No. 24-

In the

Supreme Court of the United States

JAMIE H. PIZARRO, CRAIG SMITH, JERRY MURPHY, RANDALL IDEISHI, GLENDA STONE, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, AND MARIE SILVER,

Petitioners,

v.

THE HOME DEPOT, INC., THE ADMINISTRATIVE COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN, AND THE INVESTMENT COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

David Tracey
Counsel of Record
Kate MacMullin
Sanford Heisler Sharp McKnight, LLP
17 State Street, Suite 3700
New York, NY 10004
(646) 402-5650
dtracey@sanfordheisler.com

Leigh Anne St. Charles
Sanford Heisler Sharp McKnight, LLP
611 Commerce Street, Suite 3100
Nashville, TN 37203

[Additional Counsel Listed On Inside Cover]

130707

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

Charles Field
Sanford Heisler Sharp
McKnight, LLP
7911 Herschel Avenue,
Suite 300
La Jolla, CA 92037

Kaitlin Leary
Sanford Heisler Sharp
McKnight, LLP
700 Pennsylvania Avenue SE,
Suite 300
Washington, DC 20003

Counsel for Petitioners

QUESTION PRESENTED

This case raises a long-unresolved question at the heart of ERISA's fiduciary enforcement provisions.

The Employee Retirement Income Security Act of 1974 (ERISA) codifies the trust law rule that fiduciaries "shall be personally liable" for all "losses to the plan resulting from" each breach of fiduciary duty. 29 U.S.C. § 1109(a). Yet the circuits are split over whether ERISA adopts trust law's burden-shifting framework for adjudicating such claims. Five circuits follow trust law. They hold that, under § 1109(a), once the plaintiff-beneficiaries establish breach and a related loss, the burden shifts to the defendant-fiduciaries to disprove causation—specifically, to show that the loss would have occurred even absent the breach. Two circuits, including the Eleventh Circuit in the opinion below, reject trust law. They hold that burden-shifting does not apply to claims under § 1109(a). Relatedly, without squarely addressing whether burden-shifting applies, three circuits have stated that plaintiffs must plead or prove some causal link.

The question presented is whether, consistent with trust law, burden-shifting applies to the element of causation under 29 U.S.C. § 1109(a).

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs-appellants below, are Jamie H. Pizarro, Craig Smith, Jerry Murphy, Randall Ideishi, and Glenda Stone, on behalf of themselves and others similarly situated, and Marie Silver. Rachelle North was a plaintiff-appellant below at the time the Notice of Appeal was filed. Plaintiffs-appellants filed a Suggestion of Death for Ms. North on April 4, 2023, which the Eleventh Circuit entered on August 8, 2024. *See* Suggestion of Death of Rachelle North, *Pizzaro v. The Home Depot, Inc.*, No. 22-13643, (11th Cir. Apr. 4, 2023), ECF. No. 38; Order on Suggestion of Death of Rachelle North, *Pizzaro v. The Home Depot, Inc.*, No. 22-13643, (11th Cir. Aug. 8, 2024), ECF. No. 75.

Respondents, who were defendants-appellees below, are The Home Depot, Inc., The Administrative Committee of the Home Depot Futurebuilder 401(k) Plan, and The Investment Committee of the Home Depot Futurebuilder 401(k) Plan.

STATEMENT OF RELATED PROCEEDINGS

The related proceedings to this matter include the proceedings in the district court, *Pizarro v. The Home Depot, Inc.*, No. 18-cv-01566, (N.D. Ga.), and the Eleventh Circuit, *Pizzaro v. The Home Depot, Inc.*, No. 22-13643, (11th Cir.). The district court entered judgment and two amended judgments on September 30, 2022, October 4, 2022, and October 14, 2022, respectively. *See Pizarro v. The Home Depot, Inc.*, No. 18-cv-01566, (N.D. Ga. Sept. 30, 2022, Oct. 4, 2022, and Oct. 14, 2022), ECF Nos. 344, 345, 346. The Eleventh Circuit affirmed the district court's decision and entered judgment on August 2, 2024. *Pizarro v. The Home Depot, Inc.*, No. 22-13643, (11th Cir. Aug. 2, 2024), ECF Nos. 73-1 & 74. The Eleventh Circuit denied Petitioners' petition for rehearing and rehearing *en banc* on September 4, 2024. *Pizarro v. The Home Depot, Inc.*, No. 22-13643, (11th Cir. Sept. 4, 2024), ECF No. 79-2.

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 111 F.4th 1165 and reproduced at App. 1a-29a. The opinion of the district court is reported at 634 F. Supp. 3d 1260 and reproduced at App. 30a-116a.

JURISDICTION

The Eleventh Circuit issued its opinion on August 2, 2024. Petitioners timely filed a petition for rehearing and rehearing *en banc* on August 23, 2024, which the court of appeals denied on September 4, 2024. App. 123a-124a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 409(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1109(a), provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of

> the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

INTRODUCTION

"ERISA abounds with the language and terminology of trust law." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). As with trust law, the statute holds fiduciaries "personally liable" for all "losses to the plan resulting from" any breach of fiduciary duty. 29 U.S.C. § 1109(a). *Accord* Restatement (Third) of Trusts § 100 (2012). Yet, the circuit courts are split over whether ERISA adopts trust law's burden-shifting framework for adjudicating such claims. On at least three prior occasions, parties have sought this Court's review of the question presented in this petition. *See Putnam Invs., LLC v. Brotherston*, 140 S. Ct. 911 (2020); *Pioneer Ctrs. Holding v. Alerus Fin.*, 585 U.S. 1056 (2018); *RJR Pension Inv. Comm. v. Tatum*, 576 U.S. 1054 (2015). Now, with the Eleventh Circuit's decision below, the circuit split is mature, and the issue is ripe for a writ of certiorari.

The split boils down to a question of background law. The circuits agree that § 1109(a) is "silent" on the burden of proof. The circuits also agree that background law must fill that silence. But the circuits disagree on what background law applies. The First, Second, Fourth, Fifth, and Eighth Circuits apply trust law's framework: once the participant demonstrates breach and a related loss, the burden shifts to the fiduciary to show that the loss would have occurred anyway. *E.g. Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 36 (1st Cir. 2018) (citing Restatement (Third) of Trusts § 100 *cmt.* f). The Tenth and Eleventh Circuits acknowledge trust law's regime, but they disagree that it applies to § 1109(a). Instead, they apply "the 'ordinary default rule' . . . 'that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims.'" *E.g.* App. 12a (quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005)). Relatedly, the Sixth, Seventh, and Ninth Circuits have stated that plaintiffs must plead or prove some causal link, but they have not squarely addressed the question of burden-shifting on the element of causation. *E.g. Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995), *abrogated by Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014).

This Court's precedents provide a clear answer to the split: trust law, not the "ordinary default rule," should fill § 1109(a)'s silence on the burden of proof. With ERISA, "Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility." *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985). Thus, in case after case, this Court has been "guided by principles of trust law," *Firestone*, 489 U.S. at 111, and has "look[ed] to the law of trusts." *Tibble v. Edison Int'l*, 575 U.S. 523, 529 (2015). Indeed, trust law serves as a "starting point for analysis of ERISA unless it is inconsistent with the language of the statute, its structure, or its purposes." *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000) (alterations omitted) (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999)).

Yet, the Eleventh Circuit, like the Tenth Circuit before it, failed to follow that guidance. Instead, the court held that trust law would not apply to ERISA absent a clear statement to the contrary. Specifically, it would "only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute." App. at 14a-15a (quoting *Useden v. Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991). Under this inverted standard, since § 1109(a) is silent on the burden of proof, the "ordinary default rule" fills the gap rather than trust law. App. 12a (quoting *Schaffer*, 546 U.S. at 56-57). *Cf. Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1337 (10th Cir. 2017) (rejecting trust law in favor of the "ordinary default rule" that the burden remains with the plaintiff).

The entrenched circuit split bears on issues of national importance, both legal and practical. Legally, the inconsistent circuit rulings threaten ERISA's design as a "uniform body of benefits law." *Rutledge v. Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 86 (2020) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990). Practically, as of 2022, Americans had more than $11 trillion saved in ERISA retirement plans.[1] At stake is whether courts place any burden of persuasion on those plans' fiduciaries when they breach their duties.

1. U.S. Dep't of Labor, *Private Pension Plan Bulletin*, 3 (September 2024), https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2022.pdf.

This case presents an ideal vehicle to restore national uniformity to the circuits' interpretation of § 1109(a). The question presented was fully briefed and argued below, and there are no jurisdictional disputes. For each of the claims on appeal, the district court rejected burden-shifting and granted summary judgment based on the element of causation. The Eleventh Circuit affirmed. Thus, this appeal presents a clean, case-dispositive opportunity to resolve, once and for all, whether § 1109(a) adopts trust law's burden-shifting framework for causation.

STATEMENT OF THE CASE

A. Background.

The Home Depot FutureBuilder Plan (the "Plan") is one of the largest 401(k) plans in America, with approximately $9.1 billion in retirement savings for 230,000 participants as of year-end 2019. App. 4a. The Plan's fiduciaries include Defendants The Home Depot, Inc., the Investment Committee of the Home Depot FutureBuilder 401(k) Plan, and the Administrative Committee of the Home Depot FutureBuilder 401(k) Plan (collectively, "Home Depot"). App. 33a-34a. The Investment Committee's duties include selecting and monitoring the Plan's investment options and service providers and monitoring expenses and fees. App. 4a-5a. The Administrative Committee is the Plan Administrator and a named fiduciary for purposes of ERISA.

Petitioners represent classes of current and former Home Depot employees who participated in the Plan at any time from April 12, 2012, to the present (the

"Class Period").[2] App. 33a. They allege that Home Depot breached ERISA's duty of prudence in two ways: First, Home Depot allowed two service providers—Financial Engines Advisors LLC ("FE") and Alight Financial Advisors LLC ("AFA")—to charge participants excessive fees for their investment advisory services (the "Excessive Fees" claim). App. 34a. Second, Home Depot failed to timely remove imprudent investments (the "Challenged Funds" claims)—specifically, several BlackRock Life Path Target Date Funds, the TS&W Small Cap Value Fund, the Stephens Small Cap Growth Fund, and the J.P. Morgan Stable Value Fund. App. 34a. Petitioners allege that, as a result of Home Depot's breaches of fiduciary duty, Plan participants lost hundreds of millions of dollars in retirement savings. App. For Pls.-Appellants Vol. 2, *Pizzaro v. The Home Depot, Inc.*, No. 22-13643, (11th Cir. Feb. 9, 2023), ECF No. 22-2 at 100.

B. District Court Proceedings.

Petitioners filed a class action complaint against Home Depot in the U.S. District Court for the Northern District of Georgia. Following discovery, the parties cross-moved for summary judgment.[3] As relevant here, the district

2. The district court appointed all Petitioners as class representatives except Petitioner Silver. Petitioner Silver continued as a named plaintiff in her individual capacity. Order on Pls.' Mot. for Class Certification and on Defs.' Motions For Summary Judgment as to Counts II and VI, *Pizarro v. The Home Depot Inc.*, No. 18-cv-01566, (N.D. Ga. Sept. 21, 2020), ECF No. 186 at 4 n.1 & 75-76.

3. The district court denied Petitioners' motion for partial summary judgment. Petitioners do not seek this Court's review of that ruling.

court denied Home Depot's motion for summary judgment on the element of breach. The court held that Petitioners had established disputes of material fact as to whether Home Depot breached its duty of prudence by failing to appropriately monitor FE's and AFA's fees and all but one of the Challenged Funds.[4] App. 76a (Excessive Fees claim); 87a (BlackRock TDFs); 104a (JPMorgan Fund); 109a (TS&W Fund).

Turning to the element of causation, the district court noted that the parties disputed "which party bears the burden to prove loss causation." App. 66a. The court resolved that dispute in Defendants' favor. It assigned Petitioners the burden of proving "'that no reasonable fiduciary would have maintained the investment[s] [and advisory] services[s]'" at issue. App. 76a (quoting *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1127 (D. Colo. 2020), *aff'd*, 1 F.4th 769 (10th Cir. 2021)).

On the Excessive Fees claim, the district court held that "Plaintiffs have not adduced sufficient evidence to show a disputed issue of material fact concerning whether Home Depot paid excessive fees relative to other FE or AFA clients." App. 77a. The court further found that "Plaintiffs failed to marshal any evidence that *no prudent fiduciary* in Home Depot Defendants' proverbial shoes would have selected FE or AFA over other managed account providers." App. 80a. Accordingly, the district

4. Regarding the Stephens Fund, the district court held that there was no genuine dispute of material fact on the element of breach and that Home Depot was entitled to judgment as a matter of law. App. 115a. The Eleventh Circuit affirmed. App. 27a. Petitioners do not seek this Court's review of the lower courts' judgment with respect to the Stephens Fund.

court concluded that "[t]here is no evidence that Home Depot Defendants' actions or inactions caused the Plan a loss," App. 81a, and granted Home Depot's motion for summary judgment on the Excessive Fees claim. App. 83a.

On the Challenged Funds claims, the district court held that Petitioners' evidence failed to create a genuine dispute of material fact as to whether "no prudent fiduciary" would have retained the Challenged Funds during the Class Period. App. 100a (BlackRock TDFs); App. 106a (JPMorgan Fund); App. 112a-113a (TS&W Fund); App. 115a (Stephens Fund). Therefore, the district court granted Home Depot's motion for summary judgment on the Challenged Funds claims.

C. The Eleventh Circuit's Decision.

The Eleventh Circuit affirmed. "This case presents two questions," the court began, "which party has the burden to show loss causation, and how to meet that burden." App 2a. The court answered both questions in Defendants' favor. "ERISA does not impose a burden-shifting framework," held the court. App 10a. Instead, even when plaintiffs establish that there was a breach of fiduciary duty and a related loss, "plaintiffs must [also] show that a hypothetical prudent fiduciary . . . would not have made the same choices." App. 3a.

According to the panel, the Eleventh Circuit's prior precedent "foreclose[d] adopting [a] burden-shifting framework." App. 3a. In the 1992 case *Willett v. Blue Cross & Blue Shield of Alabama*, the circuit had instructed that "'[o]n remand, the burden of proof on the issue of causation will rest on the beneficiaries." App. 10a (alteration in original) (quoting *Willett*, 953 F.2d 1335, 1343 (11th Cir. 1992)). Yet, *Willet* had also "note[d] that to obtain 'a grant of summary judgment in its favor, [the fiduciary] would have had to establish the absence of causation by proving that the beneficiaries' claimed losses could not have resulted from' its breach." App. 10a (quoting 953 F.2d at 1343). The opinion below characterized this latter sentence as "an ordinary summary judgment burden" with no implication for burden-shifting. Though it noted, "[t]o be fair, the *Willett* court could have been more artful" in its explanation. App. 11a.

The court then proceeded to "offer[] . . . some of the reasoning" against burden-shifting that "we elided" in *Willett*. App. 11a. ERISA, the court noted, "does not explicitly assign the burden of proof on . . . loss causation." App 12a. To fill that statutory silence, the court looked first to "the 'ordinary default rule' . . . 'that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims.'" App. 12a (quoting *Schaffer*, 546 U.S. at 56-57). "[W]ithout any evidence that Congress intended to vary from it," said the court, "we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." App. 12a (quoting *Schaffer*, 546 U.S. at 57-58). Turning to § 1109(a), the Court found no "affirmative indication" that Congress intended to depart from the default rule. App. 12a. Thus, "[t]he ordinary rule resolves this case." App. 12a.

Trust law did not alter the court's conclusion. The court acknowledged that, "in 'determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts.'" App. 13a-14a. (quoting *Tibble*, 575 U.S.

at 528-29). But, the court said, ERISA is "meaningfully distinct from the body of the common law of trusts." App. 14a (quoting *Useden*, 947 F.2d at 1581). Thus, the court would "only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute." App. 14a-15a (quoting *Useden*, 947 F.2d at 1581).

Turning again to § 1109(a), the court did not find "any language suggesting that Congress's omission of trust law's burden-shifting framework for loss causation was anything but deliberate." App. 15a. The court then rejected one proposed rationale for burden-shifting—fiduciaries' greater access to information as compared to beneficiaries. App. 15a. Instead, the court concluded that ERISA's mandatory disclosure and reporting requirements "suggest[] that Congress dealt with the information imbalance problem by shrinking the gap, not shifting the burden." App. 15a.

Having decided that plaintiffs bear the burden on causation, the court next explained "what will satisfy that burden." App. 16a. The court held, "[P]laintiffs must show that the investments made were not objectively prudent." App. 16a. This means "that a hypothetical prudent fiduciary in the same circumstances as the defendant, armed with the information that a proper evaluation would have yielded, would not (or could not) have made the same choice." App. 16a.

Applying this standard to Petitioners' claims, the Eleventh Circuit held that "the plaintiffs have not shown a genuine dispute of material fact on loss causation for either" the Excessive Fees claim or the Challenged Funds claims. App. 19a. Specifically, "the plaintiffs cannot show that a prudent fiduciary in the same position as Home Depot would have made different choices on either the plan's service providers or the four challenged funds." App. 29a. Thus, the Eleventh Circuit affirmed the district court's grant of summary judgment to Home Depot. App. 29a.

REASONS FOR GRANTING THE PETITION

I. The Circuit Courts Are Split Over Whether ERISA Adopts Trust Law's Burden-Shifting Framework for Causation.

The Circuit Courts of Appeals are split over whether ERISA incorporates trust law's burden-shifting framework for causation. The First, Second, Fourth, Fifth, and Eighth Circuits follow trust law: after the plaintiff proves a breach of fiduciary duty and a related loss, the burden shifts to the defendant-fiduciary to prove that the loss would have happened anyway. *See infra* Section I.A.

By contrast, the Tenth and Eleventh Circuits reject trust law's burden-shifting framework. *See infra* Section I.B. Moreover, the Sixth, Seventh, and Ninth Circuits have issued decisions recognizing that plaintiffs must show some causal link between breach and loss without addressing whether burden-shifting applies to causation. *See infra* Section I.C. Among the circuits that have not adopted trust law's burden-shifting framework, there is no uniform reasoning underlying their holdings.

For decades, the Courts of Appeals have acknowledged this unresolved split. *See*, *e.g.*, App. 12a n.2 (describing split); *Brotherston*, 907 F.3d at 35 ("Our sister courts are split."); *Pioneer Ctrs.*, 858 F.3d at 1336 (describing split); *Plasterers' Local Union v. Pepper*, 663 F.3d 210, 220 (4th Cir. 2011) ("[T]he circuit courts of appeals are split."); *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 160 (3d Cir. 1999) ("[O]ur sister circuits have divided").

The government has likewise acknowledged this "division among the courts of appeals," as have scholars and practitioners. Br. for the United States as Amicus Curiae, *Putnam Invs., LLC v. Brotherston*, No 18-926, 2019 WL 6465006, at *15 (Nov. 27, 2019). *See also*, *e.g.*, Catalina J. Vergara, *The Shifting Landscape on Burden Shifting:* Pioneer Centres *Settles, and the First Circuit Joins the Fray*, 26 No. 4 ERISA Litig. Rep. NL 4 (Nov. 2018) (noting that *Pioneer Centres* "solidified what was then a brewing circuit split"); Peter Langdon, *For Whom the Plan Tolls:* Tatum v. RJR Pension Investment Committee *and the Emergence of Exacting Scrutiny Awaiting Fiduciaries in Breach in the ERISA Litigation Landscape post* Dudenhoeffer, 49 Creighton L. Rev. 437, 447-50 (2016).

A. Five Circuits Follow Trust Law: They Shift the Burden to the Defendant-Fiduciary After the Plaintiff Establishes Breach and a Related Loss.

The First, Second, Fourth, Fifth, and Eighth Circuits hold that, once the plaintiff establishes breach of fiduciary duty and a related loss, the burden shifts to the defendant to show that the loss was not caused by the breach.

Sacerdote v. N.Y. Univ., 9 F.4th 95, 113 (2d Cir. 2021);[5] *Brotherston*, 907 F.3d at 39; *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 363 (4th Cir. 2014); *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995) (quoting *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994)); *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992).

These courts draw their holdings from the same source: the common law of trusts. *See Sacerdote*, 9 F.4th at 113 (noting that burden-shifting "is aligned with the Supreme Court's instruction to 'look to the law of trusts' for guidance in ERISA cases" (quoting *Tibble*, 575 U.S. at 529)); *Brotherston*, 907 F.3d at 36 ("This burden allocation has long been the rule in trust law."); *Tatum*, 761 F.3d at 363 (adopting "the long-recognized trust law principle" of burden-shifting); *Martin*, 965 F.2d at 671 (citing Bogert, *The Law of Trusts and Trustees* § 871 (2d rev. ed. 1982 &

5. A concurring opinion in a prior Second Circuit decision questions trust law's burden-shifting framework on causation. *See Silverman v. Mut. Ben. Life Ins. Co.*, 138 F.3d 98, 106 (2d Cir. 1998) (Jacobs, J., concurring). This concurrence, however, merely rejects burden-shifting where there is no evidence of any "causative link" between breach and loss. *Id.* at 105. This is consistent with the burden-shifting framework, which requires the plaintiff to first prove breach and a "related loss." Restatement (Third) of Trusts § 100 *cmt*. f. Moreover, contra *Silverman*, the Second Circuit's prior decision in *Teamsters* and its subsequent decision in *Sacerdote* evidence robust endorsement of trust law's burden-shifting regime. *See N.Y. State Teamsters Council Health & Hosp. Fund v. Estate of DePerno*, 18 F.3d 179, 182 (2d Cir. 1994) ("[O]nce the beneficiaries have established their *prima facie* case by demonstrating the trustees' breach of fiduciary duty, 'the burden of explanation or justification . . . shift[s] to the fiduciaries.'") (quoting *Nedd v. United Mine Workers*, 556 F.2d 190, 210 (3d Cir. 1977)); *Sacerdote*, 9 F. 4th at 113.

supp. 1991)); *see also McDonald*, 60 F.3d at 237 & nn.13 & 14 (citing *Roth*, 16 F.3d at 917, which in turn cites *Martin*, 965 F.2d at 671)).

Trust law "governed most benefit plans before ERISA's enactment," and supplies "much of the content" of "ERISA's fiduciary duties." *Tatum*, 761 F.3d at 357. Accordingly, "when the Supreme Court confronts a lack of explicit direction in the text of ERISA, it regularly seeks an answer in the common law of trusts." *Brotherston*, 907 F.3d at 36. (citing *Varity Corp. v. Howe*, 516 U.S. 489, 496-97, 502, 506-07 (1996)); *Accord Sacerdote*, 9 F.4th at 113.

Here, "[§] 1109(a) does not explicitly state" how to allocate the burden on causation. *Brotherston*, 907 F.3d at 35. The background law—trust law—fills the gap: it "places the burden of disproving causation on the fiduciary once the beneficiary has established that there is a loss associated with the fiduciary's breach." *Id.* (citing Restatement (Third) of Trusts, § 100 *cmt*. f.; *Tatum*, 761 F.3d at 363).

As the First and Fourth Circuits have also noted, burden-shifting complements "the structure and purpose of ERISA." *Tatum*, 761 F.3d at 363; *accord Brotherston*, 907 F.3d at 37. "[T]he statute's primary objective is to protect 'the interests of participants in employee benefit plans and their beneficiaries.'" *Tatum*, 761 F.3d at 363 (quoting 29 U.S.C. § 1001(b)). Indeed, Congress sought "to offer beneficiaries, not fiduciaries, more protection than they had at common law." *Brotherston*, 907 F.3d at 37 (citing *Varity*, 516 U.S. at 497). Thus, "it would be strange to reject trust law's rules on burden allocation . . .

especially where the benefit of such a reduction would flow exclusively to employers whose breaches were followed by losses to the plan." *Id.* at 38. To do so would "minimiz[e] the fiduciary provisions' deterrent effect.'" *Tatum*, 761 F.3d at 363 (quoting Br. of Sec'y of Labor as Amicus Curiae, *Tatum v. RJR Pension Inv. Comm.*, No. 13-1360, 2013 WL 3193467, at *20 (4th Cir. June 25, 2013), ECF No. 46 at 26).

To be sure, courts on this side of the split acknowledge that, in other contexts, the "default rule provides that the burden of proof rests with the plaintiff" on all elements of their claim. *Tatum*, 761 F.3d at 362 (citing *Schaffer*, 546 U.S. at 56); *Brotherston*, 907 F.3d at 35 (same). But that general rule "'admits of exceptions,' and one such exception arises under the common law of trusts." *Tatum*, 761 F.3d at 362 (quoting *Schaffer*, 546 U.S. at 57). Indeed, even in contexts apart from trust law, "the burden may be allocated to the defendant when" as in ERISA, "he possesses more knowledge relevant to the element at issue." *Brotherston*, 907 F.3d at 38 (citing *Schaffer*, 546 U.S. at 60); *see also Sacerdote*, 9 F.4th at 113 (noting "the need in certain instances to shift the burden to the trustee, who commonly possesses superior access to information").

The consistent reasoning offered by the circuit courts that endorse the burden-shifting approach stands in contrast to the inconsistent and often unsupported justifications provided by the circuit courts that have eschewed burden-shifting for causation, as explained below.

B. Two Circuits Reject Trust Law: They Place the Burden to Prove Causation Solely on the Plaintiff.

The Tenth and now Eleventh Circuits reject trust law's burden-shifting framework. App. 15a; *accord Pioneer Ctrs.*, 858 F.3d at 1337 (holding "that the burden falls squarely on the plaintiff . . . to prove losses to the plan 'resulting from' the alleged breach of fiduciary duty" (quoting 29 U.S.C. § 1109(a))).

