No. 19-___

IN THE

Supreme Court of the United States

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

v.

MEMC LLC, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Fifth Third Bancorp v. Dudenhoeffer*, this Court unanimously held that the question whether a plaintiff had plausibly alleged a claim under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, for breach of the fiduciary duty of prudence had to be answered by conducting a "careful, context-sensitive scrutiny of a complaint's allegations" because the content of the duty of prudence "turns on 'the circumstances . . . prevailing' at the time the fiduciary acts." 573 U.S. 409, 425 (2014) (alteration in original) (quoting 29 U.S.C. § 1104(a)(1)(B)).

In the decision below, the court of appeals discarded the core lesson of *Dudenhoeffer* and imposed a categorical heightened pleading standard on ERISA plaintiffs alleging a breach of the duty of prudence based on the fiduciary's decision to hold an unduly risky asset despite publicly available information evincing the asset's risk. Specifically, the court of appeals held that such a plaintiff is always required to plead "special circumstances" that call into question whether the asset's price was overvalued, even when the plaintiff's claim turns on the prudence of including the asset in a retirement plan rather than its price, and further required that those "special circumstances" include nonpublic information. The question presented is:

Whether *Dudenhoeffer*'s "context-sensitive scrutiny of a complaint's allegations" can be met where a court presumes an asset must be prudent if it is publicly traded and imposes a categorical requirement that a plaintiff meet a heightened pleading standard without considering the circumstances surrounding the alleged breach.

PARTIES TO THE PROCEEDING

Petitioner Alexander Y. Usenko, derivatively on behalf of the SunEdison Semiconductor Ltd. Retirement Savings Plan, was the plaintiff-appellant below.

Respondents MEMC LLC, The Investment Committee of the SunEdison Semiconductor Ltd. Retirement Savings Plan, Hemant Kapadia, Penny Cutrell, Steve Edens, Karen Steiner, Cheng Yang, and Ben Llorico were defendants-appellees below.

RELATED PROCEEDINGS

There are no proceedings directly related to this case.

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INTRODUCTION

In *Fifth Third Bancorp. v. Dudenhoeffer*, this Court held that whether a plaintiff had sufficiently pled a claim under ERISA for a breach of the duty of prudence "will necessarily be context specific" because the content of that duty "turns on 'the circumstances . . . prevailing' at the time the fiduciary acts." 573 U.S. 409, 425 (2014) (quoting 29 U.S.C. § 1104(a)(1)(B)). In this case, the Eighth Circuit discarded *Dudenhoeffer*'s core directive, replacing it instead with a presumption that it is always prudent to include a publicly traded asset in a retirement plan unless a plaintiff pleads the existence of nonpublic "special circumstances." This requirement has no basis in *Dudenhoeffer*, and, left to stand, turns *Dudenhoeffer*'s "context specific" scrutiny on its head.

This Court is set to clarify the application of *Dudenhoeffer*'s pleading standards this term in *Retirement Plans Committee of IBM v. Jander*, No. 18-1165. There, the Second Circuit conducted the kind of case-specific analysis required under *Dudenhoeffer* and, relying on numerous contextual allegations, held that a breach-of-fiduciary-duty claim involving a publicly traded asset could proceed without imposing any heightened pleading standard. Because this Court has already granted certiorari in that case, it should hold this petition pending the outcome in *Jander*. The Court's decision in *Jander* will clarify how *Dudenhoeffer*'s context-specific analysis should be conducted and provide necessary guidance to ensure that lower courts, like the Eighth Circuit here, properly consider all of the facts alleged in the complaint when resolving a motion to dismiss rather than relying on bright-line rules or presumptions that would foreclose virtually any effort to hold fiduciaries accountable for

breaching their duty of prudence when it comes to publicly traded assets included in a retirement plan.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 926 F.3d 468 (8th Cir. 2019). App. 1a. The decision of the United States District Court for the Eastern District of Missouri is unreported but available at 2018 WL 999982.

JURISDICTION

The court of appeals entered judgment on June 4, 2018. On August 15, 2019, Justice Gorsuch extended the time to file a petition for certiorari to October 2, 2019. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . .

