No. 19-595

IN THE

Supreme Court of the United States

ERIC O'DAY, et al., Individually, On Behalf of the SunEdison, Inc. Retirement Savings Plan,

Petitioners,

v.

AHMAD CHATILA, et al.,

Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS AHMAD CHATILA, EMMANUEL HERNANDEZ, ANTONIO R. ALVAREZ, CLAYTON C. DALEY, JR., GEORGANNE C. PROCTOR, STEVEN V. TESORIERE, JAMES B. WILLIAMS, RANDY H. ZWIRN, THE SUNEDISON RETIREMENT SAVINGS PLAN INVESTMENT COMMITTEE, BRIAN WUEBBELS, PHELPS MORRIS, MATTHEW HERZBERG, MATT MARTIN, AND JAMES WELSH

SARAH A. HEMMENDINGER
SIDLEY AUSTIN LLP
555 California Street
Suite 2000
San Francisco, CA 94104
(415) 772-1200

MARK B. BLOCKER*
CHRISTOPHER K. MEYER
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000
mblocker@sidley.com

Counsel for Respondents Ahmad Chatila, Emmanuel Hernandez, Antonio R. Alvarez, Clayton C. Daley, Jr., Georganne C. Proctor, Steven V. Tesoriere, James B. Williams, Randy H. Zwirn, The SunEdison Retirement Savings Plan Investment Committee, Brian Wuebbels, Phelps Morris, Matthew Herzberg, Matt Martin, and James Welsh

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*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that an ERISA imprudence claim that alleged that 401(k) plan fiduciaries should have predicted, based on publicly available information, the bankruptcy of a company whose publicly traded stock was a plan investment option, 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.

2. Whether the Second Circuit correctly held that, with respect to an ERISA imprudence claim based on plan fiduciaries' alleged nonpublic information, petitioners failed to allege that a prudent fiduciary in petitioners' position could not have concluded that petitioners' proposed alternative actions, which the complaint acknowledges would have led to "dramatic losses" to the Plan and its participants, would do more harm than good, and therefore failed to state a claim in light of *Dudenhoeffer* and *Amgen Inc.* v. *Harris*, 136 S. Ct. 758 (2016) (per curiam).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

INTRODUCTION 1

COUNTERSTATEMENT OF THE CASE 4

A. Factual Background 4

B. Procedural Background 6

REASONS FOR DENYING THE PETITION 10

I. THERE IS NO REASON TO HOLD THE PETITION FOR PETITIONERS' PUBLIC INFORMATION CLAIM BECAUSE *JANDER* DOES NOT INVOLVE SUCH A CLAIM, AND THE SECOND CIRCUIT FAITHFULLY APPLIED THIS COURT'S PRECEDENT 12

A. The Pleading Standard Applicable To Public Information Claims Is Not At Issue In *Jander* 12

B. The Second Circuit Faithfully Applied This Court's Precedent And Is In Accord With All Of The Courts Of Appeals That Have Addressed Public Information Claims 14

1. The Second Circuit Correctly Applied *Dudenhoeffer*'s "Special Circumstances" Requirement 14

2. Petitioners Cannot Evade *Dudenhoeffer* By Characterizing Their Claim As An "Excessive Risk" Claim 18

TABLE OF CONTENTS—continued

Page

II. THE NONPUBLIC INFORMATION CLAIM PROVIDES NO REASON TO HOLD THE PETITION BECAUSE THE CLAIMED ALTERNATIVE IN *JANDER* WAS DIFFERENT THAN THE ONE PETITIONERS ADVANCE 20

CONCLUSION 29

TABLE OF AUTHORITIES

CASES Page

Amgen Inc. v. *Harris*, 136 S. Ct. 758 (2016) 1, 2, 21, 22
Coburn v. *Evercore Tr. Co.*, 844 F.3d 965 (D.C. Cir. 2016) 12, 17, 19
Dudenhoeffer v. *Fifth Third Bancorp*, 692 F.3d 410 (6th Cir. 2012), *vacated*, 134 S. Ct. 2459 (2014) 19
Fifth Third Bancorp v. *Dudenhoeffer*, 134 S. Ct. 2459 (2014) .... *passim*
Graham v. *Fearon*, 721 F. App'x 429 (6th Cir. 2018) 13, 23
Graham v. *Fearon*, No. 1:16 CV 2366, 2017 WL 1113358 (N.D. Ohio Mar. 24, 2017), *aff'd*, 721 F. App'x 429 (6th Cir. 2018) 24
Jander v. *Ret. Plans Comm. of IBM*, 910 F.3d 620 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 2667 (June 3, 2019) (No. 18-1165) 9, 13, 22, 23
In re JPMorgan Chase & Co. ERISA Litig., No. 12 Civ. 04027 (GBD), 2016 WL 110521 (S.D.N.Y. Jan. 8, 2016), *aff'd sub nom. Loeza* v. *John Does 1-10*, 659 F. App'x 44 (2d Cir. 2016) 24
Kopp v. *Klein*, 894 F.3d 214 (5th Cir. 2018) 12, 17, 20
Martone v. *Robb*, 902 F.3d 519 (5th Cir. 2018) 13, 23
Rinehart v. *Lehman Bros. Holdings Inc.*, 817 F.3d 56 (2d Cir. 2016) .... *passim*
Saumer v. *Cliffs Nat. Res. Inc.*, 853 F.3d 855 (6th Cir. 2017) 12, 17, 20, 25
Singh v. *RadioShack Corp.*, 882 F.3d 137 (5th Cir. 2018) 12, 17, 19, 20

