No. 12–3736

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ANTHONY ABBOTT et al., Plaintiffs-Appellants, v. LOCKHEED MARTIN CORP. and LOCKHEED MARTIN INVESTMENT MANAGEMENT CO., Defendants-Appellees.	))))))))	On Appeal from the U.S. District Court for the Southern District of Illinois No. 06-cv-00701-MJR Hon. Michael J. Reagan

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-3736

Short Caption: Abbott v. Lockheed Martin Corp.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Lockheed Martin Corporation; Lockheed Martin Investment Management Company

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP; Armstrong Teasdale LLP; Schulte Roth & Zabel LLP; Seyfarth Shaw LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

The parent company of Lockheed Martin Investment Management Co. is Lockheed Martin Corp.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

State Street Corporation indirectly holds more than 10% of the stock of Lockheed Martin Corp.

Attorney's Signature: s/ Jeffrey W. Sarles Date: 2/13/2013

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Attorney's Signature: s/ Robert P. Davis Date: 2/13/2013

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Attorney's Signature: s/ Brian D. Netter Date: 2/13/2013

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Attorney's Signature: s/ Peter H. White Date: 2/13/2013

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JURISDICTIONAL STATEMENT

Plaintiffs' jurisdictional statement is not complete or correct. Plaintiffs filed suit in the U.S. District Court for the Southern District of Illinois, invoking federal question jurisdiction under 28 U.S.C. § 1331 for claims premised on 29 U.S.C. § 1132. R.2. As explained below, however, Plaintiffs lack Article III standing to pursue their Stable Value Fund claim because none of the original named plaintiffs sustained injury-in-fact as to that claim. *See infra* pages 16-29. Accordingly, this Court lacks jurisdiction to consider the merits of plaintiffs' appeal.

After plaintiffs' motion for class certification was denied in part on September 24, 2012, SA 1-31, plaintiffs invoked the jurisdiction of this Court on October 4, 2012, by petitioning for interlocutory review pursuant to Fed. R. Civ. P. 23(f) and 28 U.S.C. § 1292(e). This Court granted permission to appeal in relevant part on November 21, 2012. R.372.

ISSUES PRESENTED FOR REVIEW

1. Whether plaintiffs lack Article III standing to challenge the prudence of an investment fund in which none of the original named plaintiffs invested during the period of alleged imprudence.

2. Whether the district court properly exercised its discretion in denying certification of a class on plaintiffs' Stable Value Fund challenge because they had failed to meet their burden to demonstrate compliance with Rule 23(a).

STATEMENT OF FACTS

A. Background

This case is about two 401(k) retirement plans offered by defendant Lockheed Martin Corp.: the Salaried Savings Plan and the Hourly Employees Savings Plan Plus (collectively, "the Plans"). Between them, the Plans offer tax-deferred retirement savings for more than 100,000 Plan participants, ranging from new college graduates starting to save for a retirement decades away to retirees who depend on monthly distributions for living expenses.

1. In a 401(k) plan, participants choose how to direct the investment of their retirement savings, subject to the parameters of the plan. The Plans offer a wide range of investment opportunities that reflect the diversity of Plan participants and their investment strategies. Those investment offerings are selected and monitored by a team of investment professionals employed by Lockheed Martin Investment Management Co., a subsidiary of Lockheed Martin Corp. (collectively, "Lockheed Martin"). Plan investment options are studied for asset and risk characteristics, performance history, and fund management, and the set of funds is analyzed to confirm that Plan participants can formulate an individualized portfolio with a wide range of risk-and-return preferences. R.146-13, at 2-13. When investment options are deemed inadequate for Plan participants, they are removed from the Plan, and when new opportunities arise, new investment options are added. *See, e.g.*, Supp. App. 96.

During relevant periods, participants could allocate their retirement savings among three categories of investment options. *See id. First*, for Plan

participants "uncomfortable making [their] own allocation decisions, or . . . just looking for simplicity," the Plans offered Aggressive, Moderate, and Conservative Asset Allocation Funds that "invest[ed] in a combination of four underlying index funds" in proportions consistent with the chosen risk threshold. *Id.* at 97. *Second*, for Plan participants "comfortable deciding how to divide [their] money among stocks, bonds and short-term investments," the Plans offered eleven additional core funds covering a broad range of asset classes, including opportunities to invest in Lockheed Martin common stock. *Id.* at 101, 111-12. *Third*, the Plans offered a self-managed brokerage account for participants seeking "additional flexibility." *Id.* at 113. Through a self-managed account, participants could invest in individual stocks and bonds and more than 3500 mutual funds. *Id.*

To aid in choosing among the investment options, plaintiffs received various disclosures. Summary plan descriptions described Plan rules and investment options and provided historical returns. Supp. App. 1-94, 117-83. Summaries of material modifications provided participants with notice of material changes to the terms or policies of the investment options offered. *See, e.g.*, *id.* at 95-116; R.146-92 through -93. Periodic account statements offered participants a snapshot into the effectiveness of their own allocation decisions. *See, e.g.*, R.179-13. And participants seeking more information about the funds had access to quarterly fund composition and performance reports prepared by Morningstar, Inc. *See, e.g.*, R.146-11; R.146-72 through -75.

2. This appeal 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.

Supp. App. 96, 102. Participants were told that "The 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." *Id.* That cautious approach comported with the objectives of the SVF: "to provide safety of principal, stable income and liquidity." *Id.*; *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).

Lockheed Martin's SVF was, at all relevant times, a proprietary fund available only to participants in the Plans. Supp. App. 23, 102. Within the fund, assets were segregated into subportfolios, such that the insurance contracts were held in a separate account from money market assets. That

structure permitted Plan fiduciaries to evaluate the performance of each of the SVF components against benchmarks that reflected the risk-and-return profile of those components, rather than comparing the aggregate fund to a single benchmark. R.146-16, at 6-8; R.146-17, at 1-2; R.146-71, at 1. At certain times, the subportfolio containing insurance contracts was benchmarked against the Hueler FIRSTSource Index ("Hueler Index"), and the subportfolio containing money market assets was benchmarked against 90-day Treasury bills. App. 91. At no time did Lockheed Martin benchmark the composite SVF against the Hueler Index, which never reflected the risk-and-return profile of the composite SVF.

Behind the scenes, Lockheed Martin's Investment Committee reviewed the performance of each subportfolio and debated on an ongoing basis the appropriate investment mix for the aggregate SVF. After two major issuers of insurance contracts to 401(k) plans were seized by regulators,[1] "there was concern that [insurance companies] may not be able to make good on some of these contracts" and "there [was] real risk of potential loss of principal." R.146-64, at 105; R.146-66, at 23. Because the SVF was the most conservative investment option available to Plan participants, the fiduciaries took steps to ensure that it was not unduly risky. Accordingly, Plan participants were advised in their 1998 summary plan description that "as of July 1, 1998,

[1] *See* Kenneth N. Gilpin, *Regulators Seize Large Canadian Insurer*, N.Y. TIMES, Aug. 13, 1994, § 1, at 37; Wayne King, *Mutual Benefit Seized by New Jersey Officials*, N.Y. TIMES, July 17, 1991, at D2; Richard W. Stevenson, *Executive Life Was in Red by $426.3 Million at End of '90*, N.Y. TIMES, June 8, 1991, § 1 at 46.

money market securities and insurance contracts [would] comprise approximately 80% and 20% of the Fund's assets, respectively," but that "the Fund's current strategy [was] to cease new investments in insurance contracts." Supp. App. 127.[2]

The majority view was not, however, unanimous. One member of the Investment Committee, Cora Ingrim, sought to increase the SVF's exposure to insurance contracts. In an internal memorandum, she objected that the SVF had "become a money market fund," and expressed concern that the name of the fund might be perceived as "false advertising." R.119-3, at 1. Accordingly, she proposed that the Investment Committee either "change the name of the fund to reflect its composition" or change the composition of the fund to reflect her understanding of the "stable value" moniker. *Id.*

