No. 17-1515

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MARY BARCHOCK; THOMAS WASECKO; STACY WELLER

Plaintiffs-Appellants,

v.

CVS HEALTH CORPORATION; THE BENEFITS PLAN COMMITTEE OF CVS HEALTH CORPORATION; GALLIARD CAPITAL MANAGEMENT, INC.

Defendants-Appellees.

Appeal from the United States District Court for the District of Rhode Island, Case No. CA 16-61ML, The Honorable Mary M. Lisi, Senior Judge

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure Rule 26.1, Defendant-Appellee CVS Health Corporation states that it has no parent corporation; it is a publicly held corporation, and no other publicly held corporation owns 10% or more of its stock.

Defendant-Appellee Galliard Capital Management, Inc. states that it is a wholly-owned subsidiary of Wells Fargo Asset Management Holdings, LLC, which is owned by Everen Capital Corporation. Everen Capital Corporation is owned in turn by Wells Fargo & Company, which is a publicly held corporation. Wells Fargo & Company has no parent corporation, and the most recent information available shows that no company owns 10% or more of its stock.

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INTRODUCTION

During one of the most turbulent periods in American economic history, the CVS Stable Value Fund ("the Fund") met its stated objective: to "preserve capital while generating a steady rate of return higher than money market funds provide." Pltfs.' Addendum ("Add.") 9 ¶ 27 (emphasis omitted). Plaintiffs sued years later, claiming that the Fund kept their capital *too* safe, and that the Fund's better-than-money-market-returns were not high *enough*. Plaintiffs point to no improprieties in the process defendants used to manage the Fund following the crash in 2008. They do not allege that defendants personally gained by managing the Fund "too" conservatively during those challenging years. They simply allege that, had the Fund borne more risk in the years after the financial crisis, then it would have produced higher returns. Had plaintiffs sued in 2010 to force the Fund's fiduciaries to take on more risk, their complaint would have been summarily dismissed. Their legal claim is no better for having waited. Only in hindsight can plaintiffs assert that a higher-risk strategy would have paid off, and not *lowered* the Fund's returns or even caused capital losses.

The law does not judge the Fund's fiduciaries based on the Fund's after-the-fact results. Plaintiffs do not overcome this settled principle by alleging that other funds were invested differently during this period, in a way that offered the prospect of greater returns. The Fund's managers were not duty-bound to

approximate the average investment mix of other stable value funds. Plaintiffs' contrary theory defies the well-established duty of fiduciaries to exercise their independent judgment with regard to their particular plans, not to blindly follow the average decisions of peers.

In light of the obligation for fiduciaries to exercise independent judgment, it should come as no surprise that stable value managers during the post-crash period did not converge around any industry average. They embraced a wide range of investment allocations reflecting a wide range of risk/return judgments in pursuit of their particular investing goals. That is, the arithmetic mean or "average" is no "industry norm," as plaintiffs assert, but is rather a statistical device that *conceals* the substantial variation in risk tolerance and strategies in the stable value fund industry. Courts should not substitute their judgments, based on some imaginary "industry norm," for the independent judgment of investment management professionals responding to dramatic changes in the marketplace. That is a role courts cannot possibly fill.

Plaintiffs also argue—contrary to basic economic reality—that a guarantee of better returns was available without incurring additional risk. The law does not entertain claims based on the denial of fundamental principles of economics, and plaintiffs' theory is in any event contradicted by facts they incorporated into their complaint.

As this Court has long recognized, the "test of prudence" under ERISA "is one of *conduct*, and not a test of the result of performance of the investment." *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7 (1st Cir. 2009) (quoting *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983)); *see id.* (fiduciary prudence "cannot be measured in hindsight" (quotation omitted)). The complaint's theory of liability, if accepted, would invite widespread judicial second-guessing of fiduciary judgments. It would encourage fund managers to herd toward an industry average to avoid the risk of litigation—which would inevitably limit the range of options available to plan sponsors in the marketplace—rather than exercise the independent judgment the fiduciary duty standard requires. Courts do not and should not "substitute [their] judgment" for that of ERISA fiduciaries navigating uncertain conditions. *Caterino v. Barry*, 8 F.3d 878, 883 (1st Cir. 1993) (Breyer, J.). The district court's judgment should be affirmed.

ISSUES PRESENTED

1. Whether the complaint states a claim for breach of the fiduciary duty of prudence by alleging that the Fund's conservative strategy, in achieving the CVS Stable Value Fund's mandate in the wake of the financial crisis, generated lower returns than did the higher-risk average investment mix of other stable value funds.

2. Whether the complaint states an independent claim that CVS breached its fiduciary duty to monitor the Fund's management.

STATEMENT OF THE CASE

A. ERISA and 401(k) Basics

ERISA regulates "employee benefit plans," including plans that provide retirement benefits to employees. 29 U.S.C. § 1002(3). Employers frequently sponsor defined contribution plans such as 401(k) plans to provide retirement benefits to their employees. Participants in a 401(k) plan contribute a portion of their pre-tax compensation to individual accounts, which they can then allocate among investment options selected by their plan fiduciaries. Department of Labor ("DOL") regulations encourage defined contribution plans to offer "a broad range of investment alternatives" with "materially different risk and return characteristics." 29 C.F.R. § 2550.404c-1(b)(3)(i). Under those regulations, one of the investment alternatives made available to plan participants should be a "safe" option—an "income producing, low risk, liquid" fund. *Id.* § 2550.404c-1(b)(1)(ii), (b)(3).

B. The CVS 401(k) Plan and Its Investment Lineup

CVS sponsors a 401(k) plan ("the Plan") to help its employees save for retirement. District Court Docket ("Dkt.") 16, Ex. A ("2010-2014 Plan Form

5500s") at 292.[1] CVS employees who participate in the Plan have individual accounts which they may allocate among the options in the Plan's investment lineup according to their individual investment needs and preferences. *See, e.g.*, *id*. at 248-53, 320-24. CVS matches up to five percent of eligible compensation contributed by each participant to his or her account. *See, e.g.*, *id.* at 321.

The Plan's investment lineup included up to 18 investment options during the putative class period. These ranged from higher-risk equity options (such as an "Aggressive Lifestyle Fund" and an "International Equity Fund") to lower-risk fixed income vehicles (such as an "Inflation-Protected Bond Fund," a "Diversified Bond Fund," and a "U.S. Bond Index Fund"). 2010-2014 Plan Form 5500s at 32-34, 103-05, 173-78, 250-53, 322-24. The CVS Stable Value Fund is the Plan's lowest-risk investment option. *See* Add. 8-9 ¶ 27.

The stated investment objective of the CVS Stable Value Fund is to "preserve capital while generating a steady rate of return higher than money market funds provide." Add. 9 ¶ 27 (emphasis and quotation omitted). Participants who wish to minimize the risk of investment losses or who do not

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[1] As plaintiffs' counsel acknowledged below (Dkt. 26 at 10-11, 28-29), the publicly available annual reports (or "Form 5500s") that the Plan submitted to the DOL are incorporated into the complaint by reference and may therefore be considered in connection with the motion to dismiss. *See, e.g.*, Add. 8-9 ¶ 27; Add. 10-12 ¶¶ 36, 38, 39, 42; *see also infra* at 17.

have time to ride out market downturns, such as individuals in or approaching retirement, can use the Fund to avoid market volatility. Stable value funds are frequently offered as a conservative investment alternative in retirement plans. Add. 5 ¶ 13. They vary in structure and type, but most invest "in a high-quality diversified, fixed-income portfolio that is designed to preserve capital while providing steady positive returns." *Id.*; *see also, e.g.*, Add. 8-9 ¶ 27.[2] Plan disclosures cited in the Complaint indicate that the CVS Stable Value Fund may invest in "cash, highly rated insurance company contracts[,] … other bond investments, and a commingled fund managed by Galliard Capital Management that is further diversified by manager and security type." Add. 8-9 ¶ 27; *see also, e.g.*, 2010-2014 Plan Form 5500s at 253, 324.

The Plan fiduciaries engaged Galliard to provide investment management services to the Fund. Add. 2-3 ¶¶ 5- 6. During the relevant period, the Fund invested in cash equivalents, guaranteed investment contracts ("GICs") (that is, insurance company contracts guaranteeing a fixed or variable rate of return backed by the insurer's general account) and similar security-backed contracts, and

[2] *See also* DOL ERISA Advisory Council, Report on Stable Value Funds and Retirement Security in the Current Economic Conditions (2009) ("DOL Report"), http://www.dol.gov/ebsa/publications/2009ACreport3.html (last visited Oct. 2, 2017) (describing a stable value fund as "a conservative, fixed income investment vehicle with an objective of preserving capital while providing a relatively stable rate of return").

collective trust funds. Add. 9 ¶ 27; *see also, e.g.*, 2010-2014 Plan Form 5500s at 266, 334. The Fund's cash-equivalent holdings are invested in the EB Temporary Investment Fund (the "TIF"), a fund managed by Bank of New York Mellon that invests in "short-term debt obligations of the U.S. Government, short-term corporate obligations, certificates of deposit, demand deposits, and other short-term debt obligations." Add. 9 ¶ 29.

Plaintiffs emphasize that the CVS Stable Value Fund held 55 percent of its assets in the TIF. Plaintiffs' Opening Brief ("Br.") 17. But as plaintiffs concede, that was the allocation in 2010, months after the financial crisis reached its deepest trough. Br. 8; Add. 10 ¶¶ 32-33. This allocation was adjusted at least annually thereafter, and declined as market conditions improved; by 2013 (the latest year addressed by the complaint), the Fund's cash-equivalent allocation had declined to 27 percent. Add. 11-12 ¶¶ 38, 41, 43. Thus, from 2010 to 2013, between 45 and 73 percent of the Fund's assets were invested in longer-term, higher-risk investments—that is, the types of investments that plaintiffs assert the Fund should have held in greater quantity.

C. Procedural History

a. *Plaintiffs' Original Complaint*

Plaintiffs filed this action on February 11, 2016, asking the district court to hold that the Fund's level of cash equivalents between 2010 and 2013 breached

ERISA's fiduciary duty of prudence. Dkt. 1 ("Compl."). Plaintiffs asserted that it was "'obvious' that the CVS Stable Value Fund would have been more profitable" if it had invested more in GICs and less in cash equivalents, and that doing so would not have "material[ly]" increased the Fund's exposure to risk. A.11 (quoting Compl. ¶ 20).

On June 24, 2016, after full briefing and a hearing, Magistrate Judge Sullivan issued a Report and Recommendation recommending that the Court grant defendants' motion to dismiss. As Judge Sullivan explained, ERISA's prudence standard focuses not on "*ex post facto* results" but rather on the fiduciary's conduct in making investment decisions. A.14. Courts "must be mindful that fiduciary decision-making 'involves a balancing of competing interests under conditions of uncertainty,'" and that how fiduciaries strike that balance "is reviewed with deference, so long as an appropriate process was used." *Id.* (quoting *Bunch*, 555 F.3d at 7).