TABLE OF AUTHORITIES—continued

Page

Smith v. *Delta Air Lines Inc.*, 619 F. App'x 874 (11th Cir. 2015) 12, 17, 20

Tibble v. *Edison Int'l*, 135 S. Ct. 1823 (2015) 20

Usenko v. *MEMC LLC*, 926 F.3d 468 (8th Cir. 2019), *petition for cert. filed*, No. 19-460 (U.S. Oct. 2, 2019) 12, 17, 19, 20

Whitley v. *BP, P.L.C.*, 838 F.3d 523 (5th Cir. 2016) 25

Wilson v. *Edison Int'l, Inc.*, No. LA CV15-09139 JAK (PJWx), 2016 WL 7469601 (C.D. Cal. July 6, 2016) 24

Wilson v. *Fid. Mgmt. Tr. Co.*, 755 F. App'x 697 (9th Cir. 2019) 12, 17

INTRODUCTION

Petitioners alleged that fiduciaries of a 401(k) plan should have concluded that the company's own publicly traded stock was overvalued, and should have publicly announced a prediction that the company was destined for bankruptcy. Petitioners conceded that this would have decimated the value of the Plan's and the participants' company stock holdings. The Second Circuit held that these claims were implausible and failed to state a claim. That decision was consistent with this Court's precedents and those of every other circuit that has considered such claims.

As is common in these types of lawsuits, petitioners' claims are premised on both publicly available information and nonpublic information. In *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459, 2471-73 (2014), and in *Amgen Inc.* v. *Harris*, 136 S. Ct. 758 (2016) (per curiam), this Court set forth stringent pleading standards that were designed to weed out these types of meritless claims at the pleading stage.

For public information claims, 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." *Dudenhoeffer*, 134 S. Ct. at 2471.

For nonpublic information claims, this Court held that to state a claim, a complaint must plausibly allege (1) "an alternative action that the defendant could have taken that would have been consistent with the securities laws," as ERISA's fiduciary duties do "not require a fiduciary to break the law," *id.* at

2472; *Amgen*, 136 S. Ct. at 759 (quoting *Dudenhoeffer*, 134 S. Ct. at 2472), and (2) "that a prudent fiduciary in the same position 'could not have concluded' that the alternative action 'would do more harm than good.'" *Amgen*, 136 S. Ct. at 760 (quoting *Dudenhoeffer*, 134 S. Ct. at 2473).

Since *Dudenhoeffer* and *Amgen*, every circuit court that has addressed the theories advanced by petitioners has affirmed dismissal. There is no circuit split on any of the issues raised in the petition.

Indeed, the petition does not even ask this Court to grant certiorari based on the current state of the law. 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 (argued Nov. 6, 2019), and then (2) "dispose[] of [the petition] accordingly." Pet. 23. But there is no reason to hold the petition, let alone grant certiorari, because *Jander* involves a fundamentally different type of claim from the ones alleged here.

With respect to petitioners' public information claim, *Jander* is irrelevant. The claim in *Jander* is based solely on nonpublic information, and the question presented there only concerns the "more harm than good" standard that applies to nonpublic information claims; no question is presented in *Jander* relating to the public information pleading standard. Thus, *Jander* will not have any impact on petitioners' public information claim—this Court has already held that such claims are implausible absent some special circumstances that are not present here.

Jander also will have no impact on petitioners' nonpublic information claim. This Court granted certiorari in *Jander* to consider whether the plaintiffs satisfied the "more harm than good" pleading standard by alleging that an early disclosure of inside information alongside the SEC's regular reporting process would have caused less damage than a later disclosure, and by relying on a generalized economic hypothesis that delaying the disclosure of negative inside information about a company results in a more severe decrease in the company's stock price—an issue that has divided the courts of appeal. But as the Second Circuit (which decided *Jander*) concluded, petitioners made no such allegations here, so *Jander* is inapposite.

Instead of the quite narrow and limited alternative course of action the plaintiffs proposed in *Jander*, petitioners here proposed an extreme course of action that would have guaranteed severe adverse consequences for the Plan and its participants. Petitioners proposed that respondents should have made a public pronouncement that they would be suspending further purchases and liquidating existing holdings of SunEdison stock, as well as their reason for doing so, namely, that they predicted that a SunEdison bankruptcy was certain. But a reasonable fiduciary could have (and most likely would have) concluded that this course of action would result in disaster. Petitioners have acknowledged as much in their complaint, which alleges that "once the [alleged] insider information was disclosed, the Plan and its participants would suffer dramatic losses to their retirement savings." Pet. App. 153a, ¶ 221. And, not surprisingly, there is no circuit split on this point: the courts of appeals that have evaluated such proposed alternatives have uniformly held that they fail to satisfy *Dudenhoeffer* and *Amgen*'s "more harm than good" standard.

Jander will not change any of this. If this Court affirms *Jander*, the law will be no different than it was when the Second Circuit issued its opinion, which already considered and distinguished *Jander*. If, on the other hand, this Court reverses *Jander*, that would be all the more reason to deny certiorari, since *Jander* will represent simply another unsuccessful attempt to state an ERISA prudence claim relating to company stock.

Because the Second Circuit correctly applied this Court's precedent and is in accord with every other court of appeals to have considered similar claims, and because *Jander* will have no impact on the consistent precedent for such claims, this Court should deny the petition.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

SunEdison was a renewable energy development company. Pet. App. 53a, ¶ 57. It financed, built, and operated solar, wind, and hydro power plants around the globe. *Id.* at 58a-59a, ¶ 64. SunEdison sponsored a 401(k) plan for its employees called the SunEdison Retirement Savings Plan (the "Plan"). *Id.* at 48a-49a, ¶¶ 39-45.