The Tenth Circuit, which was the first court to "reject outright" burden-shifting, recognized that "the statute is silent as to *who* bears the burden of proving a resulting loss." *Pioneer Ctrs.*, 858 F.3d at 1335-36. It also acknowledged that trust law applies burden-shifting to the element of causation—an accepted "exception" to the "default rule" that the burden of persuasion always rests with the plaintiff. *Id.* (quoting Restatement (Third) of Trusts § 100 *cmt.* f).

Yet the court did not fill ERISA's silence with trust law. The court eschewed ERISA's antecedents, and instead relied on criminal law precedent to hold that causation could not be read as an exception or affirmative defense to § 1109(a). *Id.* at 1336 (citing *United States v. Prentiss*, 256 F.3d 971, 979 (10th Cir. 2001)). Thus, it held that the more general "default rule" applied, and that the plaintiff unconditionally bore the burden on causation. *Id.* at 1337.

The Eleventh Circuit, in the decision below, relied primarily on *Willett*, 953 F.2d 1335, believing that "[o]ur precedent already answers this question." App. 10a. But *Willett* did not consider burden-shifting. *See e.g. Tatum*

761 F.3d at 362 n.10 (noting that *Willett* did not "address[] a situation in which plaintiffs had already established both fiduciary breach and a loss."). If anything, *Willett* contained language supporting burden-shifting. *See* 953 F.2d at 1343 (stating that, to prevail on summary judgment, the fiduciary "would have had to establish the absence of causation by proving that the beneficiaries' claimed losses could not have resulted from" the breach). Indeed, Eleventh Circuit precedent prior to *Willet* endorsed burden-shifting in trust law and other ERISA contexts. *E.g.*, *Brown v. Blue Cross & Blue Shield of Ala.*, 898 F.2d 1556, 1566–67 (11th Cir. 1990); *Fine v. Semet*, 699 F.2d 1091, 1095 (11th Cir. 1983); *Fulton Nat'l Bank v. Tate*, 363 F.2d 562, 564 (5th Cir. 1966) ("The District Court erred in holding that even after such a demonstration the burden remained with the beneficiaries.").

In addition to misreading its own precedent, the Eleventh Circuit also contravened this Court's precedent, as set forth below. *See infra* Section II.

C. Three Circuits State that Plaintiffs Must Plead or Prove Some Causal Link Without Addressing Burden-Shifting.

The Sixth, Seventh, and Ninth Circuits have held that plaintiffs must plead or prove a causal link between breach and loss, but they have not clearly addressed burden-shifting on causation. *Kuper*, 66 F.3d at 1459; *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1099 (9th Cir. 2004); *Peabody v. Davis*, 636 F.3d 368, 373 (7th Cir. 2011).

The Sixth and Ninth Circuits created their "causal link" requirement in the context of the now-defunct

"*Moench* presumption" for cases involving Employee Stock Ownership Plans ("ESOPs"). *See Kuper*, 66 F.3d at 1459–60 (adopting reasoning of *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995)); *Wright*, 360 F.3d at 1098-99 (same). Under *Moench*, courts presumed fiduciary prudence unless plaintiffs proved an abuse of discretion. *Kuper*, 66 F.3d at 1459.

In *Fifth Third Bancorp v. Dudenhoeffer*, this Court abrogated *Moench*. 573 U.S. 409. *Dudenhoffer* made clear that "the law does not create a special presumption favoring ESOP fiduciaries." 573 U.S. at 418. Specifically, ERISA does not require plaintiffs to prove that "a prudent fiduciary acting under similar circumstances would have made a different investment decision" in order to overcome a presumption that defendants acted prudently. *Dudenhoeffer*, 573 U.S. at 418 (quoting *Dudenhoefer v. Fifth Third Bancorp*, 692 F.3d 410, 418 (6th Cir. 2012)).

Following *Dudenhoeffer*, the Sixth Circuit recognized this Court's rejection of the prudence presumption undergirding *Kuper*. *Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 860–62 (6th Cir. 2017). Yet, without explanation or analysis, the Sixth Circuit reasserted *Kuper*'s holding that "'a plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan.'" *Id.* at 863 (quoting *Kuper*, 66 F.3d at 1459). The Ninth Circuit, which relied on *Kuper*'s holding that the plaintiff must show a causal link, *see Wright*, 360 F.3d at 1099 (quoting *Kuper*, 66 F.3d at 1459), has not addressed this issue since *Dudenhoeffer*. Thus, especially after *Dudenhoeffer*, neither the Sixth nor the Ninth Circuit has a clear position on what it means to "show a causal link" or whether the burden shifts at any point to the defendant-fiduciaries.

The Seventh Circuit, for its part, is equally opaque. To be sure, the court has said, "the plaintiff must show . . . causation of an injury." *Peabody*, 636 F.3d at 373 (7th Cir. 2011). But for support it provided a bare "see" citation to *Kamler v. H/N Telecommunication Services, Inc.*, 305 F.3d 672, 681 (7th Cir. 2002). *Kamler*, however, was about whether the plaintiff had sufficiently *alleged a breach* of fiduciary duty, not who had the burden to *prove causation*. In that context, the court noted, "although not explicitly indicated by the prior caselaw, the plaintiff must *allege* that the breach of fiduciary duty caused some harm to him or her that can be remedied." 305 F.3d at 681 (emphasis added).[6] The Seventh Circuit has never connected the dots between *Kamler's* burden to "allege . . . some harm" and *Peabody's* burden "to show . . . causation."

Further muddying the water, the Sixth, Seventh, and Ninth Circuits have each placed the burden on breaching fiduciaries to disprove the extent of the financial consequences of their breaches. As the Seventh Circuit explained, "the burden is on the defendants who are found to have breached their fiduciary duties to show which profits are attributable to" proper investments. *Leigh v. Engle*, 727 F.2d 113, 138 (7th Cir. 1984). *Accord Kim v. Fujikawa*, 871 F.2d 1427, 1431 (9th Cir. 1989) (placing "squarely on the breaching fiduciary the burden of demonstrating what portion of the activities . . . benefited the Funds.") (citing *Leigh*, 727 F.2d at 138-39). In other

6. In *Brandt v. Grounds*, 687 F.2d 895, 898 (7th Cir. 1982), the Seventh Circuit also held that the plaintiffs had failed to allege "a causal connection." There, however, the plaintiff had failed to allege that the Defendant was acting in a fiduciary capacity when it engaged in the challenged conduct (issuing a cashier's check to a plan trustee in his individual capacity).

words, "in measuring a loss, the burden of persuasion should be placed on the breaching fiduciary." *Sec'y of U.S. Dep't of Lab. v. Gilley*, 290 F.3d 827, 830 (6th Cir. 2002) (citing *Kim*, 871 F.2d at 1430-31).

II. The Eleventh Circuit's Holding Is Incorrect and Misapplies This Court's Precedent.

The Eleventh Circuit erred by relying on the "ordinary default rule" to fill § 1109(a)'s silence on the burden of proof. App. 12a. Instead, as this Court's precedents make clear, the circuit should have been "guided by principles of trust law." *Firestone*, 489 U.S. at 111.

A. The Eleventh Circuit Inverted This Court's Guidance for Interpreting ERISA.

"Congress "legislate[s] against a background of common-law adjudicatory principles.'" *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014) (quoting *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991)). Thus, "[w]hen a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" *Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019) (quoting *Hall v. Hall*, 584 U.S. 59, 73 (2018)).

Here, that old soil is the common law of trusts. "ERISA abounds with the language and terminology of trust law." *Firestone*, 489 U.S. at 110. "[R]ather than explicitly enumerating *all* of the powers and duties of trustees, Congress invoked the common law of trusts to define the scope of their authority and responsibility." *Cent. States*, 472 U.S. at 570. Indeed, ERISA's "fiduciary responsibility provisions," including § 1109, "codify and make applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts." *Firestone*, 489 U.S. at 110 (alterations omitted) (quoting H.R. Rep. No. 93-533, p. 11 (1973), U.S. Code Cong. & Admin. News 1974, pp. 4639, 4649). Thus, trust law serves as the "starting point for analysis of ERISA unless it is inconsistent with the language of the statute, its structure, or its purposes." *Harris Tr.*, 530 U.S. at 250 (alterations omitted) (quoting *Hughes Aircraft*, 525 U.S. at 447). *Accord Varity*, 516 U.S. at 497 (same).

This Court has, time and again, admonished lower courts to interpret ERISA with due regard for trust law principles. In *Firestone*, for example, this Court relied on trust law to set the standard of review for benefits eligibility determinations. 489 U.S. at 110-14. Because ERISA was silent on the issue, *id.* at 109, trust law supplied the rule. *Id.* at 110-14. Likewise, in *Tibble*, this Court reversed the Ninth Circuit's application of ERISA's statute of limitations; the circuit had failed to account for trust law's "continuing duty to monitor trust investments." 575 U.S. at 529. And in *LaRue*, this Court held that § 1109(a)—the very provision at issue here—encompassed claims for "lost profits" based on the background trust law. *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 253 n.4 (2008); *see also, e.g.*, *Harris Tr.*, 530 U.S. at 251-52 (2000) (noting that trust law supports suits against non-fiduciary parties-in-interest to a prohibited transaction); *id.* at 251 n.3 (suggesting that trust law provides guidance on an unresolved question of the burden of proof).[7]

7. Even when this Court has *deviated* from trust law, it has only done so after identifying the reasons for such deviation in the text, structure, and purpose of ERISA. *See, e.g.*, *Hughes Aircraft*, 525 U.S. at 446-47 (deviating from the common-law doctrine of a

In the decision below, the Eleventh Circuit failed to follow this Court's guidance. Its "starting point" presumed trust law would *not* apply. *Contra Harris Tr.*, 530 U.S. at 250; *Varity*, 516 U.S. at 497. Instead, it would "only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute." App. 14a-15a (quoting *Useden*, 947 F.2d at 1581).

Since the text of § 1109(a) is silent on burden-shifting, the circuit refused to apply ERISA's trust law antecedents. App. 12a, 14a-15a. Rather, the court transplanted into the text the general principle—developed outside the context of fiduciary law—"that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims." App. 12a (quoting *Schaffer*, 546 U.S. at 57). While the court was right to fill ERISA's silence with background law, it drew from the wrong source—the general common law instead of trust law. *Cf. e.g. Firestone*, 489 U.S. at 109-14 (drawing from trust law rather than the Labor Management Relations Act); *Tibble*, 575 U.S. at 528 (holding that trust law should have informed the court's application of ERISA's statute of limitations).

wasting trust only because "ERISA itself plainly spells out the circumstances under which a plan terminates."); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256-59 (1993) (holding that "compensatory damages" against non-fiduciaries were not included in the term "equitable relief" based on the language and structure of ERISA).

B. Trust Law Adopts Burden-Shifting and Nothing in ERISA's Language, Structure, or Purpose Rejects It.

The sources are clear. ERISA's "starting point"—trust law—applies burden-shifting in fiduciary breach cases. *See, e.g.*, *Fulton*, 363 F.2d at 564 ("The District Court erred in holding that even after such a demonstration the burden remained with the beneficiaries."); *Blankenship v. Boyle*, 329 F. Supp. 1089, 1096 (D.D.C. 1971) ("[T]he burden of justifying the conduct is clearly on the trustees."); *In re Maurice's Estate*, 249 A.2d 334, 336 (Pa. 1969) (burden "shifted to the Executor to prove due care."); *Branch v. White*, 239 A.2d 665, 674 (N.J. Super. Ct. App. Div. 1968) ("[T]he burden of proof should be on the defaulting trustee clearly to disestablish causal connection."); *In re Ziegler's Est.*, 258 A.D. 1077, 1077 (N.Y. App. Div. 1940) ("The burden of showing that there was no such market was upon the trustees."); Restatement (Third) of Trusts § 100 *cmt.* f ("[T]he burden shifts to the trustee."); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 871, Westlaw (database updated July, 2024) ("If the beneficiary makes a prima facie case, the burden of contradicting it or showing a defense will shift to the trustee.").

Nothing in the "language of [ERISA], its structure, or its purposes" militates against applying this well-established rule. *Harris Tr.*, 530 U.S. at 250 (citing *Hughes Aircraft*, 535 U.S. at 447) (alterations omitted).

As discussed, the text of § 1109(a) is silent. It provides that fiduciaries who breach their duties "shall be liable" "to make good to such plan any losses to the plan resulting from each such breach." § 1109(a). The requirement that the losses "result[] from" the breach means that there must be a causal link between the breach and the loss. But ERISA says nothing about whether the burden shifts on the element of causation, as courts have repeatedly recognized. *See*, *e.g.*, *Pioneer Ctrs.*, 858 F.3d at 1335 ("[T]he statute is silent as to *who* bears the burden of proving a resulting loss." (emphasis in original)).

ERISA's structure also supports application of trust law's burden-shifting rule. As this Court has recognized, "ERISA abounds" with trust law's "language and terminology." *Firestone*, 489 U.S. at 110. Under ERISA, "all assets of an employee benefit plan shall be held in trust by one or more trustees." 29 U.S.C. § 1103(a). Those trustees are "fiduciar[ies]," who must discharge their duties "solely in the interest" of "participants" and "beneficiaries" and "with the care, skill, prudence, and diligence . . . [of] a prudent [person] acting in a like capacity." 29 U.S.C. § 1104(a); *see also* 29 U.S.C. § 1102(1) (requiring every employee benefit plan to have named fiduciaries). In sum, ERISA's "fiduciary obligations . . . are those of trustees of an express trust—the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

ERISA's purposes, as described by this Court, likewise favor burden-shifting. With ERISA, Congress sought "to offer employees *enhanced* protection for their benefits." *Varity*, 516 U.S. at 497 (emphasis added). Indeed, the statute's primary objective is to protect "the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b). Because Congress intended ERISA to *enhance*, not reduce, trust law's duties, it would be contrary to Congress's purpose to reject trust law's burden-shifting framework. Doing so would "afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone*, 489 U.S. at 114.

C. The Eleventh Circuit Failed to Follow The Guidance of Trust Law's Rationales for Burden-Shifting.

The "ordinary default rule" placing the burden of proof on plaintiffs "admits of exceptions." *Schaffer*, 546 U.S. at 57 (citing 2 J. Strong, McCormick On Evidence § 337 (5th ed. 1999) (hereinafter McCormick)). The logic of two such exceptions apply with particular force in trust law and should have "guided" the Eleventh Circuit's analysis of § 1109(a). *Firestone*, 489 U.S. at 111.

First, courts shift the burden of proof for "disfavored contention[s]." McCormick § 337. Trust law has long viewed causation in this light. Fiduciary obligations far surpass the "morals of the market place." *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). "Courts," therefore, "do not take kindly to arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same." *Martin*, 965 F.2d at 672 (quoting *In re Beck Ind., Inc.*, 605 F.2d 624, 636 (2d Cir. 1979)). Burden-shifting is one of trust law's mechanisms to "encourage the trustee's compliance" with their high duties. Restatement (Third) of Trusts § 100 *cmt*. f.

As this Court has noted, ERISA was animated by the same compliance concerns. "The crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n. 8. (1985). "ERISA was designed to prevent these abuses in the future." *Id.* Given this context, "it would be strange to reject trust law's rules on burden allocation . . . , especially where the benefit of such a reduction would flow exclusively to employers whose breaches were followed by losses to the plan." *Brotherston*, 907 F.3d at 38.

In the opinion below, Eleventh Circuit did not consider trust law's policy of disfavoring fiduciaries who claim that their breaches did not cause loss. The circuits that have done so uniformly apply burden-shifting. *See Martin*, 965 F.2d at 672 ("Courts do not take kindly . . . ") (citation omitted); *Tatum*, 761 F.3d at 365 (same); *Brotherston*, 907 F.3d at 38.

Second, courts shift the burden "where the facts with regard to an issue lie peculiarly in the knowledge of a party." McCormick § 337. "Trust law has long embodied similar logic." *Brotherston*, 907 F.3d at 38 (citing Restatement (Third) of Trusts, § 100 *cmt.* f and 1 Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America*, § 322 (1836)). It moderates the "default rule" to account for "the trustee's superior (often, unique) access to information about the trust and its activities." Restatement (Third) of Trusts § 100 *cmt.* f. Several courts interpreting ERISA have likewise adopted this logic. *E.g. Brotherston*, 907 F.3d at 38; *Sacerdote*, 9 F.4th at 113.

In its opinion below, the Eleventh Circuit rejected the informational asymmetries rationale. In the court's view, ERISA's "mandatory disclosure and reporting" requirements sufficiently "mitigate[] the informational advantage imputed to the trustee at common law." App. 15a. But, like ERISA, trust law has tools to close the information gap, including duties to disclose information, maintain records, and segregate assets. *E.g.* Restatement (Third) of Trusts § 82-84. Still, burden-shifting remains the norm. *Id.* § 100 *cmt.* f. Moreover, ERISA disclosures barely scratch the surface of the factual question at the heart of causation. Although fiduciaries must disclose their *past* conduct (*see* 29 U.S.C. § 1023), those disclosures do not necessarily indicate what a prudent fiduciary *would have done* absent breach. *See Brotherston*, 907 F.3d at 38 ("[I]t makes little sense to have the plaintiff hazard a guess as to what the fiduciary would have done had it not breached its duty . . . only to be told 'guess again.'"). *Accord Sacerdote*, 9 F.4th at 113 (quoting *Brotherston*, 907 F.3d at 38).

III. Burden-Shifting Is a Recurring Issue of Broad National Importance.

The uncertainty over whether § 1109(a) incorporates trust law's burden-shifting framework has significant and wide-ranging impact for employers, employees, and the national economy. As causation is an element of the claim, this issue will recur in every ERISA case that seeks monetary relief for a breach of fiduciary duty. Thus, the issue affects not only defined contribution plans (such as 401(k) and 403(b) plans) but also extends to defined benefit (pension) plans and to many employer-provided healthcare plans.

The number of individuals and amount of assets that are potentially affected by this issue is staggering. According to data provided by the Department of Labor, there were 151.5 million participants holding over $11 trillion in 801,371 defined benefit and defined contribution plans governed by ERISA as of 2022.[8] This is in addition to the 83 million participants in 81,805 group healthcare plans governed by ERISA as of 2021.[9] Thus, the uncertainty over the proper standard for establishing causation once a breach of fiduciary duty has occurred affects a large percentage of Americans and potentially trillions of dollars in retirement savings.

Moreover, the uncertainty around this issue frustrates Congress's goal of establishing "a uniform body of benefits law." *Rutledge*, 592 U.S. at 86 (quoting *Ingersoll-Rand Co.*, 498 U.S. at 142). With ERISA, Congress sought to "induc[e] employers to offer benefits by assuring a predictable set of liabilities." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002). Nationwide uniformity "help[s] administrators, fiduciaries and participants to predict the legality of proposed actions." *Pilot Life Ins. Co v. Dedeaux*, 481 U.S. 41, 56 (1987) (quoting H.R. Rep. No. 93-533, 94th Cong., 2d Sess. 12 (1973), *reprinted in* 2 Senate Comm. on Lab. and Pub. Welfare, Legislative History of ERISA, 94th Cong., 2d Sess., 2359 (Comm.

8. U.S. Dep't of Labor, *Private Pension Plan Bulletin*, 3 (September 2024), https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2022.pdf.

9. U.S. Dep't of Labor, *Group Health Plans Report*, 4 (Sept. 2023), https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/annual-report-on-self-insured-group-health-plans-2024-appendix-a.pdf.

Print 1976)). The present circuit split contravenes these Congressional goals.

If this Court does not intervene to resolve the questions presented, uncertainty will proliferate. Indeed, this petition marks the fourth time in the last ten years that a party has sought the Court's review on this precise issue—two from courts endorsing burden-shifting and two from courts rejecting burden-shifting. *See Brotherston*, 140 S. Ct. 911; *Pioneer Ctrs.*, 585 U.S. 1056; *Tatum*, 576 U.S. 1054. This Court's immediate review is warranted to restore uniformity to the application of ERISA nationwide.

IV. This Case Presents an Ideal Vehicle for Resolving the Conflict.

This case presents an ideal vehicle for determining whether burden-shifting applies to the element of causation under § 1109(a). There are no jurisdictional disputes, and the issue concerns a pure question of law. The question presented was fully briefed below. The court of appeals addressed that question and based its decision upon its resolution.

The question presented is also dispositive of the outcome of this case. The district court already determined that there are genuine disputes of material fact on the element of breach,[10] and Home Depot did not appeal that finding. Instead, after holding that Petitioners

---

10. This holding applied to all claims except as to the Stephens Fund. Petitioners do not seek this Court's review of the lower courts' judgment with respect to the Stephens Fund claim. *See supra* note 3.

bear the burden on causation, the court entered summary judgment in favor of Home Depot on that element. The appellate court affirmed—holding that the burden did not shift on causation and that Petitioners could not meet their burden.

Had the district court shifted (or been instructed by the appellate court to shift) the burden on causation, this case would have proceeded to trial. At summary judgment, Home Depot would have had to prove—as a matter of law—that a hypothetical prudent fiduciary would have approved of the advisory service providers' fees and would have retained the Challenged Funds. *E.g. Tatum*, 761 F.3d at 364 (reciting the "hypothetical prudent fiduciary" test) (quoting *Plasterers'*, 663 F.3d at 218)). Evaluating Petitioners' claims according to that standard, the district court would have found, at a minimum, that genuine disputes of material fact existed on the issue of causation, and thus would have denied Home Depot's motion for summary judgment.

The question of whether burden-shifting applies to § 1109(a)'s element of causation has split the courts of appeals. That conflict among the courts is fully developed, the issue is squarely presented in this case, and there are no threshold questions to be resolved. Thus, the question presented warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEIGH ANNE ST. CHARLES
SANFORD HEISLER SHARP
MCKNIGHT, LLP
611 Commerce Street,
Suite 3100
Nashville, TN 37203

DAVID TRACEY
Counsel of Record
KATE MACMULLIN
SANFORD HEISLER SHARP
MCKNIGHT, LLP
17 State Street, Suite 3700
New York, NY 10004
(646) 402-5650
dtracey@sanfordheisler.com

CHARLES FIELD
SANFORD HEISLER SHARP
MCKNIGHT, LLP
7911 Herschel Avenue,
Suite 300
La Jolla, CA 92037

KAITLIN LEARY
SANFORD HEISLER SHARP
MCKNIGHT, LLP
700 Pennsylvania Avenue SE,
Suite 300
Washington, DC 20003

Counsel for Petitioners

December 3, 2024

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 2, 2024

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13643

JAIME PIZARRO, CRAIG SMITH, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, JERRY MURPHY, RANDALL IDEISHI, GLENDA STONE, *et al.*,

Plaintiffs-Appellants,

GARTH TAYLOR, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

versus

THE HOME DEPOT, INC., THE ADMINISTRATIVE COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN, THE INVESTMENT COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN,

Defendants-Appellees,

FINANCIAL ENGINES ADVISORS, LLC,

Defendants.

Appendix A

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:18-cv-01566-SDG

Before Branch, Grant, and Ed Carnes, Circuit Judges.

Grant, Circuit Judge:

The Employee Retirement Income Security Act of 1974 requires fiduciaries administering employee-benefit plans to prudently investigate, choose, and monitor investments. 29 U.S.C. § 1104(a)(1)(B). Fiduciaries who fall short can be removed. *Id.* § 1109(a). But where a breach of that duty causes monetary losses, fiduciaries also face financial liability—they must "make good to such plan any losses to the plan resulting from each such breach." *Id.* Recovery of damages under § 1109 thus hinges on two showings: a failure to prudently monitor, investigate, and evaluate investments, and a financial loss caused by that failure.

This case presents two questions: which party has the burden to show loss causation, and how to meet that burden. The plaintiffs, a class of current and former Home Depot employees, argue that the company failed to prudently manage its multi-billion-dollar 401(k) retirement plan, resulting in excessive fees and subpar returns. The district court found an issue of material fact on that duty-of-prudence question for all but one of the plaintiffs' claims. But on the second element, loss causation, the answer was different—the court decided that the plaintiffs had not met their burden for any claims. Even if Home Depot did not appropriately monitor and evaluate the service providers' fees and the plan's investments, the court concluded, the plaintiffs had not shown that Home Depot's investment choices were objectively imprudent. And that, in turn, meant that any losses to the plan were not caused by Home Depot's failure to investigate.

The plaintiffs say this approach is not correct—that the burden should be flipped, which means ERISA fiduciaries are required to show that their plans' losses were caused by something other than their own failure to investigate and evaluate. In other words, show that the losses were *not* caused by their breach.

We cannot agree. Our prior precedent forecloses adopting this burden-shifting framework, as do ordinary principles of civil liability. Nor does ERISA's text help the plaintiffs—it offers no indication that Congress intended to require defendant fiduciaries to disprove loss causation.

The plaintiffs thus bore the burden, but they did not sustain it. ERISA requires a prudent process, but it does not guarantee good results. So to prove that losses were caused by a fiduciary's breach, plaintiffs must show that a hypothetical prudent fiduciary, armed with the information a proper evaluation would have yielded, would not have made the same choices. The plaintiffs here have not done that—Home Depot's investment decisions were objectively prudent, whether or not it used the right process to evaluate and monitor them. We agree with the district court that the damages claims fail, and we affirm its well-reasoned order granting summary judgment to Home Depot.

I.

The Home Depot 401(k) Plan, called FutureBuilder, is a defined-contribution retirement plan. It is among the largest 401(k) plans in the United States, with about 230,000 participants and $9.1 billion in assets as of year-end 2019. The plan is headed by two committees—the Investment Committee and the Administrative Committee—both appointed by The Home Depot, Inc.[1] These committees have broad duties, including selecting and monitoring investment options, retaining service providers, and monitoring expenses and fees.