Judge Sullivan found that plaintiffs' challenge to the Fund's asset allocation and resulting performance was an improper hindsight-based claim. A.15. Plaintiffs had failed "to criticize any aspect of Galliard's investment process or of CVS's monitoring of Galliard's investment process," nor had they argued that the Fund failed to fulfill its stated objectives. A.10. Judge Sullivan rejected Plaintiffs' "naked assertion" that the Fund could have invested in higher-yielding securities

with "no material additional investment, credit, or liquidity risk." A.15 (quoting Compl. ¶ 2). Fund risk disclosures incorporated into the complaint "clearly reflect" that plaintiffs' proposed alternative investments—which the Fund already held, albeit in lower quantities than plaintiffs would have preferred—would have added risk of lower returns or losses to the Fund. *Id.* (citing 2010-2014 Plan Form 5500s). Judge Sullivan saw no obligation to "abandon common sense and ignore the basic economic principle that the potential for higher returns brings higher risk." A.16. With plaintiffs' "implausible averment" set aside, plaintiffs were simply complaining that the fiduciaries "did not use [a] crystal ball to restructure the allocation of assets in the Stable Value Fund on the perfect wisdom of hindsight." *Id.* Such hindsight-based allegations do not state a claim that the Fund was imprudently managed. *Id.*

Judge Sullivan likewise rejected plaintiffs' argument that their claim was equivalent to the claim allowed to proceed in *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803 (7th Cir. 2013). In *Abbott*, the challenged fund was "up to 99% … invested in money market instruments," and thus was neither diversified nor structured to deliver above-money market returns as required by that fund's governing documents. A.17. Here, the Fund's asset allocation—"approximately half in TIFs and half in higher-yield insurance contracts" at its most conservative—was consistent with its stated investment objectives. *Id.*

b. Plaintiffs' Amended Complaint

Plaintiffs filed an amended complaint instead of pursuing objections to Judge Sullivan's Report & Recommendation. The amended complaint asserted the same basic claims as before, but added allegations about the investment decisions and risk/return judgments of *other* stable value fund managers during the period at issue. Add. 4-8 ¶¶ 11-25; Add. 10-12 ¶¶ 36-43. In particular, the amended complaint cited a Stable Value Investment Association survey (the "SVIA Survey") which stated that on average stable value funds held less cash (and accordingly had a longer average duration) than the Fund did from 2010 to 2013. Add. 12-13 ¶¶ 44, 48. Plaintiffs asserted that the "excessive"—i.e., above-average—allocation to cash equivalents revealed that the Fund's managers had acted imprudently. Add. 8 ¶ 26.

On January 31, 2017, Judge Sullivan again recommended dismissal of plaintiffs' claims after full briefing and a hearing, explaining that plaintiffs' reliance on industry averages could not support an inference of an imprudent process. Add. 43-44. Those averages were "merely data points calculated from a range, potentially a wide range, of measures of investment duration, asset allocation and fund performance, from an array of managers, some more, and some less, risk-averse." Add. 43. "Deviation from the average, standing alone, means nothing"—"[w]hat matters" is whether the Fund's duration and portfolio allocation

"conformed to the Plan's disclosed investment objective of preserving capital while generating a higher rate of return than a money market fund." *Id.* As that point was conceded here, plaintiffs had to allege something more than "just a failure to adhere to the mean" in order for a court to infer imprudence. *Id.* Judge Sullivan explained that far from requiring "fund managers mindlessly to manage to the middle or the mean," ERISA requires just the opposite: that fiduciaries "exercise their judgment in view of the particular circumstances of the plan." Add. 44. Nothing in the amended complaint changed the essential nature of plaintiffs' claim—it still reduced to the assertion that "with the prescience of a crystal ball's forecast of the future, the CVS Stable Value Fund managers could have delivered better returns for the investors." Add. 44-45.

The amended complaint also added allegations that the Fund "predictably underperformed" other stable value funds because of a "'fire-and-forget' asset placement" in cash equivalents. Add. 44 (quoting Add. 17-18 ¶¶ 63, 65). Judge Sullivan determined that these conclusory allegations, too, could not sustain plaintiffs' claims. Not only were they not plausibly supported by facts, they were contradicted by the amended complaint's own acknowledgement that the Fund's allocation to cash equivalents was repeatedly adjusted during the relevant period. *Id.*; *see supra* at 7 (noting plaintiffs admit substantial reduction in proportion of assets in cash equivalents from 2010 to 2013).

c. The District Court's Order

Plaintiffs objected to Judge Sullivan's Second Report & Recommendation to the district court; on April 18, 2017, Judge Lisi adopted it in full, and dismissed the amended complaint with prejudice. Add. 60-61. Judge Lisi emphasized that the amended complaint "includes no allegations from which it could be inferred that Galliard failed to adhere to the Plan's guidelines and investment objectives" or other disclosures. Add. 58. The court refused to credit plaintiffs' reliance upon industry average data, questioning whether an average could be "an appropriate measure of comparison" because an average can be generated from "multiple outliers at either end of the spectrum." Add. 59. The court further explained that simply comparing "the Fund's investment allocation with an industry average" does not show the Fund's fiduciaries failed to act with the prudence required by ERISA. Add. 59-60. Plaintiffs' claim boiled down to the contention that the Fund's "investments, when considered in hindsight, might have yielded higher gains if Galliard had allocated the Fund's investment more in line with the industry average." Add. 60. Because that claim ran headlong into the settled rule that "'the test of prudence . . . is one of conduct, and not a test of the result of the performance of the investment,'" the amended complaint failed to state a claim, and so the court dismissed the suit. Add. 60 (quoting *Bunch*, 555 F.3d at 7) (omission in original).

Plaintiffs now appeal.

SUMMARY OF ARGUMENT

I. The district court correctly determined that the amended complaint fails to state a claim for a breach of the duty of prudence. Courts reviewing claims of imprudent investment management focus on a fiduciary's conduct in arriving at an investment decision, not on the investment's results. Plaintiffs do not point to any impropriety in the defendants' conduct when deciding how to manage the Fund. Plaintiffs have abandoned on appeal the only allegation in the amended complaint that purported to criticize the fiduciaries' decision-making process. What is left is simply an attack on the Fund's results: plaintiffs urge the Court to infer imprudent investment decisions from the Fund's performance relative to other stable value options. That hindsight-based claim fails as a matter of law. ERISA does not judge investment managers' prudence by after-the-fact results. Higher risk investments *may* lead to higher returns, but they may also to lower returns or even investment losses. Because it is undisputed that the CVS Stable Value Fund was structured to meet—and did meet—its investment mandate, the managers' risk/reward judgments within the boundaries of the mandate are not made suspect simply because of the outcome of those decisions.

Neither of plaintiffs' attempts to dress up their hindsight-based theory has merit. First, plaintiffs assert that an improper process should be inferred from the

Fund's poor performance combined with its allegedly substantial deviation from a supposed "normal" mix of cash equivalents and longer-term options. They assert that the "norms and standards of stable value fund investing" are revealed in the average cash-equivalent allocation reported in an industry survey. But plaintiffs have not plausibly alleged that the average investment mix reflects any "norm" that other stable value managers generally follow. To the contrary, plaintiffs' own hand-picked survey shows that fund managers varied widely in their investment allocation choices during the turbulent period at issue. Plaintiffs' focus on a supposed industry "average" actually conceals the differing judgments stable value fund managers made in light of their clients' needs and preferences and the uncertain environment they faced.

What plaintiffs' survey reveals is precisely what ERISA encourages. Even if there were some discernible asset-mix "norm" among stable value managers, ERISA would not bind fiduciaries to it. ERISA requires fiduciaries to make individual judgments based on the needs of the particular plans and participants they serve. Courts have therefore recognized that fiduciaries may make non-average choices in the exercise of their judgment under conditions of uncertainty. The Fund was the most conservative investment option in the Plan, with a mandate to "preserve capital" while generating income higher than money market returns. It is nonsensical to suggest that the Fund's fiduciaries were forbidden to take a

relatively conservative approach to managing the most conservative option in the Plan in a punishing economic environment. Fiduciaries whose investment strategy is consistent with their fund's investment objectives should not feel pressure to take more risks with participants' retirement savings merely because other managers serving other plans are pursuing more aggressive strategies. Plaintiffs' theory asks judges to determine the "correct" investment decisions fiduciaries should make within a given asset class, contrary to the process-focused review the law mandates. That review appropriately prevents courts from attempting to second-guess fiduciaries' balancing of competing interests in uncertain conditions.

Unsurprisingly, plaintiffs' novel theory of ERISA imprudence is not supported by any of the cases they cite. Plaintiffs rely on cases in which a fund was managed contrary to its stated investment objectives, or where alleged self-interested conduct supported an inference of a deficient investment process. Plaintiffs do not and cannot make any such allegations here. Simply alleging that the Fund was not managed like an "average" stable value fund and that, in hindsight, it underperformed the "average" fund does not indicate a defective management process.

Plaintiffs' second theory for avoiding the prohibition on hindsight-based attacks fares no better. Plaintiffs assert that unique features of stable value funds fully protect them from downside risks, such that a tilt in favor of longer-term

investments will always translate into higher returns. As the court below recognized, that assertion defies basic economic principles and cannot be credited. Stable value funds have not discovered a magical way to increase returns without any increase in risk. The Plan disclosures, which are incorporated into the complaint, detail some of the risks that longer-term investments carry. And plaintiffs' cited survey data confirms that stable value managers do not take maximal risk in their portfolios, as they presumably would if they believed that the stable value structure would prevent any losses. Even assuming that structural features of stable value funds mitigate investors' direct experience of certain risks, plaintiffs do not plausibly allege that those features somehow eliminate risk altogether. The Fund fiduciaries here did not imprudently turn down a "sure thing"—there is no such thing.

II. The amended complaint also asserts a claim against CVS for an alleged failure to adequately monitor the management of the Fund. As the plaintiffs tacitly concede, that claim cannot proceed if the underlying allegation of imprudence is not viable. The district court was correct to dismiss that separate claim as well.

STANDARD OF REVIEW

This Court reviews a Rule 12(b)(6) dismissal de novo. *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012). The Court should "take the complaint's well-pled (i.e., non-conclusory, non-speculative) facts as true,

drawing all reasonable inferences in the pleader's favor, and see if they plausibly narrate a claim for relief." *Id.* "Plausible" means "something more than merely possible, and gauging a pleaded situation's plausibility is a context-specific job that compels [the court] to draw on [its] judicial experience and common sense," considering "(a) implications from documents attached to or fairly incorporated into the complaint, (b) facts susceptible to judicial notice, and (c) concessions in plaintiff's response to the motion to dismiss." *Id.*; *see also Butler v. Deutsche Bank Trust Co. Ams.*, 748 F.3d 28, 32 (1st Cir. 2014) (court may disregard "bald assertions" and "unsupportable conclusions" (quotation omitted)). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint must be dismissed. *Ashcroft v. Iqbal*, 556 U.S. 662, 769 (2009). The Court may consider facts established by documents that are incorporated by reference into the complaint or matters of public record. *Beddall v. State Street Bank*, 137 F.3d 12, 17 (1st Cir. 1998).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE AMENDED COMPLAINT FAILS TO STATE A CLAIM OF IMPRUDENT INVESTMENT MANAGEMENT

A. Settled Principles of ERISA Prudence Review Preclude Plaintiffs' Claims

As the Supreme Court has made clear, a motion to dismiss is an "important mechanism for weeding out meritless [ERISA] claims." *Fifth-Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014).[3] To state a claim for imprudence under ERISA, a plaintiff must plead facts showing that the fiduciaries did not act "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

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[3] Plaintiffs continue to cite an unpublished, 2011 decision of the Southern District of New York for the proposition that prudence claims are "rarely" suitable for resolution on summary judgment, "much less" on a motion to dismiss. Br. 12 (alteration and quotation omitted). That case pre-dates the Supreme Court's contrary decision in *Dudenhoeffer* as well as a Second Circuit decision affirming the dismissal of prudence claims brought against an investment manager. *See Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Retirement Plan v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 716 (2d Cir. 2013) ("*St. Vincent*"). In fact, courts routinely dismiss claims for fiduciary breach that do not plausibly allege an imprudent process. *See, e.g.*, *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009); *Renfro v. Unisys Corp.*, 671 F.3d 314, 326-27 (3d Cir. 2011); *Loomis v. Exelon Corp.*, 658 F.3d 667, 671-73 (7th Cir. 2011); *White v. Chevron Corp.*, 2016 WL 4502808, at *8 (N.D. Cal. Aug. 29, 2016); *In re Disney ERISA Litig.*, 2017 WL 1505129, at *4-6 (C.D. Cal. Apr. 21, 2017); *Meiners v. Wells Fargo & Co.*, 2017 WL 2303968, at *2 (D. Minn. May 25, 2017); *Bd. of Trs. of the Operating Eng'rs Pension Tr. v. J.P. Morgan Chase Bank, N.A.*, 2012 WL 1382274, at *4 (S.D.N.Y. Apr. 20, 2012).

