. P. 9(b).

79. *See Jander*, 910 F.3d at 632 (noting the court has also refrained from using 9(b)'s heightened standard in other ERISA cases); *see also* 29 U.S.C. § 1113.

80. 967 F.3d 767 (8th Cir. 2020).

81. *See id.* at 770–71.

82. *Id.*

83. *Id.* at 771.

84. *Id.* (noting plaintiffs' significant losses in the wake of the scandal).

85. *See* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 428–30 (2014) (outlining the necessary considerations for stock-drop cases); *see also Allen*, 967 F.3d at

use the "could not" standard and ultimately found plaintiffs' breach of duty-of-prudence claim implausible.[86] While the court noted that the relevant inquiry is a fact-intensive one, it saw the "could not" language as too demanding a test for the *Allen* plaintiffs to overcome.[87] The inquiry, the court noted, is also temporally restrained, concerned only with the facts known to the fiduciary at the time relevant to the cause of action.[88]

The *Allen* court rejected the plaintiffs' duty-of-prudence claim by embracing the Fifth Circuit's view of similar cases.[89] Additionally, it expressed skepticism of *Jander*'s reliance on "general economic principles."[90] The opinion highlights the divide between the two circuits' interpretations of *Dudenhoeffer*.[91]

The *Allen* plaintiffs attempted to distinguish their case from the plaintiffs in the Fifth Circuit by contending that their "duty to disclose" argument was supported by the "fact" that discovery of the fraud was inevitable; an argument the court noted Fifth Circuit plaintiffs made in *Martone v. Robb*.[92] Under the argument, when fraud will inevitably be discovered and disclosed, a reasonably prudent fiduciary will opt to disclose earlier rather than later, because it is a "general economic principle" that fraud concealed over time is more harmful than fraud that is disclosed quickly.[93] The *Allen* court summarized the *Martone* decision as rejecting this logic because: (1) if the principle truly was "generally known" it would be applicable in virtually all ERISA fraud cases; and (2) it contradicts the Fifth Circuit's finding in *Whitley v. BP, P.L.C.*[94] that earlier disclosure of fraud could have been

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772–73 (using the *Dudenhoeffer* inquiry).

86. *See Allen*, 967 F.3d at 774–75 (finding that even a short-term stock-drop satisfied defendant's burden).

87. *See id.* (finding that plaintiffs' argument had merit, but that the argument was not so convincing that the court would find that no "prudent fiduciary" would disagree).

88. *Id.* at 773 (specifying that only the facts known to the fiduciary at the time of the investing decision can impose liability).

89. *Id.* (citing Whitley v. BP, P.L.C., 838 F.3d 523, 529 (5th Cir. 2016); Martone v. Robb, 902 F.3d 519 (5th Cir. 2018)).

90. *See id.* at 773–74 (expressing doubt on the theory that fraud inflicts more harm on stock value the longer the fraud goes on).

91. *See id.* at 774 (criticizing *Jander* and putting forth its own view of the *Dudenhoeffer* inquiry).

92. *Id.* at 773–74 (pointing to the ongoing investigation into the matter by government regulators). *See generally* Martone v. Robb, 902 F.3d 519 (5th Cir. 2018) (finding that even if inevitable discovery were sufficiently shown, plaintiffs failed to meet the burden of the "could not" test).

93. *Allen*, 967 F.3d at 773 (citing Martone v. Robb, 902 F.3d 519 (5th Cir. 2018)).

94. 838 F.3d 523 (5th Cir. 2018).

considered more harmful by a reasonably prudent fiduciary.[95]

The *Allen* court explicitly noted that *Jander* is the only case in which the *Dudenhoeffer* standard was satisfied by a plaintiff with a disclosure of fraud argument.[96] The *Allen* court rejected *Jander* and called the "general economic principle" too generic to be beneficial to plaintiffs and further opined that an unusual disclosure made during a regulatory investigation could do more harm than good.[97]

F. Defendants Rely on Pegram v. Herdrich, Seeking to Foreclose Plaintiffs from Proceeding to Discovery

In 2000, the Supreme Court decided *Pegram v. Herdrich*,[98] which involved an unusual set of facts that *Dudenhoeffer* defendants have since used to argue that plaintiffs are barred from recovery.[99] At face value, *Pegram*'s holding seems to support such an outcome.[100]

Herdrich was an enrollee in a health maintenance organization ("HMO") where patients acquired pre-paid medical services.[101] Pegram, a physician, examined Herdrich for abdominal pain and, despite alarming symptoms, decided Herdrich should wait eight days for an appointment at an HMO facility with Pegram's staff fifty miles away.[102] Herdrich's appendix burst before the eight days and he suffered other complications.[103]

Herdrich made an ERISA (non-ESOP) claim against Pegram, who was a fiduciary, because the medical services were pre-paid.[104] The Court was

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95. *Allen*, 967 F.3d at 773–74.

96. *Id.* at 774 (calling *Jander* the "sole instance" after recapping two sister circuits' *Dudenhoeffer* cases finding for defendants).

97. *See id.* at 774–75 (noting the possibility of a greater stock drop if the disclosure were made outside the normal reporting regime).

98. 530 U.S. 211 (2000).

99. *See* Brief for Petitioner, *supra* note 44, at 30 (summarizing *Pegram*'s holding: "ERISA requires that 'the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions.' Consequently '[i]n every case charging breach of ERISA fiduciary duty' the 'threshold question' is whether the defendant 'was acting as a fiduciary . . . when taking the action subject to complaint.' If not, then ERISA liability cannot attach.").

