No. 19-460

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

BRIEF IN OPPOSITION FOR RESPONDENTS MEMC LLC, THE INVESTMENT COMMITTEE OF THE SUNEDISON SEMICONDUCTOR RETIREMENT SAVINGS PLAN, STEVE EDENS, HEMANT KAPADIA, BEN LLORICO, AND CHENG YANG

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QUESTION PRESENTED

Whether the Eighth Circuit correctly held that an ERISA imprudence claim that alleged that plan fiduciaries should have predicted the bankruptcy of an unrelated company whose publicly traded stock was a plan investment option, based solely on publicly available information, was implausible in light of *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459 (2014), which held that such claims are generally implausible, and where every court of appeals to judge such claims has reached a similar conclusion.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent MEMC, LLC states that it is wholly-owned by GlobalWafers B.V. GlobalWafers B.V. is wholly-owned by SunEdison Semiconductor PTE LTD, which is wholly-owned by GlobalWafers Singapore PTE LTD. GlobalWafers Singapore PTE LTD is wholly-owned by GlobalWafers Co., Ltd., which is publicly traded on the Taipei Exchange.

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INTRODUCTION

In the decision below, the Eighth Circuit held that a claim alleging that ERISA plan fiduciaries should have concluded, based solely on public information, that a publicly traded stock was overvalued and destined for bankruptcy, was implausible and failed to state a claim. The Eighth Circuit's decision was consistent with this Court's precedents and those of every other circuit that has considered such claims.

In *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014), this Court held that "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." As the petition tacitly acknowledges, since *Dudenhoeffer*, every circuit that has addressed claims based on public information has affirmed dismissal and rejected the same arguments petitioner raised. Pet. 19.

Not surprisingly, the petition does not claim that there is a circuit split; it does not even ask this Court to grant certiorari. Instead, the petition asks this Court to (1) hold the petition pending the Court's consideration of *Retirement Plans Committee of IBM* v. *Jander*, No. 18-1165 (set for argument on November 6, 2019), and then (2) "dispose of [the petition] accordingly." Pet. 23.

But there is no reason even to hold the petition, let alone grant it, because *Jander* involves a fundamentally different type of claim governed by an entirely different pleading standard. *Dudenhoeffer* recognized that ERISA imprudence claims relating to publicly traded stock can be based on either public information or nonpublic information, and announced different pleading standards that apply to each type of claim. The claim in *Jander* is based solely on nonpublic information; the claim here is based solely on public information. The question presented in *Jander* only concerns the "more harm than good" standard that applies to nonpublic information claims; no question is presented relating to the public information pleading standard. Thus, *Jander* will not have any impact on the claim asserted here—this Court has already held that public information claims are implausible absent some special circumstance.

Because the Eighth Circuit and every other court of appeals to have considered these claims has uniformly applied *Dudenhoeffer*'s public information pleading standard to reject such claims, and because *Jander* will have no impact on the consistent precedent for public information claims, this Court should deny the petition.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

Petitioner is a former employee of SunEdison Semiconductor ("Semi")—a company now known as MEMC LLC—and a participant in the SunEdison Semiconductor Retirement Savings Plan (the "Plan") Pet. App. 14a. The Plan is a 401(k) plan that provides participants with an individual account and allows them to direct the investment of their account among a number of different investment options. *Id.* at 16a-17a, ¶¶ 15-16.

Prior to May 2014, Semi was a wholly-owned subsidiary of SunEdison, Inc., and its employees participated in the 401(k) plan sponsored by SunEdison (the "SunEdison Plan"). Pet. App. 16a, ¶ 14. One of the investment options in the SunEdison Plan was a fund that invested primarily in SunEdison stock, which was publicly traded. *Id.*

In May 2014, Semi was spun off from SunEdison and became a separate company. *Id.* As part of the spin-off, the Semi Plan was created to provide benefits for the Semi employees, including employees who previously worked for SunEdison and were participants in the SunEdison Plan. *Id.*; 8th Cir. App. 163-74. The SunEdison Plan transferred assets held for the Semi employees to the new Semi Plan, including their investments in SunEdison stock. Pet. App. 16a, ¶ 14; 8th Cir. App. 163-74.

