No.

In the Supreme Court of the United States

LOCKHEED MARTIN CORP. and
LOCKHEED MARTIN INVESTMENT MANAGEMENT CO.,
Petitioners,

v.

ANTHONY ABBOTT, LLOYD DEMARTINI,
ERIC L. FANKHAUSER, DAVID KETTERER,
and DENNIS TOMBAUGH,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Plaintiffs seek to represent a class of 56,000 employees and retirees who invested in a fund that allegedly was offered imprudently to participants in their 401(k) plan. Plaintiffs seek retrospective monetary relief under the theory that the allegedly imprudent fund caused them economic harm. When the lawsuit was filed, only one of the named plaintiffs had ever invested in the challenged fund, and under plaintiffs' theory of damages, his account *benefited* from the alleged imprudence. The Seventh Circuit nevertheless held that plaintiffs had standing to represent the class.

The question presented is:

Whether a plaintiff has standing to represent a class where the defendant's alleged misconduct did not cause him harm.

CORPORATE DISCLOSURE STATEMENT

Lockheed Martin Corp. has no parent company. The parent company of Lockheed Martin Investment Management Co. is Lockheed Martin Corp.

More than 10% of the common stock of Lockheed Martin Corp. is held indirectly by State Street Corp.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Lockheed Martin Corp. and Lockheed Martin Investment Management Co., respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–21a) is reported at 725 F.3d 803. The order denying rehearing en banc (App., *infra*, 78a) is unreported. The opinion of the district court (*id.* at 22a–50a) is reported at 286 F.R.D. 388.

JURISDICTION

The judgment of the court of appeals was entered August 7, 2013. App, *infra,* 1a. The order denying rehearing en banc was entered September 11, 2013. *Id.* at 78a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp.* v. *Cuno,* 547 U.S. 332, 341 (2006). "[A]n essential and unchanging part of the case-or-controversy requirement" is a plaintiff's obligation to establish standing (*Lujan* v. *Defenders of Wildlife,* 504 U.S. 555, 560 (1992)), which requires that a plaintiff have "'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction" (*Warth* v. *Seldin,* 422 U.S.

490, 498–99 (1975) (emphasis added) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962))).

In *Lujan*, this Court held that a party invoking federal jurisdiction must support standing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." 504 U.S. at 561. In the ERISA context, most courts of appeals have understood *Lujan* to require claimants seeking retrospective monetary relief to show that they would be entitled to such relief if their theory of imprudence proved meritorious—and that *Lujan* requires dismissal of a claim on standing grounds if, at any stage in the proceeding, the plaintiff cannot demonstrate that the conduct he is challenging caused him to sustain redressable personal injury.

The Seventh Circuit has taken a contrary position. Driven by its determination to avoid "mak[ing] a preliminary question depend on the final resolution of the merits," that court's view is that a plaintiff has standing to sue as a class representative even if he "does *not* appear to have suffered any damages." App., *infra*, 8a (emphasis added). Rather, under the Seventh Circuit's approach, because standing is merely a "prerequisite to *filing suit*" (*Arreola* v. *Godinez,* 546 F.3d 788, 794–95 (7th Cir. 2008)), the plaintiff must demonstrate only that he *invested* in the fund he is challenging, whereupon the mere possibility that a theory of injury will later emerge is enough to satisfy Article III (App., *infra,* 8a–9a).

The Seventh Circuit's approach runs roughshod over decades of this Court's jurisprudence and creates a conflict among the courts of appeals. It makes the injury-in-fact requirement a mere formality, thereby permitting sham plaintiffs (through their lawyers) to launch enormous class actions in which the plaintiffs have no stake in the outcome.

This Court should grant certiorari to resolve this sharp split among the circuits and to rule that a class representative unable to show that he personally sustained injury may not pursue redress for the alleged injuries of others. In the alternative, because the Seventh Circuit's decision is so clearly inconsistent with this Court's precedents, summary reversal is warranted.

A. Factual Background

1. The Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832 (codified as amended at 29 U.S.C. § 1001 *et seq*.), provides for two primary types of retirement plans: defined benefit plans and defined contribution plans. A defined benefit plan "consists of a general pool of assets," which "may be funded by employer or employee contributions, or a combination of both." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439 (1999). Upon retirement, a participant in a defined benefit plan "is entitled to a fixed periodic payment" and the employer "must cover any underfunding as the result of a shortfall that may occur from the plan's investments." *Ibid.* In contrast, defined contribution plans provide participants with individual accounts, in which they accrue "benefits based solely upon the amount contributed to the participant's account." ERISA § 3(34), 29 U.S.C. § 1002(34). An employer's contribution to an employee's plan "is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide." *Hughes Aircraft*, 525 U.S. at 439.

"Defined contribution plans dominate the retirement plan scene today." *LaRue* v. *DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008). Among defined contribution plans, 401(k) plans are especially prominent. In a 401(k) plan, employee participants make tax-preferred contributions to an individual account and then decide, subject to the terms of their plan, how to invest the assets. Across the country, 401(k) plans now hold more than $3 trillion in retirement assets. Steven Greenhouse, *401(?)*, N.Y. TIMES, Sept. 12, 2012, at F1.

The growth in 401(k) plans has brought an accompanying boom in 401(k)-related litigation. Qualified retirement plans, such as 401(k) plans, are subject to ERISA, which permits plan participants to file suit for redress of a breach of fiduciary duty (ERISA §§ 409, 502(a)(2), 29 U.S.C. §§ 1109, 1132(a)(2); see *LaRue*, 552 U.S. at 253).

Starting in 2006, a St. Louis-based law firm filed more than a dozen virtually identical cases against the sponsors of large 401(k) plans. See generally Tom Lauricella, *Fidelity Is Sued over 401(k) Fees*, WALL ST. J., Dec. 14, 2006, at C13. Those cases alleged generally that plan fiduciaries had breached their duties to participants by permitting excessive fees to be charged to the plans and by offering imprudent investment options. This is one of those cases.

2. Petitioner Lockheed Martin Corporation sponsors a number of retirement plans for its employees. Eligible employees are entitled to participate in either of two relevant 401(k) plans: the Salaried Savings Plan or the Hourly Employees Savings Plan Plus (collectively, the "Plans").

Participants who invest retirement assets in the Plans receive matching contributions from their employer and must elect how to invest the assets in their account among investment options selected and monitored by petitioner Lockheed Martin Investment Management Co., a subsidiary of Lockheed Martin Corp. (collectively, "Lockheed Martin").

Reflecting the diversity of Plan participants and their investment strategies, the Plans offer participants a wide range of investment options. During the relevant periods, participants could allocate their retirement savings among three categories of investment options, depending on their risk preferences and familiarity with investment vehicles: automatically balanced conservative, moderate, and aggressive asset allocation funds; a set of eleven core funds reflecting a range of asset-class investments in stocks, bonds, and liquid investments; and a self-managed brokerage account providing access to stocks, bonds, and thousands of mutual funds. See C.A. Supp. App. 96–113.

3. This petition concerns one of the core funds, the Stable Value Fund ("SVF"). In a 2001 disclosure mailed to all Plan participants, the SVF was described as a "Money Market" fund investing in the following types of assets:

> U.S. Treasury bills and other direct obligations of the U.S. Government, high quality commercial paper, banker's acceptances and notes, fully insured savings bank deposits, commingled money market funds and other short-term fixed income securities, all with maturities of one year or less.

C.A. Supp. App. 96, 102. Participants were told that "[t]he Fund may also invest in insurance contracts[,] . . . [which] represent a longer-term investment vehicle with a correspondingly higher expected rate of return than short-term securities," and that "[a]pproximately 2% of the Fund's assets [were] invested in insurance contracts." *Id.* at 102. This disclosure made clear that the SVF was a conservative investment vehicle: participants were advised that "[d]ue to its high quality and short maturity structure, its rate of return is usually lower than other fixed income options." *Ibid.* That cautious approach comported with the objectives of the SVF: "to provide safety of principal, stable income and liquidity." *Ibid.*; see also *id.* at 15 (describing the SVF, in the 2004 summary plan description, as the "most conservative" investment fund); *cf.* 29 U.S.C. § 1104(c)(3) (requiring ERISA plans seeking safe-harbor protection to provide a low-risk investment option that protects principal).

Consistent with disclosures to Plan participants and its low-risk strategy, the expected yield on the SVF was lower than the expected yield for riskier investment funds.

B. Proceedings Below

1. Plaintiffs filed suit against Lockheed Martin on September 11, 2006, seeking to represent a putative class of all plan participants. They made wide-ranging allegations about the administration of the Plans and their investment options and alleged generically that plaintiffs had "suffered financial losses" as a result of Lockheed Martin's alleged breaches of fiduciary duty. R.2 ¶ 134.[1]

After discovery commenced, Lockheed Martin learned that plaintiffs' allegations of financial losses were untrue as to certain of their claims. Plaintiffs had responded to newspaper advertisements taken out by a law firm, which did not vet its clients to determine if they stood to benefit from the claims that the law firm would be pursuing. Thus, plaintiffs' counsel filed suit to challenge the prudence of certain investment options in which none of their clients had ever invested any money. In such circumstances, plaintiffs could not have "suffered financial losses."

As relevant here, one of plaintiffs' claims targets the SVF. Plaintiffs' theory is that the SVF was too risk-averse and should have achieved the higher returns of funds that allocated greater portions of their assets to insurance contracts. See App., *infra*, 4a. In support of that theory, plaintiffs disclosed reports from three proposed expert witnesses. Two of those witnesses—Al Otto and Edward O'Neal—purported to compute the damages stemming from Lockheed Martin's supposed mismanagement of the SVF. R.148–2; R.148–3. Both Otto and O'Neal computed damages by comparing the return of the SVF to the return of the Hueler FirstSource Index—an index of funds allocating a greater share of their assets to insurance contracts. Both Otto and O'Neal concluded that the SVF underperformed the Hueler Index for the overall period between 1997 and 2007, but *outperformed* the index in 2006 and 2007, such that if Lockheed Martin had structured its SVF to track the

[1] "R." refers to the record of the district court in *Abbott* v. *Lockheed Martin Corp.*, No. 06-cv-0701 (S.D. Ill.).

Hueler Index, plan participants would have been *worse off* in those years. R.148–2, at 65; R.148–3, at 18. A third proposed expert did not compute damages but included in his report a chart showing that the SVF outperformed the Hueler Index in 2006 and 2007. R.148–5, at 12.

2. In December 2008, Lockheed Martin moved for summary judgment. It challenged plaintiffs' standing to pursue a claim involving the SVF because plaintiffs had "presented no evidence that they were invested in [the SVF] for the period[] for which they allege imprudent conduct by Defendants." R.146 at 23. Indeed, Lockheed Martin had seen "no evidence that they ever invested in the SVF." *Id.* at 24. In opposition, plaintiffs did not offer any evidence that any plaintiff had invested in the SVF, let alone that any plaintiff had suffered a loss under their theory of imprudence. Nor did plaintiffs adduce any evidence of injury-in-fact at the hearing; their position was that plaintiffs "have standing to raise issues beyond just the funds they were [invested] in." R.199 at 81.

After the hearing, plaintiffs moved to supplement their summary judgment opposition with evidence that one of them, Lloyd DeMartini, was invested in the SVF on August 25, 2006, 17 days before plaintiffs filed suit—but, under plaintiffs' theory, well after the SVF had allegedly stopped sustaining damages. R.220 at 1. Lockheed Martin responded, *inter alia*, that the new material was irrelevant given that "Plaintiffs have standing to raise claims concerning the [SVF] only for periods in which they were invested in that fund" and their expert acknowledged that in 2006, "the SVF was *outperforming* the benchmark" offered by plaintiffs, such that, even with the new evidence, no plaintiffs had suffered injury-in-fact under their theory. R.221 at 4. Plaintiffs' motion to supplement their opposition was denied. R.224.

On March 31, 2009, the court denied Lockheed Martin's motion for summary judgment in relevant part. It accepted plaintiffs' theory that "[t]he statutory provisions of ERISA unambiguously grant the plaintiffs the standing needed to bring their claims," regardless of whether any of them invested in the SVF, because ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), "specifically identifies participants and beneficiaries as parties who may sue fiduciaries on behalf of a plan." App., *infra*, 66a.

3. Four days later, the district court granted in part plaintiffs' motion for class certification. R.239. Lockheed Martin petitioned the Seventh Circuit for interlocutory review pursuant to Fed. R. Civ. P. 23(f), arguing, *inter alia*, that "the Petition should be granted to address whether plan participants who lack any stake in the outcome may represent a class of all participants" as a matter of Article III standing. Pet. for Leave to Appeal Pursuant to Rule 23(f) at 8, *In re Lockheed Martin Corp.*, 412 F. App'x 892 (7th Cir. 2011) (No. 09–8019). The Seventh Circuit summarily granted Lockheed Martin's petition and directed the district court to conduct further proceedings consistent with the intervening decision in a related case, *Spano* v. *Boeing Co.*, 633 F.3d 574 (7th Cir. 2011). *In re Lockheed Martin*, 412 F. App'x at 893.

4. On remand, plaintiffs sought permission to add two new plaintiffs who *had* invested in the SVF during the alleged damages period. R.300 at 13. Over

Lockheed Martin's opposition, permission was granted. R.304 at 17.

Plaintiffs then filed an amended motion for class certification. Plaintiffs also filed an expert report showing that, under their theory of the case, the new plaintiffs had sustained $688 and $31 in SVF-related damages, respectively. R.344–2, at 6–7. Plaintiffs did not submit any evidence that DeMartini had sustained any damages through his investment in the SVF. Lockheed Martin opposed class certification, arguing that (1) no class can be certified as to a claim on which the original plaintiffs lacked standing; and (2) plaintiffs failed to satisfy the requirements of Rule 23(a).

The district court denied plaintiffs' motion in relevant part. Reserving the question of plaintiffs' standing (App., *infra*, 34a), it found that plaintiffs' proposed class definition did not satisfy the requirements of Rule 23(a) as interpreted in *Spano* (*id.* at 34a–39a).

5. Plaintiffs petitioned the Seventh Circuit to take an interlocutory appeal. That court granted the petition and vacated the denial of class certification.

In response to Lockheed Martin's argument that the court lacked jurisdiction as to plaintiffs' SVF claim, the court acknowledged that "[i]f damages are measured exclusively by the Hueler Index," pursuant to plaintiffs' approach, "DeMartini does not appear to have suffered any damages." App., *infra*, 8a. The court nevertheless held that, based on DeMartini's investment in the SVF, plaintiffs had demonstrated standing, at all pertinent phases of the litigation, concluding:

- at the motion-to-dismiss stage, "[plaintiffs'] complaint alleged that they were harmed by Lockheed's mismanagement of the SVF," which "was sufficient to establish injury-in-fact for pleading purposes" (*id.* at 10a);
- at summary judgment, plaintiffs "refute[d] Lockheed's standing objection" with evidence that "showed that DeMartini was invested in the SVF during the relevant period" (*ibid.*); and
- for purposes of class certification, "DeMartini's lack of damages as measured by the Hueler Index suggests that he may have a problem proving the degree of his injury," but is not "dispositive proof that DeMartini was not injured," because there might be some theory—not yet identified by plaintiffs—under which "if the Plan had been managed prudently, it might have outperformed the Hueler Index at all times, and thus DeMartini would have done even better" (*id.* at 8a–9a).

The court further suggested that, in addressing standing, courts "must resist the urge to make a preliminary question depend on the final resolution of the merits," such that, if DeMartini ultimately proved *unable* to demonstrate individual injury, it would have no implications for Article III standing. App., *infra,* 8a.

In light of its holding that DeMartini had standing, the court declined to address whether plaintiffs have standing based on (1) the parties added to the case in 2011; or (2) the original plaintiffs' participation in other investment funds in the Plans. App., *infra*, 7a–8a.

The court of appeals rejected Lockheed Martin's additional objections to class certification and vacated the district court's denial of class certification on the SVF claim. App., *infra*, 11a–21a.

REASONS FOR GRANTING THE PETITION

Article III requires a plaintiff invoking the jurisdiction of a federal court to demonstrate that he has experienced actual or threatened injury due to a defendant's allegedly wrongful conduct. *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721, 726 (2013). Otherwise, the "dispute is not a proper case or controversy [and] the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler*, 547 U.S. at 341.

Many of the contours of the Article III inquiry are settled. Plaintiffs must demonstrate standing for "each claim" and "for each form of relief that is sought." *Davis* v. *FEC*, 554 U.S. 724, 734 (2008) (quoting *DaimlerChrysler*, 547 U.S. at 352). In a class action, the *named* plaintiffs must demonstrate that they have constitutional standing (*O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974)), measured at the time the complaint was filed (*Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)). And the "plaintiff bears the burden of proof" to establish standing "with the manner and degree of evidence required at the [applicable] stage[] of the litigation." *Lujan*, 504 U.S. at 561.

But a critical question dividing the courts of appeals is whether a plaintiff who seeks retrospective monetary relief for economic injury, but whose financial account, in fact, *benefited* from the defendant's alleged misconduct, has nevertheless demonstrated injury-in-fact sufficient for federal jurisdiction. This question arises with frequency in defined-contribution ERISA cases, where a plan participant who can readily demonstrate participation in a plan cannot demonstrate an injury to his individual account within that plan. Five courts of appeals—the Third, Sixth, Eighth, Tenth, and Eleventh Circuits—have held that no justiciable claim exists if the plaintiff cannot establish personal injury. But the Seventh Circuit has taken a contrary position. Its position is that once a plaintiff makes allegations of injury-in-fact and demonstrates participation in the underlying plan, any subsequent inquiry into whether the plaintiff experienced economic loss resulting from his claim is a non-jurisdictional merits determination.

