No. 17–1693

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JAMES ELLIS and WILLIAM PERRY, individually, and as representatives of a class of similarly situated persons,

Plaintiffs-Appellants,

v.

FIDELITY MANAGEMENT TRUST CO.,

Defendant-Appellee.

On Appeal from
The U.S. District Court for the District of Massachusetts
No. 1:15-cv-14128-WGY

MOTION OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLEE AND AFFIRMANCE

Kevin Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, NW
Washington, DC 20005

Brian D. Netter
bnetter@mayerbrown.com
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Nancy G. Ross
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606

Counsel for The Securities Industry and Financial Markets Association

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Securities Industry and Financial Markets Association has no parent corporation, nor does a publicly held corporation own more than 10% of its stock.

MOTION OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

The Securities Industry and Financial Markets Association (SIFMA) respectfully moves this Court for leave to file a brief as amicus curiae in support of Appellee and affirmance.

SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks, and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the United States, serving clients with over $20 trillion in assets, and managing more than $67 trillion in assets for individual and institutional clients, including mutual funds and retirement plans.

This case concerns matters within SIFMA's area of interest and expertise. SIFMA's members manage stable value funds and offer them in the defined-contribution plans that they sponsor and administer for their employees. SIFMA has a strong interest, on behalf of its members, in clarifying the fiduciary obligations of investment managers in selecting and managing investment options.

The proposed amicus brief addresses fundamental flaws in Plaintiffs' submission to this Court. *First*, because of the inherent uncertainty of financial decision making, asset management must be judged based on its contemporaneous process; hindsight has no meaningful role to play. *Second*, an asset manager need not employ the approach suggested by the calculated average of its peers to be prudent. *Third*, ERISA's duty of loyalty prevents fiduciaries from competing with plan participants but does not prevent fiduciaries from benefiting when their interests and plan participants' interests are aligned. These errors are central to Plaintiffs' thesis; illuminating the errors will therefore materially advance this Court's consideration of the underlying appeal.

Defendant-Appellee has consented to the filing of SIFMA's amicus brief, but Plaintiffs-Appellants have withheld their consent.

This motion is accompanied by the proposed amicus brief.

Wherefore, the motion for leave to file a brief as amicus curiae should be granted.

Dated: November 10, 2017

s/ Brian D. Netter

Brian D. Netter
1st Cir. Bar #1172960
bnetter@mayerbrown.com
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Nancy G. Ross
nross@mayerbrown.com
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Kevin Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, NW
Washington, DC 20005

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because it contains 321 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Bookman Old Style 14-point font.

s/ Brian D. Netter

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system, which will electronically serve all registered counsel of record.

s/ Brian D. Netter

No. 17–1693

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

JAMES ELLIS and WILLIAM PERRY, individually, and as representatives of a class of similarly situated persons,

Plaintiffs-Appellants,

v.

FIDELITY MANAGEMENT TRUST CO.,

Defendant-Appellee.

On Appeal from
The U.S. District Court for the District of Massachusetts
No. 1:15-cv-14128-WGY

BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEE AND AFFIRMANCE

Kevin Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, NW
Washington, DC 20005

Brian D. Netter
bnetter@mayerbrown.com
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Nancy G. Ross
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606

Counsel for The Securities Industry and Financial Markets Association

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Securities Industry and Financial Markets Association has no parent corporation, nor does a publicly held corporation own more than 10% of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE IDENTITY AND INTEREST OF THE AMICUS CURIAE 1

ARGUMENT 3

I. ASSET MANAGEMENT MUST BE JUDGED BY PROCESS, NOT HINDSIGHT. 6

A. Hindsight can play no role in the assessment of asset management. 6

B. Process is the touchstone for evaluating asset management. 9

II. TO ENGAGE IN A PRUDENT PROCESS, AN ASSET MANAGER NEED NOT FOLLOW THE HERD. 12

A. Asset managers reasonably differentiate their investment offerings from competitors' funds. 13

B. Investing in longer-duration bonds does not provide an opportunity for stable value funds to achieve additional returns without additional risk. 16

III. ASSET MANAGERS DO NOT BREACH A DUTY OF LOYALTY BY HAVING INCENTIVES TO ADVANCE PARTICIPANTS' INTERESTS. 18

CONCLUSION 21

CERTIFICATE OF COMPLIANCE 22

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Page(s)