The Semi Plan offered a broad range of investment options from which participants could choose to invest their funds; one of those investment options was a fund that invested in SunEdison stock. 8th Cir. App. 143-44, 167. Effective February 1, 2015 (before the "Relevant Period" alleged in the operative complaint), the Semi Plan was amended to provide that participants could retain their existing Plan holdings in SunEdison stock, but could no longer make additional purchases. Pet. App. 17a, ¶ 18; 8th Cir. App. 153-55, 164. Plaintiff chose to retain his SunEdison stock in his Semi Plan account.

In the late summer of 2015 and continuing into 2016, a confluence of market events sent SunEdison into a downward spiral from which it ultimately could not recover. On April 21, 2016, SunEdison filed for bankruptcy to reorganize under Chapter 11. Pet. App. 45a, ¶ 61.

B. Procedural Background

1. In 2017, petitioner filed this lawsuit against Semi and the Plan's investment committee in the Eastern District of Missouri, purportedly proceeding

derivatively on behalf of the Plan. Plaintiff subsequently amended the complaint to add six individual defendants.

The Amended Complaint asserted a single count alleging that respondents breached their duty of prudence under ERISA by allowing Semi Plan participants to continue to hold SunEdison stock. Petitioner alleged that, during the Relevant Period (July 20, 2015 to April 21, 2016), Respondents knew or should have known that SunEdison stock was overvalued. The Amended Complaint alleged that "the value of SunEdison stock . . . look[ed] grim," that the stock was too risky, and that the stock therefore was "not a suitable and appropriate investment for the Plan." Pet. App. 36a, ¶ 53, 54a, ¶ 87. Petitioner claimed that, at the start of the Relevant Period, respondents should have predicted that SunEdison's future bankruptcy was "inevitable," based solely on reading publicly available information, such as internet articles and SEC filings. *Id.* at 20a-47a, ¶¶ 29-64, 54a, ¶ 89. Petitioner did not allege that respondents had any nonpublic information relating to SunEdison and did not assert a claim based on insider information.

Respondents moved to dismiss, arguing that the Amended Complaint's prudence claim was foreclosed by *Dudenhoeffer* because it was based solely on public information and did not allege any special circumstances. In opposing the motion, petitioner never disputed that the Amended Complaint failed to allege special circumstances; instead, he took the position that *Dudenhoeffer* did not apply and, therefore, allegations of special circumstances were not required. See Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint, *Usenko* v. *SunEdison Semiconductor, LLC*, No. 4:17-cv-02227-AGF (E.D. Mo. Nov. 21, 2017), ECF No. 37 at 8-11; Pet. App. 63a.

2. On February 21, 2018, the district court granted respondents' motion to dismiss with prejudice. Pet. App. 58a-67a. The district court held that because petitioner's prudence claim was based solely on public information, under *Dudenhoeffer*, petitioner had to allege a special circumstance affecting the reliability of the market price of SunEdison stock, and petitioner admittedly had not even attempted to plead any special circumstance. *Id.* at 63a-64a.

The district court rejected petitioner's various attempts to distinguish *Dudenhoeffer*. First, it held that *Dudenhoeffer* applies to all publicly traded securities, not just employer securities. Pet. App. 64a. Second, it held that *Dudenhoeffer* applies to prudence claims regardless of whether they allege that a stock is overvalued or excessively risky. *Id.* at 64a-65a. Third, it held that petitioner could not evade *Dudenhoeffer* by alleging a failure to monitor the SunEdison stock. *Id.* at 65a.

3. The Eighth Circuit affirmed. Applying *Dudenhoeffer*'s public information claim pleading standard, the Eighth Circuit concluded that the Amended Complaint sought to fault respondents for failing to act on publicly available information about SunEdison but "contains no allegations that the circumstances indicated to the defendants that they could not rely on the market's valuation of SunEdison stock." Pet. App. 8a. To the contrary, the allegations confirmed that the market *was* reliable and functioning properly, because SunEdison's stock price "did react to the company's announcements and the financial press's negative commentary as to the high debt load and liquidity problems, among other concerns." *Id.* The Eighth Circuit also held that *Dudenhoeffer* was controlling

regardless of whether SunEdison stock was an employer security, noting that *Dudenhoeffer* rejected the contention that fiduciaries of employee stock ownership plans are subject to a different standard. *Id.* at 9a-10a.