The Seventh Circuit's position is erroneous and invites abuse of the class-action protocol by plaintiffs with no actual stake in a dispute. The courts on the long side of this lopsided split have correctly applied this Court's precedents regarding constitutional standing and properly determined that plaintiffs who sustained zero or "negative" damages under their own theory of the case lack a justiciable claim. None of those courts would have permitted a plaintiff's claim to survive based on such speculation about critical jurisdictional facts. But the Seventh Circuit did.

The distinction between merits issues and jurisdictional issues may not have practical consequences in every case. But in class actions—where a plaintiff seeks to represent absent parties—the implications are profound. In this case, a constitutionally infirm plaintiff seeks to represent the interests of 56,000 others. Lowering the standing bar for plaintiffs as the Seventh Circuit has done allows plaintiffs who cannot show any injury—who, in fact, benefited from the conduct on which they are suing—to drive high-stakes, high-cost litigation (or settlement proceedings) on behalf of thousands of class members. Under the Seventh Circuit's rule, a suit can be brought—and a class certified—where the class representative demonstrates merely that he or she *invested in* the relevant fund during the relevant period.

Because this case is an appropriate vehicle for resolving the standing issues now dividing the courts of appeals, the petition should be granted and the case set for plenary review. In the alternative, because the decision below is in direct conflict with this Court's precedents, summary reversal is warranted.

I. The Decision Below Implicates A Five-to-One Circuit Split

In the decision below, the Seventh Circuit considered whether a plaintiff who "does not appear to have suffered any damages" can nevertheless satisfy the injury-in-fact requirement of constitutional standing. App., *infra*, 8a. The court held that "[i]njury-in-fact for standing purposes is not the same thing as the ultimate measure of recovery," such that an "absence of damages" under a plaintiff's theory of the case is not "dispositive proof that [he] was not injured." *Id.* at 8a–9a. Rather, the court's view was that plaintiffs had done enough to satisfy federal jurisdictional requirements by establishing that one of the original named plaintiffs had once held an investment in the fund that plaintiffs were challenging.

The Seventh Circuit's understanding of Article III—and its conclusion that a plaintiff's failure to establish injury under his theory of the case is a failure on the merits, not of standing—cannot be reconciled with decisions by the Third, Sixth, Eighth, Tenth, and Eleventh Circuits.

Third Circuit. In *Horvath* v. *Keystone Health Plan East, Inc.*, 333 F.3d 450 (3d Cir. 2003), the Third Circuit held that speculation about economic injury is *inadequate* to support constitutional standing and that a plaintiff must instead have an actual theory of injury that withstands scrutiny. A plaintiff filed suit under ERISA, alleging that her health maintenance organization ("HMO") failed to disclose financial incentives to physicians that had a detrimental effect on patient care. The plaintiff acknowledged that she was not injured by compromised medical care but instead argued that she had suffered financial losses because the HMO provider was overpaid by her employer, which could have passed savings along to her. As to a retrospective claim for monetary compensation—the same type of claim at issue here—the Third Circuit found plaintiff's theory "far too speculative to serve as the basis for a claim of individual loss" and dismissed the case for lack of standing. *Id.* at 457.[2]

[2] The Third Circuit also has applied these principles outside the ERISA context. In *Hayes* v. *Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013), the court vacated class certification of a consumer fraud claim. The complaint alleged that Sam's Club stores sold extended warranty products on as-is products even though the warranties were valid only if the products were also covered by manufacturers' warranties. The named plaintiff had purchased two extended warranties for as-is products but did not know whether his products were also covered by manufacturers' warranties. The Third Circuit recognized that it therefore did "not know if [the plaintiff's] suit presents an Article III

Sixth Circuit. Also in conflict with the decision below, the Sixth Circuit has held that when a plaintiff did not suffer a net financial loss under her theory of damages, she lacks standing to pursue the claim. In *Taylor* v. *KeyCorp*, 680 F.3d 609 (6th Cir. 2012), the plaintiff alleged that KeyCorp had breached its fiduciary duty to participants in its 401(k) plan by misrepresenting the lending and tax practices of KeyCorp stock (which was offered to plan participants). Her theory was that KeyCorp stock had become artificially inflated and was therefore an imprudent investment option. But the Sixth Circuit reviewed the plaintiff's trading history, which showed that she "sold over 80% of her KeyCorp holdings at a time she claims the stock was artificially inflated." *Id.* at 613. Because that meant she was a net winner under her theory of the case, the court "found plaintiffs to be without Article III standing." *Ibid.*; see also *Drutis* v. *Rand McNally & Co.*, 499 F.3d 608, 611 (6th Cir. 2007) (holding that certain plaintiffs lacked standing "because they suffered no injury as a result of the challenged [retirement] plan"). Recognizing that there is a "difference between 'actual injury' for purposes of Article III standing and damages," the court held that "where [a plaintiff] derived a *benefit* from defendants' alleged breaches of fiduciary duty, we do not see how she can allege any form of 'actual injury.'" *Taylor,* 680 F.3d 613 n.3.

Eighth Circuit. In a context strikingly similar to the circumstances of this case, the Eighth Circuit

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case or controversy." *Id.* at 361. But rather than permit the case to proceed in the face of such uncertainty, the court of appeals directed the district court to determine, on remand, "whether [the plaintiff] * * * sustained an injury" and to dismiss the case if he did not. *Ibid.*

has held that a court does *not* conflate standing with the merits when it insists upon proof that a plaintiff has been injured in a manner that can be judicially redressed. In *Brown* v. *Medtronic, Inc.*, 628 F.3d 451 (8th Cir. 2010), the court rejected the assertion that "financial 'damages' [are] not a component of the standing inquiry in an ERISA breach of fiduciary duty case." *Id.* at 456. The plaintiff in that case alleged that the fiduciaries to Medtronic's 401(k) plan had breached fiduciary duties by imprudently permitting participants to invest in Medtronic stock when its price was artificially inflated. But when the district court compared the dates of share-price changes and the dates of the plaintiff's purchases and sales of shares, it determined that, under his theory of artificial inflation, he "was a net beneficiary of * * * [Medtronic's] actions or failures to act." *Id.* at 455. The district court therefore dismissed the plaintiff's complaint for lack of standing. *Ibid.* In affirming, the Eighth Circuit held that a plaintiff cannot pursue an ERISA breach-of-fiduciary-duty claim based on "a purported 'abstract violation' of a fiduciary duty" without any showing of personal financial loss. *Id.* at 457. The court reasoned that if an "abstract violation" constituted sufficient injury to invoke federal jurisdiction, it would leave courts without any means for redressing such an injury, and any ensuing proceedings would be "purely advisory." *Ibid.*

Tenth Circuit. In the Tenth Circuit, a plaintiff who participates in a defined contribution plan does not have standing to challenge an alleged breach of fiduciary duty that does not cause his individual account to sustain damages. In *Cunningham* v. *Adams*, 106 F. App'x 693 (10th Cir. 2004), a plaintiff challenged the validity of another participant's withdrawal of that participant's funds from the plan. But the withdrawal of funds from one participant's account would not ordinarily affect another participant's account. The plaintiff's theory was that the defendant withdrew more than his share of the assets from the plan, which the court acknowledged "could have an adverse effect on other participants." *Id.* at 696 n.1. But, upon reviewing the facts underlying the plaintiff's "mathematical argument," the court held that the plaintiff had "fail[ed] to provide any facts to establish any injury in fact to himself" and therefore affirmed a grant of summary judgment to the defendant. *Id.* at 696 & n.1.

Eleventh Circuit. Finally, the Eleventh Circuit has reversed an order certifying a class on a claim for breach of fiduciary duty because the plaintiff did not sustain a net loss under his theory of the case. In *Piazza* v. *EBSCO Industries, Inc.*, 273 F.3d 1341 (11th Cir. 2001), the plaintiff was a former employee of EBSCO who participated in its defined-contribution retirement plan. He challenged, *inter alia*, the undervaluation of EBSCO stock held by his plan. But the plaintiff had not taken distributions from the fund while the stock was undervalued; thus, the net effect of the alleged undervaluation was that *other* participants (who cashed out their holdings on unfavorable terms) were undercompensated, while those remaining in the plan (like the plaintiff) benefited. As a result, the court concluded that the plaintiff "was not injured" and therefore "lacks standing." *Id.* at 1354 (citing *Lujan*).

* * *

The above-described cases squarely conflict with the decision below. The courts identified above have taken seriously the limitations of Article III and have recognized that they are powerless to adjudicate claims when—regardless of the merits of the claim—the plaintiff has no personal stake in the outcome of the litigation.

No other court of appeals has taken the Seventh Circuit's dismissive approach, permitting untethered speculation to replace injury-***in-fact***.

II. The Decision Below Is Erroneous

The decision below contorts the law of standing. In holding that a plaintiff satisfies Article III, for purposes of class certification, even if he "does not appear to have suffered any damages" (App., *infra,* 8a), the Seventh Circuit flouted this Court's precedents subjecting a plaintiff to an increasing burden of proof as to standing as proceedings progress. Accordingly, plenary review is warranted to resolve the circuit split in favor of the majority position. In the alternative, because the Seventh Circuit's approach is so manifestly inconsistent with this Court's decisions, summary reversal is warranted.

It is beyond dispute that a plaintiff must demonstrate standing "throughout all stages of litigation." *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2661 (2013). In *Lujan*, this Court specified the nature of that continuing obligation—a plaintiff must demonstrate standing "with the manner and degree of evidence required at the successive stages of the litigation." 504 U.S. at 561. Thus, because Article III standing is a prerequisite for class certification,[3] the moving par-

[3] Accordingly, courts of appeals have unanimously agreed that they must assess standing when they agree to hear interlocutory appeals concerning class certification pursuant to Fed. R. Civ. P. 23(f). See, *e.g.*, *McNair* v. *Synapse Grp. Inc.*, 672 F.3d 213, 223 n.10 (3d Cir. 2012); *Lindsay* v. *Gov't Emps. Ins. Co.,* 448 F.3d 416, 420 (D.C. Cir. 2006); *Olden* v. *LaFarge Corp.,* 383

ty must "affirmatively demonstrate" standing "*in fact*." *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011); accord *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013).

With respect to the claim at issue here, the *Lujan* analysis is straightforward. Each plaintiff was required to come forward with actual facts that "affirmatively demonstrate" that he sustained personal injury from the alleged violation, evaluated as of the time the complaint was filed. But only one of the plaintiffs who filed the initial complaint (DeMartini) invested in the SVF, and under plaintiffs' calculations, he was a net *beneficiary* of the investment strategy of the SVF. Therefore, he has not shown injury from his asserted claim and cannot represent a 56,000-person class action.[4]

The decision below suggests that the *Lujan* analysis does not apply because (1) plaintiffs' claim might

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F.3d 495, 498 (6th Cir. 2004); *City of Hialeah, Fla.* v. *Rojas,* 311 F.3d 1096, 1101 (11th Cir. 2002); *Bertulli* v. *Indep. Ass'n of Cont'l Pilots,* 242 F.3d 290, 294 (5th Cir. 2001).

[4] A number of courts of appeals have required a similar showing of individual harm in the context of defined benefit plans and welfare benefit plans. In *Harley* v. *Minnesota Mining & Manufacturing Co.*, 284 F.3d 901 (8th Cir. 2002), for example, the Eighth Circuit held that the plaintiff lacked standing because the defined benefit plan had a surplus that covered any losses owing to defendants' breaches of fiduciary duty. Plaintiff could not demonstrate actual injury because "[i]n a defined benefit plan, if plan assets are depleted but the remaining pool of assets is more than adequate to pay all accrued or accumulated benefits, then any loss is to plan surplus." *Id.* at 906; see also *David* v. *Alphin*, 704 F.3d 327, 333–39 (4th Cir. 2013); *Loren* v. *Blue Cross & Blue Shield*, 505 F.3d 598, 608–09 (6th Cir. 2007); *Glanton ex rel. ALCOA Prescription Drug Plan* v. *AdvancePCS Inc.*, 465 F.3d 1123 (9th Cir. 2006).

change as the case proceeds; and (2) a decision dismissing the claim for lack of standing would conflate standing with the merits. Both of those suggestions are foreclosed by the precedents of this Court.

First, it makes no difference that class certification is "provisional" and that plaintiffs' "damages measure will likely become more refined" as trial progresses. App., *infra*, 8a. In the seven years that this case has been pending, plaintiffs have had every opportunity to develop the theory of their case. Under the theory that they have adopted—and according to the class definition that they themselves proffered—none of the original named plaintiffs sustained any injury. Yet, this Court's decisions in *Wal-Mart* and *Comcast* emphasize that a plaintiff seeking class certification bears the burden to "affirmatively demonstrate" compliance with Rule 23. Plaintiffs cannot "affirmatively demonstrate" injury-in-fact with a theory under which injury-in-fact is plainly absent. Under the Seventh Circuit's approach, a court could speculate that a class-unsuitable claim might later be amended to make it suitable for class-wide treatment. But under *Wal-Mart* and *Comcast*, plaintiffs are not entitled to class certification as a matter of course. Rather, class certification is not permitted *until* the plaintiff identifies and supports a certifiable claim. Thus, a defective class definition cannot serve as a placeholder for a future, acceptable class definition that may or may not exist. Here, no plaintiff asserted a claim under which he was damaged by the allegedly imprudent offering of the SVF option. Therefore, plaintiffs cannot certify a class under that theory.

Second, holding plaintiffs to their obligation to establish injury-in-fact does not "make a preliminary question depend on the final resolution of the merits." App. *infra*, 8a. "The standing inquiry focuses on whether the plaintiff is the proper party to bring * * * suit." *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997). Although that inquiry "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, * * * it often turns on the *nature and source* of the claim asserted." *Warth*, 422 U.S. at 500 (emphasis added). Here, the merits question is whether the SVF was imprudent. The standing question is whether DeMartini was injured by the alleged lack of prudence and would benefit if his claim is upheld. Thus, DeMartini's eligibility to challenge the investment strategy of the SVF has nothing to do with the merits of whether offering that fund option was imprudent. Accordingly, fear about prejudging the merits does not justify an unwarranted exercise of federal jurisdiction in this case or in similar frequently recurring circumstances.

III. The Question Presented Is Important

There can be little doubt that the question presented is sufficiently important to warrant review. This Court routinely grants certiorari to address questions of Article III standing.[5]

The context of this case makes it particularly important. ERISA governs the relationships between employers and their employees on crucial issues concerning employee benefits. As to 401(k) plans alone, 51 million American workers are active partici-

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[5] See, *e.g.*, *Hollingsworth* v. *Perry*, 133 S. Ct. 2652 (2013); *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138 (2013); *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721 (2013); *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436 (2011).

pants.[6] Thousands of putative class actions are filed each year in federal court, and ERISA class actions are among the largest and most procedurally complex. The class action mechanism can be useful when it is appropriate, but it produces unjust results and wastes enormous resources when wielded in the wrong circumstances.

The constitutional requirements for standing impose important limitations on class action litigation. *First*, standing is designed to "limit[] the business of federal courts to 'questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.'" *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 395–96 (1980) (quoting *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968)). The question presented by this case implicates that core standing consideration, for if a plaintiff does not have to prove actual harm resulting from the asserted violation from the beginning of the case, the adversarial system fails: the plaintiff is free to alter his theories at will and a defendant cannot meaningfully demonstrate that the grievance is incorrect.

Second, any system that allows lawyers to invoke federal jurisdiction before determining if their clients have an actual stake in the case invites abuses of the class action system. If an attorney can certify a 56,000-member class action—and demand a settlement—without even identifying a single injured member of his class, then there will be perverse incentives for lawyers to file meritless suits.

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[6] See Investment Co. Inst., Frequently Asked Questions About 401(k) Plans, at http://www.ici.org/policy/retirement/plan/401k/faqs_401k.

Third, hypothetical disputes—or disputes in which the plaintiff cannot identify whether or not he is aggrieved—burden an already overburdened federal judiciary. The Seventh Circuit's approach amounts to an endorsement of advisory opinions in a wide range of circumstances. Federal courts have neither the constitutional authority nor the excess capacity to engage in such pursuits.

IV. This Case Is An Ideal Vehicle

This case is an ideal vehicle for addressing whether a plaintiff unable to articulate a theory under which he sustained personal injury may nevertheless initiate litigation designed to pursue class-wide relief. The decision below is on the short side of the lopsided circuit split and affects an issue—standing—that will resolve all SVF-related claims in this litigation if standing is found lacking.[7]

Although this case arises in an interlocutory posture, the question presented *can* arise only in such a posture. Outside the class context, it makes no difference whether an uninjured plaintiff loses for lack of standing or on the merits. And for class action cas-

[7] If plaintiffs' counsel were to seek to refile the SVF claim with class representatives who satisfy Article III, such a claim would be time-barred, because ERISA's six-year limitations period is a statute of repose, such that equitable tolling pursuant to *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), is unavailable. See, *e.g., Archer* v. *Nissan Motor Acceptance Corp.*, 550 F.3d 506, 508 (5th Cir. 2008); *Wolin* v. *Smith Barney Inc.*, 83 F.3d 847, 850 (7th Cir. 1996); *Landwehr* v. *DuPree*, 72 F.3d 726, 733 (9th Cir. 1995); *Larson* v. *Northrop Corp.*, 21 F.3d 1164, 1174–76 (D.C. Cir. 1994); cf. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991) (holding that equivalent provision under the Securities Exchange Act of 1934 is not subject to tolling).

es, this Court has suggested that a defendant may not be able to raise lack of standing after a class has been certified and prevails at trial. See *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1530 (2013); *E. Tex. Motor Freight Sys. Inc.* v. *Rodriguez*, 431 U.S. 395, 406 n.12 (1977). Moreover, the very reason for the addition of subsection (f) to Rule 23 was to permit interlocutory review of class certification rulings.