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). Courts reviewing claims for fiduciary breach focus "on a fiduciary's conduct in arriving at an investment decision, not on its results, and ask[] whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) (collecting cases); *see Bunch*, 555 F.3d at 7 (the "test of prudence … is one of conduct, and not a test of the result of performance of the investment" (quotation and emphasis omitted)). As the Supreme Court has reiterated, those principles mean that the challenged conduct should be judged based on the circumstances prevailing "at the time the fiduciary acts," not in hindsight. *Dudenhoeffer*, 134 S. Ct. at 2471; *St. Vincent*, 712 F.3d at 716; *DeBruyne v. Equitable Life Assur. Soc. of U.S.*, 920 F.2d 457, 465 (7th Cir. 1990) (ERISA "requires prudence, not prescience").

ERISA does not mandate one-size-fits-all solutions. Courts recognize that fiduciary decision-making frequently "involves a balancing of competing interests under conditions of uncertainty." *Bunch*, 555 F.3d at 7 (quoting *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006)). Courts therefore review how fiduciaries strike that balance "at a distance," and "do not simply substitute [their] judgment for that of the trustees." *Caterino*, 8 F.3d at 883. Put otherwise, courts do not seat fiduciaries on the "razor's edge" in exercising their

judgment, *Armstrong*, 446 F.3d at 733, and do not evaluate prudence by asking "whether the best possible action was taken" by the fiduciary, *Bunch*, 555 F.3d at 7; *see also Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) (ERISA prudence does not require "any particular course of action if another approach seems preferable"). A range of decisions may be reasonable and prudent even for similarly situated fiduciaries.

ERISA further recognizes that fiduciary decisions must be made, and judged, in context. The prudence standard is "flexible"; it recognizes that a fiduciary should consider the specific "character and aims" of the "particular type of plan he serves." *Donovan*, 716 F.2d at 1467; *see also In re Unisys*, 74 F.3d at 435 (similar). Moreover, courts must assess "the prudence of each investment" in relation "to the portfolio as a whole." *St. Vincent*, 712 F.3d at 717; *see also Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999) (noting that ERISA and implementing regulations endorse modern portfolio theory rather than assessing each fund in a lineup "in isolation"). That is, fiduciaries charged with managing an investment fund for a particular plan must be mindful of an investment's role in the fund, and of the fund's role in the plan's overall investment lineup.

These established standards compelled dismissal of the amended complaint. The Fund was the most conservative option in CVS's plan, and it fulfilled the

conservative objective disclosed to Plan participants: It "preserv[ed] capital while generating a steady rate of return higher than money market funds provide." Add. 9 ¶ 27 (emphasis omitted). Plaintiffs do not directly criticize the process by which the Fund's investment allocation was selected in pursuit of that objective. They have abandoned the only effort they made below to question the process defendants employed (challenging an alleged "unthinking commitment to money-market type 'fire-and-forget' asset placement"), which was refuted by the amended complaint's own allegations. Add. 17-18 ¶ 63; *see* Add. 44; Add. 11-12 ¶¶ 38-43. And because plaintiffs have never suggested that defendants had something to gain from managing the fund conservatively, they do not argue that allegedly disloyal decision-making raises doubts about the prudence of the fiduciaries' process.

On appeal, plaintiffs complain that they "have no access to information about the precise process used to arrive" at the decisions the fiduciaries made, and so seek relief from the obligation to point to any improper process. Br. 20. But plaintiffs here have no less access to information than any other plaintiffs. And all plaintiffs must at least allege some basis for *inferring* a deficiency in the fiduciaries' process, as courts have repeatedly held in dismissing the claims of ERISA plaintiffs who also claim a lack of access to information at the pleading stage. *Supra* at 18 n.3. Moreover, as discussed above, courts refuse to allow an inference of improper process from nothing more than a hindsight evaluation of a

fund's performance. The fact that plaintiffs lack access to information about the fiduciaries' processes has not before and should not now undermine this settled law. Plaintiffs' challenge to the performance of the CVS Stable Value Fund should be rejected.

B. Plaintiffs' Contrary Arguments Are Foreclosed By Precedent And Common Sense

Plaintiffs try to avoid the prohibition on hindsight-based claims with two arguments. First, and most prominently, they claim that an imprudent process may be inferred from the Fund's deviation from industry averages combined with its allegedly weak results. Second, they claim that the Fund had available to it the holy grail of investments: a way to guarantee better results without incurring additional risk. Neither argument withstands scrutiny.

1. Plaintiffs' Reliance On Industry Averages And "Underperformance" Cannot Support An Inference Of Imprudence

a. Plaintiffs primarily argue that this Court should infer an imprudent decision-making process because the Fund deviated "substantially" from industry asset-allocation averages (and thus from industry average fund-level duration, a measure of risk). *See* Br. 16-20. Plaintiffs assert that the average investment allocations reflected in the SVIA Survey should be treated as the "norms and standards of stable value fund investing," and that, measured against those

supposed "norms," the Fund's investment choices were "so anomalous as to raise a compelling inference of imprudence." Br. 16-17 (emphasis omitted). Plaintiffs' proposal is legally unsound.

At the outset, plaintiffs' focus on the arithmetic mean, or "average," investment allocation conceals the wide diversity of allocations in the marketplace for stable value funds. The SVIA survey plaintiffs rely upon described the year-end allocations reported by some (not all) stable value fund managers in 2011 and 2012. Yet even among the funds in that year-end snapshot, managers reported allocations to U.S. Treasuries ranging from 5 to 56 percent of assets, GIC allocations ranging from 0.2 to 70 percent, mortgage-backed securities allocations ranging from 5 to 33 percent, and cash allocations ranging from 2 to 48 percent. *See* Defs.' Addendum ("Defs. Add.") 11, 14.[4] The survey thus belies plaintiffs' suggestion that there is a single stable value asset allocation "norm." To the contrary, the survey reflects that fund managers choose from a wide range of allocations across permissible investments in response to customer preferences, market conditions, and their individual funds' particular mandates. That kind of varied marketplace is just what ERISA encourages. *See infra* at 24-26. Although

[4] Notably, plaintiffs' assertion that the Fund's allocation to cash equivalents was wildly anomalous is incorrect even on its own terms. The Fund's cash equivalent allocation for three of the four years at issue was *within* the ranges reported in the survey. Defs.' Add. 14.

both the Magistrate Judge and District Judge discussed this point below (Add. 43; Add. 59), plaintiffs still have no response.

Moreover, even if there were some industry "norm" regarding the optimal investment mix for a stable value fund, deviation from that norm could not support a plausible inference that the fiduciaries acted imprudently. ERISA counsels fiduciaries *against* mindless adherence to industry averages without regard for the particular requirements, objectives, and circumstances of their plans. *In re Unisys*, 74 F.3d at 434 ("the prudence requirement is flexible," and fiduciary's conduct "is evaluated in light of the 'character and aims' of the particular plan he serves"); *Donovan*, 716 F.2d at 1467 (same); *see* 29 C.F.R. § 2550.404a-1(b)(1)(i). ERISA does not demand a herd mentality from fund managers, or even encourage it. As the Seventh Circuit has put it, the fact that a defendant's investment choices were not "typical" says "little about the wisdom" of those investments, and indicates "only that [the defendant] may not have followed the crowd." *DeBruyne*, 920 F.2d at 465. Even more to the point here, ERISA fiduciaries are not required to take on a *higher* degree of risk simply because other investment managers have opted to do so. *See, e.g.*, *Jenkins v. Yager*, 444 F.3d 916, 925-26 (7th Cir. 2006) (explaining that notwithstanding "years of lower performance," an "investment strategy" that was based on "find[ing] long-term, conservative reliable investments that would do well during market fluctuations" was neither "unreasonable [n]or imprudent").

Here, the CVS Stable Value Fund is designated as the Plan's "safe" investment option—the Plan did not include any lower-risk option, such as a money market fund. The fiduciaries were obliged to manage the Fund in view of its role as the most conservative investment alternative in the Plan. Any participant who wanted to take more risk had numerous higher-risk, higher-reward-potential options in the Plan lineup, including longer-duration (i.e., higher-risk) fixed income options. *Supra* at 5; *see Loomis v. Exelon Corp.*, 658 F.3d 667, 673-74 (7th Cir. 2011) (recognizing that 401(k) plans are designed to provide a range of potential risk/reward alternatives for participant selection). The bare fact that the investment allocation of this particular fund, in this particular plan, was more conservative than the industry "average" in the years following one of the worst economic crises in history does not support an inference that the fiduciaries failed to use a diligent process to decide those allocations. *See also* Add. 40-42, 59.

b. Requiring investment managers to conform to industry-average characteristics under pain of fiduciary liability (Br. 26) would obviously confound ERISA's directive that fiduciaries should make investment choices based on their individual plan's needs. It would also impose perverse pressure on fiduciaries to follow the crowd in circumstances when a fiduciary's individual judgment counsels a different course. Even determining what the "crowd" is doing in a given asset class may prove elusive, as plaintiffs' own survey demonstrates. Far

from revealing a single, consensus mix of investments for a stable value fund, the survey shows a broad dispersion in asset types and proportions. *Supra* at 23. When plaintiffs suggest using an industry average as a standard against which fiduciary decisions will be judged, they are really suggesting that fund managers should pretend that substantial variety (in customer needs and preferences as well as fund manager judgments) does not exist. Plaintiffs' hindsight-crafted duty to manage to an arithmetic industry mean would fundamentally alter—and confuse—the nature of the duty of prudence itself.

ERISA does not funnel fund manager judgments toward some statistical artifice. Established First Circuit (and other) authority recognizes that fiduciaries are frequently called upon to "balance[] competing interests under conditions of uncertainty," and holds that courts should not second-guess how fiduciaries strike that balance. *Bunch*, 555 F.3d at 7 (quoting *Armstrong*, 446 F.3d at 733). Because courts are "institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them," *Jones v. Harris Assocs.*, 559 U.S. 335, 352-53 (2010) (quotation omitted), ERISA recognizes that it is the role of *fiduciaries* to make those judgments using a prudent process, and holds that they are not placed "on a razor's edge" in doing so, *Armstrong*, 446 F.3d at 733. Courts accordingly do not "substitute [their] judgment" for that of fiduciaries." *Caterino*, 8 F.3d at 883.

