UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MARY BARCHOCK, THOMAS WASECKO, and STACY WELLER, Plaintiffs,	:	
v.	:	C.A. No. 16-061ML
CVS HEALTH CORPORATION, THE BENEFITS PLAN COMMITTEE OF CVS HEALTH CORPORATION, and GALLIARD CAPITAL MANAGEMENT, INC., Defendants.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

Before the Court is the second motion to dismiss launched by Defendants CVS Health Corporation, the Benefits Plan Committee of CVS Health Corporation (collectively, "CVS"), and Galliard Capital Management, Inc. ("Galliard"). ECF No. 32. The motion challenges the plausibility of Plaintiffs' claim that an actionable failure to exercise appropriate prudence tainted the investment allocation in a Stable Value Fund managed by Galliard that CVS offered as an investment option for the retirement plan of its employees.

Defendants' first motion to dismiss was the subject of a report and recommendation, ECF No. 24 ("R&R"),[1] issued on June 24, 2016, in which I recommended that Plaintiffs' concededly "brief" complaint, R&R at 3 n.3, be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because "Plaintiffs offer the Court nothing from which to conclude that the Stable Value Fund's short-term fixed income holdings were unreasonable in view of all the considerations a prudent fiduciary might have found relevant, much less that the Fund's fiduciaries failed to use

[1] This second report and recommendation assumes the reader's familiarity with the first R&R; in crafting this one, I have strived to avoid repetition of what is stated there. To the extent that they are pertinent, the findings and legal analysis in the R&R are deemed to be incorporated here.

appropriate methods to investigate and make those investment allocation decisions." R&R at 10. Plaintiffs followed up with a timely objection, as well as a motion to amend their complaint. ECF Nos. 27, 28. In lieu of ruling on the objection, the Court granted Plaintiffs leave to amend; their First Amended Class Action Complaint ("Complaint") was filed on August 2, 2016. ECF No. 30. Defendants responded with this renewed motion to dismiss.

The motion has been referred to me for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). While this Complaint contains far more ballast than its predecessor, I find that the new material adds little more than substantial factual support for the allegation found to be legally insufficient in the first go-round – that hindsight reveals that the Fund's allocation did not maximize returns. Further, although Plaintiffs' new averments –that the Fund's asset allocation, the duration of the Fund's investments and the Fund's performance deviated from industry averages – rest firmly on a substantial factual foundation, they too are insufficient to permit an inference of imprudence. For the reasons that follow, I conclude that Plaintiffs have failed again to sustain their threshold burden of putting forward plausible allegations sufficient to raise an inference that Defendants breached any duty owed to Plaintiffs. I recommend that the Complaint be dismissed.

I. BACKGROUND[2]

As before, the Complaint arises under the Employee Retirement Income Security Act of 1974[3] ("ERISA"), and concerns the benefit plan offered to CVS employees. Plaintiffs, who are plan participants, allege that Galliard failed to exercise appropriate prudence with respect to the investment allocation in the Stable Value Fund, one of the investment options chosen by

[2] As in the R&R, the facts recited here are drawn from well-pled factual averments in the Complaint, which, together with all inferences that flow from them, are taken as true for purposes of this motion.

[3] 29 U.S.C. § 1001, *et. seq.*

Plaintiffs, and that CVS failed in its duty to monitor Galliard's investment management. They seek to serve as class representatives for a group consisting of all plan participants who invested in the Stable Value Fund, pursuant to Fed. R. Civ. P. 23. Compl. ¶ 84.

The CVS retirement plan permits eligible CVS employees to select from an array of investment options; during the relevant period, sixteen or more were offered, ranging from higher-risk equity options to lower-risk fixed income vehicles. Compl. ¶¶ 8-9. The Stable Value Fund was offered as a conservative option. Compl. ¶ 9. The disclosed objective of the Stable Value Fund was to "preserve capital while generating a steady rate of return higher than money market funds provide." Compl. ¶ 27 (emphasis omitted). In a much-cited 2013 decision, the Seventh Circuit Court of Appeals describes a generic stable value fund:

> SVFs are recognized investment vehicles that are available only through employer-sponsored retirement plans and some college savings plans. They typically invest in a mix of short- and intermediate-term securities, such as Treasury securities, corporate bonds, and mortgage-backed securities. Because they hold longer-duration instruments, SVFs generally outperform money market funds, which invest exclusively in short-term securities.