100. *See Pegram*, 530 U.S. at 231 (asserting that plaintiffs cannot hold plan fiduciaries liable for actions taken in a non-fiduciary capacity that are not for the sole benefit of plan beneficiaries).

101. *Id.* at 215.

102. *Id.*

103. *Id.*

104. *See ERISA: Court Rules Physician HMO Has Fiduciary Duty*, CAL. HEALTHLINE (Apr. 23, 1999), https://californiahealthline.org/morning-breakout/erisa-court-rules-physician-hmo-has-fiduciary-duty/.

ultimately unwilling to find that medical decisions made by Pegram while treating Herdrich made Pegram liable for breaching a fiduciary duty.[105] Importantly, the Court found that Pegram could only be liable for actions taken in his capacity as a fiduciary not as a medical professional.[106] In other words, the two roles were separable.

III. JANDER IS NOT IMPERVIOUS BUT IS MORE FAITHFUL TO DUDENHOEFFER'S STANDARDS AND GOALS

Only the Second, Fifth, and Eighth Circuits have published *Dudenhoeffer* opinions.[107] The disagreement results primarily from a single sentence in the Court's opinion in *Dudenhoeffer*: "[L]ower courts faced with such claims should also consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases . . . or publicly disclosing negative information would do more harm than good to the fund . . . ."[108]

The majority circuits (the Fifth and Eighth) have concluded that prudent fiduciaries cannot plausibly view disclosing their company's fraudulent behavior to be more beneficial to the fund than harmful.[109] The Second Circuit has taken the opposite position.[110] The majority circuits have extended *Dudenhoeffer* beyond the practical realities of long-term investing by analyzing short-term harm without analyzing long-term harm.[111] Also, the majority circuits do precisely what Justice Breyer warned against in

105. *See Pegram*, 530 U.S. at 222–31 (noting the Court's doubts that Congress intended medical decisions to be considered fiduciary decisions).

106. *See id.* at 231–37.

107. Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620 (2d Cir. 2018); Martone v. Robb, 902 F.3d 519 (5th Cir. 2018); Allen v. Wells Fargo & Co., 967 F.3d 767 (8th Cir. 2020).

108. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 429–30 (2014) (articulating the test for the first time); *see also* Amgen Inc. v. Harris, 577 U.S. 508 (2016) (per curiam) (remanding a Ninth Circuit case with instructions to follow the *Dudenhoeffer* test).

109. *See, e.g.*, *Martone*, 902 F.3d at 527 (finding that disclosure was not "so clearly beneficial" to be availing for plaintiffs' pleading).

110. *See Jander*, 910 F.3d at 631 (noting that while the *Dudenhoeffer* standard is a demanding one, at the pleading stage, with all inferences drawn in plaintiff's favor, general economic principles can be accepted, and if needed, rejected at a later stage of the suit).

111. *Cf.* Richard Best, *3 Reasons Not to Sell After a Market Downturn*, INVESTOPEDIA, https://www.investopedia.com/articles/investing/021116/3-reasons-not-sell-after-market-downturn.asp (last updated Aug. 30, 2021) (arguing that large market dips, even crashes like 2008 and Brexit reactions, should not affect long-term portfolio strategies because it is not "part of the plan").

Dudenhoeffer; they foreclose all avenues to recovery for plaintiffs.[112] Last, the majority circuits violate traditional notions of the fiduciary duty to avoid conflicts of interest and duties to serve shareholders and other stakeholders.[113]

A. The Harm Inquiry of a Retirement Fund Cannot Be Confined to a Short-Term Stock Drop

The Eighth Circuit, relying on the Fifth's decision in *Martone*, inappropriately cabins its analysis of harm into a short-term stock drop inquiry.[114] When courts answer *Dudenhoeffer*'s pivotal inquiry, "could a reasonably prudent fiduciary have viewed the proposed alternative as more harmful," the majority circuits are satisfied by the mere possibility of a reactionary drop in stock prices following disclosure.[115] This shallow analysis is: (1) too defense-friendly, like the presumption of prudence in *Dudenhoeffer*; and (2) particularly inappropriate because the funds at issue are retirement funds which are inherently focused on long-term returns.[116]

The Supreme Court, in *Dudenhoeffer*, rejected a defense-friendly presumption of prudent decision-making adopted by every circuit court to consider the presumption and noted that the defense-friendly, judicial creation inappropriately tipped the balance struck by Congress between the interests of ESOP participants and the encouragement of ESOP creation.[117] A shallow inquiry of the pivotal question set forth in *Dudenhoeffer*, which

112. *See Dudenhoeffer*, 573 U.S. at 424–25 (acknowledging the competing concerns of Congress but finding that the presumption of prudence would make it impossible for plaintiffs to plead even meritorious cases).

113. *See* Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1963–67 (2018) (describing a lack of academic agreement on whether shareholder theory is a norm or law but maintaining that shareholder theory is a staple of fiduciary duties in corporate law).

114. *See* Allen v. Wells Fargo & Co., 967 F.3d 767, 774–75 (8th Cir. 2020) (accepting, presumably, any drop in value for any length of time as sufficient).

115. *See id.* at 775 (relying on *Martone* to accept alleged harm without analyzing the length or extent of probable harm).

116. *See* Kent Greenfield, *The Rise of the Working Class Shareholder: An Application, An Extension, and a Challenge*, 99 B.U. L. REV. 303, 306 (2019) (noting that unlike some short-term focused shareholders, retirement funds are the "prototypical long-term" funds where beneficiaries seek increased value over time); U.S. DEP'T OF LABOR, EMP. BENEFITS SEC. ADMIN., RETIREMENT PLANS AND ERISA 6, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs (last visited Sept. 29, 2021) (noting that at the federal level, plan participants are not entitled to receive benefits until they are sixty-five years old, have invested in the plan for ten years, or are no longer employed by the company).

