No. _____

IN THE

Supreme Court of the United States

ALEXANDER Y. USENKO, Derivatively on Behalf of the SunEdison Semiconductor
Ltd. Retirement Savings Plan,

Plaintiff–Petitioner,

v.

MEMC LLC; THE INVESTMENT COMMITTEE OF THE SUNEDISON SEMICONDUCTOR LTD. RETIREMENT SAVINGS PLAN, HEMANT KAPADIA; PENNY CUTRELL; STEVE EDENS; KAREN STEINER; CHENG YANG; BEN LLORICO,

Defendants–Respondents,

And

JOHN DOES 1-10,

Defendants.

APPLICATION TO THE HONORABLE NEIL M. GORSUCH FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Applicant Alexander Y. Usenko ("Plaintiff") requests an extension of time of 60 days, up to and including Friday, November 1, 2019, for the filing of a petition for a writ of certiorari to review the decision of the Court of Appeals for the Eighth Circuit dated June 4, 2019 (the "Order") (attached as Appendix A). The jurisdiction of this Court is based on 28 U.S.C. § 1254(l). Defendants have consented to the extension of time requested by this application (the "Application").

In support of this Application, Plaintiff states as follows:

1. Absent an extension, the petition for writ of certiorari is due September 3, 2019, having rolled over from September 2, 2019 which is a holiday. In compliance with Rule 13.5, Plaintiff makes this application more than 10 days before the due date.

2. This case presents an important and recurring question regarding the Employee Retirement Income Security Act ("ERISA), 29 U.S.C. Sec. 1001, et seq. and the scope of this Court's decision in *Fifth Third v. Dudenhoeffer*, 134 S. Ct. 2459 (2014) and a related case where this Court has already granted certiorari in, *Jander v. Ret. Plans Committee of IBM*, 910 F.3d 620 (2d Cir. 2018), *cert. granted*, __ S. Ct. ___, 2019 WL 1100213 (June 3, 2019) ("*Jande*r"). In the instant decision below, which did not involve a company stock fund being held in the retirement plan, and notwithstanding that Plaintiff did not allege that the market price of the asset in issue

was overvalued, the court held that Plaintiff needed to show "special circumstances" that the market price was not a reliable indicia of prudence in order plead a claim for breach of fiduciary duty. Order at 6. *Fifth Third*, specifically addresses "special circumstances" in the context of allegations regarding the propriety of relying on the market price of the stock. 573 U.S. at 426. If there is no presumption of prudence under *Fifth Third* and the market price is the "best estimate of its value in light of its riskiness and the future net income flows that those holding it are likely to receive," then under a "context specific" analysis, the fiduciaries should have considering the market price when deciding whether to take any action to sell or retain the retirement asset. *See* Order at 6 (citations omitted). A fiduciary cannot use the market price both as a shield and a sword. One of this Court's stated reasons for issuing its opinion in *Fifth Third*, was to reconcile the language of ERISA's fiduciary duties with those cases which required allegations that the company in issue was facing an impending collapse or dire circumstances in order to state a claim that a breach of the fiduciary duty of prudence had occurred. 573 U.S. 417. The decision of the court below acknowledges that the company was in "financial distress. Order at 3.

3. In *Fifth Third*, plaintiffs alleged, *inter alia*, that the company stock fund was overvalued. *See Fifth Third,* 573 U.S. at 426. Here, the allegation was that the asset in question, the stock of a different company, had a correct market price that accurately reflected the public news that the subject company could not pay its loans

and was illiquid. Nonetheless, the fiduciaries here took no action in light of the public information to analyze whether the stock was prudent or should be liquidated. In contrast, the allegation in *Fifth Third* was that the stock was declining because of the general collapse of the housing market (*Id.*). While it may be reasonable to assume that a company could rebound from general industry challenges or an isolated adverse event, it was not plausible to make any such assumption under the context specific analysis of this case. Under the analysis of the Eighth Circuit, holding a publicly traded asset in a plan would simply be enough, *at the pleading stage*, to satisfy a fiduciary's duty of prudence, even as the public markets reacted negatively to the true financial condition of the asset while simultaneously the fiduciaries took no steps to review whether the asset remained prudent for retirement investing.

4. The expansion by the Eighth Circuit of the holding of *Fifth Third* ignores its rationale and this Court's decision in *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828-29 (2015), which held, among other things, that a fiduciary's duty to monitor includes removing imprudent investments. Neither *Fifth Third* nor *Tibble* hold that the duty to monitor is extinguished when the asset is publicly traded and the market correctly incorporates the bad news by driving the price of the asset down, here to zero.