The Eighth Circuit further held that this Court's decision in *Tibble* v. *Edison International*, 135 S. Ct. 1823, 1828 (2015)—acknowledging the unremarkable principle that an ERISA fiduciary has a continuing duty to monitor investments and remove imprudent ones—did not exempt petitioner from meeting *Dudenhoeffer*'s pleading requirements, which required a showing that the challenged investment was imprudent in the first place. Pet. App. 9a.

REASONS FOR DENYING THE PETITION

The petition should not be held pending *Jander*, because *Jander* will have no impact on the pleading standard that applies here. *Jander* does not involve a claim based on public information, and no question is presented relating to the pleading standard for such claims. Instead, *Jander* involves an imprudence claim based on nonpublic, insider information, which is governed by an entirely different standard. That standard is not implicated here, because petitioner has not alleged that respondents possessed any inside information regarding SunEdison.

Given the irrelevance of *Jander*, there is no reason to grant the petition. The petition does not claim that there is a circuit split; on the contrary, it concedes that the courts of appeals' decisions on public information claims are uniform. Pet. 19. As a result, the petition boils down to a pure request for error correction.

But even that request has no merit. Petitioner portrays the "special circumstances" requirement as an Eighth Circuit invention, but that requirement comes verbatim from this Court's decision in *Dudenhoeffer*—a unanimous opinion issued only five years ago. Petitioner also complains that the courts of appeals applying the standard have unanimously rejected similar public information claims, but that unanimity is hardly a basis for granting the petition. This Court made clear that such claims would rarely if ever be viable ("implausible as a general rule"), so it is hardly surprising that every circuit since *Dudenhoeffer* has rejected such claims. This Court said that the pleading standards were intended to weed out meritless imprudence claims, such as ones that try to impose liability on ERISA fiduciaries for failing to accurately predict future stock price movements based on the same information available to every investor in the market. This is exactly what the Eighth Circuit did. The petition should be denied.

I. THE PETITION SHOULD NOT BE HELD PENDING *JANDER* BECAUSE THIS CASE INVOLVES A DIFFERENT TYPE OF CLAIM.

A. *Dudenhoeffer* Set Forth Separate Pleading Standards For Two Types Of ERISA Imprudence Claims.

Petitioner's request to hold the petition pending *Jander* simply ignores the fact that *Dudenhoeffer* set forth two separate pleading standards that apply to two different types of ERISA imprudence claims. One standard applies to claims alleging that fiduciaries should have acted on the basis of *public* information, and a separate standard applies to claims alleging that fiduciaries should have acted on the basis of *nonpublic*, i.e., *inside*, information.

1. Public Information Claims.

In a claim based on public information, a plaintiff alleges—always with the benefit of hindsight—that ERISA fiduciaries should have recognized from publicly available information that a publicly traded stock offered as an investment option to plan participants was overvalued or too risky. Such claims are predicated on the notion that, based on reviewing public information, the fiduciaries should have predicted that the stock price would decline in the future, and acted on that prediction by liquidating the plan's stock holdings or halting additional purchases. *Dudenhoeffer*, 134 S. Ct. at 2471.

This Court recognized the heads-I-win, tails-you-lose nature of these claims. If a plan fiduciary fears that continuing to invest in a publicly traded stock might be imprudent, he may "find[] himself between a rock and a hard place." *Id.* at 2470. If the fiduciary continues to allow the stock as an investment option "and the stock goes down[,] he may be sued for acting imprudently." *Id.* But if the fiduciary halts the investment or forces participants to liquidate their holdings and the stock price goes up, "he may be sued for disobeying the plan documents," *id.*, or "for missing the opportunity to benefit from good performance," *id.* (quoting *White* v. *Marshall & Ilsley Corp.*, 714 F.3d 980, 987 (7th Cir. 2013), *abrogated by Dudenhoeffer*, 134 S. Ct. at 2467).

