No. 19-595

IN THE

Supreme Court of the United States

ERIC O'DAY, et al., Individually and 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

REPLY BRIEF FOR PETITIONERS

THOMAS J. MCKENNA
GREGORY M. EGLESTON
GAINEY MCKENNA & EGLESTON
501 Fifth Avenue, 19th Fl.
New York, New York 10017

DANIELLA QUITT
GLANCY PRONGAY & MURRAY LLP
712 Fifth Avenue, 31st Fl.
New York, New York 10019

MATTHEW W.H. WESSLER
Counsel of Record
GUPTA WESSLER PLLC
1900 L Street NW, Ste. 312
Washington, DC 20036
(202) 888-1741
matt@guptawessler.com

Counsel for Petitioners

December 20, 2019

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REPLY BRIEF FOR PETITIONERS

This case involves the dismissal of ERISA breach-of-fiduciary-duty claims that involve a fiduciary's decision not to act on inside information. As the petition explained, the Second Circuit affirmed that dismissal by concluding that the allegations could not satisfy *Dudenhoeffer*'s "more harm than good" pleading standard. Because that exact issue is before this Court in *Jander*, this petition should be held pending a decision in that case.

In opposition, the respondents assert that *Jander* "will have no impact" on this case. Yet they acknowledge that the claims in this case, just like those in *Jander*, involve allegations "that fiduciaries should have acted on the basis of nonpublic, *i.e.*, inside information." Opp. 10. And they concede that the key inquiry in both cases is the same: whether an "alternative course of action" would "satisfy" *Dudenhoeffer*'s "'more harm than good' standard." Opp. 3. The respondents' "no impact" assertion thus rests entirely on a claimed factual distinction: In their view, the "alternative course of action the plaintiffs proposed in *Jander*" was "quite narrow and limited;" whereas here, they say, it was "extreme" and "severe." Opp. 3.

But that supposed factual distinction is irrelevant to the core legal question at stake in both cases: how *Dudenhoeffer*'s "more harm than good" requirement applies for breach-of-fiduciary-duty claims involving inside information. Because that question indisputably implicates this case, the Court should hold the petition pending a decision in *Jander*.

I. This case, like *Jander*, involves the application of *Dudenhoeffer*'s "more harm than good" pleading standard.

The respondents' claim that *Jander* "will have no impact" on this case is demonstrably wrong. Because both cases involve the same species of claim and implicate the identical legal inquiry, how the Court decides *Jander* will directly impact the result in this case.

As the petition makes clear (at 5–7), the plaintiffs in this case brought a breach-of-fiduciary-duty claim based, among other things, on the respondents' decision not to act on inside information. In particular, the complaint alleged that the respondents had inside access to crucial negative information about SunEdison—including the company's massive liquidity problems brought on by certain high-interest and exceedingly risky loan agreements, a looming requirement to post collateral for a margin loan, and serious discrepancies between the public statements regarding the company's cash on hand and the actual amount.

And the complaint alleged one clear course of action—an asset purchase freeze—that the respondents could have taken to avoid doing more harm than good. *See* Pet. 18. By taking action to freeze purchases of SunEdison stock, for example, the respondents could have protected the plan's participants from further losses. In addition, taking this action would also avoid saddling the company's stock with additional negative expectations. That was true, the complaint alleged, because the company's overwhelming negative publicity had *already* destroyed investor confidence (illustrated by recurring major investor sell-offs of SunEdison stock) and there was no way the stock could rebound given the intractable liquidity problems. *See* Pet. 18; Pet. App. 31a–32a. The viability of this

proposed action, moreover, was reinforced by the real-world fact that at least three other major companies had taken the same action that the respondents could have taken here. *See* Pet. 18–19.

