UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

ANTHONY ABBOTT et al., Plaintiffs, v. **LOCKHEED MARTIN CORPORATION et al.,** Defendants.	Case No. 3:06-cv-701-MJR-DGW

DEFENDANTS' TRIAL BRIEF ON STABLE VALUE FUND CLAIM

Lockheed Martin's Stable Value Fund was designed as a safe haven for plan participants who wanted, above all else, to guarantee the security of their retirement assets. For retirees, those approaching retirement, or others who count on their savings to pay monthly expenses, security is paramount. Throughout its existence, the Stable Value Fund has satisfied that objective.

When investing, though, security comes at a price. It is axiomatic that reducing investment risk will decrease expected long-term returns. Investors facing a long retirement horizon therefore generally focus their investments in equities and minimize investments designed to ensure security of principal.

In crafting the mix of investments that comprise the Stable Value Fund—the most secure investment option in Lockheed Martin's 401(k) plans—plan fiduciaries knew all of this. They knew that some plan participants needed security and that compromises on security could be used to achieve greater returns. Plan fiduciaries conducted research, held meetings, and engaged in ongoing conversations in which they weighed the pros and cons and had spirited debates about the best strategy for the plans' most conservative investors. Over time, plan fiduciaries altered the composition of the Stable Value Fund to reflect market conditions.

ERISA requires fiduciaries to exercise their professional expertise in the interests of plan participants. They must educate themselves as to the merits of different courses of action and offer appropriate investment options to participants in light of those considerations. In a 401(k) plan, the ultimate investment decisions are "left . . . to the people who have the most interest in the outcome." *Loomis v. Exelon Corp.*, 658 F.3d 667, 673-74 (7th Cir. 2011). So fiduciaries have the responsibility to make available a broad array of investment options that suit plan participants with different risk tolerances. The evidence will show that Defendants did precisely that.

Plaintiffs' Stable Value Fund claim initially alleged that Lockheed Martin made harmful misrepresentations to plan participants. During the class period, some other companies that offered a 401(k) investment option they called "Stable Value" preferred investments in insurance contracts (which are riskier) over money-market assets (which are more secure). Lockheed Martin designed its Stable Value Fund to contain mostly money-market assets—and told plan participants just that. Nevertheless, Cora Ingrim, the managing director responsible for supervising the Stable Value Fund, cited the naming convention used by other companies to recommend that the Investment Committee change the risk profile of the fund. Although she said that either approach—insurance contracts or money-market instruments—was appropriate, she said that making no change could amount to "false advertising."

There was no "false advertising." Lockheed Martin was accurate and precise in telling plan participants what sorts of investments the Stable Value Fund contained and what it did not. In any event, to preserve the eligibility of their claim for class certification, Plaintiffs expressly disavowed any claim sounding in misrepresentation. *See, e.g.*, Reply Br. for Appellants at 16, *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803 (7th Cir. 2013) (No. 12-3736), 2013 WL

874975, at *16 ("the SVF claim is not a misrepresentation claim, but an imprudence claim"); *id.* at 2 ("Lockheed's assertion that the substance of the SVF claim is a misrepresentation theory is baseless"); *id.* at 16 ("Lockheed's contention that the SVF claim is a 'misrepresentation' claim . . . is simply false."); *id.* at 17 ("Any misrepresentations or otherwise inadequate disclosures merely negated Lockheed's claimed 'safe-harbor' defense."); Recording of Oral Arg. at 28:42-29:22, *Abbott*, 725 F.3d 803 (No. 12-3736) ("[D]efendants are trying very hard to mischaracterize . . . this claim as a misrepresentation claim, [be]cause they're trying to fit it into the *DeBruyne* case by saying that just because we called it a stable value fund doesn't mean we were wed to a particular way of investing those assets, and we never say that they were."). Plaintiffs are thus left to argue that investing a plan's most conservative investment fund in money-market assets is imprudent, because insurance contracts are supposedly superior.

The claim that money-market funds are imprudent is breathtaking. Money-market assets are a time-tested safe haven for investors looking to minimize their risk exposure. For that reason, more than half the nation's 401(k) plans offer such an option to their plan participants. And the U.S. Department of Labor has acknowledged the appropriateness of money-market investment options in 401(k) plans. In short, insurance contracts may achieve greater returns over the long run, but only because they expose plan participants to greater risk. Reasonable investment professionals can (and do) choose both options.

At core, what ERISA requires is for fiduciaries to exercise their professional judgment based on an analysis of the relevant facts and circumstances. That is what happened here, and the result was a prudent fiduciary decision and an investment option entirely consonant with industry standards. Defendants are therefore entitled to judgment on Plaintiffs' Stable Value Fund claim.