Abbott v. Lockheed Martin Corp., 725 F.3d 803, 806 (7th Cir. 2013) (internal citations omitted).

Plaintiffs allege that, during the years 2010 through 2013, between 27% and 55% of the CVS Stable Value Fund's assets were invested in what amounts to a highly-liquid, short-term, cash-equivalent money market fund, similar to a "token-interest checking account." Compl. ¶¶ 28-30, 34. The EB Temporary Investment Fund ("TIF") is managed by Bank of New York Mellon, and invests in "short-term debt obligations of the U.S. Government, short-term corporate obligations, certificates of deposit, demand deposits, and other short-term debt obligations." Compl. ¶¶ 33-34, 38, 40, 43; see Compl. ¶ 30 ("The incredible cash flow [in and out] of the [TIF] shows it is used by investors (other than the Stable Value Fund) as a *very short-term* investment option.") (emphasis in original). During the years in issue, these TIFs yielded

negligible returns, from a high of 0.28% in 2010 to a low of 0.17% in 2013. During the same period, the portion of the Fund allocated to TIFs bounced up and down but consistently exceeded one quarter of the total assets under management, ranging from 55% in 2010, down to 44% in 2011, back up to 48% in 2012, and down to 27% in 2013. Compl. ¶¶ 31, 35, 38, 41, 43. The balance of the CVS Stable Value Fund was invested in intermediate-term investments (in this instance, longer-term insurance contracts), which yielded substantially higher returns, typically 5% or more. See R&R at 3.

With this fleet of facts, navigating with far more precision than before, Plaintiffs allege that an inference of a breach of the duty of prudent management arises from an examination of three aspects of the CVS Stable Value Fund's asset allocation. As a result of the amendment, the Complaint is now loaded to the scuppers with factual allegations in support of each. Based on these allegations, the new pleading is more effective at tamping down the inference[4] of prudence (as opposed to imprudence) that the initial pleading reflected. See R&R at 10 ("far from permitting an inference of imprudence, if these allegations suggest anything, it is that Galliard's management was beyond reproach").

First, Plaintiffs argue that there was excessive liquidity in the Fund's asset allocation and that the too-brief duration of the investments caused by an excessive percentage invested in

[4] In their Complaint, Plaintiffs reference the financial storms of the late 2000s, emphasizing that stable value funds performed well in "weather[ing] the recent financial crisis of 2007-08." Compl. ¶ 25. However, they take umbrage with the R&R's references to the financial upheaval, arguing that the Court appeared to read into the original complaint the inference that Galliard's investment decisions were motivated by the financial crisis. Plaintiffs are right that neither the original pleading nor the current Complaint contains an overt suggestion of linkage between the CVS Stable Value Fund's investment allocation and the financial crisis, apart from temporal proximity. Plaintiffs are also right that the R&R observed that the only inference to be drawn from their skimpy pleading was that Galliard's "management was beyond reproach." R&R at 10. However, the conclusions in the R&R are not based on such an inference. Rather, they rested on the utter absence of any factual allegation permitting the opposing inference – that Galliard was imprudent. The same is true now; that is, I do not rely on any possible inference that Galliard's investment strategy was a prudent response to the financial crisis. To the extent that such an inference might be drawn from the pleading, it can play no role in the Court's determination of this motion to dismiss. See Katz v. Pershing, LLC, 672 F.3d 64, 70-71 (1st Cir. 2012) (to decide motion to dismiss, court should "indulge all reasonable inferences [from the well-pleaded factual averments] *in [plaintiff's] favor*") (emphasis supplied).

short-term TIFs resulted in suppressed returns. Compl. ¶¶ 32, 44, 48. In support of this allegation, they aver that an essential characteristic of a stable value fund is that the foreseeability of the liquidity needs of the investors, in this instance CVS employees who are nearer to retirement, permits the prudent manager to rely on a yield curve in selecting longer-term, higher-yield investments. Compl. ¶¶ 9, 15-16. They cite to industry statistics establishing that the average duration of stable value fund investments in the relevant period ranged from 2.78 years to 3.74 years.[5] Compl. ¶ 17. By contrast, the duration of the CVS Stable Value Fund's investments was, Plaintiffs charge, "ultra-short," ranging from .87 years to 1.1 years. Compl. ¶¶ 26, 48. According to Plaintiffs, this comparison confirms that the CVS Stable Value Fund was "a severe outlier and categorically imprudent." Compl. ¶ 50 (emphasis omitted).