This Court also recognized that a fiduciary's "fail[ure] to outsmart" the market is "not a sound basis for imposing liability." *Id.* at 2472 (alteration in original) (quoting *White*, 714 F.3d at 992). To avoid subjecting fiduciaries to lawsuits for failing to accurately predict future stock price movements, this Court set forth a strict pleading standard designed to "weed[] out meritless claims" through motions under Rule 12. *Id.* at 2471.

In *Dudenhoeffer*, this Court held that imprudence claims based solely on public information, like the one here, "are *implausible as a general rule*, at least in the absence of special circumstances." *Id.* (emphasis added). This Court explained that "a fiduciary usually 'is not imprudent to assume that a major stock market . . . provides the best estimate of the value of the stocks traded on it that is available to him.'" *Id.* at 2471-72 (omission in original) (quoting *Summers* v. *State St. Bank & Tr. Co.*, 453 F.3d 404, 408 (7th Cir. 2006)).

Dudenhoeffer embraced the efficient market theory, which recognizes that the market processes information about publicly traded companies, and that information is reflected in the stock's daily market price. Thus, fiduciaries should not be expected to outperform the market "based solely on their analysis of publicly available information." *Id.* at 2471 (internal quotation marks omitted). Accordingly, fiduciaries "may, as a general matter . . . prudently rely on the market price." *Id. Dudenhoeffer* instructs that prudence claims based upon public information should be dismissed, unless a plaintiff alleges some extraordinary "special circumstance." *Id.* at 2471-72.

This Court made clear that "special circumstances" would be rare. The special circumstances would have to be ones "that would make reliance on the market's valuation imprudent." *Id.* at 2472 (describing such a circumstance as one "affecting the reliability of the market price as 'an unbiased assessment of the security's value in light of all public information'").

2. Nonpublic Information Claims.

The second type of ERISA imprudence claim is one based on nonpublic information. In those cases, a plaintiff alleges that plan fiduciaries, which may include senior company officers, possessed adverse material inside information suggesting that the company's own stock (offered as a plan investment option) was over-valued. Those claims assert that the plan fiduciaries should have acted on the inside information, e.g., by disclosing the inside information, liquidating the plan's stock holdings, or suspending future purchases. *Id.*

This Court recognized an obvious problem with those types of insider information ERISA claims: ERISA's duty of prudence does not require or permit a plan fiduciary to break the law, and a plan fiduciary in possession of material, nonpublic information is bound by insider trading laws, so selling a plan's shares based on such information is not an option. *Id.* at 2472-73. In addition, this Court recognized that "stopping purchases—which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment—or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund," thus harming the very participants the fiduciary is supposed to protect. *Id.* at 2473.

To address these concerns, *Dudenhoeffer* set forth a separate pleading standard applicable to imprudence claims based on nonpublic information, which this Court reaffirmed in *Amgen Inc.* v. *Harris*, 136 S. Ct. 758 (2016) (per curiam). To assert a viable ERISA imprudence claim based on nonpublic information, a complaint must plausibly allege (1) "an alternative action that the defendant could have taken that would have been consistent with the securities laws," and (2) "that a prudent fiduciary in the same position 'could not have concluded' that the alternative action 'would do more harm than good.'" *Id.* at 760 (quoting *Dudenhoeffer*, 134 S. Ct. at 2473). This "more harm than good" standard was intended to balance the competing concerns a fiduciary faces.

B. The Pleading Standard Applicable To Public Information Claims Is Not At Issue In *Jander*.

Since *Dudenhoeffer*, every court of appeals to consider the issue, including the Eighth Circuit here, has heeded this Court's warning that public information claims are generally "implausible" and uniformly affirmed dismissals of ERISA imprudence claims based on public information. See *O'Day* v. *Chatila*, 774 F. App'x 708, 710-11 (2d Cir. 2019); *Wilson* v. *Fid. Mgmt. Tr. Co.*, 755 F. App'x 697, 698 (9th Cir. 2019); *Kopp* v. *Klein*, 894 F.3d 214, 219-21 (5th Cir. 2018) (per curiam); *Singh* v. *RadioShack Corp.*, 882 F.3d 137, 144-47 (5th Cir. 2018) (per curiam); *Saumer* v. *Cliffs Nat. Res. Inc.*, 853 F.3d 855, 862-63 (6th Cir. 2017); *Rinehart* v. *Lehman Bros. Holdings Inc.*, 817 F.3d 56, 65-67 (2d Cir. 2016) (per curiam); *Coburn* v. *Evercore Tr. Co., N.A.*, 844 F.3d 965, 969-72 (D.C. Cir. 2016); *Smith* v. *Delta Air Lines Inc.*, 619 F. App'x 874, 876 (11th Cir. 2015) (per curiam).