FACTUAL BACKGROUND

To help its employees prepare for retirement, Lockheed Martin offers a variety of retirement benefits. Among these benefits are two 401(k) plans at issue here—the Salaried Savings Plan ("SSP") and the Hourly Employee Savings Plan Plus ("HSP").

In a 401(k) plan, plan fiduciaries offer a menu of investment options. Plan participants make voluntary contributions and employers may provide a company match. Plan participants then elect how to invest their personal accounts among the investment options. Depending on their ages, the extent of their savings, and their general risk tolerances, plan participants have widely divergent preferences for retirement investing. Accordingly, plan fiduciaries must ensure that plan participants have access to a range of investment options—ranging from conservative options emphasizing preservation of principal to riskier options, like equity funds, that expose participants to greater risk to deliver the potential for greater long-term returns.

At Lockheed Martin, plan participants had access to between 11 and 21 investment options, at various times, as well as an open-ended Self-Managed Account (which was launched in 2001). Throughout the class period, the most conservative investment option in the SSP and the HSP was the Stable Value Fund. The Stable Value Fund has its origin in the heritage 401(k) plans from Lockheed Corporation and Martin Marietta Corporation that preceded the companies' 1995 merger and the merger of their retirement plans in 1997. As its most conservative option, Lockheed Corporation, prior to the merger, offered participants the option to invest portions of their retirement savings in a fund investing exclusively in short-term instruments backed by the full faith and credit of the United States government. Such instruments (along with short-term corporate bonds) are often referred to as "money-market" instruments. While these investments offer modest returns, they are widely recognized as the most secure investment option available.

Martin Marietta Corporation, for its most conservative investment option, offered a fund invested heavily in insurance contracts. An insurance contract is a specialized financial instrument typically offered by an insurance company. Similar to a bond, the issuer accepts a deposit and agrees upon maturity to return the balance plus interest at a predetermined rate. Bonds and insurance contracts differ, though, when participants seek to withdraw their investments before maturity. A bondholder who sells an investment prior to maturity is entitled to the market price, which varies depending on the interest rate of the bond and the prevailing interest rates for newer bonds. With an insurance contract, however, a participant is entitled to his original deposit plus interest at the original rate, irrespective of changes in the interest rate market. Insurance contracts come in varying forms, depending on whether the fund's assets are held by the insurer or the plan. These related products are sometimes referred to as guaranteed investment contracts ("GICs"), synthetic GICs, "wrapped" bonds, book-value products, or stable-value products.

Although their returns are, in one sense, "guaranteed," insurance contracts carry more risk than money-market instruments. They expose plan participants to counterparty credit risk—the possibility that the insurance companies will fail or refuse to perform. In the 1990s, those risks materialized when several GIC issuers suddenly failed, even though their products carried AAA ratings just months earlier. Insurance contracts also expose plan participants to risks arising from their underlying investments in bonds. Bonds usually yield a higher rate of return the longer their duration (*i.e.*, the later in time their payment is due). Those bonds can fail with greater regularity than the shorter-duration loans that comprise the money market, causing losses to an insurance contract's portfolio. Perhaps most importantly, insurance contracts expose plan participants to risks unrelated to the bond market. Mass withdrawals, corporate mergers, acquisitions, bankruptcies, spinoffs, and layoffs can void insurers' guarantees, leaving plan participants directly exposed to the risk that the underlying bonds will underperform. None of these risks exists in money-market instruments.

When Lockheed merged with Martin Marietta and their 401(k) plans were consolidated, the resulting plan inherited a mix of money-market assets and insurance contracts from Martin Marietta's legacy plan. Plan fiduciaries needed to reach consensus on an investment philosophy for the fund moving forward. On the one hand, fiduciaries considered the need for a safe option for plan participants (such as retirees) with ongoing expenses. On the other hand, these same fiduciaries considered the prospect that insurance contracts may offer greater returns (because the underlying assets are longer-term investments, which typically have higher yields). In the end, because there were other investment options available in the merged Lockheed Martin plan to *increase* participants' exposure to risk, plan fiduciaries opted for a conservative approach in structuring their most conservative investment option. The plans could not sell their existing insurance contracts without risking loss, but the fiduciaries decided not to purchase new insurance contracts and rather to convert them on a rolling basis to short-term money-market assets upon maturity.

Lockheed Martin advised plan participants that the Stable Value Fund would consist primarily of money-market assets in a 1998 Summary Plan Description:

> It is anticipated that as of July 1, 1998, money market securities and insurance contracts will comprise approximately 80% and 20% of the Fund's assets, respectively. However, the Fund's current strategy is to cease new investments in insurance contracts, so the percentage of Fund assets invested in insurance contracts should decrease over time.

In the same Summary Plan Description, plan participants were advised of the implications of this investment strategy: "as investment by the Fund in insurance contracts decreases over time, the rate of return can be expected to decline in a stable or falling interest rate environment."