Finally, plaintiffs' alternative claims to standing pose no obstacle to review. When this Court "reverse[s] on a threshold question, [it] typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430–31 (2012). This Court has granted certiorari in innumerable cases despite the existence of unanswered subsidiary questions below. See, *e.g.*, *ibid.*; *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2597 (2013); *Douglas* v. *Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1211 (2012); *Bond* v. *United States,* 131 S. Ct. 2355, 2366–67 (2011). There is no reason why this Court could not address the Seventh Circuit's erroneous assessment of the evidentiary requirements for standing.

Moreover, plaintiffs' alternative theories are plainly without merit. Their claim that ERISA § 502(a) authorizes even uninjured plan participants to file suit for breach of fiduciary duty confuses Article III standing with statutory standing (see *Raines*, 521 U.S. at 820 n.3; John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1226 (1993))—as all nine courts of appeals to have considered this issue have unanimously held.[8] This case is unlike *First American Financial Corp.* v. *Edwards*, 132 S. Ct. 2536 (2012) (per curiam), where the Court dismissed as improvidently granted a petition concerning whether the existence of statutory damages—in the absence of any other claim to injury-in-fact—was sufficient to satisfy Article III. Here, plaintiffs are not entitled to statutory damages.

Finally, plaintiffs cannot cure their standing defect by adding new named plaintiffs five years after filing suit. Consistent with this Court's precedents, the Seventh Circuit does not permit the addition of new parties to cure a standing defect that existed at the outset of trial. *Walters* v. *Edgar*, 163 F.3d 430, 432–33 (7th Cir. 1998); *Sherman ex rel. Sherman* v. *Koch*, 623 F.3d 501, 506 (7th Cir. 2010); accord 1 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 2:8 (5th ed. 2011) ("[I]f a case has only one class representative and that party does not have standing, then the court lacks jurisdiction over the case and it must be dismissed; if the case only had this one class representative from the outset, then there is no opportunity for a substitute class representative to take the named plaintiff's place because this means that the court never had jurisdiction over the matter."); cf. *Genesis Healthcare*, 133 S. Ct. at 1530 (proper remedy for pre-certification loss of jurisdiction due to mootness is dismissal). Thus, such a ma-

[8] See *David*, 704 F.3d at 333; *Taylor*, 680 F.3d at 612; *Cent. States Se. & Sw. Areas Health & Welfare Fund* v. *Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 200 (2d Cir. 2005); *Horvath*, 333 F.3d at 456 (3d Cir. 2003); *Glanton*, 465 F.3d at 1127; *Cunningham*, 106 F. App'x at 696; *Harley*, 284 F.3d at 906–07; *Piazza*, 273 F.3d at 1354; *Waters Corp.* v. *Millipore Corp.*, 140 F.3d 324, 325 n.3 (1st Cir. 1998).

neuver cannot affect the propriety of resolving the question presented by this case.

CONCLUSION

The petition for a writ of certiorari should be granted and the case should be set for plenary review. In the alternative, the decision below should be summarily reversed.

Respectfully submitted.

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APPENDICES

APPENDIX A

In the United States Court of
Appeals for the Seventh Circuit

No. 12–3736

ANTHONY ABBOTT, *et al.*,

Plaintiffs-Appellants,

v.

LOCKHEED MARTIN CORPORATION
and LOCKHEED MARTIN INVESTMENT
MANAGEMENT COMPANY,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 06-cv-0701-MJR — **Michael J. Reagan**, *Judge.*

ARGUED MAY 29, 2013 — DECIDED AUGUST 7, 2013

Before BAUER, WOOD, and TINDER, *Circuit Judges*

WOOD, *Circuit Judge*.

In *Spano* v. *Boeing Co.*, 633 F.3d 574 (7th Cir. 2011), we confronted for the first time the question whether an action for breach of fiduciary duty under Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(2), may be maintained as a class action when a defined-contribution retirement savings plan is at issue. We concluded in *Spano* that the answer was "maybe."

The proposed classes before us in that case, however, were too broad to meet the certification requirements of Federal Rule of Civil Procedure 23. *Spano* thus left for another day the resolution of many questions concerning the use of the class-action device for a Section 502(a)(2) claim about a defined-contribution plan.

This case requires us to take the next step. It involves a proposed class of plaintiffs who are participants in two defined-contribution plans run by Lockheed Martin. The class is more focused than those we rejected in *Spano*, and it reflects *Spano*'s guidance about how to define a certifiable Section 502(a)(2) class. Notwithstanding these improvements, the district court thought that it still came up short, and so the court declined to certify the class. We granted Plaintiffs' petition under Federal Rule of Civil Procedure 23(f) to appeal that ruling. We now reverse, and we hope that our explanation for doing so will further refine the discussion we began in *Spano*.

I

A

Plaintiffs have brought a number of claims against Lockheed Martin Corporation and Lockheed Martin Investment Management Company (collectively, Lockheed) regarding the management of Lockheed's two retirement savings plans, the Salaried Savings Plan and the Hourly Savings Plan. (The two plans are indistinguishable for purposes of this appeal, and we refer to them collectively as the "Plan" from here on unless the distinction is relevant.) In general they allege that Lockheed breached its fiduciary duty to the Plan in a number of ways, in violation of Sections 409 and 502 of ERISA, 29 U.S.C. §§ 1109(a), 1132(a)(2)-(3). The Plan is a defined-contribution plan, often referred to as a 401(k), which allows employees to direct a portion of their earnings to a tax-deferred retirement savings account; the employee's contribution is often augmented by the employer. These plans offer a range of investment options to participants, who are permitted to allocate the funds in their accounts as they choose. Defined-contribution plans are common in this country, and they "play a vital role in the retirement planning of millions of Americans." *Spano*, 633 F.3d at 576.

Among the investment options Lockheed offered Plan participants was something called the "stable-value fund" (SVF). SVFs are recognized investment vehicles that are available only through employer-sponsored retirement plans and some college-savings plans. See, *e.g.*, Adam Zoll, *For Safety–First Savers, Stable–Value Funds Are Tough to Beat*, http://news.morningstar.com/articlenet/article.aspx?id=592164 (last visited Aug. 5, 2013). They typically invest in a mix of short- and intermediate-term securities, such as Treasury securities, corporate bonds, and mortgage-backed securities. Because they hold longer-duration instruments, SVFs generally outperform money market funds, which invest exclusively in short-term securities. *Id.* To provide the stability advertised in the name, SVFs are provided through "wrap" contracts with banks or insurance companies that guarantee the fund's principal and shield it from interest-rate volatility. *Id.*; see also Paul J. Donahue, *Plan Sponsor Fiduciary Duty for the Selection of Options in Participant–Directed Defined Contribution Plans and the Choice Between Stable Value and Money Market*, 39 AKRON L. REV. 9, 20–22 (2006).

Plaintiffs allege that the SVF that Lockheed offered through its Plan failed to conform to this general description. Rather than containing a mix of short- and intermediate-term investments, Lockheed's SVF was heavily invested in short-term money market investments. This resulted in a low rate of return, such that in Lockheed's own words, the SVF did "not beat inflation by a sufficient margin to provide a meaningful retirement asset." Plaintiffs contend that structuring the SVF in this manner amounted to imprudent management and violated Lockheed's duty to manage the Plan "with [ ] care, skill, prudence, and diligence under the circumstances." 29 U.S.C. § 1104(a)(1)(B).

B

Plaintiffs filed this suit in 2006. Lockheed eventually moved for summary judgment, and in March 2009 the district court granted the motion with respect to some claims and denied it for others. The SVF claim is one that survived. Several days later, the district court certified two classes under Federal Rule of Civil Procedure 23(b)(1)(A) and (B), one for the Salaried Savings Plan and one for the Hourly Savings Plan. Each class was certified for all claims. The Salaried Savings Plan class was defined as:

> All persons, excluding from the class defendants and/or other individuals who are or may be liable for the conduct described in the First Amended Complaint, who were or are participants or beneficiaries of the Salaried Plan and who were or may have been affected by the conduct set forth in the First Amended Complaint, as modified by subsequent court orders, as well as those who will

> become participants or beneficiaries of the Plan in the future.

The Hourly Savings Plan class definition was materially identical. Lockheed petitioned for permission to appeal the certification orders under Rule 23(f), which permits the courts of appeals to accept an interlocutory review of the grant or denial of class certification. We held the petition pending our decision in *Spano*. After *Spano* was issued, we vacated the district court's certification order and remanded for further proceedings.

On remand, Plaintiffs moved to modify the class definitions and to amend their complaint to add additional named plaintiffs to serve as class representatives. To conform to our statement in *Spano* that "a class representative in a defined-contribution case would at a minimum need to have invested in the same funds as the class members," *id*. at 586, Plaintiffs proposed separate classes for each of their remaining claims, with class membership in each one limited to those Plan participants who invested in the relevant funds during the class period. To conform to Spano's warning that the class must not be "defined so broadly that some members will actually be harmed" by the relief sought, *id*. at 587, Plaintiffs limited their definition of the SVF class to those who suffered damages as a result of Lockheed's purportedly imprudent management of the fund. To achieve this latter result, Plaintiffs proposed to use as a benchmark for class certification purposes the Hueler FirstSource Universe index (Hueler Index). That index tracks the performance of a variety of stable value funds over time—as relevant here, throughout the class period. By providing a reference point for how an average, prudently managed stable value fund would have performed throughout the class period, Plaintiffs reasoned that the Hueler Index offered a reasonable counterfactual estimate of how Lockheed's SVF would have performed if not for Lockheed's imprudence. By limiting the SVF class to only those Plan participants who suffered harm under this measure, Plaintiffs further reasoned that they had avoided including anyone in the class who may have benefited from Lockheed's conduct. The new proposed class was as follows:

> All participants and beneficiaries of the [Salaried and Hourly Savings Plans] whose accounts held units of the [SVF] from September 11, 2000 through September 30, 2006 and whose SVF units underperformed relative to the Hueler FirstSource Index. Excluded from this class are the Defendants, other [Lockheed] employees with responsibility for the Plans' investment or administrative functions, and members of the Lockheed Martin Board of Directors.

The district court was still not satisfied with this narrowed class definition. It acknowledged that the class was "better-defined and more targeted" than both the previous class certified in the case and the classes in *Spano*, but it found that the SVF claim was "not suitable for class treatment" nevertheless. In the district court's view, including the Hueler Index in the class definition was an improper attempt to "use class certification to 'back door' a resolution of this contested issue [i.e., the proper measure of loss] in [Plaintiffs'] favor." The court concluded that Plaintiffs' SVF claims were not "typical" of those of the class, as required by Rule 23(a)(3). The district court also declined to certify the class provisionally under

Rule 23(c)(1)(C), which enables the district court to alter or amend any class definition at any point prior to final judgment. It took the position that certifying a class containing a reference to the Hueler Index was not an "inherently tentative" decision amenable to later modification.

Plaintiffs petitioned for permission to appeal under Rule 23(f). We granted permission with respect to the SVF claims. For the reasons discussed below, we now reverse and remand for further proceedings.

II

At the outset, we must address standing. Lockheed insists that the district court lacked subject-matter jurisdiction over the SVF claim because none of the original named plaintiffs had Article III standing to bring the action. Only one of the original named plaintiffs, Lloyd DeMartini, invested in the SVF at any point during the class period, and Lockheed asserts that he cannot show he was injured by his investment. Without injury, there can be no Article III standing, which requires a plaintiff to show an injury-in-fact that is fairly traceable to the defendant's conduct and that could likely be redressed by a favorable court decision. See, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *United States* v. *5 S. 351 Tuthill Rd., Naperville, Ill.*, 233 F.3d 1017, 1022 (7th Cir. 2000). Because we reject Lockheed's contention that DeMartini cannot show injury, we conclude that the district court's jurisdiction was proper. (In light of this conclusion, we need not, and do not, address Plaintiffs' argument that the later addition of David Ketterer, another SVF investor who indisputably has standing, as a named plaintiff cures any standing defect that may have existed at the outset of the case, nor do we explore the possibility that Article III standing is satisfied by Section 502(a)(2)'s express authorization of suit by any Plan member on behalf of the Plan.)

Lockheed bases its argument that DeMartini lacks standing on Plaintiffs' use of the Hueler Index to measure damages and define the SVF class. If damages are measured exclusively by the Hueler Index, DeMartini does not appear to have suffered any damages, since he invested in the SVF during a brief and apparently unusual period during which the Hueler Index did not outperform the SVF. Seizing on this, Lockheed concludes that DeMartini must be incapable of showing injury under any measure of damages. But this does not follow. As Plaintiffs emphasize throughout their briefs, the Hueler Index is intended only as a provisional estimate of damages, useful only as a mechanism to ensure that the class meets the requirements of Rule 23; by the time all is said and done, the damages measure will likely become more refined, and it is possible that DeMartini will be entitled to damages under whatever measure is used. This is just one of many instances in which we must resist the urge to make a preliminary question depend on the final resolution of the merits. See *Payton* v. *Cnty. of Kane*, 308 F.3d 673, 677 (7th Cir. 2002). Injury-in-fact for standing purposes is not the same thing as the ultimate measure of recovery. The fact that a plaintiff may have difficulty proving damages does not mean that he cannot have been harmed. DeMartini's lack of damages as measured by the Hueler Index suggests that he may have a problem proving the degree of his injury, but Lockheed overreads both Article III's injury-in-fact requirement and the facts in this case when it interprets the absence of damages under the Hueler Index as dispositive proof that DeMartini was not injured. (It is possible, for instance, that if the Plan had been managed prudently, it might have outperformed the Hueler Index at all times, and thus DeMartini would have done even better. All of that remains to be shown.)

It is often the case in class litigation that by the time the remedial phase is reached, some of the original plaintiffs will not be entitled to recover, either because they lost on the merits or because they cannot show damages. Sometimes the reason a particular plaintiff cannot recover may be related to one of the three Article III standing requirements: the plaintiff may not have shown that the defendant caused her injury (in which case, we could also say that her injury was not "fairly traceable" to the defendant), or she might have failed to show that she suffered an injury at all. But in such cases, the plaintiff has lost on the merits; we do not reach back in time and enter a judgment dismissing the case for want of an Article III case or controversy. Yet that is effectively what Lockheed is asking us to do here; it wants us to use the hindsight acquired as the claims in this case have evolved to find that there was never jurisdiction over the case to begin with. We have previously rejected this unworkable view of Article III standing, and we do so again here. See, *e.g.*, *Kohen* v. *Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) ("Jurisdiction established at the pleading stage by a claim of injury that is not successfully challenged at that stage is not lost when at trial the plaintiff fails to substantiate the allegation of injury; instead the suit is dismissed on the merits."); *Bruggeman ex rel. Bruggeman* v. *Blagojevich*, 324 F.3d 906, 909 (7th Cir. 2003) ("[I]f [a plaintiff's] claim has no merit, then he has not been injured by any wrongful conduct of the defendant; but if the consequence were that he lacked standing, then every decision in favor of a defendant would be a decision that the court lacked jurisdiction, entitling the plaintiff to start over in another court.").

Finally, Lockheed harps on the point that it is Plaintiffs' burden to show standing. That is true but irrelevant: Plaintiffs have satisfied that burden. Their complaint alleged that they were harmed by Lockheed's mismanagement of the SVF. This was sufficient to establish injury-in-fact for pleading purposes. See *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 ("general factual allegations of injury resulting from the defendant's conduct may suffice" to establish standing at the pleading stage); *Alliant Energy Corp.* v. *Bie*, 277 F.3d 916, 919–20 (7th Cir. 2002). Lockheed first challenged subject-matter jurisdiction in relation to the SVF claim in its motion for summary judgment, but it argued only that no plaintiff had shown that he was invested in the SVF at any point during the class period. This was incorrect, as Plaintiffs had already demonstrated through evidence that they attached to their motion for class certification; that evidence showed that DeMartini was invested in the SVF during the relevant period. This was all that was required to refute Lockheed's standing objection. See *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (plaintiff can satisfy burden to show standing at summary judgment by providing "specific facts" that support standing, which are accepted as true for purposes of summary judgment). At every step in the litigation, Plaintiffs have met their burden of demonstrating standing "in the same way as any other matter on which the plaintiff bears the burden of proof ... with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

III

A

Turning to the heart of the appeal, Plaintiffs ask us to reverse the district court's denial of class certification on the SVF claim. They argue that the proposed class, in accordance with our decisions in *Spano*, 633 F.3d 574 (7th Cir. 2011), and *Ross* v. *RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), vacated on other grounds, — U.S. —, 133 S.Ct. 1722, 185 L.Ed.2d 782 (2013), is precisely defined and carefully tailored to ensure that no plaintiff who may actually have benefited from Lockheed's management of the SVF will be swept into a class that seeks relief in which he has no interest (or may actively oppose). The district court did not necessarily disagree with this description. It was concerned instead that the reference in the class definition to the Hueler Index improperly prejudged the merits of the SVF claim. We review a denial of a motion for class certification for an abuse of discretion. *Messner* v. *Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012).

In concluding that the reference to the Hueler Index prejudged the merits of the SVF claim, the district court appears to have assumed that accepting the class definition also required him to accept the conclusion that the SVF was mismanaged because it underperformed relative to the Hueler Index. Any such assumption would be mistaken. It misunderstands both the nature of the SVF claim and the relation between the class definition and the merits. Plaintiffs are not arguing that the SVF was imprudently managed in violation of ERISA *because* it did not match or outperform the Hueler Index; rather, Plaintiffs allege that the SVF was imprudently managed because its mix of investments was not structured to allow the fund to beat inflation and therefore that it could not serve as a prudent retirement investment for Lockheed employees. If Plaintiffs prevail on this theory, they may offer the Hueler Index as one basis for calculating damages. For now, however, the reference to the Hueler Index in the class definition in no way binds the district court to the use of the Hueler Index as the damages measure should Plaintiffs prevail. If the court concludes that a different measure would be better, it is free to use one.