Cases

Bunch v. W.R. Grace & Co.,
555 F.3d 1 (1st Cir. 2009) 9

DeBruyne v. Equitable Life Assurance Soc'y of the U.S.,
920 F.2d 457 (7th Cir. 1990) 8, 13, 14

DiFelice v. U.S. Airways, Inc.,
497 F.3d 410 (4th Cir. 2007) 9, 19

Donovan v. Bierwirth,
680 F.2d 263 (2d Cir. 1982) 19

Pegram v. Herdrich,
530 U.S. 211 (2000) 20

Rinehart v. Lehman Bros. Holdings Inc.,
817 F.3d 56 (2d Cir. 2016) 8

Roth v. Sawyer-Cleator Lumber Co.,
16 F.3d 915 (8th Cir. 1994) 9

PBGC ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.,
712 F.3d 705 (2d Cir. 2013) 10

Sweda v. Univ. of Pa.,
2017 WL 4179752 (E.D. Pa. Sept. 21, 2017) 7

In re Unisys Sav. Plan Litig.,
74 F.3d 420 (3d Cir. 1996) 10

Varity Corp. v. Howe,
516 U.S. 489 (1996) 18

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes and Regulations

29 U.S.C. § 1104(a)(1) 18

29 C.F.R. § 2550.404a-1(b)(1) 11

Other Authorities

Andrew Apostol, *How to Evaluate Stable Value Funds and Their Managers*, Dwight Asset Management Company (July 2007) 14

Fed. R. App. P.:
Rule 29(a)(4)(D) 1
Rule 29(a)(4)(E) 1

Inv. Co. Inst., Frequently Asked Questions About 401(k) Plan Research, https://www.ici.org/policy/retirement/plan/401k/faqs_401k 8

Restatement (Second) of Trusts (1959) 19

STATEMENT OF THE IDENTITY AND INTEREST OF THE AMICUS CURIAE[1]

The Securities Industry and Financial Markets Association (SIFMA) is the voice of the U.S. securities industry. SIFMA represents the broker-dealers, banks, and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the United States, serving clients with over $20 trillion in assets, and managing more than $67 trillion in assets for individual and institutional clients, including mutual funds and retirement plans. SIFMA has offices in New York and Washington, D.C., and is the regional member of the Global Financial Markets Association for the United States. Additional information about SIFMA is available at http://www.sifma.org.

---

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

Pursuant to Rule 29(a)(4)(D), this brief is accompanied by a motion for leave to file.

Virtually all companies that offer participant-directed retirement plans permit their participants to elect an income-producing, low risk, liquid fund, such as a money market fund or a stable value fund. SIFMA members manage such funds, and also offer them in the defined-contribution plans that they sponsor and administer for their employees.

The rise in the use of defined contribution plans has spawned a rise in lawsuits like this one, in which participants allege that plan fiduciaries breached their duties to plan participants by structuring investment options in a manner that proved, with the benefit of hindsight, to be too risky—or not risky enough. Fund managers must make their decisions, however, before it is known how the investment markets will fare.

SIFMA has a strong interest, on behalf of its members, in clarifying the fiduciary obligations of investment managers in selecting and managing investment options in retirement plans governed by ERISA.

ARGUMENT

ERISA imposes duties of prudence and loyalty on certain asset managers. The duty of prudence compels covered asset managers to rely on research and judgment to pursue the disclosed objectives of their investment funds; but it does not subject them to judgment by hindsight. The duty of loyalty prevents those asset managers from benefiting at the expense of their investors; but it does not prevent them from benefiting alongside plan participants.

In this case, two participants in the Barnes and Noble 401(k) Plan (the "Plan") have challenged the Fidelity Group Employee Benefit Plan Managed Income Portfolio (the "Portfolio"), a stable value fund offered to Plan participants. As the name suggests, a stable value fund is a conservative investment option that is designed primarily to provide stability, as opposed to growth. Plaintiffs do not claim that the Portfolio failed to achieve its desired stability, nor that it lost value. Rather, their theory is that, in the immediate aftermath of the 2008 financial crisis, Fidelity was obligated by ERISA to invest the Portfolio in riskier, longer-term assets in pursuit of greater yield.

