No. 19-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Fifth Third Bancorp v. Dudenhoeffer*, this Court unanimously held that the question whether a plaintiff had plausibly alleged a claim under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, for breach of the fiduciary duty of prudence had to be answered by conducting a "careful, context-sensitive scrutiny of a complaint's allegations" because the content of the duty of prudence "turns on 'the circumstances . . . prevailing' at the time the fiduciary acts." 573 U.S. 409, 425 (2014) (alteration in original) (quoting 29 U.S.C. § 1104(a)(1)(B)).

In the decision below, the court of appeals discarded the core lesson of *Dudenhoeffer* and imposed a categorical heightened pleading standard on ERISA plaintiffs alleging a breach of the duty of prudence based on the fiduciary's decision to hold an unduly risky asset despite publicly available information and inside information evincing the asset's imprudence. The question presented is:

Whether *Dudenhoeffer*'s "context-sensitive scrutiny of a complaint's allegations" can be met where a court presumes an asset must be prudent if it is publicly traded and presumes that a reasonably prudent fiduciary would never conclude that it "would not do more harm than good" to freeze purchases of a company's assets based on inside information.

PARTIES TO THE PROCEEDING

Petitioners Eric O'Day, Robert Linton, Lee Medina, and Gaurab Samanta were plaintiffs-appellants below.

Respondents 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, and James Welsh were defendants-appellees below.

RELATED PROCEEDINGS

There are no proceedings directly related to this case.

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INTRODUCTION

In *Fifth Third Bancorp. v. Dudenhoeffer*, this Court held that whether a plaintiff had sufficiently pled a claim under ERISA for a breach of the duty of prudence "will necessarily be context specific" because the content of that duty "turns on 'the circumstances . . . prevailing' at the time the fiduciary acts." 573 U.S. 409, 425 (2014) (quoting 29 U.S.C. § 1104(a)(1)(B)). In this case, the Second Circuit discarded *Dudenhoeffer*'s core directive, replacing it instead with a series of presumptions that eviscerate claims under ERISA: First, it concluded that any plaintiff claiming a breach of prudence based on publicly available information must identify "special circumstances" affecting the reliability of the stock's price, even when the underlying claim has nothing to do with the price of the stock. Second, it apparently concluded that a plaintiff can never plausibly allege that a prudent fiduciary would have frozen purchases of a company's assets based on inside information about the risk of the stock. But these presumptions have no basis in *Dudenhoeffer*, and in fact turn *Dudenhoeffer*'s context-specific scrutiny on its head.

This Court is set to clarify the application of *Dudenhoeffer*'s pleading standards this term in *Retirement Plans Committee of IBM v. Jander*, No. 18-1165. That case, like this one, concerns what a plaintiff must do to plausibly allege an ERISA violation based on a fiduciary's inside corporate information, and the decision in *Jander* will thus shed light on whether the plaintiffs' allegations here were sufficient. But more fundamentally, *Jander* presents this Court with competing interpretations of how to apply and evaluate *Dudenhoeffer*'s context-specific, fact-intensive requirement to duty-of-prudence breach claims. Resolving that interpretive dispute will clarify *Dudenhoeffer*'s directive and provide lower courts with

necessary guidance for how to properly consider and evaluate the facts alleged in the complaint when resolving a motion to dismiss.

OPINIONS BELOW

The opinion of the Second Circuit is unreported but available at 774 F. App'x 708 (2d Cir. 2019). App. 1a. The decision of the United States District Court for the Southern District of New York is reported at 331 F. Supp. 3d 101 (S.D.N.Y. 2018). App. 8a.

JURISDICTION

The court of appeals entered judgment on June 7, 2019. On August 16, 2019, Justice Ginsburg extended the time to file a petition for certiorari to November 4, 2019. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act of 1974, Pub. L. No. 93–406, 88 Stat. 829, as amended and codified at 29 U.S.C. § 1001 *et seq.*, provides in relevant part:

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . .

STATEMENT

I. Factual background

A. Public information regarding SunEdison

At the beginning of 2015, SunEdison—a "high-profile renewable energy powerhouse" and one of the country's largest energy providers—looked like a solid operation. App. 113a. It had spun off several of its subsidiaries into independent companies, was acquiring smaller companies to fuel its growth, and was trading at over $30 per share on the New York Stock Exchange. App. 58a–59a, 158a. But less than six months later, its stock had plummeted by more than 50% and market analysts were calling the company "a house of cards." App. 112a.

