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

REPLY BRIEF FOR THE PETITIONER

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In their opposition brief, the respondents offer one reason why this Court should decline to hold this petition: that however this Court interprets *Dudenhoeffer*'s pleading standards in *Jander*, "will not have any impact on this case." Opp. 12. In their view, because the claims in *Jander* are "based on nonpublic information" and those here are "based on public information," nothing this Court says in *Jander* can have any bearing on this case. Opp. 10–11. That slices things too finely.

Jander 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 fiduciaries might need to take action. That is, in fact, precisely the lesson the Second Circuit drew from *Dudenhoeffer* when it assessed the plausibility of the breach claims in *Jander*. On the other hand, as the petitioners in *Jander* have argued, *Dudenhoeffer* requires lower courts to apply clear-cut rules when assessing claims that would foreclose claims based on the duty of prudence in entire categories of cases. Under that approach, fiduciaries would be relieved from *any* ongoing duty to examine the assets being held in the retirement trust so long as they are publicly traded.

How this Court may resolve that choice matters here. Adopting the petitioners' preferred approach in *Jander* would mean that lower courts may be correct in imposing restrictive pleading requirements that would eliminate entire categories of breach-of-fiduciary-duty claims—like those at issue in this case. But adopting the respondents' view would cut against that understanding and would reinforce *Dudenhoeffer*'s caution that courts must not adopt unduly restrictive pleading standards but must instead consider all the circumstances surrounding an alleged breach of the fiduciary's duty of prudence. This Court should hold the petition pending its decision in *Jander*.

I. How this Court decides *Jander* will impact this case.

The respondents principally claim that "*Jander* will not have any impact on this case." Opp. 12. As they see it, because the claims in *Jander* "involve[] an imprudence claim based on nonpublic, insider information," nothing the Court can say will affect "*Dudenhoeffer*'s pleading standard for claims based on *public* information," which is what's at stake here. Opp. 6, 12. The respondents' position, in other words, is that *Dudenhoeffer* "set forth two separate pleading standards that apply to two different types of ERISA imprudence claims" and *Jander* implicates only one of them. Opp. 7.

That is wrong. *Dudenhoeffer* did not adopt two distinct across-the-board pleading standards, one governing imprudence claims based on nonpublic information and another governing public information. Instead, the Court reaffirmed the general rule that breach-of-fiduciary-duty claims based on a theory of imprudence are governed by "the same standard of prudence." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 418–19 (2014).

In reaching this conclusion, the Court rejected an invitation to apply a heightened pleading standard for certain imprudence claims involving ESOP fiduciaries. *See id.* at 419 (refusing to apply a presumption of prudence because "ESOP fiduciaries are subject to the duty of prudence just as other ERISA fiduciaries are").

The Court then provided a straightforward description of the "appropriate way" for lower courts to "weed out meritless lawsuits." *Id.* at 425. That "important task," the Court explained, "can be better accomplished through careful, context-sensitive scrutiny of a complaint's allegations." *Id.* After all, "[b]ecause the content of the duty of prudence turns on 'the circumstances . . . prevailing' at the time the fiduciary acts," the "appropriate inquiry will necessarily be context specific." *Id.*

The respondents (at 8) disagree that this approach controls—at least when it comes to any imprudence claim "based on public information." They insist that, contrary to all the foregoing, the Court in *Dudenhoeffer* actually "set forth a strict pleading standard" for *all* public-information duty-of-prudence claims. *See* Opp. 8 (arguing that "this Court held that imprudence claims based solely on public information, like the one here, are *implausible as a general rule*"). For this entire category of claim, the respondents say, *Dudenhoeffer* requires that a court grant a fiduciary's motion to dismiss unless the complaint contains allegations of "special circumstances." Opp. 9.

Dudenhoeffer does not bear the weight of this expansive claim. As we explained in our opening brief (at 11), the statement in *Dudenhoeffer* on which the respondents rely was carefully tailored to only one specific subset of imprudence claims—those alleging "that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock." 573 U.S. at 426. It is thus irrelevant that such a "requirement comes verbatim" from *Dudenhoeffer*. Opp. 7. The Court nowhere suggested, let alone held, that such a pleading rule would also apply to claims raising different theories of imprudence—it simply didn't address it.

And that, in short, is what's at stake in *Jander*. Although the respondents rely on the narrow "question presented in *Jander*" to argue against this understanding, the parties have briefed the case in a very different way from how it was originally presented. *See, e.g.*, Tr. of Oral Arg. at 22, *Retirement Plans Comm. of IBM v. Larry W. Jander* (2019) (No. 18-1165) (observing that "[y]our argument now and the government and most of the briefs here seem, as Justice Sotomayor pointed out, to be addressing a different issue than what we granted cert on").

The task for the Court as the parties have now presented it is whether to reinforce *Dudenhoeffer*'s instruction that deciding if a "complaint states a claim that the defendant has acted imprudently" requires "careful, context-sensitive scrutiny of [the] complaint's allegations" by affirming the Second Circuit's decision or, on the other hand, whether that approach does not apply to a certain category of claim is implausible on its face, making the Second Circuit's decision erroneous. *See* 573 U.S. at 425. Because the Eighth Circuit's decision here implicates that choice as well, a decision in *Jander* will impact the outcome of this case. The Court should therefore hold this petition pending the outcome in *Jander*.

II. *Dudenhoeffer* did not impose a categorical heightened pleading standard for all breach claims involving any publicly traded security.