Plaintiffs say that Fidelity's failure to chart a more aggressive course entitles them to proceed to trial on claims that Fidelity breached its duty of prudence (because Fidelity offered a fund that was supposedly less aggressive than the average fund offered by its competitors) and its duty of loyalty (because Fidelity employees were supposedly motivated in their decision making to enhance their bonuses, which were impacted by the Portfolio's performance).

Plaintiffs' theories—if endorsed by a court—would prove deeply problematic to the financial services industry and to the ERISA plans that it serves. With the benefit of hindsight, it will always be possible to observe that, during any given period, more risk in particular segments was either rewarded or punished. At the point of decision, however, asset managers lack the benefit of hindsight. Instead, asset managers and ERISA fiduciaries must rely on sound processes to offer plan participants the opportunity to elect a specified tradeoff between risk and possible reward. Courts have rightly refused to credit claims, like this one, that rely, inextricably, on hindsight.

Rather, courts require ERISA plaintiffs to demonstrate that fiduciary decisions resulted from an imprudent *process*. Here, the

district court found evidence only of a robust process in which Fidelity employees were constantly evaluating market conditions, subjecting their assumptions to the crucible of analysis and debate—*i.e.*, exactly what fiduciaries are supposed to do. Plaintiffs' grievance with the decision below is based on the fact that Fidelity's decisions about how to craft the Portfolio were not unanimous. Again, that is how fiduciaries are supposed to interact. An investment group that reaches *all* of its decisions *without* dissent is one that has failed to grapple with the difficult questions that their investors need answered.

In the end, then, Plaintiffs' case amounts to nothing more than the claim that the Portfolio should have looked more like some "average" stable value fund. But ERISA permits—indeed, encourages—fiduciaries to make their own decisions about whether, in any given market segment, they want an average level of risk, or a below- or above-average level of risk, based on their own judgments and on the specific circumstances of their own participants. ERISA permits fund managers to develop a stable value fund—or any other type of fund—with a below-average level of risk. The manager cannot later be subjected to liability because

that below-average level of risk yielded a lower return than a fund that took on more risk.

Nor, for that matter, should Plaintiffs be able to advance their claim under a theory of disloyalty. Plaintiffs claim that Fidelity breached its duty of loyalty because it was motivated to increase its capacity to offer stable value products. Plaintiffs' theory of the duty of loyalty turns on a fiduciary's subjective motivations. But the law looks to objective measures. It is desirable—not actionable—for fiduciaries to align their interests with the interests of plan participants. So where an investment manager makes decisions that will benefit multiple parties, there is no need to conduct a trial to discern its subjective motivation.

I. ASSET MANAGEMENT MUST BE JUDGED BY PROCESS, NOT HINDSIGHT.

A. Hindsight can play no role in the assessment of asset management.

In hindsight, it is easy to discount low probabilities of catastrophic events that did not occur (or to take for granted low probability events that did occur). But accurately projecting uncertain events beforehand is hard. Indeed, their lack of predictability is what makes the markets function. Investors

demand a premium for taking on risk, so the market prices bonds and stocks based on expectations for their future value combined with the likelihood that the expectations will be realized.

In that environment of uncertainty, asset managers employ techniques to manage risks. They assemble portfolios to achieve targets for risk and projected return and monitor the portfolios to ensure continued compliance with those objectives. This approach permits asset managers to offer investors the opportunity to participate in a particular risk-return tradeoff. But, in any given market environment, some strategies will outpace targets, while others will fall short.

In aggregate, it is an unavoidable fact of mathematics that one-in-four funds will land in the bottom quartile. ERISA plaintiffs are frequently tempted by that truism to engage in condemnation-by-comparison. As the argument runs, the fact that other investments fared better over some (arbitrary) time period shows that the challenged investments were flawed.[2]

---

[2] *See, e.g.*, Complaint ¶ 100, *Sweda v. Univ. of Pa.*, 2017 WL 4179752 (E.D. Pa. Sept. 21, 2017) (No. 2:16-cv-04329), ECF No. 1 (alleging that plan fiduciaries breached their duty of prudence by

If this reasoning were enough to take an ERISA claim to trial, it would be a foolproof way to keep the federal courts occupied overseeing the Nation's 500,000 401(k) plans.[3] With the benefit of hindsight, a plaintiff can easily identify the quarter of funds with returns in the bottom quartile, and then identify the investment decisions that most contributed to their lower returns.