Throughout the summer and fall of 2015, SunEdison's business decisions, and the negative press it received, triggered a downward spiral of the company's stock. For instance, the company's mid-summer acquisition of solar-technology company Vivint Solar, Inc. for $2.2 billion—a price analysts called "close to gob smacking" because it overvalued Vivint by nearly 60%—sparked a "sharp dive" in SunEdison's stock prices. App. 64a, 65a, 108a. Several months later, SunEdison announced that it was laying off 15% of its entire workforce. App. 97a. And the very next day, the *Wall Street Journal* reported that the company was in possible legal trouble for failing to make millions of dollars in required payments for one of its acquisitions. App. 97a–98a. SunEdison's business expenditures were

"clearly unsustainable" and the company was "over-leveraged" with a debt-to-equity ratio that "severely call[ed] into question" its long-term prospects. App. 101a.

One month later, in November of 2015, things got even worse. Analysts warned that SunEdison's stock—which was down 75% on the year—was in "freefall." App. 121a. Others described SunEdison as "getting crushed" and "butchered" by the market as its stock price continued to spiral down. App. 109a. Given the company's poor outlook and its reliance on cash, major investors began frantically selling off their entire positions—some even asked SunEdison to buy back shares to "stop the bleeding." App. 119a.

The start of 2016 brought more bad news. After a restructuring that diluted shareholder value, investors began a "massive sell-off" of SunEdison stock and the stock price "crash[ed]." App. 125a. Investors were warned to "stay away" from SunEdison stock, App. 128a, because SunEdison likely would not survive the year, App. 132a–134a. Less than two weeks after the new year, SunEdison stock hit an intra-day trading low of $2.36—almost $30 per share less than it had closed just 6 months earlier. App. 135a–137a.

Yet as most of the other investors got out, the respondents in this case—plan fiduciaries for SunEdison's employee stock ownership plan ("ESOP")—stayed in. Throughout 2015 and the early part of 2016, the plan managers took no steps to investigate the prudence of the stock, freeze purchases of it, sell it, or diversify their portfolio to balance the added risk. App. 162a, 172a–74a. And that was true even in the face of increasingly troubling public reports warning that (1) SunEdison held too much debt and represented a high risk investment, (2) investors

should "stay away," and (3) large investors were selling off major blocks of SunEdison stock. App. 71a–72a, 103a, 120a, 121a–123a. Despite this, the fiduciaries continued to hold SunEdison stock, and allow beneficiaries to make additional purchases of the stock, despite the major risk it posed.

B. Inside information regarding SunEdison

The defendants' awareness of SunEdison's precariousness was not limited to what the company or other industry analysts were publicly reporting. Rather, the defendants—as corporate insiders and members of SunEdison's board of directors—also had additional information about the company that reinforced how imprudent it was to own or invest in SunEdison stock.

For starters, behind the scenes, the defendants were well aware that the company was facing liquidity problems "by, at the latest, the spring of 2015." App. 61a. The company's liquidity problems arose from two sources: first, SunEdison had pursued an aggressive acquisition strategy, including purchasing First Wind Holdings, LLC for $2.4 billion in late 2014; and second, SunEdison had agreed to guarantee a $410 million margin loan on behalf of a wholly-owned subsidiary in early 2015 that required SunEdison to post cash collateral within forty-eight hours if the subsidiary's stock fell below a certain level. App. 59a–61a, 81a–82a. The details of the loan agreement—including the collateral trigger point—were not publicly disclosed and thus known only by the defendants working inside SunEdison, including one of the fiduciaries of the ESOP (Wuebbels) named in the complaint. App. 82a.

Still, in spite of these serious liquidity problems, SunEdison continued to aggressively borrow to acquire entities throughout the spring and summer of 2015, nearly doubling its corporate debt. App. 61a–62a, 64a, 70a–71a.