As made clear by this disclosure to participants, at the start of the class period, the Stable Value Fund consisted almost entirely of money-market assets. But plan fiduciaries understood that the composition of the Stable Value Fund would be subject to revision as market conditions (like interest rates) changed and new insurance products gained a track record. LMIMCo fiduciaries had regular conversations with investment managers, to learn what products were available; and with peers, to learn what products other companies were using. Ms. Ingrim, in particular, kept close tabs on the composition of the Stable Value Fund. She prepared frequent reports detailing its composition and performance, monitored bond-market conditions, and discussed investment strategies with her colleagues.

At the start of the class period, in late 2000, plan fiduciaries determined that it would be a poor time to purchase insurance contracts. At that time, the yield curve was inverted, which means that interest rates for short-term bonds actually exceeded interest rates for long-term bonds. Thus, when Ms. Ingrim evaluated the duration of the investments that comprised the Stable Value Fund in December 2000, she concluded that "the short end is where we want to be right now," a view shared by the fixed-income experts at State Street Global Advisors. At that time, Lockheed Martin decided to stick with its short-duration money-market-based strategy.

In 2001, the yield curve still was inverted, but discussions about the future of the Stable Value Fund were ongoing and fluid. Plan fiduciaries were preparing a new set of disclosures to plan participants, to describe new investment options. As part of those preparations, Ms. Ingrim and Jeffrey Sharpe (a member of the Investment Committee who was then LMIMCo's General

Counsel), exchanged emails about how best to characterize the future composition of the Stable Value Fund. Given that the composition of the Stable Value Fund was the product of constant evaluation and debate—such that fiduciaries would add insurance contracts if conditions warranted—they decided to advise plan participants that "exposure to insurance contracts . . . may change over time." In 2001 and 2002, interest rates on bonds and short-term investments fell sharply. That meant that those who had locked in higher rates on insurance contracts a few years earlier were doing far better than anybody who was investing in new insurance contracts or bonds (short-term or long-term) in the early 2000s.

When interest rates fell, the rates on short-term investments fell more sharply, making it more costly to prevent risk. These changes in market conditions prompted Ms. Ingrim to reconsider the risk-return tradeoff. At the September 4, 2002, meeting of the LMIMCo Investment Committee, Ms. Ingrim advised the Investment Committee of her thoughts on this topic and "agreed to recommend to the [Investment] Committee ways to enhance the Stable Value Fund." She and her team proceeded to meet with vendors of insurance contracts and by late January 2003 had developed four options for increasing the exposure of the Stable Value Fund to bonds wrapped by insurance contracts. On February 7, 2003, a few months after the Investment Committee had asked Ms. Ingrim for her recommendations, she prepared a memorandum. She emphasized that "[a] strong philosophical argument can be made to support either a money market fund OR a stable value fund as [the] 'safest' investment option," but she advised that, if the Investment Committee chose to stick with money-market assets, it should rename the fund "[t]o avoid false advertising."

With Ms. Ingrim's encouragement, the Investment Committee at its meeting on February 25, 2003, "discussed various alternatives for increasing the stable value products in the Stable

Value Fund and agreed to examine further these alternatives." A month later, on April 1, 2003, the Investment Committee further evaluated available options, and on April 29, 2003, it decided to allocate $250 million from the Stable Value Fund to insurance contracts and set a two-year goal to increase the Stable Value Fund's allocation of insurance contracts to 25% of the overall assets. Consistent with these resolutions, $500 million had been invested in stable value instruments by September 2003. LMIMCo continued to make incremental purchases of insurance contracts, studied the composition of the portfolio, interviewed stable value professionals, and "assess[ed] the risk/return consequences for changing the allocation" of the Stable Value Fund between money-market assets and insurance contracts.

In December 2004, the Investment Committee approved a further increase to the Stable Value Fund's insurance contract holdings. By the end of 2004, the insurance-contract allocation had reached 39%. LMIMCo continued to discuss further options for structuring the Stable Value Fund.

In mid-2005, the Investment Committee evaluated the appointment of an overall fund manager to supervise the various subportfolios comprising the Stable Value Fund. After evaluating 14 different investment managers in the marketplace, Invesco was appointed overall fund manager in February 2006. Shortly thereafter, an additional $250 million was allocated to an insurance contract portfolio to be managed by Invesco. By August 2006, at the end of the class period, 60% of the Stable Value Fund consisted of insurance contracts.