Plaintiffs' claim here follows that hindsight selection algorithm. But showing that other stable-value funds generated greater returns—and tying those greater returns to decisions to take on more risk—is not probative of whether the Portfolio's asset managers made decisions that were reasonable at the time they were made.

Accordingly, with good reason, courts have not permitted ERISA claims to be founded on hindsight-based reviews of performance. Rather, they have emphasized that ERISA's "fiduciary duty of care . . . requires prudence, not prescience." *DeBruyne v.*

---

offering a fund that trailed "two other . . . funds in the same investment style").

[3] Inv. Co. Inst., Frequently Asked Questions About 401(k) Plan Research, https://www.ici.org/policy/retirement/plan/401k/faqs_401k.

Equitable Life Assurance Soc'y of the U.S., 920 F.2d 457, 465 (7th Cir. 1990) (internal quotation marks omitted); *accord Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 64 (2d Cir. 2016). So "whether a fiduciary's actions are prudent cannot be measured in hindsight." *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 424 (4th Cir. 2007).

B. Process is the touchstone for evaluating asset management.

Because of the prohibition on judgment by hindsight, courts evaluating ERISA prudence claims do not consider performance—which is inherently a hindsight assessment—but rather focus on whether the manager engaged in a prudent process. As this Court held in *Bunch v. W.R. Grace & Co.*, fiduciary decision-making must be "'viewed from the perspective of the time of the challenged decision rather than from the vantage point of hindsight.'" 555 F.3d 1, 7 (1st Cir. 2009) (quoting *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917-18 (8th Cir. 1994)). So when an investment decision results from "thorough investigative and decisional process," "it is difficult, indeed impossible, given the standard of review . . . to legally challenge the[] actions." *Id.* Other courts

employ similar standards, recognizing that consideration of a fund's performance sheds no light on whether an investment vehicle was appropriately conceptualized and implemented, and thus must be excluded from the assessment of prudence. *See, e.g.*, *PBGC ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 730 (2d Cir. 2013); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) (requiring investment decisions to be reviewed "according to an objective standard, focusing on a fiduciary's *conduct* in arriving at an investment decision, not on its results, and asking whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment") (emphasis added).

The U.S. Department of Labor has placed the same emphasis on process, interpreting the duty of prudence to be satisfied if the fiduciary's process is diligent:

> With regard to an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to his investment duties, [ERISA's prudence] requirements . . . are satisfied if the fiduciary:
>
> (i) Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties,

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

29 C.F.R. § 2550.404a-1(b)(1).

The Labor Department's regulations, then, obligate fiduciaries to engage in a deliberative process in which they probe key issues pertaining to their investment duties and make determinations based on their evidence-based assessments. It appears undisputed here that Fidelity did just that—repeatedly assessing, for example, how best to maintain wrap coverage while wrap providers were exiting the market, and challenging, for example, whether another benchmark might prove more effective. Plaintiffs invoke circumstances in which there were heated debates about how best to administer the Portfolio. Plaintiffs' litigating position is that minority viewpoints should have been adopted—and that a lack of unanimity among Fidelity's decision makers shows that there is a real issue that merits a full trial. But Plaintiffs are interpreting the internal dissonance completely wrong. Internal debates and

disagreements on tough issues are evidence of *sound* fiduciary processes—not evidence of fiduciary shortcomings. When fiduciaries encounter difficult decisions—decisions that entail judgments about how best to handle uncertainty—they *should* challenge each other's assumptions and they *should* air out their disagreements. (And after hindsight becomes available, fiduciaries should be expected to look back on their past actions to contemplate what they could have done differently.) A process lacking robust debate is not, ordinarily, a healthy process. Far more often, evidence of disagreement is not indicative of fiduciary *breach* but rather evidence of sound fiduciary process.

II. TO ENGAGE IN A PRUDENT PROCESS, AN ASSET MANAGER NEED NOT FOLLOW THE HERD.

Without considering hindsight, there is little left to Plaintiffs' case. Here, as the district court found, Plaintiffs lack any evidence to dispute that Fidelity "engaged in a comprehensive process of evaluating potential investment strategies and investments for the Portfolio." ADD 30.