Second, the Complaint offers a robust array of statistical information regarding industry averages for asset allocation during the relevant period; these reflect that the weighted average cash-equivalent percentage of total stable value fund assets ranged from between 5.18% and 8.3%. Compl. ¶¶ 23-24, 44.[6] Like the comparison of investment duration, Plaintiffs claim that the contrast between the average percentages (between 5.18% and 8.3%) and the percentages for the CVS Stable Value Fund (between 27% and 55%) plausibly establishes that the Fund deviated substantially from the norm, Compl. ¶¶ 13-25, 32, 44, 48, permitting the inference that the CVS Stable Value Fund was again "a severe outlier and categorically imprudent." Compl. ¶ 45 (emphasis omitted). As Plaintiffs characterize it, the excessive allocation to cash equivalents defeated the essential characteristic of a stable value fund, which is supposed to be an investment

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[5] These figures are drawn from a report released by a trade association, the Stable Value Investment Association ("SVIA"). Compl. ¶ 13. They reflect both overall averages (3.67% and 3.74%) and the averages for individually managed funds like the CVS Stable Value Fund (2.78% and 2.87%). Compl. ¶¶ 17, 48. They are based on data from 2011 and 2012. Id.

[6] Like the duration statistics, these data are drawn from SVIA information for 2011 and 2012; the SVIA-generated overall averages are 5.18% and 5.73%, while the individually-managed averages are 7.72% and 8.37%. Compl. ¶¶ 13, 24, 44.

that generally outperforms money market funds while delivering lower volatility. Compl. ¶¶ 53, 55, 56. Overall, Plaintiffs claim that such an asset allocation permits the inference that Galliard simply parked the CVS Stable Value Assets and forgot about them – "an unthinking commitment to money-market type 'fire and forget' asset placement." Compl. ¶ 63. The Complaint concludes that the plain imprudence of such an investment strategy is not just a matter of hindsight, but rather was contemporaneously obvious to Defendants. Id.

Third, braced by the new focus on industry averages, Plaintiffs have salted their Complaint with new averments aimed at the Fund's performance. For example, they recite SVIA 2010 industry data reflecting that stable value funds generally performed well during the period of financial upheaval following 2008, in that average yields were 3% or more, which significantly exceeds the yield (between slightly more than 0% and 1.4%) of intermediate government bonds, six-month certificates of deposits and money market funds. Compl. ¶¶ 25, 55. However, the Complaint does not compare these returns with the actual returns of the CVS Stable Value Fund; like the original complaint, the Complaint still does not reveal what the actual returns were. Rather, and somewhat illogically, it focuses on the performance of the "other assets of the CVS Stable Value Fund," Compl. ¶¶ 51-52, and concludes that, if the whole had been invested in the same intermediate-term assets as the portion dedicated to longer-term insurance contracts, the Fund's performance would have exceeded the actual performance in 2010 by 2.4%, in 2011 by 1.4%, in 2012 by 1% and in 2013 by 0.4%.[7] Compl. ¶ 52.

[7] This approach makes no sense. It asks the Court to assume that any short-term investment in a cash-equivalent like the TIFs is *per se* improper, totally ignoring that, by definition, a stable value fund is a "mix of short- and intermediate-term securities." Abbott, 725 F.3d at 806. In a different allegation of the Complaint, Plaintiffs concede the point, pleading that their claim is that the CVS Stable Value Fund assets should have been invested "in a far greater amount of intermediate-term investments to align with long-established standards of stable value investing, which over time had shown higher returns than money market funds with less risk." Compl. ¶ 60. In any event, an examination of the Fund that is focused on one part in isolation from the whole runs contrary to settled law – "the prudence of [an] investment is not assessed in isolation but, rather, as the investment relates to the portfolio as

Relatedly, the Complaint now asserts that a comparison of unspecified SVIA average performance data, supplemented by analogous unspecified data from Hueler Analytics, with the undisclosed performance data for the CVS Stable Value Fund permits the conclusion that the CVS Fund underperformed a comparable average fund by 0.92 % in 2010, by 0.91% in 2011, by 1.29% in 2012 and by 0.63% in 2013. Compl. ¶¶ 66-67. Based on this analysis, the Complaint concludes that Plaintiffs and the class they represent lost a total of $70 million in reduced investments returns over the period in issue. Compl. ¶ 74. They contend that such a loss raises "a strong inference of a flawed investment strategy and process" on the part of Galliard. Compl. ¶¶ 72, 81.