During the class period, Home Depot engaged a number of service providers and advisors to help administer the plan. Three types of providers concern us here. *First*, Home Depot engaged a recordkeeper, responsible for administering participants' accounts, maintaining plan records, processing individual transaction instructions, and sending disclosures. *Second*, Home Depot retained an investment consultant, which analyzed the plan's investments, performance, and fees, and prepared discussion guides for the Committees' meetings. And *third*, Home Depot hired a financial advisor to provide plan participants with investment advisory and managed account services. The identities of these service providers and their relationships to one another varied over time. Suffice it for now to state that these companies included

1. This opinion refers to The Home Depot, Inc., the Administrative Committee, and the Investment Committee collectively as "Home Depot."

Aon Hewitt, Aon Hewitt Investment Consultants, Financial Engines, Alight Solutions, and Alight Financial Advisors.

During the class period, the plan's financial advisor automatically provided all participants with its basic advisory services, which included retirement investment resources (like projected total savings based on savings rate and retirement age), analysis of the plan's investment options, and summaries of each participant's account and forecasted value. Participants could also opt in to a managed account program, where the financial advisor used algorithms to directly make investment decisions on each participant's behalf.

For these services, the financial advisor charged two types of fees. The "plan access fee" was a flat dollar fee charged to all plan participants for the basic advisory services. The "professional management fee" was a tiered asset-based fee charged only to participants enrolled in the managed account program. While the parties agree on what the fees were during the class period, they hotly contest how these fees compared to others available in the marketplace.

Participants in Home Depot's plan funded their individual accounts with deductions from their paychecks, plus matching funds contributed by the company. The participants (or the financial advisor, if the participant opted in to the managed account program) then chose from a menu of available funds curated by Home Depot. Four are at issue here.

The BlackRock family of target date funds, offered throughout the entire class period, was designed as a set of all-in-one solutions for retirement investing. Each fund held an asset portfolio that was diversified based on targeted retirement dates by year; these funds automatically rebalanced their holdings on predetermined "glide paths" to retirement, becoming less risky as the participant's retirement date approached. BlackRock's suite of target date funds employed a more conservative glide path than most peer funds, meaning that they would be comparatively less risky at the same point in the lifecycle, but could also expect smaller returns. The BlackRock funds were popular—many other Fortune 500 companies' 401(k) plans offered the same target date funds during the class period.

The JPMorgan Stable Value Fund, as the name suggests, was a fund designed to protect investors' principal, earning consistent yet modest returns that would exceed those available from a money market account. This fund delivered on its promise, yielding positive returns to investors during the entire class period.

Finally, Home Depot offered two funds designed to invest mostly in small-capitalization companies with long-term growth potential. The TS&W Fund was added to the plan in 2009, and the Stephens Fund was introduced in 2013. After a rocky period of fluctuating performance, both plans were removed as options in 2017.

In 2018, the plaintiffs filed a class action lawsuit against Home Depot, alleging two violations of ERISA's fiduciary duty of prudence. *First*, they claimed that Home Depot failed to adequately monitor the fees charged by the plan's financial advisor for its investment advisory and managed account services, resulting in excessive costs for plan participants. *Second*, they alleged that Home Depot failed to prudently evaluate the four challenged investment options, and that this failure led Home Depot to keep the funds available despite their subpar performance. The plaintiffs sought damages, equitable relief, and attorney's fees. The district court certified a class of all participants in Home Depot's 401(k) plan who either received advisory services from the plan's financial advisor or who invested in any of the challenged investment funds between April 12, 2012 and the date of the court's judgment.

Following discovery and cross-motions for summary judgment, the district court concluded that several genuine disputes of material fact existed—whether Home Depot had complied with its duty of prudence while monitoring plan fees, as well as whether it had complied with that duty while monitoring three of the four challenged funds. But the court went on to find that even if these disputes were resolved in the plaintiffs' favor, they could not show that the violations had caused them any financial loss. And that meant they had no statutory right to monetary relief. In addition to finding an absence of loss causation, the district court also found no genuine dispute on whether Home Depot had prudently monitored the Stephens Fund. Finally, it ruled that the plaintiffs had forfeited their requests for equitable relief by failing to mount any arguments on that front at the summary judgment stage. This is the plaintiffs' appeal.

II.

We review a district court's grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party and drawing all inferences in its favor. *Baker v. Upson Reg'l Med. Ctr.*, 94 F.4th 1312, 1316-17 (11th Cir. 2024). "Summary judgment is appropriate only when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law." *Id.* at 1317.

Allocation of the burden of proof is a legal question reviewed by this Court de novo. *Greenberg v. Comm'r*, 10 F.4th 1136, 1155 (11th Cir. 2021). "When the nonmoving party has the burden of proof at trial," the party moving for summary judgment can proceed in one of two ways. *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (en banc) (emphasis omitted). It "may show—that is, point out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 1438 (alterations adopted and quotation omitted). "Alternatively, the moving party may support its motion for summary judgment with affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial." *Id.* "If the moving party shows the absence of a triable issue of fact by either method, the burden on summary judgment shifts to the nonmoving party, who must show that a genuine issue remains for trial." *Id.* If the nonmoving party fails to make this showing, the moving party is entitled to summary judgment. *Id.*

III.

ERISA requires a fiduciary to 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). This duty of prudence is objective, judged by the information available at the time of each investment decision—not by the glow of hindsight. *Sacerdote v. New York Univ.*, 9 F.4th 95, 107 (2d Cir. 2021). The inquiry centers not on the results of an investment, but on a fiduciary's process for choosing that investment. *Id.*

Once a violation of this duty of prudence is shown, ERISA imposes a severe consequence—the fiduciary is personally liable for "any losses to the plan resulting from" the breach. 29 U.S.C. § 1109(a). But the last words in this clause, "resulting from," impose an important limit on that liability—loss causation. So for a damages claim to succeed, the breach of fiduciary duty must proximately cause the plaintiffs' losses. *Willett v. Blue Cross & Blue Shield of Alabama*, 953 F.2d 1335, 1343 (11th Cir. 1992).

This appeal raises two questions. *First*, who bears the ultimate burden of proof on loss causation? And *second*, what must be proven to establish that element?

A.

We begin with the burden of proof. The plaintiffs, along with the United States Secretary of Labor as amicus curiae, argue that once a plaintiff shows that a fiduciary breached the duty of prudence and that the plan suffered a loss, the burden shifts to the fiduciary to prove that the loss was not caused by its breach. They say this shift is necessary because the common law of trusts has an analogous requirement. For its part, Home Depot responds that ERISA does nothing to disrupt the ordinary expectation that plaintiffs must prove each element of their claims.

Our precedent already answers this question. ERISA does not impose a burden-shifting framework; instead, plaintiffs bear the ultimate burden of proof on all elements of their claims, including loss causation. In *Willett v. Blue Cross & Blue Shield of Alabama*, we stated—quite explicitly— that if the plaintiffs succeeded in showing a breach, "[o]n remand, the burden of proof on the issue of causation will rest on the beneficiaries; they must establish that their claimed losses were proximately caused" by that breach. 953 F.2d at 1343. Though it offered little analysis, the case left no doubt—plaintiffs bear the burden.

The plaintiffs here cannot explain away *Willett*. They do try, pointing to a single line of that opinion, which notes that to obtain "a grant of summary judgment in its favor, [the fiduciary] would have had to establish the absence of causation by proving that the beneficiaries' claimed losses could not have resulted from" its breach. *Id.* Well, yes.

That is an ordinary summary judgment burden—showing that the other side cannot prove its case. To be fair, the *Willett* court could have been more artful in pointing out that a party who does not bear the burden of proof at trial can win summary judgment in two ways: with affirmative evidence showing that the other side cannot win, or by pointing out an absence of evidence supporting the other side's claims. *Four Parcels of Real Prop.*, 941 F.2d at 1437-38. But in context, the sentence plaintiffs highlight is best understood as noting the ordinary Rule 56 summary judgment standard, that a party moving for summary judgment has the responsibility to show that the nonmoving party's case cannot succeed at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 607-08 (11th Cir. 1991). That standard applies no matter who bears the ultimate burden of proof. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-16 (11th Cir. 1993).

So this Court has already settled the question—the burden of proving loss causation lies with the plaintiff. And though we are bound by the prior-panel precedent rule to enforce that holding, we also endorse it, offering here some of the reasoning we elided there. *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

As always, the "touchstone for determining the burden of proof under a statutory cause of action is the statute itself." *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107, 1110 (11th Cir. 2008). The text of ERISA imposes personal liability on a fiduciary only for damages "resulting from" its breach of duty. 29 U.S.C. § 1109(a). Proximate causation is the key link between a breach of duty and a recoverable loss. *Willett*, 953 F.2d at 1343.

ERISA, like many other statutes, does not explicitly assign the burden of proof on every issue—including loss causation. But the "ordinary default rule" is "that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-57, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). Congress legislates against this default, so without any evidence that Congress intended to vary from it, "we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." *Id.* at 57-58.

The ordinary rule resolves this case. Requiring a defendant to *disprove* causation so long as a plaintiff can show a breach and some loss would turn the usual principles of civil liability on their head. If Congress had intended this departure from the norm, it could have said so; absent any affirmative indication to that end, we decline to impose it ourselves.[2]

---

2. The Tenth Circuit also rejects a burden-shifting framework for the element of loss causation. *Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1337 (10th Cir. 2017). The Sixth, Seventh, and Ninth Circuits too have stated that plaintiffs bear the burden of proving loss causation, though without commenting on the burden-shifting argument. *Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 863 (6th Cir. 2017); *Peabody v. Davis*, 636 F.3d 368, 373 (7th Cir. 2011); *Wright v.*

To be sure, there are exceptions to this ordinary rule, but they do not apply here. The burden of proof can be shifted on specific elements if they can "fairly be characterized as affirmative defenses or exemptions." *Id.* at 57. Such shifts occur because those who invoke "a special exception to the prohibitions of a statute" ordinarily bear "the burden of proving justification." *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948). Here, though, causation is not an affirmative defense; it is an element of the plaintiff's claim. It is no surprise, then, that none of the textual or structural indications suggesting that an element is an affirmative defense or an exemption are present here. *See United States v. Kloess*, 251 F.3d 941, 944-46 (11th Cir. 2001). Indeed, the plaintiffs do not suggest otherwise. Put simply, it is "impossible to look at the text and structure of" ERISA and § 1109(a) and conclude loss causation is anything other than a core element of a plaintiff's case. *Meacham v. Knolls Atomic Power Lab'y*, 554 U.S. 84, 93, 128 S. Ct. 2395, 171 L. Ed. 2d 283 (2008).

Nor does the common law of trusts provide a lifeline for those who wish to shift the burden. It is true—in

---

Oregon Metallurgical Corp., 360 F.3d 1090, 1099 (9th Cir. 2004). The First, Fourth, Fifth, and Eighth Circuits, on the other hand, shift the burden of proof on causation to the defendants. *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 35-39 (1st Cir. 2018); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 361-63 (4th Cir. 2014); *McDonald v. Provident Indem. Life Ins.*, 60 F.3d 234, 237 (5th Cir. 1995); *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992). Finally, the Second Circuit has published opinions endorsing both approaches. *Compare Silverman v. Mut. Benefit Life Ins.*, 138 F.3d 98, 104 (2d Cir. 1998), *with Sacerdote*, 9 F.4th at 113.

"determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts." *Tibble v. Edison Int'l*, 575 U.S. 523, 528-29, 135 S. Ct. 1823, 191 L. Ed. 2d 795 (2015). And at least some authorities say that at common law, "when a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach." Restatement (Third) of Trusts § 100 cmt. f (Am. L. Inst. 2012).[3] One justification for this rule is "the trustee's superior (often, unique) access to information about the trust and its activities." *Id.*

But ERISA is not the common law. It is a complex statutory scheme, and this Court has long "reject[ed] the unselective incorporation of trust law rules into ERISA." *Useden v. Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991); *see also Moore v. Am. Fed'n of Television & Radio Artists*, 216 F.3d 1236, 1244 n.17 (11th Cir. 2000). Our responsibility is always "to give effect to the plain meaning of the statute" first. *Moore*, 216 F.3d at 1244 n.17. "ERISA is a comprehensive and reticulated statute, bearing the marks of circumspect drafters." *Useden*, 947 F.2d at 1581 (quotation omitted). "[W]hile it is obvious that ERISA is informed by trust law, the statute is, in its contours, meaningfully distinct from the body of the common law of trusts." *Id.* We therefore proceed carefully, and "only incorporate a given trust law principle if the statute's

3. Home Depot identifies sources from the time of ERISA's passage that disagree, rejecting a burden-shifting rule. Because we find that ERISA did not adopt such a rule, we need not decide whether it existed in the background common law of trusts to begin with.

text negates an inference that the principle was omitted deliberately from the statute." *Id.*

Here, the statute lacks any language suggesting that Congress's omission of trust law's burden-shifting framework for loss causation was anything but deliberate. And the plaintiffs' rationale for burden shifting—the informational advantages of trustees over beneficiaries—does not cleanly apply to ERISA. ERISA imposes on fiduciaries a comprehensive scheme of mandatory disclosure and reporting, both to plan participants and to the public at large. *See* 29 U.S.C. §§ 1021-32. The statute itself thus enforces a suite of requirements mitigating the informational advantage imputed to the trustee at common law. These disclosures, combined with the "proper use of discovery tools," mean that ERISA fiduciaries lack the informational advantage that would justify shifting the burden of proof. *Thomas*, 525 F.3d at 1113-14; *see also Schaffer*, 546 U.S. at 60-61. So ERISA's text, if anything, suggests that Congress dealt with the information imbalance problem by shrinking the gap, not shifting the burden.

In sum, "where Congress does not squarely address the question, where the statute's structure and language do not suggest a shift of the burden to the defendant," and "where plaintiffs are not peculiarly at a disadvantage in the discovery of necessary facts, we will not shift the burden of proof, or any element thereof, to the defendant." *Thomas*, 525 F.3d at 1114. As *Willett* has already provided, and as we elaborate today, plaintiffs must prove loss causation for an ERISA breach-of-fiduciary-duty claim under § 1109(a).

B.

Now that we know who has the burden of proving loss causation—the plaintiffs—the next question is what will satisfy that burden. A fiduciary's breach of its duty to prudently evaluate and monitor a plan's investments does not automatically result in a loss because an imprudent process can sometimes yield a prudent investment. That may happen, as then-Judge Scalia vividly put it, "through prayer, astrology or just blind luck." *Fink v. Nat'l Sav. & Tr. Co.*, 772 F.2d 951, 962, 249 U.S. App. D.C. 33 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part). And even an "objectively prudent" investment can sometimes turn out to be a losing one. *Id.* So liability turns not only on an imprudent process, but also on that process resulting in an imprudent investment. In other words, losses are only compensable if they are caused by a fiduciary's bad decisions rather than by the usual vagaries of the market.

To recover damages then, plaintiffs must show that the investments made were not objectively prudent. That means they must have fallen outside the "range of reasonable judgments a fiduciary may make based on her experience and expertise," such that a hypothetical prudent fiduciary in the same circumstances as the defendant, armed with the information that a proper evaluation would have yielded, would not (or could not) have made the same choice. *Hughes v. Nw. Univ.*, 595 U.S. 170, 177, 142 S. Ct. 737, 211 L. Ed. 2d 558 (2022).

Our standard recognizes the fact-laden, judgment-heavy nature of investment decisions. An ERISA fiduciary's management of an employee-benefit plan does not consist of a series of yes-or-no, up-or-down choices in a vacuum. In any single set of circumstances, there might be—indeed, likely will be—many objectively prudent choices a fiduciary could make. ERISA recognizes that managing an employee-benefit plan "will implicate difficult tradeoffs" yielding a range of reasonable options. *Id.* No one—not even the most diligent fiduciary—can predict the future. Different prudent fiduciaries, facing the same set of circumstances, can exercise their judgment and reach different conclusions in light of that uncertainty.

The parties spill considerable ink arguing about semantics—whether an objectively prudent investment is one that a hypothetical prudent fiduciary "would have" also made, or whether it is one that such a fiduciary "could have" also made. This mirrors the debate in the Fourth Circuit's decision in *Tatum v. RJR Pension Investment Committee*, 761 F.3d 346 (4th Cir. 2014). There, the majority said "would," while the district court said "could." *Id.* at 363-66. But here, the would-versus-could debate is a sideshow. *See id.* at 377 (Wilkinson, J., dissenting) (criticizing the would/could debate as "semantics at its worst"). That's because *Tatum* shifted the burden of proving loss causation onto the fiduciary, while we keep that burden with the plaintiffs. *Id.* at 363 (majority opinion). There is a real difference between requiring proof that a reasonable fiduciary "would have" picked the same investment versus requiring proof that it "could have" done so.[4] But that gap does not hold up

4. For what it is worth, we agree with Judge Wilkinson's dissent that requiring a defendant to prove that a hypothetical prudent fiduciary *would* have also made the same choice "ignore[s] the fact that there is not one and only one 'same decision' that qualifies

when plaintiffs have the burden—if a plaintiff shows that a hypothetical prudent fiduciary "could not have" made the same choice as the defendant, she has also shown that a hypothetical prudent fiduciary "would not have" made the same choice, and vice versa. It is simply an imprudent choice.

In sum, to succeed on a breach-of-fiduciary-duty claim, a plaintiff must convince a factfinder that the fiduciary's choice was objectively unreasonable—that it was not one that a prudent fiduciary would also have made.

IV.

We now apply that legal standard. The plaintiffs advance two discrete claims on appeal. *First*, the plan's financial advisor—Financial Engines until 2017, Alight Financial Advisors after that—charged Home Depot excessive fees.[5] And *second*, Home Depot should have

---

as objectively prudent." *Tatum*, 761 F.3d at 378 (Wilkinson, J., dissenting). To illustrate, imagine that, faced with a particular decision, there are three (and only three) reasonable investment choices: *A*, *B*, and *C*. By our read, the *Tatum* majority's rule requires a fiduciary who chose *A* to show that each and every other prudent fiduciary would have also chosen *A*, even though *B* and *C* were also prudent choices. Because a fiduciary will not be able to make that showing, the *Tatum* rule would impose liability on a fiduciary even though it made an objectively prudent choice—completely contrary to ERISA's loss causation requirement.

5. In 2017, Alight Financial Advisors became the plan's direct financial advisor. It took over the managed account services, but Financial Engines continued to provide investment advice to plan participants as a subcontractor for Alight Financial Advisors.

dropped four funds after they underperformed alternative investment options and certain market benchmarks. Viewing the evidence in the light most favorable to the plaintiffs, and drawing all reasonable inferences in their favor, the plaintiffs have not shown a genuine dispute of material fact on loss causation for either of their claims.

A.

We start with fees. As we have said, Home Depot paid two types of fees over the class period, first to Financial Engines and then to Alight Financial Advisors: plan access fees and professional management fees. Plaintiffs challenge only the prudence of the latter. Home Depot negotiated and secured several decreases over the years in the professional management fee. The fee dropped in 2014 and again in 2017 before a broader overhaul in 2021 resulted in new asset thresholds and fees for the tiers.[6] These decreases, however, are not enough to show that the fees were objectively prudent throughout the class period. The plaintiffs' evidence that they were not falls into three buckets.

The first is that competitors of Financial Engines and Alight Financial Advisors charged lower fees for comparable services. But assuming that's true, simply showing that there were other reasonable choices does not mean that retaining Financial Engines and Alight Financial Advisors was not also reasonable, given the

6. We previously granted Home Depot's unopposed motion to file proprietary pricing information under seal.

Home Depot plan's size and goals. In fact, Financial Engines was the most popular service provider for 401(k) plans of similar size and complexity to Home Depot's. That many other sophisticated investment professionals managing similarly sized plans made the same choice as Home Depot suggests objective prudence; it is direct evidence that other fiduciaries "acting in a like capacity and familiar with such matters" made the same choice "in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B); *see Pfeil v. State St. Bank & Tr. Co.*, 806 F.3d 377, 388 (6th Cir. 2015). Such evidence is not dispositive on its own, of course, and other evidence can show that a popular choice was still imprudent. The problem for the plaintiffs is that they cannot make that showing here.

The plaintiffs identify other service providers that compete with Financial Engines and Alight Financial Advisors, but that effort is fundamentally flawed. Though the plaintiffs' chosen comparators also offer advisory and managed account services, ERISA requires a more granular analysis tailored to a plan's "character" and "aims." 29 U.S.C. § 1104(a)(1)(B). "[N]othing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund [or service provider] (which might, of course, be plagued by other problems)." *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009), *abrogated on other grounds by Hughes*, 595 U.S. 170.

The competitors that have been identified differ in key respects that make it impossible for the plaintiffs to show at trial that no prudent fiduciary in Home Depot's shoes would have chosen the financial advisors it did. We have already noted that Financial Engines was the leading service provider to large plans like Home Depot's. It also offered preexisting integration with Home Depot's recordkeeper, Aon Hewitt (later rebranded as Alight Solutions). So did Alight Financial Advisors, a wholly owned subsidiary of Alight Solutions. Other firms Home Depot could have selected were smaller or lacked the seamless integration with Aon Hewitt's website and services that Financial Engines and Alight Financial Advisors offered. The plaintiffs offer no evidence that a hypothetical prudent fiduciary managing Home Depot's 401(k) plan—among the largest in the nation—would have considered its financial advisors' fees unreasonable in comparison to their competitors given their large capacity, experience with similarly sized plans, and integration with Home Depot's recordkeeper.

The plaintiffs' next argument is that Financial Engines and Alight Financial Advisors charged higher fees to Home Depot than they did to other comparable clients. This point is fiercely contested by Home Depot, and the parties disagree about whether Home Depot's fees should be calculated by dollars per participant or basis points, as well as which plans served by Financial Engines and Alight Financial Advisors are an appropriate baseline for comparison.[7] But even taking the plaintiffs' preferred approach for both variables—which unsurprisingly produces the worst outcome for Home Depot—the record

7. A "basis point" is equal to one one-hundredth of one percent (0.01%).

shows that Home Depot's top-tier fee, measured in basis points, is by no means an outlier when compared to other plans with roughly the same assets. The fee the plaintiffs highlight, charged to more than 90 percent of participants, was at or better than the median in two years during the class period, and was never worse than the second quintile. The fees for half of all plans will, by definition, be worse than the median; a fee somewhat higher than median in a handful of years during the class period is a far cry from being such an objectively unreasonable charge for the providers' services that a prudent fiduciary would not have stayed the course.

Every other comparison results in a better—much better—outlook for Home Depot. In terms of dollars per participant, Home Depot paid lower fees to Financial Engines and Alight Financial Advisors than 96 percent of all other plans in every year during the class period. And in terms of basis points, the top-tier fee charged to Home Depot was equal to or lower than the top-tier fee of at least half of all other plans in every year during the class period. In the end, no matter how the evidence is evaluated, there is no triable issue of fact on the objective prudence of the fees charged by Home Depot's financial advisors.

The plaintiffs' last contention is that the fees were excessive because they were inflated by a kickback paid by Financial Engines to the plan's recordkeeper, Aon Hewitt. Home Depot, they now argue, was imprudent for failing to recoup the value of this payment from Financial Engines. But the plaintiffs never raised this theory below—instead, they argued at summary judgment only that Home Depot was imprudent for failing to recoup the alleged kickback from *Aon Hewitt*. The district court granted Home Depot summary judgment on this claim, concluding that the plaintiffs had failed to plead it in their complaint. The plaintiffs do not challenge that determination on appeal; instead, they try to sidestep that ruling by recharacterizing the alleged kickback scheme as evidence that the fees charged by *Financial Engines* were excessive. Because they did not make this argument at summary judgment, we will not consider it for the first time on appeal. *T.R. ex rel. Brock v. Lamar Cnty. Bd. of Educ.*, 25 F.4th 877, 884-85 (11th Cir. 2022).

B.

We turn next to the plaintiffs' claims that Home Depot should have dropped four specific funds from its 401(k) plan. At the outset, we note that the plaintiffs' attacks on the four funds suffer from a common flaw—the principal evidence is drawn only from short time periods during which the funds underperformed their peers. A few here-and-there years of below-median returns, however, are not a meaningful way to evaluate a plan's success as a long-term investment vehicle. The plaintiffs, in other words, cannot show that a fund is objectively imprudent by just "pointing to another investment that has performed better in a five-year snapshot of the lifespan of a fund that is supposed to grow for fifty years." *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1166 (6th Cir. 2022); *see also Jenkins v. Yager*, 444 F.3d 916, 925-26 (7th Cir. 2006). In fact, selling a fund too soon because of disappointing short-term losses "is one of the surest ways to frustrate the long-term growth of a retirement plan." *Smith*, 37 F.4th at 1166.

Getting to the specifics, we start with BlackRock. The plaintiffs argue that the BlackRock target date funds underperformed their peers, focusing on the third quarter of 2013. The first problem is that, qualitatively, these funds were popular options offered by other employers' plans of comparable size and complexity, and consistently received positive ratings from industry analysts.

Quantitatively, the plaintiffs fare no better. They argue that the BlackRock funds underperformed both the median target date fund in the market and the specific target date funds their expert selected. As the district court found, these are "apples and oranges." Target date funds are not all created equal—funds from different sponsors may have different glide paths, which means they also have different risk-return profiles. In years when the equity market is hot, a more aggressive target date fund that retains equities longer will appear to outperform a fund that shifts toward more conservative assets like bonds sooner. But that snapshot does not mean it is objectively imprudent to adopt a more conservative strategy—the tables turn when the market is down.