Rather, Plaintiffs' theory is that Fidelity was wrong to "increase[] the conservatism" of the Portfolio in the aftermath of the

2008 financial crisis because some other stable value fund managers were willing to keep their money in asset-backed securities, mortgage pass-throughs, and lower-rated corporate bonds. Pls.' Br. 10.

Plaintiffs are wrong to suggest that it is desirable for investment managers to follow the herd and their reasoning is particularly suspect in the stable value fund context.

A. Asset managers reasonably differentiate their investment offerings from competitors' funds.

On appeal, Plaintiffs contend that their challenge to the Portfolio is justified because Fidelity's competitors "worked with less restrictive guidelines and achieved more competitive crediting rates." Pls.' Br. 13. In so arguing, Plaintiffs suggest that Fidelity was required to adopt laxer guidelines—and to assume greater risk—in order to parallel the strategies of competitor funds.

Such was the claim in *DeBruyne*, where the Seventh Circuit rejected the claim that losses sustained on Black Monday by Equitable's "Balanced Fund" resulted from imprudence because Equitable's fund did not reflect the same balance as other "balanced funds." The Seventh Circuit held that "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." 920 F.2d at 465.

The *DeBruyne* approach is the right one. The contrary presumption—that deviations from typicality support an inference of imprudence—would undermine the interests of plan fiduciaries in having choices along the risk/return spectrum.

Even if there were such a thing as a typical stable value fund,[4] it does not benefit investors to be restricted to investment options that cluster tightly around an "average"; to the contrary, it benefits investors to have investment lineups that reflect conscious decisions about the objectives of the population.

That is because 401(k) investors come in all shapes and sizes. Some are old, some are young. Some have considerable wealth, some are dependent on their plan balances to make ends meet. Different plans can be expected to have different populations of plan

---

[4] *But see, e.g.*, Andrew Apostol, *How to Evaluate Stable Value Funds and Their Managers*, Dwight Asset Management Company (July 2007) ("Due 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.").

participants; one would not, for example, expect that the employee population of Barnes and Noble would resemble that of a Silicon Valley startup or a hedge fund. Different investor populations will sometimes indicate different strategies. For example, an older investor may prefer the certainty of a low-risk stable value fund to a more speculative long-term growth fund. Even within a single asset class, the circumstances of the targeted population may counsel in favor of a more aggressive—or a more conservative—posture.

It is particularly relevant here that this case involves how an investment option that is typically the most conservative option available to retirement plan participants was invested in the immediate aftermath of the 2008 financial crisis—which highlighted the risks of assets previously thought to be safe. Different investment populations reasonably greeted this "New World Order" with different strategies. Fund managers reasonably crafted funds with different risk profiles to meet the concerns of the marketplace—and many sophisticated plans opted for the risk profile of the Portfolio. *See* Def.'s Br. 12-13 (identifying some of the participating plans).

As a broader matter, it is a basic tenet of modern investment management that diversification—and a diversity of investment options—expands the horizon of desirable portfolios. Were this Court to accept the theory that Plaintiffs could bring an ERISA claim to trial merely by identifying deviations from industry averages, then the whole financial marketplace would suffer from the reduced choice that would predictably result. If an investment manager that diverges from the average in the level of risk that it assumes or in its general investment strategy has a litigation target on its back, those funds will not long be offered, at least not to retirement plans that are subject to ERISA.

B. Investing in longer-duration bonds does not provide an opportunity for stable value funds to achieve additional returns without additional risk.

As applied to the stable value context, Plaintiffs' assertion is that other stable value funds follow the "typical" model because it permits them access to greater returns.

But the pursuit of greater returns is not free. Investors who seek greater returns must generally take on additional risks. Sometimes, those risks will be rewarded; sometimes, not. But the key point is that it is inappropriate merely to compare the returns

of different funds without accounting for the disparities in investment risks.

Such is the case for stable value funds. Stable value funds have desirable features. By combining bonds and an investment wrap, participants can achieve bond-like returns without the interest-rate volatility present in bond funds. But those features do not *eliminate* the risk of losses, they just delay them. The stability-enhancing features of a stable value fund mean that, if a stable value fund invests in a bond that defaults, the value of the fund will not take an immediate tumble, but the loss will be amortized over a period of time—unless the wrap provider is insolvent, in which case the losses are experienced immediately. Over the long run, the performance of a stable value fund approaches the performance of the underlying bond portfolio, minus the expenses of maintaining the wrap coverage and administering the fund.