The Plan is an "individual account plan" or defined contribution plan. It provides for acquisition and holding of employer securities (known as an "eligible individual account plan" ("EIAP") under ERISA), and is intended to qualify as a "cash or deferred profit sharing plan under Section 401 of the Internal Revenue Code," commonly known as a 401(k) plan. 2d Cir. App. 343, 378, 381-82, §§ 1.4, 17.6(n), 18.1. Contributions to a participant's account come from both the participant and the employer. Pet. App. 49a, ¶ 44.

Participants self-direct the investment of their accounts among a broad range of investment options offered under the Plan. 2d Cir. App. 382-83, § 18.2. One of the many investment options available to participants was the SunEdison Stock Fund, a fund that, as its name implies, invested in SunEdison common stock. Pet. App. 49a-50a, 159a, ¶¶ 46, 239; 2d Cir. App. 382-83, § 18.2. The Plan provides that participants are not required to invest any of their account in the SunEdison Stock Fund, may not direct investment into the SunEdison Stock Fund that exceeds 15% of their account balance, and may not direct that more than 15% of new contributions be invested in the SunEdison Stock Fund. 2d Cir. App. 382-83, § 18.2.

Petitioners are all current or former Plan participants who allegedly invested in the SunEdison Stock Fund. Pet. App. 37a-39a, ¶¶ 13-16. Petitioners have named two groups as defendants: (1) the "Director Defendants," who are alleged to have served on the SunEdison Board of Directors at various times during the Relevant Period, and (2) the "Investment Committee Defendants," who are alleged to have served as members of the Plan's Investment Committee. *Id.* at 39a-46a, ¶¶ 17-32. The Investment Committee as an entity is also named as a defendant. *Id.* at 44a, ¶ 26.

The Investment Committee's duties, which are delineated in the Plan, include general responsibility for the investment of Plan assets, the establishment of Plan investment policies, and selection of Plan investment options. 2d Cir. App. 375-83, §§ 17-18. The complaint alleges that the Director Defendants had the power to appoint and remove individuals to serve on the Investment Committee. Pet. App. 34a, 172a, ¶¶ 5, 283. However, other than the power to appoint and remove members of the Investment Committee, nothing in the Plan gives the Director Defendants any authority or responsibility with respect to administration of the Company Stock Fund.

In late summer 2015 and continuing into 2016, a confluence of events—including an industry-wide downturn and constricting access to capital, among other things—sent SunEdison's stock into a downward spiral from which it did not recover. On April 21, 2016, SunEdison filed for bankruptcy to reorganize under Chapter 11. Pet. App. 139a, ¶ 205.

B. Procedural Background

1. Four ERISA class actions were filed in the Eastern District of Missouri against SunEdison and its officers and directors. These actions were transferred to the Southern District of New York as part of an MDL created to manage all pending litigation relating to SunEdison.

Petitioners filed a consolidated complaint and amended it several times, including after respondents filed motions to dismiss identifying numerous pleading deficiencies. *In re SunEdison, Inc. Sec. Litig.*, No. 1:16-mc-02744-PKC (S.D.N.Y.), ECF Nos. 23, 30 (Amended Consolidated Complaint and Second Amended Consolidated Complaint). The operative pleading is the Second Amended Consolidated Complaint (the "Complaint"). Pet. App. 31a-177a.

In Count I, petitioners alleged that respondents acted imprudently under ERISA by continuing to offer the SunEdison Stock Fund as an investment option during the Relevant Period from July 20, 2015 until April 21, 2016. Pet. App. 50a, 164a-167a, ¶¶ 48, 255-266. This count asserted two theories of imprudence: one based on public information and one based on nonpublic information.

The public information claim asserts that the Plan fiduciaries should have concluded by the start of the Relevant Period that SunEdison stock was overvalued or too risky. This theory alleged that the fiduciaries should have reached this conclusion based solely on publicly available information such as analyst reports and internet articles. Pet. App. 150a-151a, ¶¶ 212-213.[1]

The nonpublic information claim asserts that certain senior officers who served as Plan fiduciaries knew or should have known that the company was destined for bankruptcy. Pet. App. 153a, ¶¶ 218-221; 2d Cir. Pet. Br. at 36-37. Petitioners assert that the alternative action the fiduciaries should have taken was to liquidate the Plan's holdings and suspend additional Plan purchases in SunEdison stock, but only "following proper disclosure" of the reasons for doing so, *i.e.*, a public announcement to the market of the fiduciaries' supposed knowledge of SunEdison's "inevitable bankruptcy" and "certain worthlessness" at a time when the stock was trading at over $31. Pet. App. 64a-65a, 149a, 153a, 157a, ¶¶ 80-83, 209, 219, 232; 2d Cir. Pet. Br. at 31, 35-36.

In Count II, petitioners alleged that Defendants breached their duty of loyalty, based on the same allegations that form the basis of Count I. Pet. App. 167a-172a, ¶¶ 267-279. In Count III, petitioners al-

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[1] Petitioners assert that the publicly available information cited in the Complaint made clear that a SunEdison bankruptcy was inevitable, but the Complaint makes clear that this is not true. As of July 20, 2015, when petitioners argue the fiduciaries should have acted on the public information, SunEdison stock was trading at over $31 per share (Pet. App. 64a-65a, ¶¶ 80-83), which means that the market did not view the public information as portending bankruptcy.

leged that the defendant fiduciaries breached a duty to monitor each other. *Id.* at 172a-175a, ¶¶ 280-291.