STATEMENT

I. Factual Background

At the beginning of 2015, SunEdison—a "high-profile renewable energy powerhouse" and one of the country's largest energy providers—looked like a solid operation. App. 23a. It had spun off several of its subsidiaries into independent companies, was acquiring smaller companies to fuel its growth, and was trading at over $30 per share on the New York Stock Exchange. App. 19a–21a. But less than six months later, its stock had plummeted by more than 50% and market analysts were calling the company "a house of cards." App. 22a–23a.

By November of 2015, things were even more dire. After several "massive" quarterly losses, App. 23a, SunEdison's stock was down 75% on the year, App. 29a. Analysts warned that the stock was in "freefall" and, given the company's poor outlook, major investors began frantically selling off their entire positions—some even asked SunEdison to buy back shares to "stop the bleeding" of the stock's plummeting price. App 28a.

The start of 2016 brought more bad news. After a restructuring that diluted shareholder value, investors began a "massive sell-off" of SunEdison stock that triggered the stock price to "crash[]." App. 33a. Investors were warned to "stay away" from SunEdison stock, App. 35a, because SunEdison had "destroyed" its shareholders, App. 37a–38a, and likely would not survive the year, App. 40a. Less than two weeks after the new

year, SunEdison stock hit a trading low of $2.36 before closing at $3.02—almost $30 per share less than it had closed just 6 months earlier. App. 40a.

Yet as most of the other investors got out, the respondents in this case—plan fiduciaries for a retirement plan offered by SunEdison Semiconductor, LLC ("Semi") that held SunEdison stock as an asset for participants—stayed in. As part of their retirement plan, the fiduciaries for Semi—a separate company spun off from SunEdison—offered several investment options to participants, including a fund that invested solely in the stock of SunEdison, Semi's former parent corporation.[1] App. 16a. Throughout 2015 and the early part of 2016, the Semi plan managers took no steps to investigate the stock, sell it, or diversify their portfolio to balance the added risk. App. 31a–32a, 44a. And that was true even in the face of increasingly concerning public reports warning that (1) SunEdison held too much debt and represented a high risk investment, (2) investors should "stay away," and (3) large investors were selling off major blocks of SunEdison stock. App. 22a–25a, 28a–29a, 32a–41a. Instead, the fiduciaries continued to hold SunEdison stock in the Semi plan despite the major risk it posed.

By April 2016, financial analysts' predictions were finally realized: SunEdison and certain subsidiaries filed

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[1] Semi became independent from SunEdison in 2014. App. 16a. Thus, the SunEdison stock plan was not purchasing shares of participants' employer's stock, and the fund was no longer an employee stock ownership plan ("ESOP"). The retirement plan's organizing documents did not offer an explanation of the purpose for offering employees shares of a company that no longer had a formal relationship with Semi. *See, e.g.*, App. 16a.

for Chapter 11 bankruptcy. App. 43a. SunEdison's stock was suspended from trading on April 21, 2016—by this point, it was trading at $0.34. App. 43a–44a. Those Semi employees who had invested in the retirement plan lost the entire value of their SunEdison stock. App. 13a.

II. Proceedings below

Alexander Usenko, a former Semi employee who had invested in Semi's defined-contribution retirement plan, brought suit against the plan fiduciaries, alleging that they had breached their duty of prudence under ERISA by continuing to retain SunEdison's excessively risky stock as an asset in the plan. App. 12a–13a, 51a–54a. As fiduciaries, he explained, respondents had a duty to monitor SunEdison's stock and act on the host of publicly available information—including the stock's plummeting value, reports of the company's huge debts and liquidity problems, other sophisticated investors' highly public divestment and calls for buybacks, and analysts' universal warning to stay far away from SunEdison stock—to investigate and ultimately divest from SunEdison stock well before SunEdison filed for bankruptcy in 2016. App. 51a–54a.

The district court granted the defendants' motion to dismiss the complaint. The district court concluded that this Court's "heightened pleading standard" in *Dudenhoeffer* foreclosed the claims in the case. *Usenko v. SunEdison Semiconductor LLC*, 2018 WL 999982, at *3 (E.D. Mo. Feb. 21, 2018). In the district court's view, *Dudenhoeffer* controlled even though Semi's retirement plan was not an ESOP, as was the plan in *Dudenhoeffer*. *Id.* (noting that nothing in *Dudenhoeffer* "suggests that the holding is limited to employer securities"). And it held that *Dudenhoeffer*'s analysis controlled even though