Finally, Plaintiffs repeat the original allegation – derivative of the allegation of imprudence – that CVS breached its fiduciary obligations by standing by and doing nothing in the face of what they aver was obvious underperformance. Compl. ¶¶ 82, 83.

II. STANDARD OF REVIEW

To find blue water and avoid foundering on the shoals of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must give the defendant fair notice of what the claim is and the grounds on which it rests, and allege a plausible entitlement to relief. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 559 (2007). The plausibility inquiry requires the court to distinguish "the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." Morales-Cruz v. Univ. of P.R., 676 F.3d 220, 224 (1st Cir. 2012). The Court must then determine whether the factual allegations are sufficient to support "the reasonable inference that the defendant is liable for the misconduct alleged." Haley v. City of Boston, 657 F.3d 39, 46 (1st

a whole." PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt., 712 F.3d 705, 716 (2d Cir. 2013).

Cir. 2011) (quoting Iqbal, 556 U.S. at 678) (internal quotation marks omitted). The complaint should not be read "too mechanically"; rather, it should be considered holistically with a heavy dose of common sense. Rodriguez-Vives v. P.R. Firefighters Corps of P.R., 743 F.3d 278, 283 (1st Cir. 2014). All well-pled facts must be taken as true and all reasonable inferences drawn in the plaintiff's favor. Ruivo v. Wells Fargo Bank, N.A., 766 F.3d 87, 90 (1st Cir. 2014). To hold the course steady with an ERISA complaint, the Supreme Court has directed that lower courts should deploy Iqbal/Twombly as "an important mechanism for weeding out meritless claims." Fifth-Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2471 (2014).

III. LAW AND ANALYSIS

In a nutshell, Defendants contend that the new material may give the Complaint more heft but does nothing to alter the fatal failing of the original pleading – the claim remains implausible because it is built on nothing more than a *post hoc* critique of how the CVS Stable Value Fund was managed. Defendants argue that the Complaint's now-robust comparison of various characteristics of the Fund to an array of industry averages still amounts to an impermissible hindsight attack on the asset allocations and durations of the investment. Thus, the Complaint is still devoid of any plausible facts permitting an inference of conduct by Galliard that was inconsistent with its duty of prudence. And therefore, it still fails to state a claim.

In response, Plaintiffs contend that their new facts permit the inference that the CVS Stable Value Fund was so heavily weighted down by ultra-short-term assets that Galliard effectively was managing it as a money market fund; this inference arises from their allegations that the CVS Fund's cash buffer ranged between a quarter to over half of the assets and its investment duration was hovered at roughly one year, while the average stable value fund maintained a small cash buffer of between five and ten percent and invested in assets with a

duration of approximately three years. That is, these significant differences between the CVS Stable Value Fund and the averages for similar funds permit the inference that Galliard's asset management procedures were flawed, imprudent and in breach of its fiduciary duty. Plaintiffs argue that this inference is sufficient to open the hatch to discovery so that they can access the inside information essential to allow them to analyze Galliard's investment procedures.

I begin the voyage with a reprise of the law, starting with the bedrock principle that an ERISA claim for fiduciary imprudence must be based on facts showing that the fiduciary did not act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). "The test of prudence – the Prudent [Person] Rule – is one of *conduct*, and not a test of the result of performance of the investment." Bunch v. W.R. Grace & Co., 555 F.3d 1, 7 (1st Cir. 2009) (emphasis in original) (internal citation omitted). The standard focuses on "whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt., 712 F.3d 705, 716 (2d Cir. 2013). Claims that fail plausibly to allege a deficiency in the conduct and process of arriving at an investment decision must be dismissed. Id. at 717. Courts recognize that, under ERISA, fiduciary decision-making frequently "involves a balancing of competing interests under conditions of uncertainty." Bunch, 555 F.3d at 7 (quoting Armstrong v. LaSalle Bank Nat'l Ass'n, 446 F.3d 728, 733 (7th Cir. 2006)). It does not seat fiduciaries on the "razor's edge" in striking that balance but rather reviews discretionary decisions "deferentially" to ensure an appropriate process was employed. Armstrong, 446 F.3d at 733;

Chao v. Merino, 452 F.3d 174, 182 (2d Cir. 2006) (prudent person standard does not require fiduciary to take "any particular course of action if another approach seems preferable").