Despite Ingrim's concerns, there is no evidence in the record that any Plan participants mistook the SVF for a fund that had minimal exposure to money market assets. Indeed, plan disclosures were explicit about the investments that comprised the SVF. Supp. App. 22-23, 102, 127. Plaintiffs' expert Paul Kampner testified that a Plan participant would "probably not" understand "the name Stable Value Fund and what complexities might go

[2] The risk of loss of principal embedded in insurance contracts exemplified by the regulatory seizures of Executive Life, Mutual Benefit Life and Confederation Life in the mid-1990s was not unique to that era. During the recent economic downturn, the security of insurance contracts was again called into question. Ben Bernanke, chairman of the Federal Reserve, testified before Congress that the government bailout of American International Group ("AIG") was motivated in part by concerns that 401(k) plan participants would lose $40 billion in insurance contracts if AIG were to collapse. Eleanor Laise, *'Stable' Funds In Your 401(k) May Not Be*, WALL ST. J., Mar. 26, 2009, at D1.

along with that fund." R.146-66, at 21. And plaintiffs' expert Albert Otto acknowledged that any Plan participant who was so inclined could have consulted the Plans' "disclosures to determine precisely what [the] Stable Value Fund contained." R.179-7, at 263. In any event, although plaintiffs characterize "stable value fund" as a "generally recognized investment for retirement plans," Pls.' Br. 3, the reality is that "'[d]ue to the varying expectations of individual plan sponsors and the range of management techniques used by their stable value managers, there is not a single style or strategy that is common across all stable value funds.'" R.146-66, at 22 (quoting Andrew Apostol, *How to Evaluate Stable Value Funds and Their Managers*, Dwight Asset Management Company (July 2007)).[3]

B. Proceedings Below

1. Plaintiffs filed suit in September 2006 and amended their complaint in November 2008. R.2; R.137. In the first amended complaint, five named plaintiffs alleged that the composition of the SVF was "[c]ontrary to the label of 'Stable Value Fund' Defendants used," because the fund was "heavily invested . . . in short-term, money market funds." R.137 ¶ 129. Plaintiffs also

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[3] Moreover, the money market assets that comprised the bulk of the Lockheed Martin SVF during the relevant time period fit within numerous definitions of "stable value." *See* R.146 at 17-18; *see also, e.g.*, Comptroller of the Currency, *Collective Investment Funds: Comptroller's Handbook* 44-45 (2005), *reproduced at* R.146-79, at 47-48 (explaining that short-term investment funds and money-market funds offer "stable value"); *The Role of Employer-Sponsored Retirement Plans in Increasing National Savings*: *Hearing Before the Spec. Comm. on Aging*, 109th Cong. 55 (2005) (statement of J. Mark Iwry) (defining "stable-value investments" as "bond and money market funds"); James J. Cramer, STAY MAD FOR LIFE 72 (2007) (describing a "stable-value fund" as "funds that invest in money markets, highly rated short- and medium-term bonds, and insurance contracts").

alleged that "[b]ecause Defendants structured the [SVF] to provide such low returns, it was an imprudent investment for participants in the Plans for participants' retirement funds." *Id.* ¶ 130. In addition to their SVF claims, plaintiffs alleged various other breaches of fiduciary duty, including allegations that the funds investing primarily in Lockheed Martin common stock were managed imprudently. *Id.* ¶¶ 88-116.

Plaintiffs disclosed five experts to offer opinion testimony about their SVF claim. Each opined that the SVF was imprudent because it was not a true stable value fund, according to the industry definition, and that Lockheed Martin was misrepresenting the fund to participants through its name. *See* R.148-1, at 2; R.148-2, at 5; R.148-3, at 10; R.148-5, at 10; R.146-128, at 33.

2. Lockheed Martin moved for summary judgment. As a threshold matter, it challenged plaintiffs' Article III 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." App. 61. The lack of any named plaintiff who could testify to plaintiffs' grievance made it difficult to pinpoint plaintiffs' claim, so on the merits, Lockheed Martin broadly defended the prudence of the SVF. It offered undisputed facts to demonstrate that the SVF was operated in a manner entirely consistent with the disclosures sent to Plan participants. *Id.* at 53-54. It explained that plaintiffs' challenge to the *name* of the SVF is foreclosed by this Court's decision in *DeBruyne v. Equitable Life Assurance Society*, 920 F.2d 457 (7th Cir. 1990), which held that a "Balanced Fund" could not be

challenged because it did not resemble other so-called "balanced funds." App. 54-57. And it defended the prudence of the balance of investments made in the SVF by establishing that 49% of 401(k) plans offer a money market fund. *Id.* at 57-58.

In March 2009, the district court ruled on Lockheed Martin's motion for summary judgment. App. 150. It rejected the standing challenge, holding 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 for alleged breaches." App. 163 (emphasis added).

On the merits, the district court substantially limited the scope of plaintiffs' SVF claim. Relying upon *DeBruyne*, the court found that "using the term 'stable value' does not 'wed' the Fund to a specific mix of investments," and that the composition of the SVF could be "'changed by disclosure.'" App. 167-68 (quoting *DeBruyne*, 920 F.2d at 464). Nevertheless, the court believed that Ingrim's memorandum was evidence that Lockheed Martin was concerned that it was not operating the SVF in compliance with Plan documents "indicat[ing] 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 [insurance contracts.]" App. 168. Because that problem "was recognized and addressed

during the period relevant to the current proceedings," the court concluded that "summary judgment on this issue is not warranted." *Id.* at 168-69.[4]

3. Meanwhile, plaintiffs' motion for class certification remained pending. Plaintiffs had sought a Rule 23(b)(1) class of all past, present, and future Plan participants. As to the SVF, Lockheed Martin challenged the proposed class definition as "overly broad," R.179 at 16, and contended that the SVF class could not be certified because plaintiffs had not invested in the fund at issue, and their claims sounded in misrepresentation, which required individualized proof of reliance. *Id.* at 5-8.

In April 2009, the district court granted plaintiffs' motion in relevant part. App. 174. For each Plan, it certified a class of all past, present, and future Plan participants "who were or may have been affected by the conduct set forth in the First Amended Complaint." *Id.* at 191. The court's opinion did not address any of Lockheed Martin's specific challenges to the proposed SVF class.

At the same time, the district court denied plaintiffs' motion to certify a class on their claim regarding funds investing primarily in Lockheed Martin common stock. App. 184-87. Plaintiffs then moved to file a "direct action" on behalf of the Plan pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). The

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[4] The "plan documents" cited by the district court were actually internal memoranda. *See, e.g.*, App. 90-92, 99-103. As described above, the summary plan descriptions accurately described the composition of the SVF at all relevant times. Far from promising a greater return than money market assets, Plan disclosures advised participants that the SVF would invest primarily in such assets and that its return might not outpace inflation. Supp. App. 22, 102, 127.

court denied the motion, finding that plaintiffs had waived the "direct action" theory and that their construction of § 502(a)(2) lacks merit. App. 193.

4. The parties cross-petitioned to file an interlocutory appeal pursuant to Fed. R. Civ. P. 23(f). Lockheed Martin's petition raised claims related to standing and individualized reliance. Plaintiffs' cross-petition involved the denial of class certification on their company stock fund claim.

After holding the petition in abeyance pending disposition of a triumvirate of ERISA class-action appeals, this Court granted Lockheed Martin's petition and directed the district court to reconsider class certification in light of the intervening opinions in *Spano v. Boeing Co.*, 633 F.3d 574 (7th Cir. 2011), and *Howell v. Motorola, Inc.*, 633 F.3d 552 (7th Cir. 2011). *In re Lockheed Martin Corp.*, 412 F. App'x 892, 893 (7th Cir. 2011). Plaintiffs' cross-petition was denied. *Id.*

5. On remand, plaintiffs sought permission to file a Second Amended Complaint to add two new plaintiffs without altering the underlying substance of the complaint. R.304 at 7. Both new plaintiffs—David Ketterer and Roger Menhennett—invested in the SVF during the alleged damages period. App. 231. Over Lockheed Martin's opposition, permission was granted. R.304 at 17.