When adjusting for these different glide path choices, the BlackRock target date funds' returns matched those of their peers and market benchmarks almost perfectly. Home Depot's investment consultant, Aon Hewitt Investment Consultants, benchmarked each fund against a custom index created by BlackRock that weighted the universe of comparison target date funds against the glide path allocation of BlackRock's offerings, creating an apples-to-apples comparison. BlackRock's target date funds' three- and five-year returns closely matched these custom indexes throughout the entire class period.[8] ERISA does not require that fiduciaries choose the maximally aggressive option in each investment class; the plaintiffs cannot show that a prudent fiduciary would not have also retained these funds in light of Home Depot's investment objectives.

The plaintiffs' arguments about the JPMorgan Stable Value Fund suffer from a similar problem. That fund's principal objective was capital preservation—which it achieved by delivering positive returns in every year during the class period. It outperformed its benchmark (an index tracking the three-month treasury bill rate) on a one-, three-, five-, and ten-year basis for the entire class period, with just a single exception: the one-year return ending in the fourth quarter of 2019 missed its benchmark by two basis points (0.02%). With the exception of a handful of quarters at the beginning of the class period, it also consistently outperformed the benchmarks selected for it by Aon Hewitt Investment Consultants.

The plaintiffs' arguments that the JPMorgan fund was objectively imprudent depend on changing the index against which the fund was benchmarked. But whether

8. Even this comparison slightly underrates the BlackRock target date funds because the funds' actual performance is reported net of investment management fees, while it is generally not possible to obtain the returns of the idealized comparison benchmark without paying any transaction or management fees.

an investment is objectively imprudent must be assessed against the actions of a hypothetical prudent fiduciary with "like aims." 29 U.S.C. § 1104(a)(1)(B). We cannot say "that a plan fiduciary's choice of benchmark, where such a benchmark is fully disclosed to participants, can be imprudent by virtue of being too conservative." *Ellis v. Fid. Mgmt. Tr. Co.*, 883 F.3d 1, 10 (1st Cir. 2018). Home Depot offered the stable value fund because it was conservative, advertised it as conservative, and benchmarked it against a conservative metric. Because the fund met the expectations set for it, the plaintiffs' breach-of-fiduciary-duty claim relying on comparisons to other, more aggressive benchmarks fail.

As for the TS&W Small Cap Value Fund, the plaintiffs marshalled no evidence beyond a few years of underperformance to show that retaining these funds was not objectively prudent. Again, short periods of relative underperformance alone do not meet a plaintiff's burden to establish objective imprudence. The TS&W fund serves as an object lesson in why: the plaintiffs criticize Home Depot for not removing that fund in the second quarter of 2012. At that point, its three- and five-year returns had underperformed the fund's peers for a handful of quarters, with its three-year returns ranking as low as the 99th percentile in its peer group. Its three-year return (though not its five-year return) had also consistently trailed its benchmark index. By the first quarter of 2015, however, the fund's three- and five-year returns had dramatically rebounded—after that, it significantly outperformed its benchmark and ranked among the very top funds in its peer group. Later, the fund's performance declined again relative to its peers before Home Depot dropped it from the plan. Plaintiffs argue that any data past the second quarter of 2012 is irrelevant, but these metrics show that the objective prudence of a long-term retirement option cannot be measured only by referencing short-term shifts in the market.

Lastly, the Stephens Fund. Here too the plaintiffs attack the fund using only a few years of underperformance, but unlike for the other three funds, the district court found no genuine dispute of material fact about the prudence of Home Depot's monitoring process. We affirm that conclusion too.

ERISA fiduciaries must give "appropriate consideration to those facts and circumstances that" they "know[] or should know are relevant to the particular investment or investment course of action involved." 29 C.F.R. § 2550.404a-1(b)(1)(i). And they must "conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options." *Hughes*, 595 U.S. at 176. "If the fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty." *Id.*; *see also GIW Indus., Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d 729, 732-33 (11th Cir. 1990). The "content of the duty of prudence turns on the circumstances prevailing at the time the fiduciary acts," so the inquiry is necessarily "context specific." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425, 134 S. Ct. 2459, 189 L. Ed. 2d 457 (2014) (alteration adopted and quotation omitted).

Home Depot added the Stephens Fund to its plan in late-2013 and removed it about four years later. Throughout this period, Home Depot scrutinized the fund's performance—the Investment Committee's meeting minutes show that it received briefings on the fund's performance from Aon Hewitt Investment Consultants as well as directly from the fund's managers. The plaintiffs complain that Home Depot should not get off the hook for "passively accept[ing]" Aon Hewitt's advice, but the record shows that Home Depot did anything but. It asked Aon Hewitt several times whether the fund's disappointing returns in the short term justified its continued inclusion in the plan. While Aon Hewitt counseled continued patience, Home Depot removed the fund. On this record, there is no genuine dispute of material fact on the prudence of Home Depot's monitoring process for the Stephens Fund.

In sum, the plaintiffs failed to offer enough evidence to show that the four challenged funds were objectively imprudent investments, or that Home Depot violated its duty of prudence while monitoring the Stephens Fund. They thus cannot succeed on their breach-of-fiduciary-duty claims.

V.

Finally, we agree with the district court that the plaintiffs forfeited their claims for equitable relief. The district court is not required to "distill every potential argument that could be made based upon the materials before it on summary judgment." *Resol. Tr. Corp. v.*

Dunmar Corp., 43 F.3d 587, 599 (11th Cir. 1995) (en banc). Instead, it is up to the parties to formulate their arguments—grounds not relied on at summary judgment are abandoned. *Id.*; *see also Rd. Sprinkler Fitters Loc. Union No. 669 v. Indep. Sprinkler Corp.*, 10 F.3d 1563, 1568 (11th Cir. 1994).

Home Depot's motion put the plaintiffs on notice that the company sought summary judgment on "all claims asserted by Plaintiffs." Had the plaintiffs contended that Home Depot's arguments did not defeat their entitlement to equitable relief, the district court would have had the opportunity to evaluate those arguments in the first instance—and we would have a reasoned decision to review.

But that is not what happened. The plaintiffs did not make any equitable relief arguments below; the only mention of equitable relief in any of their summary judgment papers was a perfunctory reference to its availability in the legal standard section of the opposition brief. The plaintiffs therefore forfeited any such claims.

* * *

ERISA tasks fiduciaries with prudently administering the employee-benefit plans under their charge. Here, the plaintiffs cannot show that a prudent fiduciary in the same position as Home Depot would have made different choices on either the plan's service providers or the four challenged funds. We therefore **AFFIRM** the district court's grant of summary judgment to Home Depot.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED SEPTEMBER 30, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:18-cv-01566-SDG

JAIME H. PIZARRO, CRAIG SMITH, JERRY MURPHY, RANDALL IDEISHI, GLENDA STONE, RACHELLE NORTH, MARIE SILVER, AND GARTH TAYLOR, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

THE HOME DEPOT, INC.; THE ADMINISTRATIVE COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN; THE INVESTMENT COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN; AND DOES 1-30,

Defendants.

Appendix B

OPINION AND ORDER

This matter is before the Court on cross-motions for summary judgment [ECF 227; ECF 238] filed by Defendants The Home Depot, Inc.; The Administrative Committee of The Home Depot FutureBuilder 401(k) Plan; and The Investment Committee of The Home Depot FutureBuilder 401(k) Plan (collectively, Home Depot Defendants or Defendants)[1] and Plaintiffs Jaime H. Pizzaro, Craig Smith, Jerry Murphy, Randall Ideishi, Glenda Stone, Rachelle North, Marie Silver, and Garth Taylor, on behalf of themselves and all others similarly situated (collectively, Plaintiffs). Also pending before the Court are Home Depot Defendants' motions to exclude the opinions and testimony of Plaintiffs' experts, Drs. Arthur B. Laffer and Gerald Buetow [ECF 234; ECF 236], and Plaintiffs' motion for recusal [ECF 333].

---

1. "As a general matter, fictitious-party pleading is not permitted in federal court." *Richardson v. Johnson*, 598 F.3d 734, 738 (11th Cir. 2010) (citing *New v. Sports & Recreation, Inc.*, 114 F.3d 1092, 1094 n.1 (11th Cir. 1997)). The First Amended Complaint lists Does 1-30 as Defendants but does not describe them in any specific manner, except that "Plaintiffs will substitute the real names of the Does when they become known to Plaintiffs." ECF 53, at 8. This vague reference does not warrant application of the exception to the general rule against fictitious parties, and Plaintiffs have not attempted to substitute the Does. Accordingly, they are disregarded.

The Court has carefully considered the parties' extensive briefing,[2] the proposed orders they submitted,[3] as well as the U.S. Chamber of Commerce's brief of *amicus curiae* and Plaintiffs' response thereto.[4] Although it occurred before this case was reassigned to undersigned, the Court also carefully reviewed the transcript of the oral argument held on February 24, 2022.[5] For the reasons set forth below, Plaintiffs' motion for recusal [ECF 333] is **DENIED**. Home Depot Defendants' summary judgment motion [ECF 227] is **GRANTED** and Plaintiffs' partial summary judgment motion [ECF 238] is **DENIED**. Home

2. ECF 228-1 (Defs.' Summ. J. Br.); ECF 228-2 (Defs.' SUMF); ECF 270 (Pls.' Resp.); ECF 270-1 (Pls.' RSUMF); ECF 270-2 (Pls.' SAMF); ECF 283-1 (Defs.' Reply); ECF 283-2 (Defs.' RSAMF); ECF 240-1 (Pls.' Summ. J. Br.); ECF 240-2 (Pls.' SUMF); ECF 265-1 (Defs.' Resp.); ECF 265-2 (Defs.' RSUMF); ECF 265-3 (Defs.' SAMF); ECF 289 (Pls.' Reply); ECF 289-1 (Pls.' RSAMF); ECF 234 (Mot. to Exclude Laffer Test.); ECF 264 (Resp. to Mot. to Exclude Laffer Test.); ECF 286 (Reply to Mot. to Exclude Laffer Test.); ECF 236 (Mot. to Exclude Buetow Test.); ECF 261 (Resp. to Mot. to Exclude Laffer Test.); EF 284 (Reply to Mot. to Exclude Laffer Test.); ECF 333 (Mot. for Recusal); ECF 334 (Resp. to Mot. for Recusal).

3. ECF 337 (Pls.' Proposed Summ. J. Order); ECF 338 (Defs.' Proposed Order Denying Defs.' Summ. J. Mot.); ECF 339 (Defs.' Proposed Order Granting Defs.' Summ. J. Mot.); ECF 340 (Pls.' Proposed Order on Mots. to Exclude); ECF 341 (Defs.' Proposed Order Granting Mot. to Exclude Laffer); ECF 342 (Defs.' Proposed Order Granting Mot. to Exclude Buetow).

4. ECF 308 (*Amicus Curiae* Brief); ECF 312-2 (Pls. Resp. to *Amicus Curiae* Brief).

5. ECF 332 (Trans. of Mot. H'g).

Depot Defendants' motions to exclude expert testimony [ECF 234; ECF 238] are **DENIED as moot**.

[TABLE OF CONTENTS OMITTED]

I. Background[6]

Unless otherwise noted, the following facts are undisputed or not subject to any genuine dispute.[7]

A. Factual Background

This matter arises under the Employee Retirement Income Security Act of 1974 (ERISA). Plaintiffs are current and former employees of The Home Depot, Inc. (Home Depot) who participated in the Home Depot FutureBuilder 401(k) plan (the Plan) from April 2012 until the time of judgment (the Class Period).[8] Plaintiffs allege that Home Depot Defendants—the fiduciaries of

6. Many of the documents filed in this case have been placed under seal. The Court has determined that those portions of the record cited in this opinion do not require the protection of a seal.

7. On cross-motions for summary judgment, the Court views the facts "in the light most favorable to the non-moving party on each motion." *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1317 (11th Cir. 2021). The Court accepts as admitted any facts set forth in the parties' Statements of Undisputed Material Facts and supported by evidence that the opposing party did not "specifically controvert[ ] with a citation" to record evidence. *Pledger v. Reliance Tr. Co.*, No. 1:15-CV-4444, 2019 U.S. Dist. LEXIS 233995, 2019 WL 10886802, at *1 n.2 (N.D. Ga. Mar. 28, 2019).

8. *See generally* ECF 53 (Am. Compl.).

the Plan—breached their fiduciary duties under ERISA in two principal ways.[9] First, Plaintiffs allege that the Home Depot Defendants failed to prudently monitor the investment advisory services offered to Plan participants by third-party professional managed account services providers, resulting in "excessive" fees charged to the Plan (the Excessive Fees Claim). Second, Plaintiffs allege that Home Depot Defendants failed to prudently monitor and remove certain Plan investment options that performed poorly relative to other available investment options (the Challenged Funds Claims).[10]

1. The Plan and Its Committees, Advisors, and Delegees

The Plan is a defined contribution, individual account retirement plan governed by ERISA.[11] Plan participants invest a portion of their earnings by selecting from a menu of investment options, which the Home Depot Defendants have elected to offer; Home Depot also makes certain matching contributions.[12] The balance of each participant's account is the sum of their investments and certain matching contributions from Home Depot in light of any income, expenses, gains, and losses.[13] The Plan

9. *Id.* ¶¶ 15-18.

10. *Id.* ¶¶ 160-75.

11. *Id.* ¶¶ 7-14; ECF 228-2 (Defs.' SUMF), ¶ 2.

12. ECF 228-2 (Defs.' SUMF), ¶¶ 2-3.

13. *Id.* ¶ 4.

is "one of the largest [401(k)] plans in America,"[14] with approximately 193,000 participants and $4.1 billion in assets by year-end 2012, and 230,000 participants and $9 billion in assets by year-end 2019.[15]

Defendants the Administrative Committee (AC) and the Investment Committee (IC) of the Plan (together, the Plan Committees) are responsible for managing the Plan. The Plan Committees and their members—all of whom are Home Depot employees—are the Plan's named fiduciaries.[16]

During the Class Period the Plan Committees held individual committee meetings to discuss the Plan. The IC met quarterly[17] and was responsible for adopting an updated written investment policy statement (IPS), which set out guidelines for selecting and monitoring Plan investments;[18] evaluating, selecting, reviewing, and monitoring the Plan's investments; periodically reviewing each fund's performance results and fee structures; and monitoring the reasonableness of expenses paid from the Plan's assets.[19] The AC met at least once a year and was

---

14. ECF 265-2 (Defs.' RSUMF), ¶ 2.

15. *Id.*

16. ECF 228-2 (Defs.' SUMF), ¶ 12.

17. *Id.* ¶ 20; ECF 240-2 (Pls.' SUMF), ¶¶ 40-41.

18. ECF 240-2 (Pls.' SUMF), ¶ 6.

19. ECF 265-2 (Defs.' RSUMF), ¶ 7.

responsible for the administration of the Plan.[20] Home Depot Defendants maintain that the Plan Committees also conducted business outside of regularly scheduled meetings, though Plaintiffs dispute the extent to which that occurred.[21]

The Plan Committees were counseled by outside advisors at various points throughout the Class Period. For example, the Plan Committees relied on Aon Hewitt Investment Consultants (AHIC).[22] AHIC routinely prepared materials (*i.e.*, Discussion Guides) for the Plan Committees before meetings.[23] AHIC also prepared quarterly reports (Quarterly Investment Reviews or QIRs) for the Plan Committees' review.[24] The contents of the Discussion Guides and QIRs are discussed below where relevant. While the parties dispute whether, at various points during the Class Period, AHIC's Discussion Guides and QIRs contained adequate information for the Home Depot Defendants to make prudent decisions regarding professional management services and investment options,

---

20. ECF 228-2 (Defs.' SUMF), ¶ 20; ECF 240-2 (Pls.' SUMF), ¶¶ 40-41.

21. ECF 228-2 (Defs.' SUMF), ¶ 30; *see generally* ECF 270 (Pls.' Resp.); ECF 240-1 (Pls.' Summ. J. Br.); ECF 240-2 (Pls.' SUMF); ECF 289 (Pls.' Reply).

22. ECF 228-2 (Defs.' SUMF), ¶ 31. AHIC is used throughout this Order as a generic term to account for Aon Hewitt's investment consultancy and its various iterations, *e.g.*, Hewitt Investment Group, LLC and Hewitt EnnisKnupp.

23. *Id.* ¶ 32.

24. *Id.*

the parties do not dispute that these documents routinely reported investment returns for the Plan over various time periods as compared to selected benchmarks, as well as comparisons to peer funds. Another consultant, Curcio Webb LLC (Curcio Webb), assisted the Plan Committees with selecting Plan service providers, among other duties.[25] A third consultant, herronpalmer, advised the AC in connection with a request for proposal (RFP) for recordkeeping services in 2019, following the filing of this lawsuit.[26]

The Plan Committees also relied on employees in Home Depot's Benefits Department (the Benefits Department) for various business items. The extent to which Home Depot Defendants delegated fiduciary duties to the Benefits Department is disputed and discussed in greater detail below, but it is agreed that the Benefits Department negotiated certain contracts with outside service providers and provided periodic updates to the Plan Committees.[27]

2. Professional Managed Account Services

Throughout the Class Period the Plan engaged professional managed account services providers.[28] Participants in the Plan could enroll in these "Professional Management" services and, if they did, an advisor

25. *Id.* ¶ 38.

26. *Id.* ¶¶ 144-45.

27. *Id.* ¶¶ 17-19.

28. *Id.* ¶ 46.

employed by the services provider would assume control over an individual participant's investment account, steering the participant's funds and distributing them among the Plan's investment options according to the participant's relevant traits and preferences.[29] The services provider could collect this information directly from the participant, or by integrating itself with the Plan's recordkeeper, Aon Hewitt.[30] The latter approach, which the Plan employed during the Class Period, involved a data-sharing arrangement between the services provider and Aon Hewitt.[31] It is undisputed that recordkeeping services were necessary; however, in its Excessive Fees Claim, Plaintiffs dispute the usefulness and costs of the Plan's data-sharing arrangements, as well as the prudence of Home Depot Defendants' efforts to monitor the usefulness and costs of the data-sharing arrangements.

i. Merrill Lynch

Before the Class Period began the Plan engaged Merrill Lynch to provide professional account management services.[32] Merrill Lynch did not charge a data-

---

29. *Id.* ¶ 155. Plaintiffs dispute the extent to which Professional Management qualitatively differs from more "passive" management options, but they generally agree this is the gist of Professional Management.

30. *Id.* AHIC, an outside advisor to the Plan Committees, and Aon Hewitt, the Plan's recordkeeper, were different entities with separate functions relative to the Plan.

31. *Id.* ¶ 155.

32. *Id.* ¶ 47.

connectivity fee because it was not integrated with the Plan's recordkeeper.[33] As a result, participants in the Plan had to provide Merrill Lynch with information collected by Aon Hewitt, then Merrill Lynch provided participants with advice based, in part, on that information, and participants had to implement the advice themselves.[34] According to Home Depot Defendants this was an inconvenience with staggering ramifications: Only 1.5% of eligible participants used Merrill Lynch's services.[35]

ii. The Transition to Financial Engines

In March 2011, allegedly because of Merrill Lynch's lack of integration with Aon Hewitt and Plan participants' underutilization of Merrill Lynch's functions, the IC executed an agreement with Financial Engines Advisors, LLC (FE) to replace Merrill Lynch and provide integrated Professional Management to the Plan.[36] It is undisputed that Home Depot Defendants did not conduct a request for proposal (RFP) process before entering into the initial agreement with FE.[37]

In addition to its substantial advisory portfolio, totaling approximately $47.5 billion in assets under

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* ¶ 48.

37. The parties agree that Home Depot Defendants' initial negotiation with and engagement of FE occurred outside the bounds of ERISA's statute of repose.

management,[38] FE also provided three key service offerings to participants in the Plan. First, it offered all Plan participants annual projections of their retirement income and recommendations for possible changes in their investment strategy (collectively, the Retirement Evaluation).[39] Second, FE offered participants forecasts of their potential future account value or retirement income, analyses of Plan investment options, and guidance on savings rates and retirement age (collectively, Online Advice).[40] Participants could also call FE advisors as part of its Online Advice service. [41] Third, FE offered Professional Management, which allowed it to assume control over a participant's account and implement changes on the participant's behalf.[42]

FE charged two fees for these services, the prudence of which Plaintiffs dispute. First, all participants in the Plan paid an annual platform fee (Plan Access Fee) for the Retirement Evaluation and Online Advice.[43] The Plan Access Fee was a mandatory flat rate fee charged to each Plan participant for these services.[44] Second, for participants who opted to enroll in Professional Management, a graduated asset-based fee schedule was

38. *Id.* ¶ 159.

39. *Id.* ¶ 54.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* ¶ 55.

44. *Id.* ¶ 89.

applied, and the rate for each tier depended on the amount of assets under management.[45]

Importantly, FE and Aon Hewitt's services were integrated. Under this arrangement FE obtained information pertinent to its investment advice directly from Aon Hewitt, and implemented its advice in real time without the need for Plan participants to serve as "middlemen."[46] To facilitate this integration FE and Aon Hewitt entered into a data-sharing agreement by which FE paid Aon Hewitt a "data connectivity fee," which was assessed as a percentage of the advisory fees FE charged the Plan.[47] At first, Aon Hewitt charged FE 25% of the total Plan Access Fees and 20% of the Professional Management fees.[48] Plaintiffs challenge the propriety of this arrangement and refer to it as a "kickback."[49]

iii. Home Depot Defendants' Monitoring Efforts and Negotiations

a. Monitoring Efforts

Throughout the Class Period the Benefits Department periodically met with FE to discuss quarterly "Reach

---

45. *Id.* ¶ 89.

46. *Id.* ¶¶ 47, 69, 71.

47. *Id.* ¶¶ 56-58.

48. *Id.* ¶ 57.

49. *See* ECF 53 (Am. Compl.), ¶¶ 2, 4, 63, 214(c).

and Impact" reports.[50] The Benefits Department also monitored how may Plan participants enrolled in Professional Management.[51] During the Class Period the percentage of Plan participants enrolled in Professional Management increased from 7.3% to 15.7%.[52]

AHIC provided the IC with an annual analysis of total Plan costs, including breakdowns of the fees paid to the Plan's different service providers.[53] And, beginning in 2013, the Benefits Department prepared an analysis of the Plan's providers' disclosures, which included descriptions of the providers' services and fees, for the IC's review.[54] *See* 29 C.F.R. § 2550.408b-2.[55]

However, the Plan Committees' meeting minutes neither reflect an express discussion about the reasonableness of the fees paid to FE (or those fees later paid to Alight Financial Advisors) nor a discussion of the fees charged by other professional managed account services providers until after this case was initiated in 2019.[56]

---

50. ECF 228-2 (Defs.' SUMF), ¶¶ 91-93.

51. *Id.* ¶ 94.

52. *Id.* ¶ 96.

53. *Id.* ¶ 103.

54. *Id.* ¶¶ 106-07.

55. The Section 408(b)(2) disclosure regulation became effective on July 1, 2012, shortly after the start of the Class Period.

56. ECF 265-2 (Defs.' RSUMF), ¶¶ 200-01, 240; ECF 245-23 (Pls.' Ex. 23) (Apr. 26, 2016 AC Minutes).

b. Negotiations and Asset-Based Fee Pricing

Though Plaintiffs dispute whether and to what extent Home Depot Defendants, as opposed to a designee (*e.g.*, the Benefits Department), were involved in any negotiation, FE lowered its fees charged to the Plan three times during the Class Period. First, in 2013, FE submitted two pricing proposals to the Benefits Department, which reviewed the proposals with Curcio Webb.[57] Home Depot Defendants accepted the second proposal, resulting in a reduction of FE's fee for the first tier of assets under management (the Top-Tier Fee),[58] and lowering the threshold percentage of participant enrollment at which point FE would reduce its Top-Tier Fee from 20% to 17.5%.[59] Under the new agreement, FE also decreased its Plan Access Fee.[60] Home Depot Defendants did not conduct an RFP as part of this process.[61] And there is no evidence that Home Depot Defendants benchmarked FE's fees against the market rates for professional managed account services

57. ECF 228-2 (Defs.' SUMF), ¶¶ 109-19.

58. ECF 289-1 (Pls.' RSAMF), ¶¶ 62, 66; ECF 231-6 (Defs.' Ex. 76), at 15; ECF 249-1 (Pls.' Ex. 101) (Home Depot FE Pricing Analysis).

59. ECF 228-2 (Defs.' SUMF), ¶ 119.

60. *Id.*

61. ECF 265-2 (Defs.' RSUMF), ¶¶ 194, 240, 248; ECF 289-3 (Pls.' Ex. 263) (Investment Committee [Buben] Dep.), at 244:21-245:6.

before renewing FE's contract, though the parties dispute whether any adequate benchmark then existed.[62]

Second, in 2015 and 2016, before the December 31, 2016 expiration of the Aon Hewitt recordkeeping contract, Curcio Webb was retained to perform a benchmarking analysis of recordkeeping services.[63] Its analysis did not indicate the basis for its benchmark range of FE's fees; in other words, it did not contain information indicating whether its assessment was based on fees paid by similarly-sized plans, or whether it accounted for the fees

62. ECF 265-2 (Defs.' RSUMF), ¶ 238 (noting that Home Depot Defendants' expert, Steven Gissiner, testified that plan sponsors evaluate the reasonableness of managed account fees and services by "benchmarking" them against the fees paid by other plans for comparable services). Despite Home Depot Defendants' claim that Curcio Webb conducted a benchmarking assessment before the 2013 FE contract renegotiation and renewal, ECF 265-1 (Defs.' Resp.), at 18, Curcio Webb's principal testified that it did not perform "any sort of benchmarking in connection with the managed account fees in 2013," or perform an "extensive analysis" of the managed account fees FE proposed. ECF 289-5 (Pls.' Ex. 265) (Curcio Dep.), at 128:10-23, 137:12-20, 142:25-143:6. Curcio Webb provided some feedback related to FE's Plan Access Fee, though it did not reference Professional Management fees. *See* ECF 289-1 (Pls.' RSAMF), ¶¶ 64-65, 67; ECF 231-5 (Defs.' Ex. 75) (Curcio Sept. 26, 2013 email suggesting platform fee at a lower flat rate "with a lower cost when the managed account balances hit certain levels"); ECF 231-7 (Defs.' Ex. 77) (Oct. 2013 FE Pricing Analysis); ECF 231-8 (Defs.' Ex. 78) (Curcio Oct. 31, 2013 email stating, "This is excellent movement. You both should be happy! Awesome result . . . .").