Until recently, courts of appeals also had uniformly affirmed dismissals of claims based on *nonpublic* information under the "more harm than good" standard. But in December 2018, the Second Circuit reversed a dismissal under that standard based on generalized allegations that disclosure of nonpublic information was inevitable and later disclosure would do more harm than good. *Jander* v. *Ret. Plans Comm. of IBM*, 910 F.3d 620, 631 (2d Cir. 2018), *cert.*

granted, No. 18-1165 (June 3, 2019). This holding created a split with the Fifth and Sixth Circuits, both of which had held that nearly identical allegations were implausible. See *Martone* v. *Robb*, 902 F.3d 519, 526-27 (5th Cir. 2018); *Graham* v. *Fearon*, 721 F. App'x 429, 436 (6th Cir. 2018).

This Court granted certiorari in *Jander* to address the following question: "Whether [*Dudenhoeffer*'s] 'more harm than good' pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time." Petition for a Writ of Certiorari at i, *Ret. Plans Comm. of IBM* v. *Jander*, No. 18-1165 (U.S. Mar. 4, 2019).

Critically, in *Jander*, neither the petitioners, respondents, nor the Government (which has appeared as amicus) have asked this Court to address, much less revise, *Dudenhoeffer*'s pleading standard for claims based on *public* information. That is because *Jander* does not involve such a claim.

The petitioner here has not brought a claim based on nonpublic information or alleged that respondents possessed any inside information regarding SunEdison. Instead, petitioner's claim is the generally implausible public information claim that is subject to *Dudenhoeffer*'s "special circumstances" pleading standard. As a result, *Jander* will not have any impact on this case.

Thus, the entire premise of petitioner's request to hold their petition pending this Court's resolution of *Jander*—that "the way this Court interprets *Dudenhoeffer*'s standards" in *Jander* "will affect the outcome of this case" (Pet. 23)—is incorrect. There is no reason to hold the petition pending *Jander*, and thereby leave the parties in limbo. The petition can and should be disposed of now by denying it.

II. THE EIGHTH CIRCUIT'S OPINION FAITHFULLY APPLIED THIS COURT'S PRECEDENT AND IS IN ACCORD WITH ALL OF THE OTHER COURTS OF APPEALS THAT HAVE ADDRESSED PUBLIC INFORMATION CLAIMS.

Once petitioner's reliance on *Jander* is rejected, there is nothing left of the petition. There is no circuit split or any other certiorari-worthy issue. All of the courts of appeals that have considered imprudence claims based on public information—even the Second Circuit, which decided *Jander*—have uniformly rejected the theories petitioner raised here. And petitioner's arguments that Eighth Circuit's opinion is somehow inconsistent with *Dudenhoeffer*—a pure plea for error correction—are meritless.

A. The Eighth Circuit Correctly Applied *Dudenhoeffer*'s "Special Circumstances" Requirement.

Petitioner first argues that *Dudenhoeffer* does not require that a complaint allege any special circumstances to state a public information claim—he says the Eighth Circuit "newly[] imposed" that requirement. Pet. 7-8. But the special circumstances requirement comes straight from *Dudenhoeffer*. This Court said that if an imprudence claim is premised solely on public information, the claim is "implausible as a general rule," unless a plaintiff can plausibly allege some sort of "special circumstance" that would "affect[] the reliability of the market price as 'an unbiased assessment of the security's value in light of all public information.'" *Dudenhoeffer*, 134 S. Ct. at 2471-72. In other words, absent special circumstances, public information claims are supposed to be weeded out at the pleading stage.