Bonds with a longer duration—or a lower credit rating—are likelier to be defaulted, which is why, except in anomalous interest-rate environments, longer and lower-rated bonds have higher yields. So a stable value fund with a longer duration is riskier than a fund with a shorter duration. Were this not so, stable value funds would

be investing primarily in 10-, 15-, and 20-year bonds, rather than in 1-, 2-, and 3-year instruments.

III. ASSET MANAGERS DO NOT BREACH A DUTY OF LOYALTY BY HAVING INCENTIVES TO ADVANCE PARTICIPANTS' INTERESTS.

Plaintiffs' other claim sounds in breach of the duty of loyalty. That theory fares no better than their prudence theory. On loyalty, the gravamen of Plaintiffs' argument is that ERISA requires fiduciaries to have an "eye single" to participants' interests. Plaintiffs interpret the "eye single" standard as entitling ERISA plaintiffs to bring suit whenever the ERISA fiduciary is motivated, subjectively, by a personal benefit—even if that benefit is achieved, objectively, by advancing the interests of plan participants.

Plaintiffs' theory of what constitutes disloyalty is unsupported by the law, and would imperil fundamental—and fundamentally sound—practices that are customary within the financial services industry.

To begin, ERISA's duty of loyalty does not mean what Plaintiffs say. The statute requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). Like much of ERISA, this

standard is an adaptation of the law of trusts. *Cf. Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) ("[T]he law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties.").

Under the law of trusts, the loyalty requirement requires fiduciaries to avoid being adverse with their beneficiaries; a fiduciary "is under a duty not to profit at the expense of the beneficiary and not to enter into competition with him." Restatement (Second) of Trusts § 170 cmt. a (1959). Similarly, under ERISA, courts have interpreted the duty of loyalty to prohibit adversity between fiduciaries and their beneficiaries but have rejected an expansion of the duty to prohibit fiduciaries from benefitting from their decisions. *See, e.g.*, *DiFelice*, 497 F.3d at 421 n.6 (rejecting the claim that a fiduciary breaches its duty of loyalty by being an officer or director of the plan sponsor "simply because an officer or director has an understandable interest in positive performance of company stock"). Indeed, the case on which Plaintiffs primarily rely, *Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir. 1982), recognizes that fiduciaries do not breach their duties if they undertake an action, in the interests of plan participants, that

"incidentally benefits the corporation or, indeed, themselves." *Id.* at 271.

The duty of loyalty, then, stands for the proposition that fiduciaries—while acting in a fiduciary capacity[5]—must not act on personal interests adverse to the interests of plan participants.

Plaintiffs' theory is quite different. They suggest that a fiduciary is liable when its objectives are aligned with plan participants', if the fiduciary was subjectively motivated by its own interests.

Courts are not equipped to engage in the psychological hair splitting that would be required by Plaintiffs' theory. Nor would it benefit plan participants. To the contrary, fiduciaries—including asset managers to retirement plans—should be encouraged to align their interests with the interests of plan participants.

That is, after all, the norm in the financial services industry. Fund managers frequently get paid a fee that is proportional to their assets under management—so if their funds perform well, they will get paid more. Individual asset managers likewise may receive

[5] Under ERISA, when acting *outside* a fiduciary capacity, "a fiduciary may have financial interests adverse to beneficiaries." *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000).

bonuses for exceeding performance targets for the funds that they manage. These practices are *desirable*, as a rising tide lifts all boats. This Court should be loathe to adopt a rule that would prove impossible to administer, inconsistent with industry norms, and lacking any discernible benefit to plan participants.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: November 10, 2017

s/ Brian D. Netter

Kevin Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, NW
Washington, DC 20005

Brian D. Netter
1st Cir. Bar #1172960
bnetter@mayerbrown.com
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Nancy G. Ross
nross@mayerbrown.com
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B)(i) because it contains 3,809 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Bookman Old Style 14-point font.

s/ Brian D. Netter

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system, which will electronically serve all registered counsel of record.

s/ Brian D. Netter