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

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.

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

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,

---

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

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].

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

---

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.

[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).

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

---

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

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

I. Background 7

A. Factual Background 7

1. The Plan and Its Committees, Advisors, and Delegees 8

2. Professional Managed Account Services 11

i. Merrill Lynch 13

ii. The Transition to Financial Engines 13

iii. Home Depot Defendants' Monitoring Efforts and Negotiations 16

a. Monitoring Efforts 16

b. Negotiations and Asset-Based Fee Pricing 17

c. FE's Competitors 21

3. Investment Options 23

i. JPMorgan Fund 23

a. Purpose 23

b. Fiduciary Monitoring and Fund Performance 23

ii. BlackRock TDFs 25

a. Purpose 25

b. Fiduciary Monitoring and Fund Performance 26

iii. Small Cap Funds 29

a. TS&W Fund 30

1. Purpose 30

2. Fiduciary Monitoring and Fund Performance 31

b. Stephens Fund 32

1. Purpose 32

2. Fiduciary Monitoring and Fund Performance 32

B. Procedural Background 34

II. Motion for Recusal 36

III. Summary Judgment 38

A. Procedural Issues 40

1. Home Depot Defendants' "Successive" Summary Judgment Motions 40

2. The Burden to Prove Loss Causation 43

3. Plaintiffs' "Failure to Recoup" Claim 45

B. Plaintiffs' ERISA Claims 47

1. The Excessive Fees Claim 51

i. Home Depot Defendants' Monitoring of FE's and AFA's Fees 52

ii. Loss Causation 53

a. Professional Management Fees Relative to Other FE and AFA Clients 54

b. The Plan's Other Options for Professional Managed Account Services 57

2. The Challenged Funds Claims 61

i. The BlackRock TDFs 62

a. Home Depot Defendants' Monitoring 63

1. Use of the BlackRock Custom Benchmarks and Consideration of Peer Funds 66

2. BlackRock TDFs' Underperformance 72

b. Loss Causation 78

ii. JPMorgan Fund 80

a. Home Depot Defendants' Monitoring 80

b. Loss Causation 84

iii. Small Cap Funds 87

a. TS&W Fund 87

1. Home Depot Defendants' Monitoring 87

2. Loss Causation 90

b. Stephens Fund 93

1. Home Depot Defendants' Monitoring 93

2. Loss Causation 95

IV. Home Depot Defendants' Motions to Exclude 96

V. Conclusion 97

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 the Plan—breached their fiduciary duties under ERISA in two principal ways.[9] First, Plaintiffs allege that

---

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 WL 10886802, at *1 n.2 (N.D. Ga. Mar. 28, 2019).

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

9 *Id.* ¶¶ 15–18.

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 is "one of the largest [401(k)] plans in America,"[14]

---

[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.

[14] ECF 265-2 (Defs.' RSUMF), ¶ 2.

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 responsible for the administration of the Plan.[20] Home Depot Defendants maintain

---

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.

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

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, the parties do not dispute that these documents routinely reported investment returns for the

---

[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.*

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

---

[25] *Id.* ¶ 38.

[26] *Id.* ¶¶ 144–45.

[27] *Id.* ¶¶ 17–19.

[28] *Id.* ¶ 46.

"Professional Management" services and, if they did, an advisor 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.

---

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.

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-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

---

[32] *Id.* ¶ 47.

[33] *Id.*

[34] *Id.*

[35] *Id.*

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 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]

---

[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.

[38] *Id.* ¶ 159.

[39] *Id.* ¶ 54.

[40] *Id.*

[41] *Id.*

[42] *Id.*

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 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

---

43 *Id.* ¶ 55.

44 *Id.* ¶ 89.

45 *Id.* ¶ 89.

46 *Id.* ¶¶ 47, 69, 71.

47 *Id.* ¶¶ 56–58.

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 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

---

48 *Id.* ¶ 57.

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

50 ECF 228-2 (Defs.' SUMF), ¶¶ 91–93.

51 *Id.* ¶ 94.

52 *Id.* ¶ 96.

53 *Id.* ¶ 103.

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]

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

---

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).

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

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

---

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.

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

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 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

---

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.

64 ECF 289-1 (Pls.' RSAMF), ¶ 89.

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

66 *Id.* ¶¶ 126–29.

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 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]

---

67 *Id.* ¶ 130.

68 *Id.*

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

70 ECF 228-2 (Defs.' SUMF), ¶ 141.

71 *Id.* ¶¶ 137–39.

72 *Id.* ¶¶ 140–42.

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]

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*

---

[73] *Id.* ¶¶ 144–45.

[74] *Id.* ¶¶ 146–48.

[75] *Id.* ¶ 152.