Consistent with these principles, a claim against a fiduciary may not chart a course based on no more than a hindsight assessment of an investment's performance. St. Vincent, 712 F.3d at 716 ("we judge a fiduciary's actions based upon information available to the fiduciary at the time of each investment decision and not from the vantage point of hindsight"); Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 595 (8th Cir. 2009) ("In evaluating whether a fiduciary acted prudently, we therefore focus on the process by which it makes its decisions rather than the results of those decisions."). Fiduciaries are not required to predict the future, and cannot be held liable for deciding to avoid risks that, in hindsight, could have been tolerated. Fifth Third Bancorp, 134 S. Ct. at 2471-72; DeBruyne v. Equitable Life Assur. Soc. of U.S., 920 F.2d 457, 465 (7th Cir. 1990) (ERISA "requires prudence, not prescience"). Nor are they held to the standard of looking to the average and copying what they see – as the Seventh Circuit colorfully expressed the principle, "assertions of what a 'typical'[] fund portfolio manager might have done in [the past] say little about the wisdom of [defendant's] investments, only that [defendant] may not have followed the crowd." DeBruyne v. Equitable Life Assurance Soc'y, 920 F.2d 457, 465 (7th Cir. 1990). To require fiduciaries to conform to industry averages would require them to ignore their individual plans' needs and requirements, which is contrary to the core fiduciary standards that govern their conduct. In re Unisys Sav. Plan Litig., 74 F.3d 420, 434 (3d Cir. 1996) ("focusing on a fiduciary's conduct in arriving at an investment decision, not on its results," . . . adequacy of a fiduciary's independent investigation and ultimate investment selection is evaluated in light of the 'character and aims' of the particular type of plan he serves"); see Armstrong v. LaSalle Bank Nat'l Ass'n, 446 F.3d 728, 733 (7th Cir. 2006)

(investment decisions must involve "balancing of competing interests under conditions of uncertainty" in the specific circumstance); Chao v. Merino, 452 F.3d 174, 182 (2d Cir. 2006) (ERISA does not require fiduciary to take "any particular course of action if another approach seems preferable") (quotation omitted); Caterino v. Barry, 8 F.3d 878, 883 (1st Cir. 1993) (Breyer, J.) ("trustees must discharge their duties 'with respect to a [multiemployer] plan solely in the interest of the participants and beneficiaries . . . with [ ] care, skill, prudence, and diligence'").

Tacking into this headwind, Plaintiffs rely on other decisions that they argue establish that it is enough at the pleading phase of an ERISA case to allege deviations between the challenged fund's performance or characteristics and those of other comparable funds. E.g., Braden, 588 F.3d 585; Krueger v. Ameriprise Fin., Inc., No. 11-cv-02781 (SRN/JSM), 2012 WL 5873825, at *10-11 (D. Minn. Nov. 20, 2012). They misstate the holdings in these decisions. Far from finding that nothing more than a deviation from the average is sufficient for an inference of mismanagement, while each case includes comparison evidence, their holdings rely on inferences of self-dealing or disloyalty by the manager – claims that are completely missing from the Complaint here. For example, while Braden certainly underscores the importance of permitting claims based on inferences to proceed, 588 F.3d at 598, it relies on the allegation that the fund manager included underperforming assets in the fund to earn higher fees and in exchange for services; it is the self-dealing that permitted the inference that "the process by which appellees selected and managed the funds in the Plan [was] tainted by failure of effort, competence, or loyalty. Id. at 596. Krueger is similar, holding that the allegation, that the employer directed that the retirement investments must be made in its own underperforming

funds in order to drive fees and profits, plausibly permitted the inference of a flawed fiduciary process. 2012 WL 5873825, at *10-11.