117. *See Dudenhoeffer*, 573 U.S. at 412, 425 ("weeding out" the "plausible sheep from the meritless goats" was a valid concern, but the presumption did not serve this concern in a way that protected the "plausible sheep").

effectively forecloses plaintiffs' recoveries, is similarly too defense-friendly and tips the balance against ESOP participants enforcing their rights.[118]

The shallow inquiry suffers another deficiency aside from failing *Dudenhoeffer*'s balancing consideration.[119] Given that the funds at issue are retirement funds, an analysis of harm that is unconcerned with the long-term well-being of the fund is inappropriate.[120] The short-term stock drop consideration may be one factor in the analysis, but the reasonably prudent fiduciary analysis cannot be readily separated from the fact that these cases ask what a prudent fiduciary of a retirement fund would do.[121] Whereas a day trader or general shareholder in a company may devalue a stock based on its short-term value, an ESOP beneficiary valuing the stock will be more concerned with its long-term value.[122]

If immediate disclosure of fraud would halve the value of a fund in one month but the fund would recover in one year, no reasonable fiduciary could argue that delayed disclosure was a prudent decision for a retirement fund.[123] Considerations of long-term value are entirely missing from the Eighth Circuit's analysis.[124]

118. *See id.* at 424 (rejecting a presumption of prudence, in part, because it forecloses even the most meritorious claims by plaintiffs).

119. *See id.* (quoting Conkright v. Frommert, 559 U.S. 506, 517 (2010)) (describing the balance as between the "fair and prompt enforcement of" beneficiaries' rights and the creation of ESOPs).

120. *See* Greenfield, *supra* note 116, at 306.

121. *See id.* (noting that "any effort by companies to prioritize short-term returns at the expense of the long-term health of the company will be opposed by employee investors" of pensions funds).

122. *Compare* Justin Kuepper, *Day Trading: An Introduction*, INVESTOPEDIA, https://www.investopedia.com/articles/trading/05/011705.asp (last updated Sept. 8, 2021) (noting that day traders profit from small changes in the market over short time scales), *with* Akhilesh Ganti, *Employee Stock Ownership Plan (ESOP)*, INVESTOPEDIA, https://www.investopedia.com/terms/e/esop.asp (last updated Apr. 8, 2021) (noting that an ESOP's value to beneficiaries stems from their ability to "cash out" upon retirement or quitting their existing job because the stock cannot be kept by the employee after they are no longer working).

123. *See* Victoria Schwartz, *Disclosing Corporate Disclosure Policies*, 40 FLA. ST. U. L. REV. 487, 493 (2013) (noting that empirical economic studies show investors value disclosure requirements because relevant information gives investors confidence in their decisions and protects the "believability of the flow of information" and that lack of disclosure creates an assumption of the worst).

124. *See* Allen v. Wells Fargo & Co., 967 F.3d 767, 774–75 (8th Cir. 2020) (deciding, briefly, that a prudent fiduciary could find earlier disclosure "more harmful," but not placing the harm in any temporal context).

i. Allen Rejects General Economic Principles by Inaccurately Characterizing Those Principles as Too "Generic"

One criticism of the "stock-drop" plaintiffs' arguments is a reliance upon the "general economic principle" that fraud is more harmful over time.[125] However, any concerns of excessively generic assertions are quelled by analyzing whether "inevitable disclosure" is plausibly pleaded.[126] The majority circuits are correct that generic claims of "inevitable disclosure" should not be availing to plaintiffs.[127] But where inevitable disclosure can be specifically alleged, as is often the case, "general economic principles" should be sufficient.[128] Further, the Eighth Circuit's concern with plaintiffs' claims being "too generic" would be more properly aimed at later stages of litigation, as opposed to the pleading stage where plaintiffs need only allege facts that make their right to recovery "plausible," not "likely to prevail."[129] Relatedly, whether the "general economic theories" are persuasive is better left to a jury, as a question of fact, rather than a judge, as a question of law.[130]

If inevitable discovery can be specifically alleged, plaintiffs' cases are more compelling.[131] Defendants' arguments that plaintiffs' allegations are "too generic" are more properly aimed at the "inevitable discovery" allegation than the "fraud over time" assumption.[132] The argument that fraud, concealed over time, does more harm to the company than fraud, self-disclosed after a brief amount of time is well supported.[133]

However, an inquiry into whether inevitable disclosure has been properly alleged would comport with the "context specific analysis" mandated by the

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125. *See id.* at 773–74 (pointing to similar arguments made in *Martone*).

126. *See id.* at 774–75 (criticizing *Jander*'s inevitability decisions by noting that the sale of the company was only "likely," meaning it was not inevitable).

127. *See id.* at 774 (noting that generic inevitable disclosure claims satisfying the *Dudenhoeffer* pleading standard have only been successful in *Jander*).

128. *See id.* at 771 (pleading that Wells Fargo was already under investigation by a government regulator because indicators of fraud had been detected).

129. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (noting that when accepting pleadings as true, the plaintiff need only state a claim that is "plausible on its face," not one that is probable).

130. *See* Pullman-Standard v. Swint, 456 U.S. 273, 287–88 (1982) (noting the differences between questions of law and questions of fact).

131. *See* Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 629–30 (2d Cir. 2018) (accepting plaintiff's allegations that disclosure of the fraud was inevitable and that exposure of longer-term fraud would undermine a company's credibility).

132. *See generally* Schwartz, *supra* note 123 (explaining that shareholders value negative information because its disclosure makes the company more believable).