A decision on a class definition should not, in principle, influence the merits of the case. All class definitions allude to the merits, in that they assume either implicitly or explicitly that the defendant's conduct has adversely affected the defined group of people. Compare *Ross*, 667 F.3d at 903 (approving a class defined as "[a]ll current and former non-exempt employees of [defendant] who have worked at [one of defendant's] retail branch locations in Illinois at any time during the last three years, who were subject to [defendant's] unlawful compensation policies of failing to pay overtime compensation for all hours worked in excess of forty per work week"), and *Messner*, 669 F.3d at 810 (proposed class of "[a]ll persons or entities ... who purchased or paid for inpatient hospital services or hospital-based outpatient services directly from Northshore ... its wholly-owned hospitals, predecessors, subsidiaries, or affiliates ... from at least as early as January 1, 2000 to the present") (omissions in original). We do not worry that certifying a class in such cases somehow prevents the defendant from proving that it is not liable for unlawful conduct. The class definition is a tool of case management. It settles the question who the adversaries are, and so it enables the defendant to gauge the extent of its exposure to liability and it alerts excluded parties to consider whether they need to undertake separate actions in order to protect their rights. See *Payton*, 308 F.3d at 678. What it does not tell us is who will win the case. *Cf. Messner*, 669 F.3d at 823 (whether some class members' claims will fail on the merits is "a fact generally irrelevant to the district court's decision on class certification"); *Schleicher* v. *Wendt*, 618 F.3d 679, 687 (7th Cir. 2010) ("The chance, even the certainty, that a class will lose on the merits does not prevent its certification.") There is no cause for concern that certifying a particular class will bind the court when it comes time to resolve the case.

B

On the merits, Lockheed argues that the real problem with the proposed class definition is that it attempts to sneak into the case a theory of liability that was rejected at summary judgment. Lockheed contends that Plaintiffs are precluded from raising any claim that the SVF was imprudently managed. As it sees things, the sole theory still in the case rests on misrepresentation through omission: namely, that Lockheed allegedly inadequately disclosed the nature of the SVF to Plan participants. Because many misrepresentation claims are poorly suited to class treatment, accord *Spano*, 633 F.3d at 589, Lockheed urges us to find that the SVF claim is unsuitable for class treatment no matter how the class is defined. This argument fails on several levels.

First, Lockheed distorts Plaintiffs' SVF claim when it characterizes their theory as one in which the SVF was imprudently managed because it deviated from the mix of investments held by other funds bearing the “stable value” label. Plaintiffs’ claim is not so narrow. Plaintiffs allege that the SVF was an imprudent investment, full stop. They aim to show that the SVF was not structured to beat inflation, that it did not conform to its own Plan documents, and that Lockheed failed to alter the SVF’s investment portfolio even after members of its own pension committee voiced concerns that the SVF was not structured to provide a suitable retirement asset. The fact that the SVF’s investment mix apparently deviated from that of other, similarly named funds may be relevant evidence on which Plaintiffs will rely, but it does not exhaust their theory of imprudence.

From the First Amended Complaint through this appeal, Plaintiffs have made clear that they believe Lockheed’s management of the SVF violated ERISA because “it was an imprudent investment for participants.” This allegation appears, among other places, in the First Amended Complaint, the original motion for class certification, Plaintiffs’ opposition to summary judgment, the Second Amended Complaint, Plaintiffs’ amended motion for class certification, and finally Plaintiffs’ appellate briefs. They allude rarely, if at all, to misrepresentation.

Most importantly, Lockheed’s argument that the district court rejected Plaintiffs’ imprudent management claim at summary judgment is belied by the record. The district court’s order denying summary judgment on the SVF claim reads in its entirety: “Defendants’ motion is DENIED as to their claim that the Stable Value Fund was properly disclosed to Plan participants and was a prudent investment option for them.” All this order says is that the imprudent management claim survives. (Lest there be any doubt, the district court referred again to the imprudent management claim in its class certification decision when it stated that among Plaintiffs' surviving claims was the question "whether the Stable Value Fund [ ] was properly disclosed to Plan participants and was a prudent investment option for them.")

Lockheed ignores this language and instead points to isolated statements from the court's summary judgment memorandum to support its contention that the court implicitly foreclosed the imprudent management claim. It leans heavily on the district court's discussion of *DeBruyne* v. *Equitable Life Assurance Society*, 920 F.2d 457 (7th Cir. 1990), reasoning that the district court's acknowledgment of DeBruyne 's holding can only mean that it rejected a theory of imprudent management that relies on evidence that other stable value funds had a different mix of investments from the SVF. This interpretation stretches both the district court's order and DeBruyne beyond what either can bear.

DeBruyne arose out of the "Black Monday" stock market crash of 1987. *Id.* at 461. The plaintiffs were investors in an American Bar Association-sponsored retirement fund known as the "Balanced Fund," which purported to offer a balanced mix of low- and high-risk investments. *Id.* at 460. After losing money in the 1987 crash, the plaintiffs sued, claiming that the Balanced Fund did not contain the mixture of investments advertised in the plan documents and was not prudently managed. *Id.* at 462. Their sole evidence backing up these assertions was an expert report that included: (a) a comparison of the Balanced Fund's losses with those of other, similarly named funds; (b) a calculation of the Balance Fund's investment risk for several years in the 1980s (though not for 1987, the critical year in the case); and (c) an unsupported claim that the Balanced Fund was not constituted in the way a "typical" balanced fund would have been managed in 1987. *Id.* at 462–63. Unswayed by this submission, the district court granted summary judgment to the defendants.

This court affirmed. We noted that the plaintiffs could not show that the Balanced Fund was improperly managed based only on an expert's say-so. *Id.* at 464. We also observed that the defendants did not "on using the term 'balanced,' become wed to a pre-established definition that could not be changed by disclosure." *Id*. The expert's statement about what a "typical" fund manager would have done in 1987, we concluded, "say[s] little about the wisdom of [defendant's] investments, only that [defendants] may not have followed the crowd." *Id.* at 465.

These are the statements from *DeBruyne* to which Lockheed clings. Even in isolation they do not carry the day for Lockheed, and other aspects of the case show that its holding is far narrower than Lockheed asserts. The defendants in DeBruyne submitted evidence that their fund's composition was in line with several recognized definitions of the term "balanced" used in the industry, as well as that of many other balanced funds. *Id.* at 464. The opinion discussed this evidence twice and relied on the fact that the plaintiffs offered nothing to rebut it; their silence indicated that the defendants' evidence was both relevant and probative. *Id.* at 464–65. In addition, it is not clear that the expert in *DeBruyne* actually offered any evidence that the Balanced Fund contained an unusual mixture of investments relative to other "balanced" funds; the only concrete comparison the expert offered was of such funds' *losses*, but this says nothing about the composition of the funds. *Id.* at 462–63. Indeed, the expert's conclusion that the management of the Balanced Fund was not "typical" does not appear to have been based on any evidence whatsoever. *Id. DeBruyne* does not support Lockheed's sweeping and counterintuitive proposition that the makeup and performance of similar funds is irrelevant to an imprudent management claim.

In any event, the district court did not hold that *DeBruyne* precludes Plaintiffs from arguing that Lockheed's SVF was imprudent by relying on evidence of the composition of other stable value funds. It said only that "[a]s in *DeBruyne*, using the term 'stable value' does not 'wed' the Fund to a specific mix of investments. That does not mean, however, that the Fund need not be managed with care and prudence." This statement does not bar Plaintiffs from pursuing their claim of imprudent management, nor does it bar them from presenting their case in any particular manner.

C

Because Plaintiffs' proposed class definition was crafted with *Spano* in mind, we take a moment to explain why our decision to uphold the class definition now before us is consistent with that case. In *Spano*, the district court had certified classes in two separate cases, *Spano* v. *Boeing Co.* (No. 09–3001), and *Beesley* v. *International Paper Co.* (No. 09–3018); both cases involved alleged breaches of fiduciary duty in violation of ERISA Sections 409 and 502(a)(2)-(3). 633 F.3d at 576–77. The class definitions in each case were extraordinarily broad and essentially identical to one another. The class in *Spano* was defined to include:

> All persons, excluding the Defendants and/or other individuals who are or may be liable for the conduct described in this Complaint, who are or were participants or beneficiaries of the Plan and who are, were or may have been affected by the conduct set forth in this Complaint, as well as those who will become participants or beneficiaries of the Plan in the future.

Id. at 577. On top of these "breathtaking[ly]" broad definitions, id. at 586, the allegations in both complaints were somewhat vague. In *Spano*, the plaintiffs objected to the inclusion of certain funds in the plan, but it was unclear exactly which ones or why. *Id.* Meanwhile, in *Beesley*, the plaintiffs objected to various misrepresentations and allegedly excessive administrative fees, but it was impossible to pin down how many misrepresentations the plaintiffs accused International Paper of making or whether the challenged fees applied to specific investment options or to the plan as a whole. *Id.* at 589–90.

The combination of exceedingly broad class definitions and murky claims made it difficult to assess the district court's certification orders. *Id.* at 586. Against that background, we were certain only that the particular classes before us could not stand. While we may have offered some guidance for how to approach class certification in actions under Section 502(a)(2), we emphasized that we were deciding only the cases before us. *Id.* at 578 ("We are not here to review any or all hypothetical orders that the court might have crafted."); *id.* at 588 ("Nothing we have said should be understood as ruling out the possibility of class treatment for one or more better-defined and more-targeted classes.").

It is against this backdrop that readers must understand *Spano* and its warnings that plaintiffs and courts must take care to avoid certifying classes in which a significant portion of the class may have interests adverse to that of the class representative. See, *e.g.*, *id.* at 587 ("It is not enough to say that the named plaintiffs want relief for the plan as a whole, if the class is defined so broadly that some members will actually be harmed by that relief."); *id.* at 591 ("[A] fund that turns out to be an imprudent investment over a particular time for one participant may be a fine investment for another participant who invests in the same fund over a slightly different period. If both are included in the same class, a conflict will result and class treatment will become untenable."). Given the breadth of the classes at issue in *Spano* and the vagueness surrounding plaintiffs' claims, we were concerned that intra-class conflict of the sort that defeats both the typicality and adequacy-of-representation requirements of Rule 23(a) was all but inevitable. In such cases, a district court should not certify a class that fails to address that danger (say, through the use of subclasses or by defining the class more narrowly). But this court has never held, and *Spano* did not imply, that the mere possibility that a trivial level of intra-class conflict may materialize as the litigation progresses forecloses class certification entirely. See, *e.g.*, *Johnson* v. *Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 372 (7th Cir. 2012) ("It is premature to declare the alleged conflicts of interest an insoluble bar to the class action."); *Kohen*, 571 F.3d at 680 ("At this stage in the litigation, the existence of such conflicts is hypothetical. If and when they become real, the district court can certify subclasses with separate representation of each....”). This is as true in the Section 502(a)(2) context as in any other area.

The appropriateness of class treatment in a Section 502(a)(2) case (as in other class actions) depends on the claims for which certification is sought. Here, the specifics of the SVF claim make it unlikely that the sorts of conflicts that concerned us in *Spano* will arise. Plaintiffs emphasize that a Section 502(a)(2) action seeks only to make the fiduciary refund to the Plan any losses caused by the breach. 29 U.S.C. § 1109(a) (“Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach....”). There appears to be no risk that any SVF investor who benefited from Lockheed’s imprudent management would have her Plan assets reduced as a result of this lawsuit. Moreover, unlike many imprudent management claims—in which the allegation is that fraud or undue risk inflated the value of a fund and then caused it to crash, see, *e.g.*, *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 592 (3d Cir. 2009)—Plaintiffs’ allegation is that the SVF was so low-risk that its growth was insufficient for a retirement asset. A very low-risk fund is by nature not subject to the wide swings in value that would enable some investors to reap a windfall from a fund’s mismanagement. Finally, the fact that the SVF underperformed relative to the Hueler Index for all but a very brief portion of the class period reinforces the intuition that few, if any, SVF investors profited from Lockheed’s conduct. Should any of these statements turn out to be wrong, the district court can make further adjustments to the class definition later.

Finally, we repeat that this class definition is considerably narrower than those at issue in *Spano*. Plaintiffs have taken care to limit the class to those Plan participants who invested in the SVF during the class period. Their reference to the Hueler Index is one reasonable way to exclude from the class any persons who did not experience injury. These details make all the difference. We conclude both that *Spano* poses no bar to the proposed SVF class and that the district court's reservations about the class were unfounded. We leave it to the district court to decide in the first instance whether the remaining requirements for class certification have been met.

IV

We note in concluding that, to the extent the district court had concerns that the proposed class definition might not align with the ultimate outcome of the case, it may have misapprehended its authority under Rule 23(c)(1) to alter or amend its class certification order before final judgment. The district court thought itself foreclosed from this option because ruling on the class definition would not be the sort of "inherently tentative" decision amenable to later modification. But there is nothing more permanent about this proposed class definition than any other. As we explained above, adopting Plaintiffs' class definition in no way binds the district court when it comes time to rule on the merits, and we cannot detect any other feature of this class that removes it from eligibility for adaptation.

The order denying class certification for the proposed SVF class is REVERSED and the case is REMANDED for further proceedings.

APPENDIX B

In the United States District Court
for the Southern District of Illinois

Case No. 06-cv-0701-MJR

ANTHONY ABBOTT, ERIC FANKHAUSER, LLOYD DEMARTINI, JACK JORDAN, DENNIS TOMBAUGH, DAVID KETTERER AND ROGER MENHENNETT, individually and on behalf of all those similarly situated,

Plaintiffs,

v.

LOCKHEED MARTIN CORPORATION and LOCKHEED MARTIN INVESTMENT MANAGEMENT COMPANY,

Defendants.

Memorandum and Order

REAGAN, District Judge:

I. INTRODUCTION

This matter is before the Court on Plaintiffs' Amended Motion for Class Certification (Doc. 343). Plaintiffs Anthony Abbott, Eric Fankhauser, Lloyd DeMartini, Jack Jordan, Dennis Tombaugh, David Ketterer and Roger Menhennett are participants in the Salaried Savings Plan ("SSP") and/or the Hourly Employee Savings Plan Plus ("HSP") for which Defendant Lockheed Martin Corporation ("LMC") is the plan sponsor and a named fiduciary. Defendant Lockheed Martin Investment Management Company ("LMIMCo"), a wholly-owned subsidiary of LMC, is responsible for the Plans' investments and the appointment, removal, and replacement of investment managers and trustees. LMIMCo is also a named fiduciary for the Plans.[1]

Pursuant to 29 U.S.C. § 1132(a)(2) and (3), Plaintiffs bring suit on behalf of themselves and all those similarly situated for breach of the fiduciary duties imposed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002 *et seq.* ("ERISA"). Plaintiffs allege that the fiduciaries of the Plans breached their duties under ERISA, resulting in lost retirement savings of hundreds of millions of dollars.

This Court enjoys subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). Venue is proper pursuant to 29 U.S.C. § 1132(e)(2).

This case was filed on September 11, 2006. Since then, Plaintiffs have twice amended their complaint, and the Court has narrowed their claims to three: (1) whether excessive fees paid by the Plans provide a basis for Plaintiffs' fiduciary breach claim; (2) whether the Stable Value Fund ("SVF") was properly disclosed to Plan participants and was a prudent investment option for them; and (3) whether the Company Stock Funds ("CSF") were a prudent investment option for Plan participants.

This Court previously granted class certification as to Plaintiffs' excessive fees and SVF claims and denied class certification as to the CSF claims. LMC thereafter petitioned for an interlocutory appeal of the grant of class certification, and Plaintiffs cross-

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[1] Except where specificity is required, the Court will refer to Defendants collectively as "LMC."

petitioned as to their claim that was denied. The United States Court of Appeals for the Seventh Circuit granted LMC's petition, denied Plaintiffs' cross-petition, and vacated and remanded the class certification order. *In re Lockheed Martin Corp.*, 412 Fed.Appx. 892 (7th Cir. 2011). The Seventh Circuit directed that the parties and the Court should be guided by its decisions in *Spano* v. *The Boeing Co.*, 633 F.3d 574 (7th Cir. 2011), and *Howell* v. *Motorola, Inc.*, 633 F.3d 552 (7th Cir. 2011), in arguing and resolving issues related to class certification. *In re Lockheed Martin Corp.*, 412 Fed.Appx. at 893.

Plaintiffs thereafter filed a renewed motion for class certification (Doc. 343). For the reasons that follow, the Court **GRANTS in part and DENIES in part** Plaintiffs' motion.

II. DISCUSSION

Class certification is governed by Federal Rule of Civil Procedure 23. A plaintiff must demonstrate that he satisfies all of the requirements of Rule 23(a): numerosity, commonality, typicality and adequacy of representation; and one of the requirements of Rule 23(b). *See Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Williams* v. *Chartwell Fin. Servs., Ltd.*, 204 F.3d 748, 760 (7th Cir. 2000). The plaintiff bears the burden to "affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal–Mart Stores, Inc.* v. *Dukes*, ––– U.S. ––––, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) (emphasis in original).