Indeed, this case is a textbook example of a claim that should be weeded out. The claim here boils down to an argument that the plan fiduciaries—who no longer worked at SunEdison and were in no better position than anyone else in the market to evaluate SunEdison's future prospects—should have divined, based *entirely* on the same public information available to every investor in the market, that a SunEdison bankruptcy was a certainty. In other words, petitioner is claiming that plan fiduciaries should have outsmarted the market; they should have known that the value of SunEdison stock was zero at times when the market said otherwise. And petitioner insists that plan fiduciaries should have used this crystal ball to conduct a *forced* liquidation of participants' holdings of SunEdison stock.

While the complaint treats each adverse event reported to the public as somehow signaling that SunEdison's bankruptcy several months later was inevitable, it relies entirely on hindsight. After all, if bankruptcy was so certain and obvious, the market would have incorporated that information and the stock price would have been at or near zero. But those were not the facts alleged—SunEdison stock was trading at $31.66 at the start of the Relevant Period. Pet. App. 13a, ¶ 4. Petitioner is trying to fault respondents for not outsmarting the market by predicting that SunEdison would go bankrupt.

In other words, petitioner encouraged the courts below to make the exact mistake this Court warned about in *Dudenhoeffer*: turning ERISA fiduciaries into market soothsayers. The district court and the Eighth Circuit properly refused to take the bait. The Eighth Circuit recognized petitioner's claim for what it was: an attempt to fault respondents for failing to predict the future based on nothing more than publicly available information. Pet. App. 8a. The Eighth Circuit then considered whether the complaint alleged any special circumstances that would suggest that the market was unreliable. *Id.* This is exactly the analysis that *Dudenhoeffer* requires.

The Eighth Circuit is not alone in enforcing the special circumstances requirement. Since *Dudenhoeffer*, every court of appeals that has addressed similar public information claims—including the Second Circuit, which decided *Jander*—has affirmed dismissal for failure to allege special circumstances. See *O'Day*, 774 F. App'x at 710-11; *Wilson*, 755 F. App'x at 698; *Singh*, 882 F.3d at 146-47; *Kopp*, 894 F.3d at 220; *Rinehart*, 817 F.3d at 66-67; *Saumer*, 853 F.3d at 862-63; *Coburn*, 844 F.3d at 969-70; *Smith*, 619 F. App'x at 876.

The fact that no public information claim has survived in *any* appellate court since *Dudenhoeffer* is neither surprising nor troubling. This Court made clear that viable public information claims would be rare by declaring them generally implausible. Petitioner suggests that successful claims should be common by essentially arguing that fiduciaries should be expected to outsmart the market. But ERISA does not expect that of fiduciaries; that was the very reason this Court said that public information claims are generally implausible. The unanimity among courts of appeals in rejecting public information claims shows the standard is working in weeding out these meritless, implausible claims.

Petitioner next argues that the Eighth Circuit "rais[ed] the pleading bar even higher" than *Dudenhoeffer* requires by holding that "publicly available information can *never* satisfy" the special circumstances requirement, i.e., that "only insider information can satisfy it." Pet. 8, 11. But the Eighth Circuit said no such thing. It simply notes that the complaint did not allege that the market was unreliable, and that, if anything, the allegations suggest that the market *was* reliable because it *did* react to the public information on which petitioner relied. Pet. App. 8a. There was no need for the Eighth Circuit to consider what facts might constitute special circumstances because petitioner conceded that he had not even attempted to plead any. *Id.* at 63a.

Petitioner argues that requiring a plaintiff to allege special circumstances is somehow inconsistent with this Court's observation in *Dudenhoeffer* that courts should perform "careful, context-sensitive scrutiny of a complaint's allegations." Pet. 9. But that argument amounts to a claim that *Dudenhoeffer* was somehow internally inconsistent, and no court has ever suggested that is the case.

Nobody disputes the unremarkable principle that courts should carefully review a complaint when evaluating a motion to dismiss. But as applied to ERISA imprudence claims, that "careful, context-sensitive scrutiny" requires a court to evaluate (1) whether a claim is premised exclusively on public information and, if so, (2) whether the complaint alleges special circumstances that would warrant a departure from the general rule of implausibility. The lower courts here considered and correctly resolved both of those issues. This was an easy case.