Usenko's breach-of-fiduciary-duty claim was premised on the continued holding of an excessively risky asset rather than (as was the case in *Dudenhoeffer*) an asset whose price was overvalued. *Id.* (reasoning that the same pleading requirement applies across the board because "[t]he plaintiffs in *Dudenhoeffer*, too, alleged that 'the fiduciaries knew or should have known that Fifth Third's stock was . . . excessively risky"). Applying *Dudenoeffer*'s "heightened pleading standard," the district court held that, for fiduciary-breach claims involving no insider information, a plaintiff must—if the asset has a publicly traded price—plead "special circumstances" regardless of the theory of breach. *Id.*

The Eighth Circuit affirmed. It agreed with the district court that this Court had given "no indication" that its holding in *Dudenhoeffer* was limited to ESOPs and likewise concluded, without explanation, that *Dudehoeffer*'s "special circumstances" requirement should apply to claims that an asset posed an excessive risk as well as to claims that an asset's price was artificially inflated. App. 9a. Applying that pleading requirement, the court held that Usenko had failed to satisfy *Dudenhoeffer*'s standard because he had not pled any "circumstances indicat[ing] to the defendants that they could not rely on the market's valuation [i.e., price] of SunEdison stock." App. 7a. The court recognized that Usenko had alleged "that the declines in SunEdison's stock price and reports of SunEdison's extraordinary debts and liquidity problems should have prompted them to investigate and ultimately determine that divesting from SunEdison stock would be prudent as early as July 20, 2015," but it brushed this off as irrelevant because "SunEdison's stock price did react to the company's announcements and the financial press's negative commentary." App. 7a–8a. In

the court's view, Semi's fiduciaries were not required to consider the continued prudence of retaining the asset in the plan based on the information that led to SunEdison's demise.

In reaching this conclusion, the court relied on the Fifth Circuit's suggestion in *Singh v. RadioShack Corp.*, 882 F.3d 137 (5th Cir. 2018) (per curiam), that "[p]laintiffs cannot evade *Dudenhoeffer*'s general implausibility rule by disguising claims based on public information as special circumstances." App. 7a–8a (quoting *Singh*, 882 F.3d at 147). In other words, in the Eighth Circuit's view, after *Dudenhoeffer* there can *never* be a claim for breach of the duty of prudence involving a publicly traded asset unless the complaint also alleges the existence of nonpublic "special circumstances." App. 8a.

The Eighth Circuit also "reject[ed]" any attempt to "evade" what it saw as *Dudenhoeffer*'s rule by relying on this Court's decision in *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015). App. 9a. *Tibble*, the Eighth Circuit held, cannot "save[]" a breach claim—even one alleging that a fiduciary has a continuing duty to monitor investments and remove imprudent ones—because *Dudenhoeffer*'s rule still requires the existence of "special circumstances." App. 9a (concluding that *Tibble* "does not exempt Usenko's complaint from meeting *Dudenhoeffer*'s pleading requirements").

REASONS FOR GRANTING THE PETITION

I. The decision below was incorrect and conflicts with this Court's decision in *Dudenhoeffer*.

Dudenhoeffer instructs courts considering a claim based on ERISA's duty of prudence to conduct a

contextual, fact-based inquiry to determine whether that claim has been plausibly alleged. Yet, the Eighth Circuit below did the exact opposite. Instead of considering the facts alleged by the plaintiff, the Eighth Circuit imposed a categorical "special circumstances" heightened standard for breach-of-fiduciary-duty claims involving a publicly traded asset. In the Eighth Circuit's view, it is "undeniable" that, under *Dudenhoeffer*, a plaintiff who fails to plead the existence of "special circumstances" demonstrating that a fiduciary "could not rely on the market's valuation" of a challenged asset cannot "plausibly state a breach of the duty of prudence," regardless of the theory of breach. App. 7a.

That, standing alone, was error. *Dudenhoeffer* imposes no such categorical pleading requirement. But the Eighth Circuit compounded its error by raising the pleading bar even higher. It held that publicly available information can *never* satisfy its newly-imposed "special circumstances" requirement and that such a requirement must be met for any publicly traded asset, even those outside the ESOP context. That establishes an impossible pleading bar: The Eighth Circuit offered no explanation for how fiduciaries of one company could ever obtain non-public information about the internal affairs of another sufficient to satisfy this standard. No authority supports this expansive view of *Dudenhoeffer*.