In challenges involving defined-contribution pension plans, "[t]he question whether to certify a class ... is ... a complex one" that "will turn on the circumstances of each case." *Spano*, 633 F.3d at 582. "[S]ome of the determinations required by Rule 23 cannot be made without a look at the facts." *Id.* at 583; *see also id.* at 591 ("… short-cuts in the class certification process are not permissible"). Assessing a plaintiff's motion for class certification requires the Court to engage in "a rigorous analysis" to determine whether "the prerequisites of Rule 23(a) have been satisfied." *Wal–Mart*, 131 S.Ct. at 2551, *quoting Gen. Tel. Co. of S.W.* v. *Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). If a court deems certification appropriate, "an order (or incorporated opinion) must include two elements: '(1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis.' " *Ross* v. *RBS Citizens, N.A.*, 667 F.3d 900, 905 (7th Cir. 2012), *quoting Wachtel ex rel. Jesse* v. *Guardian Life Ins. Co.*, 453 F.3d 179, 187–88 (3d Cir. 2006). As the Seventh Circuit has admonished, clarity in class certification orders is essential to facilitate appellate review. *Id.*, *citing* Comm. on Rules of Practice and Procedure, *Report of the Judicial Conference* 8, 11 (Sept. 2002); *see Spano*, 633 F.3d at 589.

A. Excessive Fees Class

Plaintiffs seek to certify a plan-wide class on the basis that the Plans caused them to incur unreasonable administrative expenses. In compliance with *Spano*, the Excessive Fees Class is temporally limited. 633 F.3d at 583–84. The class period begins on the earliest date allowed by the Court's summary judgment order applying ERISA's six-year statute of limitations (Doc. 226 at 12). *See* 29 U.S.C. § 1113. The class period ends on the discovery cut-off date

(Doc. 108). Plaintiffs request certification of the following class:

> All participants and beneficiaries of the Lockheed Martin Corporation Salaried Savings Plan and the Lockheed Martin Corporation Hourly Savings Plan from September 11, 2000 through December 22, 2008, excluding the Defendants, other LMIMCo or Lockheed Martin employees with responsibility for the Plans' investment or administrative functions, and members of the Lockheed Martin Board of Directors.

1. Numerosity

Rule 23(a)(1) requires that the class must be "so numerous that joinder of all members is impracticable." This is not an onerous burden since "courts have found the numerosity element satisfied where the putative class would number in the range of as few as ten to forty class members." *Cima* v. *WellPoint Health Networks, Inc.*, 250 F.R.D. 374, 378 (S.D.Ill.2008). Here, the Plans had more than 100,000 participants. That is sufficient to satisfy the requirement of Rule 23(a)(1).

2. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." "It is enough that there be one or more common questions of law or fact." *Spano*, 633 F.3d at 585. In a defined-contribution plan, "fund participants operate against a common background." *Id.* As to fees, Plaintiffs challenge, at least in part, the propriety of fees that were charged to every participant in the Plans.[2] That is sufficient to satisfy the requirement of Rule 23(a)(2).

3. Typicality

Rule 23(a)(3) provides that the "claims … of the representative parties" must be "typical of the claims ... of the class." To satisfy this requirement, "there must be enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group." *Id.*, 633 F.3d at 586.

In *Spano*, the Seventh Circuit explained that determining whether a plan-wide class is suitable depends on whether fees are "fund-specific," in which case a plan-wide class would be inappropriate, or "imposed equally on every plan participant," in which case a plan-wide class would be warranted. *Id.* at 590. The court emphasized that "[p]recision on this point is essential to ensure that the class representative's claim is typical." *Id.*

Here, a plan-wide class is warranted because the claimed excessive fees were imposed on all participants uniformly, as opposed to being charged on a fund-specific basis. *See id.* Plaintiffs have specified that the disputed administrative fees were charged to each participant as a uniform percentage of the participant's total account value and did not vary by fund. To the extent that there are differences among class members' damages, those differences would be a product of mathematics based on their account balances in the Plans. Because every participant paid a

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[2] Plaintiffs' Second Amended Complaint identifies 18 common issues of law or fact.

portion of the alleged excessive fee, any participant's claim is typical of the class. *See id.* at 590.

As limited, the claim is that the fee characterized as an administrative expense was an unreasonable expenditure for Plan participants. Since Plaintiffs' challenge is to the sum of plan-wide fees, it does not include revenue sharing, which did not exist for every fund option and for which the amount varied.[3] LMC agrees that Plaintiffs satisfy the typicality requirement as to their overall fees challenge since their claim is limited to the administrative fees charged to each Plan participant as an annual percentage of his assets and they do not incorporate revenue sharing into their analysis.

Plaintiffs have identified each of the named Plaintiffs as a class representative for the fees class. LMC has challenged the appropriateness of only one of those Plaintiffs, Menhennett. LMC contends that Menhennett is not typical (or adequate, for that matter), because he executed a release of his claims in connection with his termination.

On July 9, 2012, the Court denied Plaintiffs' motion to exclude the undisclosed release of claims and concluded that the release Menhennett signed in May 2010 is valid and applicable to his claim (Doc. 366).

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[3] In this context, revenue sharing is indirect compensation—or indirect use of fund assets—for investment adviser fees. State Street Bank and Trust Company, with its affiliates, served as trustee and recordkeeper for the Plans as well as the investments manager for several of the Plans' investment fund offerings. State Street received direct compensation from Defendants as well as revenue sharing from certain of the Plans' outside investment managers.

As the Seventh Circuit recently recognized, a release is effective in an ERISA case if it was "made knowingly and voluntarily," *Howell*, 633 F.3d at 559. "The presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation." *CE Design Ltd.* v. *King Architectural Metals, Inc.*, 637 F.3d 721, 726 (7th Cir. 2011), *quoting J.H. Cohn & Co.* v. *American Appraisal Assocs.*, 628 F.2d 994, 999 (7th Cir. 1980).

The evidence shows that Menhennett knowingly and voluntarily signed a release of his claims in connection with his termination. This defense would destroy the required typicality of the class and call into question the adequacy of his representation. As a result, Menhennett does not meet the requirements of typicality (or adequacy) to serve as a class representative in the excessive fees class or any other class for which Plaintiffs seek certification.

The Court concludes that Abbott, Fankhauser, DeMartini, Jordan, Tombaugh, and Ketterer satisfy the typicality requirement, but Menhennett does not. Menhennett is excluded as a class representative.

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." In order to satisfy the requirements of Rule 23(a)(4), the class representative must " 'possess the same interest and suffer the same injury as the class members.' " *Uhl* v. *Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 985 (7th Cir. 2002), *quoting E. Tex. Motor Freight Sys. Inc.* v. *Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977). Accordingly, in evaluating adequacy, a court must make sure that there are no inconsistencies between the interests of the named party and the class that he or she represents. *Uhl*, 309 F.3d at 985, (*citing Amchem Prods.*, 521 U.S. at 625, 117 S.Ct. 2231).

Plaintiffs have identified all of the named plaintiffs as class representatives for the fees class. The Court concludes that Abbott, Fankhauser, DeMartini, Jordan, Tombaugh and Ketterer satisfy the adequacy requirement. As above, the Court excludes Menhennett as a class representative.

5. Rule 23(B)

Having determined that the requirements of Rule 23(a) are satisfied as to the excessive fees claim, the Court turns to the question of whether a class action can be maintained under one of Rule 23(b)'s three subsections. Rule 23(b) authorizes certification of a class action if the prerequisites of subdivision (a) are satisfied, and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests....

In this case, the Court finds—and LMC does not dispute—that the failure to certify the proposed class would result in inconsistent or varying adjudications with respect to the individual members of the class, which would establish incompatible standards of conduct for LMC, thereby making this action appropriate for certification under Rule 23(b)(1)(A). In addition, adjudications with respect to individual members of the proposed class would, as a practical matter, be dispositive of the interests of the other members who are not parties to the adjudication or substantially impair or impede their ability to protect their interests, making certification under Rule 23(b)(1)(B) appropriate as well.

6. Rule 23(G)

Having determined that Plaintiffs' excessive fees claim is appropriate for class certification, the Court must also address the adequacy of counsel. Rule 23(g) provides, in pertinent part,

(1) **Appointing Class Counsel**. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class; ...

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class; …

Plaintiffs ask the Court to appoint Schlichter, Bogard & Denton, LLP, as class counsel for the same reasons as set forth in its previous class certification motion. LMC does not object. As the Court has previously observed, this firm has extensive experience in litigating large and complex class actions and has been designated as class counsel in similar breach of fiduciary duty cases filed in this District. The Court concludes that the firm of Schlichter, Bogard & Denton is adequate to serve as class counsel for the excessive fees class.

B. Stable Value Fund

In the SVF claim, Plaintiffs contend that LMC imprudently managed the Plans' SVF option by investing excessively in money market investments as opposed to stable value products that would have provided the Fund higher returns without significantly higher risk. In compliance with *Spano*, the SVF Class is temporally limited. 633 F.3d at 583–84. The class period begins on the earliest date allowed by the Court's summary judgment order applying ERISA's six-year statute of limitations. Doc. 226 at 12, *citing* 29 U.S.C. § 1113. The class period ends on the date Plaintiffs concede the composition of the SVF was changed in order to generate sufficient returns, such that class members ceased to suffer losses. For their SVF claims, Plaintiffs seek the certification of the following class:

> All participants and beneficiaries of the Lockheed Martin Corporation Salaried Savings Plan and the Lockheed Martin Corporation Hourly Savings Plan whose accounts held units of the Stable Value Fund (SVF) from September 11, 2000 through September 30, 2006 and whose SVF units underper-

> formed relative to the Hueler FirstSource Index. Excluded from this class are the Defendants, other LMIMCo or Lockheed Martin employees with responsibility for the Plans' investment or administrative functions, and members of the Lockheed Martin Board of Directors.

In this Court's first order on class certification, a plan-wide class was approved for purposes of the SVF claims. The Court must now reconsider that decision in light of Spano and the changes to Plaintiffs' claim and class definition.

1. Numerosity And Commonality

LMC does not dispute that the SVF satisfies the requirements of numerosity and commonality. The Court agrees that these requirements are satisfied. Plaintiffs estimate that the SVF Class contains more than 50,000 members (more than 50,000 SSP participants and 6,000 HSP participants in 2005 alone). That estimate is supported by the declaration of an expert witness, Steve Pomerantz, Ph.D. Doc. 344–2, ¶ 7 (estimating approximately 50,000 participants per year during the class period). Moreover, Plaintiffs' challenge to the SVF Fund as a whole raises at least one common question that satisfies the requirement of commonality, such as whether LMC breached its fiduciary duties under 29 U.S.C. § 1104(a)(1) in its management of the SVF and what prudent alternative exists by which to determine the Plans' losses under 29 U.S.C. § 1109(a), from which each class member will derive his or her individual loss.

2. Typicality And Adequacy

As to typicality and adequacy, there are three points of dispute: (1) whether Plaintiffs' claims are suitable for class treatment, (2) whether the proposed class representative, David Ketterer, has standing to raise those claims and (3) whether considerations as to Ketterer preclude certification. Because the Court finds that Plaintiffs' claims are not suitable for class treatment, it will not reach the question of whether the sole proposed class representative, Ketterer, has standing to bring these claims or is otherwise precluded from serving as a class representative.

The "claims … of the representative parties" must be "typical of the claims … of the class[.]" Fed. R. Civ. P. 23(a)(3). Claims are typical when they arise "from the same event or practice or course of conduct that gives rise to the claims of other class members and [the] claims are based on the same legal theory." *Arreola* v. *Godinez*, 546 F.3d 788, 798 (7th Cir. 2008) (quotation marks and citation omitted). Typicality "should be determined with reference to the [defendants'] actions, not with respect to particularized defenses [they] might have against certain class members [.]" *CE Design*, 637 F.3d at 725, *quoting Wagner* v. *NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996). To satisfy typicality in an ERISA fiduciary breach case, "there must be a congruence between the investments held by the named plaintiff and those held by members of the class he or she wishes to represent." *Spano*, 633 F.3d at 586.

Plaintiffs claim that LMC failed to administer the SVF option prudently and failed to bolster returns beyond money market levels, as Plan documents required. Plaintiffs assert that LMC failed to perform proper oversight and make necessary changes to the Plans, or to make those changes in a timely manner. Plaintiffs also contend that the managers of the SVF heavily invested in short-term money market funds, as a result of which, the SVF was a very low-yielding fund that greatly underperformed an index of stable value funds. This caused Plan participants' investment to fail to keep pace with inflation, and participants were damaged thereby.

Ketterer invested in the SVF during the class period and suffered losses under the class's measure of plan losses (Doc. 344–2 at 6–7 ¶¶ 14–15). As such, he asserts claims that are typical of the class because the class is defined as those participants who suffered losses under the above-described theory of the case. According to Plaintiffs, the same course of conduct by LMC gives rise to the claims of all members of the class, as limited, and those claims are all based on the same legal theory. *See Arreola*, 546 F.3d at 798.

The Court agrees with Plaintiffs that their proposed classes are "better-defined and more-targeted," as required by *Spano,* 633 F.3d at 588. Nevertheless, a fundamental problem exists with the class definition that leads the Court to conclude that the class, as defined, cannot be certified. Plaintiffs have divided SVF investors into two categories: those whose investments outperformed the Hueler FirstSource Index[4] (those who might have had "no complaint"

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[4] "FIRSTSource Index is the first relevant pool of aggregate industry data on returns for stable value separate accounts. Index data encompasses approximately 150 plans and has been complied [sic] from numerous stable value investment management firms and several independent plan sponsors with assets totaling approximately $85 billion." http://www.hueler.com/firstsource.htm.

with the SVF) and those whose investments underperformed that benchmark within the six-year class period.

By framing the class in this way, Plaintiffs attempt to describe a class that would comport with the Seventh Circuit's determination that "[a] claim of imprudent management … is not common if the alleged conduct harmed some participants and helped others[.]" *Spano*, 633 F.3d at 588. In other words, Plaintiffs seek to avoid an intra-class conflict by identifying and excluding those participants who *benefited* from the SVF. *See id.* at 591.

In attempting to resolve this issue, Plaintiffs have created other issues, equally serious. Setting the Index as the exemplar by which to judge stable value funds is analogous to the failed attempt by the plaintiffs in *DeBruyne* to compare the percentage loss of the Equitable Balanced Fund with the percentage gains and losses of 22 other publicly-traded balanced funds. *DeBruyne* v. *Equitable Life Assur. Soc. of U.S.*, 920 F.2d 457, 462 (7th Cir. 1990). The Seventh Circuit reasoned, "Hanan's [plaintiffs' expert's] assertions of what a 'typical' balanced fund portfolio manager might have done in 1987 say little about the wisdom of Equitable's investments, only that Equitable may not have followed the crowd." *Id.* at 465. Although the plaintiffs (and Hanan) argued that the balanced fund was "out of balance," the Court observed that plaintiffs "did not invest in Hanan's balanced fund, they invested in Equitable's Balanced Fund and the Plan gave Equitable freedoms that Hanan simply ignore[d]." *Id.* at 464.

As applied here, Plaintiffs' claiming that a typical stable value fund would have achieved a particular return, as shown by reference to the Hueler Index, says little about the wisdom of LMC's investments. *See id.* at 465. Furthermore, participants chose the level of risk and return that they were willing to accept, based on Plan documents. On this issue, the Court finds compelling the Declaration of Lassaad Turki, LMC's expert witness, who opined that to suggest that an alternative stable value fund would have offered superior returns without increased risk defies basic economic principles and the reality of the SVF's structure. There is no evidence to show that rather than investing in the SVF, participants would have invested in a fund with 40% or less money market holdings (the Index benchmark), and no showing that this percentage is "prudent." Moreover, reference to the Index serves to highlight the reason for the intra-class conflict: some participants benefited from the SVF because their SVF investments outperformed the Index.

Like the plaintiffs in *George* v. *Kraft Foods Global, Inc.*, 2011 WL 5118815 (N.D.Ill.2011), who relied on Vanguard Funds as their comparators, Plaintiffs' choice of the Hueler Index as the comparator for purposes of the class definition "builds into the class definitions assumptions about the complicated and unsettled issues of loss and causation." *George*, 2011 WL 5118815, at *8. In *George*, the plaintiffs sought to include in the class only those "harmed" by the defendants' alleged fiduciary breach. *Id.* So, the plaintiffs limited the proposed classes to participants whose investments underperformed in comparison to Vanguard Funds. *Id.* Consequently, the class definition assumed that underperformance of the Fund in comparison with Vanguard Funds was the proper measure of loss. However, whether the proper measure of performance and loss was to be determined by comparison to the Vanguard Funds was unresolved, and the plaintiffs could not use class certification to "backdoor" a resolution of this contested issue in their favor. *Id.* The George court then noted that the Supreme Court in *Wal–Mart*, 131 S.Ct. 2541, and the Seventh Circuit in *Spano* had emphasized that it is the plaintiffs' burden to "affirmatively demonstrate" that the proposed class definition is appropriate. *Id.*

Plaintiffs herein have limited the proposed classes to participants whose investments underperformed in comparison to Hueler Index. But it is yet to be determined whether the proper measure of performance and loss is to be made by that comparison. It remains unresolved whether the Index is the appropriate benchmark by which to judge whether the SVF was an imprudent investment option.

Plaintiffs argue that the Court need not make this determination at this stage of the litigation. *Citing Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 n. 11, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) and Fed. R. Civ. P. 23(c)(1)(C), Plaintiffs assert that, since the Court can amend class certification at any time, the current class definition necessarily is tentative until the merits question is resolved. They submit that LMC is free to argue for a different method for calculating plan losses if LMC is found to have breached its fiduciary duties.