5. Further, the decision below held that there is nothing in *Fifth Third* to limiting its pleading requirements of establishing "special circumstances" to "employee stock ownership plans." Order at 8-9. However, *Fifth Third*'s analysis began by refuting that it was proper to have a special "presumption of prudence" for an ESOP plan. 573 U.S. at 415. No ESOP is at issue here. In addition, the potential dilemmas faced by the fiduciaries in *Fifth Third* regarding whether taking action to protect the retirement plan would adversely affect their own company stock have no relevance here. *Id.* at 428.

6. In addition, Plaintiff's writ of certiorari will submit that, although decided in a slightly different context, the Second Circuit's decision in *Jander* has the more reasoned analysis of what is "plausible" in light of *Fifth Third*. *Jander* makes clear that you must view the allegations of the complaint in its entirety and that all reasonable inferences are to be drawn in plaintiff's favor: "the standard is plausibility not likelihood or certainty…." 910 F.3d at 631. Here, it is certainly plausible with the plethora of public information available, that had the fiduciaries bestirred themselves to review the prudence of continuing to hold the retirement asset, the plan participants would have been better off. Plaintiff was not advocating that the fiduciaries outsmart the market but rather they heed what public information is in the market, what is the public price of the asset and review whether it remains prudent to hold the asset in light of all the circumstances then prevailing. Consistent

with the efficient market theory that underpins *Fifth Third*, *Jander* holds that one should not presume, *at the pleading stage*, that the market will overreact to bad news. *Jander*, 910 F.3d at 630.

The questions raised by the Eighth Circuit's decision are especially important because they directly affect employee stock plans across the country even with respect to non-company stock assets. Using this Court's decision in *Fifth Third*, courts around the country have found, at the pleading stage, that if a plan asset is publicly traded, plan fiduciaries need not take any action in the absence of proof that the price is unreliable. Simply because an asset has a public price, does not make the asset automatically prudent to hold in a retirement account. Accepting this erroneous idea holds plan fiduciaries to a lesser standard than a fiduciary in any other context without considering the plausibility standards espoused in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted) and *Jander*. This seems to also conflict with *Fifth Third* which expressly held that the duty of prudence applies to all fiduciaries, including ESOP fiduciaries, not the other way around. 573 U.S. at 425. The 60-day extension sought by the Application is requested to enable to adequately prepare a comprehensive but tailored petition for writ of certiorari. In addition to the complexity of the issues, Plaintiff's counsel has substantial existing obligations near the current due date of the petition. Among other things, Mr. McKenna is scheduled to make several business trips in August,

including from New York to California and back again, as follows: a trip August 12 to August 14 to attend a mediation in San Diego, California in an action entitled *Pokorney* v. *Spiegel, et al.*, Case No.: 18STCV09365 (Calif. Sup. Ct., Los Angeles Cty.); a trip August 21 and 22 to Chicago to attend a court conference in a case entitled *Brown v. Gonzalez et al.*, Case No.: 1:19-cv-617 (N.D. Ill.), and from there a trip to and from Oakland, California for oral argument on a motion on August 23 in a case entitled *Galbiati* v. *Page, et al.*, Case No.: 3:19-cv-1063 (N.D. Cal.). In addition, Mr. McKenna has primary responsibility for preparing several oppositions to motions to dismiss, the first of which is due on August 23, 2019 in *De Nicola v. Woodman, et al.*, Case No.: 2019-0119-JRS (Chancery Del.), and the second and third of which are both due on September 6 in actions entitled *Karp v. SI Financial Group, Inc. et al.*, 3:19-cv-00199-MPS (D. CT) and *Behrmann v. Brandt, et al*., 19-cv-00772-UNA (D. DE). Mr. McKenna also has a long-planned family vacation at the end of August. All of these matters will impede his ability to prepare the petition for a writ of certiorari. An extension of time will not prejudice respondents who have consented to the relief sought by this Application. There has been no previous application for an extension.

For the foregoing reasons, Plaintiff hereby requests that an extension of time, to and including November 1, 2019, be granted within which Plaintiff may file a petition for a writ of certiorari.

Respectfully submitted,

s/ Thomas J. McKenna
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August 7, 2019

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Defendants–Respondents,

And

JOHN DOES 1-10,

Defendants.

PROOF OF SERVICE

The undersigned certifies that on August 7, 2019, he caused to be served An Application to the Honorable Neil M. Gorsuch for an Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals

for the Eighth Circuit, by filing same electronically and by mailing the same in envelopes bearing postage fully prepaid, addressed to opposing counsel as follows:

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Dated: August__, 2019 _____