ARGUMENT

I. Defendants Discharged Their Fiduciary Duties And Are Entitled To Judgment.

Defendants acted as prudent fiduciaries in their management of the Stable Value Fund. Recognizing the diverse needs of plan participants, they decided in 1997 that plan participants should have access to a near risk-free investment vehicle to ensure safety of principal, which is particularly important for older plan participants, who rely on their savings for living expenses. Defendants made their decision with full knowledge of the pros and cons—and the prevalence of both insurance contracts and money-market products within the 401(k) marketplace demonstrates that both are reasonable decisions. That initial decision predates the limitations period, in any event, so it is not now open to challenge.

After making the initial decision to discontinue investments in insurance contracts due to problems in the insurance market, Defendants did exactly what is expected of plan fiduciaries. They continued to monitor market conditions and the needs of plan participants and they ultimately decided to forge a middle ground, while consistently providing plan participants with detailed and accurate disclosures.

Defendants' ongoing review of the Stable Value Fund's composition exemplifies what is expected of plan fiduciaries under ERISA. ERISA contemplates that fiduciaries have discretion and that they will exercise that discretion in the best interests of plan participants. *Kamler v. H/N Telecomm. Servs., Inc*., 305 F.3d 672, 681 (7th Cir. 2002). An ERISA fiduciary "is supposed to be careful rather than bold." *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006). Accordingly, except where a fiduciary is acting out of self-interest, "judicial review of the decisions of an ERISA trustee . . . is deferential" (*id.* at 732), and reflects the necessity that the "'fiduciary duty of care,' as the district court so cogently stated it, 'requires prudence, not prescience'" (*DeBruyne v. Equitable Life Assurance Soc'y*, 920 F.2d 457, 465 (7th Cir. 1990) (quoting *DeBruyne v. Equitable Life Assurance Soc'y*, 720 F. Supp. 1342, 1349 (N.D. Ill. 1989)); *see also, e.g.*, *Taylor v. United Techs. Corp.*, 2009 WL 535779, at *8 (D. Conn. Mar. 3, 2009) ("Whether a fiduciary's actions are prudent cannot be measured from the vantage point of hindsight"), *aff'd*, 354 F. App'x 525 (2d Cir. 2009)).

The statutory standard provides that a fiduciary must discharge his duties

> 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.

29 U.S.C. § 1104(a)(1)(B).

That standard is met if the fiduciary satisfies either of two standards. *First*, a fiduciary can demonstrate *procedural prudence*. "With regard to an investment or investment course of action taken by a fiduciary," the duty of prudence is satisfied if the fiduciary:

> (i) Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and
>
> (ii) Has acted accordingly.

29 C.F.R. § 2550.404a-1(b)(1); *see In re Motorola Sec. Litig.*, 644 F.3d 511, 519-20 (7th Cir. 2011). Procedural prudence focuses on the "process by which [a fiduciary] makes its decisions rather than the results of those decisions." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009). The proper inquiry is whether the fiduciary "'employ[ed] the appropriate methods to investigate the merits of the investment and to structure the investment.'" *Jenkins v. Yager*, 444 F.3d 916, 927 (7th Cir. 2006) (quoting *Eyler v. Commissioner*, 88 F.3d 445, 454 (7th Cir. 1996)); *accord Harris v. Amgen, Inc.*, 770 F.3d 865, 875-76 (9th Cir. 2014); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 356 (4th Cir. 2014); *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 723 (6th Cir. 2000); *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 153 (3d Cir. 1999); *Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 955 (D.C. Cir. 1985). Thus, "the test of prudence is one of conduct and not performance." *Kanawi v. Bechtel Corp.*, 590 F. Supp. 2d 1213, 1230 (N.D. Cal.

2008). After all, "[i]t is easy to opine in retrospect that the Plan's managers should have made different decisions, but such 20/20 hindsight musings are not sufficient to maintain a cause of action alleging a breach of fiduciary duty.". *Id.*

Second, and in the alternative, a fiduciary can demonstrate *substantive prudence*. *See Howard v. Shay*, 100 F.3d 1484, 1489 (9th Cir.1996); *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919 (8th Cir.1994); *Fink v. Nat'l Sav. & Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring); *Tibble v. Edison Int'l*, 2010 WL 2757153, at *37 (C.D. Cal. July 8, 2010), *aff'd*, 729 F.3d 1110 (9th Cir. 2013), *cert. granted on other grounds*, 135 S. Ct. 43 (2014) (No. 13-550). Irrespective of the process for achieving the result, a fiduciary bears no responsibility if the decision made was objectively reasonable, measured at the time of the decision. *See Roth*, 16 F.3d at 919; *accord Tatum*, 761 F.3d at 357; *Steinman v. Hicks*, 252 F. Supp. 2d 746, 760 (C.D. Ill.), *aff'd*, 352 F.3d 1101 (7th Cir. 2003).

Under either of these alternative standards, Defendants are entitled to judgment on Plaintiffs' Stable Value Fund claims.