A. The Eighth Circuit's decision discards the context-specific analysis adopted by *Dudenhoeffer* and replaces it with a categorical "special circumstances" pleading requirement.

In *Dudenhoeffer*, this Court considered the applicable pleading standard when an ERISA plaintiff alleges a breach of the duty of prudence. It recognized that there

was a need to "divide the plausible sheep from the meritless goats." 573 U.S. at 425. And this Court offered a clear directive to the lower courts on how to analyze whether an ERISA plaintiff had sufficiently pled a breach of prudence claim: "That important task can be . . . accomplished through careful, context-sensitive scrutiny of a complaint's allegations." *Id.* In reaching this conclusion, the Court rejected the prevailing view of the lower courts that, in all ESOP cases, a presumption of prudence would apply to a defendant-fiduciary's actions. *Id.*

In renouncing a presumption of prudence, this Court emphasized that such a bright-line rule would be inappropriate for duty-of-prudence claims because "the content of the duty of prudence turns on 'the circumstances . . . prevailing' at the time the fiduciary acts," and as a result, "the appropriate inquiry will *necessarily* be context specific." *Id.* (alteration in original) (emphasis added). This Court also warned that it would not countenance any standard that "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." *Id.*

Dudenhoeffer thus sent an important message: When deciding whether an ERISA plaintiff has plausibly alleged a breach of the duty of prudence, courts must conduct a fact-intensive inquiry based on all the circumstances at the time of the alleged breach. Courts cannot avoid this detailed analysis by creating hard-and-fast rules and presumptions about what would constitute an implausible claim. And the lower courts certainly could not impose rules that made it virtually impossible to state a claim for breach of a fiduciary duty.

The Second Circuit's decision in *Jander v. Retirement Plans Committee of IBM*, 910 F.3d 620 (2d Cir. 2018), illustrates these basic lessons. There, the panel conducted a context-specific analysis and considered all the facts and circumstances alleged in the plaintiff's complaint to conclude that fiduciaries had plausibly violated their duty of prudence. In reaching this conclusion, the Second Circuit identified multiple complaint-specific facts that, taken together, "plausibly establish that a prudent fiduciary in the Plan defendants' position" would have acted differently than did the defendants. *Jander*, 910 F.3d at 628.

The Second Circuit declined to impose any categorical pleading standard. Looking to *Dudenhoeffer* and this Court's later decision in *Amgen, Inc. v. Harris*, 136 S. Ct. 758 (2016), the Second Circuit recognized that any inquiry into the existence of a potential breach was inherently factual and that, at the motion-to-dismiss stage, "the standard is plausibility—not likelihood or certainty." *Jander*, 910 F.3d at 631. Of course, as the court noted, "further record development might not support findings so favorable to Jander and adverse to the Plan defendants." *Id.* But that did not justify imposing a heightened requirement for breach claims involving a publicly traded asset at the pleadings stage.

In contrast to the Second Circuit's decision in *Jander*, the Eighth Circuit in this case discarded *Dudenhoeffer*'s core lesson. It imposed a specific heightened pleading standard for breach claims involving publicly traded assets, namely that in the absence of an allegation of some nonpublic special circumstance, a plaintiff cannot "plausibly allege that ERISA fiduciaries breached the duty of prudence." App. 8a. The Eighth Circuit thus announced what is essentially a new presumption: If an

asset is publicly traded, it is presumed that a fiduciary's decision to include it in a retirement plan is prudent, regardless of the theory of breach or the prevailing circumstances surrounding the challenged asset.

It is the Second Circuit's approach in *Jander*, not the Eighth Circuit's here, that faithfully complies with *Dudenhoeffer*. In *Dudenhoeffer*, this Court suggested that "where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances." 573 U.S. at 426 (crediting the efficient market theory). But *Dudenhoeffer* did *not* say that a plaintiff could *never* state a plausible duty-of-prudence claim absent alleging special circumstances or that all publicly traded assets are reflexively prudent. Nor should it: a "special circumstances" requirement simply repackages the presumption of prudence that *Dudenhoeffer* rejected in favor of the more thorough, case-specific analysis of all the facts at the time of the alleged breach.

B. Even assuming *Dudenhoeffer* mandates a "special circumstances" pleading requirement, the Eighth Circuit impermissibly expanded the scope of that requirement.