63. ECF 228-2 (Defs.' SUMF), ¶¶ 121-23.

charged by other providers.[64] Nevertheless, Curcio Webb advised that no formal RFP for recordkeeping services was necessary, and the IC did not conduct one.[65]

As part of the negotiation process with FE, the Benefits Department and Aon Hewitt discussed the data connectivity fee FE paid to Aon Hewitt, and Aon Hewitt agreed to reduce the fee and to cap the fee per annum.[66] Further, purportedly in an effort to eliminate the payment of indirect compensation from FE to Aon Hewitt for data connectivity, Aon Hewitt recommended that Home Depot Defendants use an Aon Hewitt subsidiary, Aon Hewitt Financial Advisors (later, Alight Financial Advisors, or AFA), as its direct managed account services provider (the Direct Service Proposal).[67] Under the Direct Service Proposal, FE would continue to provide investment advice as AFA's subcontractor.[68]

The Benefits Department and Curcio Webb recommended at an April 2016 AC meeting that the Plan adopt the Direct Service Proposal.[69] Home Depot's Director of Benefits explained that the Top-Tier Fee would again be reduced under the Direct Service Proposal, and

64. ECF 289-1 (Pls.' RSAMF), ¶ 89.

65. ECF 228-2 (Defs.' SUMF), ¶¶ 122-23.

66. *Id.* ¶¶ 126-29.

67. *Id.* ¶ 130.

68. *Id.*

69. *See* ECF 245-23 (Pls.' Ex. 23) (Apr. 26, 2016 AC Minutes).

that AFA would pay FE 50% of the fees it received from Plan participants for its advisory services.[70] Curcio Webb provided a benchmarking analysis of FE's pricing relative to other professionally managed account services.[71] The AC approved a contract containing the Direct Service Proposal, effective July 1, 2017.[72]

Third, in 2019, Home Depot Defendants conducted a formal RFP for the Plan's recordkeeping services.[73] herronpalmer advised the AC to renew the Plan's agreement with Aon Hewitt and keep AFA, which agreed to eliminate the Plan Access fee, as the direct provider of investment advisory services.[74] The negotiated agreement matched competitor Voya's pricing and reduced Professional Management fees further, with an entirely different graduated fee schedule that offered lower fees for the initial investment tiers than the Top-Tier Fees in place for much of the Class Period, as well as no Plan Access Fee.[75] The AC approved the renewed agreement with Aon Hewitt and AFA at its November 20, 2019 meeting, effective January 1, 2021.[76]

70. ECF 228-2 (Defs.' SUMF), ¶ 141.

71. *Id.* ¶¶ 137-39.

72. *Id.* ¶¶ 140-42.

73. *Id.* ¶¶ 144-45.

74. *Id.* ¶¶ 146-48.

75. *Id.* ¶ 152.

76. *Id.* ¶ 153.

c. FE's Competitors

As part of FE's initial public offering, its 2010 prospectus identified Morningstar, GuidedChoice, and ProManage as "direct competitors that offer independent portfolio management and investment advisory services to plan participants in the workplace."[77] The parties dispute whether these *competitors* identified as part of FE's IPO are apt *comparators*; that is, whether they offered services like FE's and had experience similar to FE's, and whether their services and experience would have met the Plan's goals during this time period. It is undisputed, however, that as a matter of basis points (bps), each offered managed account services at lower rates than Plan participants paid to FE and AFA.[78] Further, throughout the Class Period, FE and AFA charged higher fee rates and higher total fees to Plan participants than they did to participants in many comparably sized plans.[79]

77. ECF 265-2 (Defs.' RSUMF), ¶ 142.

78. *See id.* ¶¶ 143, 144, 145, 153; ECF 145-12, at 9-10 (ProManage Form ADV Part 2A Brochure for All Services); ECF 283-2 (Defs.' RSAMF), ¶ 31.

79. ECF 283-2 (Defs.' RSAMF), ¶ 8; ECF 270-1 (Pls.' RSUMF), ¶ 163; ECF 246-17 (Pls.' Ex. 57), at 141 (Aon Hewitt's July 16, 2010 Response to Request for Proposal for Defined Contribution and Health and Welfare Outsourcing Administration Services) (noting that Aon Hewitt partnered with Guided Choice to provide managed accounts services); *see also* ECF 265-2 (Defs.' RSUMF), ¶¶ 148-49, 152-53; ECF 271-12 (Pls.' Ex. 172) (Buetow Rebuttal Rep.), ¶ 16 (McDonalds 401(k) plan using GuidedChoice with recordkeeping services from Aon Hewitt). *See also* ECF 251-18 (Pls.' Ex. 158) (Gissiner Rep.), at 96-97; ECF 228-2 (Defs.' SUMF), ¶¶ 153-54

3. Investment Options

While the Plan acted as a menu, offering a variety of investment options from which Plan participants could select during the Class Period, Plaintiffs' Challenged Funds Claims address four of those options: the JPMorgan Stable Value Fund (the JPMorgan Fund), the BlackRock LifePath Target Date Funds (the BlackRock TDFs), as well as the TS&W Small Cap Value Fund (the TS&W Fund) and the Stephens Small Cap Growth Fund (the Stephens Fund) (together, the Small Cap Funds).

i. JPMorgan Fund

a. Purpose

The JPMorgan Fund was added to the Plan on October 9, 2007, prior to the start of the Class Period.[80] As a "stable value" fund, the JPMorgan Fund was designed to preserve investors' principal while earning consistent returns.[81]

(detailing J.C. Penny's and Target's fees in bps for Professional Management). In 2013, FE also provided Home Depot Defendants with pricing data for 18 comparably sized plans, many of which paid a lower fee in bps for Professional Management before and after the 2014 change in the Plan's Professional Management pricing. ECF 265-2 (Defs.' RSUMF), ¶¶ 184, 185; ECF 249-1 (Pls.' Ex. 101) (Home Depot FE Pricing Analysis).

80. ECF 228-2 (Defs.' SUMF), ¶ 170.

81. *Id.* ¶ 171.

b. Fiduciary Monitoring and Fund Performance

The Plan's IPS utilized several different benchmarks for the JPMorgan Fund during the Class Period, including the Barclays Capital Intermediate Aggregate Index (2011 to 2013); the CitiGroup 3 Month Treasury Bill Index (2013 to 2015), and the Rolling 3 Year Constant Maturity Index (2015 onward).[82] The JPMorgan Fund underperformed its benchmarks' three- and five-year performance at the beginning of the Class Period in 2012 and 2013, but it outperformed its benchmarks thereafter.[83] AHIC's reports to the IC largely reflect this trend. AHIC reported to the IC in 2012 that the JPMorgan Fund's underperformance was due to a lack of "wrap capacity"—*i.e.*, a shortage of insurers willing to provide wrap coverage in the wake of the 2008 global financial crisis—which caused the fund to maintain a higher cash concentration.[84] By the end of 2013, the JPMorgan Fund's five-year performance placed it in the 89th percentile of peer funds.[85] By 2014, the fund was in the top half of its peers.[86]

---

82. ECF 270-2 (Pls.' SAMF), ¶ 79.

83. ECF 233-22 (Wermers Rep.), at 156 (Ex. 26, Comparison of Crediting Rate of the JPMorgan Stable Value Fund Relative to Its Benchmarks' and Peer Group's Returns as Reported in the QIR).

84. ECF 228-2 (Defs.' SUMF), ¶¶ 176-77.

85. ECF 233-22 (Wermers Rep.), at 156 (Ex. 26, Comparison of Crediting Rate of the JPMorgan Stable Value Fund Relative to Its Benchmarks' and Peer Group's Returns as Reported in the QIR).

86. *Id.*

It is undisputed that the JPMorgan Fund consistently delivered positive returns during the Class Period.[87] The JPMorgan Fund's crediting rate—*i.e.*, the interest rate applied to the book value of the investment contract expressed as an effective annual yield—outperformed the Citigroup 3-Month Treasury Bill Index, identified as the benchmark in the Fund's factsheets, for ten-, five-, three-, and one-year periods during the Class Period with the exception of a single one-year period ending in 2019.[88] And it generally exhibited a lower expense ratio as compared to the median expense ratio of peer funds during the Class Period.[89] In other words, it performed solidly.

Though the JPMorgan Fund was the subject of a class action lawsuit concerning its investment in mortgage-backed securities leading up to the 2008 global financial crisis, the lawsuit settled for $75 million in 2017.[90] The Plan still offers the JPMorgan Fund to participants.

ii. BlackRock TDFs

a. Purpose

The BlackRock TDFs were a suite of target-date funds (TDFs) managed by BlackRock and offered as an option

---

87. ECF 228-2 (Defs.' SUMF), ¶ 172.

88. ECF 233-22 (Wermers Rep.), ¶ 142.

89. *Id.* ¶ 148.

90. ECF 228-2 (Defs.' SUMF), ¶¶ 188, 191-92.

in the Plan during the Class Period.[91] During most of the Class Period, the BlackRock TDFs included eight different funds, each corresponding with a different retirement date from 2015 to 2055.[92] TDFs possess different glide paths; that is, they allocate assets differently as the target retirement date approaches, either "to-retirement" or "through-retirement."[93]

b. Fiduciary Monitoring and Fund Performance

The IC considered the BlackRock TDFs' glide path on at least a few occasions during the Class Period. The IC's March 22, 2013 meeting minutes show that AHIC explained that the BlackRock TDFs employed a more conservative glide path than other funds, which could affect their performance.[94] On October 21, 2014, AHIC and BlackRock representatives discussed with the IC changes to the BlackRock TDFs' glide path that would result in a less conservative, higher equity allocation.[95]

---

91. *Id.* ¶ 193.

92. ECF 233-22 (Wermers Rep.), ¶ 92; *id.* at 119 (Ex. 2, percentage of Plan Assets by Investment Option).

93. *Id.* ¶¶ 91, 93, 96. A "to-retirement" glide path reaches its final asset allocation by the target retirement date, whereas a "through-retirement" glide path continues to change its asset allocation through the target date and beyond, resulting in different returns.

94. ECF 228-2 (Defs.' SUMF), ¶ 207.

95. *Id.* ¶¶ 209-10.

By December 5, 2014, IC meeting minutes confirm that AHIC noted that the BlackRock TDFs' new glide path was still conservative relative to peers, but continued to rate the BlackRock TDFs as a "Buy."[96]

The January 3, 2018 IC meeting minutes note AHIC's discussion of further changes to the BlackRock TDFs' glide path, as well as AHIC's recommendation that a "to-retirement" glide path was still appropriate because only 25% of participants left assets in the Plan when they retired or otherwise separated from employment.[97] According to the December 10, 2019 IC meeting minutes, AHIC advised that "75% of . . . participants withdrew their assets at termination during 2018, supporting a 'to[-retirement]' glide[ ]path"; at that time, the IC "discussed the glide[ ]path, including the amount of risk that was appropriate, especially in the event of a downturn[,] and agreed with AHIC that a change to a 'through' fund would not be appropriate."[98]

To evaluate the BlackRock TDFs throughout the Class Period, the IC used custom benchmarks, administered by BlackRock.[99] These benchmarks reflected the asset allocations of specific vintages of the BlackRock TDFs.[100]

96. *Id.* ¶ 211.

97. ECF 228-2 (Defs.' SUMF), ¶¶ 212-13.

98. ECF 232-11 (Defs.' Ex. 115), at 4 (Dec. 10, 2019 IC Minutes).

99. ECF 228-2 (Defs.' SUMF), ¶ 198.

100. *Id.*

Plaintiffs argue that custom benchmarks do a poor job of reflecting performance relative to peer funds; Home Depot Defendants maintain that the custom benchmarks permitted the IC to analyze how closely the BlackRock TDFs tracked their target allocations. In any case, the BlackRock TDFs closely followed their custom benchmarks throughout the Class Period.[101]

AHIC's QIRs provided a peer percentile ranking for the BlackRock TDFs through mid-2015.[102] The peer rankings showed that the BlackRock TDFs had strong performance relative to other TDFs at the start of the Class Period, with some vintages ranking in the top 10% for one-year or five-year performance.[103] By the end of 2013, however, three- and five-year performance for some vintages of the BlackRock TDFs ranked in the bottom 10% of funds.[104] The last AHIC QIR that contained peer rankings for the BlackRock TDFs suggested that all vintages of the BlackRock TDFs had performed in the top half of their peer groups in 2014.[105] After that, AHIC's QIRs did not include peer evaluations for the BlackRock TDFs.

---

101. *Id.* ¶ 208.

102. *Id.* ¶ 104.

103. *See* ECF 272-28 (Pls.' Ex. 228), at 23-30 (Q2 2012 PRIME Report).

104. *See* ECF 245-4 (Pls.' Ex. 4) ("BlackRock LifePath Target Date Fund Performance Percentile Rank Among Peer Universe").

105. *See* ECF 246-6 (Pls.' Ex. 46), at 29-46 (Q2 2015 Quarterly Investment Review).

The BlackRock TDFs invested in passively managed funds and were organized as collective investment trusts (CITs) rather than mutual funds.[106] Among available TDFs, the Blackrock TDFs' expense ratio was one of the lowest throughout the Class Period.[107] Home Depot Defendants negotiated at least three fee concessions from BlackRock during the Class Period.[108] Further, the evidence indicates that, among TDFs organized as CITs, the BlackRock TDFs were popular.[109] As of 2019, the BlackRock TDFs held approximately $125 billion in ERISA assets.[110] And, during the Class Period, the BlackRock TDFs were offered in the 401(k) plans of, among other companies, Bank of America, Microsoft, Cisco Systems, and Apple.[111]

iii. Small Cap Funds

For part of the Class Period, the Plan offered the Small Cap Funds. Due to the Small Cap Funds' fluctuating performance, detailed individually below, the IC began considering replacements for these funds in March 2017.[112] And, after hearing presentations from potential

106. ECF 228-2 (Defs.' SUMF), ¶ 195; ECF 233-22 (Wermers Rep.), ¶ 121.

107. ECF 228-2 (Defs.' SUMF), ¶ 201.

108. *Id.* ¶¶ 202-05.

109. *Id.* ¶ 195.

110. *Id.*

111. *Id.*

112. *Id.* ¶¶ 267-70.

replacement candidates, the IC resolved in June 2017 to replace the Small Cap Funds, effective November 1, 2017.[113] The IC replaced both of the Small Cap Funds with composite small/mid cap, or "SMID" funds, which also replaced the Plan's mid-cap investment options.[114]

a. TS&W Fund

1. Purpose

The TS&W Fund, which was added to the Plan in 2009, sought to provide "long-term growth primarily through investment in U.S. small-capitalization companies that are believed to be undervalued relative to the market and industry peers."[115]

2. Fiduciary Monitoring and Fund Performance

At the end of 2012, the TS&W Fund's net three- and five-year returns placed it at 87% and 96% of its peers, respectively.[116] One year later, in 2013, the TS&W Fund's net ten-year returns put it in the top percentile of all peer

113. *Id.* ¶¶ 271-74.

114. *Id.* ¶¶ 268-74.

115. *Id.* ¶¶ 228-29.

116. ECF 233-22 (Wermers Rep.), at 131 (Ex. 13A, Comparison of Annualized Net Returns of the TS&W Fund Relative to Its Benchmark and Peer Group's Returns as Reported in the QIR).

funds.[117] And by the end of the first quarter of 2015, the TS&W Fund's three-year performance placed it in the top percentile of peer funds.[118] By the end of 2016, the TS&W Fund's three- and five-year performance fell back to 81% and 67% of peers, respectively.[119] During the time it was offered in the Plan, the TS&W Fund had an expense ratio that was consistent with or lower than the median expense ratio of its peer funds.[120]

IC members raised questions about replacing the TS&W Fund, most notably in December 2016 when its three- and five-year performance fell.[121] Though AHIC advised the IC to exercise patience with the TS&W Fund,[122] recommending against replacing it in June 2016,[123] the fund was jettisoned from the Plan a short time later.

---

117. *Id.*

118. ECF 246-5 (Pls.' Ex. 45), at 7 (Q1 2015 Quarterly Investment Review).

119. ECF 233-22 (Wermers Rep.), at 131 (Ex. 13A, Comparison of Annualized Net Returns of the TS&W Fund Relative to Its Benchmark and Peer Group's Returns as Reported in the QIR).

120. ECF 228-2 (Defs.' SUMF), ¶ 266.

121. *Id.* ¶ 263.

122. *Id.* ¶ 261.

123. *Id.*

b. Stephens Fund

1. Purpose

The Stephens Fund, which was added to the Plan in October 2013, sought to provide "long-term growth of capital by constructing an equity portfolio consisting of the stocks of small-capitalization companies with growth characteristics."[124]

2. Fiduciary Monitoring and Fund Performance

At the time it was selected in 2013, the Stephens Fund's gross returns outperformed its benchmark for one-, three-, five-, and ten-year periods.[125] In 2014 and 2015, however, the Stephens Fund underperformed its benchmark.[126] Though the Stephens Fund then slightly outperformed its benchmark in 2016, by the end of 2016 its trailing three- and five-year returns lagged the benchmark and fell in the bottom half of peer funds.[127] The Stephens Fund's ten-year returns, however, beat its

---

124. *Id.* ¶¶ 226-27.

125. ECF 233-22 (Wermers Rep.), at 121-22 (Exs. 4 & 5, Comparison of Annualized Gross Returns of the Stephens Fund Relative to Its Benchmark, Annualized Gross Returns of the Stephens Fund Relative to Comparison Groups of Separately Managed Accounts in the Same Morningstar Category).

126. *Id.*

127. *Id.*

benchmark until 2017.[128] During the time it was offered in the Plan, the Stephens Fund's expense ratio was lower than at least 88% of its peer group.[129]

As early as July 2015, after a short period of underperformance and less than two years after it had been added to the Plan, IC members questioned whether they should replace the Stephens Fund.[130] As with the TS&W Fund, AHIC recommended exercising patience with the Stephens Fund and, in December 2015, cautioned the IC to wait at least three years before removing the Stephens Fund.[131] Less than two years later, however, the IC removed the Stephens Fund from the Plan.

B. Procedural Background

Plaintiffs filed the Complaint on April 12, 2018,[132] and the Amended Complaint on July 11, 2018.[133] On April 10, 2020, prior to class certification, Home Depot Defendants filed motions for summary judgment against four named Plaintiffs, arguing that their deposition testimony contradicted Plaintiffs' individual allegations that FE and AFA had been allowed to engage in an "unlawful reverse churning scheme" that "charged Plan participants millions of dollars in asset-based investment advisory fees without

---

128. *Id.*

129. ECF 228-2 (Defs.' SUMF), ¶ 247.

130. *Id.* ¶¶ 242, 263.

131. *Id.* ¶¶ 243-44.

132. ECF 1 (Compl.).

133. ECF 53 (Am. Compl.).

providing any corresponding benefit to participants."[134] On September 21, 2020, the Court denied Home Depot Defendants' motions.[135] The Court also certified three classes of Plan participants and beneficiaries (excluding Home Depot Defendants) who, at any time from April 12, 2012 through the date of judgment: (1) invested in the Challenged Funds, (2) received investment advisory services from FE through Professional Management, or (3) received investment advisory services from AFA through Professional Management.[136]

Home Depot Defendants filed the present motion for summary judgment on all claims on July 12, 2021.[137] The same day, Home Depot Defendants filed the motions to exclude Drs. Arthur B. Laffer's and Gerald Buetow's expert opinions and testimony.[138] Plaintiffs filed their own affirmative motion for partial summary judgment on claims related to Professional Management and the BlackRock TDFs.[139] Later, on December 21, the U.S. Chamber of Commerce (the Chamber) filed a brief of *amicus curiae* in support of Home Depot Defendants' position.[140]

---

134. *See* ECFs 130-133 (quoting ECF 53 (Am. Compl.), ¶¶ 5, 180).

135. ECF 186.

136. *See generally id.*

137. ECF 227.

138. ECF 234; ECF 236.

139. ECF 240.

140. ECF 308.

On February 23, 2022, the parties submitted to U.S. District Court Judge William M. Ray, II, then presiding over this case, proposed orders on the pending cross-motions for summary judgment and motions to exclude.[141] Judge Ray heard oral argument on the motions on February 24.[142] Shortly thereafter, on March 4, Judge Ray entered an order of recusal[143] and the case was reassigned to undersigned. On April 15, Plaintiffs moved for the recusal of undersigned.[144]

II. Motion for Recusal

Plaintiffs move to recuse undersigned from this case because of his disclosed previous position on the Chamber's Technology Litigation Advisory Committee (TLAC). Home Depot Defendants oppose the motion. For the following reasons, the motion is denied.

The parties appear to agree, as does the Court, that the circumstances here do not present an actual conflict that mandates recusal. Rather, Plaintiffs' position is that undersigned's previous affiliation with the Chamber may run afoul of the requirement that a judge "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The parties likewise agree that the applicable test for this recusal

141. *See supra* n.3.

142. ECF 320.

143. ECF 321.

144. ECF 333.

determination is whether "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *Yeyille v. Miami Dade Cnty. Pub. Sch.*, 654 F. App'x 394, 395 (11th Cir. 2016) (quoting *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1998)). Given this framework, a more robust disclosure of undersigned's previous affiliation with the Chamber is in order.

Undersigned served as an uncompensated member of the TLAC from 2018 to 2019, prior to his confirmation to the bench. Undersigned's activity with the TLAC could best be described as passive. He recalls dialing into a handful of conference calls during which Chamber representatives discussed the Chamber's Litigation Center's involvement in technology- or cyber-related litigation. Undersigned and other members of the TLAC received an unknown number of widely distributed emails of the same vein. He further recalls that, occasionally, the TLAC's members voted on conference calls or through email chains on whether the Chamber should seek to intervene in particular litigation matters, but undersigned does not recall any vote taken that was particularly controversial or the result of which was not nearly or entirely unanimous. Undersigned does not recall ever attending a related in-person event during his short tenure as a member of the TLAC. Undersigned voluntarily resigned from the TLAC prior to his confirmation to the bench, and has since had no relationship whatsoever with the TLAC or any other component of the Chamber. Given its focus on technology- and cyber-related litigation, the

TLAC never addressed litigation matters pertaining to ERISA or any other subject that even remotely relates to the instant litigation.

With this background the Court concludes that recusal is not appropriate. No objective disinterested lay observer with these facts would entertain a significant doubt about undersigned's impartiality. That is not to suggest that Plaintiffs were not within their right, and reasonably so, to raise the question given undersigned's disclosed affiliation with the Chamber. No offense has been taken. And make no mistake, receiving an invitation to recuse from a complex ERISA class action case boasting over 300 docket entries containing thousands of pages of record evidence is tempting to say the least. But the administration of justice requires more, and undersigned concludes that, under the controlling standard and the specific factual circumstances, recusal is not warranted. Plaintiffs' motion is respectfully denied.

III. Summary Judgment[145]

Summary judgment is appropriate where the evidence shows "that there is no genuine dispute as to any material fact and [that] the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party seeking summary judgment has the burden of informing the court of the basis for its motion and identifying the portions of the record that it believes demonstrate the absence of a

145. During the February 24, 2022 oral argument before Judge Ray, Plaintiffs and Home Depot Defendants agreed that the summary judgment motions could be adjudicated without deciding Home Depot Defendants' Daubert motions. ECF 332, at 138 (Trans. of Mot. H'g).

genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The movant carries its burden by showing "an absence of evidence to support the nonmoving party's case." *Id.* at 325.

If a movant meets its burden, the party opposing summary judgment must present evidence that shows there is a genuine issue of material fact or that the movant is not entitled to judgment as a matter of law. *Id.* at 324; *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). In determining whether a genuine issue of material fact exists to defeat a motion for summary judgment, the evidence is viewed in the light most favorable to the party opposing summary judgment, "and all justifiable inferences are to be drawn" in favor of that opposing party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). This evidence must regard an element essential to its case, and on which it will bear the burden of proof at trial. *Celotex Corp.*, 477 U.S. at 322. "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

A. Procedural Issues

1. Home Depot Defendants' "Successive" Summary Judgment Motions

As an initial matter Plaintiffs aver that Home Depot Defendants' motion for summary judgment is a fifth successive one, and is therefore procedurally barred.[146]

146. ECF 270 (Pls.' Resp.), at 6-7.

Plaintiffs insist that, because it follows four partial summary judgment motions Home Depot Defendants filed in 2020 against four named Plaintiffs on their individual claims, it runs afoul of Judge Ray's Standing Order and the rule against successive summary judgment motions.[147] The Court declines Plaintiffs' invitation to disregard Home Depot Defendants' current summary judgment motion.

Plaintiffs are correct that this Circuit does "not approve in general the piecemeal consideration of successive motions for summary judgment," and that parties should "present their strongest case for summary judgment when the matter is first raised." *Schwindler v. Bryson*, No. 1:11-CV-1276, 2015 WL 12990955, at *2 (N.D. Ga. Aug. 13, 2015) (quoting *Fernandez v. Bankers Nat'l Life Ins. Co.*, 906 F.2d 559, 569 (11th Cir. 1990)). However, as even the authority on which Plaintiffs rely makes clear, "[t]wo motions for summary judgment may be ruled upon in the same case, particularly when discovery has been extended for good reason . . . and the district judge allows a second summary judgment motion." *Fernandez*, 906 F.2d at 569 (collecting cases endorsing a trial court's discretion to consider a subsequent summary judgment motion when a different judge ruled on the prior motion, or when the subsequent summary judgment motion is based on an expanded record).