A. Defendants Engaged In Procedural Prudence As To Management Of The Stable Value Fund.

To demonstrate procedural prudence, a plan fiduciary must give "appropriate consideration" to relevant "facts and considerations," "including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties," and must act based on that professional judgment. 29 C.F.R. § 2550.404a-1(b)(1).

For purposes of Plaintiffs' Stable Value Fund claim, the period under review is—at most—the period between September 11, 2000, and September 30, 2006. Doc. No. 226 at 11; *see also infra* pp. 22-23 (arguing that the timeframe for the Stable Value Fund claim actually runs from October 12, 2005, until September 30, 2006, because of David Ketterer's late entry into the case). The time period is significant because only acts or omissions during the time period can be challenged. Plaintiffs may not, for example, challenge the 1997 decision to discontinue new investments in insurance contracts and argue that they suffered continuing effects from that decision during the limitations period. *See, e.g.*, *Kanawi*, 590 F. Supp. 2d at 1225; *Phillips v. Alaska Hotel & Rest. Emps. Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991). The operative question here is how a prudent fiduciary would have acted starting in September 2000.

As summarized *supra* (at 4-9), the evidence will show that Defendants met exactly the standard for procedural prudence set forth in ERISA and the Secretary of Labor's implementing regulations. With full awareness of the Stable Value Fund's role as the most conservative option in the plans, and in the presence of abundant other options for increasing exposure to higher returns, plan fiduciaries made the considered decision to invest in less risky money-market assets. As the interest-rate environment changed, they reevaluated their allocations and, weighing the relevant facts and considerations, made periodic adjustments to their investment strategy.

The evidence here tracks that in *Tibble*. In *Tibble*, Plaintiffs' expert, Steve Pomerantz (who is also Plaintiffs' expert in this case), opined that "a prudent fiduciary would have recognized that the [short-term investment fund] was not a fund which served participants' best retirement interests and would have replaced it with a stable value fund, recognizing that such is clearly a superior conservative retirement investment." Expert Report of Steve Pomerantz, Doc. No. 438–2, ¶ 50, *Tibble v. Edison Int'l*, 639 F. Supp. 2d 1074 (C.D. Cal. 2009) (No. 2:07-cv-5359). But the district court granted summary judgment to the defendants, finding it sufficient that plan fiduciaries had "considered the possibility of including a stable value fund, but instead decided on a money market because the money market fund would provide more consistent returns and have lower risk." *Tibble*, 639 F. Supp. 2d at 1118. The Ninth Circuit affirmed, holding that it was "fatal to beneficiaries" that uncontroverted evidence showed "discussions about the pros and cons of a stable-value alternative." *Tibble*, 729 F.3d at 1136. The evidence here will show abundant discussions about the pros and cons of different conservative fund compositions, which, as in *Tibble*, is "fatal" to Plaintiffs' claim.

Plaintiffs' claim relies heavily upon hindsight. Any investment can be criticized after the fact for generating lower returns than an alternative. Hindsight, though, is not and cannot be the standard for reviewing investment decisions by ERISA fiduciaries. *DeBruyne*, 920 F.2d at 465; *Taylor*, 2009 WL 535779, at *8. Fiduciaries in a 401(k) plan are expected to provide a wide range of risk-and-return options so that plan participants can choose a portfolio that reflects their personal objectives and risk tolerance. During the class period, Lockheed Martin plan fiduciaries appropriately exercised their professional judgment to ensure the security of the plans' most conservative investment option. Given the oversight of LMIMCo—and Ms. Ingrim in particular—Plaintiffs cannot demonstrate that plan fiduciaries failed to meet the ERISA standard of care.

B. The Management Of The Stable Value Fund Was Substantively Prudent.

Even if there were no evidence as to procedural prudence, Defendants would be entitled to judgment because the composition of the Stable Value Fund was, at all times, substantively prudent.

Defendants' decision to offer money-market products in the most conservative investment option was objectively reasonable. Money-market funds are prevalent 401(k) options; as noted in *Tibble*, "in 2005 and 2006, 58% of defined contribution plans offered a money market fund." 639 F. Supp. 2d at 1118. "The prudent investor rule is profoundly protective of trustees who have followed common investment-industry standards." John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 657 (1995). It could not have been imprudent for Lockheed Martin to offer plan participants an investment option that favored money-market assets instead of insurance contracts when so many other investment fiduciaries made the same calculation and offered the very same thing.

Indeed, the Secretary of Labor has determined, through rulemaking actions entitled to deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), that money-market and stable value products are both prudent investment choices for plan participants seeking to preserve assets for retirement with minimal risk and reasonable return.