133. *See* Urska Velikonja, *The Cost of Securities Fraud*, 54 WM. & MARY L. REV. 1887, 1903–06 (2013) (noting the different kinds of harm that a fraudulent disclosure to a regulator makes, which a self-reported disclosure, by extension, would not).

Dudenhoeffer Court.[134] Whether a company's fraud would inevitably have been discovered requires a case-by-case analysis.[135] The *Allen* court's accusation that *Jander*'s analysis is too generalized is misplaced.[136] By rejecting "general economic principles" and foreclosing those principles as a matter of law, the majority circuits inhibit, rather than promote, case-by-case analysis.

B. The Eighth Circuit Effectively Adopts a New Presumption of Prudence

In *Dudenhoeffer*, the Court rejected a judicially created "presumption of prudence" because it barred plaintiffs' recovery unless the company was on the verge of collapse.[137] The Eighth Circuit's rejection of the proposed alternative action of disclosing fraud, even in the face of inevitable discovery, is a similar de facto bar to recovery.[138]

Thus far, every proposed alternative action has been rejected as implausible.[139] Selling the stock violates insider trading laws.[140] Diversifying the fund imposes a duty explicitly precluded by the statute's plain language.[141] Freezing future purchases of the employer's stock has not been presented to a circuit court post-*Dudenhoeffer*, but likely violates insider trading principles and would signal to the public that something was wrong with the fund.[142] This likely leaves only one avenue open for plaintiffs to recover: a duty to disclose fraud.

The Second Circuit acknowledged the proposed alternative inquiry is fact-

134. *See* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 425 (2014) (rejecting the presumption of prudent investing by ESOP fiduciaries because it foreclosed broad classes of plaintiffs instead of evaluating individual cases).

135. *See id.*

136. *See* Allen v. Wells Fargo & Co., 967 F.3d 767, 774 (2d Cir. 2020) (suggesting *Jander*'s analysis is applicable in every stock-drop case).

137. *Dudenhoeffer*, 573 U.S. at 425.

138. *See Allen*, 967 F.3d at 773 (noting that *Dudenhoeffer*'s standard was a demanding one yet foreclosing on plaintiffs' primary argument in circuit courts to date).

139. *See id.* (foreclosing disclosure as an option that no prudent fiduciary would forego).

140. *See Dudenhoeffer*, 573 U.S. at 423 (rejecting any proposed alternatives that require a fiduciary to break insider trading laws). *See generally* Andrew W. Marrero, *Insider Trading: Inside the Quagmire*, 17 BERKELEY BUS. L.J. 234 (2020) (noting the complex and confusing nature of insider trading laws and the statute's lack of clarity).

141. *See* 29 U.S.C. § 1104(a)(2) (exempting fiduciaries from the diversification requirements of ERISA because it defeats the inherent purpose of ESOPs).

142. *See Allen*, 967 F.3d at 775 (arguing that an action which "spooks the market" could reasonably be anticipated by a fiduciary to cause an outsized stock drop).

specific.[143] This language is noticeably absent from the Eighth Circuit's rationale.[144] Additionally, the brief and summary dismissal of plaintiffs' suggestion that earlier disclosure of fraud is better for the health of the fund, suggests a de facto foreclosure on plaintiffs pleading any alternative course of action in a duty-of-prudence ERISA claim.[145]

If the Eighth Circuit's interpretation were to prevail, plaintiffs in these cases would be forced to use the "absent special circumstances" caveats the courts have attached to each of the foreclosed alternative actions.[146] This regime is the new presumption of prudence.[147] If plaintiffs are not entitled to recovery, absent special circumstances, this has the same effect as the presumption of prudence.[148] In essence, the majority Circuits presume that fiduciaries have no duty to disclose fraud because they reject economic theories that suggest fraud causes increased harm over time.[149] In this way, should the Supreme Court reject *Jander*'s interpretation of the *Dudenhoeffer* test, it would effectively reject the part of *Dudenhoeffer* that seeks to preserve plan beneficiaries' abilities to assert their rights.[150]

C. The Eighth Circuit Allows Fiduciary Behavior Which Contradicts Traditional Notions of the Fiduciary Duty

The fiduciary's duties are plainly outlined in 29 U.S.C. § 1104(a)(1)(A).[151] The plan fiduciary may only act for the benefit of "participants" and "beneficiaries" of the ESOP.[152] Neither definition includes the interests of

143. *See* Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 626 (2d Cir. 2018) (examining the Court's "context-sensitive scrutiny" inquiry set forth in *Dudenhoeffer*).

144. *See Allen*, 967 F.3d at 774–77 (lacking a fact-specific inquiry).

145. *See id.* at 774–75 (finding plaintiffs' claims based on general economic principles inadequate even with all inferences drawn in plaintiffs' favor).

146. *See* Fifth Third Bancorp v. Duddenhoeffer, 573 U.S. 409, 426 (2014) (leaving open the possibility for plaintiffs to allege public information forms a basis to propose the fiduciary should have recognized the stock was overvalued).

147. *See Allen*, 967 F.3d at 773–74 (rejecting the economic theories that fraud is more harmful over time because if they truly were "generally known" then the Fifth Circuit would not have found for defendants in *Whitley*).

148. *See id.* (suggesting that unless new, more convincing data supports the "general economic principles," they will be unavailing to plaintiffs in any case brought in this circuit).

149. *See id.* at 773–75 (explaining and rejecting general economic principles because they would apply in "virtually every fraud case" and this was inherently impossible because *Martone* found the principles inapplicable).