2. The district court granted respondents' motion to dismiss. Pet. App. 29a-30a. The district court held that the public information claim did not satisfy the pleading requirements this Court set forth in *Dudenhoeffer* or *Rinehart* v. *Lehman Bros. Holdings Inc.*, 817 F.3d 56 (2d Cir. 2016) (per curiam), because petitioners failed to allege special circumstances that would exempt their claim from *Dudenhoeffer*'s general rule that public information claims are implausible. Pet. App. 16a-19a. The district court explained that allegations of "negative developments for the Company, corresponding press reports and subsequent drops in share price" did not constitute "special circumstances." *Id.* at 18a-19a. To the contrary, the district court noted that the relationship between the negative press coverage and the stock price drops in fact made the claim that "SunEdison shares were riskier than the market's assessment" *less plausible*, because it showed that the market was processing the negative information. *Id.* at 19a.

The district court also held that the nonpublic information claim was implausible. The district court held that conclusory allegations that a "'proper disclosure' and subsequent freeze on purchases and liquidation of shares would not have done more harm than good" were insufficient under *Dudenhoeffer*. Pet. App. 21a-22a. The district court explained that petitioners' proposed alternative course of action—*i.e.*, disclosing to the market that the company was headed to bankruptcy before divesting the Plan's shares of company stock—would have triggered a negative market reaction, and that the Complaint did not plausibly allege that "any reasonable fiduciary would have concluded that the benefits of plaintiffs' proposed actions would have been greater than the possible harms of a drop in stock price and loss of value to a plan." *Id.* at 23a.

The district court also rejected petitioners' attempt to circumvent *Dudenhoeffer* by alleging a failure to monitor SunEdison stock, Pet. App. 24a-27a, and held that Plaintiffs' duty of loyalty claims failed for the same reasons as their prudence claims. *Id.* at 27a-29a. The district court further held that petitioners' claim that the directors were liable for failing to monitor the actions of the Investment Committee and take corrective actions failed because petitioners did not plausibly allege that the Investment Committee committed any underlying breach. *Id.* at 27a.

3. The Second Circuit affirmed. As to the public information claim, it concluded that the district court correctly held that petitioners "did not allege any 'special circumstances' that would affect the reliability of the market price as a reflection of the value of SunEdison shares." Pet. App. 5a. Instead, the claim was exactly the type that this Court has held is generally implausible. *Id.*

As to the nonpublic information claim, the Second Circuit held that it also failed to satisfy *Dudenhoeffer's* pleading standard. On appeal, petitioners relied extensively on the Second Circuit's decision in *Jander* v. *Retirement Plans Committee of IBM*, 910 F.3d 620 (2d Cir. 2019), *cert. granted*, 139 S. Ct. 2667 (June 3, 2019) (No. 18-1165). Pet. App. 5a-6a. Petitioners argued that their claim was similar and that *Jander* "provides a roadmap for analyzing" petitioners' claims. 2d Cir. Pet. Reply Br. at 13. The Second Circuit, however, held that petitioners' claims were significantly different from those in *Jander* because they had never alleged that earlier disclosure of any inside information would have caused less damage than a later disclosure. Pet. App. 5a-6a.

The Second Circuit also rejected petitioners' attempt to avoid *Dudenhoeffer* by framing their claims as a failure to monitor, explaining that such a claim "requires Defendants both to have improperly monitored investments and to have failed to remove imprudent ones." Pet. App. 6a. "Plaintiffs failed to plausibly allege that it was imprudent for Defendants not to remove any investments." *Id.* The Second Circuit also affirmed the district court's dismissal of petitioners' duty of loyalty and failure to monitor claims.[2]

REASONS FOR DENYING THE PETITION

The petition should not be held because the outcome of *Jander* will have no impact on the claims that were asserted here. Instead, the petition should be denied.

Petitioners' request to hold the petition pending *Jander* 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.

With respect to the public information claim, *Jander* plainly will have no impact. The question presented in *Jander* solely concerns the contours of the "more harm than good" standard applicable to non-

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[2] The petition does not seek review of the Second Circuit's affirmance of the dismissal of their "failure to monitor" claim or the claims against the Director Defendants.

public information claims. *Jander* has nothing to do with the public information standard, so the Court's opinion will not impact the ruling on this claim.

But even as to the nonpublic information claim, *Jander* will not improve petitioners' arguments because, as the Second Circuit noted, *Jander* involved a different theory than the one petitioners advanced here. The alternative action proposed in *Jander* concerns disclosure through the regular SEC reporting process that, if made earlier, would have resulted in less harm to the stock price. No such alternative is alleged here. Instead, the alternative proposed here involves a public prediction of bankruptcy that petitioners agree would have devastated the stock price and severely harmed the Plan and its participants. There is no allegation that this harm would have been less severe than the harm caused by a delay in disclosure, as was alleged in *Jander*. The Second Circuit already considered how *Jander* impacts this case, and concluded it does not help petitioners for precisely this reason. Thus, even if the Court affirms in *Jander*, it will not affect the ruling in this case; the Second Circuit already held that the facts were different. And of course if this Court reverses *Jander*, that won't help petitioners either.

Courts of appeals have uniformly rejected the viability of a nonpublic information claim predicated on the sort of extreme alternative proposed here. Unable to identify a circuit split, the petition boils down to a pure request for error correction: petitioners now dispute the notion that their proposed alternative action would have caused a decline in SunEdison's stock price. But there is no error to correct on this score because the Complaint expressly conceded that their proposed alternative would have resulted in "dramatic losses" to the Plan and its participants.

This Court made clear that the pleading standards announced in *Dudenhoeffer* were intended to weed out meritless imprudence claims, and that is exactly what the Second Circuit did here. The petition should be denied.