In the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), Pub. L. No. 107-16, 115 Stat. 38, Congress directed the Secretary of Labor to identify safe-harbor investment options that are "deemed to satisfy the fiduciary requirements of [ERISA] section 404(a)" for circumstances when funds are automatically rolled over into individual retirement plans. EGTRRA § 657(c)(2)(A) (codified at note following 26 U.S.C. § 401). The Secretary concluded that "the safe harbor should be designed to minimize risk, preserve assets for retirement and maintain liquidity." 69 Fed. Reg. 58018, 58021 (Sept. 28, 2004). And the Secretary further found that those criteria are satisfied by "money market funds" and "'stable value products,'" because both options are "designed to preserve principal and provide a reasonable rate of return." *Id.*; *see* 29 C.F.R. § 2550.404a-2(c)(3). Thus, the Secretary conclusively determined that *either* money-market or stable value investments are prudent for investors seeking to preserve principal while generating a reasonable rate of return.

For long-term investors, investment professionals recommend a diversified portfolio that includes age-appropriate allocations to equities, bonds, and cash. Subsequent to the promulgation of the EGTRRA regulations, Congress directed the Secretary to identify safe-harbor default investment options for new plan participants who fail to designate an investment election. *See* ERISA § 404(c)(5), 29 U.S.C. § 1104(c)(5). At the time, most 401(k) plan sponsors treated the default investment as a stopgap measure and "offer[ed] as default investment vehicles money market or stable value funds or similarly-performing vehicles." Default Investment Alternatives Under Participant Directed Individual Account Plans, 71 Fed. Reg. 56806, 56817 (proposed Sept. 27, 2006). But the Secretary focused on the prospect that some plan participants may never make an election and proposed to include in the safe-harbor only those investment fund products or model portfolios designed to provide "long-term appreciation and capital preservation through a mix of equity and fixed income exposures" appropriate for individual participants or the participants of the plan as a whole. *See* 29 C.F.R. § 2550.404c-5(e)(4). That definition again treated both money-market and stable value funds the same, excluding both investments as appropriate *individual* default funds (although they could be included as *components* of safe-harbor funds):

> Such investments can play a useful role as a component of a diversified portfolio, . . . when such funds become the exclusive investment of participants or beneficiaries, it is unlikely that the rate of return generated by those funds over time will be sufficient to generate adequate retirement savings for most participants or beneficiaries.

71 Fed. Reg. at 56807 Proponents of stable value funds objected, making the same arguments that Plaintiffs make here—"that stable value funds are superior to money market funds and other cash-equivalent products because stable value investments earn higher rates of return than money market funds and other cash-equivalent products." Final Rule, Default Investment Alternatives

Under Participant Directed Individual Account Plans, 72 Fed. Reg. 60452, 60462-63 (Oct. 24, 2007).

Even assuming that stable value funds "would outperform money-market funds," the Secretary concluded that the possibility that stable value funds are superior investment vehicles "should be assessed with caution," because "[e]conomic theory suggests that if financial markets are efficient, financial instruments with similar risk characteristics will provide similar returns." *Id.* at 60473 n.35. Thus, the Secretary found it "likely that there are important differences between money market and stable value funds beyond any difference in average returns." *Id.* The Secretary identified some of the risks of stable value products:

> (1) "stable value products may come with a variety of features that may sometimes erode actual returns in response, for example, to certain plan sponsor actions that have the effect of shifting participant account allocations away from such products";
>
> (2) "[s]uch stable value product features may sometimes dissuade plans or participants from making investment changes that they otherwise would, thereby imposing opportunity costs"; and
>
> (3) "stable value products may expose investors to the credit risk of the fund vendor in ways that money market funds do not."

Id.

As a result of these additional risks, the Secretary concluded that only "money-market funds reasonably represent available near risk-free investment instruments" and that money-market funds and stable value funds should not be treated differently for purposes of the safe-harbor: Both types of funds automatically satisfy ERISA's prudence requirement for the 120-day period following a participant's first elective contribution. 29 C.F.R. § 2550.404c–5(e)(4)(iv). After that period, cash-equivalent or bond investments would be an appropriate *component* of a diversified portfolio (*see, e.g.*, Dep't of Labor, Investor Bulletin: Target Date Retirement Funds 3 (2010), http://www.dol.gov/ebsa/pdf/TDFInvestorBulletin.pdf (anticipating blend of stocks, bonds, and cash in retirement portfolios)), but would not be entitled to safe-harbor status as standalone funds.

It defies logic that money market funds are automatically prudent as *default* investment options for participants who make no election in their first four months of employment but thereafter become imprudent—and cannot even be offered to participants who *want* a low-risk asset as part of their diversified portfolio.

The takeaways from the Secretary's regulations are unavoidable. Because money-market assets are an appropriate component in a diversified portfolio, it cannot be inappropriate to offer participants the option to invest a portion of their portfolio in money-market assets. Because money-market assets are the *only* near-risk-free investment alternative, fiduciaries are not forgoing a superior risk-free investment option by preferring a conservative money-market approach to riskier investments in insurance contracts. And because money-market assets have been found by the Secretary of Labor to be a source of reasonable returns, fiduciaries are not required to force participants to assume greater risk when risk may not be appropriate given their personal situation.