150. *See Dudenhoeffer*, 573 U.S. at 429–30 (stating the test for a claim of the breach of the duty of prudence); *see also id.* at 424 (quoting Conkright v. Frommert, 559 U.S. 506, 517 (2010)) (noting concern for upholding beneficiaries' rights).

151. 29 U.S.C. § 1104(a)(1)(A).

152. *Id.*

the company or the employer.[153] This accords with ESOPs being a form of cooperative where employees are given additional incentives to better the company.[154] Several interests are served by disclosing fraud, including correction of inflated stock price, informing investors of facts pertinent to their assets, and the potential benefit of reducing harm over the long-term.[155] Thus, plaintiffs operating under this theory of the case have, at minimum, met the low standards of mere "plausible pleading."[156]

Similarly, traditional notions of shareholder theory, which are deeply embedded in U.S. economic policies, including ERISA, run contrary to the Eighth Circuit's reasoning.[157] Shareholder theory is the basic notion that business' sole obligations are to maximize shareholder value.[158] Thus, allowing ERISA fiduciaries to avoid disclosing fraud, considering general economic principles, violates shareholder theory and ERISA's explicit commands.[159]

i. Defendants in Stock-Drop Cases Overextend Pegram

Defendants in *Dudenhoeffer* cases assert that a plan fiduciary who is also a corporate officer cannot be held personally liable for actions taken in their corporate capacity that are not for the exclusive benefit of ESOP

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153. *Id.* § 1002(7)–(8).

154. *See* Ganti, *supra* note 122 (listing the incentive structure of ESOPs).

155. *See* Jared A. Funk, *What's the Price Tag?: Measuring the Economic Impacts of Fraud*, FRAUD MAG. (May/June 2015), https://www.fraud-magazine.com/article.aspx?id=4294988056 (listing factors that exacerbate the harms of fraud, including the possible increase in harm over time, the harm of a cover-up, the costs of an investigation, and how many higherups are involved). *But see* Rebekah Susan Mammen & Vinisha Verghese Edakalathur, *Forensic Accounting: Impact of Fraud on Stock Price*, 8 INT'L J. OF BUS. & MGMT. INVENTION 89, 91–95 (2019) (analyzing stock prices of three companies after fraud announcements and finding no price change).

156. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (establishing that pleadings cannot be hypothetically possible, but rather must be minimally plausible).

157. *See* Greenfield, *supra* note 116, at 303–04 (detailing the "enduring" debate between shareholder theory and stakeholder theory and recent legislation incorporating the former).

158. *See* Peter Landau, *Stakeholder vs. Shareholder: How They're Different & Why It Matters*, PROJECT MANAGER (Jan. 31, 2019), https://www.projectmanager.com/blog/stakeholder-vs-shareholder (defining "shareholder" and comparing and contrasting with the related term "stakeholder"). *But see Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans (announcing a shift from focus on shareholders to a focus on stakeholders).

159. *See* Funk, s*upra* note 155 (detailing the harms shareholders incur in the event of fraud); 29 U.S.C. 1104(a)(1)(A) (mandating a lone duty to beneficiaries).

participants/beneficiaries.[160] Relying on *Pegram*, defendants make an improper assumption that ESOP beneficiaries' interests are severable from what is beneficial for shareholders generally.[161] Further, these arguments overextend the portion of ERISA that allows for these dual roles while ignoring the portion of ERISA which, in conjunction with the common law of trusts, directs fiduciaries to avoid conflicts of interests.[162]

But more importantly, *Pegram* is readily distinguishable from the current circuit disagreement.[163] The Court in *Pegram* was hesitant to hold a physician liable for medical decisions which did not align with plaintiff's financial interests.[164] Those specific and valid hesitations are not applicable in traditional *Dudenhoeffer* cases.

D. Defendants Rely on Two Primary Arguments

Several counterarguments face the Second Circuit's reasoning. Some of these counterarguments have merit, while others stretch the bounds of logical consistency.[165] Two prevailing arguments dominate the case law.[166]

i. Allowing Plaintiffs to Proceed Based on Economic Generalities Are Applicable to Any Stock-Drop Case

The Eighth Circuit criticizes the Second Circuit as allowing plaintiffs to proceed based on an allegation that any plaintiff in any *Dudenhoeffer* case could make.[167] This criticism is misplaced.

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160. *See* Brief for Petitioner, *supra* note 44, at 32–35 (arguing that the *Jander* plaintiffs are seeking to hold defendants liable for not disclosing the overvaluation in quarterly SEC filings, which combined with the argument that defendants would spook the market in a disclosure outside of normal filings should result in a judgement for IBM).

161. *See* Landau, *supra* note 158 (defining "shareholder" and "stakeholder" in such a way that ESOP beneficiaries can be properly categorized as both).

162. *See generally* Fred Reish, *The Fiduciary Rule: What's Next (Part 4)?: Interesting Angles on the DOL's Fiduciary Rule #88*, NAT'L L. REV. (Apr. 25, 2018), https://www.natlawreview.com/article/fiduciary-rule-what-s-next-part-4-interesting-angles-dol-s-fiduciary-rule-88 (noting the duty to avoid conflicts of interest).

163. *See generally* Pegram v. Herdrich, 530 U.S. 211 (2000) (detailing a situation in which a physician would be held liable for medical decisions that were antithetical to the beneficiary's pecuniary interest).

164. *See id.* at 218–22 (noting the dangers of physicians making health decisions while considering financial interests).

165. *Compare* Brief for Petitioner, *supra* note 44, at 2 (stating Jander's argument as "[i]f 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"), *with id.* at 14 (noting that under *Pegram*, plan fiduciaries have no duty to beneficiaries when acting in their corporate capacity).