Jander involves a similar situation. There, like here, the plaintiffs brought a breach-of-fiduciary-duty claim alleging that the fiduciaries failed to take action based on inside information. The plaintiffs alleged that the fiduciaries knew that IBM had artificially inflated the value of its microelectronics business by failing to publicly disclose the business's massive losses. *See Jander v. Retirement Plans Committee of IBM*, 910 F.3d 620, 623 (2d Cir. 2018). And the complaint alleged that, instead of deciding not to act on this information, the fiduciaries should have taken steps to protect the plan participants from incurring losses once the true value of the business became public. *Id.* at 628.

True enough, as the respondents repeatedly point out (*see*, *e.g.*, Opp. 2–4, 23–28), one of the proposed alternative actions at issue here differs from *Jander*—in *Jander*, the focus was on early corrective disclosure while here one of the proposed actions was freezing the purchase of company stock. But that is irrelevant to the *legal* question at issue in these cases. In both, determining whether the complaint stated a breach-of-fiduciary-duty claim required an application of *Dudenhoeffer*'s "more harm than good" standard. *Compare* Pet. App. 5a–6a, 20a–23a (assessing whether the allegations that a prudent fiduciary should have frozen the purchase of stock "would have done more harm than good") *with Jander*, 910 F.3d at 628 (analyzing whether the allegations "plausibly establish that a prudent fiduciary in the Plan defendants' position could not have concluded that corrective disclosure would do more harm than good").

II. The Court should hold this petition for *Jander*.

Beyond the dogged focus on the different factual alternative actions, the respondents offer no compelling reason why this petition should not be held until the law is settled. As *Jander* comes to the Court, the key issue is how lower courts should decide whether a complaint has plausibly alleged a breach-of-fiduciary-duty claim based on inside information. *Compare* Respondents' Br. at 2, 36, *Jander*, No. 18-1165 (Sept. 24, 2019) (arguing that the inquiry should involve "a careful, considered assessment of the specific factual context" of the allegations and that such an approach is required by *Dudenhoeffer*), *with* Petitioners' Br. at 22, *Jander*, No. 18-1165 (Aug. 6, 2019) (insisting that the Court should impose a general rule that ERISA fiduciaries never have a duty "to use material nonpublic information learned in a *corporate* capacity to make decisions in their *fiduciary* capacity"). That question is implicated here no less than in *Jander*.

And a decision resolving that issue will undoubtedly affect this case. Although the plaintiffs here offered a host of context-specific allegations to demonstrate that one proposed action by the fiduciaries—freezing purchases of SunEdison stock—would not have done more harm than good, the lower court declined to specifically consider or analyze these allegations. Instead, it held that this type of proposed action was categorically insufficient to meet *Dudenhoeffer*'s pleading standard and incapable of stating a breach claim. *See* Pet. 19–20. That type of categorical rule, although not endorsed in *Dudenhoeffer*, is advanced by the petitioners in *Jander*.

But if, as the *Jander* respondents have argued, a court's analysis of *Dudenhoeffer*'s "more harm than good" standard requires "a careful, considered assessment of the specific factual context" of the allegations, then the

approach taken here by the lower courts will have been error. And that is all the more true if this Court in *Jander* reiterates that *Dudenhoeffer*'s "context-sensitive" approach offers courts flexibility to account for the many varieties of situations in which an ESOP fiduciary might need to decide whether to take an action—like freezing the purchase of assets—or do nothing.

Given that the outcome of this case turns on how *Dudenhoeffer* should be applied, this case should be held pending resolution of *Jander*.

CONCLUSION

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

Respectfully submitted,

MATTHEW W.H. WESSLER
Counsel of Record
GUPTA WESSLER PLLC
1900 L Street NW, Ste. 312
Washington, DC 20036
(202) 888-1741
matt@guptawessler.com

THOMAS J. MCKENNA
GREGORY M. EGLESTON
GAINEY MCKENNA & EGLESTON
501 Fifth Avenue, 19th Fl.
New York, New York 10017
(212) 983-1300

DANIELLA QUITT
GLANCY PRONGAY &
MURRAY LLP
712 Fifth Avenue, 31st Fl.
New York, New York 10019
(212) 935-7400

December 20, 2019 *Counsel for Petitioners*