Indeed, when acquiring Vivint Solar, it told that company confidentially that it simply did not have the liquidity to finance the acquisition. App. 88a, 161a. Yet throughout this same period, the defendants told shareholders that SunEdison was on a plan of "sustainable growth," had sufficient liquidity to run its business, and would be undertaking new growth-creating projects that (the defendants knew) were impossible to actually complete. App. 61a–63a, 64a–65a, 70a–71a, 84a–85a, 86a, 95a–96a.

To finance these acquisitions, SunEdison entered into a loan agreement with Goldman Sachs in August 2015, allowing it to borrow $169 million at an effective interest rate of 15%—more than 14% over the prevailing benchmark for short-term interest rates. App. 92a. Such a high interest rate would have alerted shareholders to the failing financial health of SunEdison, but the company did not disclose the loan until November 2015. App. 93a–94a. The defendants, of course, knew well before then because one of the ESOP committee members (Wuebbels) was actively involved in securing the loan.

As SunEdison's outlook continued to deteriorate, it faced yet another obstacle: by August 4, it was clear that SunEdison would be required to post collateral under the terms of the margin loan it had guaranteed to First Wind. App. 93a. It wasn't until August 25 that UBS first reported publicly that a margin call had been made and satisfied by SunEdison. *Id.* UBS inferred that SunEdison had pledged additional shares of stock to satisfy the collateral, *see id.*, but it wasn't until October 7 that SunEdison revealed this inference to be wrong. App. 93a–94a. SunEdison had actually posted $152 million in cash as additional collateral—primarily cash acquired from the Goldman Sachs loan. Many of the defendants, as insiders, were well aware of this as well. *Id.*

In what was later termed the "Friday Night Massacre," Chatila and Wuebbels exercised SunEdison's power to fire the YieldCo's senior executives (who had raised disclosure concerns just weeks earlier), appoint defendant Wuebbels as CEO to the YieldCos, and reconstitute the YieldCo's Board-level conflicts committees purportedly to approve the purchase of assets in India called "the India Projects." App. 148a. In reality, it allowed defendant Wuebbels to facilitate the pay off of the margin loan with minutes to spare. *Id.*

Then, on November 10, SunEdison held its third-quarter earnings call. On this call, one of the defendants reported that SunEdison had "approximately $1.4 billion" in available cash. App. 102a. Yet, as the *Wall Street Journal* would later report, that public statement conflicted with an internal report (known by the defendants) suggesting that SunEdison had only $90 million in available cash at the time. App. 140a–149a. This internal report also advised that several senior officials were troubled that "SunEdison was running out of money and wasn't being honest with investors about its financial problems." App. 147a.

Later that month, much of this nonpublic information finally became public, triggering massive sell-offs of SunEdison stock by investors, including prominent hedge funds, but there were no such sales by the fiduciaries of the ESOP. App. 103a. Finally, six months later, financial analysts' predictions were finally realized when SunEdison filed for Chapter 11 bankruptcy. App. 139a. SunEdison's stock—which was trading now at $0.34—was then suspended from trading and those SunEdison employees who participated in the company's ESOP retirement plan lost the entire value of the stock.

II. Proceedings below

Plaintiffs Eric O'Day, Robert Linton, Lee Medina, and Gaurab Samata are former SunEdison employees who invested in SunEdison stock through SunEdison's retirement plan. They brought suit in the Eastern District of Missouri on behalf of themselves and a class of similarly situated individuals, alleging that the defendants had breached their duties of prudence and loyalty under ERISA by continuing to retain SunEdison's excessively risky stock as an asset in the plan, as well as allowing beneficiaries to continue purchasing shares. App. 31a–32a. They further alleged that the defendants had failed to monitor the performance of SunEdison stock as required by ERISA. App. 32a. As fiduciaries, the plaintiffs explained, the defendants had a duty to monitor SunEdison's stock and act on the host of publicly available information and inside information to investigate, freeze purchasing of, and ultimately divest from SunEdison stock well before SunEdison filed for bankruptcy in 2016. *Id.*

The cases were transferred to the Southern District of New York and consolidated with an existing multidistrict litigation case against SunEdison pending in that district. The District Court for the Southern District of New York granted defendants' motion to dismiss the complaint. The court first concluded that the plaintiffs had failed to state a claim based on publicly available information. App. 16a. In the court's view, it was bound by circuit precedent holding that *Dudenhoeffer*'s requirement that a plaintiff plead "special circumstances" is "applicable to *all* allegations of imprudence based upon public information—regardless of whether the allegations are framed in terms of market value or excessive risk." App. 117a–19a (alteration in

original) (quoting *Rinehart v. Lehman Bros. Holding Inc.*, 817 F.3d 56, 65–66 (2d Cir. 2016)).