Three points inform this Court's decision to consider Home Depot Defendants' motion. First, their prior summary judgment motions were aimed at individual Plaintiffs' allegations that FE had engaged in "reverse

147. *Id.*

churning," *i.e.*, charged Plaintiffs and Class Members an ongoing investment management fee but failed to provide any substantive investment advice or service to account for that fee.[148] Home Depot Defendants aver, and Plaintiffs do not dispute, that Plaintiffs have since abandoned that theory. Since then, three classes have been certified as to two sets of claims, neither of which implicates a "reverse churning" theory. Accordingly, Home Depot Defendants do not present a "renewed" motion aimed at a settled issue.

Second, Home Depot Defendants' pending summary judgment motion relies, in part, on the fruits of a February 18, 2021 order from the Western District of North Carolina, granting Plaintiffs' motion to compel and ordering third-party professional management services providers to produce information about confidential fee arrangements for Professional Management with other customers.[149] This order and the subsequent production here of data concerning providers' fee arrangements with other customers postdate Home Depot Defendants' April 10, 2020 motions for summary judgment. Thus, Home Depot Defendants' pending summary judgment motion is not a "second bite at the apple," as Plaintiffs jibe.[150]

Third, Plaintiffs insist that Judge Ray's standing order prohibits another summary judgment motion without leave of Court, which they maintain Home Depot Defendants

---

148. *Cf.* ECF 130; ECF 131; ECF 132; ECF 133; *see also* ECF 53 (Am. Compl.), ¶ 53 (discussing "reverse churning").

149. *See generally* ECF 212; ECF 214.

150. ECF 270 (Pls.' Resp.), at 12.

neither sought nor secured.[151] But Judge Ray signaled at the June 20, 2020 hearing on Home Depot Defendants' four summary judgment motions and Plaintiffs' motion for class certification that Home Depot Defendants would not be barred from filing another motion for summary judgment at the close of discovery.[152] Plaintiffs either understood this much, or waived any objection to Home Depot Defendants' pending summary judgment motion when, on July 7, 2021, they filed a joint motion with Home Depot Defendants for leave to file excess pages for briefs in support of summary judgment.[153]

The Court finds that Plaintiffs are not prejudiced by its consideration of Home Depot Defendants' pending motion.

2. The Burden to Prove Loss Causation

Plaintiffs and Home Depot Defendants dispute which party bears the burden to prove loss causation under controlling Eleventh Circuit law. *See Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335, 1343-44 (11th Cir.

---

151. *See* ECF 270 (Pls.' Resp.), at 8, 12-13.

152. ECF 174 (Trans. of July 20, 2020 Mot. H'g), at 50:4-11 ("So [the recently amended standing order] is really irrelevant in this case for the stuff . . . that we've heard or will consider. But should we get to the end of this case and the defendant[s] or the plaintiff[s] wishes to file motions for summary judgment, I'll require that you file it as part of one motion. And if you think you need more room[,] . . . then you need to file a motion seeking relief from the page requirements.").

153. *See* ECF 225.

1992). Home Depot Defendants argue that it is Plaintiffs' burden to prove that Home Depot Defendants' alleged breach of fiduciary duty caused a loss to the Plan.[154] Plaintiffs insist that to prevail at summary judgment Home Depot Defendants must "establish the absence of causation by proving that the beneficiaries' claimed losses could not have resulted from the breach," and that Home Depot Defendants must establish as a matter of law that a prudent fiduciary "would have agreed to pay the same fees to FE and AFA and would have retained the Challenged funds."[155] Plaintiffs promote an incorrect reading of the law: Nothing about ERISA or the Eleventh Circuit's decision in *Willet* changes the burden framework for summary judgment.

It is well-settled that the summary judgment movant must show an absence of evidence to support the non-movant's case to prevail at summary judgment. *See Celotex*, 477 U.S. at 325. The non-movant must then point to evidence to create an issue of material fact as to the essential elements of the claim. *Id.* at 322. As the summary judgment framework applies to this case, Home Depot Defendants are not required to disprove loss causation regarding either of Plaintiffs' claims to win summary judgment; rather, to prevail, Home Depot Defendants must show an absence of any evidence supporting either breach or loss causation (the challenged elements), or that no reasonable factfinder could find breach or loss causation as a matter of law.

---

154. ECF 228, at 4.

155. ECF 270 (Pls.' Resp.), at 4 (cleaned up).

Plaintiffs' misunderstanding apparently stems from their interpretation of *Willett*. There, the defendant lost at summary judgment, and the Eleventh Circuit instructed that, on remand, the defendant would have to prove the plaintiffs' losses "could not have resulted" from a breach to prevail as a matter of law and obtain a reversal of summary judgment for the plaintiffs, and also a grant of summary judgment in its own favor. *See Willett*, 953 F.2d at 1343. However, the court cautioned that, "[o]n remand, the burden of proof on the issue of causation will rest on the [plaintiffs]." *Id.*

The court's explanation of what the defendant would have to prove, tailored to the evidence and posture of that case, cannot stand for the idea that, here, Home Depot Defendants must disprove loss causation at summary judgment. Otherwise, it would contravene the Supreme Court's clear rule that summary judgment is fitting "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

3. Plaintiffs' "Failure to Recoup" Claim

Plaintiffs argue, in reference to their Excessive Fees Claim, that evidence suggests that Home Depot Defendants failed to accept an offer from Aon Hewitt to credit revenue it received from FE back to the Plan. In other words, Plaintiffs argue that Home Depot Defendants imprudently failed to recoup money from Aon Hewitt and that the evidence either creates a material disputed issue of fact such that Home Depot Defendants' summary judgment motion must be denied on this ground or that entitles Plaintiffs themselves to summary judgment.[156] Home Depot Defendants mount numerous defenses to this claim, but the most compelling is this: Plaintiffs never raised this claim before summary judgment.[157] In fact, Plaintiffs' Amended Complaint is devoid of any mention of Aon Hewitt's offer to credit back fees to the Plan.

Eleventh Circuit precedent is clear: The liberal pleading standard "does not afford plaintiffs with an opportunity to raise new claims at the summary judgment stage." *Newman v. Ormond*, 396 F. App'x 636, 639 (11th Cir. 2010) (quoting *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1314 (11th Cir. 2004)). Plaintiffs "may not amend [their] complaint through argument in a brief opposing summary judgment." *Gilmour*, 382 F.3d at 1315.

Plaintiffs maintain that they have always alleged a kickback scheme between FE and Aon Hewitt, and Aon Hewitt's offer to "credit back" certain fees to the Plan is "egregious evidence" of the alleged kickback scheme. They further argue that their "failure to recoup" theory is a result of discovery, which is meant to "develop evidence supporting the underlying allegations."[158] The Court recognizes that Plaintiffs have, as they say, always alleged

156. *See* ECF 270 (Pls.' Resp.), at 7-9; *see also* ECF 240-1 (Pls.' Summ. J. Br.).

157. *See* ECF 265-1 (Defs.' Resp.), at 12-18.

158. ECF 289 (Pls.' Reply), at 10 n.14.

a kickback scheme.[159] But the theory Plaintiffs espouse at summary judgment is something entirely different. Plaintiffs' "failure to recoup" theory is tantamount to a claim that Home Depot Defendants paid excessive fees to Aon Hewitt, which has never before been alleged. On learning of this evidence in discovery Plaintiffs could have moved to amend the complaint, but they did not. *Gilmour*, 382 F.3d at 1315.

To the extent Plaintiffs move for partial summary judgment on their "failure to recoup" theory, their motion is **DENIED**. Home Depot Defendants' motion in this regard is **GRANTED**.

B. Plaintiffs' ERISA Claims

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983). "The principal object of the statute is to protect plan participants and beneficiaries." *Boggs v. Boggs*, 520 U.S. 833, 845, 117 S. Ct. 1754, 138 L. Ed. 2d 45 (1997).

As ERISA fiduciaries, the Home Depot Defendants are each subject to the statute's strict standard of care, which is "the highest known to law." *Herman v. NationsBank Tr. Co. (Georgia)*, 126 F.3d 1354, 1361 (11th Cir. 1997) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8

159. *See* ECF 1 (Compl.), ¶¶ 2, 4, 46; ECF 53 (Am. Compl.), ¶¶ 2, 4, 63.

(2d Cir. 1982)). Fiduciaries must act "for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). Further, they must 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).

Fiduciaries must select a plan's investment options prudently, monitor those options continuously, and replace imprudent ones. *See generally Tibble v. Edison Int'l*, 575 U.S. 523, 135 S. Ct. 1823, 191 L. Ed. 2d 795 (2015). Fiduciaries must "vigorously and independently investigate the wisdom of a contemplated investment." *Pledger v. Reliance Tr. Co.*, No. 1:15-CV-4444, 2019 U.S. Dist. LEXIS 233995, 2019 WL 10886802, at *20 (N.D. Ga. Mar. 28, 2019). Fiduciaries must prudently select third-party service providers, too, and can be subject to liability if they do not reasonably monitor the fees charged and the fees are excessive. *Pledger v. Reliance Tr. Co.*, 240 F. Supp. 3d 1314, 1330 (N.D. Ga. 2017). In other words, fiduciaries must be good stewards of investors' investments—a proposition that no party contests.

To succeed on their claims for breach of fiduciary duty under 29 U.S.C. § 1104, Plaintiffs must prove that (1) Home Depot Defendants acted as fiduciaries, (2) Home Depot Defendants breached their fiduciary duties, and (3) the breaches proximately caused a loss to the Plan. *See, e.g.*, *Perez v. DSI Contracting, Inc.*, No. 1:14-CV-282-LMM, 2015 U.S. Dist. LEXIS 201427, 2015 WL 12618779, at *4 (N.D. Ga. Jul. 24, 2015). Home Depot Defendants do not contest that the IC and AC were fiduciaries to the Plan; thus, only the elements of breach and loss causation remain contested.

If the Court finds that Home Depot Defendants breached their duty, then it must determine whether there were "any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). Determining whether a loss occurred as a result of the fiduciaries' breach of duty requires a comparison between the challenged plan's actual performance and performance that would have otherwise occurred—*e.g.*, performance according to models the Court accepts as reasonable.[160] G*IW Indus., Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d 729, 733 (11th Cir. 1990) (citing *Donovan v. Bierwirth*, 754 F.2d 1049, 1057 (2d Cir. 1985) ("The question of loss to the Plan . . . requires a comparison between the actual performance of the Plan and the performance that otherwise would have taken place")).

160. The Court need not offer greater detail here regarding the methods other courts have used to calculate loss. Suffice it to say that courts seem to employ either of two approaches: one that focuses on the "most profitable" alternatives (the Most Profitable Approach), or another that seeks to replicate the returns of a benchmark index (the Index Approach). *See, e.g., In re BellSouth Corp. ERISA Litig.*, No. 1:02-CV-2440, 2006 U.S. Dist. LEXIS 110201, 2006 WL 8431178, at *5 (N.D. Ga. Dec. 5, 2006) (discussing Most Profitable and Index Approaches).

Of course, "even when the [p]lan as a whole has not suffered losses," courts may grant equitable relief under 29 U.S.C. § 1132(a)(3), including injunction, mandamus, restitution, and surcharge.[161] *Moitoso v. FMR LLC*, 451 F. Supp. 3d 189, 217-18 (D. Mass. 2020) (citation omitted). However, these remedies are available only when such relief is "appropriate," 29 U.S.C. § 1132(a)(3), such as when the fiduciaries were clearly negligent. *Cf. Moitoso*, 451 F.Supp, at 218. Here, while Plaintiffs raised avenues for equitable relief in their Amended Complaint, they made no argument for equitable relief at summary judgment.[162] Accordingly, Plaintiffs' claim for equitable relief is deemed waived. *See Resol. Tr. Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) ("There is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment. Rather, the onus is upon the parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned.") (cleaned up).

---

161. Surcharge is defined as "the imposition of personal liability on a fiduciary for willful or negligent misconduct in the administration of his fiduciary duties." *LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.)*, 196 F.3d 1, 7 (1st Cir. 1999) (cleaned up) (quoting Black's Law Dictionary 1441 (6th ed. 1990)).

162. *Compare* ECF 53 (Am. Compl.), at 106-08 *with* ECF 240 (Pls.' Summ. J. Br.) (making no mention of equitable remedies under 29 U.S.C. § 1132) *and* ECF 270 (noting only that failure to abide by the ERISA "prudent investor" rule establishes liability even when the Plan does not suffer a loss, but failing to advance any argument in favor of or request equitable remedies as provided in 29 U.S.C. § 1132.).

With these standards in mind, the Court addresses the parties' arguments as they pertain to each of Plaintiffs' claims: the Excessive Fees Claim and the Challenged Funds Claims.

1. The Excessive Fees Claim

Plaintiffs and Home Depot Defendants cross-move for summary judgment on Plaintiffs' Excessive Fees Claim. Plaintiffs allege that Home Depot Defendants imprudently failed to investigate and monitor unreasonably high fees for Professional Management charged by FE and AFA, and that FE's and AFA's collection of a data connectivity fee, which they partially remitted to Aon Hewitt, amounted to a kickback.[163] Home Depot Defendants argue that they are entitled to summary judgment on the Excessive Fees Claim because Plaintiffs have not established a genuine issue of fact to support either that (1) Home Depot Defendants breached their fiduciary duties by offering the Professional Management program to Plan participants or (2) the fees participants paid for Professional Management caused a loss to the Plan.

i. Home Depot Defendants' Monitoring of FE's and AFA's Fees

As an initial matter, the Court recognizes that Judge Ray previously highlighted record evidence

163. ECF 53 (Am. Compl.), ¶¶ 34-73, 176-86; *see also id.* ¶¶ 211-16 (charging each Defendant with a failure to monitor the performance of other fiduciaries).

"demonstrating genuine issues of material fact as to the elements of Plaintiffs' Excessive Fee [C]laim":

- As to Home Depot Defendants' ongoing process for monitoring the fees charged by FE and by AFA, Plan Committee meeting minutes suggests: (1) that the fiduciaries neither investigated nor discussed whether the asset-based fee rate FE or AFA charged was reasonable relative to the services they performed;

- As to the reasonableness of FE's and AFA's fees, readily available public documents suggested that FE and AFA operate in a highly competitive market, that other service providers offered comparable investment advisory services at lower rates than those FE and AFA charged, and that FE and AFA charged lower rates to other plans they serviced;

- As to the alleged "kick-back" arrangement between FE and Aon Hewitt, Curcio Webb cautioned Home Depot Defendants that they should monitor the arrangement closely to ensure the fees FE remitted to Aon Hewitt were not "unreasonably high"; and

- Regarding the retention of AFA after the "kick-back" payments were eliminated, evidence that Home Depot Defendants did

> not engage in a competitive bidding process, conduct a market survey of fees, or inquire into whether the fees charged by AFA were reasonable.[164]

For purposes of the instant summary judgment motions the Court adopts Judge Ray's findings as they relate to evidence of Home Depot Defendants' breach of their fiduciary duties concerning Plaintiffs' Excessive Fees Claim. But this is not the end of the inquiry, because to prevail Plaintiffs must demonstrate loss causation as a matter of law, or at least demonstrate a genuine issue of material fact concerning same to defeat Home Depot Defendants' motion.

ii. Loss Causation

As discussed above Plaintiffs bear the burden to show that Home Depot Defendants' breach proximately caused a loss to the Plan. 29 U.S.C. § 1109; *Willett*, 953 F.2d at 1343-44. Regardless of any imprudent process, if a plan fiduciary selects an objectively prudent service or investment option, the plan has not suffered a loss, and the element of loss causation is wanting. That is, a plaintiff "must show that no reasonable fiduciary would have maintained the investment [or service] and thus [the defendants] would have acted differently" absent the alleged breach. *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1127 (D. Colo. 2020) (cleaned up), *aff'd*, 1 F.4th 769 (10th Cir. 2021). *See also Fink v. Nat'l Sav. & Tr. Co.*,

164. ECF 186 (Order on Mot. to Certify Class), at 71-72.

772 F.2d 951, 962, 249 U.S. App. D.C. 33 (D.C. Cir. 1985) (Scalia, J., concurring in part) ("Breach of the fiduciary duty to investigate and evaluate would sustain an action to enjoin or remove the trustee . . . or perhaps even to recover trustee fees paid for . . . services that went unperformed. But it does not sustain an action for the damages arising from losing investments. I know of no case in which a trustee who has happened—through prayer, astrology or just blind luck—to make (or hold) objectively prudent investments . . . has been held liable for losses from those investments because of his failure to investigate and evaluate beforehand.") (citation omitted); *accord Lanfear v. Home Depot Inc.*, 718 F. Supp. 2d 1364, 1382 (N.D. Ga. 2010) (collecting cases), *aff'd*, 679 F.3d 1267 (11th Cir. 2012).

a. Professional Management Fees Relative to Other FE and AFA Clients

Plaintiffs have not adduced sufficient evidence to show a disputed issue of material fact concerning whether Home Depot paid excessive fees relative to other FE or AFA clients. In fact, quite the contrary. Expressed as a per capita fee (*i.e.*, dollars per participant), it is undisputed that Plan participants paid lower fees to FE and AFA for Professional Management throughout the Class Period than participants in almost all other plans serviced by FE and AFA.[165] Based on information sought and obtained by Plaintiffs, the Plan's average per capita fees for Professional Management in every year between 2012

165. ECF 228-2 (Defs.' SUMF), ¶ 154.

and 2020 were lower than those FE and AFA assessed to at least 96% of other plans.[166] From 2014 through 2017 and in 2019, the fees were lower than those assessed to 99% of FE and AFA customers.[167]

Plaintiffs insisted at oral argument that a per capita expression of fees is misleading because fees are advertised and assessed as basis points, *i.e.*, the rate that Plan participants paid based on their assets under management.[168] The Court disagrees. It is undisputed that throughout the Class Period the Plan had a substantial pool of assets contributed to by a high number of participants with low average account balance, as compared to other plans serviced by FE and AFA.[169] Plaintiffs have not marshalled any evidence to account for why Professional Management fees expressed in basis points, rather than per capita, more accurately captures the Plan's unique low average participant balance relative to its high total number of participants, or otherwise better "fit" the Plan's circumstances.[170]

---

166. *Id.*

167. *Id.*

168. ECF 332 (Trans. of Mot. H'g), at 157:21; *see also* ECF 270 (Pls.' Resp.), at 13-14.

169. ECF 233-20 (Defs.' Ex. 150) (Gissiner Supp. Rep.), ¶ 9.

170. Plaintiffs do not contest the prudence of the Plan Access Fee; rather, the Excessive Fees Claim takes aim at the prudence of fees paid for Professional Management. Even assuming that his opinion is admissible, Dr. Buetow's regression analysis accounts for the Plan Access Fee and Professional Management fees but

Moreover, because of the Plan's unique composition, most Plan participants were concerned exclusively with the Top-Tier Fee. Evidence shows that the Top-Tier Fee, even expressed in basis points, was the same as or lower than all FE- and AFA-managed plans with an average participant balance lower than the Plan's.[171] And the Plan's Top-Tier Fee in basis points was the same as or equal to at least half of other plans under FE's and AFA's management, regardless of their volume of participants or total Plan assets under management.[172]

Put simply, Plaintiffs have failed to adduce evidence to show why the Plan's fees for Professional Management, expressed in basis points *or* per capita, were imprudent or imprudently bargained, let alone a result of anything other than the Plan's unique characteristics.[173]

---

does not account for the total number of participants in comparator plans. ECF 233-26 (ECF 250-13) (Am. Buetow Rep.), ¶ 2. Plaintiffs maintain that the total fees paid is an appropriate variable for Dr. Buetow's model because Professional Management fees are the "chief component" thereof. ECF 270 (Pls.' Resp.), at 19. The Court finds this argument unpersuasive. *Cf. Winn-Dixie Stores, Inc. v. Dolgencorp*, LLC, 746 F.3d 1008 (11th Cir. 2014) (affirming exclusion of regression analysis for lack of "fit" between what the analysis purported to measure and what it, in fact, measured).

171. ECF 233-20 (Defs.' Ex. 150) (Gissiner Supp. Rep.), at 25 (Ex. 6, Average Professional Management Member Balance and "Top-Tiered" Professional Management Fee).

172. *Id.* ¶ 18.

173. *Cf. id.* ¶ 9 (explaining that, if FE's and AFA's costs are driven primarily by the number of participants they must advise, rather than the amount of assets they manage, then they must charge

b. The Plan's Other Options for Professional Managed Account Services

Plaintiffs also failed to marshal any evidence that *no prudent fiduciary* in Home Depot Defendants' proverbial shoes would have selected FE or AFA over other managed account providers.

Plaintiffs point to competitor professional managed account services providers and insist that Home Depot Defendants "could have achieved lower fees for the same services" FE and AFA provided.[174] However, as Home Depot Defendants asserted at oral argument, Plaintiffs mistake competitors for comparators.[175] The evidence shows that, in filings with the Securities and Exchange Commission, FE identified Morningstar, GuidedChoice, and ProManage as "[d]irect competitors that offer portfolio management and investment advisory services to [401(k)] plan participants," but that does not mean these companies are appropriate comparators.[176]

Even if Plaintiffs adduced evidence to raise a disputed material fact as to whether these companies

a higher rate, *i.e.*, more in basis points, to account for the cost of providing investment advice).

174. ECF 270 (Pls.' Resp.), at 14.

175. ECF 332 (Trans. of Mot. H'g), at 96:20.

176. ECF 270-2 (Pls.' SAMF), ¶ 4; ECF 271-12 (Pls' Ex. 172) (Buetow Rebuttal Rep.), at 8-9; ECF 272-35 (Pls.' Ex. 235) (FE Securities and Exchange Form 10-K), at 14.

were appropriate comparators, a higher fee alone does not compel the conclusion that the fees charged to a plan are excessive; instead, fees must be evaluated "relative to the services rendered." *Young v. Gen. Motors Inv. Mgmt. Corp.*, 325 F. App'x 31, 33 (2d Cir. 2009). Here, the undisputed record evidence shows that Plaintiffs' identified competitors were not apt for apples-to-apples comparison based on the services they provided throughout the Class Period.[177] More importantly, though they disagree and argue that other professional managed account services offered Professional Management similar to FE's or AFA's, Plaintiffs offer no evidence that any of these providers were both less expensive *and* satisfied the Plan's goals as well as or better than FE and AFA.[178] Likewise, evidence that Aon Hewitt demonstrated a willingness to work to integrate its recordkeeping service with other companies' professional managed account services,[179] and that such an alternative arrangement (were it to exist) might have been less expensive because other Professional Management providers were generally less expensive, is not evidence that FE's and AFA's Professional Management fees were objectively imprudent.

There is no evidence that Home Depot Defendants' actions or inactions caused the Plan a loss. Plaintiffs merely assert that the hypothetical prudent fiduciary could have

---

177. *See supra* Section I.A.2.iii.c.; ECF 270-1 (Pls.' RSUMF), ¶¶ 155-69.

178. *See generally* ECF 235-2 (Nov. 22, 2013 IPS); ECF 235-3 (Dec. 5, 2014 IPS).

179. ECF 270 (Pls.' Resp.), at 22.

done better by selecting another provider for Professional Management. But what Plaintiffs fail to do is demonstrate with record evidence a disputed issue of material fact that it was *imprudent* for Home Depot Defendants to select FE or AFA at the time. Such post hoc arguments as Plaintiffs make routinely fail in the context of an ERISA breach of fiduciary duty claim, and they fail here. *Cf. Ellis v. Fid. Mgmt. Tr. Co.*, 883 F.3d 1, 10 (1st Cir. 2018) (noting that "[w]hether a fiduciary's actions are prudent cannot be measured in hindsight," and affirming summary judgment on the plaintiffs' prudence claims because "plaintiffs lacked any evidence that any of the decisions made . . . were unreasonable under the circumstances."); *Pension Benefit Guard Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) (affirming grant of 12(b)(6) motion because amended complaint only alleged that investments were improper with the benefit of hindsight); *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 219 (4th Cir. 2011) (vacating trial judgment for lack of loss causation showing where district court "never found that the failure to investigate investment options led to imprudent investments or otherwise found that the investments were objectively imprudent"); *Wilcox v. Georgetown Univ.*, No. CV 18-422 (RMC), 2019 U.S. Dist. LEXIS 3082, 2019 WL 132281, at *12 (D.D.C. Jan. 8, 2019) ("Indeed, the Plans could be transformed from what they are to something else. But Plaintiffs provide no evidence that the three entirely different investment platforms . . . would agree to continue the same offerings at a lesser, or combined, recordkeeping price; nor have they identified any [plan] that has accomplished that feat.") (citing *Gartenberg v. Merrill Lynch Asset Mgmt.*, 694 F.2d

923, 928 (2d Cir. 1982) (noting that, in an excessive fees claim, whether a fiduciary violates its duty of prudence requires that "the advisor-manager must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining")).

Because Plaintiffs failed to establish evidence of loss causation concerning their Excessive Fees Claim, much less show a disputed issue of material fact concerning same, Plaintiffs' motion for partial summary judgment in this regard is **DENIED** and Home Depot Defendants' summary judgment motion regarding same is **GRANTED**.