B. Petitioner Cannot Evade *Dudenhoeffer* By Characterizing His Claim As An "Excessive Risk" Claim.

Petitioner argues that *Dudenhoeffer* is inapplicable by characterizing his claim as one alleging that the stock was "excessively risky," as opposed to overvalued. Pet. 16-20. According to petitioner, *Dudenhoeffer*'s "special circumstances" requirement applies only where a plaintiff alleges "that an asset was overvalued" (Pet. 16), and not where a plaintiff alleges that a stock is "excessively risky." *Id.*

This argument fails for several reasons. For starters, petitioner has conceded that his claim is, ultimately, an overvaluation claim. The complaint alleges that the stock was overvalued and that a drop in stock price was "inevitable." Pet. App. 54a, ¶ 89. The petition asserts that respondents "knew that SunEdison's stock was careening toward zero" (Pet. 19), and in his Eighth Circuit brief, petitioner conceded that his claim is that "SunEdison stock's 'true value' as a long-term retirement asset was not the market price assigned to it," which is a classic overvaluation claim. 8th Cir. Pet. Br. at 48. Petitioner acknowledges that overvaluation claims are subject to *Dudenhoeffer*'s special circumstances requirement. Pet. 16.

And in any event, even if petitioner had cast his complaint solely in terms of "excessive risk" instead of overvaluation, that is a distinction without a difference. *Dudenhoeffer* itself addressed a claim that the stock at issue was excessively risky. Before *Dudenhoeffer* reached this Court, the Sixth Circuit had held that the complaint stated a claim precisely *because* it alleged that defendants "were aware of the risks" that ultimately led to a fall in the stock's share price, and sufficiently alleged that "such *risks* made [the stock] an imprudent investment." *Dudenhoeffer* v. *Fifth Third Bancorp.*, 692 F.3d 410, 419-20 (6th Cir. 2012) (emphasis added), *vacated*, 134 S. Ct. 2459 (2014). But this Court reversed that holding and vacated the Sixth Circuit opinion. In doing so, this Court expressly noted the complaint's allegation "that . . . the fiduciaries knew or should have known that Fifth Third's stock was overvalued *and excessively risky*," and in Section IV.A of *Dudenhoeffer*, this Court again quoted the Sixth Circuit's discussion of the allegations about the "risks of such investments." *Dudenhoeffer*, 134 S. Ct. at 2464, 2472 (emphasis added). If this Court did not intend for *Dudenhoeffer*'s pleading standard to apply to excessive risk claims, it would not have vacated the Sixth Circuit's ruling in that case.

Moreover, as petitioner concedes, there is no circuit split on this issue. Pet. 19. All of the courts of appeals to have considered this argument have held that any claimed distinction between overvaluation and excessive risk is "illusory." *Rinehart*, 817 F.3d at 65-66; see also *O'Day*, 774 F. App'x at 710-11; *Coburn*, 844 F.3d at 970-71; *Singh*, 882 F.3d at 145-46; *Kopp*, 894 F.3d at 220; *Saumer*, 853 F.3d at 862. As these courts have explained, applying *Dudenhoeffer* to all claims of imprudence, whether characterized as overvaluation claims or excessive risk claims, "is consistent with the efficient market hypothesis that risk is accounted for in the market price of a security." *Rinehart*, 817 F.3d at 66. "[W]hen a stock becomes increasingly risky (and hence, its potential for loss increases), its price falls so as to maintain the expected market rate of return." *Coburn*, 844 F.3d at 972 n.5. Thus, *Dudenhoeffer*'s "market-price-reliance rule dispatched both the value- and risk-based claims," *Saumer*, 853 F.3d at 862, and *Dudenhoeffer* "applies equally to . . . public-information claims premised on excessive risk." *Singh*, 882 F.3d at 146; *Kopp*, 894 F.3d at 220.

C. The Eighth Circuit Correctly Rejected Petitioner's Argument That *Dudenhoeffer* Can Be Evaded By Alleging A Failure To Monitor.

Petitioner also attempted to evade *Dudenhoeffer* by alleging that respondents breached a "continuing duty to monitor" the SunEdison stock, which "exists separate and apart from the . . . duty to exercise prudence in selecting investments at the outset." Pet. App. 47a, ¶ 65. While the quoted language is from *Tibble*, 135 S. Ct. at 1828, petitioner's argument is utterly inconsistent with *Tibble* and courts of appeals have uniformly rejected it.