The court held that *Dudenhoeffer*'s "special circumstances" pleading requirement was not satisfied here. Although the plaintiffs identified eight categories of information constituting special circumstances, the district court concluded that these items were insufficient because "[t]hey identify negative developments for [SunEdison], corresponding press reports and subsequent drops in share price." App. 18a. In the court's view, the "drops in share price" were "correlated to negative news," and so were "consistent with the market's integration of risk into share value." App. 19a. In other words, the court reasoned that, because news of SunEdison's riskiness caused its stock price to drop, the stock could never be an imprudent investment under ERISA.

The district court likewise concluded that the plaintiffs had failed to state a claim based on inside information. The court ruled that the plaintiffs did not "satisfy *Fifth Third*'s strenuous pleading requirements" by plausibly alleging that the defendants could have taken an alternative action that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than help it. App. 21a. The plaintiffs alleged that SunEdison should have corrected its misstatements about its liquidity level and frozen or restricted additional purchases of SunEdison stock before ultimately allowing it to be liquidated. Doing this, the plaintiffs alleged, would not have done more harm than good because (1) SunEdison was already the subject of overwhelmingly negative financial analysis, including (correct) predictions that the company would not make it through 2016, (2) SunEdison already would have needed to disclose its net losses, (3) the stock had

already lost value following the announcement of the Vivint acquisition, and (4) participants could have purchased alternative investments in the plan that performed well over the same period. App. 157a–159a.

Relying on the Second Circuit's decision in *Rinehart*, the district court rejected these allegations. It concluded that these allegations were insufficient and that a fiduciary could have concluded that divesting or freezing company stock could "accelerat[e] the company's collapse and reduc[e] the plan's value." App. 22a (quoting *Rinehart*, 817 F.3d at 68).

Finally, the district court held that the plaintiffs had failed to state a claim based on defendants' failure to monitor SunEdison's stock. The court reasoned that a prudent fiduciary "could have concluded that a change in the Plan's holdings would have done more harm than good," and, as a result, the plaintiffs had failed to meet their burden of alleging "facts suggesting that additional monitoring of the Plan's holdings 'would have averted the injury' and caused a 'change of course.'" App. 26a.

The Second Circuit affirmed. It agreed with the district court that the plaintiffs "did not allege any 'special circumstances' that would affect the reliability of the market price as a reflection of the value of SunEdison shares." App. 5a. It also concluded that the plaintiffs had not stated a claim under *Dudenhoeffer* based on nonpublic information because the allegations failed to adequately align with those made in *Jander*. As the court saw it, the allegations were "[u]nlike" those in *Jander* because the complaint did not contain an allegation "that an earlier disclosure of SunEdison's financial problems might have caused less damage than a later disclosure." App. 6a. The court also distinguished this case on the basis that there was no

allegation that "disclosure of SunEdison's problems alone, without also halting purchases of SunEdison stock or divesting SunEdison stock altogether, would have sufficed." *Id.* Opting not to analyze all of the relevant circumstances to determine whether a prudent fiduciary could have decided that disclosure and freezing of assets would do more harm than good, the Second Circuit instead determined that these differences from *Jander* meant that the complaint failed to state a claim under *Dudenhoeffer*. *Id.*

REASONS FOR GRANTING THE PETITION

I. The decision below was incorrect and conflicts with this Court's decision in *Dudenhoeffer*.

Dudenhoeffer instructs courts considering a claim based on ERISA's duty of prudence to conduct a contextual, fact-based inquiry to determine whether that claim has been plausibly alleged. Yet, the Second Circuit below failed to do so in two ways.

First, on the plaintiffs' public information claim, the Second Circuit imposed a categorical requirement that a plaintiff alleging that a stock was imprudent nevertheless must allege "special circumstances" that would "affect the reliability of the market price" of a stock, even though here the imprudence does not turn on the stock's market price. That, standing alone, misreads *Dudenhoeffer*. In *Dudenhoeffer*, this Court imposed no such categorical pleading requirement, and instead required the opposite: a contextual analysis of the facts at issue in a particular case.