I. THERE IS NO REASON TO HOLD THE PETITION FOR PETITIONERS' PUBLIC INFORMATION CLAIM BECAUSE *JANDER* DOES NOT INVOLVE SUCH A CLAIM, AND THE SECOND CIRCUIT FAITHFULLY APPLIED THIS COURT'S PRECEDENT.

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

In *Dudenhoeffer*, this Court held that claims based on public information "are implausible as a general rule" and should be dismissed unless the plaintiff can allege some extraordinary "special circumstance." 134 S. Ct. at 2471-72. Since *Dudenhoeffer*, every court of appeals to consider the issue, including the Second Circuit here, has heeded this Court's warning that public information claims are generally implausible by affirming dismissals of such claims. See *Usenko* v. *MEMC LLC*, 926 F.3d 468, 473-74 (8th Cir. 2019), *petition for cert. filed*, No. 19-460 (U.S. Oct. 2, 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*, 817 F.3d at 65-67; *Coburn* v. *Evercore Tr. Co.*, 844 F.3d 965, 969-73 (D.C. Cir. 2016); *Smith* v. *Delta Air Lines Inc.*, 619 F. App'x 874, 876 (11th Cir. 2015) (per curiam).

That pleading standard is not at issue in *Jander*. Instead, *Jander* involves a different standard—the "more harm than good" standard—applicable to *non-public* information claims. In *Jander*, 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*, 910 F.3d at 631. 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).

Petitioners' contention that "the way this Court interprets *Dudenhoeffer*'s standards" in *Jander* "will affect the outcome" of this claim (Pet. 23) is farfetched and wrong. *Jander* does not involve a public information claim. Neither party in *Jander* has asked the Court to address or alter the public information claim pleading standard. Thus, the ultimate decision in *Jander* will have no impact on petitioners' public information claim.

B. The Second Circuit Faithfully Applied This Court's Precedent And Is In Accord With All Of The Courts Of Appeals That Have Addressed Public Information Claims.

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

1. The Second Circuit Correctly Applied *Dudenhoeffer*'s "Special Circumstances" Requirement.

Petitioners first argue that *Dudenhoeffer* does not require that a complaint allege any special circumstances to advance a public information claim—they say the Second Circuit incorrectly "imposed" that requirement. Pet. 11. But the special circumstances requirement comes straight from *Dudenhoeffer*, which recognized that public information claims like the one alleged here are "implausible as a general rule, at least in the absence of special circumstances." 134 S. Ct. at 2471.

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, if the plan fiduciaries had reviewed certain public information, they could have predicted that the stock price would decline in the future and avoid any subsequent losses from the decline. *Id.*

In *Dudenhoeffer*, the 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," and 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 and alteration in original) (quoting *White*, 714 F.3d at 992, and *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 (quoting

Halliburton Co. v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2014)). Accordingly, fiduciaries "may, as a general matter . . . prudently rely on the market price." *Id.*

To avoid subjecting fiduciaries to lawsuits for failing to predict future stock price movements, *Dudenhoeffer* set forth a strict pleading standard designed to "weed[] out meritless claims" through motions under Rule 12. *Id.* This Court held 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.'" *Id.* at 2471-72 (quoting *Halliburton Co.*, 134 S. Ct. at 2411).

This case is a textbook example of a claim that should be weeded out. The public information claim here boils down to an argument that the plan fiduciaries should have divined, based on the same public information available to every investor in the market, that a SunEdison bankruptcy was a certainty. In other words, petitioners are claiming that plan fiduciaries should have outsmarted the market and should have been required to predict the future.

While the Complaint treats each adverse event reported to the public as somehow signaling that SunEdison's bankruptcy months later was inevitable, it does so only with the benefit of hindsight. After all, if bankruptcy was certain and obvious, as petitioners argue, then 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 over $31 at the start of the Relevant Period. Pet. App. 65a, ¶ 83. The market did not believe that the publicly available information indicated that SunEdison was destined for bankruptcy. Thus, petitioners are trying to fault respondents for not outsmarting the market by being the only ones to predict that SunEdison would go bankrupt.

Petitioners thus 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 Second Circuit properly refused to take the bait. The Second Circuit recognized petitioners' claim for what it was: an attempt to fault respondents for failing to predict the future based on publicly available information. Pet. App. 5a. The Second Circuit also 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 Second Circuit is not alone in enforcing the special circumstances requirement. Since *Dudenhoeffer*, every court of appeals that has addressed virtually identical public information claims has affirmed dismissal for failure to allege special circumstances. See *Usenko*, 926 F.3d at 473-74; *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.

Petitioners argue 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. 12 (quoting *Dudenhoeffer*, 134 S. Ct. at 2470). But that argument amounts to a claim that *Dudenhoeffer* was somehow internally inconsistent, which is incorrect. 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 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 considered and correctly resolved both issues. This was an easy case.

2. Petitioners Cannot Evade *Dudenhoeffer* By Characterizing Their Claim As An "Excessive Risk" Claim.

Petitioners argue that *Dudenhoeffer* is inapplicable by characterizing their claim as one alleging that the stock was "excessively risky," as opposed to overvalued. Pet. 8, 13-17. According to petitioners, *Dudenhoeffer*'s "special circumstances" requirement applies only where a plaintiff asserts "a claim for overvaluation," *id.* at 13, and not where a plaintiff asserts an "excessive-riskiness claim," *id.* at 16.