166. *See id.* at 25–32 (presenting two arguments against *Jander*).

167. *See* Allen v. Wells Fargo & Co., 967 F.3d 767, 774 (8th Cir. 2020) (suggesting

As an initial matter, reliance on a "general economic theory" is likely unavailing for plaintiffs if they cannot specifically allege facts necessary to show inevitable disclosure.[168] If disclosure appears to have been concealable, then the "general economic principle" that fraud is more harmful over time is irrelevant.[169] Specific facts are required in plaintiffs' pleadings which tend to show the fraud would inevitability have been disclosed.[170]

Moreover, the general economic principles plaintiffs assert are sound.[171] When fraud is uncovered, as opposed to self-reported, investors distrust the company in the future and are less likely to invest in it.[172] The *Jander* plaintiffs supported this "general economic principle" with various peer-reviewed economic analyses.[173] Fiduciaries opting not to disclose known fraud are likely calculating the harms to the company and its short-term investors, not the harms to ESOP beneficiaries saving for retirement.[174]

ii. The Second Circuit's Precedent Would Allow Excessively Burdensome Discovery

Another critique of *Jander* lies in its alleged consequences. The majority circuits, as well as other sources, suggest that *Jander*'s precedent allows for burdensome discovery if plaintiffs can use "general economic principles."[175] This critique runs contrary to the considerations laid forth in

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that if the use of "general economic principles" was sufficient, then plaintiffs would be allowed to proceed in "virtually every fraud case").

168. *See id.* (detailing the *Jander* plaintiffs' specific allegations which suggested inevitable discovery of fraud).

169. *See generally* Schwartz, *supra* note 123 (listing the harms caused by fraud which result from a reaction to its discovery becoming public knowledge).

170. *See id.*

171. *See* Funk, *supra* note 155 (detailing the harms shareholders incur in the event of fraud).

172. *See id.*

173. *See Allen*, 967 F.3d at 774 (citing Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620 (2d Cir. 2018)) (noting that the *Jander* plaintiffs cited several "economic analyses").

174. Stephen P. Ferris & A.C. Pritchard, *Stock Price Reactions to Securities Fraud Class Actions Under the Private Securities Litigation Reform Act* 33–34 (Univ. Mich., John M. Olin Ctr. for Law & Econ., Working Paper No. 01-009, 2001), https://ssrn.com/abstract=288216 (noting the primary harm to stock comes from the initial revelation of the fraud and the effects slowly fade).

175. *See* Brief for Petitioner, *supra* note 44, at 6, 17–18, 31–32 (arguing that the *Jander* court's precedent would allow for frivolous claims to proceed, contravening *Dudenhoeffer*'s concern with weeding out "the plausible sheep from meritless goats"); Wilson v. Edison Int'l, Inc., 315 F. Supp. 3d 1177, 1193 (C.D. Cal. 2018) (agreeing with the rationale in *Amgen* in the absence of Ninth Circuit guidance).

Dudenhoeffer.[176] There, the Court was not concerned with burdensome discovery, but rather, with meritless discovery.[177] Understandably, defendants do not allege plaintiffs' claims are meritless.[178]

While *Dudenhoeffer* explicitly noted that Congress sought to encourage the creation of ESOP funds, this concern cannot outweigh *Dudenhoeffer*'s other concern of beneficiaries enforcing their rights.[179] Plan beneficiaries' right to recover their retirement funds lost through fraud should outweigh the mere specter of excessive litigation and subsequent discovery which might discourage the creation of ESOPs.[180] Indeed, *Dudenhoeffer* was explicitly cognizant of foreclosing all of plaintiffs' avenues to recovery when it rejected the "presumption of prudence."[181] Enacting a similar bar to recovery here, based merely on speculatively excessive discovery, runs contrary to *Dudenhoeffer*'s explicit rationale for meritorious discovery.[182]

E. The Pegram Problem

Treating the duties of plan fiduciary and corporate officer as readily severable is unnecessary and, even if it were necessary, unworkable.[183] Majority courts and critics of the Second Circuit argue that *Pegram* forecloses plaintiffs' recovery in these cases because defendants would be held liable for their actions as non-fiduciaries.[184] *Pegram* forecloses plaintiffs from holding plan fiduciaries liable for actions taken in their

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176. *See* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 425 (2014) (noting any proper standard for ESOP cases should be aimed at weeding out frivolous claims).

177. *See id.*

178. *See generally* Brief for Petitioner, *supra* note 44 (arguing throughout that in future hypothetical cases, where fraud may or may not have occurred, the *Jander* decision would allow for burdensome discovery, but never alleging that Jander's case itself was meritless).

179. *See Dudenhoeffer*, 573 U.S. at 424–25.

180. *See generally* Teresa Ghilarducci, *Big Retirement Losses If The Market Crashes Tomorrow*, FORBES (Dec. 5, 2018, 3:29 PM), https://www.forbes.com/sites/teresaghilarducci/2018/12/05/big-retirement-losses-if-the-market-crashes-tomorrow/?sh=1ad0ad547dab (estimating that retirement funds lost $2.4 trillion in the last two quarters of 2008).

181. *See Dudenhoeffer*, 573 U.S. at 425 (noting the presumption of prudence operates to bar all plaintiffs from enforcing their rights under an ESOP).

182. *See id.* at 424 (noting a concern for "meritless, economically burdensome lawsuits").

183. *See* ROSEN ET AL., *supra* note 7 (noting the inherent risks associated with being an insider ESOP fiduciary and how to handle the position with minimum litigation exposure).