Despite the clear indications from industry and government that either money-market or stable-value investments are appropriate, Plaintiffs contend otherwise. As characterized in their class-certification appeal, Plaintiffs

> aim to show that the SVF was not structured to beat inflation, that it did not conform to its own Plan documents, and that Lockheed failed to alter the SVF's investment portfolio even after members of its own pension committee voiced concerns that the SVF was not structured to provide a suitable retirement asset.

Abbott v. Lockheed Martin Corp., 725 F.3d at 811. The evidence does not support any of those allegations.

Inflation Risk. Investments in short-term assets may not always beat inflation. That risk was expressly considered by the Investment Committee and clearly disclosed to participants. In every summary plan description, Lockheed Martin warned plan participants that "[d]ue to the high quality and short maturity structure [of the Stable Value Fund], its rate of return is usually lower than other fixed income options and the Fund may have greater inflation risk, which is the chance that the Fund's return will not exceed inflation."

Every investment option offered by 401(k) plans has some risk. For the Stable Value Fund, inflation risk must be weighed against the desire to protect principal. The fiduciaries here clearly considered that risk and told participants of the risk. Short-duration investments are appropriate as part of a diversified portfolio and are sometimes necessary for retirees or for short-term investors like Plaintiff David Ketterer, who moved his assets into the Stable Value Fund to avoid imperiling his divorce settlement through the loss of any principal. It is acceptable—and, indeed, common—to offer low-risk funds that carry an inflation risk—indeed, even the federal government's vaunted Thrift Savings Plan offers a fund that "is subject to inflation risk, or the possibility that your . . . investment will not grow enough to offset the reduction in purchasing power that results from inflation." Thrift Savings Plan, G Fund: Government Securities Investment Fund, https://www.tsp.gov/investmentfunds/fundsheets/fundPerformance_G.shtml.

Compliance with Plan Documents. Plaintiffs' next allegation is that the Stable Value Fund is inconsistent with plan documents. That concern is easily dismissed.

As a threshold matter, the "plan documents" referenced by Plaintiffs are the summary plan descriptions. *See, e.g.*, Reply Br. at 17 n.7, *Abbott*, 725 F.3d 803. But the Supreme Court has held that plan disclosures, like summary plan descriptions, "do not themselves constitute the *terms* of the plan" and cannot form the basis for a breach-of-the-plan claim. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1877-78 (2011).

In addition, the supposed misrepresentation in the summary plan descriptions simply does not exist. The descriptions of the Stable Value Fund explained (1) its objectives; (2) its composition and strategy, including the relative allocations between money-market assets and insurance contracts; and (3) factors affecting performance, including the effects of the Fund's allocations. Within that description, Plaintiffs contend that, among the Stable Value Fund's objectives—"to provide safety of principal, stable income and liquidity"—the allocation to money-market investments did not offer "stable income." To the contrary, money-market assets do provide stable income. And to the extent there could be any possible confusion, the very next sentence of the disclosures describes the precise instruments that comprised the Stable Value Fund.

In any event, Plaintiffs have expressly and repeatedly disavowed any claim premised on misrepresentation (*see supra* at 2-3), and with good reason. If Plaintiffs' claim were based on misrepresentation, they would be required to prove detrimental reliance (which they cannot prove as individuals, let alone on a class-wide basis). Plaintiffs should not be permitted at trial to advance a claim that depends on alleged misrepresentations in the disclosures of the Stable Value Fund, or as to its name; if they do, this Court should decertify the Stable Value Fund class.

<u>Alteration of Stable Value Fund Portfolio</u>. Finally, there are no facts to support Plaintiffs' theory that Lockheed Martin "failed to alter the Stable Value Fund's investment portfolio even after members of its own pension committee voiced concerns that the Stable Value Fund was not structured to provide a suitable retirement asset." That allegation stems

from a description of the Stable Value Fund written in *September 2006*—at a time when even Plaintiffs agree that the Stable Value Fund was prudently managed.