This argument fails for several reasons. For starters, while petitioners assert that their claim "does not turn on the stock's market price," Pet. 11, they have conceded that their claim *is* based on the stock's market price and is, ultimately, an overvaluation claim, regardless of the label they find most convenient when trying to evade *Dudenhoeffer*. The Complaint alleges that the stock was overvalued and that a drop in stock price was "inevitable." Pet. App. 152a-153a, ¶ 217. And in their Second Circuit brief, petitioners specifically argued that their claim is that the fiduciaries should have known that SunEdison's "'true value' . . . was not the current market price assigned to it"—a classic overvaluation claim—and should have predicted "that SunEdison was heading to bankruptcy and certain [to be] worthless[]." 2d Cir. Pet. Br. at 31. Petitioners acknowledge that overvaluation claims are subject to *Dudenhoeffer*'s special circumstances requirement. Pet. 13.

And in any event, even if petitioners had cast their Complaint solely in terms of "excessive risk," that is a distinction without a difference. *Dudenhoeffer itself* addressed a claim that the stock at issue was excessively risky. 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 and vacated the Sixth Circuit opinion, and 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 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* to apply to excessive risk claims, it would not have vacated the Sixth Circuit's ruling.

There is no circuit split on this issue. All of the courts of appeals to have considered this argument have held that any claimed distinction between overvaluation and excessive risk is "illusory" and have applied the standard to claims alleging excessive risk. *Rinehart*, 817 F.3d at 65-66; *Usenko*, 926 F.3d at 472-74; *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.[3]

II. THE NONPUBLIC INFORMATION CLAIM PROVIDES NO REASON TO HOLD THE PETITION BECAUSE THE CLAIMED ALTERNATIVE IN *JANDER* WAS DIFFERENT THAN THE ONE PETITIONERS ADVANCE.

As for the nonpublic information claim, petitioners' request to hold their petition pending *Jander* fares no better. While *Jander* involves a nonpublic information claim, the parallels with this case end there. *Jander* will not impact this case because it concerns a proposed alternative action and theory that petitioners did not plead here. Even if *Jander* is affirmed, the outcome here won't change because the Second Circuit already determined that the facts alleged are different than those in *Jander*.

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[3] Petitioners have abandoned their theory raised below that they could evade *Dudenhoeffer* by alleging the fiduciaries breached a "duty to monitor" the SunEdison stock. Petitioners based this theory on this Court's decision in *Tibble* v. *Edison International*, 135 S. Ct. 1823, 1828-29 (2015), but in *Tibble*, this Court recognized that a failure to monitor, alone, is not sufficient to establish liability. *Tibble* held that "plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments *and remove imprudent ones*." *Id.* (emphasis added). And, once again, there is no circuit split on this issue. Courts of appeals have uniformly held that, even assuming a failure to monitor, a plaintiff still must plausibly allege that the stock was imprudent and therefore additional monitoring would have prevented retention of that investment option. And whether a complaint plausibly alleges that a publicly-traded stock was imprudent is governed by *Dudenhoeffer*'s pleading standard. Pet. App. 6a; *see also Usenko*, 926 F.3d at 474-75; *Saumer*, 853 F.3d at 863; *Singh*, 882 F.3d at 147; *Kopp*, 894 F.3d at 220-21; *Smith*, 619 F. App'x at 875-76; *Rinehart*, 817 F.3d at 66 n.3. As discussed above, petitioners here failed to satisfy those requirements.

In *Dudenhoeffer*, this Court recognized that some ERISA imprudence claims are based on nonpublic information. See 134 S. Ct. at 2472. In such 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. Such claims assert that the plan fiduciaries should have acted on the inside information, *e.g.*, by liquidating the plan's stock holdings or suspending future purchases.

This Court recognized an obvious problem with these claims: the securities laws prohibit acting on insider information. ERISA's duty of prudence does not permit a plan fiduciary to break the law, and a plan fiduciary who possesses 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 nonpublic information claims, which this Court reaffirmed in *Amgen*, 136 S. Ct. 758. To assert a viable nonpublic information claim, a complaint must plausibly allege (1) "an alternative action that the defendant could have taken that would have been consistent with the securities laws," as ERISA's fiduciary duties do "not require a fiduciary to break the law," *id.* at 759 (quoting *Dudenhoeffer*, 134 S. Ct. at 2472); *Dudenhoeffer*, 134 S. Ct. at 2472, and (2) "that a prudent fiduciary in the same position 'could not have concluded' that the alternative action 'would do more harm than good,'" *Amgen*, 136 S. Ct. at 760 (quoting *Dudenhoeffer*, 134 S. Ct. at 2473).

Jander concerns the "more harm than good" element. In *Jander*, plaintiffs alleged that a business unit that IBM had been trying to sell was overvalued as a result of accounting violations, and that the defendant fiduciaries knew of this inside information. 910 F.3d at 622-23. On appeal, plaintiffs narrowed their proposed alternative action to just one: that the fiduciaries should have made earlier corrective disclosure of the inside information conducted alongside the regular SEC reporting process. *Id.* at 628. Plaintiffs argued that because IBM was trying to sell the business, the buyer was sure to discover the violations in due diligence, so it was inevitable that the information would eventually come out. *Id.* at 630. Thus, under plaintiffs' theory, the only issue was whether the information should have been disclosed sooner rather than later.

Plaintiffs in *Jander* acknowledged that earlier disclosure of the inside information could negatively impact the stock price, but they cited "economic analyses that show that reputational harm is a common result of fraud and grows the longer the fraud is concealed, translating into larger stock drops." *Id.* at 629.