Plaintiffs nevertheless submit that a court should decide the "correct" balance of risk to return for this particular stable value fund in the years after the financial crisis. Even as they concede (Br. 19) that "a fiduciary is not obliged to act strictly in accordance with industry standards," they contend (Br. 17) that courts must identify and brand as imprudent those funds that are "so anomalous" compared to a hypothetical "average" portfolio. The intractable line-drawing problems that plaintiffs' novel theory of prudence review would foist upon courts are self-evident—and they are precluded by the longstanding authorities reviewing fiduciary judgments "at a distance," not through the lens of hindsight. *Caterino*, 8 F.3d at 883. Where—as here—a fund is concededly structured to meet its investment objectives, the fiduciaries' exercise of independent judgment within those boundaries does not imply a deficient process.

c. None of the cases plaintiffs cite supports their theory that the Fund's deviation from industry averages warrants an inference of imprudence. In fact, the primary case plaintiffs rely upon, *Abbott v. Lockheed Martin Corp.*, explicitly rejects their theory. The district court in *Abbott* explained that "using the term 'stable value' does not 'wed' the Fund to a specific mix of investments." 2009 WL 839099, at *11 (S.D. Ill. Mar. 31, 2009). And the Seventh Circuit similarly emphasized that the claim there was not simply that the fund's investment mix "deviated from the mix of investments held by other funds bearing the 'stable

value' label." 725 F.3d at 811. Instead, the crucial allegation in *Abbott* was that the fund "did not conform to its own Plan documents"—namely, its stated investment objective to preserve capital and beat money market returns by investing in a variety of longer-term instruments—because the stable value fund at issue invested as much as *99 percent* in money market securities. *Id.*; *see* 2009 WL 839099, at *11. *Abbott* thus stands for the unexceptionable proposition that plaintiffs may state a claim by alleging that a fund was not structured in a way that was calculated to meet its stated investment objectives.[5]

Plaintiffs do not, and could not, plausibly allege the same here. It is undisputed that the Fund met its stated objective of preserving capital and beating money market returns. *See supra* at 20-21. To be sure, plaintiffs at one point suggest that the fiduciaries here "were effectively managing a money market fund." Br. 13. But their allegations detail the contrary. Throughout the relevant period, the Fund invested between 45 and 77 percent of the Fund's assets in non-cash-equivalent investments, which produced participant returns well in excess of

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[5] *Abbott* also noted in passing that the plaintiffs alleged that the fund at issue there was not a meaningful retirement asset because it "was not structured to beat inflation." 725 F.3d at 811. But as the DOL has explained, capital preservation options such as stable value funds "can, and in many instances will, play an important role as a component of a diversified portfolio." 72 Fed. Reg. 60,452, 60,463 (Oct. 24, 2007). And a capital preservation option can plainly be an appropriate retirement vehicle for participants in or approaching retirement age, whose primary investment goal is the preservation (not growth) of their savings.

money market returns. *See* Add. 33.[6] A fund substantially consisting of non-money market investments is self-evidently not "effectively" a money market fund, and therefore the difference between this case and *Abbott* is not one of "degree." Br. 27 (emphasis omitted). In *Abbott*, the plaintiffs were promised—but were not given—a fund that would seek to provide above-money market returns. Here, the plaintiffs received exactly what they were promised, but sued because, with the benefit of hindsight, they could have had more.

Plaintiffs also cite *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009), for the undisputed proposition that *certain types* of allegations may give rise to an inference that an imprudent process was used. Br. 20. But the *type* of allegation the court relied on in that case is absent here. In *Braden*, the plaintiffs alleged that the fiduciaries chose funds with higher management fees in order "to benefit the trustee at the expense of the participants." *Id.* at 596. That is, the allegation of self-dealing—absent here—permitted the plausible inference that the process itself may have been imprudent. *Id.*

The same is true of the two district court cases plaintiffs present (Br. 19-20) as support for the proposition that a fund's alleged "underperformance" can

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[6] Money market funds are legally required to maintain a dollar-weighted average investment duration of under 60 days. 17 C.F.R. § 270.2a-7(d)(1)(ii). The Fund's average duration during the period in question ranged between 0.87 years to 1.1 years. Add. 13 ¶ 48.

support an inference of imprudence. In *Krueger v. Ameriprise Financial, Inc.*, 2012 WL 5873825 (D. Minn. Nov. 20, 2012), much like in *Braden*, the plaintiffs alleged that the defendants had improperly required that retirement investments be made in their own underperforming funds, without "any competitive bidding process," in order to benefit "themselves at the expense of participants." *Id.* at *10. The court was explicit that the allegation that the funds at issue "were chosen to benefit" the defendants at the expense of the plaintiffs supported the claim of imprudence (and not just the plaintiffs' disloyalty claim). *Id.* at *11; *see also Austin v. Union Bond & Tr. Co.*, 2014 WL 7359058, at *14 (D. Or. Dec. 23, 2014) (citing *Krueger* for the proposition that a "claim may be based on poor performance . . . *only when* supported by additional facts" (emphasis added)). There were similar indications of a tainted, and biased, process leading to the selection of higher-fee investment options in *Lorenz v. Safeway, Inc.*, 241 F. Supp. 3d 1005, 1019 (N.D. Cal. 2017).

Plaintiffs cite no case that relies on a fund's deviation from industry average investment allocations or performance, either alone or in combination, to infer an imprudent process. This should not become the first. Such a ruling would be inconsistent with settled law and sound policy. Fiduciaries are not required to follow the crowd, and their investment decisions are not judged in hindsight. If, as here, all a plaintiff can plead is that (1) the Fund did not conform to industry

averages, and (2) looking back, the Fund underperformed an average of stable value funds, established law rightly dictates that their claim fails.

2. Plaintiffs Do Not Plausibly Allege That The Fund Could Have Invested In Higher-Return Assets With No Increase In Risk

In an attempt to avoid the obvious hindsight nature of their attack, plaintiffs renew the initial complaint's remarkable assertion that increased investment in longer-term, non-cash assets would have allowed the Fund to obtain "substantially higher returns with no materially-increased risk." Br. 26. The Fund's management was imprudent, the argument goes, because *any* reasonable stable value manager would have known *ex ante* that a higher proportion of non-cash investments would have been completely riskless given the "structural features of stable value funds." *Id.*

Plaintiffs' assertion that stable value funds are somehow immune from economic reality is implausible. As Judge Sullivan noted, the Plan disclosures themselves detail some of the risks posed by higher-risk investments in a stable value fund. A.15-16. GICs present liquidity risk, for example; withdrawing from them early may lead to losses because they must be held to maturity over periods in which interest rates can fluctuate and cause the value of fixed income investments to fall. 2010-2014 Plan Form 5500s at 262 (noting limits on terminating GICs "prior to the scheduled maturity date"). More generally, longer

duration assets experience bigger losses in market value when there is an upward movement in interest rates, and these losses become locked in if the assets must be sold to pay redeeming investors. Financial Industry Regulatory Authority, Duration—What an Interest Rate Hike Could Do To Your Bond Portfolio (Feb. 14, 2013), https://www.finra.org/investors/alerts/duration-what-interest-rate-hike-could-do-your-bond-portfolio (explaining sensitivity of longer-duration fixed income products to interest rate changes). Fixed income securities also present issuer risk. When a stable value fund invests in a GIC, for instance, the invested funds are held in the issuing insurer's general account, exposing GICs to losses in the event the issuing insurer defaults. 2010-2014 Plan Form 5500s at 262 ("in the event of default of an issuer . . . withdrawing participants may experience losses" which could "render the Plan unable to achieve its objective of maintaining a stable contract value"). A prudent fiduciary could have found this type of risk especially significant in the immediate post-crisis years, given that one of the most widely used providers of GICs to stable value funds—AIG—had been one federal bailout away from collapse. *See* Federal Reserve Bank of New York, Actions Related to AIG, https://www.newyorkfed.org/aboutthefed/aig (last visited Oct. 2, 2017) (explaining that in September 2008 AIG was the "[i]ssuer of approximately $38 billion of stable value wrap contracts" and that if it had failed "[w]orkers whose

401(k) plans had purchased guarantees in the form of [those] contracts could have lost that insurance”).[7]

The DOL, echoing the Plan’s own disclosures, has expressed skepticism that stable value funds can produce higher returns than money market funds with no added risk. 72 Fed. Reg. 60,452, 60,473 n.35 (Oct. 24, 2007) (stating that assertions that stable value funds can achieve higher returns than money market funds with no added risk should be “assessed with caution” in light of basic “economic theory” that “financial instruments with similar risk characteristics will provide similar returns”). Indeed, plaintiffs’ counsel is currently pursuing a suit alleging that a different stable value fund was managed *with excessive risk*, reflecting their (correct) understanding that non-cash stable value fund investments

[7] Indeed, after the financial crisis, the federal government sought to place the most prominent insurers in the investment contracts business under more stringent supervision as “systematically important financial institutions,” precisely because of the claim-paying risks that GIC investors take on. *See, e.g.*, Financial Stability Oversight Council, *Basis for the Financial Stability Oversight Council’s Final Determination Regarding Prudential Financial, Inc.* at 2 (Sept. 19, 2013) (“Many employee benefit retirement plans have large exposures to Prudential through insurance and stable value products. Material financial distress at Prudential could impair the ability of pension plans to meet certain obligations to retirement plan participants.”), https://www.treasury.gov/initiatives/fsoc/designations/Documents/Prudential%20Financial%20Inc.pdf (last visited Oct. 2, 2017); *Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 223-24 (D.D.C. 2016) (explaining that “the Dodd-Frank Act empowers FSOC to designate certain nonbank financial companies”—e.g., insurers—“for supervision by the Board of Governors of the Federal Reserve System … under enhanced prudential standards” to “prevent[] a reoccurrence” of the 2008 financial crisis).

do not free fund investors from risk, despite the structural features of stable value funds. Consol. & Am. Compl. ¶ 15, *In re JPMorgan Chase Stable Value Fund ERISA Litig.*, No. 12-cv-2548 (S.D.N.Y. Dec. 16, 2014), ECF No. 182 ("the JPM Stable Value Funds sustained catastrophic—but predictable—losses directly related to JPM's *inappropriate high risk, leveraged strategy*" (emphasis added)); *see also id.* ¶ 62 (asserting that "a relatively low-risk profile is in order" (quotation omitted)).[8]

Plaintiffs' own allegations refute the notion that any prudent stable value manager would have known in advance that a higher allocation to longer-term investments would have presented no material additional risk. If plaintiffs' assertion were correct, then stable value managers would presumably maximize their investment risk in reliance on stable value's structural protections. But plaintiffs' own survey data shows that managers vary broadly in their risk/reward

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[8] Indeed, during this period the retirement plan trade press publicly reported that State Street—the CVS Plan's prior stable value manager—closed its stable value funds after experiencing significant market losses from risky investments and facing the loss of its wrap insurance coverage. *See* Christine Williamson, "State Street Corp. adds $610 million to stable value," Pension & Investments (Jan. 26, 2009), http://www.pionline.com/article/20090126/PRINT/901239934/state-street-corp-adds-610-million-to-stable-value; Douglas Appell, "SSgA exits stable value; $8 billion may be up for grabs," Pension & Investments (June 14, 2010), http://www.pionline.com/article/20100614/PRINT/306149972/ssga-exits-stable-value-8-billion-may-be-up-for-grabs; 2010-2014 Plan Form 5500s at 42 (reflecting that State Street managed the CVS Plan's stable value option in 2009 but not in 2010). A plan fiduciary could have been aware of these public reports at the time.

judgments, holding widely varying amounts of relatively lower-risk assets (such as cash equivalents and U.S. Treasuries) and relatively higher-risk assets (such as GICs and mortgage-backed securities). *Supra* at 23. The risks that came with longer-duration, non-cash investments were very much "material," especially for the fiduciaries of the Plan's safest option.

Common sense and the materials incorporated into the amended complaint therefore render implausible the assertion that stable value funds uniquely avoid the principle that investments with the potential for higher returns carry a risk of lower returns or even losses. *See also* A.16 (explaining that court need not "abandon common sense and ignore the basic economic principle that the potential for higher returns brings higher risk"). Plaintiffs do not plausibly allege that no prudent fiduciary could have concluded that increasing the Fund's allocation to longer-term, potentially higher-return assets would carry material risks during the post-crisis period.[9]

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[9] Plaintiffs' theory, if correct, would mean that no 401(k) plan could include an option that is "substantially" less aggressive than plaintiffs' imagined "average" stable value fund—including a money market option—because higher returns may be had for no added risk. This theory has already been rejected by courts that have dismissed claims that money market funds are *per se* imprudent in view of the purported relative benefits of stable value funds. *See, e.g.*, *Pledger v. Reliance Trust Co.*, 240 F. Supp. 3d 1314, 1333-34 (N.D. Ga. 2017); *White v. Chevron Corp.*, 2016 WL 4502808, at *7 (N.D. Cal. Aug. 29, 2016).