The Eighth Circuit's error went beyond just requiring that a plaintiff allege special circumstances to state a breach-of-fiduciary-duty claim. The court also made that pleading standard impossible to meet by (1) requiring that only insider information can satisfy it, and (2) expanding its applicability well beyond the circumstances of *Dudenhoeffer*—to apply to any publicly traded asset based on any theory of imprudence. Neither *Dudenhoef-*

fer nor ERISA justifies such an expansive pleading requirement.

1. *Dudenhoeffer* does not justify the Eighth Circuit's rule that public information can never be "special circumstances."

The Eighth Circuit acknowledged that, in this case, the plaintiff alleged that a host of publicly available information established that SunEdison was in "freefall" and that investors were warned to "stay away" from its stock because it had "destroyed" its shareholders and likely would not survive the year. App. 3a–4a; *see also* App. 29a, 33a, 35a, 37a–40a. It likewise did not find that the fiduciaries had reviewed the continued prudence of retaining SunEdison stock in the plan even as the public warnings became increasingly dire and the price continued to decline. App. 9a. Nevertheless, the court concluded that such information could *never* qualify as a special circumstance sufficient to establish a plausible breach claim. App. 7a–8a. That was so, the court explained, because if "public information" could count "as special circumstances," then a plaintiff could "evade *Dudenhoeffer*'s general implausibility rule by disguising [their] claims." App. 7a–8a (quoting *Singh*, 882 F.3d at 147); *see also Singh*, 882 F.3d at 147 (reasoning that public information will always be incorporated into a company's stock price and therefore never plausibly states a claim under *Dudenhoeffer*).

But if true, *Dudenhoeffer*, and indeed ERISA law generally, would be turned on its head. Courts have long recognized that a plaintiff can plausibly allege that a fiduciary violated its duty of prudence by failing to act on publicly available information warning that an asset was no longer a sound investment. *See, e.g.*, *Griffin v.*

Flagstar Bancorp. Inc., 492 F. App'x 598, 604–05 (6th Cir. 2012); *Tracey v. Mass. Inst. of Tech.*, 2019 WL 4192148, at *4 (D. Mass. Sept. 4, 2019); *Sims v. First Horizon Nat. Corp.*, 2009 WL 3241689, at *24–25 (W.D. Tenn. Sept. 30, 2009). The Eighth Circuit's rule, in contrast, makes it impossible for such claims to exist. That is the very kind of overly restrictive pleading standard that *Dudenhoeffer* explicitly rejected. 573 U.S. at 425–26 (rejecting a presumption that "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").

This Court's decision in *Tibble* underscores why the Eighth Circuit's overly-stringent reading of *Dudenhoeffer* is wrong. There, the Court reaffirmed that an ERISA fiduciary "is required to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances." *Tibble*, 135 S. Ct. at 1827–28. As a result, "[a] plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Id.* at 1829. But this duty to monitor makes no sense if, as the Eighth Circuit concluded, (1) a fiduciary is *always* allowed to rely solely on the fact that an asset has a price, and (2) publicly available information can *never* constitute a "special circumstance" that would require the fiduciary to investigate or take further action. In fact, under the Eighth Circuit's rule, the *only* ERISA fiduciaries who would have an obligation to monitor their holdings would be ESOP fiduciaries, and only to the extent that they might have inside information.

Lower courts have long rejected this cramped view of a fiduciary's duty under ERISA. Courts have recognized

that "[w]hether an ERISA fiduciary has acted prudently requires consideration of both the substantive reasonableness of the fiduciary's actions and the procedures by which the fiduciary made its decision." *Fish v. Great-Banc Trust Co.*, 749 F.3d 671, 680 (7th Cir. 2014). *Dudenhoeffer*, which involved "an ESOP fiduciary's *decision* to buy or hold the employer's stock," was about substantive reasonableness. 573 U.S. at 412. But the duty of prudence depends not only on the merits of a transaction, "but also on the thoroughness of the investigation into the merits of that transaction." *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007).

To demonstrate procedural prudence, fiduciaries must "engage[] in a reasoned decisionmaking process," *id.* at 420, and use "appropriate methods to investigate the merits of the investment and to structure the investment." *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 86 (2d Cir. 2001). And after an investment decision has been made, they must continue to "monitor the prudence of their investment decisions to ensure that they remain in the best interest of plan participants." *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 358 (4th Cir. 2014) (citing *DiFelice*, 497 F.3d at 423). As this Court recognized in *Tibble*, the duty of prudence thus requires a fiduciary "to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances." 135 S. Ct. at 1827–28. And that requirement "exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset." *Id.* at 1828.