But the decision that the Hueler Index is not an appropriate measure of damages is not the sort of decision that is "inherently tentative." *See Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 277, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988). In other words, it is not a decision that the court "ordinarily would expect to reassess and revise ... in response to events occurring 'in the ordinary course of litigation.' " 485 U.S. at 277, 108 S.Ct. 1133, *quoting*

Moses H. Cone Memorial Hospital v. *Mercury Construction Corp.*, 460 U.S. 1, 13, n. 14, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). And even though it would be, as Plaintiffs contend, LMC's burden to prove that losses are less than what Plaintiffs assert, Plaintiffs must, in the first instance, carry their burden of affirmatively demonstrating that the proposed class definition is appropriate.

Plaintiffs have not satisfied the typicality requirement as to their SVF theory, and their motion for class certification as to this Fund must be denied. This is not to say that it would be impossible to certify an SVF class, only that Plaintiffs have not now articulated a certifiable claim as to the prudence of the SVF.

C. Company Stock Fund ("CSF")

Plaintiffs contend that LMC imprudently managed the Plans' CSF options by holding excessive amounts of cash and incurring excessive expenses that diluted participants' returns from what was supposed to be an investment in Lockheed Martin stock. In compliance with *Spano*, the CSF Class is temporally limited. 633 F.3d at 583–84. The class period begins on the earliest date allowed by the Court's summary judgment order applying ERISA's six-year statute of limitations (Doc. 226 at 12). *See* 29 U.S.C. § 1113. The class period ends on the discovery cut-off date (Doc. 108). Plaintiffs seek to certify two subclasses of investors in the CSF:

> **CSF subclass, September 2000—July 2002:** All participants and beneficiaries of the Lockheed Martin Corporation Salaried Savings Plan and the Lockheed Martin Corporation Hourly Savings Plan whose accounts held units of the Company Common

Stock Fund, Hourly ESOP, or Salaried ESOP, and whose units underperformed relative to Lockheed Martin Common Stock, from September 11, 2000 through July 31, 2002. Excluded from this class are participants who bought and sold units in those funds within a 48–hour period. Further excluded from this class are the Defendants and other LMIMCo or Lockheed Martin employees with responsibility for the Plans' investment or administrative functions, and members of the Lockheed Martin Board of Directors.

CSF subclass, August 2002—December 2008: All participants and beneficiaries of the Lockheed Martin Corporation Salaried Savings Plan and the Lockheed Martin Corporation Hourly Savings Plan whose accounts held units of the Company Common Stock Fund, Hourly ESOP, or Salaried ESOP, from August 1, 2002 through December 22, 2008, and whose units underperformed relative to Lockheed Martin Common Stock. Excluded from this class are the Defendants and other LMIMCo or Lockheed Martin employees with responsibility for the Plans' investment or administrative functions, and members of the Lockheed Martin Board of Directors.

All of the Plaintiffs except Jack Jordan seek to represent this class.[5]

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[5] DeMartini, Menhennett, Ketterer, Tombaugh, and Fankhauser all invested in the salaried employees' ESOP. *Id.* ¶ 24. Abbott invested in the hourly employees' ESOP. *Id.*

1. Numerosity

The Court finds that the numerosity requirement is met as to the subclasses. Plaintiffs have produced evidence that each subclass includes thousands of participants from throughout the United States. LMC does not dispute this finding. Both of the CSF subclasses satisfy Rule 23(a)(1). *See Spano*, 633 F.3d at 585.

2. Commonality

The Court finds that the CSF subclasses include common questions of law and fact. These questions include whether LMC mismanaged the CSFs and what is the proper measure of the losses to the Plans that LMC would have to make good under § 1109(a). LMC does not dispute this finding. Both of the CSF subclasses satisfy Rule 23(a)(2). *See Spano*, 633 F.3d at 585–86, 588–89.

3. Typicality

By creating two subclasses and excluding from the September 2000–July 2002 subclass those participants who bought and sold units in the CSF within a 48–hour period, Plaintiffs attempt to cure the day-trader problem which the Court found precluded certification of this class in its prior class certification order (Doc. 239, pp. 11–14). The first subclass ends and the second subclass begins on the date that, according to Plaintiffs, LMC implemented changes to the Plans that resolved the day-trading issue.

Quoting Christianson v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 108 S.Ct. 2166, 100 L.Ed.2d

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DeMartini, Ketterer, and Fankhauser also invested in the company common stock fund. *Id.* ¶ 25. Jordan had reached the age threshold under the Plan to diversify his ESOP investments by the time period at issue.

811 (1988), LMC contends that Plaintiffs' motion should be denied under the law-of-the-case doctrine, which provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." LMC submits that the Court has already ruled that Plaintiffs' CSF claims suffer from an intra-class conflict and that the conflict cannot be cured by the creation of subclasses. Plaintiffs respond that the Seventh Circuit's order granting LMC's Rule 23(f) Petition vacated this Court's entire class certification order, such that there is no law of the case.

On this issue, LMC points to *Tate* v. *Showboat Marina Casino P'ship*, 431 F.3d 580 (7th Cir. 2005), where the Court observed,

> [T]he Supreme Court has specified considerations that a court should weigh in deciding whether to follow or to overrule a previous decision. "[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether

> facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."

Tate, 431 F.3d at 583, *quoting Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 854–55, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (additional citations omitted).

Weighing these considerations, the Court finds that revisiting its April 3, 2009, Order is appropriate. The basis for the Court's decision was the existence of an intra-class conflict. If Plaintiffs have succeeded in curing this conflict, then the facts have changed and the Court's original decision robbed of justification. LMC does not assert that it will be prejudiced by the Court's reviewing this issue, and certainly no discovery would have to be undertaken. So, the question is, would the Court now reach the same conclusion as to certifying the CSF that it reached in April 2009.

CSF subclass, September 2000–July 2002 ("Subclass 1")

Plaintiffs no longer challenge the existence of an intra-class conflict, but they claim to have cured the conflict by excluding "day traders" from the subclass definition. However, they have failed to "affirmatively demonstrate" that Subclass 1 satisfies Rule 23(a)'s requirements of typicality and adequacy of representation. In particular, it would not cure the intra-class conflict to exclude only persons who made multiple trades within 48 hours. Plaintiffs have conceded that there is no industry-accepted definition of a "day trader," and they have come forward with no evidence to establish that a 48–hour rule would cure the intra-class conflict in this case. At the January 27, 2012, class certification hearing, Plaintiffs' counsel argued,

> Now on the definition of day trader, Your Honor—I mean there is no industry definition. The day trader thing has been around since back in 2000, the whole internet trading buzz. In fact, the day trader was only an issue in this Plan up to 2002 and ceased to be an issue. It has been out there. There is not a standardized definition of it. The only definition we have of it is the defendant's definition since they are the ones who say these were the folks causing the problem and got the benefit from the way we ran this thing. So the defendants should give us the definition—what do you mean when you guys say day trader. Doc. 365, Transcript, 42:6–16.

But it is not LMC's burden to define the class or to show that it is sufficiently definite to warrant certification. "The plaintiff must also show (it is the plaintiff's burden to prove the class should be certified, *Trotter* v. *Klincar*, 748 F.2d 1177, 1184 (7th Cir. 1984)), that the class is indeed identifiable as a class." *Oshana* v. *Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006), *citing Simer* v. *Rios*, 661 F.2d 655, 669 (7th Cir. 1981) ("It is axiomatic that for a class action to be certified a 'class' must exist."); *Alliance to End Repression* v. *Rochford*, 565 F.2d 975, 977 (7th Cir. 1977) (agreeing that class definitions must be definite enough that the class can be ascertained). Under Plaintiffs' proposed definition, persons benefiting from the complained-about liquidity could still be members of the class. Stated another way, serious problems exist in defining and identifying the members of the class such that, as proposed, the CSF subclass does not satisfy the requirement of an adequately defined and clearly ascertainable class. *See Simer*, 661 F.2d at 669.

Moreover, excluding the day traders from the subclass would not alter the effect of a final judgment on their interests. The CSF are organized at the plan level, and the certification of the proposed subclasses affects the rights of all those who invested in the CSF. Consequently, under Federal Rule of Civil Procedure 19(a) day traders are "person[s] who … must be joined as a party." Plaintiffs have identified no class representative for the day traders, and the time for doing so has long since passed.

CSF subclass, August 2002–December 2008 ("Subclass 2")

LMC objects to certification of the 2002–2008 subclass on the ground that Plaintiffs have not satisfied their burden to prove that the intra-class conflict was resolved by 2002. According to LMC, by 2002, the Plans had implemented only the first of a series of changes to the plan design intended to curb frequent trading in the CSF. LMC notes that Plaintiffs' expert Ross Miller testified that the problems attendant to day trading persisted through the 2004 period.

Under Rule 23(c)(1)(C), "An order [to certify a class] under Rule 23(c)(1) may be altered or amended before final judgment." A court "remains under a continuing obligation to review whether proceeding as a class action is appropriate, and may modify the class or vacate class certification pursuant to evidentiary developments arising during the course of litigation." *Ellis* v. *Elgin Riverboat Resort*, 217 F.R.D. 415, 419 (N.D.Ill.2003) (citations omitted). "Thus, the court's initial certification of a class 'is inherently tentative.' " *Id.* (*quoting Coopers & Lybrand*, 437 U.S. at 469 n. 11, 98 S.Ct. 2454).

Unlike the 48–hour day trader issue or the Hueler Index comparator, the question of whether the class period runs from 2002–2008 or 2004–2008 or some other similar, identifiable period is not central to class certification. But if the Court ultimately concludes that the day trader class conflict did not resolve until, say 2004, it can easily amend the class definition.

Moreover, for "minor overbreadth problems that do not call into question the validity of the class as a whole, the better course is not to deny class certification entirely but to amend the class definition as needed to correct for the overbreadth." *Messner* v. *Northshore Univ. HealthSystem*, 669 F.3d 802, 826 n. 15 (7th Cir. 2012), *citing Washington* v. *Walker*, 734 F.2d 1237, 1240 (7th Cir. 1984) (noting that district court conditioned grant of certification on plaintiff's redefinition of class).

On the issue of typicality, the Court conditionally finds that Subclass 2 meets the requirements of Rule 23(a)(3).

4. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." In order to satisfy the requirements of Rule 23(a)(4), the class representative must " 'possess the same interest and suffer the same injury as the class members.' " *Uhl* v. *Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 985 (7th Cir. 2002), *quoting E. Tex. Motor Freight Sys. Inc.* v. *Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453

(1977). Accordingly, in evaluating adequacy, a court must make sure that there are no inconsistencies between the interests of the named party and the class that he or she represents. *Uhl*, 309 F.3d at 985, (*citing Amchem Prods.*, 521 U.S. at 625, 117 S.Ct. 2231).

Plaintiffs have identified all of the named Plaintiffs, except Jordan, as class representatives for Subclass 2. The Court has excluded Menhennett as a class representative, *supra*. The Court finds no inconsistencies between the interests of the named parties and the class that they represent. Therefore, the Court concludes that Abbott, Fankhauser, DeMartini, Tombaugh and Ketterer satisfy the adequacy requirement.

5. Rule 23(B)

Having determined that the requirements of Rule 23(a) are satisfied as to the excessive fees claim, the Court turns to the question of whether a class action can be maintained under one of Rule 23(b)'s three subsections. Rule 23(b) authorizes certification of a class action if the prerequisites of subdivision (a) are satisfied, and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests....

FED. R. CIV. P. 23(b)(1).

In this case, the Court finds that the failure to certify Subclass 2 would result in inconsistent or varying adjudications with respect to the individual members of the class, which would establish incompatible standards of conduct for LMC, thereby making this action appropriate for certification under Rule 23(b)(1)(A). In addition, adjudications with respect to individual members of Subclass 2 would, as a practical matter, be dispositive of the interests of the other members who are not parties to the adjudication or substantially impair or impede their ability to protect their interests, making certification under Rule 23(b)(1) (B) appropriate as well.

6. Rule 23(G)

Having determined that Plaintiffs' CSF claim for Subclass 2 is appropriate for class certification, the Court must also address the adequacy of counsel. Rule 23(g) is set forth in full above.

LMC contends that permitting the certification of CSF subclasses would create a conflict for class counsel. LMC asserts that the persons excluded from the Company Stock Fund subclasses as day traders would be members of the excessive fees class. Thus, class counsel would be required to represent clients on one claim who had adverse interests to the firm's clients on another claim.

The Court does not agree. Assuming, *arguendo*, that LMC is correct in its assertions as to Subclass 1 where day traders create a conflict, it does not follow that there would be a similar conflict as to Subclass 2 where day trading is not an issue. Furthermore, each of the proposed classes is discrete and the interests of participants in any given Fund are not adverse to those of the firm's other clients.

For the reasons stated above, the Court finds that the appointment of Schlichter, Bogard & Denton, LLP, as class counsel for CSF Subclass 2 is appropriate.

III. CONCLUSION

For all of the above reasons, the Court **GRANTS in part and DENIES in part** Plaintiffs' Amended Motion for Class Certification (Doc. 343): Plaintiffs' motion for class certification of the Excessive Fees Class and the CSF Subclass 2 is **GRANTED**; Plaintiffs' motion for class certification of the SVF Class and the CSF Subclass 1 is **DENIED**.

A. For Plaintiffs' Excessive Fees claim, as described above, the court appoints plaintiffs Anthony Abbott, Eric Fankhauser, Lloyd Demartini, Jack Jordan, Dennis Tombaugh And David Ketterer as Class Representatives Of The Excessive Fees Class and certifies the following class pursuant to rule 23(b)(1)(a) and (b):

> All participants and beneficiaries of the Lockheed Martin Corporation Salaried Savings Plan and the Lockheed Martin Corporation Hourly Savings Plan from September 11, 2000 through December 22, 2008, excluding the Defendants, other LMIMCo or Lockheed Martin employees with responsibility for the Plans' investment or administrative functions, and members of the Lockheed Martin Board of Directors.

That class is certified to resolve the following claim:

> Whether administrative fees paid by the Plans and charged to plan participants as a uniform percentage of their assets were excessive, without taking into account any revenue sharing between investment managers and the Plans' recordkeeper.

B. For Plaintiffs' Company Stock Funds Plaintiffs claims as described above, the court appoints Anthony Abbott, Eric Fankhauser, Lloyd Demartini, Dennis Tombaugh And David Ketterer as Class Representatives of CSF Subclass 2 and certifies the following subclass pursuant to Rule 23(b)(1)(A) and (B):

> **Subclass for August 2002–December 2008:** All participants and beneficiaries of the Lockheed Martin Corporation Salaried Savings Plan and the Lockheed Martin Corporation Hourly Savings Plan whose accounts held units of the Company Common Stock Fund, Hourly ESOP, or Salaried ESOP, from August 1, 2002 through December 22, 2008, and whose units underperformed relative to Lockheed Martin Common Stock. Excluded from this class are the Defendants and other LMIMCo or Lockheed Martin employees with responsibility for the Plans' investment or administrative functions, and members of the Lockheed Martin Board of Directors.

The Court **APPOINTS** the firm of Schlichter, Bogard & Denton, LLP, as Class Counsel for the Plaintiff Classes pursuant to Rule 23(g).

IT IS SO ORDERED.

DATED this 24th day of September, 2012

APPENDIX C

In the United States District Court
for the Southern District of Illinois

Case No. 06-cv-0701-MJR

ANTHONY ABBOTT, ERIC FANKHAUSER, LLOYD DEMARTINI, JACK JORDAN, and DENNIS TOMBAUGH, individually and on behalf of all those similarly situated,

Plaintiffs,

v.

LOCKHEED MARTIN CORPORATION and LOCKHEED MARTIN INVESTMENT MANAGEMENT COMPANY,

Defendants.

Order and Memorandum

REAGAN, District Judge:

I. INTRODUCTION AND FACTUAL BACKGROUND

Plaintiffs, Anthony Abbott, Eric Fankhauser, Lloyd DeMartini, Jack Jordan and Dennis Tombaugh, individually and on behalf of all similarly situated persons, filed this action pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002 *et seq.* ("ERISA"). Specifically, Plaintiffs allege that Defendants, Lockheed Martin Corporation ("LMC"), as Administrator for the Plans, and Lockheed Martin Investment Management Company

(“LMIMCo”), which handles investment matters, breached their fiduciary duties under ERISA with regard to two employee benefits plans: the LMC Salaried Savings Plan (“SSP”) and the LMC Hourly Savings Plan (“HSP”) (“the Plans”). Abbott is a participant in the HSP and seeks to represent the HSP Class; Fankhauser, DeMartini, Jordan and Tombaugh, are participants in the SSP and seek to represent the SSP class.

Since 1995, State Street Bank & Trust Company (“State Street”), with its affiliates, has served as trustee and recordkeeper for the Plans as well as the investment manager for several of the Plans’ investment fund offerings. In 2000, State Street assigned its recordkeeping responsibilities to CitiStreet, a partly-owned subsidiary. State Street received direct compensation from LMC as well as indirect compensation, revenue sharing, from certain of the Plans’ outside investment managers.

The Plans offer an array of investment choices, including core funds, asset allocation funds and a self-managed account. The core funds, which generally included 11 options, ranged in risk from the conservative Stable Value Fund to the more aggressive Company Stock Fund and Employee Stock Ownership Plan Funds (collectively, “company stock funds”). Three asset allocation funds provided diversified asset portfolios offering conservative, moderate and aggressive risk options. In 2001, the Plans added the self-managed account (“SMA”), which allowed participants to invest up to half of their retirement savings in a portfolio of their own choosing, including stocks, bonds and more than 9,000 mutual funds from more than 300 fund families.

The Stable Value Fund ("SVF") invests in United States Treasury bills, commercial paper, banker's acceptances and notes, savings bank deposits, money market funds and other short-term fixed securities. It also invests in contracts with insurance companies, known as guaranteed investment contracts ("GICs"), wherein the insurer promises to repay the principal and a contractually-fixed rate of interest over a specified period of time.