Plaintiffs then filed an amended motion for class certification. App. 275. They made two principal changes to the proposed SVF class. *First*, they removed all of the original named plaintiffs (who had not invested in the SVF during the relevant timeframe) as class representatives and replaced them with Ketterer and Menhennett (who had). *Second*, they hard-wired their damages

theory into the class definition by including only Plan participants whose SVF investments had underperformed the Hueler Index—the benchmark that Lockheed Martin had used to assess the performance of the insurance-contracts held in the SVF.

The district court denied plaintiffs' motion as to plaintiffs' proposed SVF class. The court found that plaintiffs failed to "carry their burden of affirmatively demonstrating that the proposed class definition is appropriate." SA 19. In particular, the court rejected plaintiffs' proposal to delimit class membership by testing participant returns against the Hueler Index, which the court found to be "analogous to the failed attempt by the plaintiffs in *DeBruyne*" to challenge the "Balanced Fund" by comparing it to other "balanced funds." *Id.* at 16. In light of that finding, the court found it unnecessary to consider Lockheed Martin's separate argument that plaintiffs lack standing on the SVF claim. Meanwhile, the court granted plaintiffs' motion for class certification as to other claims, including in part their challenge to the funds investing primarily in Lockheed Martin common stock. *Id.* at 19-29 (certifying class for limited time period).

SUMMARY OF ARGUMENT

I. No class can be certified on plaintiffs' SVF claim because plaintiffs lack standing to raise that claim. In a class action, Article III requires that at least one of the named plaintiffs has sustained injury-in-fact as of the time the complaint was filed. Congress cannot by statute authorize a lawsuit by a plaintiff who lacks a discrete, individualized injury. Thus, the district court

erred by holding that ERISA § 502(a)(2), which authorizes suits by plan participants to redress breaches of fiduciary duty, automatically confers standing on *any* plan participant to raise *any* participant's claim. That provision merely authorizes a plan participant who has sustained an injury to file suit to redress that injury. Otherwise, any plan participant could file suit to raise *another* plan participant's claim—even though the plaintiff manifestly would lack a personal stake in the outcome. All nine federal courts of appeals that have considered this issue have held that plan participants must have a personal injury to seek money damages under ERISA § 502.

Under that established principle, plaintiffs cannot satisfy their burden to prove that they have Article III standing. Neither of the original class representatives for the SVF claim had standing because they had not invested in the SVF, and under this Court's precedent, a district court cannot cure a standing defect by adding new plaintiffs.

II. Even if plaintiffs had standing to pursue their SVF claim, the district court did not abuse its discretion in denying plaintiffs' motion for class certification as to that claim. This Court's decision in *Spano* emphasizes the importance of precision in defining a class and the substantive issues to be resolved on a class-wide basis. Here, there is no such precision. In fact, the liability theory that plaintiffs invoke to seek class certification materially differs from the liability theory that survived summary judgment.

The district court permitted plaintiffs to proceed only on their claim that the SVF was not managed in accordance with Plan documents and that Plan

participants were thereby misled about the nature of their investment in the SVF. Plaintiffs, though, have not sought to certify a class on that theory of SVF liability. And in any event, such a misrepresentation claim is suitable for class certification only if the misrepresentation was so central to the operation of the plan that reliance by all plan participants can be assumed. That is not the case here, and plaintiffs have not asserted that it is.

The district court rejected at summary judgment the claim on which plaintiffs now seek class certification. Applying this Court's decision in *DeBruyne*, the court found that plaintiffs are not entitled to challenge on the merits whether the SVF was managed in a manner typical of other so-called "stable value funds" managed by other companies. Yet, that is precisely the imprudence challenge that plaintiffs seek to raise here by asserting that the SVF differed from other "stable value funds." Plaintiffs are not entitled to certify a class to pursue a claim that has already been rejected on the merits.

Even if that theory were still in the case, plaintiffs' motion was correctly denied. Their claim that the SVF was not a prudent "stable value fund" is fundamentally a misrepresentation claim. It rests on plaintiffs' contention that participants did not receive the "stable value fund" investment that they expected. Moreover, because participants have multiple investment options in a 401(k) plan, a participant is injured by an imprudent investment in a particular fund only if it prevents the participant from constructing a prudent portfolio. Given the panoply of investment options available here, it is not surprising that plaintiffs' class definition does not identify any Plan

participants who were so injured. Finally, even if a class could be certified based on plaintiffs' supposed entitlement to a typical "stable value fund," they have not shown that the Hueler Index identifies those participants who were injured under that theory.

Plaintiffs' contention that this means that no class can ever be certified to challenge an allegedly imprudent investment fund is incorrect. Applying these *Spano* standards, the district court did certify a class to challenge investments in the company stock funds during the relevant period. Plaintiffs' failure to specify a certifiable class on the SVF claim is specific to the claim they are pursuing and the class they have defined. If plaintiffs were challenging whether the SVF was a prudent investment fund—as opposed to whether it was a prudent "stable value fund"—they could have avoided many of the threshold barriers to class certification that require affirmance of the district court's ruling.

STANDARD OF REVIEW

1. "Whether a party has standing to bring suit is a question of law . . . review[ed] de novo." *Disability Rights Wis., Inc. v. Walworth Cnty. Bd. of Supervisors*, 522 F.3d 796, 800 (7th Cir. 2008).

2. Because "a district court has broad discretion to determine whether certification of a class is appropriate," this Court's review of a district court's denial of class certification is "circumscribed." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993). The denial of class certification can be reversed "only when . . . the district court abused its

discretion in reaching its decision." *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 703 (7th Cir. 1993).

ARGUMENT

I. NO CLASS CAN BE CERTIFIED ON PLAINTIFFS' STABLE VALUE FUND CLAIM BECAUSE PLAINTIFFS LACK STANDING TO RAISE THAT CLAIM.

Plaintiffs lack Article III standing to raise their SVF claim. Consequently, the district court lacked jurisdiction to entertain plaintiffs' motion for class certification as to that claim. This Court should therefore vacate in part the order denying certification and remand with directions to dismiss the claim. In the alternative, because standing is a prerequisite for class certification, the district court's denial of plaintiffs' motion as to the SVF class should be affirmed on that basis. *See* 16 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 3931.1 (2d ed. 2012) (standing is appropriately addressed on Rule 23(f) review); *accord Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002); *City of Hialeah v. Rojas*, 311 F.3d 1096, 1101 (11th Cir. 2002).

A. Injury-In-Fact Is Constitutionally Required In ERISA Actions Filed By Plan Participants.

Although the district court correctly declined to certify a class on plaintiffs' SVF claim, it should not have addressed the suitability of class certification at all. The court entertained plaintiffs' motion as to the SVF class only because it labored under the misimpression that *any* Plan participant may sue to remedy any breach of fiduciary duty, regardless of whether the participant sustained a personal injury that could be redressed by judicial

action. To the contrary, only Plan participants who sustain injury-in-fact possess standing.

1. Injury-in-fact is an essential component of Article III standing.

Article III of the Constitution limits judicial power to "cases" and "controversies." U.S. Const. art. III, § 2. "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). "That limitation requires those who invoke the power of a federal court to demonstrate standing." *Already, LLC v. Nike, Inc.* 133 S. Ct. 721, 726 (2013).

The "irreducible constitutional minimum" of standing consists of (1) injury-in-fact ("an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical"), *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and quotation marks omitted)); (2) that is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . [the] result[] [of] the independent action of some third party not before the court," *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); and (3) that will "likely" be "redressed by a favorable decision," *id.* at 38. Because plaintiffs have not suffered injury-in-fact, they fail this test.

2. ERISA § 502(a)(2) does not alter the Article III requirement of injury-in-fact.

ERISA § 502(a)(2) authorizes "a participant" to initiate a "civil action" for breach of fiduciary duty. 29 U.S.C. § 1132(a)(2). That provision does not obviate a plaintiff's obligation to demonstrate injury-in-fact.