That plaintiffs waited until 2016 to bring their lawsuit confirms their impermissible hindsight attack. By then it was clear that the returns on the Fund were lower than those of some other, more aggressive funds offered by other plans. That means by then it was clear that the risks that the fiduciaries avoided by choosing a more conservative course had not materialized. But a risk that does not materialize was still a risk, and was still prudent to plan for. Consumers do not get to demand that their auto insurers refund their annual premiums simply because they did not get in any accidents that year. Plaintiffs likewise should not be allowed to judge the prudence of the fiduciaries' investment choices based merely on their after-the-fact results. Because it is unknowable "at the time the fiduciary act[ed]" whether the risks being avoided will actually occur in the future, *Dudenhoeffer*, 134 S. Ct. at 2471, disappointing results in hindsight cannot support a claim for ERISA imprudence, *Bunch*, 555 F.3d at 7; *DeBruyne*, 920 F.2d at 465 (ERISA "requires prudence, not prescience" (quotation omitted)).

II. PLAINTIFFS' CLAIM AGAINST CVS FAILS FOR THE SAME REASONS

Plaintiffs make no argument that their claim against CVS for a purported "failure to monitor" could survive if they have no plausible claim that Galliard acted imprudently. *See* Br. 29-30. That implicit concession is correct: a monitoring fiduciary does "not fail in the discharge of its duty to select and

monitor" if the investment manager "did not commit a breach." *Bunch v. W.R. Grace & Co.*, 532 F. Supp. 2d 283, 292 (D. Mass. 2008), *aff'd*, 555 F.3d 1 (1st Cir. 2009). The monitoring claim must be dismissed as well.

CONCLUSION

The judgment below should be affirmed.

Dated: October 2, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 8,545 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Brian D. Boyle

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2017, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit by using the appellate CM/ECF system. All interested parties are registered CM/ECF users.

Dated: October 2, 2017 /s/ Brian D. Boyle

ADDENDUM TO DEFENDANTS-APPELLEES' BRIEF

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Decl. of Brian D. Boyle and Supporting Ex. A
(ECF No. 33) .... Addendum 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MARY BARCHOCK, THOMAS WASECKO, and STACY WELLER, Plaintiffs, v. CVS HEALTH CORPORATION, THE BENEFITS PLAN COMMITTEE OF CVS HEALTH CORPORATION, and GALLIARD CAPITAL MANAGEMENT, INC., Defendants.	Case No. 1:16-cv-00061-ML-PAS

DECLARATION OF BRIAN D. BOYLE IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

I, Brian D. Boyle, declare and state as follows:

1. I am an attorney with O'Melveny & Myers LLP, counsel for CVS Health Corporation ("CVS") and the Benefits Committee of CVS Health Corporation in the above-captioned action.

2. I submit this declaration in support of Defendants' Motion to Dismiss the Amended Complaint.

3. The facts set forth in this declaration are based on my personal knowledge. If called to testify as a witness, I can testify to the matters and facts set forth herein.

4. Attached hereto as **Exhibit A** is a true and correct copy of the "SVIA 17th Annual Stable Value Investment & Policy Survey" from 2013, as obtained from the public docket of *Austin v. Union Bond & Trust Co., et al.*, No. 3:14-cv-00706 (D. Or.), Docket No. 47.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration is executed this 2nd day of September, 2016 in Washington, D.C.

/s/ Brian Boyle

Brian D. Boyle (*pro hac vice*)
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1625 Eye Street, N.W.
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CERTIFICATE OF SERVICE

I, Brian D. Boyle, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on September 2nd, 2016.

/s/ Brian D. Boyle
Brian D. Boyle

EXHIBIT A

Exhibit 3

SVIA 17th Annual Stable Value Investment & Policy Survey

This survey covers $701.3 billion in stable value assets under management as of December 31, 2012. The survey takes a broad look at the major components of stable value assets under management from the three major investment management sectors: individually managed single-plan accounts (formerly external management and in-house management by a plan sponsor), bank and investment company commingled pooled funds, and life insurance company accounts attached to full service products. Highlights from the survey are provided below.

Stable value assets covered in this survey rose substantially from $645.6 billion at year-end 2011 to $701.3 billion at year-end 2012. This increase of 8.6% occurred due to an increase in all three management segments: individually managed accounts by 2.9%, pooled funds by 0.8%, and life insurance company accounts by 17.0%. Part of the increase can be explained by three new companies with life insurance accounts that participated in the survey in 2012.

The distribution of assets among management segments changed slightly:

	2011	2012	Change
Single Individually managed accounts	33.6%	31.9%	-1.7%
Pooled funds	22.8%	21.1%	-1.7%
Life Insurance company accounts	43.6%	47.0%	3.4%
	100.0%	100.0%	

Assets represented in the survey are predominantly from defined contribution plans at 94.6%, with 401(k) plans representing the majority of assets at 55.4% of all assets covered by the survey. The remaining 5.4% was comprised of other tax-deferred savings plans such as 529 plans, Taft Hartley plans, and defined benefit plans.

The overall net return for stable value accounts fell from 3.18% in 2011 to 2.97% in 2012, which reflects the declining interest rate environment. However, stable value account returns still compare favorably to money market returns for the same period.

Average credit quality of underlying investments decreased overall with survey participants reporting AA or Aa2 or better on average using both S&P and Moody ratings.

Average duration increased in 2012 to 3.74 years from 3.67 years in 2011.

Overall contribution rates out-paced withdrawal rates, with weighted overall contribution rates at 22.6% and withdrawal rates at 21.3%.

Product allocation to broad investment types continued to vary widely based on management segments. Overall, the survey found the average allocation in 2012 for stable value products was 5.7% in cash, 44.9% in GICs and general account products, and 49.4% in wrapped assets. **(Included Other (6.3%) with GICs and general account products.)**

SVIA members are cautioned to look at response rates on a question-by-question basis when making market segment or year to year comparisons. In some cases, changes may represent a change in participation rather than a change in investment or a policy trend.

Stable Value Investment Association
202-580-7620 / 1025 Connecticut Avenue, NW / Suite 1000 / Washington, D.C. 20036 / www.stablevalue.org

The observations and data contained in this report or survey are intended to be illustrative in nature to give an overview of the stable value industry, as well as to provide relative trend information. These observations and data are reflective of the reporting or survey period only and, as such, are subject to change. This information may not be reflective or applicable to a specific plan's stable value investment option or a specific stable value fund. Further, these observations and data are not intended to constitute nor represent a benchmark.

Addendum 6

About the Survey

Data for the SVIA Investment Policy Survey is provided by managers of their own firm's or client firms' stable value accounts. Survey respondents include both members of the SVIA and non-member firms. All stable value (SV) accounts surveyed are in deferred retirement savings plans, some 529 plans and a few defined benefit retirement plans.

Manager Segments

Individually managed single-plan accounts - pages 5-7

Stable value accounts managed for single plans on a stand-alone basis by an independent investment management firm, by a mutual fund company, or by employees or affiliates of the sponsoring plan. This single plan account category for 2011 and 2012 reflects the combination of (a) single plan accounts managed by external management firms or mutual fund companies, and (b) single plan accounts managed by plan sponsors directly. This combination occurred when many internally managed survey participants changed to external management. The resulting number of remaining stable value accounts managed directly by plan sponsors participating in this survey became too small to support a distinct segment.

Pooled funds - pages 8-10

Pooled stable value assets under management invested through bank-sponsored or investment-company-sponsored commingled pools. These pooled funds offered by banks or investment companies are sub-advised by the sponsoring company, by an affiliated investment company, or by an independent third-party investment company. The pooled funds may be offered on a full service or investment-only basis.

Life insurance company full service funds - pages 11-13

Stable value accounts managed on a commingled basis by life insurance companies and offered as part of a bundled full-service defined contribution product. The stable value account is invested in either the general account or a separate account of the life insurance company managing the plan. The stable value account within the full-service product contains one or a series of guaranteed contracts with the provider.

Data Formatting

The survey is formatted to facilitate interpretation of the data being reported while maintaining confidentiality of individual firm responses. For each data item, the survey reports the dollar-weighted average of the responses received, a straight or unweighted average of the responses, the range of responses from low to high, and the number of responses received for the question on the survey.

Exclusive Use

SVIA's Annual Stable Value Investment and Policy Survey is an exclusive benefit of membership. Data is confidential. Use of data for external purposes requires the permission of the Association.

Responses

SVIA members are cautioned to look at response rates on a question-by-question basis when making market segment or year to year comparisons. In some cases, changes may represent a change in participation rather than a change in investment or a policy trend.

Reformatting of Data

Please be advised that 2012 and 2011 data has been reformatted to combine external and internal management of single-plan stable value accounts. This segment is now identified as individually managed single-plan accounts.

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17th Annual SVIA Stable Value Investment & Policy Survey

1. Sector Summary	as of 12/31/2012				as of 12/31/2011			
	Total	Single Individually Managed Funds	Bank and Invest Co. Pools	Life Co. Full Service	Total	Single Individually Managed Funds	Bank and Invest Co. Pools	Life Co. Full Service
Stable value assets managed (millions)	$701,326	$223,415	$148,170	$329,741	$645,554	$217,027	$146,900	$281,627
Number of plans	189,361	800	49,244	139,317	159,000	815	39,303	118,882
Weighted average plan size in svf (millions)	$287.02	$878.57	$7.50	$11.82		$536.11	$8.25	$6.99
Types of assets invested in stable value								
401(k)	55.39%	84.09%	88.85%	20.91%	62.77%	84.17%	88.42%	32.89%
457	8.56%	11.49%	8.73%	6.49%	8.78%	10.68%	8.32%	7.56%
403(b)	30.66%	1.49%	0.00%	64.20%	20.66%	1.48%	0.00%	46.21%
529	1.61%	1.49%	0.00%	2.41%	1.10%	1.37%	0.00%	1.47%
Taft Hartley	0.50%	0.96%	0.94%	0.00%	2.27%	0.97%	2.10%	3.36%
Defined Benefit	0.02%	0.00%	0.11%	0.00%	1.66%	0.00%	0.18%	3.72%
Other	3.26%	0.48%	1.37%	5.99%	2.76%	1.33%	0.98%	4.79%
Net 12-month return (12-month average)	2.97%	2.68%	2.12%	3.55%	3.18%	3.04%	2.49%	3.64%
Net crediting rate	2.55%	2.59%	1.90%	2.82%	2.88%	2.91%	2.30%	3.15%
Modified duration (years)	3.74	2.87	2.43	4.93	3.67	2.78	2.39	5.03
Credit quality, S&P ratings	7.92	7.98	8.18	7.77	8.07	8.27	8.10	7.89
Credit quality, Moody's ratings	7.95	8.07	8.17	7.78	8.15	8.35	8.34	7.89
Gross contribution rate	22.63%	12.86%	34.58%	23.88%	29.72%	19.84%	40.82%	31.55%
Gross withdrawal rate	21.29%	14.22%	27.64%	23.22%	25.88%	18.41%	32.26%	28.31%
Stable value contract allocation (% of total portfolio)								
Cash or short-terms	5.72%	8.37%	14.22%	0.11%	5.18%	7.72%	11.34%	0.00%
Traditional GICs/BICs	2.06%	2.48%	6.00%	0.00%	4.64%	2.37%	7.17%	5.08%
General Account IPG or similar vehicle	36.57%	0.00%	0.00%	77.77%	37.71%	0.00%	0.00%	86.45%
Wrapped buy & hold assets	0.25%	0.42%	0.53%	0.00%	0.48%	0.73%	1.05%	0.00%
Wrapped assets managed to a fixed horizon	1.37%	0.76%	5.33%	0.00%	1.34%	0.66%	4.92%	0.00%
Wrapped actively managed evergreen assets	38.38%	77.43%	64.94%	0.00%	44.16%	83.47%	66.80%	2.05%
Assets with separate account wraps	9.38%	10.29%	8.98%	8.94%	6.37%	4.72%	8.69%	6.42%
Market-valued assets	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
Other	6.28%	0.25%	0.00%	13.18%	0.12%	0.33%	0.03%	0.00%
% of fund globally wrapped	31.48%	45.07%	81.04%	0.00%	23.61%	47.97%	32.90%	0.00%