Prior to September 2006, the Stable Value Fund was the default investment option for various Lockheed Martin retirement plans. For the SSP and HSP, participants made their investment elections at the same time as they enrolled in the plan, so no significant number of participants were defaulted into the Stable Value Fund. But for other retirement plans, like the Capital Accumulation Plan referenced in the September 2006 memo, the default option was significant. In the Capital Accumulation Plan (which is not covered by this lawsuit), Lockheed Martin makes *automatic* contributions on behalf of its employees. Plan participants are enrolled automatically. Although they are invited to elect how to invest their Capital Accumulation Plan accounts, many plan participants do not and therefore end up with the default option. The Capital Accumulation Plan was launched in 2006 as a replacement for the traditional pension. When it became clear, later that year, that many participants in that plan were defaulting into the Stable Value Fund, the default was changed to a diversified portfolio—the Conservative Asset Allocation Fund. In conjunction with the transition, talking points were prepared to brief customer-service representatives who might be fielding questions about a participant disclosure. Those talking points noted that "[t]he SVF will not beat inflation by a sufficient margin to provide a meaningful retirement asset." But that observation was not a criticism of *money-market assets*. Indeed, at that point, the Stable Value Fund was comprised primarily of insurance contracts.

There is simply no evidence that Lockheed Martin disregarded anybody's concerns about the Stable Value Fund. After Ms. Ingrim responded to the Investment Committee's September 2002 request for research with a memorandum encouraging a change in the Stable Value Fund, it took all of 18 days for the Investment Committee to endorse her general approach, and just two months for it to agree to an initial investment of $250 million in insurance contracts.

That is not evidence of fiduciary malfeasance. It shows that Lockheed Martin's fiduciaries were doing precisely what they should have been doing. They asked questions, sought answers, and made decisions in real time, without the benefit of hindsight. ERISA does not require that fiduciaries will always agree on approaches and outcomes, but it does require fiduciaries to act as investment professionals working for participants' best interests. *See, e.g.*, *Tibble*, 729 F.3d at 1136. There can be little question that Lockheed Martin's fiduciaries—who pressed their vendors for information and analytical tools and made frequent inquiries about alternative approaches—were intent on offering plan participants an appropriate mix of investment options with which they could construct their preferred portfolios.

II. In The Alternative, Defendants Are Entitled To Judgment Based On ERISA's Statute Of Repose, Which Prohibits Claims Predating October 12, 2005.

As explained *supra*, Defendants are entitled to judgment because there was no breach of fiduciary duty during the class period. In the alternative, Defendants are entitled to judgment because Plaintiffs' claims are time-barred.

ERISA contains a six-year period of repose. For this case, that period begins on October 12, 2005, six years prior to the date on which the Stable Value Fund Class's only class representative, David Ketterer, was joined to the Second Amended Complaint.

Under Section 413 of ERISA, a claim for breach of fiduciary duty may not be brought after the earlier of:

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or

> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach of violation.

29 U.S.C. § 1113. In such a two-tiered arrangement, the shorter period is a traditional statute of limitations and the longer period is a statute of repose. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991); *Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998); *Perez v. Mueller*, 2014 WL 2050606, at *3 (E.D. Wis. May 19, 2014) ("the six-year provision in § 413(1) is a statute of repose").

Although periods of limitations and repose are similar in some respects, they differ in others. *See generally CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014) (distinguishing between limitations and repose). One critical difference is that periods of repose are not subject to equitable tolling. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (neither equitable estoppel nor equitable tolling "applies to statutes of repose; their very purpose is to set an outer limit unaffected by what the plaintiff knows"); *Lampf*, 501 U.S. at 363; *Radford*, 151 F.3d at 400; *see also Teamsters & Emp'rs Welfare Trust of Ill. v. Gorman Bros. Ready Mix*, 283 F.3d 877, 887 (7th Cir. 2002) (Easterbrook, J., concurring in judgment) ("The six-and-three structure of this rule, like the three-and-one structure of the statute used for securities-fraud claims, is incompatible with equitable tolling.").

In cases subject to a statute of limitations, claims of absent class members are tolled while a motion for class certification is pending, under the rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). But because *American Pipe* is a rule of equitable tolling (*see, e.g., Young v. United States*, 535 U.S. 43, 49 (2002); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990)), ERISA's six-year period of repose cannot be tolled. Accordingly, the repose clock continued to run for Plaintiff David Ketterer until he properly moved to join the case. *See Moore v. Indiana*, 999 F.2d 1125, 1131 (7th Cir. 1993).

That same reasoning applies to absent class members. None of them is entitled to tolling for the period preceding Ketterer's claim. Accordingly, the repose period for the Stable Value Fund class begins on October 12, 2005. And because Plaintiffs do not have any theory that involves an imprudent act or omission between October 12, 2005, and September 30, 2006, Defendants are entitled to judgment.

CONCLUSION

At the close of the evidence, this Court should enter judgment for Defendants on Plaintiffs' Stable Value Fund claim.

Dated: December 3, 2014

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

ANTHONY ABBOTT, et al., Plaintiffs, v. **LOCKHEED MARTIN CORPORATION, et al.,** Defendants.	Case No. 3:06-cv-701-MJR-DGW

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendants Lockheed Martin Corporation and Lockheed Martin Investment Management Company, hereby certifies that on the 3rd day of December 2014, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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