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, and MARIE SILVER, on behalf of themselves and all others similarly situated,	)	**No. 1:18-CV-01566-WMR**
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.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION

FOR PARTIAL SUMMARY JUDGMENT

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The evidence in this case establishes that Defendants breached their fiduciary duties in numerous ways. Here, Plaintiffs seek summary judgment on three claims.

First, Plaintiffs seek summary judgment on their claim that Defendants imprudently allowed the Plan's recordkeeper, Aon Hewitt ("Aon"), to retain revenues it received from the Plan through an arrangement with the Plan's managed account provider. Defendants inexplicably failed to recoup those fees despite Aon's [redacted] This failure cost the plan millions.

Second, Plaintiffs seek partial summary judgment as to liability on the claim that Defendants imprudently failed to monitor the fees paid to the Plan's managed account providers. The undisputed material facts show that Defendants failed to examine the reasonableness of those fees or investigate any alternative providers.

Third, Plaintiffs seek partial summary judgment as to liability on the claim that Defendants imprudently retained Black Rock Target Date Funds ("TDFs" or the "Funds"). Defendants employed inapt benchmarks for the Funds, ignored years of underperformance, and failed to investigate alternative TDF providers.

Granting summary judgment on each of these issues would dispose of significant matters and streamline the presentation of the case at trial.

SUMMARY OF UNDISPUTED MATERIAL FACTS

I. The Plan, Plan Fiduciaries, and Governing Plan Documents

The Plan is a 401(k) retirement plan sponsored by Defendant Home Depot.[1] The Plan is one of the largest plans in America: from 2012 to 2019, it held between $4.1 and $9 billion in assets, and had 193,000 to 363,000 active participants.[2] The Home Depot, Inc., as the Plan Sponsor; the Investment Committee ("IC"); and the Administrative Committee ("AC") are named fiduciaries to the Plan.[3]

The Plan is governed by a set of seminal documents, including an Investment Policy Statement ("IPS").[4] [redacted]"[5]

[1] SUMF ¶ 1; Ex. 7 to the Declaration of David Tracey ("Ex.") at THD_002778. All citations to the Tracey Decl. Exhibits are hereafter referred to as "Ex."
[2] SUMF ¶ 2-3; Ex. 135 at 3, 8, Ex. 137 at 3, 9.
[3] SUMF ¶ 4; Ex. 6 §§ 11.3, 11.9, 12.1, 12.2, 12.3.
[4] SUMF ¶ 4–6, 8, 9, 11, 12, 27–28; Exs. 6–8.
[5] SUMF ¶ 32, 33; Ex. 7, THD_002778 at 2778-80.

II. Defendants Failed To Recoup Fees And Ensure Reasonable Advice Fees

Throughout the Class Period, the Plan has offered investment advisory services through Financial Engines (FE), and then Alight Financial Advisors (AFA). FE remitted a share of all fees it collected to Aon.[6] [redacted].[7] Additionally, as the Court previously recognized, Dkt. 186 at 48:

> Defendants do not dispute Plaintiffs' Statement of Additional Material Facts as to the amount of fees charged by FE and AFA, or the fact that the fees charged by FE and AFA were significantly higher than the fees charged by other providers available on the market offering substantially similar services... Similarly, Defendants do not dispute that FE charged participants in other 401(k) plans less in fees for the same services. Nor do Defendants dispute the facts setting out what the Plaintiffs characterize as the alleged failed fiduciary processes employed by the Defendant for selecting AFA as a service provider and for the ongoing monitoring (or lack thereof) of the fees charged by FE and AFA.[8]

III. Defendants Failed to Monitor the BlackRock Funds

One of the objectives for the Plan's investment options, as defined in the IPS, is to [redacted] Thus, the IPS

[6] SUMF ¶ 206; *see, e.g.*, Ex. 134 at 57.
[7] SUMF ¶¶ 220-21; Ex. 57 at CURCIO001061; Ex. 62 at THD_077711.
[8] These facts are set out in further detail in Plaintiffs' SUMF, ¶¶ 138, 140, 142–44, 151, 197, 199, 200, 206–07, 210, 225. *See, e.g., Pledger v. Reliance Tr. Co.*, 2019 WL 10886802, at *1 n.2 (N.D. Ga. Mar. 28, 2019) ("accept[ing] as admitted those facts in … Plaintiffs' [SAUMF] that [the moving Defendants] have not … specifically controverted with a citation to the relevant portions of the record").

requires the IC to [redacted] The IC must [redacted] [9]