2. The Challenged Funds Claims

Home Depot Defendants next move for summary judgment as to the Challenged Funds Claims, arguing that they did not breach their fiduciary duties vis-à-vis each of the Challenged Funds, and further that Plaintiffs cannot show any such breach caused a loss to the Plan. Plaintiffs counter that they have adduced sufficient evidence such that a rational finder of fact could determine that (1) Home Depot Defendants retained each Challenged Fund because of a deficient monitoring process (*i.e.*, procedural imprudence), and (2) each Challenged Fund underperformed the market causing a loss to the Plan (*i.e.*, substantive imprudence).[180] Plaintiffs also cross-move for summary judgment as to the BlackRock TDFs, insisting

180. *See generally* ECF 228-1 (Defs.' Summ. J. Br.); ECF 265-1 (Defs.' Resp.); ECF 283-1 (Defs.' Reply).

that the evidence there proves as a matter of law that Home Depot Defendants' failure to monitor the BlackRock Funds caused a loss to the Plan.[181]

Fiduciaries have a "continuing duty to monitor investments and remove imprudent ones." *Tibble*, 575 U.S. at 530. The "absence of a deliberative process may be enough to demonstrate imprudence," but "the presence of a deliberative process does not . . . suffice in every case to demonstrate prudence." *Sacerdote v. New York Univ.*, 9 F.4th 95, 111 (2d Cir. 2021). To meet ERISA's standards, a fiduciary must "vigorously and independently investigate the wisdom" of an investment through a process that is "intensive and scrupulous and discharged with the greatest degree of care that could be expected under all the circumstances," *Pledger*, No. 1:15-CV-4444, 2019 U.S. Dist. LEXIS 233995, 2019 WL 10886802 at *20, considering "the character and aim of the particular plan and decision at issue and the circumstances prevailing at the time." *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 299 (5th Cir. 2000) (cleaned up).

i. The BlackRock TDFs

The parties cross-move for summary judgment as to the BlackRock TDFs. Plaintiffs assert that Home Depot Defendants engaged in an imprudent process in retaining the BlackRock TDFs in three principal ways: (1) they relied exclusively on BlackRock's custom benchmark as their only benchmark for the BlackRock Funds; (2) they failed

181. *See generally* ECF 240-1 (Pls.' Summ. J. Br.).

to investigate the BlackRock TDFs' supposed consistent underperformance and make a "reasoned decision" to keep the Blackrock Funds, and (3) they failed to consider other TDFs despite that underperformance.[182] In contrast, Home Depot Defendants argue that the undisputed evidence shows that Plan fiduciaries engaged in a prudent process for monitoring the BlackRock TDFs.[183]

The Court concludes that, while the evidence is inconclusive with regard to procedural prudence, Home Depot Defendants are entitled to summary judgment because Plaintiffs failed to marshal evidence raising a genuine dispute of material fact on the element of loss causation.

a. Home Depot Defendants' Monitoring

On Home Depot Defendants' side of the ledger, there is substantial evidence that they prudently monitored the BlackRock TDFs during the Class Period. For example, the IC regularly met during the Class Period and received QIRs detailing the performance of Plan investments, including the BlackRock TDFs.[184] The IC discussed investment performance at its meetings, though the parties dispute the extent of those discussions.[185] Likewise,

182. *See* ECF 240-1 (Pls.' Summ. J. Br.), at 23-34.

183. *See generally* ECF 240-1 (Pls.' Summ. J. Br.).

184. ECF 228-2 (Defs.' SUMF), ¶ 32.

185. ECF 270-2 (Pls.' SAMF), ¶¶ 122-40.

AHIC and BlackRock representatives presented to the IC during the Class Period, though the parties dispute the import and content of those presentations.[186]

Plaintiffs counter that this evidence is not enough to demonstrate procedural prudence as a matter of law, and they identify evidence that calls into question Home Depot Defendants' general monitoring practices. For example, the IC did not always exhibit full attendance at its meetings, and Plaintiffs pan the amount of time the IC routinely devoted to evaluating the Plan's entire slate of investments as too short.[187] Plaintiffs also critique the IC's lack of documented discussion of alternative TDFs (as well as small cap funds or stable value funds amid fund underperformance),[188] or any articulated rationale for retaining the Challenged Funds, including the BlackRock TDFs.[189]

Faced with this imperfect record, *DiFelice v. U.S. Airways, Inc.*, is instructive. There, the district court found *after a bench trial* that the defendant, through its investment committee, affirmatively "met its fiduciary

186. *Id.* ¶¶ 126-40.

187. *See* ECF 270-1 (Pls.' RSUMF), ¶ 22; ECF 265-2 (Defs.' RSUMF), ¶¶ 49-51, 53, 112.

188. *See* ECF 265-2 (Defs.' RSUMF), ¶¶ 125, 135; ECF 265-3 (Defs.' SAMF), ¶ 74; *see also* ECF 265-2 (Defs.' RSUMF), ¶¶ 44-45 (citing testimony that the minutes captured the "relevant and salient points" of discussion).

189. *See* ECF 265-3 (Defs.' SAMF), ¶ 75.

duty." 497 F.3d at 421. On review, considering that the defendant's investment committee formally met four times and informally met to discuss the disputed fund, discussed whether to continue to offer the disputed fund, and twice sought outside "legal opinions" that suggested it was prudent to retain the disputed fund, the Fourth Circuit found the district court's factual findings and trial judgment "unassailable." *Id.* The Fourth Circuit was particularly persuaded by the fact that the defendant twice engaged outside advisors, as Home Depot Defendants have likewise done here. *Id.* (quoting *Donovan*, 680 F.2d at 271 and *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996)) ("We stress that U.S. Airways *twice* engaged independent advisors . . . . Although plainly independent advice is not a 'whitewash,' . . . it does 'provide evidence of a thorough investigation.'").

Notwithstanding the analogous record, *DiFelice* followed a bench trial, whereas here the parties are each asking the Court to rule in their favor as a matter of law. For the reasons described above and that will be described further below, Home Depot Defendants have put forth more than sufficient evidence to defeat Plaintiffs' motion for summary judgment on procedural prudence grounds. And although the standard is objective prudence, not perfect prudence, the Court finds that Plaintiffs have identified sufficient disputed issues of material fact concerning the quantum and quality of Home Depot Defendants' monitoring activities to warrant a denial of their summary judgment motion on procedural prudence grounds as well. *Cf. Shaw v. Conn. Gen. Life Ins.*, 353 F.3d 1276, 1282, 1286 (11th Cir. 2003) (reversing the district court's grant of summary judgment and remanding for a bench trial because district courts are not permitted to weigh evidence when considering ERISA claims at the summary judgment stage).

The Court now turns to address Plaintiffs' more granular critiques of Home Depot Defendants' procedural prudence regarding the BlackRock TDFs.

1. Use of the BlackRock Custom Benchmarks and Consideration of Peer Funds

Plaintiffs first assert that looking only to the BlackRock TDFs custom benchmarks meant that the IC compared the BlackRock TDFs "against themselves," not peer funds, in contravention of the Plan's IPSs.[190] Home Depot Defendants counter that custom benchmarks are intended to compare a TDF against its own glide path and that this fact, by itself, does not evidence an imprudent process.[191]

Plaintiffs also argue that a Department of Labor regulation's requirement that certain ERISA fee disclosures to Plan participants use only "broad-based" indexes like the S&P 500 means that the IC was imprudent to rely on custom benchmarks in deciding to add or retain

190. ECF 270 (Pls.' Resp.), at 21-25.

191. ECF 233-22 (Wermers Rep.), ¶ 116.

the BlackRock TDFs.[192] By its plain text and per Plaintiffs' argument, the regulation deals with disclosures to Plan *participants*, not the benchmarks on which fiduciaries are permitted to rely as part of a prudent monitoring process. Plaintiffs do not allege that Home Depot Defendants violated the regulation, nor does the Court see a clear link to the regulation in the record. The regulation has no demonstrable connection to the prudence of including custom benchmarks in the IC's monitoring process, and therefore is unhelpful in evaluating Home Depot Defendants' liability.

Plaintiffs point to the fact that the Plan and BlackRock publicly identified the S&P 500 as a benchmark for the BlackRock TDFs in disclosure materials during the Class Period.[193] Plaintiffs argue that this is evidence that the S&P 500 is an appropriate benchmark for the BlackRock TDFs, and that the IC should have used it rather than the custom benchmarks.[194] Home Depot Defendants counter that because the S&P 500 generally tracks the stock market's performance, it is an inappropriate benchmark for TDFs due to their structure and function. The thrust of Home Depot Defendants' argument is that just because other benchmarks may have been available is not evidence that the IC's use of only the custom benchmark is imprudent.

---

192. *See* ECF 270 (Pls.' Resp.), at 24 (citing 29 C.F.R. § 2550.404a-5(d)(1)(iii)).

193. ECF 240-2 (Pls.' SUMF), ¶ 75.

194. *See* ECF 270 (Pls.' Resp.), at 25-26.

Home Depot Defendants offer a few cases for the proposition that the Plan's and BlackRock's identification of the S&P 500 as a benchmark[195] for the BlackRock TDFs does not mean it should have been used in place of the custom benchmark. *See Wilcox*, No. CV 18-422 (RMC), 2019 U.S. Dist. LEXIS 3082, 2019 WL 132281, at *11; *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 485 n.4 (8th Cir. 2020). Plaintiffs distinguish these cases insofar as the challenged fund in each was not a TDF. But that distinction is unavailing.

In *Wilcox*, faced with the same Department of Labor regulation Plaintiffs reference here, the court granted the defendants' motion to dismiss and disallowed plaintiffs to allege in their complaint that the "[d]efendants and [the institutional asset manager] identified the [broad-based index] as *the appropriate benchmark* to evaluate the [challenged fund]." 2019 U.S. Dist. LEXIS 3082, 2019 WL 132281, at *11 (emphasis added). The court noted that, due to the Department of Labor regulation, "[p]lan [p]articipant disclosures reference only the [broad-based index] component of the benchmark," even though "the [challenged fund] explains that the appropriate benchmark is a composite of the [broad-based index] and [another index]." *Id.* Because the broad-based index was merely a component of the composite benchmark, which the challenged fund identified as the appropriate benchmark, the court found that the plaintiffs' allegation

195. ECF 228-2 (Defs.' SUMF), ¶¶ 75-76. Indeed, Plaintiffs marshal evidence that the Plan's participant disclosures identified the S&P 500 as the "primary" benchmark for the BlackRock TDFs. ECF 248-5.

"oversimplifie[d] and misstate[d] the facts and governing law"; the plaintiffs' argument that the defendants were imprudent because the challenged fund underperformed the broad-based index was accordingly "without merit." *Id. See also Davis*, 960 F.3d at 485 n.4 (affirming dismissal of an ERISA breach of fiduciary duty claim, and explaining that a passively managed index fund was an inappropriate "apples and oranges" benchmark for an actively managed variable annuity).

The fact that other benchmarks may have been available—or were highlighted by the Plan and BlackRock—is not evidence that the custom benchmarks used by the IC were imprudent. Likewise, that other TDFs with different strategic approaches (*i.e.*, different glide paths) were available for comparison, too, is not material to affirmatively demonstrating a breach of fiduciary duty. These "apples and oranges" comparisons are disfavored time and again. *See, e.g., Davis*, 960 F.3d at 485 (disallowing a comparison between the challenged (partly actively managed) fund and three actively managed funds with different asset mixes, and noting that "[t]hey are closer, but not close enough."); *Wehner v. Genentech, Inc.*, No. 20-cv-06894-WHO, 2021 U.S. Dist. LEXIS 111341, 2021 WL 2417098, at *8 (N.D. Cal. June 14, 2021) (concluding identification of S&P indices and six retail TDFs was not enough, without more, to support a claim of imprudence as to challenged TDF); *Parmer v. Land O'Lakes, Inc.*, 518 F. Supp. 3d 1293, 1306-07 (D. Minn. 2021) (granting motion to dismiss where "a simple comparison of the non-target fund prospectuses and their actively managed comparators reveal[ed] glaring differences beyond each fund's investment type and management style"); *Wilcox*, 2019 U.S. Dist. LEXIS 3082, 2019 WL 132281, at *11 (dismissing the plaintiffs' argument that "other[ ] low-cost actively and passively managed investments . . . were available"); *see also Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018) (Plaintiffs cannot "dodge the requirement for a meaningful benchmark by merely finding a less expensive alternative fund or two with some similarity.").

Plaintiffs also insist Home Depot Defendants contravened the Plan IPSs because the IC solely utilized the custom benchmark.[196] It is true that a fiduciary's contravention of the IPS is evidence that it did not engage in a prudent monitoring process. *Dardaganis v. Grace Cap.*, 889 F.2d 1237, 1241 (2d Cir. 1989) (indicating that failure to follow the governing documents is both evidence of fiduciary breach and "may, in itself, be a basis for liability under [29 U.S.C.] section 1109"). *But see Tussey v. ABB, Inc.*, 746 F.3d 327, 334 n.5 (8th Cir. 2014) (expressing "concern[ ]" that "construing all investor policy statements as binding plan documents will discourage their use . . . ."). However, the recommended IPSs stated that the IC should evaluate the BlackRock TDFs relative to a "universe of similar funds and applicable benchmarks," and listed the custom benchmarks as applicable to the BlackRock TDFs.[197] At any rate, for the reasons stated above Plaintiffs have not adduced undisputed evidence of

196. *See* Pls.' Reply at 12-14.

197. *See, e.g.*, ECF 245-7 (Pls.' Ex. 7) (Nov. 22, 2013 IPS); ECF 245-8 (Pls.' Ex. 8) (Dec. 5, 2014 IPS).

an applicable benchmark that would fall in the "universe of similar funds," as is their burden to warrant summary judgment in their favor.

Plaintiffs finally argue on this point that the IC failed to discuss how the BlackRock custom benchmarks worked or whether they were appropriate for the BlackRock TDFs according to the Plan's IPSs.[198] Plaintiffs insist that the IC's meeting minutes do not reflect that the IC ever discussed other TDF benchmarks or their rationale for measuring the BlackRock TDFs only against the custom benchmark.[199] Home Depot Defendants point to evidence that the IC did compare the returns for the BlackRock TDFs against the returns of other TDFs periodically throughout the Class Period.[200]

Plaintiffs have not shown that there is no genuine dispute of material fact that Home Depot Defendants considered only the custom benchmark throughout the Class Period[201] or that, even if they did, it was necessarily

198. ECF 240 (Pls.' MSJ Br.) at 26-27.

199. *Id.* at 27.

200. *See* ECF 265 (Defs.' Opp.) at 28-29; *see also* ECF 245-21 (Pls.' Ex. 21) Oct. 21, 2014 and Dec. 5, 2014 IC Meeting Minutes), at 12, 16.

201. *See* ECF 265-1 (Defs.' Resp.), at 27 (identifying IC materials from points throughout the Class Period that discuss the BlackRock TDFs' glide path and performance relative to other TDFs); ECF 246-8 (Pls.' Ex. 48) (4Q 2015 Quarterly Investment Review) (containing S&P 500 performance alongside an analysis of the BlackRock TDFs' performance).

imprudent to do so as a matter of law. Nor have Home Depot Defendants established the reverse as a matter of law. Accordingly, neither side is entitled to summary judgment on this basis.

2. BlackRock TDFs' Underperformance

Plaintiffs next argue that Home Depot Defendants ignored "blatant" evidence of underperformance by the BlackRock TDFs, establishing their procedural imprudence as a matter of law.[202] Home Depot Defendants do not dispute that the BlackRock Funds underperformed from 2013-15, when some of the BlackRock TDFs ranked near the bottom of their peer group for 3- and 5-year periods.[203] However, Home Depot Defendants argue that (1) neither the IPS nor the IC took the position that only three- and five-year periods adequately reflect a fund's performance;[204] (2) ERISA law shows, and their procedure expert agrees, that fiduciaries might prudently decide to retain funds through periods of underperformance[205];

202. *See* ECF 240-1 (Pls.' Summ. J. Br.), at 27-32.

203. *See* ECF 245-4 (Pls.' Ex. 4) (showing percentile ranking consistently below median for eight consecutive quarters from 2013-2015, with certain Funds ranking in the bottom 90th-99th percentile of all peer group funds).

204. *See* ECF 283-1 (Defs.' Reply), at 22 (citations omitted). The QIRs the IC received reported ten-year performance, too. *See, e.g.*, ECF 246-4 (Pls.' Ex. 44) (4Q 2014 QIR).

205. *See* ECF 283-1 (Defs.' Reply), at 22 (citing *White v. Chevron Corp.*, No. 16-cv-0793-PJH, 2017 U.S. Dist. LEXIS 83474, 2017 WL 2352137, at *20 (N.D. Cal. May 31, 2017)).

and (3) the BlackRock TDFs were a popular choice among large 401(k) plans throughout the Class Period.[206]

The Court declines to award Plaintiffs summary judgment based on the BlackRock TDFs' short period of underperformance, which the Court finds to be immaterial. First, regarding the IPSs, neither Plaintiffs nor Home Depot Defendants are quite right. The IPSs are vague regarding the appropriate benchmarking period by which the IC was to evaluate performance, but they clearly show that the IC made "the assumption that, during a five-year time span, fluctuations of the market may generally balance out and provide a fair reflection of the fund's performance."[207] Plaintiffs are wrong insofar as the IPSs do not endorse the idea that the BlackRock TDFs should have been removed after eight consecutive quarters of underperforming their peer group median on both a three-and five-year basis.[208] Nor are Home Depot Defendants justified in using the IPSs' vagueness as a shield to liability based on any period of underperformance. If Home Depot Defendants' position were law, it would render IPSs a nullity or, worse still, fiduciaries would have incentive to intentionally craft vague policy statements to avoid liability. Such a position makes for bad public policy and it is unsupported by the bulk of the authorities. *See* 29 U.S.C. § 1104(a)(1)(D); 29 C.F.R. § 2509.08-2, 73 FR 61731-01, 2008 WL 4600732,

---

206. *See* ECF 265-1 (Defs.' Resp.), at 23-24.

207. *See* ECF 245-7 (Pls.' Ex. 7) (Nov. 22, 2013 IPS); ECF 245-8 (Pls.' Ex. 8) (Dec. 5, 2014 IPS).

208. ECF 265-2 (Defs.' RSUMF), ¶ 100.

at * 61733 (Oct. 17, 2008); *Dardaganis*, 889 F.2d at 1241; *but see Tussey*, 746 F.3d at 334 n.5. All in all, IPSs are best thought of as evidence, not an edict; here, they do not support either side's position as a matter of law.[209]

Second, to the extent that Plaintiffs argue the BlackRock TDFs' underperformance relative to their peer group for three- and five-year periods in the 2013-15 window alone evidences the IC's imprudence and demonstrates Home Depot Defendants' breach of a fiduciary duty as a matter of law, they are plainly wrong. As Home Depot Defendants explain, courts have held that "the common practice of retaining investments through periods of under-performance as part of a long-range investment strategy is plainly permitted." *White v. Chevron Corp.*, No. 16-cv-0793-PJH, 2017 U.S. Dist. LEXIS 83474, 2017 WL 2352137, at *20 (N.D. Cal. May 31, 2017).

That notwithstanding, Plaintiffs' efforts to highlight other TDFs that the IC *might have selected* falls short. The fact that some target-date funds might have posted higher returns on a short-term basis does not mean that they were necessarily superior, or even desirable, options for the Plan, or that they met the Plan's goals. For the reasons discussed above, Plaintiffs have not shown that the other broad-based indexes and TDFs they reference

209. The same is true for the other Challenged Funds, to the extent Plaintiffs argue one lookback period or another was violative of or preferred by the IPSs.

are apt comparators to the BlackRock TDFs.[210] At this stage the Court will not credit Plaintiffs' arguments regarding the BlackRock TDFs' performance relative to these other funds, which exhibit different investment strategies and "through-retirement" glide paths instead of "to-retirement" glide paths. And more to the point, evaluating this argument requires weighing the evidence and determining that Home Depot Defendants' decision to retain the BlackRock TDFs in favor of other TDFs through this period of underperformance *was in fact* part of the IC's long-range investment strategy; a step too far at summary judgment.

Third, Home Depot Defendants' argument that the BlackRock TDFs were a popular choice among other large 401(k) plans throughout the Class Period raises a dispute of material fact as to procedural prudence that precludes summary judgment for Plaintiffs and Home Depot Defendants alike.[211] Home Depot Defendants correctly note that evidence of other plans' investments in the BlackRock TDFs is probative of and rebuts Plaintiffs' theory that retaining the BlackRock TDFs during the Class Period constituted imprudence. *See Ramos*, 461 F.

---

210. *See* ECF 245-3 (Pls.' Ex. 3) (showing underperformance on a one-, three-, and five-year basis compared to the S&P 500 from 2011-2019); ECF 245-5 (Pls.' Ex. 5) (showing consistent annualized underperformance compared to the BlackRock Mutual Fund TDFs in all but a single year from 2013-2019); ECF 289-26 (Pls.' Ex. 286) (showing annualized underperformance compared to Vanguard, Fidelity, and T. Rowe Price from 2012-2015).

211. ECF 265-1 (Defs.' Resp.), at 23-24. The same is true for similar evidence regarding other Challenged Funds.

Supp. 3d at 1129 (finding investments not to be imprudent in part because "[a]t least 30 other megaplans offered the [funds] at the time" the plaintiffs claimed the defendants should have divested from those funds). Of course, whether other plans used the BlackRock TDFs does not necessarily prove that the IC's monitoring process was prudent. The crux of Plaintiffs' argument is that the IC "failed to investigate or even express a modicum of concern about the BlackRock TDFs."[212] While they rely on gaps in the IC's meeting minutes, again an evaluation of their argument requires a weighing of evidence that is inappropriate at summary judgment.

At bottom, as Home Depot Defendants point out, ERISA requires "prudence, not prescience." *Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013). Plaintiffs have not established as a matter of law that the IC should have known that the BlackRock TDFs—given their asset allocation and the prevailing market conditions during their period of underperformance—would underperform. A slight period of unpredictable underperformance measured only in hindsight, without more, does not prove a violation ERISA. Plaintiffs' evidence that the IC failed to regularly compare the performance of the BlackRock Funds to that of superficially dissimilar TDFs or indices is insufficient to warrant summary judgment in their favor. But it does suffice to defeat Home Depot Defendants' motion concerning the BlackRock TDFs on procedural prudence grounds.

212. ECF 240-1 (Pls.' Summ. J. Br.), at 30.

b. Loss Causation

As with the Excessive Fees Claim, Home Depot Defendants argue that, even assuming an imprudent monitoring process, Plaintiffs have failed to marshal evidence of loss causation regarding the BlackRock TDFs and their claim fails as a matter of law.[213]

Specifically, Home Depot Defendants point to the following undisputed evidence of substantive prudence: (1) the BlackRock TDFs tracked their custom benchmark based on annualized returns during the Class Period, (2) BlackRock charged among the lowest fees of TDF providers, (3) the BlackRock TDFs are presently a popular target date fund suite, and (4) Home Depot Defendants' investment consultant, AHIC, consistently rated the funds as a "Buy."[214]

Plaintiffs primarily rely on the fact that, by the end of 2013, all of the BlackRock TDFs had a three-year performance that lagged their peer median, all but one performed worse than 70% of their peers on a five-year basis, and two performed worse than 97% of their peers.[215] As explained above, however, this evidence is based on Plaintiffs' utilization of TDFs with different glide paths as comparators. This "apples and oranges" comparison does not create a dispute of material fact.

---

213. *See generally* ECF 228-1 (Defs.' Summ. J. Br.).

214. *See* ECF 228-1 (Defs.' Summ. J. Br.), at 23-24.

215. *See* ECF 270 (Pls.' Resp.), at 23.

Even if the record fails to reflect that, at each of the disputed points during the Class Period, the IC affirmatively decided to retain the BlackRock TDFs because of their glide path or investment strategy,[216] this confuses breach and procedural prudence (*i.e.*, what Home Depot Defendants in fact did) with loss causation and substantive prudence (*i.e.*, that no prudent fiduciary would have done the same, and that selecting and retaining the BlackRock TDFs actually caused a loss to the Plan).

The fact that other funds posted higher returns on a three-, five- or ten-year basis does not establish that they are superior vis-à-vis the Plan's goals. Plaintiffs' lack of material evidence that *no prudent fiduciary* would have concluded that the BlackRock TDFs' performance would improve in the future (especially considering BlackRock's changes to its glide path in 2014)—underscored by Home Depot Defendants' evidence that the BlackRock TDFs tracked their custom benchmark throughout the Class Period, were popular among other large 401(k) plans, charged low fees, and were endorsed by AHIC—is ultimately fatal to Plaintiffs' claim. Otherwise, virtually every investment in a fund that ultimately underperformed relative to another would be actionable. *Cf. White*, 2017 U.S. Dist. LEXIS 83474, 2017 WL 2352137, at *20.

Accordingly, Plaintiffs' partial summary judgment motion is **DENIED**, and Home Depot Defendants'

216. *See id.* at 22; *but see* ECF 228-2 (Defs.' SUMF), ¶¶ 206-17 (collecting evidence that the IC considered and determined that the BlackRock TDFs' more conservative "to-retirement" glide path better met the Plan's goals).

summary judgment motion as to the BlackRock TDFs is **GRANTED**.

ii. JPMorgan Fund

Home Depot Defendants next move for summary judgment as to the JPMorgan Fund.

a. Home Depot Defendants' Monitoring

Plaintiffs' primary counter-argument to Defendants' motion in this regard is that IC meeting minutes from the first six quarters of the Class Period (Q2 2012 to Q3 2013) do not reflect any questions about the JPMorgan Fund, despite its relatively poor performance during this time period.[217] Home Depot Defendants respond that minutes are not verbatim transcripts of everything discussed at IC meetings so this evidence does not raise a material fact question about the prudence of their monitoring process.[218]

The record is inconclusive as to Home Depot Defendants' procedural prudence. First, only one set of meeting minutes reflects a specific question about the JPMorgan Fund, though multiple minutes reflect discussion about the fund.[219] Second, the benchmark

217. *See* ECF 270 (Pls.' Resp.), at 32.