The Eighth Circuit failed to even consider, let alone address, this basic facet of the breach claims here. The complaint alleged that the Semi fiduciaries never

examined the continued prudence of holding the failing SunEdison stock in the plan. App. 32a, 46a–47a. But the Eighth Circuit dismissed the failure-to-monitor claim under *Dudenhoeffer*'s "special circumstances" test, holding that it amounted to a claim that the fiduciaries "failed to outperform the market." App. 8a. That was wrong. The allegation that a fiduciary failed to adequately investigate an investment does not require the fiduciary to have made the "decision that in the light of hindsight proves best." *Tatum*, 761 F.3d at 346. All that is required is a "reasoned decision-making process." *Id.* at 369. A "fiduciary need not be prescient about future stock-value movements" to use "the procedures that a prudent fiduciary would use." *Allen v. GreatBanc Trust Co.*, 835 F.3d 670, 679 (7th Cir. 2016).

For that reason, the D.C. Circuit in *Coburn v. Evercore Trust Co.* suggested that *Dudenhoeffer*'s "special circumstances" test is inapplicable to a failure-to-monitor claim under *Tibble*. 844 F.3d 965, 970 (D.C. Cir. 2016). As explained by a concurrence in that case, "*Dudenhoeffer* involves the substance of investment decisions, while *Tibble* has to do with a fiduciary's obligation to monitor those decisions." *Id.* at 977 (Edwards, J., concurring). The theories thus "embrace distinct, albeit not mutually exclusive, causes of action for violations of a fiduciary's duty." *Id.*; *see also Brannen v. First Citizens Bankshares Inc.*, 2016 WL 4499458, at *6 (S.D. Ga. Aug. 26, 2016) (holding that *Dudenhoeffer* did not apply to "a case alleging that a Defendant … fail[ed] to conduct an investigation into the prudence of continuing to hold an investment").

2. *Dudenhoeffer* does not support the Eighth Circuit belief that the "special circumstances" pleading requirement applies to non-ESOP plans and claims that an asset was unduly risky.

In *Dudenhoeffer*, this Court considered the appropriate pleading standard for an ESOP and concluded that, generally, a claim that a company stock fund was overvalued in price would not be plausible absent special circumstances. The Eighth Circuit's decision to expand this rule outside the ESOP context and to claims based on theories beyond just that an asset was overvalued finds no support from the context-specific analysis required by *Dudenhoeffer*.

Dudenhoeffer's conclusion that "special circumstances" may be needed to make a claim for overvaluation is commonsense: an efficient market will normally properly value a stock unless something distorts its price. But that same logic does not hold up when, as here, a plaintiff claims not that the market price is distorted but instead that retention of the stock of a failing company is no longer prudent for a retirement plan under prevailing circumstances.

The price of an asset is a poor metric of its riskiness, particularly for ERISA plan participants. It is true that, all else being equal, the market will value risky stocks at a lower price. But price also incorporates potential reward, meaning that the price of a very risky stock will be higher if the potential return is also high. *See Tatum*, 855 F.3d at 565 n.10. A claim that such a stock is excessively risky does not require second-guessing market price. The market may be willing to gamble on a small chance of a large payout, but that does not make it a

prudent investment strategy for a retirement fund on which employees depend for their financial security. *See Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 409 (7th Cir. 2006).

An investment may also be imprudently risky if it is excessively volatile. *See DiFelice*, 497 F.3d at 424. But this type of claim also does not require second-guessing the market. A stock that wildly fluctuates in value may reflect the best valuation based on public information available at any given time. But a fund that invested in such a stock would face the risk that a sudden downturn could render the plan's assets unavailable. Even assuming that it is efficiently priced, such a stock therefore may not be a prudent investment choice.