184. *See* Pegram v. Herdrich, 530 U.S. 211, 225–26 (2000) (stating that fiduciaries under ERISA may only "wear their fiduciary hat" when acting in a way that will affect beneficiaries).

corporate capacity that were not to their exclusive benefit.[185]

"The *Pegram* problem" arises in specific, but not all, *Dudenhoeffer* cases.[186] When plaintiffs argue that a disclosure of fraud should have been made, defendants can argue that unusual disclosure made outside the normal reporting regime could dramatically "spook the market."[187] In response, plaintiffs may contend that the plan fiduciary, in their corporate capacity, should have made a disclosure in a standard reporting schedule, such as a quarterly SEC report.[188]

The majority circuits, when confronted with the *Pegram* problem, have accepted that standard reporting is an action done solely in a corporate officer capacity and thus the plan fiduciary is not obligated to act in the interest of plan beneficiaries by disclosing.[189] However, defendants using *Pegram* ignore ERISA's duty to avoid conflicts of interest.[190] Courts could reason that in like situations, corporate officers violate their duty to avoid conflicts of interest by omitting known fraud.[191]

IV. JANDER REQUIRES UPROOTING LESS CASE LAW

The Eighth Circuit unavoidably contradicts parts of *Dudenhoeffer*.[192] If the Court were to distinguish *Pegram* from the current disagreement, the

185. *See id.* at 213 (noting the "fatal difficulties" such a holding would yield, particularly for physician-fiduciaries).

186. *See, e.g.*, Martone v. Robb, 902 F.3d 519 (5th Cir. 2018) (finding no *Pegram* problem because plaintiffs did not allege an alternative action that the defendant should have taken in a non-fiduciary capacity).

187. *Contra* Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 628–29 (2d Cir. 2018) (rejecting this argument).

188. *See id.* at 630 (accepting such an argument as plausible, but also finding it unnecessary because the Court rejected defendant's argument).

189. *See* Harris v. Amgen, Inc., 788 F.3d 916, 941–42 (9th Cir. 2015) (agreeing with the Sixth Circuit in Dudenhoeffer v. Fifth Third Bancorp, 692 F.3d 410, 423 (6th Cir. 2012), that reports are made in a fiduciary capacity only); Amgen Inc. v. Harris, 577 U.S. 308, 311 (2016) (reiterating that the disclosure argument may work, but ultimately the *Dudenhoeffer* standard must be satisfied). *Contra* Deak v. Masters, Mates & Pilots Pension Plan, 821 F.2d 572, 580 (11th Cir. 1987) (noting that ERISA plan fiduciaries have a duty to avoid situations where their actions as corporate officers will conflict with complete loyalty to plan beneficiaries).

190. *Deak*, 821 F.2d at 580.

191. *See id.*

192. *See* Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 424 (2014) (quoting Conkright v. Frommert, 559 U.S. 506, 517 (2010)) (recognizing the balance struck by ERISA in "ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans").

resolution would be straightforward and uphold the balance pursued in *Dudenhoeffer*.[193]

A. Unless the Supreme Court Intends to Overturn Dudenhoeffer, It Must Reject Some Part of the Eighth Circuit's Rationale

The Supreme Court should grant certiorari to resolve this disagreement and should clarify that the majority circuits cannot mandate blanket dismissal of a plaintiff's case merely because the plaintiff's proposed alternative action requires the defendant to disclose their previous fraudulent behavior.[194] A bright-line rule which construes this proposed alternative to be inherently implausible runs afoul of basic tenets of shareholder theory by allowing fiduciaries to blatantly disregard shareholder and stakeholder value.[195] Additionally, any such bright-line rule would also run contrary to the Court's statement in *Dudenhoeffer* that the inquiry is inherently context specific.[196] Even *Jander*'s critics acknowledge this is the proper inquiry.[197]

Alternatively, the Court should allow "inevitable discovery" cases to proceed as they significantly bolster a plaintiff's claim that earlier disclosure is preferable in those situations.[198] The Court should reemphasize what it considered relevant in the *Dudenhoeffer* decision — that a general economic theory can be an appropriate consideration.[199] The Court should reject the argument that plaintiffs rely on "generic accusations" that will be alleged in all stock drop cases.[200] Even if plaintiffs are relying on general economic principles, they cannot proceed to discovery without specific allegations of fraud that are sufficiently plausible under *Twombly*/*Iqbal*.[201]

Last, the Court should clarify that lower courts may not cabin the

193. *See id.*

194. *See id.* at 425 (rejecting standard which makes plaintiff's enforcement of rights impossible).

195. *See id.*

196. *See id.*

197. *See, e.g.*, Allen v. Wells Fargo & Co., 967 F.3d 767, 774 (8th Cir. 2020) (arguing that *Jander*'s interpretation violates the context specific requirement, in their view, because general economic principles can be alleged by plaintiffs in every case).

198. *See, e.g.*, Funk, *supra* note 155 (suggesting that fraud concealed overtime is more harmful).

199. *See Dudenhoeffer*, 573 U.S. at 426–27 (relying on the fact that "many investors take the view" that trying to outperform markets is unrealistic).

200. *See* Jander v. Ret. Plans Comm. of IBM, 910 F.3d 620, 629–30 (2d Cir. 2018) (noting that in all cases, the economic theories alone will not suffice without other "fact-specific" arguments).

201. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (establishing that pleadings must be "plausible" and not "merely possible"); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (creating plausible pleading standard).

harm/benefit analysis to considering short-term value of the investment assets comprising the ESOP. Fiduciaries correctly argue disclosure of fraud can and often does cause short-term stock devaluation; however, plaintiffs must be allowed to counter with considerations of the harm of overvalued stock prices, underinformed investors, and the long-term harm of ongoing fraud in a business.[202] At the very least, the Court should allow for a case-by-case determination of this plausibility analysis. To this end, the Court should expressly reject the reasoning of the majority circuits insofar as they forego a context specific analysis for a blanket foreclosure upon plaintiffs' recoveries.