The company stock funds are structured as unitized funds, i.e., each investor owns "units" of the stock funds rather than actual shares of stock. Unit trades are settled in one day rather than in the three-day settlement period typical of selling stock in open market trading. A portion of the funds' assets are held in cash to provide liquidity for daily processing of fund transfers and withdrawals.

Information about the various funds' objectives, composition, past performance, expected fees and disclosures are provided in periodic Summary Plan Descriptions ("SPDs") as well as in formal and informal updates to the SPDs, annual reports and periodic personal statements. Additionally, information is available on a website accessible to Plan participants, which includes quarterly reports by the fund-rating agency Morningstar regarding the composition of each fund as well as an analysis of its risk and return.

Defendants have moved for summary judgment (Doc. 145), and Plaintiffs have moved for partial summary judgment (Doc. 149). The parties have fully briefed these motions, and they were the subject of a hearing held on March 6, 2009. First setting forth the standards that guide its analysis, the Court now rules as follows.

II. LEGAL STANDARDS

Summary judgment is proper if the pleadings, depositions, interrogatory answers, admissions, and affidavits leave no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The moving party bears the burden of establishing both the absence of fact issues and entitlement to judgment as a matter of law. *Santaella* v. *Metropolitan Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir. 1997). In determining whether a genuine issue of material fact exists, the Court reviews the record in the light most favorable to the non-moving party and makes all reasonable inferences in the non-movant's favor. *Anderson*, 477 U.S. at 255; *Ulichny* v. *Merton Community School Dist.*, 249 F.3d 686, 699 (7th Cir. 2001); *Miranda* v. *Wisconsin Power & Light Company*, 91 F.3d 1011, 1014 (7th Cir. 1996).

Because the primary purpose of summary judgment is to isolate and dispose of factually unsupported claims, the non-movant may not rest on the pleadings but must respond, with affidavits or otherwise, setting forth specific facts showing that there is a genuine issue for trial. *Oest* v. *IDOC*, 240 F.3d 605, 610 (7th Cir. 2001); *Moore* v. *J.B. Hunt Transport, Inc.*, 221 F.3d 944, 950 (7th Cir. 2000).

"ERISA section 404 imposes standards of fiduciary duty, including the fiduciary's duty to act 'with the care, skill, prudence, and diligence' as would a prudent man under the same circumstances." *Jenkins* v. *Yager*, 444 F.3d 916, 924 (7th Cir. 2006) (*citing* 29 U.S.C. § 1104(a)(1)(B)). "To state a claim for a violation of fiduciary duty, the plaintiff must 'establish: (1) that the defendants are plan fiduciaries; (2) that the defendants breached their fiduciary duties;

and (3) that the breach caused harm to the plaintiff.' " *Id.* (*quoting Brosted* v. *Unum Life Ins. Co. of America*, 421 F.3d 459, 465 (7th Cir. 2005) (*citing Kamler* v. *H/N Telecomm. Serv., Inc.*, 305 F.3d 672, 681 (7th Cir. 2002)).

The first prong of the test is satisfied because it is undisputed that Defendants are plan fiduciaries under ERISA section 3(21)(A). *See* 29 U.S.C. § 1002(21)(A). Under the second prong, a plan administrator is held "to a duty of loyalty akin to that of a common-law trustee" and "must act as though [he] were a reasonably prudent businessperson with the interests of all the beneficiaries at heart." *Id.* (*quoting Ameritech Benefit Plan Comm.* v. *Comm. Workers of America*, 220 F.3d 814, 825 (7th Cir. 2000)). The third prong requires Plaintiffs to establish the requisite causation to state a claim for breach of fiduciary duty and that the breach of that duty caused harm to Plaintiffs. *Id.* at 928.

III. ANALYSIS

A. Revenue Sharing

Both parties have filed for summary judgment on the issue of revenue sharing. Plaintiffs claim that the facts establish that LMC and LMIMCo breached their fiduciary duties under 29 U.S.C. §§ 1104(a)(1) and 1106(a)(1)(C) by failing to monitor and determine the reasonableness of fees that State Street received from the assets of LMC's 401(k) Plans and by allowing State Street to receive unreasonable compensation for its services. *Citing* DOL Advisory Opinion 97–16A, Plaintiffs submit that LMC and LMIMCo had a duty to regularly monitor all revenue sharing to ensure that compensation paid directly or indirectly for plan services, such as administration and record-keeping, were reasonable.

Plaintiffs contend that LMC and LMIMCo did not perform this duty or even attempt to determine what revenue sharing payments the Plans' service providers—State Street and CitiStreet—received from State Street Global Advisors ("SSgA") mutual funds and investments. As a consequence, according to Plaintiffs, Lockheed failed to determine that service provider fees for State Street and CitiStreet were reasonable. Specifically, Plaintiffs claim that "[l]umping all Plan fees together to determine reasonableness does not satisfy ERISA's fiduciary duties because that allows reasonable fees to balance out unreasonable fees and gives license to fiduciaries to allow unreasonable compensation to one service provider so long as other service providers receiving [sic] reasonable compensation."

LMC and LMIMCo submit that Plaintiffs' allegations regarding revenue sharing do not give rise to a claim for fiduciary breach. They claim that it is well established that revenue sharing does not inherently violate ERISA. According to LMC and LMIMCo, all fees paid by the Plans were disclosed, and there is no legal basis for Plaintiffs' contention that Plan fiduciaries must disclose internal revenue allocation separately. Additionally, LMC and LMIMCo state that LMC purchased bundled services from State Street, and, in a bundled arrangement, a fiduciary monitors whether total costs are reasonable for the total services provided.

The briefing of this issue was completed prior to the Seventh Circuit Court of Appeals's decision in *Hecker* v. *Deere & Co.*, 556 F.3d 575, 2009 WL

331285 (7th Cir. 2009).[1] The parties filed supplemental briefs addressing the impact of *Hecker* on Plaintiffs' claims. Plaintiffs' attempt to distinguish the appellate court's decision fails.

Indeed, distinguishing *Hecker* on the issue of revenue sharing is an uphill battle that Plaintiffs cannot win. A line-by-line comparison of the Second Amended Complaint ("SAC") in *Hecker* and the FAC in the current proceeding reveals that, taking into account certain factual differences that are not material to the Court's analysis, the complaints are the same—the same claims regarding hard dollar payments and revenue-sharing payments, total fees, foregone revenue sharing and undisclosed revenue sharing arrangements. *Cf.* Doc. 137, FAC ¶¶ 58–87, Doc. 187, Exhibit 2, SAC ¶¶ 62–90.

In *Hecker*, the appellate court agreed with the district court that the type of revenue-sharing arrangement described by Plaintiffs "violates no statute or regulation." *Hecker*, 2009 WL 331285 at 9. The Court explained that "the participants were told about the *total* fees imposed by the various funds, and the participants were free to direct their dollars to lower-cost funds if that was what they wished to do." *Id.* (*emphasis added*). The Court then reasoned, "The total fee, not the internal, post-collection distribution of the fee, is the critical figure for someone interested in the cost of including a certain investment

[1] The Court relies on the *Hecker* case knowing that a Petition for Rehearing en banc has been filed (see Doc. 64 of the Appeals Court Docket Sheet) and that Judge Wood has permitted the filing and dissemination of some amicus briefs (Docs.71,72). As of this writing, *Hecker* remains the law governing some of the issues in the instant case and unless *Hecker* is modified, will so remain.

in her portfolio and the net value of that investment." *Id.*

The undersigned Judge also finds no evidence that LMC and LMIMCo breached the general fiduciary duty imposed on them by 29 U.S.C. § 1104(a)(1) either by an intentionally misleading statement or a material omission. See *id.* First, Plaintiffs herein were told about the total fees through SPDs and other plan documents. The FAC does not allege that any representation in the SPDs was an intentional misrepresentation. Second, because the total fee is the critical figure, the omission of information about the revenue-sharing arrangement is not material. *See id.*

In light of the Seventh Circuit's decision in *Hecker*, Plaintiffs' motion for partial summary judgment based on revenue sharing must be denied, and LMC's and LMIMCo's motion for summary judgment must be granted on this issue.

B. Notice-Pleading Requirements

Before considering Plaintiffs' remaining claims, the Court will address claims regarding "float" and the American Century Growth Fund ("ACGF"), also referred to as the American Century Fund.

"[C]laims of breach of fiduciary duty under ERISA are subject to no pleading standard more stringent than Rule 8 of the Federal Rules of Civil Procedure, which requires a plaintiff to present only 'a short and plain statement of the claim showing that the pleader is entitled to relief' and states that '[e]ach averment of a pleading shall be simple, concise, and direct.' " *Spano* v. *Boeing Co.*, WL 1149192, 2 (S.D.Ill.2007) (*citing* FED.R.CIV.P. 8(a)(2), (e)(1); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F.Supp.2d 511, 652 (S.D.Tex.2003) ("ERISA does not have heightened pleading requirements, but is subject to the notice pleading standard of [Rule 8], i.e., … a short and plain statement of the claim showing that the pleader is entitled to relief … and that provides a defendant with fair notice of the claim against him.") (additional citations omitted).

At the March 6, 2009, hearing, the parties briefly raised the issue of float. "Float is interest earned by cash while invested before participant contributions are allocated to investments or before distributions are processed." *Taylor* v. *United Technologies Corp.*, 2009 WL 535779, 7 (D.Conn.2009). A careful review of the FAC reveals no claim of "float." Furthermore, it is not addressed in LMC's and LMIMCo's motion for summary judgment. For these reasons, the Court makes no findings as to float.

The Court has also thoroughly perused the FAC for claims regarding ACGF. It appears that Plaintiffs seek to raise claims against ACGF under an umbrella of claims regarding LMC's and LMIMCo's alleged failure to reduce fees and expenses. While Plaintiffs make very specific claims regarding the SVF (FAC, ¶¶ 128–131, 141–44, 151(g)-(j)) and the company stock funds (¶¶ 88–116, 145), they make no specific allegations regarding ACGF. Apparently, the claim—as gleaned from the parties' submissions and the in-court hearing—is that LMC and LMIMCo should not have offered ACGF as a mutual fund but rather as a separate account managed only for the Plans because such a large account could have negotiated lower investment fees. The issue is set out in general terms in FAC, ¶ 37,

> Participating employees may choose to invest Salaried Plan or HSP Plan contributions in any of thirteen investment funds. Five of

> these funds are retail mutual funds, the same mutual funds available for retail purchase, by any investor, large or small, on the open market. Although the Plans, as large investors, would qualify for the purchase of "institutional" mutual fund shares, which charge substantially lower fees than the standard shares offered to retail customers, the Plans did not make these available to participants in all of the mutual fund investment options. FAC, ¶ 37.

This allegation, however, is insufficient to put LMC and LMIMCo on notice of a claim of imprudence regarding ACGF. To satisfy the notice-pleading requirements of Rule 8(a)(2), a plaintiff must provide the grounds of his entitlement to relief by saying enough "to raise a right to relief above the speculative level." *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965–66, 167 L.Ed.2d 929 (2007). If Plaintiffs wished to identify ACGF as part of this case, they could have made specific and extensive allegations as they did regarding the SVF and the company stock funds. Even affording Plaintiffs' FAC a very liberal construction, their failure to meet the pleading requirements of Rule 8(a) on regarding the ACGF is fatal to this claim.

In the alternative, if the claim regarding the ACGF is within the scope of the complaint or has been included by implied consent, see *Torry* v. *Northrup Grumman Corp.*, 399 F.3d 876 (7th Cir. 2005), nonetheless, on the basis of *Hecker*, it must be dismissed.

Plaintiffs claim that the investment in the ACGF, a retail mutual fund, was imprudent because a giant 401(k) plan such as LMC's and LMIMCo's plan has enormous bargaining power to command lower fees. According to Plaintiffs, LMC's and LMIMCo's failure to consider a separate account was a breach of their fiduciary duty of prudence. Plaintiffs submit that the ACGF fund was by far the most expensive investment option in the Plans, charging more than double the fees of nearly every other investment option. They maintain that a separate account would have charged only 25% of the retail mutual fund rate, which would have saved the Plan $41.25 million in excessive fees. Plaintiffs contend that LMC's and LMIMCo's claims regarding the need for liquidity are without basis.

LMC and LMIMCo contend that the ACGF is a prudent investment option. They maintain that they considered and rejected making a change to a separate account in 2002 because of concerns of illiquidity but established it as a separate account in 2007 when circumstances had changed. LMC and LMIMCo submit that, in 2002, the benefits of liquidity and economies of scale outweighed the advantages of a separate account. They assert that additional non-fee considerations weighed in favor of maintaining the mutual fund structure for the ACGF, including SEC oversight and review, better access to information showing returns, greater familiarity and portability.

The Seventh Circuit's decision in *Hecker* is dispositive of this issue. The Plan at issue in *Hecker* included 23 different Fidelity retail mutual funds. *Hecker*, 556 F.3d at 578–79. The appellate court considered it important that "all of these funds were also offered to investors in the general public, and so the expense ratios necessarily were set against the backdrop of market competition." *Id.* at 586. The Court explained that it found "no statute or regulation prohibiting a fiduciary from selecting funds from one management company" and, furthermore, that nothing in ERISA "require[d] plan fiduciaries to include any particular mix of investment vehicles in their plan." *Id.*

Similarly, in the current proceeding, LMC and LMIMCo offered a wide variety of investment options, including the ACGF retail mutual fund. It was offered to participants on the same basis as to the general public, which guaranteed a competitive expense ratio. No statute or regulation requires a finding that LMC and LMIMCo were imprudent in offering the ACGF as a mutual fund rather than a separate account, and certain benefits flowed from that decision. For these reasons, the Court concludes that no breach of fiduciary duty on LMC's and LMIMCo's part has been described, and summary judgment in favor of LMC and LMIMCo is warranted as to Plaintiffs' claims regarding ACGF.

C. Statute Of Limitations

ERISA imposes a statute of limitations on claims alleging a breach of fiduciary duties. Section 413 provides as follows:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or

> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation. 29 U.S.C. § 1113.

The Court finds that the six-year statute of limitations applies here, so that any claims accruing prior to September 11, 2000, are foreclosed. There is no evidence that participants had actual knowledge of a breach three years prior to filing this action. Moreover, "[t]here is no 'continuing violation' theory to claims subject to ERISA's limitation period." *Kanawi* v. *Bechtel Corp.*, 590 F.Supp.2d 1213, 1225 (N.D.Cal.2008) (*citing Phillips* v. *Alaska Hotel & Rest. Employees Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991) (concluding that the continuing violation theory could not be applied because it would read the "actual knowledge" requirement out of the statute).

Plaintiffs contend that the tolling provision of § 1113 applies because LMC and LMIMCo engaged in multiple acts of fraudulent concealment. Defendants respond that Plaintiffs cannot satisfy the prerequisite that claims of fraudulent concealment must be pled with particularity in the complaint.

"In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." FED.R.CIV.P. 9(b); *see Jones* v. *Hoosman*, 2006 WL 1302524, 1 (N.D.Ill.2006) (collecting cases). Under Rule 9(b), the complaint must specifically allege "the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *Rogers* v. *Baxter Intern., Inc.*, 417 F.Supp.2d 974, 985 (N.D.Ill.2006) (*quoting Sears* v. *Likens*, 912 F.2d 889, 893 (7th Cir. 1990). "In other words, a plaintiff must allege 'the who, what, when, where and how' of the fraud." *Id.* (*quoting DiLeo* v. *Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990). Plaintiffs' FAC contains no allegations that satisfy Rule 9(b)'s heightened pleading requirements.[2] For this reason, the tolling provision of § 1113 does not apply, and the six-year statute of limitations forecloses claims before September 11, 2000.

The Court does not agree, however, with LMC's and LMIMCo's rather blithe assertion that all of Plaintiffs' claims are barred thereby because they have identified no discrete acts within the six-year limitations period. Rather, the Court narrows its inquiry to acts that took place on or after September 11, 2000.

D. Standing

LMC and LMIMCo contend that Plaintiffs lack standing to raise claims involving the Company Stock Fund, the SVF and ACGF. The Court has already determined that claims regarding ACGF must be dismissed and, so, need not consider the challenge

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[2] Although Plaintiffs claim that revenue sharing arrangements were not disclosed to Plan participants, FAC, ¶¶ 85–87, the Court found, supra, that the type of revenue-sharing arrangement described by Plaintiffs violated no statute or regulation because it is the total fee that is the critical figure for someone interested in the cost of including a certain investment in her portfolio and the net value of that investment.

of standing as to ACGF. As to the Company Stock Fund and the SVF, LMC and LMIMCo assert that Plaintiffs have produced no evidence that they ever invested in either of these funds and, consequently, they could not have been injured by LMC's and LMIMCo's alleged imprudent handling of these funds. According to LMC and LMIMCo, Plaintiffs also fail to satisfy the standards for third-party standing necessary to sue on behalf of other Plan participants who were, in fact, invested in those particular funds.

Plaintiffs respond that any plan participant may bring an action to compel a fiduciary to make good to the plan losses resulting from the fiduciary's breach. They assert that LMC and LMIMCo do not dispute that Plaintiffs are participants in the Plans in this case.

"Article III of the United States Constitution requires a party to demonstrate standing by alleging that: (1) the party suffered actual or threatened injury as a result of alleged illegal conduct by defendant; (2) the injury is fairly traceable to the challenged action, and (3) the injury is redressable by a favorable decision." *George* v. *Kraft Foods Global, Inc.*, 251 F.R.D. 338, 345 (N.D.Ill.2008) (*citing Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Stated another way, Plaintiffs must show a likelihood that the injury they have suffered will be redressed by a favorable outcome to the litigation. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–62, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). "While standing doesn't depend on the merits of a plaintiff's contentions, 'it often turns on the nature and source of the claim asserted ... the standing question ... is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.' " *Winarski* v. *Nannenga*, 2005 WL 1221594, 4 (N.D.Ind.2005) (*citing Warth* v. *Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (*quotations and citations omitted*)).