The Second Circuit held in *Jander* that given that it was inevitable that the information would be disclosed sooner or later, and in light of plaintiffs' generalized allegation that delaying disclosure increases the severity of a market correction, the choice was simply between one unattractive course of action (early disclosure with a slight decrease in stock price) and a much worse course of action (delayed disclosure and greater decrease in stock price). *Id.* at 630-31. The Second Circuit held that this was enough to satisfy the "more harm than good" standard: any fiduciary would have concluded that the first option would have been better, because it would have resulted in a smaller decrease in the stock price. *Id.* In so holding, *Jander* created a circuit split with the Fifth and Sixth Circuits, which had rejected similar theories. *Martone*, 902 F.3d at 526-27; *Graham*, 721 F. App'x at 436.

In light of the circuit split, this Court granted certiorari in *Jander* on 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).

The answer to that question does not matter in this case because petitioners have not made such allegations. *Jander* turned on unique allegations that the act of delaying an inevitable disclosure of adverse information increased harm to plan participants. Thus, if *Jander* is affirmed, it will at most mean that an ERISA plaintiff may be able to state a claim based on nonpublic information by plausibly identifying a disclosure that both (i) is inevitable, and (ii) becomes more harmful if delayed. That standard would not be met here. There is no plausible allegation that SunEdison's bankruptcy was inevitable as of the time petitioners insist that the plan fiduciaries should have announced as much to the world. And, regardless, petitioners have not alleged that making a premature public forecast of SunEdison's bankruptcy would have lessened the harm to Plan participants. To the contrary, petitioners' proposed alternative would have devastated the stock price, as petitioners conceded below.

Specifically, petitioners asserted below that information regarding SunEdison's "liquidity challenge" should have led respondents to conclude that SunEdison's eventual bankruptcy almost a year later was "inevitable" and that "no matter what happened, the [SunEdison] Stock would not rebound" and would "never recuperate." 2d Cir. Pet. Br. at 35-37, 44. In their petition, respondents have doubled down on this theory: they assert that respondents should have known that "there was no solution," that SunEdison's demise was "certain," and they knew or should have known, months ahead of time, that SunEdison "would eventually have to file for bankruptcy." Pet. 18.

According to petitioners, respondents, armed with such knowledge, should have publicly disclosed, as early as July 2015, that SunEdison's bankruptcy was a foregone conclusion and that the stock price would never rebound.[4] And then, after publicly predicting

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[4] Under the securities laws, fiduciaries cannot use inside information to sell shares or suspend trading without advanced disclosure of the *reasons* for doing so. *See In re JPMorgan Chase & Co. ERISA Litig.*, No. 12 Civ. 04027 (GBD), 2016 WL 110521, at *3 (S.D.N.Y. Jan. 8, 2016), *aff'd sub nom. Loeza* v. *John Does 1-10*, 659 F. App'x 44 (2d Cir. 2016); *Wilson* v. *Edison Int'l, Inc.*, No. LA CV15-09139 JAK (PJWx), 2016 WL 7469601, at *9 n.5 (C.D. Cal. July 6, 2016) (SEC's position is that "[s]uch a suspension of trading must be promptly and accurately disclosed in a Form 8-K—including the reason for the suspension"); *Graham* v. *Fearon*, No. 1:16 CV 2366, 2017 WL 1113358, at *4 n.4 (N.D. Ohio Mar. 24, 2017), *aff'd*, 721 F. App'x 429 (6th Cir. 2018). Indeed, the Complaint acknowledges that any suspension could only occur "following proper disclosure." Pet. App. 149a, ¶ 209.

bankruptcy and announcing that the Plan would therefore be suspending further purchases of SunEdison stock, petitioners proposed that respondents should have forced participants to sell their holdings in the stock. Pet. App. 149a, 153a, 157a, ¶¶ 209, 219, 232.

Putting aside that petitioners' theory would require fiduciaries to become market prognosticators—predicting the future market prospects of the company—it suffers from an even more fundamental flaw. This Court, the Second Circuit, and other circuits all have recognized the glaring problem with this course of action: it is certain to cause the stock price to plummet. As a result, a fiduciary could (and would) quite reasonably conclude that such actions will harm the plan participants who hold company stock by decreasing the value of their holdings, so this proposed plan of action does not satisfy the "more harm than good" pleading standard. See *Dudenhoeffer*, 134 S. Ct. at 2473; *Rinehart*, 817 F.3d at 68 (divesting or freezing further purchases of company stock "could have had dire consequences"); *Whitley* v. *BP, P.L.C.*, 838 F.3d 523, 529 (5th Cir. 2016) (disclosure followed by freezing purchases "would likely lower the stock price" and thus "do more harm than good"); *Saumer*, 853 F.3d at 863-65 ("disclosing inside information and stopping additional ESOP contributions" would be an "extreme action" and defendants "could have concluded that divulging inside information . . . would have collapsed [the company]'s stock price, hurting participants already invested in the [plan]"). As the Sixth Circuit has explained, such action "'is a clarion call to the investment world that the [fiduciary] lacked confidence in the value of its stock, and could have a catastrophic effect on [the] stock price,' severely harming plan members." *Saumer*, 853 F.3d at 860 (alterations in original) (quoting *In re Comput. Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1136 (C.D. Cal. 2009), *aff'd sub nom. Quan* v. *Comput. Scis. Corp.*, 623 F.3d 870 (9th Cir. 2010), *abrogated by Dudenhoeffer*, 134 S. Ct. at 2467).

The harm to the Plan and its participants here is even more certain and severe under petitioners' theory of the case, which would have required disclosure of alleged inside information that supposedly made it obvious that SunEdison's bankruptcy was a *fait accompli*. Indeed, it is difficult to imagine a course of action more harmful to Plan participants than the fiduciaries announcing to the world a prediction that SunEdison was doomed or would eventually go bankrupt; this would amount to a self-fulling prophecy, sealing the company's fate, sending the stock price to zero or close to it, and decimating the value of participant's holdings in the stock before they were sold.