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Addendum 8

1. Sector Summary	as of 12/31/2012				as of 12/31/2011			
	Total	Single Individually Managed Funds	Bank and Invest. Co. Pools	Life Co. Full Service	Total	Single Individually Managed Funds	Bank and Invest. Co. Pools	Life Co. Full Service
Underlying fund asset allocation								
Cash or equivalents	6.48%	8.61%	15.08%	1.16%	6.55%	8.64%	13.13%	1.51%
Treasuries	17.44%	30.46%	25.45%	5.02%	16.46%	26.70%	22.20%	5.58%
Agencies	3.71%	5.17%	4.83%	2.21%	3.92%	6.69%	6.59%	0.39%
Traditional GICs	2.01%	2.33%	5.98%	0.01%	2.47%	2.42%	7.22%	0.02%
Asset-backed securities	5.76%	5.93%	6.45%	5.32%	5.60%	6.22%	5.74%	5.06%
Mortgage-backed securities	18.09%	20.19%	17.36%	17.00%	19.93%	23.21%	20.35%	17.19%
Commercial mortgage-backed securities	5.48%	4.75%	3.90%	6.69%	5.63%	4.67%	3.81%	7.32%
Publicly-traded corporate bonds	26.72%	20.52%	20.32%	33.79%	24.31%	19.10%	20.68%	30.22%
Private placements	5.17%	0.25%	0.00%	10.82%	5.33%	0.63%	0.00%	11.74%
Commercial mortgages	4.40%	0.00%	0.00%	9.35%	4.24%	0.00%	0.00%	9.72%
Other	4.75%	1.79%	0.63%	8.62%	5.55%	1.72%	0.28%	11.25%
Investment types (% of portfolio)								
Dollar denominated international securities	10.99%	10.33%	5.90%	13.72%	7.83%	2.82%	4.36%	13.50%
Non dollar denominated international securities	0.74%	0.00%	0.20%	1.47%	0.62%	0.00%	0.01%	1.41%
High yield debt	2.98%	0.22%	0.30%	6.05%	1.14%	0.09%	0.10%	2.49%
Emerging market debt	0.28%	0.00%	0.00%	0.59%	0.13%	0.00%	0.00%	0.29%
Use futures, swaps or derivatives for								
Portfolio duration or curve management	60.26%	81.70%	58.18%	46.67%	59.25%	79.99%	51.70%	47.21%
Individual security duration or curve management	64.14%	40.19%	35.78%	93.10%	62.63%	42.26%	30.09%	95.29%
Credit management	62.65%	36.78%	33.86%	93.10%	60.03%	33.78%	31.23%	95.29%
Synthetic creation of industry sectors	54.53%	20.43%	20.13%	93.10%	51.06%	22.06%	19.79%	89.71%
Leverage	4.90%	0.00%	0.00%	10.42%	4.52%	0.00%	0.00%	10.37%
Currency hedging	50.95%	14.09%	10.87%	93.93%	47.85%	10.91%	9.88%	96.13%
Other	1.17%	0.00%	3.69%	0.82%	1.06%	0.00%	3.01%	0.85%
Risk participation (% of portfolio)								
Non-participating	11.83%	6.68%	8.07%	17.01%	9.39%	3.09%	9.13%	14.38%
Participating for asset experience only	1.64%	0.04%	2.88%	2.16%	0.43%	0.08%	1.78%	0.00%
Participating for all experience	65.85%	91.53%	89.05%	38.02%	65.40%	86.60%	89.09%	36.70%
Hybrid	0.00%	0.01%	0.00%	0.00%	2.97%	8.84%	0.00%	0.00%
Other	20.68%	1.74%	0.00%	42.82%	21.81%	1.39%	0.00%	48.92%

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Addendum 9

2. Single Account Individually Managed Funds

Assets under management (12/31/2012): $223,414.95
Number of Plans Represented: 800

PORTFOLIO OVERVIEW	as of 12/31/2012					as of 12/31/2011				
	single individually managed weighted average	single individually managed straight average	single individually managed minimum	single individually managed maximum	single individually managed count	single individually managed weighted average	single individually managed straight average	single individually managed minimum	single individually managed maximum	single individually managed count
Stable value assets managed (millions)		$13,142.06	$535.40	$38,353.40	17		$12,766.30	$671.00	$34,870.05	17
Number of plans	50	47	1	351	17	50	48	1	347	17
Avg plan asset size in svf (millions)	$878.57	$1,042.75	$9.12	$8,052.99	17	$596.11	$581.34	$6.58	$2,009.33	17
Types of assets invested in stable value										
401(k)	84.09%	83.22%	51.15%	100.00%	17	84.17%	83.40%	53.61%	100.00%	17
457	11.49%	10.19%	1.26%	40.17%	17	10.68%	9.71%	0.00%	42.13%	17
403(b)	1.49%	1.10%	0.17%	17.00%	17	1.48%	1.03%	0.00%	16.00%	17
529	1.49%	4.05%	0.22%	48.85%	17	1.37%	3.83%	0.00%	46.39%	17
Taft Hartley	0.96%	0.78%	1.04%	10.00%	17	0.97%	0.78%	0.00%	9.00%	17
Defined Benefit	0.00%	0.00%	0.00%	0.00%	17	0.00%	0.00%	0.00%	0.00%	17
Other	0.48%	0.66%	0.80%	5.10%	17	1.33%	1.25%	0.00%	9.52%	17
Gross blended rate (spot rate as of 12/31)	2.68%	2.77%	1.78%	4.41%	17	3.04%	3.11%	2.08%	4.18%	17
Net crediting rate	2.59%	2.64%	1.62%	4.03%	17	2.91%	2.96%	1.97%	3.88%	17
Modified duration (years)	2.87	2.82	1.99	3.88	17	2.78	2.68	1.67	3.69	17
Credit quality, S&P ratings	7.98	8.23	7.00	9.50	17	8.04	8.27	7.00	9.00	17
Credit quality, Moody's ratings	8.07	8.37	6.00	9.50	16	8.12	8.35	7.00	10.00	16
Gross contribution rate	12.86%	11.71%	2.50%	27.82%	13	19.84%	16.56%	1.60%	35.78%	13
Gross withdrawal rate	14.22%	13.34%	2.03%	33.52%	13	18.41%	16.30%	2.00%	39.25%	13
Portfolio contract mix (% of total portfolio)										
Cash or short-terms	8.37%	8.84%	3.00%	22.39%	16	7.72%	8.24%	3.57%	23.77%	17
Traditional GICs/BICs	2.48%	8.21%	0.20%	70.00%	16	2.37%	8.28%	0.00%	65.00%	17
Wrapped buy & hold assets	0.42%	0.38%	1.00%	5.38%	16	0.73%	0.52%	0.00%	8.88%	17
Wrapped assets managed to a fixed horizon	0.76%	5.27%	1.00%	78.62%	16	0.66%	5.58%	0.00%	79.50%	17
Wrapped actively managed evergreen assets	77.43%	57.57%	5.94%	97.00%	16	83.47%	60.98%	0.00%	95.00%	17
Assets with separate account wraps	10.29%	19.26%	2.76%	95.00%	16	4.72%	15.78%	0.00%	95.62%	17
Market-valued assets	0.00%	0.00%	0.00%	0.00%	16	0.00%	0.00%	0.00%	0.00%	17
Other	0.25%	0.47%	0.05%	7.00%	16	0.33%	0.62%	0.00%	8.42%	17

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Addendum 10

2. Single Account Individually Managed Funds	as of 12/31/2012					as of 12/31/2011				
	single individually managed weighted average	single individually managed straight average	single individually managed minimum	single individually managed maximum	single individually managed count	single individually managed weighted average	single individually managed straight average	single individually managed minimum	single individually managed maximum	single individually managed count
% of fund globally wrapped	45.07%	63.36%	3.50%	100.00%	16	47.97%	57.06%	0.00%	100.00%	16
Underlying fund asset allocation										
Cash or equivalents	8.61%	9.08%	2.50%	19.00%	17	8.64%	9.17%	0.00%	24.11%	17
Treasuries	30.46%	26.13%	5.00%	56.00%	17	26.70%	23.65%	6.00%	49.00%	17
Agencies	5.17%	5.57%	0.25%	14.74%	17	6.69%	8.30%	0.00%	36.05%	17
Traditional GICs	2.33%	7.92%	0.20%	70.00%	17	2.42%	8.31%	0.00%	65.00%	17
Asset-backed securities	5.93%	5.27%	0.01%	12.10%	17	6.22%	5.36%	0.00%	14.50%	17
Mortgage-backed securities	20.19%	18.40%	5.00%	33.49%	17	23.21%	20.39%	3.23%	40.76%	17
Commercial mortgage-backed securities	4.75%	4.75%	1.00%	15.00%	17	4.67%	4.22%	0.00%	14.99%	17
Publicly-traded corporate bonds	20.52%	21.14%	5.00%	42.11%	17	19.10%	18.45%	5.00%	36.85%	17
Private placements	0.25%	0.24%	4.03%	4.03%	17	0.63%	0.51%	0.00%	8.30%	17
Commercial mortgages	0.00%	0.00%	0.00%	0.00%	17	0.00%	0.08%	0.00%	1.30%	17
Other	1.79%	1.51%	0.52%	7.00%	17	1.72%	1.56%	0.00%	8.00%	17
Investment types (% of portfolio)										
Dollar denominated international securities	10.33%	13.46%	0.50%	100.00%	17	2.82%	2.28%	0.00%	11.08%	15
Non dollar denominated international securities	0.00%	0.00%	0.00%	0.00%	17	0.00%	0.00%	0.00%	0.00%	15
High yield debt	0.22%	0.27%	0.09%	0.51%	17	0.09%	0.05%	0.00%	0.60%	15
Emerging market debt	0.00%	0.00%	0.00%	0.00%	17	0.00%	0.00%	0.00%	0.00%	15
Percentage that use futures, swaps or derivatives for										
Portfolio duration or curve management	81.70%	76.47%			17	79.99%	68.75%			16
Individually security duration or curve management	40.19%	41.18%			17	42.26%	37.50%			16
Credit management	36.78%	29.41%			17	33.78%	25.00%			16
Synthetic creation of industry sectors	20.43%	23.53%			17	22.06%	25.00%			16
Leverage	0.00%	0.00%			17	0.00%	0.00%			16
Currency hedging	14.09%	23.53%			17	10.91%	18.75%			16
Other	0.00%	0.00%			17	0.00%	0.00%			16
Risk participation (% of portfolio)										
Non-participating	6.68%	11.13%	0.20%	100.00%	17	3.09%	5.24%	0.00%	44.00%	17
Participating for asset experience only	0.04%	0.03%	0.51%	0.51%	17	0.08%	0.06%	0.00%	1.00%	17
Participating for all experience	91.53%	84.24%	30.00%	100.00%	17	86.60%	84.65%	0.00%	100.00%	17
Hybrid	0.01%	0.00%	0.07%	0.07%	17	8.84%	5.53%	0.00%	93.00%	17
Other	1.74%	4.60%	8.15%	70.00%	17	1.39%	4.52%	0.00%	70.00%	17