At bottom, prudent fiduciaries do not consider just price when choosing an investment, but also "the character and aim of the particular plan and decision at issue and the circumstances prevailing at the time." *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 299 (5th Cir. 2000). For a plan with beneficiaries near retirement age, a highly risky investment may be especially imprudent because, in the event that the asset loses money, there will be little time for it to recover. *See* Turan Bali, *The intertemporal relation between expected returns and risk*, 87 J. Fin. Econ. 101 (2008); *see also GIW Indus., Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d 729, 732 (11th Cir. 1990) (upholding a duty-of-prudence claim based not on the fiduciary's "investment strategy from the vantage point of hindsight," but on failure to consider "the anticipated needs of the fund"). And, at least in cases like this one, prudence also requires consideration of a risky investment's role "within the overall plan portfolio." *Tatum*, 761 F.3d at 370 (citing

Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets Under the "Prudence" Rule, 44 Fed. Reg. 37,221, 37,222 (June 26, 1979)). That is all the more true where, as here, the asset in which the plan invests is not the employer's stock—there is no countervailing benefit to creating employees' ownership of their own company.

It therefore makes no sense to require plaintiffs alleging that an asset was unduly risky to allege that "special circumstances" distorted the price of the stock, as the Eighth Circuit held here. And were it otherwise, a fiduciary would face no consequence for the decision to retain a publicly traded but overly risky asset in a retirement plan—even though ERISA imposes "a continuing duty to monitor trust investments and remove imprudent ones." *Tibble*, 135 S. Ct. at 1828. That is especially true given this Court's clear instruction that "[t]his continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset." *Id. Dudenhoeffer*, in short, did not override this core requirement.

The facts of this case demonstrate the point. As the plaintiff alleged in his complaint, the market was well aware of how risky SunEdison's stock was. The stock's price was on a continuous decline for the better part of a year before going into "freefall" as hedge funds and other investors began selling off their entire positions in the stock. Articles repeatedly warned that SunEdison had too much debt and too little liquidity, and investment experts warned shareholders to "stay away" from the stock. And the publicly available information made clear that SunEdison stock was unlikely to rebound: the company was holding "massive" debts and had almost no

liquidity in an industry where such capital is key. That is why, months before SunEdison's bankruptcy, industry experts were correctly predicting SunEdison's demise. The fiduciary defendants in this case did not need inside information to know that SunEdison had become an imprudent, overly risky investment. But despite all of this publicly available information, the respondents did nothing: either they failed to pay attention to the unanimous warnings about SunEdison reflected in both the news and the trajectory of SunEdison's stock, or they knew that SunEdison's stock was careening toward zero and nevertheless they continued to hold it in the plan's portfolio. Either way, no special circumstances were needed to allege that the plan fiduciaries behaved imprudently by failing to act.

But even though a claim based on undue risk requires an analysis of different context-specific circumstances than a claim for an overvalued stock, four other courts of appeals have held, as the Eighth Circuit did here, that *Dudenhoeffer*'s language about "special circumstances" created a pleading requirement that applies to claims alleging a fiduciary held an unduly risky stock. *See Singh*, 882 F.3d 137; *Saumer v. Cliffs Natural Res.*, 853 F.3d 855, 861–62 (6th Cir. 2017); *Coburn*, 844 F.3d at 971; *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 65–66 (2d Cir. 2016). These courts have primarily based their conclusion on the fact that the ESOP plaintiff in *Dudenhoeffer* had alleged risk-based claims as well as claims that the stock was overvalued. *See, e.g.*, *Rinehart*, 817 F.3d at 66. In their view, that means *all* of *Dudenhoeffer*'s statements must apply equally to undue-risk claims and overvaluation claims even if those statements do not logically apply to undue-risk claims.

That is unsupportable. To limit these kinds of excessive-riskiness claims to "special circumstances" would, in ordinary cases, let fiduciaries off the hook for gambling away the assets of beneficiaries with risky investments or failing to actively monitor the plan's asset portfolio. That would defeat ERISA's core purpose of preventing the "possibility that the employee's expectation of the benefit would be defeated through poor management." *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989). Under the Eighth Circuit's rule, "special circumstances" are required not just for allegations of excessive risk, but for *all* allegations of imprudence based upon public information. If that were true, it would mean that there is no such thing as an imprudent public stock—so long as it has a price, it is prudent. *See Jander*, 910 F.3d at 628 (recognizing that "no duty-of-prudence claim against an ESOP fiduciary has passed the motion-to-dismiss stage since *Amgen*"). *Dudenhoeffer* came nowhere close to sanctioning such a wide-ranging result. Given that the Eighth Circuit's decision conflicts with, and impermissibly expands, *Dudenhoeffer*, the Court should hold this petition for *Jander*, then dispose of it accordingly.