The IC abdicated its responsibility to select an appropriate benchmark and instead relied solely on a "custom benchmark" created and administered *by BlackRock*. A benchmark is meant to be an objective barometer of performance compared to the market.[10] TDF managers seek to distinguish themselves from the market by curating a mix of investments most likely to maximize an investor's retirement assets; [redacted].[11] Yet, instead of providing a yardstick to measure how the managers' investment decisions stack up against the market, BlackRock's "custom" tool *mimics* them: that is, it provides "[redacted].[12] In other words, while it monitors how well a TDF is following its "glidepath" (i.e., shifting from equities to bonds as the target date approaches), it does *not* show how

[9] SUMF ¶¶ 32–35; Ex. 7 at [redacted]
[10] SUMF ¶¶ 74; Ex. 118 (IC Dep.) at 162:6–163:6.
[11] SUMF ¶¶ 59, 65–67; Ex. 81, THD_005651 at 5651 Ex. 103 ¶¶ 91, 99.
[12] SUMF ¶¶ 85, Ex. 83, THD_010761 at 10784.

the fund is performing relative to the rest of the market or to the fund's peers, nor whether any comparable investments are generating greater returns.[13] Under the IPS, as well as established investment principles, this is an insufficient benchmark for the IC to consider in determining whether to retain the TDFs. The Funds cannot be measured against themselves in a vacuum and simply declared to be "A-OK."

For a brief portion of the class period, the IC received quarterly investment reports from a consultant that showed the BlackRock Funds' percentile ranking against other target funds over three and five-year periods. [redacted] [15] The IC never discussed, much less inquired into, the reasons for BlackRock's ongoing track record of gross underperformance. Nor did it investigate alternative providers at any time in the Class Period.[16]

[13] SUMF ¶¶ 89–92; [redacted]
[14] SUMF ¶¶ 100, 106, 109, 111; Ex. 4, 39–46.
[15] SUMF ¶ 110; Ex. 47, THD_007453 at 7461-62, 7495-7502.
[16] SUMF ¶¶ 44–45, 125–26, 128; Ex. 118 (IC Dep.) at 234:3-17, 237:20-25, 244:5-16, 257:19-258:4, 272:8-16 ([redacted]); Ex. 17–27 (reflecting no investigation of other TDFs).

LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate on any claim or defense—or part of a claim or defense—if the record "show[s] there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When the moving party meets its initial burden, the burden shifts to the nonmoving party to adduce "specific facts" with evidence showing a genuine issue for trial. *Walker v. Darby*, 911 F.2d 1573, 1576-77 (11th Cir. 1990); *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party" summary judgment is proper. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986).

Here, Plaintiffs seek summary judgment on one claim and partial summary judgment as to liability on two claims – issues on which the record is so one-sided as to preclude a reasonable jury finding in favor of Defendants. Granting Plaintiffs' motion will serve a core purpose of Rule 56: to narrow and "streamline the litigation by establishing certain issues before trial." *SEC v. Bankatlantic Bankcorp, Inc.*, 661 Fed. App'x. 629, 630 n.1 (11th Cir. 2016).

ARGUMENT

ERISA's fiduciary duties are the "highest known to the law." *Herman v. NationsBank Tr. Co.*, 126 F.3d 1354, 1361 (11th Cir. 1997). The duty of prudence

requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B).

To enforce this duty, "the court focuses not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction." *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996).[17] Further, the conduct of the fiduciaries must be viewed in light of the size of the plan and amount of assets at stake; for example, a plan with $50 million in assets demands more extensive investment management techniques and scrutiny than one with $50 thousand. Rules and Regs. for Fiduciary Responsibility, 44 Fed. Reg. 37221, 37224 (June 26, 1979). Here, billions of dollars are at stake, constituting the retirement savings of hundreds of thousands of Home Depot's employees.

As this Court has recognized, ERISA's fiduciary standards

> require fiduciaries to select a plan's investment options prudently, to monitor them on an ongoing basis, and to remove and replace options that consistently underperform in relation to their identified benchmarks and/or peers. Similarly, fiduciaries must exercise prudence in the selection and retention of

[17] *See also DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007); *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983); *Perez v. City Nat'l Corp.*, 176 F. Supp. 3d 945, 947–48 (C.D. Cal. 2016), *aff'd sub nom. Acosta v. City Nat'l Corp.*, 922 F.3d 880 (9th Cir. 2019).

> third-party service providers and ensure that fees charged are reasonable in relation to the market." Dkt. 186 at 5-6.[18]

Strict enforcement of these duties is especially necessary where, as here, the Plan is a defined contribution plan. Under such a plan, an employee receives no guaranteed payment and bears all the risk of underperformance or excessive fees. *See e.g.*, *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 439-40 (1999). In turn, the employer has no inherent financial motivation to ensure low fees and maximum returns. ERISA's fiduciary duties serve as the only meaningful check on its conduct.