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Addendum 11

2. Single Account Individually Managed Funds	as of 12/31/2012					as of 12/31/2011				
	single individually managed weighted average	single individually managed straight average	single individually managed minimum	single individually managed maximum	single individually managed count	single individually managed weighted average	single individually managed straight average	single individually managed minimum	single individually managed maximum	single individually managed count
Withdrawal protocol										
Pro-rata	23.39%	12.94%	7.10%	100.00%	16	18.52%	12.85%	0.00%	100.00%	16
Pro-rata with a buffer	62.25%	62.04%	11.01%	100.00%	16	64.99%	61.46%	0.00%	100.00%	16
LIFO	0.00%	0.00%	0.00%	0.00%	16	0.00%	0.00%	0.00%	0.00%	16
LIFO with a buffer	0.55%	0.71%	11.34%	11.34%	16	0.54%	0.69%	0.00%	11.11%	16
Tiered	13.81%	24.31%	88.99%	100.00%	16	15.94%	25.00%	0.00%	100.00%	16
Pro-rata by participant (class year)	0.00%	0.00%	0.00%	0.00%	16	0.00%	0.00%	0.00%	0.00%	16
Other	0.00%	0.00%	0.00%	0.00%	16	0.01%	0.00%	0.00%	0.00%	16
Maximum credit exposure for policy limit for a single										
GIC issuer	4.82%	6.91%	2.00%	15.00%	14	3.98%	4.73%	0.00%	15.00%	15
Synthetic issuer	35.74%	42.50%	10.00%	100.00%	14	35.72%	39.00%	0.00%	100.00%	15
Separate account issuer	29.58%	32.31%	10.00%	100.00%	14	28.75%	33.33%	0.00%	100.00%	15
Largest actual credit exposure for a single										
GIC issuer	15.34%	8.54%	0.34%	51.90%	15	2.18%	2.75%	0.00%	12.14%	15
Synthetic issuer	42.52%	41.00%	15.58%	100.00%	15	39.71%	35.84%	0.00%	100.00%	15
Separate account issuer	22.31%	22.58%	4.51%	45.00%	15	12.69%	17.08%	0.00%	100.00%	15
Number of approved										
GIC issuer	8.38	6.25	3.00	17.00	16	5.97	4.53	0.00	15.00	17
Synthetic issuer	10.56	9.00	2.00	16.00	16	10.20	8.24	0.00	13.00	17
Separate account issuer	3.50	3.38	1.00	5.00	16	2.61	2.47	0.00	7.00	17
Average number of issuers per plan										
GIC issuers	1.98	3.35	0.30	14.00	16	1.21	2.40	0.00	15.00	16
Synthetic issuers	4.19	3.98	1.00	10.00	16	4.51	3.96	0.00	10.00	16
Separate account issuers	0.98	1.11	0.40	2.00	16	0.69	0.79	0.00	2.00	16
Total issuers	6.14	7.18	2.00	17.00	16	7.05	7.42	1.00	18.00	15

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Addendum 12

3. Pool Funds

Assets under management (12/31/12): $148,170.12
Number of plans represented: 49,244
Number of pool funds represented: 23

PORTFOLIO OVERVIEW	as of 12/31/2012					as of 12/31/2011				
	pool fund weighted average	pool fund straight average	pool fund minimum	pool fund maximum	pool fund count	pool fund weighted average	pool fund straight average	pool fund minimum	pool fund maximum	pool fund count
DC stable value assets managed (millions)		$12,347.51	$1,634.28	$34,070.75	13		$9,793.32	$135.00	$31,368.53	15
Number of plans	6,023	4,924	146	11,378	11	4,433	3,276	4	9,768	12
Avg plan asset size in svf (millions)	$7.50	$7.20	$0.20	$21.13	13	$8.25	$8.83	$0.19	$19.99	11
Avg pool asset size in svf (millions)	$7,544.79	$3,943.73	$252.00	$11,840.16	13	$9,483.70	$6,010.31	$135.40	$18,983.00	15
Types of assets invested in stable value										
401(k)	88.85%	88.21%	19.00%	100.00%	12	88.42%	83.72%	19.00%	100.00%	14
457	8.73%	8.35%	0.31%	81.00%	12	8.32%	7.55%	0.00%	81.00%	14
403(b)	0.00%	0.00%	0.00%	0.00%	12	0.00%	0.00%	0.00%	0.07%	14
529	0.00%	0.00%	0.00%	0.00%	12	0.00%	0.00%	0.00%	0.00%	14
Taft Hartley	0.94%	1.48%	3.76%	14.00%	12	2.10%	3.68%	0.00%	27.06%	14
Defined Benefit	0.11%	0.67%	0.05%	7.93%	12	0.18%	4.07%	0.00%	49.73%	14
Other	1.37%	1.30%	0.03%	14.17%	12	0.98%	0.98%	0.00%	10.51%	14
Returns										
Net 12-month return (12-month average)	2.12%	2.19%	1.40%	3.03%	12	2.49%	2.58%	1.50%	3.76%	15
Net crediting rate	1.90%	1.98%	1.22%	2.87%	11	2.30%	2.40%	1.48%	3.23%	14
Modified duration (years)	2.43	2.41	1.32	3.26	13	2.39	2.28	1.35	3.03	15
Credit quality, S&P ratings	8.18	8.04	7.00	9.00	13	8.10	8.30	7.00	9.02	14
Credit quality, Moody's ratings	8.17	8.25	6.92	9.00	12	8.34	8.57	7.00	10.00	13
Gross contribution rate	34.58%	35.38%	7.75%	72.56%	12	40.82%	32.35%	4.23%	70.78%	13
Gross withdrawal rate	27.64%	29.98%	12.17%	44.80%	12	32.26%	28.70%	3.97%	55.09%	13
Portfolio mix (% of total portfolio)										
Cash or short-terms	14.22%	14.28%	2.00%	35.50%	13	11.34%	12.28%	0.00%	30.70%	15
Traditional GICs/BICs	6.00%	10.61%	0.17%	33.57%	13	7.17%	10.80%	0.00%	39.19%	15
Wrapped buy & hold assets	0.53%	4.25%	7.20%	47.99%	13	1.05%	5.24%	0.00%	63.66%	15
Wrapped assets managed to a fixed horizon	5.33%	7.37%	17.90%	46.60%	13	4.92%	7.02%	0.00%	53.70%	15
Wrapped actively managed evergreen assets	64.94%	54.31%	13.49%	98.00%	13	66.80%	53.69%	0.00%	100.00%	15
Assets with separate account wraps	8.98%	9.02%	5.42%	24.76%	13	8.69%	10.84%	0.00%	100.00%	15
Market-valued assets	0.00%	0.00%	0.00%	0.00%	13	0.00%	0.00%	0.00%	0.00%	15
Other	0.00%	0.17%	2.24%	2.24%	13	0.03%	0.13%	0.00%	1.88%	15

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Addendum 13

3. Pool Funds	as of 12/31/2012					as of 12/31/2011				
	pool fund weighted average	pool fund straight average	pool fund minimum	pool fund maximum	pool fund count	pool fund weighted average	pool fund straight average	pool fund minimum	pool fund maximum	pool fund count
% of fund globally wrapped	81.04%	64.01%	16.53%	98.00%	13	32.90%	33.60%	0.00%	100.00%	15
Underlying fund asset allocation										
Cash or equivalents	15.08%	15.73%	2.00%	48.20%	13	13.13%	15.27%	4.00%	36.50%	15
Treasuries	25.45%	22.02%	9.05%	46.00%	13	22.20%	17.09%	5.11%	47.00%	15
Agencies	4.83%	5.03%	0.28%	12.40%	13	6.59%	6.16%	0.00%	22.27%	15
Traditional GICs/BICs	5.98%	10.60%	0.15%	33.57%	13	7.22%	10.79%	0.00%	39.19%	15
Asset-backed securities	6.45%	5.56%	1.23%	11.88%	13	5.74%	5.85%	0.00%	14.16%	15
Mortgage-backed securities	17.36%	17.23%	6.68%	30.00%	13	20.35%	19.45%	4.12%	34.08%	15
Commercial mortgage-backed securities	3.90%	4.57%	0.80%	13.00%	13	3.81%	5.64%	0.30%	17.09%	15
Publicly-traded corporate bonds	20.32%	18.75%	8.30%	35.84%	13	20.68%	19.08%	7.60%	39.87%	15
Private placements	0.00%	0.00%	0.00%	0.00%	13	0.00%	0.00%	0.00%	0.00%	15
Commercial mortgages	0.00%	0.00%	0.00%	0.00%	13	0.00%	0.00%	0.00%	0.00%	15
Other	0.63%	0.51%	0.07%	3.00%	13	0.28%	0.67%	0.00%	6.94%	15
Investment types (% of portfolio)										
Dollar denominated international securities	5.90%	5.21%	0.55%	9.72%	13	4.36%	2.01%	0.00%	9.00%	15
Non dollar denominated international securitie	0.20%	0.20%	0.20%	0.20%	13	0.01%	0.01%	0.00%	0.10%	15
High yield debt	0.30%	0.76%	0.08%	1.90%	13	0.10%	0.19%	0.00%	1.60%	15
Emerging market debt	0.00%	0.00%	0.00%	0.00%	13	0.00%	0.00%	0.00%	0.00%	15
Percentage that use futures, swaps or derivatives for										
Portfolio duration or curve management	58.18%	46.15%			13	51.70%	33.33%			15
Individual security duration or curve managem	35.78%	38.46%			13	30.09%	26.67%			15
Credit management	33.86%	23.08%			13	31.23%	20.00%			15
Synthetic creation of industry sectors	20.13%	15.38%			13	19.79%	13.33%			15
Leverage	0.00%	0.00%			13	0.00%	0.00%			15
Currency hedging	10.87%	15.38%			13	9.88%	13.33%			15
Other	3.69%	7.69%			13	3.01%	6.67%			15
Risk participation (% of portfolio)										
Non-participating	8.07%	14.22%	2.62%	52.01%	13	9.13%	16.56%	0.00%	59.00%	15
Participating for asset experience only	2.88%	6.07%	0.92%	78.00%	13	1.78%	4.04%	0.00%	56.98%	15
Participating for asset & cash flow experience	89.05%	79.70%	47.99%	100.00%	13	89.09%	79.40%	0.00%	100.00%	15
Hybrid	0.00%	0.00%	0.00%	0.00%	13	0.00%	0.00%	0.00%	0.00%	15
Other	0.00%	0.00%	0.00%	0.00%	13	0.00%	0.00%	0.00%	0.00%	15