[76] *Id.* ¶ 153.

[77] ECF 265-2 (Defs.' RSUMF), ¶ 142.

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]

---

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 (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).

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]

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

---

80 ECF 228-2 (Defs.' SUMF), ¶ 170.

81 *Id.* ¶ 171.

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]

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

---

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.*

87 ECF 228-2 (Defs.' SUMF), ¶ 172.

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 in the Plan during the Class Period.[91] During

---

88 ECF 233-22 (Wermers Rep.), ¶ 142.

89 *Id.* ¶ 148.

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

91 *Id.* ¶ 193.

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] By December 5, 2014, IC meeting minutes confirm that AHIC noted

---

[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.

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] Plaintiffs argue

---

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.*

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

---

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.*

began considering replacements for these funds in March 2017.[112] And, after hearing presentations from potential 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]

---

112 *Id.* ¶¶ 267–70.

113 *Id.* ¶¶ 271–74.

114 *Id.* ¶¶ 268–74.

115 *Id.* ¶¶ 228–29.

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 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]

---

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).

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.

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.

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

---

121 *Id.* ¶ 263.

122 *Id.* ¶ 261.

123 *Id.*

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).

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 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.

---

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] ECF 228-2 (Defs.' SUMF), ¶ 247.

[130] *Id.* ¶¶ 242, 263.

[131] *Id.* ¶¶ 243–44.

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 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]

---

[132] ECF 1 (Compl.).

[133] ECF 53 (Am. Compl.).

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

[135] ECF 186.

[136] *See generally id.*

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]

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,

---

137 ECF 227.

138 ECF 234; ECF 236.

139 ECF 240.

140 ECF 308.

141 *See supra* n.3.

142 ECF 320.

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 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

---

[143] ECF 321.

[144] ECF 333.

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

---

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).

identifying the portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (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 (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] 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

---

146 ECF 270 (Pls.' Resp.), at 6–7.

147 *Id.*

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 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.

---

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

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 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

---

149 *See generally* ECF 212; ECF 214.

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

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

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. 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

---

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.

154 ECF 228, at 4.

"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.

---

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

---

[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.

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 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 (1983). "The principal object of the statute is to protect plan participants and beneficiaries." *Boggs v. Boggs*, 520 U.S. 833, 845 (1997).

As ERISA fiduciaries, the Home Depot Defendants are each subject to the

---

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

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

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 (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 (2015). Fiduciaries must "vigorously and independently investigate the wisdom of a contemplated investment." *Pledger v. Reliance Tr. Co.*, No. 1:15-CV-4444, 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 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

[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 WL 8431178, at *5 (N.D. Ga. Dec. 5, 2006) (discussing Most Profitable and Index Approaches).

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")).

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.*

---

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.).

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).

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

---

[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).

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 "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

---

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

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.*, 772 F.2d 951, 962 (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 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

---

165 ECF 228-2 (Defs.' SUMF), ¶ 154.

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.

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]

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]

---

[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 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.

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]

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

---

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 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.

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 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

---

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.

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).

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 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*

---

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

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 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 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]

---

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

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

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 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 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, AHIC and BlackRock representatives

---

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.

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 duty." 497 F.3d at 421. On

---

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.

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"

---

[190] ECF 270 (Pls.' Resp.), at 21–25.

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

indexes like the S&P 500 means that the IC was imprudent to rely on custom benchmarks in deciding to add or retain 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

---

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.

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.

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 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 WL 132281, at *11 (emphasis added). The court noted that, due to the Department of Labor regulation, "[p]lan

---

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.

[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 "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 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 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

---

[196] *See* Pls.' Reply at 12–14.

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 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

---

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

198 ECF 240 (Pls.' MSJ Br.) at 26–27.

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 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

---

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).

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]; 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

---

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 WL 2352137, at *20 (N.D. Cal. May 31, 2017)).

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

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, 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

---

[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.

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 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 are apt comparators to the

---

[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.

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

---

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.

BlackRock TDFs during the Class Period constituted imprudence. *See Ramos*, 461 F. 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,

---

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

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.

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]

---

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

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

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.

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'

---

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

[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).

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 WL 2352137, at *20.

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

---

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.

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.

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 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,

---

[222] *Compare* ECF 273-12 (Pls.' 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).

[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).

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 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.

---

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).

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

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.

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:

---

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

[231] *See id.*

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

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

> 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 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.

---

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

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

---

[235] ECF 270, at 40–42.

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,

---

[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.

similarly managed 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 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

---

[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.

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 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 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 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 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

---

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

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

did so for five consecutive quarters.[255] However, unlike in the case of 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]

---

[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); 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.

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 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

---

[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.

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.

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.

Steven D. Grimberg
United States District Court Judge