The statutory provisions of ERISA "unambiguously grant[ ] the plaintiffs the standing needed to bring their claims." *Id.* "29 U.S.C. § 1132(a)(2) specifically identifies participants and beneficiaries as parties who may sue fiduciaries on behalf of a plan for alleged breaches." *Id.* (*citing Massachusetts Mut. Life Ins., Co.* v. *Russell*, 473 U.S. 134, 140, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985) ("There can be no disagreement with the … conclusion that § 502(a)(2) [29 U.S.C. § 1132(a)(2)] authorizes a beneficiary to bring an action against a fiduciary who has violated § 409 [29 U.S.C. § 1109]")). "[N]ot only is the relevant fiduciary relationship characterized at the outset as one 'with respect to a plan,' but the potential personal liability of the fiduciary is 'to make good *to such plan* any losses *to the plan* ... and to restore *to such plan* any profits of such fiduciary which have been made through use of assets *of the plan....*' " *Russell*, 473 U.S. at 140 (emphasis in original). "When the statutory language provides a clear answer to a question of standing, the court's analysis ends there." *Winarski*, 2005 WL 1221594 at 4 (*citation omitted*).

The Court concludes that as participants in the Plans, Plaintiffs have standing to recover the damages LMC and LMIMCo owe to the Plans under 29 U.S.C. § 1109.

E. Excessive fees

The Court turns to Plaintiffs' assertion that LMC and LMIMCo violated their fiduciary duties by selecting Plan options with unreasonably high fees for the services and management they received. The Court's analysis is again guided by the *Hecker* decision. Therein, the Seventh Circuit noted that Deere had offered a "sufficient mix of investments for their participants" and that "no rational trier of fact could find … that Deere failed to satisfy that duty." *Hecker*, 2009 WL 331285 at 10. The Court explained that the expense ratios among the available funds, finding that they varied between .07% and just over 1%. The Court reasoned that it was important that "all of these funds were also offered to investors in the general public, and so the expense ratios necessarily were set against the backdrop of market competition. The fact that it is possible that some other funds might have had even lower ratios is beside the point; nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)." *Id.*

Applying this analysis to the current proceeding, the Court first finds that LMC and LMIMCo have provided participants with a wide array of investment opportunities, including core funds, asset allocation funds and a self-managed account. The question then is whether the overall fees paid by the Plans were reasonable.

LMC and LMIMCo maintain that LMC Plan participants paid below-market fees and received a high-value product in return. They submit that, from 2000 through 2007, they participated in an annual benchmarking survey of fees for large 401(k) plans conducted by Cost Effective Measurement, Inc. ("CEM"), an independent industry benchmarking company. They contend that in all eight years, the Plans' fees were well below the CEM average. For example, in CEM's August 31, 2001, report, it found that the Plan's total cost was 27 basis points ("bp"), compared to "the universe average cost of 36 bp". Doc. 146, Exh. 8, p. 14. CEM explained that its calculated benchmark cost for the Plan was 28 bp, which suggested that "overall your plan is normal cost." *Id.* at 15. The benchmark cost was calculated based on the Plan's unique size and asset mix. *Id.*

LMC's and LMIMCo's expert, Ellen Hennessy, asserted that her opinion was confirmed by another study of 2005 plan expenses of large plans, conducted by NERA, which "shows that Lockheed Martin Plans' expenses of 18 basis points for that year were below average for plans of comparable size[.]" Doc. 146, Exh. 18, Ellen Hennessy Expert Report ¶ 15.

Plaintiffs, however, contend that there is no evidence that Plan fees were reasonable. They maintain that the documents submitted by LMC and LMIMCo indicate their own unreliability, in that they contain disclaimers regarding accuracy and completeness. For example, the CEM report states, "Comparisons of total costs are less meaningful because, as our research has shown, costs are impacted by many variables[.]" Doc. 146, Exh. 8, p. 14. The report also notes its limitations, specifically, that the benchmark cost equation is a "useful starting point in overall plan cost analysis" but that it "does not provide insight into the reasonableness of costs at the individual investment option level." *Id.* at p. 16. Furthermore, the report recommends that LMC and LMIMCo purchase a "detailed DC Fiduciary Oversight Report," which would ensure that they "comply with [their] fiduciary obligation to monitor each individual investment option [they] provide [their] participants on both a return performance and cost basis." *Id.*

Moreover, Plaintiffs' expert, Al Otto, opined, "The plan's costs for administration and recordkeeping were excessive from 1997 through at least 2006.[3] This resulted in more than $147 million in damages to the SSP and HSP participants over that time frame." Doc. 164, Exh. 5, Al Otto Expert Report ¶ 51. While Mr. Otto's opinion is flawed for purposes of this analysis because he considered revenue sharing, float and years outside the limitations period in arriving at his conclusions, see *id.* ¶¶ 54–57, 556 F.3d 575, his determination that the Plans' fees were unreasonable and cost the Plans millions in damages cannot be entirely disregarded.

Because genuine issues of material fact remain regarding whether LMC and LMIMCo violated their fiduciary duties by selecting Plan options with unreasonably high fees for the services and management they received, summary judgment on this issue is not warranted.

F. The Stable Value Fund

The stated objective of the SVF was "to provide safety of principal, stable income and liquidity." Doc. 146, Exh. 3A, p. 4. In order to meet this objective, the Fund invested in a variety of low-risk investment vehicles, including U.S. Treasury bills, corporate bonds and GICs. *Id.* Plaintiffs contend that LMC's

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[3] Defendants moved to exclude certain testimony and evidence from Plaintiffs' experts, including Otto and Miller, who are cited herein. By separate Order this day, the Court denied Defendants' motion.

and LMIMCo's imprudent selection of investments in the SVF resulted in significant underperformance and loss of retirement income. They submit that despite its name and objectives, it was not in fact a stable value fund but, rather, was administered as a money market fund.

Plaintiffs submit that the SVF was imprudent because it should have had no more than 5% of its assets invested in money market funds instead of the 50% to 99% that was actually invested. According to Plaintiffs, the SVF's return was so poor that it did not beat inflation by a sufficient margin to provide a meaningful retirement asset. Plaintiffs contend that, although the SVF was low-risk and did not lose its value, mere preservation of principal was not the Fund's sole objective.

LMC and LMIMCo contend that (1) the strategy and composition of the SVF was always fully disclosed to Plan participants; (2) there is no uniform definition of "stable value" that the SVF violated; and (3) the composition of the SVF was prudent. They submit that the Court's analysis is governed by *DeBruyne* v. *Equitable Life Assur. Soc.*, 920 F.2d 457 (7th Cir. 1990). *DeBruyne* involved a retirement plan which included an option, the Balanced Fund, which attempted to find a compromise between risk and return by creating a "balanced" portfolio of equity and debt securities. *DeBruyne*, 920 F.2d at 460. In its prospectuses, Equitable disclosed that the Fund would include common stocks, publicly-traded debt securities, and money market instruments. *Id.* Equitable repeatedly disclosed that the "mix" of security in the Balanced Fund was determined by the portfolio manager and was constantly changing. *Id.* Plaintiffs in *DeBruyne* charged, *inter alia*, that Equitable failed to manage the Fund in accordance with plan documents and failed to manage the Fund with care and prudence. *Id.* at 462.

In affirming the district court's grant of summary judgment in favor of the defendants, the Seventh Circuit Court of Appeals found that the prospectuses and reports gave Equitable "broad discretion" in deciding the mix of investments in the Balanced Fund. *Id.* at 464. The Court further found that using the term "balanced" did not "wed [the Fund] to a pre-established definition that could not be changed by disclosure." *Id.* The appellate court also concluded that what a "typical" balanced fund portfolio manager might have done in a given year said "little about the wisdom of Equitable's investments, only that Equitable may not have followed the crowd." *Id.* at 465.

In the Lockheed Martin SSP prospectus dated April 1, 2004, the SVF was listed as "Money Market/Stable Value" and as the most conservative of the core funds. Doc. 146, Exh. 3, p. 16. The prospectus indicated that there was a chance that the Fund's return would not exceed inflation. *Id.*, Exh. 3A, p. 4. The annual rate of return for the Fund between 2000 and 2003 varied from 1.39% to 6.43%. *Id.*, p. 5. The booklet summarizing investment options available under the Plans, effective April 2, 2001, provided similar information regarding objective, composition and strategy for the HSP. *Id.*, Exh. 4, p. 10. In that booklet, the SVF was in the "money market" category. *Id.*, p. 4.

According to a February 7, 2003, memorandum authored by Cora Ingrim, LMIMCo's Managing Director, and read into the record at her deposition, "Our Stable Value Fund has become a money market fund. To avoid false advertising we should change the name of the fund to reflect its composition or increase duration by adding … longer duration investments that have book value accounting." Doc. 164, Exhibit 8, Ingrim Dep., 385:13–20. Ingrim stated that in the years following this statement, there was a shift in portfolio assets from money market to stable value products within the Fund. *Id.* 386:6–10. Ingrim used the term "false advertising" to describe telling participants that they were getting more risk than was true. *Id*. 388:3–5.

As in *DeBruyne*, using the term "stable value" does not "wed" the Fund to a specific mix of investments. That does not mean, however, that the Fund need not be managed in accordance with plan documents and with care and prudence. The plan documents indicate that the return on investments in the SVF was to be bolstered beyond the relatively low return of a money market by investment in other instruments such as Treasury bills, corporate bonds and GICs. The concerns expressed by Ingrim lead the Court to conclude that LMIMCo itself had grave doubts about the composition of the Fund. She felt it was necessary to "strong arm" the Fund into making changes to avoid falsely leading participants to believe that they were getting more risk—and the concomitant greater reward—than they were. While the timeframe during which this problem developed and was resolved is not clear, what is clear is that the problem was recognized and addressed during the period relevant to the current proceedings. For these reasons, summary judgment on this issue is not warranted.

G. Company Stock Funds

The company stock funds were set up as unitized investments which included both LMC stock and cash invested in State Street's Short Term Investment Fund ("STIF"). Instead of directly holding LMC stock, participants held units in a fund that could be transferred on a same-day basis. The SPDs explain the unitized structure to participants and the impact that structure has on performance:

> The Fund is invested primarily in Lockheed Martin common stock. However, a small portion of the Fund's assets is held in cash equivalent reserves to allow for the daily processing of fund transfers (reallocations and spot transfers) and withdrawals. Cash equivalent reserves typically range between 1% and 3% of the Fund, but may be as high as 10%. Because the Fund also invests in cash equivalent reserves, the Fund's performance may vary from that of Lockheed Martin common stock. Doc. 146, Exh. 3(B), p. 3 (April 1, 2004, SSP prospectus).

The SPD also explains that the fund is not diversified or managed and, accordingly, may experience "large fluctuations" based on LMC's "financial performance, stock market volatility and general economic conditions." *Id.* Fund expenses were expected to be .03% of assets for the Fund Manager and Trustee, and .07 to 1.0% for administrative expenses. *Id.*, p. 5. Quarterly Morningstar reports showed actual liquidity levels, *e. g.*, as of March 31, 2005, the cash portfolio analysis reported net assets of 1.01%. Doc. 146, Exh. 5, p. 4.

LMC's and LMIMCo's expert, Lassaad Turki, noted that the unitized structure was advantageous in that it allowed the Plan to "batch" trades over several days, which reduced the need to engage in offsetting transactions. Doc. 146, Exh. 34 ¶ 18, Turki Expert Report. As an example, Turki discussed trading in the Company Stock Fund in April, 2002, where the liquidity buffer and the ability to batch trades resulted in the Plan trading 3.50 million shares, which—without unitization—would have required trading 23.38 million shares. *Id.* According to Turki's calculations, at 2.8 cents per share, the cost differential for that month alone would be $570,000.00. *Id.*

Plaintiffs submit, however, that the STIF was negligently managed in that it repeatedly exceeded 10% of the Funds and at one point nearly 14% of the Funds. Plaintiffs' expert, Ross Miller, asserted that the cash holdings decreased the performance of the stock funds. He particularly discussed a problem that developed with day-traders whose activities forced the funds to maintain greater liquidity levels. Doc. 164, Exh. 7, ¶¶ 28, 29. Miller cited to an April, 2001, e-mail from Ingrim, in which she noted that the plans had "a fiduciary duty to make sure that 99% of participants are not disadvantaged by a handful of day-traders[.]" *Id.* at ¶ 21.

The Court concludes that a genuine issue of material fact exists as to whether a breach of fiduciary duty occurred when cash equivalent reserves exceeded not only the typical range of 1% to 3% of the Fund but actually exceeded the 10% ceiling established in the April 4, 2004, prospectus. The question also remains how promptly management dealt with the perceived problem of day traders.

H. Safe harbor

The Court once again turns to the Seventh Circuit's analysis in *Hecker* to determine whether this action falls within ERISA's safe-harbor provisions. 29 U.S.C. § 1104(c). Under *Hecker*, "the participant must have the right to exercise independent control over the assets in her account and in fact exercise such control" and "be able to choose 'from a broad range of investment alternatives.' " *Hecker*, 2009 WL 331285 at 11 (*quoting* 29 C.F .R. § 2550.404c–1(b)(1)(ii)). Additionally, the Plan must meet nine criteria before the participant may be considered to have the opportunity to obtain "sufficient information to make informed decisions." *Id.* (*quoting* 29 C.F.R. § 2550.404c–1(b)(2)(i) (B)).

Where the Plan provides for individual accounts and meets all of these requirements, ERISA provides a safe harbor:

> [N]o person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary. 29 U.S.C. § 1104(c)(1)(A)(ii).

As in *Hecker*, Plaintiffs herein chose to anticipate the § 1104(c) defense and thereby waived other defenses. Paragraph 54 of the FAC begins, "ERISA § 404(c) provides to Plan fiduciaries a "safe harbor" from liability for losses that a participant suffers in their 401(k) accounts to the extent that the participant exercises control over the assets in his or her 401(k) accounts." Paragraphs 54 through 57 describe the information that LMC and LMIMCo was required to furnish. *Cf. Hecker*, 2009 WL 331285 at 12. In a section entitled "Defendant's Non–Compliance with 404(c)'s Safe Harbor Requirements and Concealment of Their Fiduciary Breaches," the Complaint specifies what LMC and LMIMCo allegedly failed to do. For example, paragraph 132 accuses LMC and LMIMCo of failing to disclose that they engaged in revenue sharing. Paragraphs 133 through 140 assert that LMC and LMIMCo failed and refused to provide complete information about the fees and expenses being charged to the Plans. Paragraphs 141 through 144 charge that LMC and LMIMCo misrepresented, tricked and misled participants about the composition of the Stable Value Fund and fraudulently concealed that it was a poor retirement investment. Paragraph 145 asserts that LMC and LMIMCo deliberately provided false and misleading information regarding the amount of cash held in the company stock funds as well as covering up conflicts of interest with service providers to the Plans.

For these reasons, the Court concludes that Plaintiffs have waived the right to complain about LMC's and LMIMCo's compliance with all but the following criteria: the obligation to disclose information about fees and expenses, and the obligation to provide participants with an opportunity to obtain sufficient information to make informed decisions regarding available investment alternatives. 29 C.F.R. § 2550.404c–1.

IV. CONCLUSION

Accordingly, the Court DENIES Plaintiffs' motion for partial summary judgment (Doc. 149) and **GRANTS in part and DENIES in part** Defendants' motion for summary judgment (Doc. 145), as follows:

(1) Defendants' motion is **GRANTED** as to revenue sharing, and summary judgment is entered against Plaintiffs as to any claim regarding revenue sharing;

(2) Defendants' motion is **GRANTED** as to ACGF, and summary judgment is entered against Plaintiffs as to any claim regarding ACGF;

(3) Defendants' motion is **GRANTED** as to the six-year statute of limitations, and claims before September 11, 2000, are foreclosed;

(4) Defendants' motion is **DENIED** as to whether Plaintiffs have standing to recover damages owed to the Plans under 29 U.S.C. § 1109;

(5) Defendants' motion is **DENIED** as to whether overall fees paid by the Plans provide a basis for Plaintiffs' fiduciary breach claim;

(6) Defendants' motion is **DENIED** as to their claim that the Stable Value Fund was properly disclosed to Plan participants and was a prudent investment option for them;

(7) Defendants' motion is **DENIED** as to their claim that the Company Stock Funds were a prudent investment option for Plan participants; and

(8) Defendants' motion is **DENIED** as to whether the Plans are shielded from liability by ERISA's safe harbor provision.

IT IS SO ORDERED.

DATED this 31st day of March, 2009

APPENDIX D

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

September 11, 2013

Before BAUER, WOOD, and TINDER, *Circuit Judges*

No. 12–3736
ANTHONY ABBOTT, *et al.*,
Plaintiffs-Appellants,
v.
LOCKHEED MARTIN CORPORATION
and LOCKHEED MARTIN INVESTMENT
MANAGEMENT COMPANY,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 06-cv-0701-MJR — Michael J. Reagan, *Judge.*

O R D E R

Defendants-Appellees filed a petition for rehearing and rehearing *en banc* on August 21, 2013. No judge[1] in regular active service has requested a vote on the petition for rehearing en banc, and all members of the original panel have voted to DENY rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing and rehearing *en banc* is DENIED.

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[1] Judge Joel M. Flaum did not participate in the consideration of this matter