Plaintiffs' reliance on two unreported district court decisions, one from Oregon and the other from Massachusetts, is equally unavailing. Ellis v. Fidelity Mgmt. Trust Co., 15-cv-14129-WGY, Order (D. Mass. Apr. 7, 2016) (attached at ECF No. 34-4); Austin v. Union Bank & Trust Co., 3:14-cv-00706-ST, Dkt. 127 (D. Or. Apr. 24, 2015) (attached at ECF No. 34-2). In Ellis, the two-page order issued by the district court in Massachusetts denied dismissal motions in two unrelated ERISA actions. It offers the reader little more than a citation to the standard for the resolution of benefits decisions, and simply expresses the Court's reluctance to dismiss a case that is "factually complex." ECF No. 34-4. In the Oregon decision, Austin v. Union Bank & Trust Co., the court appeared to have based its decision on the allegations, missing here, that the fiduciary decisions were flawed by the fund manager's self-dealing, and that the fund manager's investments had deviated from the plan's mandate. ECF No. 34-2 at 8, 16.

St. Vincent illustrates the point that more than just comparison data is needed to survive a motion to dismiss. 712 F.3d 705. In St. Vincent, the Second Circuit emphasized that discovery should be allowed to flow based on no more than an inference of imprudence despite the absence of facts that "directly address the process by which the Plan was managed," so that ERISA plaintiffs can access the inside information that they lack. Id. at 718. But the court also emphasized that the inference must be anchored to "more than the *mere possibility* of misconduct." Id. at 719 (quoting Iqbal, 556 U.S. at 679) (emphasis in original). Based on this standard, it held that the plaintiff's averment based on a comparison to an industry norm – the plaintiff alleged that the plan's investment in risky assets exceeded an industry benchmark by 10% – was "unenlightening without facts . . . suggesting 'whether and how this 10% variance

from the Index is material to the Fund's diversification.'"[8] Id. at 724 (noting that a 10% variance from an average could "be the difference between 10% and 20% or it could be the difference between 90% and 100%"). Despite a pleading loaded with facts, none were found to be sufficient to raise an inference of imprudence. Id. at 712, 727. "Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." St. Vincent, 712 F.3d at 718 (citing Iqbal, 556 U.S. at 679) (internal punctuation omitted).

Nor are Plaintiffs' new facts buoyed up by Abbott v. Lockheed Martin Corp., 725 F.3d 803 (7th Cir. 2013). Plaintiffs are right that Abbott involved a stable value fund that the court found had been managed contrary to the "general description" of stable value funds in that, instead of a "mix of short- and intermediate-term investments," id. at 806, its manager had invested "heavily[9] in short-term money market investments," resulting in a portfolio that was not designed to (and did not) exceed money market fund returns. Id. at 806. Plaintiffs overlook that, in finding this claim not to be viable, the Seventh Circuit recited the specific factual allegations found to permit the inference of imprudence: "that the SVF was not structured to beat inflation, that it did not conform to its own Plan documents, and that Lockheed failed to alter the SVF's investment portfolio even after members of its own pension committee voiced concerns that the SVF was not structured to provide a suitable retirement asset." Id. at 811. Finally, Abbott emphasizes that the claim against Lockheed was not narrowly based on a mere deviation "from

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[8] Notably, unlike Plaintiffs here, whose Complaint is based only on comparisons to averages, the St. Vincent plaintiffs also included detailed allegations of "warning signs" that they argued should have triggered an investigation by the fund manager. 712 F.3d at 721. The court rejected these allegations because none raised an inference that the warnings were sufficient to "suggest[] that a prudent investor *at the time* would have viewed this unspecified risk as high enough to render the investments imprudent." Id. at 722 (emphasis supplied).

[9] The district court's opinion in Abbott provides the details – despite a plan that disclosed that assets would be invested in a mix of equities, debt securities and money market instruments, the actual investment was between 50% and 99% in money market instruments. Abbott v. Lockheed Martin Corp., No. 06-cv-07010MJR, 2009 WL 839099, at *10-11 (S.D. Ill. Mar. 31, 2009), rev'd on other grounds, 725 F.3d 803 (7th Cir. 2013).

the mix of investments held by other funds bearing the 'stable value' label." Id. at 811. As the Abbott district court decision noted, "using the term 'stable value' does not 'wed' [a fund] to a specific mix of investments." Abbott v. Lockheed Martin Corp., 2009 WL 839099, at *11.