Second, on the plaintiffs' inside information claim, the Second Circuit reproduced the same error. Instead of considering whether the plaintiffs had plausibly alleged a breach of the defendants' fiduciary duty, the court limited

its analysis to whether the plaintiffs had alleged the same facts as in *Jander*. Finding that they had not, the court concluded that no claim had been plausibly alleged. Yet asking whether the case has a set of particular facts in common with another comes nowhere close to what *Dudenhoeffer* contemplates—a close look at the facts in a particular case and a determination whether, in context, the plaintiffs have alleged a breach of the duty of prudence.

A. The Second Circuit's decision discards the context-specific analysis adopted by *Dudenhoeffer* and replaces it with a categorical "special circumstances" pleading requirement.

In *Dudenhoeffer*, this Court considered the applicable pleading standard when an ERISA plaintiff alleges a breach of the duty of prudence. It recognized that there was a need to "divide the plausible sheep from the meritless goats." 573 U.S. at 425. And it offered a clear directive to the lower courts on how to analyze whether an ERISA plaintiff had sufficiently pled a breach of prudence claim: "That important task can be . . . accomplished through careful, context-sensitive scrutiny of a complaint's allegations." *Id.* In reaching this conclusion, the Court rejected the prevailing view of the lower courts that, in all ESOP cases, a presumption of prudence would apply to a defendant-fiduciary's actions. *Id.*

In renouncing a presumption of prudence, this Court emphasized that such a bright-line rule would be inappropriate for duty-of-prudence claims because "the content of the duty of prudence turns on 'the circumstances . . . prevailing' at the time the fiduciary acts," and as a result, "the appropriate inquiry will *necessarily* be context specific." *Id.* (alteration in original) (emphasis added). This Court

also warned that it would not countenance any standard 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." *Id.*

Dudenhoeffer thus sent an important message: When deciding whether an ERISA plaintiff has plausibly alleged a breach of the duty of prudence, courts must conduct a fact-intensive inquiry based on all the circumstances at the time of the alleged breach. Courts cannot avoid this detailed analysis by creating hard-and-fast rules or presumptions about what would constitute an implausible claim. And the lower courts certainly could not impose rules that made it virtually impossible to state a claim for breach of a fiduciary duty.

Yet the Second Circuit's decision here turned this message on its head. The court of appeals imposed a heightened pleading standard on breach-of-prudence claims that cannot be reconciled with the required case-specific, contextual analysis dictated by *Dudenhoeffer*. Specifically, the court held that plaintiffs must plead "'special circumstances' that would affect the reliability of the market price" of a stock even where the complaint did not challenge the market price. *Id.* at 710. That is not only inconsistent with *Dudenhoeffer*'s pleading standard, but it impermissibly extends the "special circumstances" requirement well beyond what this Court intended.

For starters, *Dudenhoeffer*'s conclusion that "special circumstances" may be needed to make a claim for overvaluation is commonsense: an efficient market will normally properly value a stock unless something distorts its price. But that same logic does not hold up when, as here, a plaintiff claims not that the market price is distorted but instead that retention of the stock of a failing company is

no longer prudent for a retirement plan under prevailing circumstances based on the exact information that is being used to value the stock in the market place.

That is true for several reasons. First, the price of an asset is a poor metric of its riskiness, particularly for ERISA plan participants. It is true that, all else being equal, the market will value risky stocks at a lower price. But price also 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 Inv. Comm.*, 761 F.3d 346 (4th Cir. 2014). A claim that such a stock is imprudent does not require second-guessing market price. The market may be willing to gamble on a small chance of a large payout, but 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).

Second, an investment may also be imprudent if it is excessively volatile, even if the price reflects this volatility. *See DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 424 (4th Cir. 2007). But this type of claim also does not require second-guessing the market. A stock that wildly fluctuates in value may reflect the best valuation based on public information available at any given time. But a fund that invested in such a stock would face the risk that a sudden downturn could render the plan's assets unavailable. Even assuming that it is efficiently priced, such a stock therefore may not be a prudent investment choice.

Prudent fiduciaries, in other words, do not consider just price when choosing an investment, but also "the character and aim of the particular plan and decision at issue and the circumstances prevailing at the time."

Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 299 (5th Cir. 2000). For a plan with beneficiaries near retirement age, a highly risky investment may be especially imprudent because, in the event that the asset loses money, there will be little time for it to recover. *See* Turan Bali, *The intertemporal relation between expected returns and risk,* 87 J. Fin. Econ. 101 (2008); *see also GIW Indus., Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d 729, 732 (11th Cir. 1990) (upholding a duty-of-prudence claim based not on the fiduciary's "investment strategy from the vantage point of hindsight," but on failure to consider "the anticipated needs of the fund"). And, at least in cases like this one, prudence also requires consideration of a risky investment's role "within the overall plan portfolio." *Tatum*, 761 F.3d at 370 (citing Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets Under the "Prudence" Rule, 44 Fed. Reg. 37,221, 37,222 (June 26, 1979)).

It therefore makes little sense to require plaintiffs alleging that an asset was unduly risky to allege that "special circumstances" distorted the price of the stock, as the Second Circuit held here. And were it otherwise, a fiduciary would face no consequence for the decision to retain a publicly traded but overly risky asset in a retirement plan—even though ERISA imposes "a continuing duty to monitor trust investments and remove imprudent ones." *Tibble v. Edison International*, 135 S. Ct. 1823, 1828 (2015). That is especially true given this Court's clear instruction that "[t]his continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset." *Id. Dudenhoeffer*, in short, did not override this core requirement.

The facts of this case bear this out. As the plaintiffs alleged in their complaint, the market was well aware of how risky SunEdison's stock was. The stock's price was on a continuous decline for the better part of a year before going into "freefall" as hedge funds and other investors began selling off their entire positions in the stock. Articles repeatedly warned that SunEdison had too much debt and too little liquidity, and investment experts warned shareholders to "stay away" from the stock. And the publicly available information made clear that SunEdison stock was unlikely to rebound: the company was holding "massive" debts and had almost no liquidity in an industry where such capital is key. That is why, months before SunEdison's bankruptcy, industry experts were correctly predicting SunEdison's demise. The fiduciary defendants in this case did not need inside information to know that SunEdison had become an imprudent investment. But despite all of this publicly available information, the respondents did nothing: either they failed to pay attention to the consensus view about SunEdison's prospects, or they knew and nevertheless continued to hold it in the plan's portfolio. Either way, no special circumstances were needed to allege that the plan fiduciaries behaved imprudently by failing to act.

Requiring allegations of "special circumstances"—on top of everything else—for these kinds of excessive-riskiness claims would, in ordinary cases, let fiduciaries off the hook for gambling away the assets of beneficiaries with imprudent investments or failing to actively monitor the plan's asset portfolio. That would defeat ERISA's core purpose of preventing the "possibility that the employee's expectation of the benefit would be defeated through poor management." *Massachusetts v. Morash,* 490 U.S. 107, 115 (1989). Under the Second Circuit's rule, "special

circumstances" are required not just for allegations of excessive risk, but for *all* allegations of imprudence based upon public information. If that were true, it would mean that there is no such thing as an imprudent public stock—so long as it has a price, it is prudent. *See Jander v. Retirement Plans Committee of IBM*, 910 F.3d 620, 628 (2d Cir. 2018) (recognizing that "no duty-of-prudence claim against an ESOP fiduciary has passed the motion-to-dismiss stage since *Amgen*"). *Dudenhoeffer* does not sanction such a wide-ranging result.

B. The Second Circuit's decision discards *Dudenhoeffer*'s contextual analysis by ignoring numerous case-specific facts demonstrating that freezing the purchase of SunEdison assets would not have done more harm than good.

The Second Circuit's decision likewise misreads *Dudenhoeffer* when considering the plaintiffs' inside-information claim below. The plaintiffs here offered a host of context-specific allegations that collectively demonstrated that a prudent fiduciary in the defendants' position could not conclude that publicly disclosing negative information and freezing purchases of SunEdison stock during the relevant period would "do more harm than good" to the fund. 573 U.S. at 430. But rather than consider whether these allegations were sufficient to state a claim, the court of appeals relied on rough analogies to its own prior cases to decide, without analysis, that this claim could not move forward. An approach that relies on a fact-by-fact comparison with different cases—especially where the claims differ—cannot be squared with the case-specific analysis required by *Dudenhoeffer*. Instead, determining whether a prudent fiduciary should have disclosed inside information to avoid doing more harm than good

must involve a close analysis of the specific facts in the specific case.

