

No. _____

IN THE
Supreme Court of the United States

ERIC O'DAY, ROBERT LINTON, LEE MEDINA, GAURAB SAMANTA, Individually,
On Behalf of the SunEdison, Inc. Retirement Savings Plan, and on Behalf of All
Other Similarly Situated Plan Participants and Beneficiaries,

Plaintiffs-Petitioners,

— v. —

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

Defendants-Respondents.

**APPLICATION TO THE HONORABLE RUTH BADER GINSBURG FOR
AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR
A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

To the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Applicants Eric O'Day, Robert Linton, Lee Medina, and Gaurab Samanta ("Plaintiffs") request an extension of time of 60 days, up to and including Tuesday, November 5, 2019, for the filing of a petition for writ of certiorari to review the decision of the Court of Appeals for the Second Circuit dated June 7, 2019 (the "Order") (attached as Appendix A). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1). Defendants-Respondents ("Defendants") have consented to the extension of time requested by this application (the "Application").

In support of this application, Plaintiffs state as follows:

1. The date within which a petition for writ of certiorari would be due, if not extended, is September 5, 2019. In compliance with Rule 13.5, this application is being filed more than 10 days before the due date.

2. This case presents an important and recurring question regarding the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Sec. 1001, et seq. and the scope of this Court's decision in *Fifth Third v. Dudenhoeffer*, 134 S. Ct. 2459 (2014) ("*Fifth Third*"), and a related case where this Court has already granted certiorari, *Jander v. Ret. Plans Committee of IBM*, 910 F.3d 620 (2d Cir. 2018), , *cert. granted*, __ S. Ct. ___, 2019 WL 1100213 (June 3, 2019) ("*Jander*"). In the

instant action below, Plaintiffs did not allege that the market had either over-valued or under-valued the company stock, but instead alleged that the company stock fund held in the retirement plan had become imprudent over the course of many months. The change in circumstances which made the company stock fund imprudent was based on inside and public information that was available to the plan fiduciaries. The court below held that Plaintiffs did not allege “special circumstances” that the stock was over-valued, citing both *Fifth Third* and *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 65-67 (2d Cir. 2016) and that Plaintiffs had failed to demonstrate that taking action would not do more harm than good. Order at 4.

3. Plaintiffs’ writ of certiorari will submit that the Second Circuit’s decision conflicts with its own precedent in *Jander*, and this Court’s opinions in *Fifth Third* and *Tibble v. Edison Int’l*, 135 S. Ct. 1823, 1828-29 (2015) (“*Tibble*”). In particular, as set forth in *Jander*, 910 F.3d at 631, complaints must be viewed in totality and where the allegations, at least at the pleading stage, support a finding that the improper conduct would be inevitably disclosed, dismissal is not warranted under *Fifth Third*. Here, there was a very public slow-motion demise of an over-leveraged company. Eventually, even the “inside” “bad news” at the company was disclosed to the market. Even then, however, the fiduciaries did not act, nor did they even review whether the company stock remained a prudent asset for the retirement plan to hold. Under such circumstances and as alleged in the complaint, it is

“plausible” that disclosure and other actions would have caused less damage to employee stockholders and the plan members, because the fiduciaries’ failure to act left the plan members with nothing. *Jander* held that a fiduciary “need not fear an irrational overreaction to the disclosure of fraud.” 910 F.3d at 630.

4. In addition, where, as here, the Defendants have admitted, for purposes of the motion to dismiss, that they did not monitor the prudence of continuing to hold the stock fund, a claim under this Court’s decision in *Tibble* is plausible and should have survived a dismissal motion. Courts throughout the country have failed to recognize that *Fifth Third* and *Tibble* are entirely consistent because *Fifth Third* addresses the situation where there are allegations that the market price of the asset is not reliable, whereas *Tibble* addresses the situation where the fiduciaries failed to monitor and remove imprudent investments. There is no conflict between the two.

5. The questions raised by the Second Circuit’s decision in this action are especially important because they directly affect employee stock plans across the country. The decision below really only focuses on one factor: does the asset in question have a publicly set price? And then holding that if it does, the asset is prudent, regardless of what negative information the fiduciaries know, whether it be public or private information, and regardless of whether the fiduciaries failed to conduct a periodic review of the prudence of continued investment in the asset. Here, the company was over-leveraged. After bankruptcy, only secured creditors

recouped any money. Misunderstanding this Court's decision in *Fifth Third*, courts around the country have found, *at the pleading stage*, that even in cases where the fiduciaries had available information that the asset was financially troubled, they need not take any action to protect their wards so long as the asset has a public price. As a result, ERISA plan fiduciaries are now held to a lesser standard than a fiduciary in any other context. This expands the holding of *Fifth Third* beyond its elimination of the presumption of prudence and its effort to balance the potential difficult choices plan fiduciaries may face who also owe duties to the company itself. *Jander* holds that under the efficient market theory, well-developed markets reflect all public information and do not over-react to new information. 910 F.3d at 630. This should include an express acknowledgement that a fiduciary taking action vis-a-vis a retirement plan will likewise not cause an over-reaction.

6. In summary, this case presents complex and important issues concerning the scope of *Fifth Third* and *Jander*. The 60-day extension sought by the Application is requested to enable the undersigned counsel to adequately prepare a petition for writ of certiorari.

7. In addition, Plaintiffs' counsel have substantial existing obligations near the current due date of the petition. Among other things, Mr. McKenna is scheduled to make several business trips in August, including from New York to California and back again, as follows: a trip August 12 to August 14 to attend a

mediation in San Diego, California in an action entitled *Pokorney v. Spiegel, et al.*, Case No.: 18STCV09365 (Calif. Sup. Ct., Los Angeles Cty.); a trip August 21 and 22 to Chicago to attend a court conference in a case entitled *Brown v. Gonzalez, et al.*, Case No.: 1:19-cv-617 (N.D. Ill.), and from there a trip to and from Oakland, California for oral argument on a motion on August 23 in a case entitled *Galbiati v. Page, et al.*, Case No.: 3:19-cv-1063 (N.D. Cal.). In addition, Mr. McKenna has primary responsibility for preparing several oppositions to motions to dismiss, the first of which is due on August 23, 2019 in *De Nicola v. Woodman, et al.*, Case No.: 2019-0119-JRS (Chancery Del.), and the second and third of which are both due on September 6 in actions entitled *Karp v. SI Financial Group, Inc. et al.*, 3:19-cv-00199-MPS (D. CT) and *Behrmann v. Brandt, et al.*, 19-cv-00772-UNA (D. DE). Mr. McKenna also has a long-planned family vacation at the end of August. All of these matters will impede his ability to prepare the petition for a writ of certiorari. An extension of time will not prejudice Defendants who have consented to the relief sought by this Application. There has been no previous application for an extension.

For the foregoing reasons, Plaintiffs hereby request that an extension of time, to and including November 5, 2019, be granted within which Petitioners may file a petition for a writ of certiorari.

Respectfully submitted,

s/ Thomas J. McKenna
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August 8, 2019

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PROOF OF SERVICE

The undersigned certifies that on August 8, 2019, he caused to be served An
Application to the Honorable Ruth Bader Ginsburg for an Extension of Time
Within Which to File a Petition for a Writ of Certiorari to the United States Court
of Appeals for the Second Circuit, by filing same electronically and by mailing the
same in envelopes bearing postage fully prepaid, addressed to opposing counsel as
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Dated: August 8, 2019