Returning to the Complaint's plausible factual allegations, I am struck again by the absence of any allegation permitting the inference that Galliard failed to adhere to the Plan's guidelines and investment objectives: to preserve capital while generating a steady rate of return higher than money market funds provide. Instead, the Complaint relies on its detailed (and unfavorable to the Fund) comparison of industry averages to the Fund's investment duration, asset allocation and (to a limited extent) performance. However, an industry average is simply an arithmetic mean derived from a diversity of investment approaches among fund managers. The weighted averages relied on by Plaintiffs are merely data points calculated from a range, potentially a wide range, of measures of investment duration, asset allocation and fund performance, from an array of managers, some more, and some less, risk-averse. Deviation from the average, standing alone, means nothing. What matters is whether the duration of the investments and the allocation of the assets chosen by Galliard conformed to the Plan's disclosed investment objective of preserving capital while generating a higher rate of return than a money market fund; when they do (as the Complaint concedes), Plaintiffs must present more than just a failure to adhere to the mean. Put differently, the new allegations may plausibly allege that various features of the CVS Stable Value Fund deviated from industry averages, but, without more, that does not permit an inference either of imprudence or prudence. See Abbott, 725 F.3d at 811; St. Vincent, 712 F.3d at 724; N.J. Carpenters Health Fund v. Royal Bank of Scot. Grp., 709 F.3d 109, 121 (2d Cir. 2013) (inference of liability may not be based on facts that are "merely consistent with, a finding of misconduct").

Plaintiffs' argument that a deviation from the average permits an inference of imprudence also ignores the fundamental principle that ERISA does not require fund managers mindlessly to manage to the middle or the mean. Indeed, to do so would breach their affirmative duty to exercise their judgment in view of the particular circumstances of the plan. See In re Unisys Savings Plan Litig., 74 F.3d 420, 435 (3d Cir. 1996) (manager must manage assets in a manner consistent with "the character and aims of the particular type of plan he serves"); DeBruyne, 920 F.2d at 465 (defendant's investment choices not imprudent just because they are not "typical"). As Braden notes, "[a]n inference pressed by the plaintiff is not plausible if the facts he points to are precisely the result one would expect from lawful conduct in which the defendant is known to have engaged." 588 F.3d at 597.

Regarding performance, the Complaint lacks facts from which a plausible inference of an imprudent process arises. Rather, it contains only the conclusory and somewhat vague allegation that the CVS Stable Value Fund "predictably underperformed substantially compared to stable value funds that presumably adopted accepted principles of stable value fund investing." Compl. ¶ 65. In support of this allegation, the Complaint alleges that Galliard disregarded the fundamentals of stable value investing in favor of "an unthinking commitment to money-market type 'fire-and-forget' asset placement," a strategy pursued by a manager who invests but then ignores the investment's performance. Compl. ¶ 63. However, this conclusory assertion is supported by no plausible facts. To the contrary, the Complaint's facts belie the allegation in that they demonstrate that, at least annually, Galliard attended to the investments by tweaking the cash allocation up and down.

At bottom, Plaintiff's amended pleading is laden with facts that plausibly buttress their core claim that, with the prescience of a crystal ball's forecast of the future, the CVS Stable

Value Fund managers could have delivered better returns for the investors. That does not state a claim. Because I find that Plaintiffs have failed to provide sufficient facts to raise an inference of imprudent investment management on the part of Galliard, I recommend that Count I of the Complaint be dismissed.

The final task, the analysis of the viability of Count II, is readily concluded. Count II alleges that CVS failed to exercise its duty as a fiduciary to select and monitor its investment manager, Galliard. Because a monitoring fiduciary does "not fail in the discharge of its duty to select and monitor" if the investment manager "did not commit a breach," Bunch v. W.R. Grace & Co., 532 F. Supp. 2d 283, 292 (D. Mass. 2008), aff'd, 555 F.3d 1 (1st Cir. 2009), my recommendation on Count I compels the same recommendation for Count II. With no plausible allegation that Galliard committed a breach of its duty as investment manager, Count II also fails to state a claim. Accordingly, I recommend that it too should be dismissed. See Bunch, 532 F. Supp. 2d at 292; Brown . Medtronic, Inc., 628 F.3d 451, 461 (8th Cir. 2010).

IV. CONCLUSION

Based on the foregoing, I recommend that Defendants' Motion to Dismiss be GRANTED and that the case be dismissed. ECF No. 32. Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
January 31, 2017