Here, those facts comfortably meet that standard. Had the fiduciaries taken steps to freeze purchases of SunEdison stock, in light of the company's massive liquidity problems, they would have avoided doing more harm than good. Consider first that the plaintiffs alleged that the overwhelming negative publicity SunEdison was receiving had already destroyed investor confidence, as evidenced by major investor sell-offs of SunEdison stock. Under those circumstances, a purchase freeze by SunEdison itself could have done little to exacerbate negative expectations for SunEdison's stock. And, as SunEdison insiders, the defendants knew that the company was unlikely to rebound from its impending collapse—there was no solution for its liquidity problems and its demise became even more certain once company insiders recognized that SunEdison would eventually have to file for bankruptcy. App. 154a–155a. Even SunEdison's own admissions all but told investors that the company was likely to experience serious, if not fatal, financial difficulties. *See, e.g.*, Mot. to Dismiss at 4–5, *In re SunEdison, Inc. Sec. Litig.*, Case No. 1:16-md-2742-PKC (related to *Horowitz, et al. v. SunEdison, Inc., et al.*, No. 1:16-cv-07917-PKC (S.D.N.Y. June 9, 2017)) (noting that "SunEdison cautioned investors that it was dependent on additional long-term project financing, that its growth was limited by capital access, and that there could be no assurance that additional financing would be available, or available on acceptable terms").

On top of that, at least three other major companies had done what the defendants here could have done—discontinue employee investment in company stock without experiencing significant disruption in those companies'

stock price. App. 156a. Those real-world examples should have signaled to a prudent fiduciary that freezing purchases was unlikely to have a significant effect on the stock. *Id.* That was all the more true here—as a freeze was particularly unlikely to affect SunEdison's stock price because the SunEdison ESOP accounted for a minute fraction of overall market investment in the company. App. 155a–156a. Moreover, as in *Jander*, it was inevitable in this case that substantial information about SunEdison's liquidity would become public: the company was required to disclose information about its debt in its third-quarter results filed with the SEC. Accordingly, all information would be public by November of 2015, and the only question was whether disclosing that information or taking protective action earlier would have been prudent. App. 116a–118a. And after November 2015, when that information *did* become public, there was simply *no* justification for the fiduciary to refuse to act on that information.

The totality of these allegations comfortably clears the pleading bar under *Dudenhoeffer*. Taken together, they plausibly establish that a reasonable fiduciary in the defendants' position could not have concluded that freezing purchase of SunEdison stock and disclosing information of SunEdison's ongoing liquidity problems would have done more harm than good to the plan.

Yet instead of considering all of these circumstances together to make a particularized assessment under *Dudenhoeffer*, the Second Circuit asked only whether the facts of this case were the same as the facts in *Jander*. App. 6a. Specifically, the Second Circuit reasoned that the present case was unlike *Jander* because 1) the plaintiffs had "not alleged that an earlier disclose of SunEdison's financial problems might have caused less damage than a later disclosure," and 2) the plaintiffs did not allege "that

disclosure of SunEdison's problems alone, without also halting purchases of SunEdison stock or divesting SunEdison stock altogether, would have sufficed." App. 6a. The absence of these allegations was fatal, according to the Second Circuit, because it meant that a prudent fiduciary could have concluded that divestment or a purchase freeze "would have done more harm than good." *Id.*

The court thus adopted a categorical rule: Under *Dudenhoeffer*, regardless of the context or specific allegations, any claim that a fiduciary imprudently failed to freeze asset purchases or divest of an imprudent stock will necessarily fail.[1]

Given that the Second Circuit's decision conflicts with, and impermissibly expands, *Dudenhoeffer*, the Court should hold this petition for *Jander*, then dispose of it accordingly.

II. This petition should be held for *Jander*, which will clarify how courts should apply *Dudenhoeffer*'s standards.

This Court has already granted certiorari in *Jander*, in which the question is how to properly read *Dudenhoeffer*.