Shifting gears, the respondents defend the Eighth Circuit's decision expanding the application of *Dudenhoeffer*'s "special circumstances" pleading requirement. In their view, the Eighth Circuit was right to read *Dudenhoeffer* to require dismissal of any breach-of-fiduciary-duty claim involving a public traded security in the absence of "special circumstances" because this Court in *Dudenhoeffer* "could not have been clearer that the general implausibility of public information claims" applies—without exception—"where a stock is publicly traded." Opp. 21; *see also id.* at 20 (arguing that "nothing in *Dudenhoeffer* suggests that its holding is limited to employer securities"). That badly mischaracterizes *Dudenhoeffer*.

In *Dudenhoeffer*, this Court trained its "special circumstances" discussion on one specific type of breach. "[W]here a stock is publicly traded," the Court explained, "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. That would distort basic principles of fiduciary prudence by repackaging the presumption of prudence that *Dudenhoeffer* rejected. And such a sweeping interpretation of *Dudenhoeffer* would mean relieve fiduciaries of any ongoing duty to examine the prudence of retaining publicly traded assets in a retirement plan.

As we explained in our opening brief, it has long been a settled principle of trust law 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* Pet. at 14. 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. GreatBanc 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).

The respondents' interpretation of *Dudenhoeffer* would eviscerate these crucial trust-law guardrails for *any* prudence-based claims involving publicly-traded securities. 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"). Nor are the respondents correct that the claim at issue in this case is a "classic overvaluation claim" that is undoubtedly controlled by *Dudenhoeffer*'s "special circumstances" pleading rule. Opp. 17. To support this assertion, the respondents point to an allegation in the complaint that the "drop in stock price was 'inevitable.'" *Id.* But not even the Eighth Circuit agreed with this characterization. It specifically recognized that the plaintiffs' theory of imprudence in this case centered on the fiduciaries' continued retention of an "excessively risky" asset in the retirement plan. Pet. App. 8a. It nevertheless held that *Dudenhoeffer*'s "special circumstances" requirement should be expanded to apply to even these claims. *Id.*

Ultimately, the respondents acknowledge that the claims here are focused on a different theory of imprudence. *See* Opp. 17. But, they say, "even if" the complaint alleged a claim that the retention of legacy SunEdison stock in the Semiconductor retirement plan constituted an "'excessive risk,'" that "is a distinction without a difference." Opp. 17. That is wrong. The claims are different precisely because they address different duties of prudence. The price of an asset is typically an accurate measure of a stock's value because a major stock market "provides the best estimate of the value of the stocks traded on it." *Dudenhoeffer*, 573 U.S. at 427. As a result, a fiduciary's "failure to outsmart an efficient market is not a sound basis for imposing liability." *Id.* (quoting *White v. Marshall & Ilsley Corp.*, 714 F.3d 980, 992 (7th Cir. 2013)).

But as we explained in our opening brief (at 16), the market price of a publicly-traded stock is not an accurate measure of its riskiness, particularly for ERISA plan participants. That is because price incorporates potential reward, meaning that the price of a very risky stock will be higher if the potential return is also high. *See Tatum v. RJR Pension Comm.*, 855 F.3d 553, 565 n.10 (4th Cir. 2017). So, although the market may be willing to gamble on a small chance of a large payout, 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). Put another way: A claim that such a stock is excessively risky does not require second-guessing market price and so doesn't implicate *Dudenhoeffer*'s discussion of those overvaluation claims that require allegations of "special circumstances affecting the reliability of the market price as 'an unbiased assessment of the security's value in light of all public information'." 573 U.S. at 427 (quoting *Halliburton Co. v. Eric P. John Fund*, 573 U.S. 258, 273 (2014)).

Try as they might, the respondents identify nothing in *Dudenhoeffer* that cuts against this understanding. True, the plaintiffs in *Dudenhoeffer* alleged both overvaluation and excessive risk theories of imprudence. *See* 573 U.S. at 413; *see* Opp. 17 (noting that the plaintiffs in *Dudenhoeffer* also had alleged "that the stock at issue was excessively risky"). But the Court focused only on the former of these in rejecting the lower court's "decision to deny dismissal," which, it held, "appears to have been based on an erroneous understanding of the prudence of relying on market prices." 573 U.S. at 427.

That conclusion accords with the *Dudenhoeffer*'s articulation of an efficient market theory of prudence for stock-drop claims. A "special circumstances" requirement may be needed to make a claim for overvaluation because an efficient market will normally properly value a stock unless something—a special circumstance—distorts its price. But that same understanding does not follow for a claim that a fiduciary's decision to retain the stock of a failing company in a retirement plan was no longer prudent. If that were true, a fiduciary would be free to ignore or disregard any information indicating that retaining a publicly traded asset in a particular retirement plan would be imprudent.

And make no mistake: The respondents offer no sound justification for why the same logic *should* apply to this type of claim. Instead, all they do is attempt, once again, to treat the claim as one challenging an asset's overvaluation, *see* Opp. 14 (insisting that the claim "boils down" to an argument that "a SunEdison's bankruptcy was a certainty" and so the stock was worthless), and argue that the Eighth Circuit is "not alone" in its embrace of a sweeping interpretation of *Dudenhoeffer*. Opp. 15.

But regardless of other courts' effort to expand the scope of *Dudenhoeffer*'s narrow "special circumstances" pleading requirement, this Court's opinion itself adopted nothing close to a categorical rule requiring the existence of special circumstances for any breach claim based on public information. Just the opposite: For these sorts of claims, no less than others, a court must still undertake "careful, context-sensitive scrutiny of a complaint's allegation" to determine whether the claims can proceed. Pet. 9.

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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