The Constitution forbids Congress from expanding the jurisdiction of the federal courts to persons who lack injury-in-fact. Although statutes can create "legal rights, the invasion of which creates standing," and Congress can remove "prudential" barriers to standing, *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975), "[a] plaintiff must always have suffered 'a distinct and palpable injury to himself,' that is likely to be redressed if the requested relief is granted," John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1226 (1993) (quoting *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979)). Stated differently, Congress lacks the power to "confer standing;" at most, "'it confers a right to sue upon parties who otherwise already have standing.'" *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 954 (7th Cir. 2005) (quoting *Common Cause v. FEC,* 108 F.3d 413, 419 (D.C. Cir. 1997) (per curiam)).

The leading case on the power of Congress to confer standing is *Lujan*. In that case, environmental groups invoked the citizen-suit provision of the Endangered Species Act, which authorized "any person" to "commence a civil suit on his own behalf" to enjoin violations of the Act. 16 U.S.C. § 1540(g); *see Lujan*, 504 U.S. at 571-72. After the Eighth Circuit held that § 1540(g) created a procedural right that endowed "any person" with standing—regardless of whether that person had a personal stake in the outcome of the case—the

Supreme Court reversed. Notwithstanding the citizen-suit provision, the Court held that the plaintiffs lacked constitutional standing because they could not identify a "concrete interest of theirs" and could not "allege any discrete injury flowing from" the alleged misconduct. *Lujan*, 504 U.S. at 571-72; *see also Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) ("[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.").

The district court's treatment of standing in this case repeats the error corrected by *Lujan*. The district court found that "[t]he statutory provisions of ERISA 'unambiguously grant[] the plaintiffs the standing needed to bring their claims,'" because ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), authorizes "a participant" to initiate a "civil action" for breach of fiduciary duty. App. 163. But *Lujan* teaches that statutory authorization to sue is not sufficient to satisfy Article III. Unless such a statute protects "a separate substantive right of the plaintiff, a plaintiff may not invoke the federal judicial power to vindicate the denial of that procedural right." *Bensman*, 408 F.3d at 952 (citing *Lujan*).

3. The policies underlying the standing requirement would be undermined if uninjured plaintiffs could raise other participants' claims.

This case exemplifies the perils of permitting a case to proceed where plaintiffs lack a personal stake. The district court resolved Lockheed Martin's motion for summary judgment before it addressed class certification. Thus, Lockheed Martin was forced to defend its conduct regarding the SVF without knowledge of any participant's particular grievance. The lack of an actual

person who had an actual grievance that required judicial intervention has inured exclusively to plaintiffs' benefit. Without an anchor to historical facts, plaintiffs have felt free to change their theories of liability as to the SVF at will. *Cf.* page 30, *infra*.

Indeed, plaintiffs' rule would permit truly bizarre proceedings in which a single plan participant could litigate claims on behalf of any other participant. According to plaintiffs, Section 502(a)(2) not only authorizes any plan participant to file suit on behalf of *all* plan participants, it authorizes *any* plan participant to file suit on behalf of *any other* plan participant. That assertion rests on a misunderstanding of the Supreme Court's decision in *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008).

LaRue involved a single participant's claim against the administrator of his 401(k) plan, which he alleged had failed to implement his investment directions. The Court held that when fiduciary conduct harms an individual plan participant, that is a plan injury for which § 502(a)(2) authorizes suit. *See LaRue*, 552 U.S. at 256. But under the interpretations of Article III and § 502(a)(2) advanced here by plaintiffs and accepted by the district court, LaRue was not the only person entitled to pursue his claim for relief. If § 502(a)(2) authorizes suits by any plan participant, regardless of his personal stake, then any participant in LaRue's plan could have sued on his behalf. Such an untoward result underscores why injury-in-fact is required; scarce judicial resources should not be consumed by parties who have no stake in the

litigation. Plaintiffs are entitled to file suit only if they stand to receive a tangible benefit if they prevail.

4. Other courts of appeals have unanimously rejected claims that no personal injury-in-fact is required in an action under ERISA § 502(a)(2).

Numerous other courts have held that while ERISA § 502(a)(2) confers *statutory* standing, it does not entitle *uninjured* plaintiffs to invoke federal jurisdiction. Earlier this year, the Fourth Circuit held that a group of participants in a defined benefit ERISA plan lacked Article III standing to challenge supposedly imprudent investment decisions because there was no evidence that the plaintiffs' benefits would be reduced by virtue of those decisions. *David v. Alphin*, __ F.3d __, 2013 WL 142072, at *7-9 (4th Cir. Jan. 14, 2013). In affirming dismissal, the court specifically rejected the contention that the plaintiffs were entitled to sue simply because ERISA § 502(a)(2) authorizes suits by plan participants or because participants have a right to a plan "operated in accordance with ERISA's fiduciary requirements." *Id.* at *5-7, *9.

Like the Fourth Circuit, the First, Second, Third, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have all held that plan participants must have a personal injury to seek money damages under § 502.[5] And this Court has

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[5] *See Taylor v. KeyCorp*, 680 F.3d 609, 612 (6th Cir. 2012) ("[T]o have standing to pursue this lawsuit, [the plaintiff] must establish that she was actually injured by defendants' alleged conduct."); *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 200 (2d Cir. 2005) (an ERISA plaintiff must "satisfy the strictures of constitutional standing by 'demonstrating individual loss'"); *accord Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 456 (3d Cir. 2003); *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465

indicated as much in dicta, emphasizing that ERISA plaintiffs have Article III standing when "if they win they will obtain a tangible benefit." *Harzewski v. Guidant Corp.*, 489 F.3d 799, 803 (7th Cir. 2007). Conversely, plaintiffs have not identified—and we are unaware of—any appellate authority in support of the district court's view that ERISA § 502(a)(2) extends Article III standing to any plan participant irrespective of personal injury. This Court should accept the unanimous view of the courts of appeals that have ruled on this issue.[6]

B. Plaintiffs Lack Standing Because No Original Named Plaintiff Sustained Injury-In-Fact.

Plaintiffs lack Article III standing as to their SVF claim because none of the original named plaintiffs sustained injury-in-fact on that claim.

1. Plaintiffs bear the burden to establish injury-in-fact with actual evidence.

Standing is "an indispensable part of the plaintiff's case . . . on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561; *accord Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 971 (7th Cir. 2005). That burden requires plaintiffs to come forward "with the manner and degree of

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F.3d 1123, 1127 (9th Cir. 2006); *Cunningham v. Adams*, 106 F. App'x 693, 696 (10th Cir. 2004); *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 906-07 (8th Cir. 2002); *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1354 (11th Cir. 2001); *Waters Corp. v. Millipore Corp.*, 140 F.3d 324, 325 n.3 (1st Cir. 1998).

[6] The district court relied on *Winarski v. Nannenga,* 2005 WL 1221594 (N.D. Ind. May 19, 2005). App. 163. In *Winarski*, the court invoked ERISA § 502(a)(2) to conclude that plaintiffs had *prudential* standing—only after concluding that plaintiffs had Article III standing (at the pleading stage) based on their allegation that the alleged fiduciary wrongdoing had compromised their interest in plan benefits. 2005 WL 1221594, at *4. Thus, *Winarski* did not hold that plan participants have constitutional standing absent an adequate showing of injury-in-fact.

evidence required at the . . . [applicable] stage[] of the litigation." *Lujan*, 504 U.S. at 561.