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Addendum 14

3. Pool Funds	as of 12/31/2012					as of 12/31/2011				
	pool fund weighted average	pool fund straight average	pool fund minimum	pool fund maximum	pool fund count	pool fund weighted average	pool fund straight average	pool fund minimum	pool fund maximum	pool fund count
Withdrawal protocol										
Pro-rata	22.99%	10.36%	34.73%	100.00%	13	21.35%	6.67%	0.00%	100.00%	15
Pro-rata with a buffer	49.23%	53.85%	100.00%	100.00%	13	47.68%	49.07%	0.00%	100.00%	15
LIFO	0.00%	0.00%	0.00%	0.00%	13	0.00%	0.00%	0.00%	0.00%	15
LIFO with a buffer	0.00%	5.02%	65.27%	65.27%	13	0.00%	0.00%	0.00%	0.00%	15
Tiered	27.78%	30.77%	100.00%	100.00%	13	27.89%	37.60%	0.00%	100.00%	15
Pro-rata by participant (class year)	0.00%	0.00%	0.00%	0.00%	13	0.00%	0.00%	0.00%	0.00%	15
Other	0.00%	0.00%	0.00%	0.00%	13	3.08%	6.66%	0.00%	100.00%	15
Maximum credit exposure for policy limit for single										
GIC issuer	7.30%	9.18%	3.00%	25.00%	12	6.67%	8.83%	3.00%	25.00%	12
Synthetic issuer	30.60%	33.54%	15.00%	100.00%	12	30.18%	34.00%	15.00%	75.00%	13
Separate account issuer	20.78%	20.00%	10.00%	25.00%	12	19.93%	20.42%	0.00%	40.00%	12
Largest actual credit exposure for a single										
GIC issuer	2.91%	4.14%	0.73%	8.17%	13	2.79%	4.66%	0.00%	18.60%	13
Synthetic issuer	19.42%	20.30%	12.00%	40.00%	13	20.55%	20.86%	9.23%	67.00%	14
Separate account issuer	13.13%	12.81%	6.37%	20.10%	13	5.97%	5.02%	0.00%	18.70%	13
Number of approved										
GIC issuer	9.24	6.40	1.00	17.00	11	6.92	7.67	0.00	17.00	12
Synthetic issuer	10.41	9.64	4.00	18.00	11	10.57	8.83	3.00	13.00	12
Separate account issuer	3.56	3.09	1.00	5.00	11	3.50	3.08	0.00	7.00	12
Number of issuers used										
GIC issuers	4.62	4.86	2.00	9.00	12	3.51	3.57	0.00	9.00	13
Synthetic issuers	7.15	6.15	2.00	11.00	12	7.46	6.35	2.00	13.00	13
Separate account issuers	1.48	1.38	1.00	4.00	12	0.63	0.54	0.00	2.00	13
Total issuers	11.23	10.71	4.00	17.00	12	11.24	9.71	0.00	20.00	14

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4. Life Insurance Company Accounts

Assets under management (12/31/12): $329,741.35
Number of plans represented: 139,317

PORTFOLIO OVERVIEW	as of 12/31/2012					as of 12/31/2011				
	life weighted average	life straight average	life minimum	life maximum	life count	life weighted average	life straight average	life minimum	life maximum	life count
Stable value assets managed (millions)		$41,218	$2,470	$141,905	8		$46,938	$2,383	$137,769	6
Number of plans	19,780	17,415	39	47,379	8	21,042	19,814	1,534	49,224	6
Avg plan asset size in svf (millions)	$11.82	$26.33	$0.53	$182.48	8	$7.0	$4.1	$0.5	$13.2	6
Types of assets invested in stable value										
401(k)	20.91%	30.80%	2.97%	67.19%	7	32.89%	46.17%	16.30%	80.28%	6
457	6.49%	17.57%	0.30%	96.24%	7	7.56%	6.50%	0.00%	18.91%	6
403(b)	64.20%	45.28%	0.79%	71.14%	7	46.21%	36.50%	7.00%	72.06%	6
529	2.41%	0.54%	3.79%	3.79%	7	1.47%	0.50%	0.00%	3.20%	6
Taft Hartley	0.00%	0.00%	0.00%	0.00%	7	3.36%	2.00%	0.00%	11.00%	6
Defined Benefit	0.00%	0.00%	0.00%	0.00%	7	3.72%	2.33%	0.00%	12.00%	6
Other	5.99%	5.81%	5.69%	21.42%	7	4.79%	6.00%	0.00%	21.27%	6
Net 12-month return (12-month average)	3.55%	3.17%	2.17%	4.41%	5	3.64%	3.30%	2.58%	4.37%	5
Net crediting rate	2.82%	2.89%	2.00%	3.82%	7	3.15%	3.07%	2.32%	4.30%	5
Modified duration (years)	4.93	4.25	3.00	6.59	5	5.03	4.27	2.84	6.53	5
Own credit quality, S&P ratings	7.77	7.81	5.00	9.00	8	7.89	7.22	5.00	9.00	6
Own credit quality, Moody's ratings	7.78	7.87	5.00	9.00	8	7.89	7.22	5.00	9.00	6
Gross contribution rate	31.55%	22.87%	6.94%	40.60%	5	31.55%	22.87%	6.94%	40.60%	5
Gross withdrawal rate	28.31%	20.58%	8.87%	36.55%	5	28.31%	20.58%	8.87%	36.55%	5
Stable value product mix										
Traditional GICs/BICs	0.00%	0.00%	0.00%	0.00%	6	5.08%	12.68%	0.00%	63.40%	5
General Account IPG or similar vehicle	77.77%	45.02%	30.42%	100.00%	6	86.45%	64.65%	6.22%	100.00%	5
Wrapped buy & hold assets	0.00%	0.00%	0.00%	0.00%	6	0.00%	0.00%	0.00%	0.00%	5
Wrapped assets managed to a fixed horizon	0.00%	0.00%	0.00%	0.00%	6	0.00%	0.00%	0.00%	0.00%	5
Wrapped actively managed evergreen assets	0.00%	0.00%	0.00%	0.00%	6	2.05%	5.11%	0.00%	25.57%	5
Assets with separate account wraps	8.94%	25.93%	0.51%	96.60%	6	6.42%	17.56%	0.00%	67.81%	5
Other	13.18%	28.57%	100.00%	100.00%	6	0.00%	0.00%	0.00%	0.00%	5

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4. Life Insurance Company Accounts	as of 12/31/2012					as of 12/31/2011				
	life weighted average	life straight average	life minimum	life maximum	life count	life weighted average	life straight average	life minimum	life maximum	life count
Investment portfolio asset allocation										
Cash or equivalents	1.16%	2.44%	0.44%	8.11%	6	1.51%	2.63%	0.30%	7.60%	6
Treasuries	5.02%	4.24%	2.50%	9.11%	6	5.58%	3.69%	0.00%	9.20%	6
Agencies	2.21%	14.41%	0.02%	78.60%	6	0.39%	1.04%	0.00%	3.40%	6
Asset-backed securities	5.32%	4.14%	1.60%	7.19%	6	5.06%	4.97%	2.30%	7.50%	6
Mortgage-backed securities	17.00%	14.58%	2.90%	26.34%	6	17.19%	15.74%	7.60%	24.90%	6
Commercial mortgage-backed securities	6.69%	5.58%	3.74%	11.00%	6	7.32%	6.55%	3.80%	11.70%	6
Publicly-traded corporate bonds	33.79%	31.19%	10.90%	37.78%	6	30.22%	32.09%	28.40%	36.20%	6
Private placements	10.82%	6.71%	6.18%	22.00%	6	11.74%	8.21%	0.00%	22.60%	6
Commercial mortgages	9.35%	6.03%	6.08%	18.00%	6	9.72%	10.11%	0.00%	18.30%	6
Other	8.62%	10.62%	7.16%	33.23%	6	11.27%	14.97%	0.60%	36.47%	6
Portfolio credit quality, S&P ratings	7.77	7.81	5.00	9.00	8	7.89	7.22	5.00	9.00	6
Portfolio credit quality, Moody's ratings	7.78	7.87	5.00	9.00	8	7.89	7.22	5.00	9.00	6
Investment types (% of portfolio)										
Dollar denominated international securities	13.72%	16.93%	8.36%	32.84%	6	13.50%	15.83%	6.66%	32.97%	5
Non dollar denominated international securities	1.47%	0.97%	0.45%	1.49%	6	1.41%	1.10%	0.00%	2.30%	6
Maximum yield debt	6.05%	4.13%	2.11%	7.10%	6	2.49%	2.37%	0.60%	5.50%	6
Emerging market debt	0.59%	1.67%	0.33%	4.17%	6	0.29%	0.31%	0.00%	1.04%	5
Percentage that use futures, swaps or derivatives for										
Portfolio duration or curve management	46.67%	50.00%			8	47.21%	66.67%			6
Individual security duration or curve management	93.10%	50.00%			8	95.29%	66.67%			6
Credit management	93.10%	50.00%			8	95.29%	66.67%			6
Synthetic creation of industry sectors	93.10%	50.00%			8	89.71%	50.00%			6
Leverage	10.42%	16.67%			8	10.37%	16.67%			6
Currency hedging	93.93%	66.67%			8	96.13%	83.33%			6
Other	0.82%	16.67%			8	0.85%	16.67%			6
Risk participation (% of portfolio)										
Non-participating	17.01%	40.74%	85.21%	100.00%	8	14.38%	30.80%	0.00%	100.00%	6
Participating for asset experience only	2.16%	14.29%	100.00%	100.00%	8	0.00%	0.00%	0.00%	0.00%	6
Participating for all experience asset	38.02%	30.76%	0.51%	100.00%	8	36.70%	52.53%	0.00%	100.00%	6
Hybrid	0.00%	0.00%	0.00%	0.00%	8	0.00%	0.00%	0.00%	0.00%	6
Other	42.82%	14.21%	99.49%	99.49%	8	48.92%	16.67%	0.00%	100.00%	6

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Addendum 17

4. Life Insurance Company Accounts	as of 12/31/2012					as of 12/31/2011				
	life weighted average	life straight average	life minimum	life maximum	life count	life weighted average	life straight average	life minimum	life maximum	life count
Withdrawal protocol										
Pro-rata	3.47%	9.94%	69.58%	69.58%	7	3.87%	13.81%	0.00%	67.81%	5
Pro-rata with a buffer	0.32%	0.07%	0.51%	0.51%	7	0.30%	0.75%	0.00%	3.74%	5
LIFO	1.11%	14.29%	100.00%	100.00%	7	1.32%	20.25%	0.00%	100.00%	5
LIFO with a buffer	14.01%	14.29%	100.00%	100.00%	7	15.01%	20.25%	0.00%	100.00%	5
Tiered	0.00%	0.00%	0.00%	0.00%	7	1.40%	3.49%	0.00%	17.45%	5
Pro-rata by participant (class year)	64.73%	18.56%	30.42%	99.49%	7	72.09%	26.44%	0.00%	100.00%	5
Other	16.37%	42.86%	100.00%	100.00%	7	6.02%	15.01%	0.00%	75.07%	5

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Addendum 18

SVIA thanks the following firms for participating in the Stable Value Investment & Policy Survey. Firms provided data for both 2012 and 2011 unless otherwise noted.

Single Individually Managed Funds

AllianceBernstein Management
Columbia Management****
DB Advisors
DuPont
Dwight Asset Management
Eastman Chemical Company
Fidelity Investments
Fiduciary Capital Management
Galliard Capital Management
Invesco
JPMorgan Asset Management
Morley Financial Services
PIMCO
Putnam Investments
Standish Mellon*****
T. Rowe Price
The Vanguard Group
UTC**

Pooled Funds

BNP Paribas Investment Partners*
Columbia Management****
DB Advisors***
Federated Investment Mgt.
Fidelity Investments
Galliard Capital Management
Goode Investment Mgt.***
ICMA Retirement Corp.
Invesco
John Hancock
Morley Financial Services
New York Life***
Putnam Investments
Standish Mellon*****
T. Rowe Price
The Vanguard Group

Life Insurance Company Accounts

Diversified Investment Advisors
Great-West**
ING
Lincoln Financial**
New York Life**
Principal Life Insurance***
Prudential Retirement
Securian Retirement Services
TIAA-CREF

*Formerly Fortis
**Did not participate in 2011 Survey
***Did not participate in 2012 Survey
****Formerly Ameriprise
*****Formerly BNY Mellon Stable Value

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