218. *See* ECF 228-2 (Defs.' SUMF),¶ 29; ECF 240-2 (Pls.' SUMF), ¶ 44.

219. *Compare* ECF 270 (Pls.' Resp.), at 32 *with* ECF 228-2 (Defs.' SUMF), ¶¶ 174-87.

used to evaluate the JPMorgan Fund's performance was altered many times: the Plan's January 2011 IPS listed the benchmark as the Barclays Capital Intermediate Aggregate Index; the November 2013 IPS listed the CitiGroup 3 Month Treasury Bill Index; and the October 2015 IPS listed the Rolling 3 Year Constant Maturity Index.[220] The IC's meeting minutes are silent regarding the rationale for these benchmark changes.[221] Third, AHIC's QIRs inexplicably changed format.[222] While the new QIRs showed benchmark and peer percentile data for the JPMorgan Fund, the IC meeting minutes contain no discussion regarding the change in format or whether the JPMorgan Fund was meeting its IPS objectives in light of the new way AHIC presented the relevant data.[223] And finally, AHIC was aware of a 2017 lawsuit implicating the JPMorgan Fund's investments that resulted in a settlement and did not recommend the IC take any action.[224] None of this evidence establishes

220. *See* ECF 245-7 (Pls.' Ex. 7) (Nov. 22, 2013 IPS), at 7; ECF 273-19 (Pls.' Ex. 254) (Jan. 7, 2011 IPS), at 7; ECF 273-20 (Pls.' Ex. 255) (Oct. 15, 2015 IPS), at 7; ECF 273-26 (Pls.' Ex. 261) (chart showing differences between JPMorgan Fund's IPS benchmark vs. benchmark used in Discussion Guides); ECF 283-2 (Defs.' RSAMF), ¶ 79.

221. *See* ECF 283-2 (Defs.' RSAMF), ¶ 79.

222. *Compare* ECF 273-12 *(P*ls.' Ex. 247) (Q1 2012 Quarterly Investment Review), at 10 *with* ECF 245-35 (Pls.' Ex. 35) (Q3 2012 Quarterly Investment Review), at 3.

223. *See* ECF 270 (Pls.' Resp.), at 32.

224. *See* ECF 270-1 (Pls.' RSUMF), ¶ 191; ECF 232-13 (Defs' Ex. 117) (July 12, 2019 IC meeting minutes).

that Home Depot Defendants engaged in an objectively imprudent process, but it does raise a dispute of material fact as to procedural prudence.

Other evidence also supports this conclusion. For example, by the third quarter of 2013, the JPMorgan Fund had underperformed its benchmark on a five-year basis for ten consecutive quarters and on a three-year basis for fourteen consecutive quarters.[225] Accepting his opinion for purposes of this Order only, Plaintiffs' expert, Dr. Laffer, opines that a prudent fiduciary would have dropped the JPMorgan Fund after the third quarter of 2012.[226] Plaintiffs also take issue with the fact that, despite this underperformance, AHIC rated the JPMorgan Fund as a "Buy,"[227] but the IC minutes do not reflect any questions about the JPMorgan Fund's underperformance or AHIC's rationale for the "Buy" rating.[228] And Plaintiffs point out that, from the start of the Class Period through the end of 2013, AHIC's Discussion Guides reported a different benchmark for the JPMorgan Fund than the benchmark

225. *See* ECF 283-2 (Defs.' RSAMF), ¶ 81; ECF 273-25 (Pls.' Ex. 260) (JPMorgan Stable Value Fund 3-Year and 5-Year Quarterly Performance Relative to Peer Universe and Benchmark).

226. *See* ECF 283-2 (Defs.' RSAMF), ¶ 80; ECF 250-12 (Pls.' Ex. 132) (Laffer Rep.), ¶ 48.

227. *See* ECF 283-2 (Defs.' RSAMF), ¶ 82; ECF 240-20 (Pls.' Ex. 20) (2013 IC Meeting Minutes).

228. *See* ECF 283-2 (Defs.' RSAMF), ¶ 82; ECF 240-19 (Pls.' Ex. 19) (2012 IC Meeting Minutes); ECF 240-20 (Pls.' Ex. 20) (2013 IC Meeting Minutes).

in the IPS.[229] Nothing in the record suggests that the IC discussed this discrepancy.

Taken together, these tranches of evidence raise a dispute of material fact as to procedural prudence with respect to the JPMorgan Fund.

b. Loss Causation

Home Depot Defendants also challenge Plaintiffs' evidence supporting loss causation. Plaintiffs contend that a prudent fiduciary would have removed the JPMorgan Fund from the Plan by the third quarter of 2013.[230] Plaintiffs base this claim on evidence that, by this point in time, the Fund's trailing three-year performance had underperformed its benchmark for fourteen consecutive quarters, and its trailing five-year performance had underperformed its benchmark for ten consecutive quarters.[231] Home Depot Defendants argue that Plaintiffs' focus on returns to assess the prudence of a stable value fund is conceptually flawed, particularly since it is undisputed that the JPMorgan Fund never lost money for participants during the Class Period.[232] The Court agrees with this assessment.

---

229. *See* ECF 283-2 (Defs.' RSAMF), ¶ 85 (citations omitted) (comparing the November 2012 Discussion Guide with the November 2012 IPS).

230. *See* ECF 270 (Pls.' Resp.), at 34.

231. *See id.*

232. *See* Defs.' Reply (Doc. 283-1), at 19-20.

Home Depot Defendants contend that the purpose of a stable value fund is to preserve capital, not to seek high returns, as in the case of mutual funds or index funds.[233] According to the 2013 IPS, the JPMorgan Fund's purpose was to:

> preserve the value of money invested, perform better than the average money market fund, and earn consistent, reliable returns by investing in a high quality fixed income portfolio combined with investment contracts which are issued by insurance companies and banks to stabilize the value and returns of the fund, even when markets are volatile.[234]

It is accordingly undisputed that the JPMorgan Funds goals were to stabilize and preserve the value of invested sums, earn modest returns on invested sums, and perform better than the average money market fund. Put differently, the JPMorgan Fund was designed to be unfailingly conservative.

With this purpose in mind, Home Depot Defendants point to their expert Dr. Wermers's report for the contention that the JPMorgan Fund's ten-year performance exceeded all benchmarks that the IC used during the Class Period. Plaintiffs complain that Dr. Wermers's report only

233. ECF 228-2 (Defs.' SUMF), ¶ 171; ECF 233-22 (Wermers Rep.), ¶ 129.

234. ECF 231-32 (JPMorgan Fund Performance Measurement Standards), at 7.

measured the JPMorgan Fund against the benchmarks included in AHIC's presentations, for only the specific years that AHIC reported the respective benchmarks, and does not include, *e.g.*, the Barclays Capital Intermediate Aggregate Index, which was the IPS-designated benchmark from November 2012 to November 2013.

While Plaintiffs take issue with the IC's use of AHIC's benchmark rather than the IPS-designated benchmark, that debate bears only on procedural prudence, *i.e.*, whether the IC violated the IPS in using AHIC's recommended benchmark as part of its monitoring process. As far as substantive prudence is concerned, Plaintiffs marshal no material evidence that the benchmarks the IC in fact used were inappropriate such that no prudent fiduciary would have retained the JPMorgan Fund based on AHIC's proffered benchmarks.

Instead, Plaintiffs argue that the Court should disregard the JPMorgan Fund's solid long-term performance because the benchmark used was "an exceedingly low hurdle."[235] But Plaintiffs "offer no authority, and [the Court is] aware of none, holding that a plan fiduciary's choice of benchmark, where such benchmark is fully disclosed to participants, can be imprudent by virtue of being too conservative." *Ellis v. Fid. Mgmt. Tr. Co.*, 883 F.3d 1, 10 (1st Cir. 2018) (affirming the district court's grant of summary judgment where a stable value fund's returns exceeded money market funds' returns throughout the class period, reasoning it would be unclear at trial "by what standard a jury could find

235. ECF 270, at 40-42.

a disclosed choice of benchmark to be imprudent as 'too conservative.'").

Accordingly, Home Depot Defendants' summary judgment motion is **GRANTED** as to the JPMorgan Fund claim.

iii. Small Cap Funds

Finally, Home Depot Defendants move for summary judgment on Plaintiffs' Small Cap Funds claims.

a. TS&W Fund

1. Home Depot Defendants' Monitoring

With respect to the TS&W Fund, Plaintiffs contend that the Investment Committee was imprudent by failing to remove the Fund after it underperformed IPS objectives from the second quarter of 2010 to the second quarter of 2012.[236] Plaintiffs argue, as with other Challenged Funds, that the IC's meeting minutes reflect a dearth of thorough inquiry into the TS&W Fund's performance and that the IC "passively accepted" AHIC's representations that the TS&W Fund was performing well during this period.[237] Home Depot Defendants respond that the record belies Plaintiffs' contentions.

---

236. *See* ECF 270 (Pls.' Resp.), at 25-26.

237. *See id.* at 26.

By March 31, 2012, the TS&W Fund had performed below its peer group median for nine consecutive quarters.[238] The Fund underperformed 99% of peers on a three-year basis and 83% of peers on a five-year basis.[239] The Fund had also underperformed its benchmark on a three-year basis.[240] This pre-Class Period underperformance is plainly not actionable.[241] Nevertheless, Plaintiffs highlight it and, relying on the gaps in the IC's meeting minutes, aver that the IC did not act on it during the Class Period. For instance, Plaintiffs point out that, at the IC's May 2012 meeting, the IC did not have a substantive discussion about the TS&W Fund's three- or five-year performance relative to peers, or its three-year underperformance relative to its benchmark.[242]

Though questions with this specificity were not documented in the 2012 meeting minutes, Home Depot Defendants contend that the IC's minutes reflect a

---

238. *See* ECF 283-2 (Defs.' RSAMF), ¶ 50; ECF 272-29 (Pls.' Ex. 229) (TS&W Small Cap Value Fund 3-Year and 5-Year Quarterly Performance Relative to Peer Universe and Benchmark).

239. *See* ECF 283-2 (Defs.' RSAMF), ¶ 50; ECF 273-12 (Pls.' Ex. 247) (1Q 2012 PRIME Report), at 11, 15, 48.

240. *See* ECF 273-12 (Pls.' Ex. 247) (1Q 2012 PRIME Report), at 14.

241. To the extent Plaintiffs argue that the IC imprudently monitored the TS&W Fund prior to the start of the class period on April 12, 2012, those claims are barred by ERISA's statute of repose. *See* 29 U.S.C. § 1113.

242. *See* ECF 283-2 (Defs.' RSAMF), ¶ 51; ECF 232-2 (Defs.' Ex. 107) (May 25, 2012 IC Meeting Minutes).

prudent monitoring process. For example, minutes for the November 2012 meeting—at which a representative from TS&W presented—contradict Plaintiffs' assertion that the IC did not discuss the Fund's performance.[243] Also at the November 2012 IC meeting, Home Depot's Director of Benefits asked AHIC if the TS&W Fund should be "put on a watch"[244]—even though the record evidence shows the TS&W Fund's performance had improved relative to its peers and benchmark by the date of this meeting.[245] At the March 2013 meeting AHIC told the Committee that the TS&W Fund had "good downside protections."[246] And, for as long as the TS&W Fund was on the Plan, AHIC continued to give it a "Buy" rating,[247] though the meeting minutes do not reflect any explicit discussion about AHIC's rationale for this rating.

The Court declines to weigh the parties' evidence and award Home Depot Defendants summary judgment on this ground.

---

243. Pls.' Ex. 19 (Doc. 245-19), at 14 (Nov. 16, 2012 IC Minutes) (reflecting discussion of TS&W Fund's returns, portfolio, and strategy).

244. ECF 283-2 (Defs.' RSAMF), ¶ 55.

245. *See id.* ¶ 52; ECF 272-28 (Pls.' Ex. 228) (2Q 2012 PRIME Report).

246. ECF 283-2 (Defs.' RSAMF), ¶ 58.

247. *See Id.* ¶ 57; ECF 230-30 (Defs.' Ex. 59) (Sept. 15, 2017 Discussion Guide).

2. Loss Causation

While Plaintiffs do not dispute that the TS&W Fund performed well in terms of gross returns[248] on a long-term (*i.e.*, ten-year) basis as compared to peer funds and the TS&W Fund's benchmark, or that the TS&W Fund's three-year performance landed it in the top percentile of its peer funds by 2015,[249] they insist that no prudent fiduciary with the Plan's goals would have focused on the TS&W Fund's long-term performance.[250]

The "primary objectives" of the TS&W Fund were "(1) To achieve a total rate of return over the longer term (3 to 5 years) in excess of the Russell 2000 Value Index" and "(2) To achieve a rate of return over the longer term (3 to 5 years) which ranks above median when compared to a representative universe of other, similarly managed

---

248. Plaintiffs call reliance on gross returns "fraudulent." True, the Securities and Exchange Commission has deemed the practice of marketing gross-of-fee data to *participants* to be impermissible because participants experience net-of-fee returns. 17 C.F.R. § 275.206(4)-1(d)(1). However, as with the Department of Labor regulation's impact on the Excessive Fees Claim, discussed above, the Securities and Exchange Commission regulation says nothing about *plans'* consideration of this data as part of their procedural and substantive decision-making process. Plaintiffs do not allege that Home Depot Defendants violated the regulation, nor do they assert a claim for fraud.

249. ECF 246-5 (Pls.' Ex. 45), at 7 (Q1 2015 Quarterly Investment Review).

250. *See* ECF 270 (Pls.' Resp.), at 27.

domestic small cap value equity portfolios."[251] The TS&W Fund sought to achieve these objectives "through investment in U.S. small-capitalization companies that are believed to be undervalued relative to the market and industry peers."[252] However, as with the BlackRock TDFs, even accepting that the TS&W Fund performed near the bottom of its peer group at a particular point in time during the Class Period, that does not establish that no prudent fiduciary would have retained the TS&W Fund.

Prevailing ERISA standards reflect that retaining investment options that experience short-term underperformance is not inconsistent with a prudent process, and in order to prove a claim for imprudence based solely on short-term underperformance, "the underperformance must be substantial." *Patterson v. Stanley*, No. 16-cv-6568 (RJS), 2019 U.S. Dist. LEXIS 174832, 2019 WL 4934834, at *10 (S.D.N.Y. Oct. 7, 2019) (cleaned up) ("Plaintiffs' assertions that the [challenged fund] performed worse than . . . the relevant benchmark . . . on a one-, five- and ten-year basis . . . do not plausibly establish that Defendants acted imprudently at any particularly point during the class period . . . . [T]his allegation relies on . . . data unavailable to the fiduciaries throughout much of the class period. . . . Even assuming these allegations are not improperly based on

---

251. ECF 283-2 (Defs.' RSAMF), ¶ 44 (citations omitted) ("Each fund's objectives are as follows. Over full market cycles (typically three or more years), each fund's performance is expected to compare favorably to the established benchmarks below.").

252. *Id.* ¶ 45.

hindsight, Plaintiffs' allegations of the Fund's alleged underperformance in average annual returns . . . do not raise a plausible inference that a prudent fiduciary would have found the Fund to be so plainly risky as to render the investments in them imprudent."); *Davis v. Salesforce.com, Inc.*, No. 20-cv-01753-MMC, 2020 U.S. Dist. LEXIS 184283, 2020 WL 5893405, at *4 (N.D. Cal. Oct. 5, 2020) (concluding "allegations 'based on five-year returns are not sufficiently long-term to state a plausible claim of imprudence.'"). Courts have similarly recognized that three- and five-year periods of underperformance are "relatively short" and do not require automatic removal of such funds from plans' portfolios. *Dorman v. Charles Schwab Corp.*, No. 17-cv-00285, 2019 U.S. Dist. LEXIS 34058, 2019 WL 580785-CW, at *6 (N.D. Cal. Feb. 8, 2019). Plaintiffs have cited no authority to the contrary.

As such, Plaintiffs' hindsight evaluation of the TS&W Fund's short-term underperformance at the top of the Class Period does not show that no prudent fiduciary would have retained the TS&W Fund past the second quarter of 2012, which is when Plaintiffs insist it should have been dumped. The evidence is classic cherry-picking, as Home Depot Defendants quip: "Plaintiffs bemoan that the TS&W Fund's three-year performance placed it in the bottom percentile of peers in 2012, but omit that the same metric had the Fund in the top percentile of its peers in 2015."[253]

Indeed, If the IC had relied on the short-term metrics Plaintiffs identify, replaced the TS&W Fund in the second

253. ECF 283-1 (Defs.' Reply), at 22.

quarter of 2012, and missed its 2015 turnaround, Plaintiffs could have critiqued that move too. ERISA is not so broad as to address such "Monday-morning quarterback" claims. Home Depot Defendants are accordingly entitled to summary judgment as to the TS&W Fund.

b. Stephens Fund

***1.* Home Depot Defendants' Monitoring**

Plaintiffs' argument concerning the Stephens Fund amounts to an assertion that the Investment Committee did not act quickly enough to replace the Fund after it was added in late 2013 and began underperforming in late 2014.[254] Home Depot Defendants respond that the record evidence does not raise a dispute of material fact as to the IC's monitoring process, and that Home Depot Defendants are entitled to summary judgment on this basis. The Court agrees.

There is no question that the Stephens Fund began underperforming peers and its benchmarks shortly after it was added to the Plan in late 2013, and that it did so for five consecutive quarters.[255] However, unlike in the case of

254. *See* ECF 270 (Pls.' Resp.), at 29-30.

255. *See* ECF 246-7 (Pls.' Ex. 47) (Q 3 2015 Quarterly Review) (reflecting three- and five-year annualized net-of-fee returns had underperformed the Stephens Fund's benchmark and median peer); ECF 246-8 (Pls.' Ex. 48) (Q4 2015 Quarterly Review) (same);

the other Challenged Funds, the IC's meeting minutes and other record evidence clearly reflect the IC's monitoring efforts. For example, because the Stephens Fund had only been added in late 2013, AHIC recommended waiting at least three years before replacing it.[256] IC members repeatedly asked AHIC about removing the Stephens Fund,[257] despite its relatively strong long-term performance[258] (like the TS&W Fund's), which only lagged below its benchmark in the quarter before it was removed. Even then, AHIC and Stephens Fund managers advised the IC on how market factors (particularly energy prices) impacted performance.[259] Stephens Fund management also provided information to the Committee on "what actions they would be taking in the future to address" the factors that they believed contributed to the Fund's

---

ECF 273-16 (Pls.' Ex. 251) (Q1 2014 Quarterly Investment Review) (reflecting that the Stephens Fund's three-and five-year annualized returns had both underperformed its benchmark); ECF 273-17 (Pls.' Ex. 252) (Q1 2016 Quarterly Review) (reflecting three- and five-year annualized returns had underperformed the Stephens Fund's benchmark); ECF 231-33 (Defs.' Ex. 103) (Q1 2015 Quarterly Review) (reflecting that the Stephens Fund's three- and five-year net-of-fees returns remained below its benchmark, and that it had performed in the bottom quartile of peer funds over the previous three-year period including before the Plan added it).

256. ECF 228-2 (Defs.' SUMF), ¶ 242.

257. *Id.* ¶¶ 242-45.

258. *Id.* ¶¶ 237-38.

259. *See* ECF 232-7 (Defs.' Ex. 111) (Dec. 5, 2014 IC Meeting Minutes), at 3; *see also* ECF 232-1 (Defs.' Ex. 105) (Feb. 6, 2015 IC Meeting Minutes), at 3.

short-term underperformance.[260] And on multiple occasions during the Stephens Fund's short tenure as a Plan investment option, AHIC routinely advised that the Stephens Fund's strategy is designed to protect on the downside and counseled patience.[261]

Plaintiffs have not raised a disputed issue of material fact to show that the monitoring process was objectively imprudent, even if—in hindsight—it could have been better. Home Depot Defendants are entitled to summary judgment as to the Stephens Fund on this basis.

2. Loss Causation

Even assuming that a disputed issue of material fact as to the prudence of IC's monitoring process for the Stephens Fund could be demonstrated, Plaintiffs nevertheless do not raise a genuine issue of fact to show that no prudent fiduciary would have decided to keep the Stephens Fund in the Plan past the first quarter of 2016, which is when Plaintiffs' expert opines that it should have been removed. As in the case of the TS&W Fund, short-term underperformance does not create a genuine issue of fact as to whether no prudent fiduciary would retain the Stephens Fund. Thus, Home Depot Defendants are entitled to summary judgment as to the Stephens Fund claim on this ground as well.

260. ECF 283-2 (Defs.' RSAMF), ¶ 69 (reflecting that, at the February 2015 IC meeting, AHIC advises that it expects the Stephens Fund to "perform better in 2015").

261. ECF 283-2 (Defs.' RSAMF), ¶ 71.

Home Depot Defendants' summary judgment motion is **GRANTED** regarding the Small Cap Funds.

IV. Home Depot Defendants' Motions to Exclude

Home Depot Defendant's counsel indicated at oral argument that the summary judgment motions could be adjudicated without addressing their motions to exclude the expert testimony of Drs. Laffer and Buetow. In light of this fact and because Home Depot Defendants are entitled to summary judgment in any event, the Court need not address Home Depot Defendant's motions to exclude. They are accordingly **DENIED as moot**.

V. Conclusion

Plaintiffs' motion for recusal [ECF 333] is **DENIED**. Home Depot Defendants' summary judgment motion [ECF 227] is **GRANTED** and Plaintiffs' partial summary judgment motion [ECF 238] is **DENIED**. Home Depot Defendants' motions to exclude expert testimony [ECF 234; ECF 236] are **DENIED as moot**. The Clerk is **DIRECTED** to eliminate reference to Does 1-30, and to enter judgment in favor of Home Depot Defendants and close the case.

SO ORDERED this 30th day of September, 2022.

/s/ Steven D. Grimberg
Steven D. Grimberg
United States District Court Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED SEPTEMBER 30, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE

NO. 1:18-CV-01566-SDG

JAMIE H. PIZARRO, CRAIG SMITH, JERRY MURPHY, RANDALL IDEISHI, GLENDA STONE, RACHELLE NORTH, MARIE SILVER,

Plaintiff(s),

vs.

THE HOME DEPOT, INC., THE ADMINISTRATIVE COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN, THE INVESTMENT COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN,

Defendant(s).

JUDGMENT

This action having come before the court, Honorable Steven D. Grimberg, United States District Judge, for consideration of Defendant's Summary Judgment, and the court having Granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby is, **dismissed**.

Dated at Atlanta, Georgia, this 30th day of September, 2022.

KEVIN P. WEIMER
CLERK OF COURT

By: s/J K Brown
Deputy Clerk

APPENDIX D — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED OCTOBER 4, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE

NO. 1:18-CV-01566-SDG

JAMIE H. PIZARRO, CRAIG SMITH, JERRY MURPHY, RANDALL IDEISHI, JERRY MURPHY, RANDALL IDEISHI, GLENDA STONE, RACHELLE NORTH, MARIE SILVER, GARTH TAYLOR,

Plaintiff(s),

vs.

THE HOME DEPOT, INC., THE ADMINISTRATIVE COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN, THE INVESTMENT COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN,

Defendant(s).

AMENDED JUDGMENT

This action having come before the court, Honorable Steven D. Grimberg, United States District Judge, for consideration of The Home Depot Defendants' Motion for

Summary Judgment, and the court having Granted said motion, and having previously granted defendant Garth Taylor's Motion to Dismiss, it is

Ordered and Adjudged that the plaintiff take nothing; that The Home Depot Defendants recover costs of this action, and the action be, and the same hereby is, **dismissed**.

Dated at Atlanta, Georgia, this 4th day of October, 2022.

KEVIN P. WEIMER CLERK OF COURT

By: s/ J K Brown
Deputy Clerk

APPENDIX E — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED OCTOBER 14, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE

NO. 1:18-CV-01566-SDG

JAMIE H. PIZARRO, CRAIG SMITH, JERRY MURPHY, RANDALL IDEISHI, GLENDA STONE, RACHELLE NORTH, MARIE SILVER, GARTH TAYLOR,

Plaintiff(s),

vs.

THE HOME DEPOT, INC., THE ADMINISTRATIVE COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN, THE INVESTMENT COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN,

Defendant(s).

AMENDED JUDGMENT

This action having come before the court, Honorable Steven D. Grimberg, United States District Judge, for consideration of The Home Depot Defendants' Motion for Summary Judgment, and the court having Granted said motion, and having previously granted defendant Garth Taylor's Motion to Dismiss, it is

Ordered and Adjudged that the plaintiff take nothing; that The Home Depot Defendants recover costs of this action, and the action be, and the same hereby is, **dismissed**.

Dated at Atlanta, Georgia, this 14th day of October, 2022.

KEVIN P. WEIMER CLERK
OF COURT

By: s/ J K Brown
Deputy Clerk

APPENDIX F — DENIAL OF PETITION FOR REHEARING AND REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED SEPTEMBER 4, 2024

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13643

JAIME PIZARRO, CRAIG SMITH, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, JERRY MURPHY, RANDALL IDEISHI, GLENDA STONE, *et al.*,

Plaintiffs-Appellants,

GARTH TAYLOR, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, *et al.*,

Plaintiffs,

versus

THE HOME DEPOT, INC., THE ADMINISTRATIVE COMMITTEE OF THE HOMEDEPOT FUTUREBUILDER 401(K) PLAN, THE INVESTMENT COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN,

Defendants-Appellees,

FINANCIAL ENGINES ADVISORS, LLC, *et al.*,

Defendants.

Appendix F

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:18-cv-01566-SDG

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before Branch, Grant, and Ed Carnes, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.