For at least three reasons, plaintiffs were required to come forward with actual evidence to prove standing. *First*, because Lockheed Martin challenged standing at summary judgment, *see* R.146 at 23-24, plaintiffs were required to adduce evidence sufficient to produce a "genuine dispute" as to a "material fact." Fed. R. Civ. P. 56(a). *Second*, because "constitutional standing . . . is a prerequisite to Rule 23 class certification," *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 108 (D.C. Cir. 2002); *accord Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1353 (11th Cir. 2001), plaintiffs were required to "affirmatively demonstrate" standing with proof that they possess standing "*in fact*." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). *Third*, even at the motion-to-dismiss stage, if the defendant comes forward with "evidence calling . . . standing into question . . . '[t]he presumption of correctness that [is] accord[ed] to a complaint's allegations falls away.'" *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009) (quoting *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n,* 149 F.3d 679, 685 (7th Cir. 1998)). At that point, "the plaintiff bears the burden of coming forward with competent proof that standing exists." *Id.*

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). And because this is a class action, the *named* plaintiffs must satisfy the standing requirements of Article III, *O'Shea v.*

Littleton, 414 U.S. 488, 494 (1974), determined as of the time the complaint was filed, *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989).

2. The proposed SVF class representatives lack standing unless the original named plaintiffs possessed standing.

The two representatives of the proposed SVF class lack standing because neither was originally named as plaintiff. Plaintiffs Ketterer and Menhennett[7] were added to the case in 2012 because *Spano* requires class representatives to be members of the class and none of the original named plaintiffs were members of the SVF class. R.299 at 1; *see* R.304 at 7. Circuit precedent makes clear that class plaintiffs lack standing to pursue a claim unless the named plaintiffs *at the time the complaint was filed* satisfied the constitutional requirements.

In *Walters v. Edgar*, 163 F.3d 430 (7th Cir. 1998), inmates in maximum security prisons filed suit to challenge their denial of access to courts. After the district court found liability but before it determined a remedy, the Supreme Court issued an opinion that led the district court to conclude that none of the named plaintiffs possessed standing. *See Walters v. Edgar*, 973 F. Supp. 793 (N.D. Ill. 1997). The district court dismissed the suit in its entirety, whereupon plaintiffs appealed to this Court, claiming that "the suit should not have been dismissed but instead other members of the class should have been named as the class representatives." *Walters*, 163 F.3d at 432. But this Court held that

[7] Plaintiffs have abandoned any reliance on Menhennett, who signed a release of claims in conjunction with a severance agreement. Pls.' Br. 8 n.10; SA 8-9. Menhennett could not have standing in light of that release. *See Already*, 133 S. Ct. at 728-29. In any event, Menhennett is not an appellant in this case, and plaintiffs assert that only "Plaintiff David Ketterer represent[s] the SVF class." Pls.' Br. 8.

amending the complaint to add new named plaintiffs would not cure the jurisdictional defect, because if the original named plaintiffs "never had standing to bring this suit," then "federal jurisdiction never attached" and the case had to be dismissed. *Id.* at 432-33; *see also Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 506 (7th Cir. 2010) ("[I]f a class representative lacks standing at the time the complaint is filed, the entire class action should be dismissed.").

A different rule applies when the court properly acquires jurisdiction over the named plaintiff, the class is certified, and then the court loses jurisdiction over the named plaintiff, as when his claim is mooted. In such a circumstance—where the court had jurisdiction at the outset—it is proper to substitute the named plaintiff with a member of the certified class whose claim is not moot. *See Walters*, 163 F.3d at 432; *see also Whitlock v. Johnson*, 153 F.3d 380, 383-84 (7th Cir. 1998). But the mootness exception cannot be used to bootstrap standing for Ketterer in this case; there was no certified class (and thus Ketterer was not an absent class member) when plaintiffs sought to add him to redress the lack of a plaintiff who had sustained injury-in-fact, and the district court lacked jurisdiction prior to that point.

As explained by a leading treatise on the law of class certification:

> [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.

1 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 2:8 (5th ed. 2011). The Sixth Circuit has specifically applied that rule to dismiss an ERISA action where the named plaintiff never "had a justiciable claim," explaining that "federal jurisdiction never attached," and thus "[i]t follows that there is no class action." *Crosby v. Bowater Inc. Ret. Plan for Salaried Employees of Great N. Paper, Inc.*, 382 F.3d 587, 597 (6th Cir. 2004).

Pursuant to *Walters*, a new plaintiff can be named to *preserve* standing "if something had happened to deprive the [original] named plaintiffs of standing . . . *after* the suit had been filed," provided that the class was certified *before* the loss of standing and the new plaintiff was an unnamed class member who had standing. 163 F.3d at 432. Because no original named plaintiff had standing, the addition of Ketterer cannot create standing here.

3. The original named plaintiffs lacked standing on the SVF claim.

None of the original named plaintiffs had standing because none of them invested in the SVF at a time when it sustained damages under plaintiffs' theory of the case.

Prior to the filing of plaintiffs' latest motion for class certification, plaintiffs requested and Lockheed Martin produced annual and quarterly account statements for each of the named plaintiffs. Plaintiffs provided these statements to an expert witness, Steve Pomerantz, who "reviewed the available quarterly and annual account statements for the named Plaintiffs and . . . calculated their losses." App. 308-09 ¶ 13 & n.10 (asserting that he reviewed 383 pages of "named Plaintiffs' quarterly and annual statements"). Pomerantz

concluded that, under plaintiffs' theory of the case, Ketterer had sustained $688 in damages on his investment in the SVF and Menhennett had sustained $31 in damages. *Id.* at 309 ¶¶ 14-15. He did not find that any of the original named plaintiffs had sustained any damage on the SVF claim.

Nevertheless, plaintiffs' opening brief asserts that plaintiff DeMartini "*contends* he suffered losses from Lockheed's imprudent management of the SVF," but cannot "*prove* his losses." Pls.' Br. 8 n.10 (emphasis added). As explained above, a contention is not enough—plaintiffs were required to come forward with evidence of injury-in-fact. Absent any evidence that an original named plaintiff sustained injury-in-fact on the SVF claim, the district court never obtained jurisdiction over that claim.

Unable to point to any evidence, plaintiffs blame their failure of proof on Lockheed Martin's supposed failure to produce the necessary "specific transaction data." Pls.' Br. 8 n.10. But that accusation is incorrect and irrelevant.

The reason why DeMartini cannot prove his losses is because there were no such losses. He invested in the SVF for the first time in 2006. *See* R.76-14, at 5. But in 2006, an investment in the SVF would have done *worse* absent the alleged breach of fiduciary duty, such that plaintiffs' expert Albert Otto computed *negative* damages to the Plans for that year. *See* R.164-5, ex. 22. A plaintiff with negative damages (*i.e.*, positive gains) did not suffer injury-in-fact. *See, e.g.*, *Taylor v. KeyCorp*, 680 F.3d 609, 613 (6th Cir. 2012); *Brown v. Medtronic, Inc.*, 628 F.3d 451, 455 (8th Cir. 2010); *Piazza*, 273 F.3d at 1354.

Plaintiffs effectively conceded that DeMartini had not been injured by the SVF when they added Ketterer and Menhennett to the case in the wake of *Spano*, at which point they did not even offer DeMartini as one of the representatives of the SVF class.

Moreover, Lockheed Martin produced DeMartini's account statements to plaintiffs. Plaintiffs then supplied those statements to Pomerantz, their expert, who opined that DeMartini had been injured by an alleged breach of fiduciary duty as to his investment in Lockheed Martin company stock. R.344-2, ¶ 24.a. Even though plaintiffs had the data they needed to assess DeMartini's injury, neither Pomerantz nor any other expert opined that DeMartini had been injured by an alleged breach of fiduciary duty as to his SVF investment.

But even if plaintiffs could show that Lockheed Martin had failed to produce relevant data within its possession, that omission would not vest the federal courts with jurisdiction. If plaintiffs required additional discoverable information that Lockheed Martin did not provide, they were obligated to move to compel discovery. *See* Fed. R. Civ. P. 37. Having failed to do so, plaintiffs have forfeited any claim to additional records. *See Reinders Bros., Inc. v. Rain Bird E. Sales Corp.*, 627 F.2d 44, 51 (7th Cir. 1980) (party that fails to invoke Rule 37 to challenge response to discovery requests "has only itself to blame for any resulting deficiency in the record and cannot complain about the matter here").