[1] The Second Circuit reached this conclusion by relying on its earlier decision in *Rinehart*. App. 6a–7a. But, once again, the Court's effort to replace a context-specific analysis with a comparison to another case is inconsistent with *Dudenhoeffer*. For instance, the plaintiffs here alleged that the fiduciaries could have, at the very least, taken action between the disclosure of damaging nonpublic information in November 2015 and SunEdison's declaration of bankruptcy in April 2016 when everyone knew that SunEdison's stock had no realistic chance of recovery. In *Rinehart*, the public disclosure was followed almost immediately by the stock's loss of value, which plausibly could have prevented a prudent fiduciary from acting. Differences like these explain why a court cannot rely on a reflexive case-by-case comparison to evaluate the plausibility of the breach claims.

As a result, this Court's resolution of *Jander* will provide much-needed clarity to the courts of appeals on how to apply *Dudenhoeffer* to allegations of breach of the fiduciary duty of prudence, and will thus affect how the Second Circuit should have analyzed the plaintiff's complaint in this case.

In its simplest form, this case, like *Jander*, concerns what kinds of allegations may be sufficient to sustain a claim for breach of a fiduciary's duty under ERISA based on inside information. Thus any resolution of *Jander* will shed much-needed light on how the Second Circuit should have analyzed the inside-information claim in this case. But more fundamentally, *Jander* presents an opportunity for this Court to clarify how lower courts should apply the context-specific analysis required by *Dudenhoeffer* to a broader range of breach-of-fiduciary-duty claims.

In *Jander*, this Court is presented with competing views of *Dudenhoeffer* and whether it should continue to require a context-specific analysis or whether breach-of-fiduciary-duty pleading should be governed by blanket rules that make it more difficult to state a claim. *Compare* Respondents' Br. at 2, 36, *Jander*, No. 18-1165 (Sept. 24, 2019) (arguing for affirmance because the Second Circuit properly conducted "a careful, considered assessment of the specific factual context in Respondents' allegations, along with Respondents' more general allegations about the increased risk of potential harm to ESOP participants" as 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").

Jander, in other words, 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 an ESOP fiduciary might need to decide whether to take an action—like making a public disclosure—or do nothing." Respondents' Br. at 43. Or, on the other, whether it requires clear-cut rules that would foreclose claims based on the duty of prudence in entire categories of cases.

How this Court resolves that choice will matter. Adopting the petitioners' approach would send a significant signal to the lower courts that they may fashion restrictive pleading requirements that would foreclose entire categories of breach-of-fiduciary-duty claims; adopting respondents' view would reinforce that, under *Dudenhoeffer*, courts must not adopt duty-of-prudence pleading standards that would be "impossible" to meet, but must instead consider all the circumstances surrounding an alleged breach of the fiduciary's duty of prudence. 573 U.S. at 425.

Providing that guidance is important. Absent a robust defense of the duty of prudence, American workers are at risk for losing their entire savings, as real-world examples have repeatedly proven. The collapse of major corporations including Enron, Bear Stearns, and Lehman Brothers all depleted employees' 401(k) assets, which had been primarily invested in their employers' stock. *See* Patrick J. Purcell, Cong. Research Serv., RS21115, *The Enron Bankruptcy and Employer Stock in Retirement Plans* 1 (2002); Scott Horsley, *Bear Stearns Collapse Costly to Many*, NPR (Mar. 17, 2008), https://perma.cc/8YEA-2YN8. The long-term effects of wiping out employee

retirement plans with the collapse of a company's stock are far-reaching: countless employees have lost their jobs, have to postpone their retirement, accept lower-paying work, and never regain a position of economic security that allows them to comfortably retire. *See* Colette Thayer, *Retirement Security or Insecurity? The Experience of Workers Aged 45 and Older*, at i-iii (2008), https://perma.cc/6J4K-TGEW ; *see also Summers*, 453 F.3d at 409.

And the way this Court interprets *Dudenhoeffer*'s standards will affect the outcome of this case. The Second Circuit declined to conduct the kind of analysis required by *Dudenhoeffer*. Instead, it relied on categorical rules that make certain duty-of-prudence claims nearly impossible to plead—a type of categorical rule that, although not endorsed in *Dudenhoeffer*, is advanced by the petitioners in *Jander*. Because 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,

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