Petitioners now argue that their proposed alternative would not have resulted in a "significant disruption in [the] stock price," Pet. 18-19, but common sense says otherwise: company insiders telling the market that they believe their company will be going bankrupt, and are therefore suspending trading and liquidating the Plan's holdings in the stock, would be the death of the stock. Petitioners cannot seriously contend that a prudent fiduciary "could not have concluded" that making this sort of public prediction would do more harm than good, and that means they cannot satisfy *Dudenhoeffer* and *Amgen*.

Indeed, petitioners' "no-impact" argument is squarely contradicted by the Complaint, which concedes that "once the [alleged] insider information was disclosed, the Plan and its participants would suffer dramatic losses to their retirement savings." Pet.

App. 153a, ¶ 221.[5] And, importantly, unlike *Jander*, petitioners did not allege that an earlier disclosure of SunEdison's financial problems might have caused less damage than a later disclosure. Thus, they could not plausibly allege that a reasonable fiduciary could not have concluded that petitioners' proposal would do more harm than good to the fund.[6]

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[5] Petitioners assert that three other companies "ha[ve] done what the defendants here could have done" and did not experience any significant disruption in their stock price. Pet. 18-19. But the actions taken by those companies are not remotely analogous to the actions petitioners proposed here. None involved an immediate suspending of trading preceded by a disclosure of negative insider information (let alone a prediction of bankruptcy). According to the Form 11-Ks cited in the Complaint, those companies merely effectuated a plan amendment that discontinued (many months later) their stock funds as an investment option, and none of the 11-Ks provide any description of the reasons for discontinuing the stock funds. 2d Cir. App. 407, 426, 464. This means that none of these other companies' actions could have resulted from a suspension of trading implemented by plan fiduciaries in response to material inside information.

[6] Petitioners suggest that their proposed alternative would not have caused a stock price decline because negative publicity about SunEdison "had already destroyed investor confidence." Pet. 18. But this argument fails for several reasons. First, it contradicts the Complaint's allegation that "once the [alleged] insider information was disclosed, the Plan and its participants would suffer dramatic losses to their retirement savings." Pet. App. 153a, ¶ 221. Second, it contradicts the Complaint's allegation that the SunEdison stock price was trading at over $31 at the start of the Relevant Period (Pet. App. 65a, ¶¶ 82-83), which would not be the case if investors had no confidence in SunEdison. Third, even if it were accurate, petitioners' argument would prove too much. If the stock price had already adjusted downward to reflect the "negative publicity," then the stock was not overvalued, and whatever remaining nonpublic information respondents possessed was not material.

Petitioners claim the Second Circuit's real sin was not undertaking a "case-specific analysis required by *Dudenhoeffer*," but they never explain what they mean or how this would help them. Pet. 17. And they contradict the argument when they assert (in the same sentence) that the Second Circuit "relies on a fact-by-fact comparison with different cases," *id.*—the prototypical "case-specific analysis." Comparing alleged facts with those in other decided cases is exactly how courts perform a case specific analysis.

Petitioners also chide the Second Circuit for analyzing "whether the facts of this case were the same as the facts in *Jander*." Pet. 19. But again, courts routinely distinguish and analogize precedential case law, so the Second Circuit's consideration of its prior authority is neither surprising nor troubling. Moreover, it was *petitioners* who relied heavily on *Jander* below, citing it twenty-nine times in their Second Circuit reply brief and asserting that *Jander* "provides a roadmap for analyzing Plaintiffs'" allegations. 2d Cir. Pet. Reply Br. at 13. Given that petitioners invited the Second Circuit to compare their case to *Jander*, it was plainly appropriate for the court to do so.

Indeed, the Second Circuit's analysis of *Jander* shows that it engaged in a contextual, case-specific analysis: it looked at the allegations and legal theories petitioners asserted, then compared those allegations and theories to *Jander* and *Rinehart*, its two prior opinions applying this Court's pleading standard in *Dudenhoeffer* and *Amgen*. Pet. App. 5a-6a.

In sum, petitioners' hope that this Court's resolution of *Jander* will somehow provide them a lifeline for their nonpublic information claim is unfounded. If this Court reverses *Jander* and concludes that the complaint failed to state a nonpublic information claim, then *Jander* obviously will be of no help to petitioners; *Jander* will simply be the latest in an uninterrupted line of cases rejecting nonpublic information claims.

And if this Court were to affirm *Jander*, that won't help petitioners either, since the Second Circuit already considered *Jander* and distinguished it from the allegations here. Petitioners' assertion that this Court's resolution of *Jander* "will affect the outcome of this case" is, simply, incorrect.

CONCLUSION

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

Respectfully submitted,

SARAH A. HEMMENDINGER	MARK B. BLOCKER*
SIDLEY AUSTIN LLP	CHRISTOPHER K. MEYER
555 California Street	SIDLEY AUSTIN LLP
Suite 2000	One South Dearborn Street
San Francisco, CA 94104	Chicago, IL 60603
(415) 772-1200	(312) 853-7000
	mblocker@sidley.com

Counsel for Respondents Ahmad Chatila, Emmanuel Hernandez, Antonio R. Alvarez, Clayton C. Daley, Jr., Georganne C. Proctor, Steven V. Tesoriere, James B. Williams, Randy H. Zwirn, The SunEdison Retirement Savings Plan Investment Committee, Brian Wuebbels, Phelps Morris, Matthew Herzberg, Matt Martin, and James Welsh

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