In sum, plaintiffs' failure to demonstrate that any named plaintiff had standing at the time their complaint was filed precludes certification of a class on their SVF claim.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN RULING THAT PLAINTIFFS' PROPOSED SVF CLASS DOES NOT SATISFY RULE 23(a).

If this Court concludes that plaintiffs have Article III standing to pursue their SVF claim, then the denial of class certification as to that claim should be affirmed because plaintiffs' proposed SVF class does not satisfy the requirements of Rule 23(a).

In *Spano*, this Court emphasized that district courts should not rubber-stamp requests to proceed on a class-wide basis, particularly in cases involving defined contribution plans, which are characterized by individual investment decisions by plan participants. 633 F.3d at 591. In distinguishing between appropriate and inappropriate uses of Rule 23, this Court declared the class definition to be "a vital step" in the inquiry and "the most important part" of a class certification order, because the nature of the class and its claims governs "the scope of the litigation and the ultimate *res judicata* effect of the final judgment." *Id.* at 583-84; *see also id.* at 589 (identifying the difficulty in identifying "exactly what misrepresentation claims have been certified" as "another flaw with the district court's order"); *Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 905 (7th Cir. 2012) (a class certification order must contain "'a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis'"), *petition for cert. filed*, 81 U.S.L.W. 307 (U.S. Aug.

1, 2012) (No. 12-165); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 (3d Cir. 2009) ("'A class certification decision requires a thorough examination of the factual and legal allegations.'").

The basic problem with plaintiffs' SVF claim is that they survived summary judgment under one theory but then sought class certification under a different, previously rejected theory. But there are problems with all the varying theories that plaintiffs have invoked during this case.

There are, in fact, three potential theories of liability at play here:

(1) Did Lockheed Martin promise SVF investors one thing and give them something else?

(2) Was the SVF an imprudent "stable value fund"?

(3) Was the SVF an imprudent investment option?

The district court permitted a variant of question (1) to proceed to trial. Plaintiffs seek class certification as to theory (2). But only theory (3) is potentially suitable for class-wide treatment.

A. Plaintiffs Are Not Entitled To Certify A Class On The Misrepresentation Theory That Alone Survived Summary Judgment.

The claim that survived summary judgment is based on a misrepresentation theory. Plaintiffs claim that the SVF was not managed in accordance with "plan documents" that supposedly "indicate[d] 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 [insurance contracts]." App. 168. Plaintiffs further claim

that Lockheed Martin's operation of the SVF had the effect of "falsely leading participants to believe that they were getting more risk—and the concomitant greater reward—than they were." *Id.* Plaintiffs spent years litigating this "false advertising" case. *See, e.g.*, App. 73, 252, 283; R.119 at 4; R.189 at 9; R.148-1, ¶ 1; R.148-2, ¶ 101; R.148-3, ¶ 16; R.148-5, at 10.

But after *Spano*, plaintiffs changed their tune. That, no doubt, is because *Spano* indicated that even if Plan documents had promised a higher-than-money market return, such a misrepresentation claim would not be eligible for class certification.

In *Spano*, this Court distinguished between two types of misrepresentation claims. Because a misrepresentation causes injury only if relied upon, class treatment is appropriate only for misrepresentations "so central to the operation of a plan that injury to someone who held shares in the affected fund[] might be inferred." *Spano*, 633 F.3d at 589. Other claims of misrepresentation "would require precisely the kind of individualized attention that would make it difficult to find a class representative with claims typical of enough people to justify class treatment." *Id.*; *see also Clark v. Experian Info. Solutions, Inc.*, 256 F. App'x 818, 821-22 & n.1 (7th Cir. 2007) ("negligent misrepresentation requires a showing of reliance"); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (requiring causal link between non-public information and securities prices for certification of securities-fraud action); *Frahm v. Equitable Life Assurance Soc'y*, 137 F.3d 955, 957 (7th Cir. 1998)

(declining to certify a class in light of conflicting evidence as to which representations had been made to which plan participants).

Here, plaintiffs have offered not an iota of evidence to suggest that class members actually relied on supposed misrepresentations in Plan documents. Quite to the contrary, proposed class representative David Ketterer testified that he did not review the materials about the SVF before investing in it and never reviewed any disclosures other than "cursorily." *See* R.353-5, at 34. Thus, he cannot have been deceived in a manner common to all class members. Indeed, Ketterer's complaint about the SVF was that Lockheed Martin "w[as] taking *more* risks with the money than they needed to," *id.* at 58 (emphasis added), which is precisely the opposite of the claim that plaintiffs seek to advance on a class-wide basis. *See also id.* at 76 ("Money markets and stuff that were in the . . . higher risk categories were not something I wanted to play with.").

The only remnant of the "false advertising" theory that appears in plaintiffs' opening brief is the quotation of the SVF objectives, which were stated in the summary plan description. *See* Pls.' Br. 4. But plaintiffs do not explain why, under their current approach, the stated objectives are relevant to their theory of liability.

As the Supreme Court indicated in *Wal-Mart*, plaintiffs bear the burden to "affirmatively demonstrate" their compliance with the requirements of Rule 23(a). 131 S. Ct. at 2551. Plaintiffs' failure to identify any evidence that the supposed misrepresentation to Plan participants was "central to the operation"

of the SVF means that they have failed to demonstrate that their class representative has a claim typical of the class he seeks to represent, or that he is an adequate plaintiff to represent their common experience. *Spano*, 633 F.3d at 589. In this respect, this case falls within the general rule that reliance on plan disclosures presents highly individualized issues of reliance that make class certification unlikely. *See Groussman v. Motorola, Inc.*, 2011 WL 5554030, at *5 (N.D. Ill. Nov. 15, 2011) (denying class certification in an ERISA case because plaintiffs "failed to show that they and the proposed class members were deceived in a uniform fashion"); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.,* 443 F.3d 1330, 1344 (11th Cir. 2006) ("[E]ach class member must prove that he relied on the [summary plan description] . . . present[ing] problems of individualized proof that preclude class certification."); *In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, 2009 WL 331426, at *6 (D.N.J. Feb. 10, 2009) ("communications to participants, and the individual participants' consequent investment choices, are central elements of the communications claim . . . [which are] highly individualized").

B. Plaintiffs Are Not Entitled To Certify A Class That Fails To Reflect Their Surviving SVF Claim.

The claim on which plaintiffs *do* seek certification is a claim that is unsustainable on the merits under this Court's decision in *DeBruyne*. Because the district court rejected that theory at summary judgment, plaintiffs are not entitled to class certification on that theory. *See, e.g.*, *Chavez v. Ill. State Police*, 251 F.3d 612, 630 (7th Cir. 2001) (affirming denial of class certification because district court had rejected claims on summary judgment); *Cowen v.*

Bank United of Tex., FSB, 70 F.3d 937, 941 (7th Cir. 1995) ("[a] decision that the claim of the named plaintiffs lacks merit ordinarily . . . moot[s] the question whether to certify the suit as a class action"); *see also Thompson v. Cnty. of Medina*, 29 F.3d 238, 241 (6th Cir. 1994) ("The district court did not abuse its discretion in refusing to certify a class as to the issues disposed of on summary judgment."). Class certification is not an opportunity to reintroduce theories of liability that have already been adjudicated and rejected on the merits.

1. Plaintiffs seek class certification under the theory that the SVF was not prudent as a "stable value fund."

The theory on which plaintiffs seek class certification is unmistakable: They believe that the SVF was not a "prudently managed stable value fund." Pls'. Br. 5; *accord id.* at 37 (same); *id.* at 31 (SVF not a "properly managed stable value fund"); *id.* at 35 (SVF not a "prudent stable value fund"). That is why, in the section of their brief entitled "Plaintiffs' theory of liability," plaintiffs explain their allegation that a "stable value fund . . . is a generally recognized investment for retirement plans," featuring "longer duration instruments that provide substantially higher returns than a money market fund." *Id.* at 3-4. Plaintiffs' liability theory is that Lockheed Martin "violated th[e] standards" of "how stable value funds are prudently managed in comparable plans," because whereas "prudent[]" stable value funds supposedly allocate "no more than 5% of [their] assets to money market investments," Lockheed Martin's SVF "allocated at least 10 times that amount." *Id.* at 5; *see also* App. 290 (describing Ketterer's claim that the SVF was not "typical of other stable value funds").