II. This petition should be held for *Jander*, which will clarify how courts should apply *Dudenhoeffer*'s standards.

This Court has already granted certiorari in *Jander*, in which the question is how to properly read *Dudenhoeffer*. As a result, this Court's resolution of *Jander* will provide much-needed clarity to the courts of appeals on how to apply *Dudenhoeffer* to allegations of breach of the fiduciary duty of prudence, and will thus affect how the Eighth Circuit should have analyzed the plaintiff's complaint in this case.

As explained above, the Second Circuit in *Jander* conducted a context-specific analysis of whether the plaintiff had sufficiently alleged a breach of the duty of prudence based on the circumstances of that case. *See supra* at 9. The Eighth Circuit rejected that case-specific approach here.

The parties in *Jander* have similarly presented this Court with competing views of *Dudenhoeffer* and whether it should continue to require a context-specific analysis or whether breach-of-fiduciary-duty pleading should be governed by blanket rules that make it more difficult to state a claim. *Compare* Respondents' Br. at 2, 36, *Jander*, No. 18-1165 (Sept. 24, 2019) (arguing for affirmance because the Second Circuit properly conducted "a careful, considered assessment of the specific factual context in Respondents' allegations, along with Respondents' more general allegations about the increased risk of potential harm to ESOP participants" as required by *Dudenhoeffer*), *with* Petitioners' Br. at 22, *Jander*, No. 18-1165 (Aug. 6, 2019) (insisting that the Court should impose a general rule that ERISA fiduciaries never have a duty "to use material nonpublic information learned in a *corporate* capacity to make decisions in their *fiduciary* capacity").

Jander, in other words, asks this Court to decide between two competing interpretations of *Dudenhoeffer*: On the one hand, whether its "'context-sensitive' approach" offers lower courts "flexibility to account for the many varieties of situations in which an ESOP fiduciary might need to decide whether to take an action—like making a public disclosure—or do nothing." Respondents' Br. at 43. Or, on the other, whether it requires

clear-cut rules that would foreclose claims based on the duty of prudence in entire categories of cases.

How this Court resolves that choice will matter. Adopting the petitioners' approach would send a significant signal to the lower courts that they may fashion restrictive pleading requirements that would foreclose entire categories of breach-of-fiduciary-duty claims; adopting respondents' view would reinforce that, under *Dudenhoeffer*, courts must not adopt duty-of-prudence pleading standards that would be "impossible" to meet, but must instead consider all the circumstances surrounding an alleged breach of the fiduciary's duty of prudence. 573 U.S. at 425.

Providing that guidance is important. Absent a robust defense of the duty of prudence, American workers are at risk for losing their entire savings, as real-world examples have repeatedly proven. The collapse of major corporations including Enron, Bear Stearns, and Lehman Brothers all depleted employees' 401(k) assets, which had been primarily invested in their employers' stock. *See* Patrick J. Purcell, Cong. Research Serv., RS21115, *The Enron Bankruptcy and Employer Stock in Retirement Plans* 1 (2002); Scott Horsley, *Bear Stearns Collapse Costly to Many*, NPR (Mar. 17, 2008), https://n.pr/2lPEYcy. The long-term effects of wiping out employee retirement plans with the collapse of a company's stock are far-reaching: countless employees have lost their jobs, have to postpone their retirement, accept lower-paying work, and never regain a position of economic security that allows them to comfortably retire. *See* Colette Thayer, *Retirement Security or Insecurity? The Experience of Workers Aged 45 and Older*, at i-iii

(2008), https://bit.ly/2nCawmR; *see also Summers*, 453 F.3d at 409.

And the way this Court interprets *Dudenhoeffer*'s standards will affect the outcome of this case. The Eighth Circuit declined to conduct the kind of analysis required by *Dudenhoeffer* and which was embraced by the Second Circuit in *Jander*. Instead, it relied on categorical rules that make certain duty-of-prudence claims nearly impossible to plead—a type of categorical rule that, although not endorsed in *Dudenhoeffer*, is advanced by the petitioners in *Jander*. Because the outcome of this case turns on how *Dudenhoeffer* should be applied, this case should be held pending resolution of *Jander*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Jander*, and then disposed of accordingly.

Respectfully submitted,

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