B. The Court Should Distinguish Dudenhoeffer Cases from Pegram

The *Pegram* problem is entirely avoidable because the *Pegram* case is easily distinguishable from *Dudenhoeffer* cases.[203] The Court should distinguish *Pegram* because *Dudenhoeffer* cases do not involve a conflict between financial concerns and health concerns. Inarguably, a physician need not make medical decisions solely for the financial benefit of the patient-beneficiary.[204]

Dudenhoeffer cases frequently concern plan fiduciaries making SEC filings.[205] Defendants in these cases argue that SEC filings are made solely in a corporate officer capacity, but this is not self-evident.[206] The Court should find that SEC filings are made in both a plan fiduciary and corporate officer capacity. Such a finding is bolstered by the argument that disclosures in SEC filings are not for the sole benefit of ESOP beneficiaries but for the corporate shareholders as well.[207]

C. The Court Should Resolve Any Potential Contradiction Within Dudenhoeffer and its Progeny

The Court should explicitly acknowledge and clarify which *Dudenhoeffer*

202. *See* Schwartz, *supra* note 123 (explaining that empirical studies show part of the harm experienced by fraud is a lasting lack of trust of future disclosures).

203. *See* Pegram v. Herdrich, 530 U.S. 211, 231–32 (2000) (considering important the unusual case of a fiduciary-physician).

204. *See id.*

205. *See* Brief for Petitioner, *supra* note 44, at 19, 24–25 (noting the argument that fiduciaries should disclose in standard SEC filings, and that the lawyers for several *Dudenhoeffer* cases were the same and made the same arguments).

206. *See id.* at 30–31 (stating that when disclosures are made in SEC filings, they are done so in a corporate capacity, not a fiduciary capacity).

207. *See* Schwartz, *supra* note 123 (arguing that a lack of information harms shareholders).

test is correct. In one part of *Dudenhoeffer*, the Court tells lower courts to analyze whether a reasonable fiduciary "would" not have viewed the proposed alternative as more likely to harm the fund than to help it.[208] Later in the opinion, the Court uses "could" instead, suggesting a more demanding standard.[209]

To decide which test is correct, the Court should consider the two options in the context of other considerations from *Dudenhoeffer*. *Dudenhoeffer* articulates the balance the Court strikes between the encouragement of ESOPs and the ability of plaintiffs to enforce their rights as plan beneficiaries.[210] In doing so, the Court struck down a judicial creation it found too defense-friendly.[211] If the Court finds *Jander*'s reasoning unconvincing, it should nonetheless find that siding with the majority would violate the previously articulated concern of beneficiary rights and avoiding judicial creations which are too defense-friendly.[212] To that end, the Court should establish the "would" test as the correct test to achieve the balance it initially articulated in *Dudenhoeffer*.[213] Even on remand, the Court instructed the Second Circuit to use both tests to reconsider arguments, suggesting a contradiction still needing resolution.[214]

V. CONCLUSION

Dudenhoeffer created a high burden for plaintiffs. While setting that standard, however, the Court explicitly acknowledged that it still disfavored overly defense-friendly judicial creations.[215] The Eighth Circuit's interpretation closes yet another door on plaintiffs' plausibly proposed

208. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 428 (2014) (emphasis added) ("To state a claim for breach of the duty of prudence . . . a plaintiff must plausibly allege an alternative action . . . that a prudent fiduciary in the same circumstances *would* not have viewed it as more likely to harm the fund than to help it.").

209. *Id.* at 430 (emphasis added) ("[L]ower courts . . . should also consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position *could* not have concluded . . . disclosing negative information would do more harm than good to the fund . . . .").

210. *Id.* at 424 (stating that the Court agrees that there needs to be a balance between allowing beneficiaries to enforce their rights and promoting ESOPs as Congress wants).

211. *See id.* at 418–19 (holding that there is no defense-friendly "presumption of prudence" exception created by the law).

212. *Id.* at 424.

213. *Id.* at 428.

214. Ret. Plans Comm. of IBM v. Jander, 140 S. Ct. 592, 594 (2020) (per curiam) (using the "would" test in one paragraph, then "could" in the following).

215. *See Dudenhoeffer*, 573 U.S. at 425 (stating the appropriate test should weed out only meritless claims).

alternative actions.[216] The decision is merely another defense-friendly judicial creation.[217]

Unless the Supreme Court wishes to effectively overrule *Dudenhoeffer*, the Eighth Circuit cannot prevail. At the very least, the Court would have to: (1) reaffirm that the inquiry is fact-intensive and the proposals of disclosing fraud cannot be presumptively implausible; (2) allow for a more lenient inquiry in cases where plaintiffs allege the fraud would inevitably be discovered; or (3) provide some other proposed alternative plaintiffs may allege which would allow plaintiffs to recover from fiduciaries who concealed information which decreased the value of retirement funds.

Surely, when the *Dudenhoeffer* Court, in the absence of SEC guidance, set out to define the inquiry courts should conduct on plaintiff's duty-of-prudence suits, they did not envision an outcome where plaintiffs cannot plausibly allege any alternative action fiduciaries should have taken.[218] The Fifth and Eighth Circuits, however, do just that.

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

217. *See Dudenhoeffer*, 573 U.S. at 412 (holding that the presumption was foreign to any other duty-of-prudence case and was inappropriate).

218. *See id.* at 429 (noting a lack of SEC guidance).