This theory starts from the premise that the SVF must be judged against other so-called "stable value funds," as if a single strategy is mandated by the name of the fund. The incorporation of the Hueler Index into plaintiffs' class definition is an application of plaintiffs' governing principle. If plaintiffs were entitled to a "typical . . . stable value fund," then they submit that the Hueler Index typifies such funds. *See* App. 226.

The premise of that argument is that there is such a thing as a "typical" or "prudent" "stable value fund," and that the SVF must be judged against such a fund even if Plan participants were told that the SVF was a different creature—a more conservative investment option, described to Plan participants as a "Money Market" fund that reflected a greater appropriation to money market assets. App. 249.

2. As the district court found at summary judgment, plaintiffs' theory is foreclosed by *DeBruyne*.

In *DeBruyne*, this Court considered and rejected the notion that a fund can be imprudent because it does not typify the allocation of similarly named funds, so long as the fund is managed in accordance with disclosures advising participants what their particular fund will actually do.

In *DeBruyne*, two participants in the ABA Members Retirement Plan filed suit alleging breach of fiduciary duty after the Black Monday stock market decline of October 19, 1987. Plaintiffs challenged the Balanced Fund, which was managed by Equitable Life Assurance Society and a subsidiary (collectively, "Equitable"). As relevant here, plaintiffs contended that Equitable had failed to comply with plan documents because the Balanced Fund was not

"balanced," and that Equitable had breached its fiduciary duty because "the Balanced Fund was not prudently managed because it was not balanced in accordance with what a 'typical' balanced fund portfolio manager might have done in 1987." *DeBruyne,* 920 F.2d at 464-65.

The district court granted summary judgment to Equitable and this Court affirmed. On the first point, this Court reasoned that "there is no uniform, pre-established definition of 'balance' and that Equitable had substantial freedom in defining that term." *DeBruyne,* 920 F.2d at 464. On the second point, this Court rejected reliance on "assertions of what a 'typical' balanced fund portfolio manager might have done," finding such considerations to be irrelevant. *Id.* at 465.

The only difference between *DeBruyne* and "[p]laintiffs' theory of liability" here is that the plaintiffs in *DeBruyne* claimed that the Balanced Fund had lost money because it was too risky, whereas plaintiffs here are seeking compensation because the SVF, as the most conservative investment option in the Plans, was allegedly too conservative. But as in *DeBruyne*, Lockheed Martin was free to define the SVF as it saw fit because there is no "uniform, pre-established definition" of "stable value." *See supra* page 7 & note 3. And because Lockheed Martin was not bound by the conception of "stable value" employed by others, what other "stable value" managers chose to do is irrelevant.

That is why, at summary judgment, the district court ruled that "[a]s in *DeBruyne*, using the term 'stable value' does not 'wed' the Fund to a specific

mix of investments." App. 168. And that is why, when plaintiffs sought to revive their theory on class certification, the district court equated their approach "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." SA 16. For if plaintiffs are not entitled to seek liability on the basis of differences between the investment strategy of the SVF and other "stable value" funds, then the Hueler Index has no role to play in identifying Plan participants who have a shared, cognizable grievance with the Plans.

3. Plaintiffs offer no credible response to the district court's reliance on *DeBruyne*.

a. Plaintiffs shrug off *DeBruyne* by arguing that the case "does not even address class certification standards," and claim that *DeBruyne* is different because plaintiffs here "do not contend the SVF was imprudent because it underperformed other stable value funds or the Hueler Index." Pls.' Br. 33-34. To be sure, as articulated in their brief to this Court, plaintiffs do not say that the SVF was imprudent because it *underperformed* other stable value funds; they make the slightly more nuanced point that it was imprudent because the *balance* between insurance contracts and money market assets in the SVF differed from other stable value funds, which resulted in underperformance.[8] But, again, that is precisely the same claim—that a

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[8] Plaintiffs were not as nuanced at the district court, where they contended that "fiduciaries managed the Stable Value Plan option imprudently and did not provide the returns a prudent fiduciary would have done in managing a similar fund." R.365 at 2-3.

"'typical balanced fund portfolio manager' would have followed a different course of action"—that this Court rejected in *DeBruyne*. 920 F.2d at 463. Similarly named funds are not similar if plan disclosures advise participants that the funds have different targets and seek different levels of risk and volatility.

As to plaintiffs' claim that *DeBruyne* was not a class certification case, that is true but irrelevant. Plaintiffs' case has been substantially curtailed by the interlocutory orders of the district court. Plaintiffs are not entitled to class certification on a claim or theory that has already been rejected. *See Chavez*, 251 F.3d at 630. And because *DeBruyne*—as applied by the district court on summary judgment—forecloses the "theory of liability" upon which plaintiffs seek class certification, the district court correctly declined to proceed down that dead-end road.

b. Relatedly, plaintiffs contend that the district court should have certified the class "provisionally," even if the class definition required subsequent amendment. But the *premise* of plaintiffs' proposed SVF class definition—that plaintiffs were entitled to a "typical stable value fund" like those reflected in the Hueler Index—is flat wrong. Having failed to offer a definition that corresponds to a claim that remains in the case, plaintiffs cannot fall back on the "inherently tentative" nature of class certification. Pls.' Br. 42. Plaintiffs are not entitled to a certified class that has an uncorrectable defect. Proceeding in the face of such an error would defy the purposes of class certification and entitle plaintiffs to use the prospect of class-wide liability to

extract settlements on unfair terms. *See, e.g.*, *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) ("[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable."); *Szabo v. Bridgeport Machs., Inc.,* 249 F.3d 672, 676 (7th Cir. 2001) ("[A]n order certifying a class usually is the district judge's last word on the subject . . . even if the district judge viewed the certification as provisional."); *Simer v. Rios*, 661 F.2d 655, 670 (7th Cir. 1981) ("[I]dentifying the class insures that those actually harmed by defendants' wrongful conduct will be the recipients of the relief eventually provided.").

In any event, plaintiffs did not argue to the district court that their definition should be used provisionally; thus, this argument has been waived. *See Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) ("arguments not raised to the district court are waived on appeal").

4. There are additional reasons why plaintiffs' reliance on the Hueler Index is inappropriate.

Even if plaintiffs still could claim that the SVF was not a "prudently managed stable value fund," they would not be entitled to class certification. As the district court correctly ruled, plaintiffs failed to "carry their burden of affirmatively demonstrating that the proposed class definition is appropriate." SA 19. There are several reasons supporting that conclusion. To the extent these reasons were not stated by the district court in its order denying certification, this Court may "affirm on any ground adequately supported in the record." *Srail v. Vill. of Lisle*, 588 F.3d 940, 943 (7th Cir. 2009).

First, the claim that the SVF was not a prudent "stable value fund" is still a misrepresentation claim. It makes sense to assess whether participants

received a prudent "stable value fund" only if they expected to invest in a "stable value fund" as plaintiffs have defined that term. Whether Plan participants understood and contemplated the "stable value fund" definition proffered by plaintiffs would surely differ among members of plaintiffs' proposed class. To certify a class as to whether the SVF was a prudent "stable value fund," plaintiffs would need to show that Ketterer's expectation that his SVF represented a "stable value fund" was typical of the class. But plaintiffs have come forward with no evidence that Ketterer or any participant shared such an expectation.