The unremarkable principle that fiduciaries have an ongoing duty to monitor investments and remove imprudent ones does not save petitioner's claim from dismissal. Even assuming *arguendo* that respondents did not monitor the SunEdison stock, that fact alone would not be sufficient to state a claim. Petitioner would still have to plead that SunEdison stock was imprudent and warranted removal if there had been additional monitoring. But whether the complaint plausibly alleged that SunEdison stock was imprudent is governed by *Dudenhoeffer*. Allegations that there was a failure to monitor do not suffice on their own to state a claim.

Indeed, *Tibble* recognizes that a failure to monitor alone is insufficient to establish liability. In *Tibble*, this Court held that a "plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments *and remove imprudent ones*." *Tibble*, 135 S. Ct. at 1829 (emphasis added). But whether a plaintiff has plausibly alleged that investment in a publicly traded stock was imprudent based solely on publicly available information is governed by *Dudenhoeffer*.

This is why the courts of appeals have consistently rejected a failure-to-monitor argument—because "a fiduciary's failure to investigate an investment decision *alone* is not sufficient to show that the decision was not reasonable." *Saumer*, 853 F.3d at 863 (citation omitted). Rather, "a plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan," which he cannot do if he fails to allege anything "that would undermine reliance on the market price." *Id.* (citation omitted); see also *O'Day*, 774 F. App'x at 711; *Singh*, 882 F.3d at 147; *Kopp*, 894 F.3d at 221; *Smith*, 619 F. App'x at 875-76.[1]

D. The Eighth Circuit Correctly Held That *Dudenhoeffer* Applies To All Publicly Traded Securities.

Although undeveloped in his petition (just as it was undeveloped below), petitioner also argues that *Dudenhoeffer* should not apply because SunEdison stock was not "the employer's stock" (i.e., after Semi was spun off, SunEdison stock was not an employer security with respect to Semi plan participants). Pet. 18. The Eighth Circuit correctly rejected this argument. In *Dudenhoeffer*, this Court held that the same prudence standard applies to all ERISA fiduciaries, and nothing in *Dudenhoeffer* suggests that its holding is limited to employer securities. In fact, in *Dudenhoeffer*, this Court specifically *overruled* numerous circuit court decisions holding that fiduciaries overseeing employer securities are governed by a different

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[1] Petitioner asserts that the D.C. Circuit suggested that *Dudenhoeffer* does not apply to a failure-to-monitor claim. Pet. 15. In fact, petitioner cites a *concurring* opinion in *Coburn*, not the opinion of the entire court. Every court of appeals that has considered this issue has agreed with the Eighth Circuit.

standard than other fiduciaries, which petitioner conceded below. 8th Cir. Pet. Br. at 31. And this Court could not have been clearer that the general implausibility of public information claims applies "where a stock is publicly traded," regardless of the type of security at issue. *Dudenhoeffer*, 134 S. Ct. at 2471.

Applying this standard to all publicly traded securities makes sense because this Court's holding in *Dudenhoeffer* is premised on the efficiency of the public markets. *Id.* at 2471-72. The efficient market theory does not depend on whether or not a security is affiliated with a participant's current employer, so it would make no sense for the application of *Dudenhoeffer* to turn on that distinction.

And there is no circuit split on the point either: both the Eighth and Ninth Circuits agree that *Dudenhoeffer* applies to non-employer securities. Pet. App. 9a-10a; *Wilson*, 755 F. App'x at 698; see also *Schweitzer ex rel. Phillips 66 Sav. Plan* v. *Inv. Comm. of Phillips 66 Sav. Plan*, 312 F. Supp. 3d 608, 620-22 (S.D. Tex. 2018), *appeal docketed*, No. 18-20379 (5th Cir. June 12, 2018); *Yates* v. *Nichols*, 286 F. Supp. 3d 854, 860 (N.D. Ohio 2017), *appeal dismissed*, No. 18-3075, 2018 WL 1888998 (6th Cir. Apr. 17, 2018).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, and the Court should decline petitioner's invitation to hold this petition pending the outcome in *Jander*.

Respectfully submitted,

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