Second, *Spano* requires a class to be defined so as to include only those who were injured. But plaintiffs' class definition cannot be reconciled with the injury recognized by ERISA §§ 409 and 502. In *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009), this Court indicated that, insofar as the role of a 401(k) plan fiduciary is to make available an array of investment options, a single undesirable fund would not be imprudent, so long as the participant could assemble a prudent portfolio. *Id.* at 586. In *Howell v. Motorola, Inc.*, 633 F.3d 552 (7th Cir. 2011), this Court acknowledged that it is possible to pursue an individual claim for breach of fiduciary duty in selecting investment options in a defined contribution plan. *Id.* at 566-68. But in *Spano*, this Court emphasized that "the availability of such a claim in theory is not the same as the ability to assert it as a class in a particular case." 633 F.3d at 590. The Court explained that the "the question on the merits would be whether the mere existence of a fund that is undesirable taints the entire plan," unless

plaintiffs could prove (1) "deliberate misrepresentations about soundness"; (2) "that participants had such a small number of options that they were forced into the bad fund"; or (3) "that the menu of options included only, or mostly, imprudent options." *Id.* Plaintiffs' method for defining who shares their claim—everybody who, in hindsight, would have benefited from a fund that secured a greater return for a particular time period by assuming greater risk—does not match the question on the merits. Under *Spano*, plaintiffs would need to show that plaintiffs were unable to assemble a desirable portfolio because of the presence of the SVF, in spite of the thirteen other available funds and the self-managed account, which permitted participants to invest in the "SEI Stable Asset Fund." App. 354-55 ¶¶ 49-50. Plaintiffs have not shown how, under their theory, the Hueler Index can be used to identify any Plan participant allegedly deprived of an adequate portfolio, much less a class of them.

Moreover, plaintiffs' proposed class presupposes that it is necessary to exclude from the class certain SVF investors during the class period, because their investments outperformed the Hueler Index. That raises an obvious question: How can fiduciaries have acted imprudently in making available a fund that was concededly appropriate for some members of the Plans? Although it is theoretically possible that a fund might be imprudent if it discriminates among participants (*e.g.*, provides returns only to persons named "Molly"), plaintiffs have offered no cogent explanation for how the SVF could have been prudent for some but imprudent for others.

Plaintiffs' only response is that Lockheed Martin was required to adduce evidence establishing that some Plan participants outperformed the Hueler Index. But plaintiffs chose voluntarily to incorporate that index into their class definition, thereby suggesting that it was necessary. The record in this case reflects neither the daily return data for the Hueler Index nor the performance of individual absent Plan participants, so the burden suggested by plaintiffs cannot reasonably fall on Lockheed Martin.

Third, even if plaintiffs could define their injury by a supposed entitlement to a stable value fund that reflected the allocations of typical stable value funds, plaintiffs have not supplied evidence to demonstrate that the Hueler Index fits the bill. Under plaintiffs' liability theory, "a prudently managed stable value fund allocates no more than 5% of its assets to money market investments." Pls.' Br. 5. At the same time, plaintiffs acknowledge that the SVF outperformed the Hueler Index when 40% of the SVF's assets were invested in money markets. *Id.* at 35; SA 17. That means that comparing the SVF to the Hueler Index does not define when a participant was injured under plaintiffs' liability theory. Plaintiffs have not even offered evidence as to what funds are indexed by Hueler or what risk profile is reflected by those funds. Before the class is defined by reference to a benchmark, plaintiffs must (at a minimum) demonstrate that the benchmark meaningfully reflects their liability theory. Here, plaintiffs manifestly have not.

C. The District Court's Order Does Not Categorically Exclude Class Certification For Imprudent Management Claims.

Much of plaintiffs' brief is dedicated to the claim that if *their* class is inappropriate for class certification, then it will be "impossible" to certify "any claim over an imprudently managed fund in a defined-contribution plan." Pls.' Br. 14. Nothing in the district court's order forecloses certification of an appropriate class. The district court recognized as much—certifying *another* of plaintiffs' claims "over an imprudently managed fund in a defined-contribution plan," *id.* at 14; SA 19-29 (certifying a class to challenge prudence of company stock funds in which class definition contains performance benchmark)—while reserving the possibility that even *these* plaintiffs could "certify an SVF class" if they "articulated a certifiable claim as to the prudence of the SVF." SA 19.

It is certainly *not* the case that there must be a way to try plaintiffs' particular claim on a class-wide basis. There are a number of factors counseling against class certification in challenges to individual investment options in a 401(k) plan, including individualized circumstances surrounding participant investment decisions, availability of other investment options, and potential for intra-class conflict. *Spano*, 633 F.3d at 579-82, 590-91. That is why "short-cuts in the class certification process are not permissible." *Id.* at 591.

Nevertheless, plaintiffs claim that class certification should be easier because of the underlying objectives of ERISA and that class certification is not even necessary because actions under ERISA § 502(a)(2) are "inherently a collective or representative action." Pls.' Br. 20. But that theory stems from a

misinterpretation of the Supreme Court's decision in *LaRue*. As this Court explained in *Spano*:

> While *LaRue* leaves no doubt that plan beneficiaries are entitled to resort to section 502(a)(2) after a breach of fiduciary duty reduces the value of plan assets in their defined-contribution accounts, that tells us very little about whether or under what circumstances employees resorting to section 502(a)(2) may properly proceed as a class under Federal Rule of Civil Procedure 23.

633 F.3d at 581. In any event, the district court has separately rejected plaintiffs' "direct action" theory that class certification is unnecessary for § 502(a)(2) claims, ruling that plaintiffs waived that theory and that it lacks merit. App. 193.[9]

None of this means that a class can never be certified. In *Neil v. Zell*, 275 F.R.D. 256 (N.D. Ill. 2011), for example, the plaintiffs filed suit on behalf of participants in an employee stock ownership plan ("ESOP"), alleging that the ESOP improperly invested in Tribune Co. stock, shortly before Tribune Co. went bankrupt and its stock became worthless. Applying *Spano*, the district court found that the plaintiffs had a common claim, except for those who had executed a release of claims. No benchmark was required to identify Plan participants who were affected by the imprudent conduct because the injury applied equally to all investors in the fund.

Here, a challenge to the SVF might be a better candidate for class certification if plaintiffs' theory were that the SVF was an imprudent

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[9] Because that ruling did not address any class certification issue, it is beyond this Court's Rule 23(f) jurisdiction. *See* 16 Wright & Miller, *supra*, § 3931.1.

investment option, rather than an imprudent "stable value fund." That is to say, if an investment in money market assets was—for some reason—categorically inappropriate in a 401(k) plan, then such a claim to the prudence of the SVF might satisfy the typicality requirement. *Cf. Spano*, 633 F.3d at 589 ("claims of excessive risk or artificial inflation may permit class certification"). But plaintiffs have never articulated that claim, divorced from the suggestion that the SVF was required to have a particular composition because it was a "stable value fund." That is presumably because money market funds are offered to plan participants in 49% of the nation's 401(k) plans, R.146 at 19-20, and plaintiffs could prevail only if all such funds were somehow imprudent.

It is not, of course, Lockheed Martin's obligation to assist plaintiffs in articulating their claims or otherwise to facilitate their pursuit of class certification. For present purposes, it suffices to say that plaintiffs have failed in their burden to demonstrate compliance with Rule 23(a) as to the claim on the merits that remains in this case. For that reason alone, the district court's denial of their motion should be affirmed.[10]

[10] Even if this Court were inclined to vacate the district court's denial of certification as to the SVF class, plaintiffs are not entitled to a "remand for certification." Pls.' Br. 44. The district court did not address all of Lockheed Martin's defenses to class certification, including whether the peculiarities of Ketterer's circumstances make him an unsuitable class representative. *See* SA 14. Plaintiffs have not asked this Court to address that defense in the first instance. Accordingly, they would be entitled, at most, to an order vacating the district court's decision and remanding for consideration of Lockheed Martin's remaining defenses.

CONCLUSION

The district court's order should be vacated and the matter remanded with instructions to dismiss the SVF claim for lack of jurisdiction. In the alternative, the district court's order should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF WORD-COUNT COMPLIANCE

The undersigned attorney hereby certifies, pursuant to Fed. R. App. P. 32(a)(7)(C), that the foregoing Brief for Defendants-Appellees contains 12,072 words, excluding those sections excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Jeffrey W. Sarles

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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