This case is a prime example: the undisputed facts establish that Defendants violated ERISA's standards as to the three claims at issue. As a matter of law, Plaintiffs establish both liability and entitlement to damages as to their first claim: Defendants breached their duty of prudence and caused the Plan to lose millions of dollars by ignoring Aon's [redacted]. As to their second and third claims, the undisputed facts establish liability, with questions of loss, causation, and remedies remaining for trial; Defendants breached their duty of prudence by: (i) allowing participants to pay millions of dollars in fees to FE and AFA without even minimal inquiry into the reasonableness of their respective fees;

[18] Citing, e.g., *Tibble v. Edison, Int'l*, 575 U.S. 523 (2015); *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197-98 (9th Cir. 2016); *George v. Kraft Foods Glob., Inc.*, 641 F.3d 786, 798–800 (7th Cir. 2011); *Pledger v. Reliance Tr. Co.*, 240 F. Supp. 3d 1314, 1330 (N.D. Ga. 2017).

and (ii) failing to properly monitor the BlackRock Funds and to even *consider* replacements despite grim performance. The Court should grant Plaintiffs' motion.

I. Defendants Imprudently Wasted Plan Assets Through Excessive Fees

The Plan's governing documents charge the IC to monitor the reasonableness of expenses paid from Plan assets.[19] As fiduciary, the IC must assess the reasonableness of compensation paid to the Plan's service providers. *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014). "Implicit in a trustee's fiduciary duties is a duty to be cost-conscious." *Tibble v. Edison Int'l*, 843 F.3d 1187, 1198 (9th Cir. 2016) (quoting Restatement (Third) of Trusts § 88 cmt. A). An ERISA fiduciary must take appropriate steps to ensure that the Plan "incur[s] only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship." *Id.* at 1197 (quoting Restatement (§ 90(c)(3)).

Here, the undisputed facts show that the Plan fiduciaries made no effort to ensure that fees collected by the Plan's recordkeeper, and charged by the Plan's investment advisory services providers, were reasonable. As a result, as Home Depot's Director of Benefits wrote in a January 2016 email to be sent to FE, "[redacted]

[19] *See* SUMF ¶ 5, 7; Ex. 7, THD_002778 at 2780.

[redacted]"[20] Accordingly, the Plan fiduciaries have breached ERISA's duty of prudence as a matter of law.

A. Defendants Imprudently Snubbed Aon's Offer to Refund Millions

Under ERISA, "responsible plan fiduciaries must obtain sufficient information regarding all fees and other compensation" received by a plan service provider in order "to make an informed decision as to whether [the] compensation for services is no more than reasonable." U.S. D.O.L., Adv. Op. 2013–03A, 2013 WL 3546834, at *4. This includes accounting for "any revenue sharing." *Id*. Here, not only did the Plan fiduciaries breach their duties by failing to ensure that Aon received only reasonable compensation through its revenue-sharing arrangement—

[redacted]

As part of its bid for the Plan's recordkeeping services in 2010, Aon disclosed that it received [redacted] FE]" and made a "[redacted][21] [redacted]

[20] *See* SUMF ¶ 230; Ex. 106, THD_076486 (emphasis added)
[21] SUMF ¶¶ 216–17, 219; Ex. 57 at CURCIO001061; Ex. 62 at THD_077711.

[redacted] Consequently, Aon retained these amounts without crediting them to the Plan. This breach of prudence alone caused the Plan to lose approximately [redacted].[23]

As a matter of law, "[w]asting beneficiaries' money is imprudent... trustees are obliged to minimize costs." Unif. Prudent Investor Act § 7; *accord* Dkt. 186 at 70; *Tibble*, 843 F.3d at 1198. "ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants." *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 571 (1985). There is no genuine dispute that Defendants wasted participants' money through inexcusable neglect; no prudent fiduciary would sit idly by and allow Aon to [redacted].

1. Defendants Also Failed to Ensure Aon Earned Only Reasonable Fees

While the rejection of Aon's offer to return money to the Plan is more than sufficient to grant summary judgment, Defendants further breached their fiduciary duties by failing to ensure that the fees paid to Aon were reasonable in the first place. As Defendants' expert recognized, a responsible plan fiduciary must ensure that the

[22] SUMF ¶¶ 220–21, 225; Ex. 150 at AS0000442, 537; Ex. 127 (Wagner Dep.) at 256:17-24; Ex. 17–20 (reflecting no discussion regarding [redacted]).
[23] SUMF ¶ 208; Ex. 1; Ex. 150, AS0000397 at 537.

compensation paid indirectly by the plan to its service providers is reasonable.[24]

As early as 2010, a consultant cautioned Defendants about the reasonableness of Aon's annual fee. It noted [redacted] the Plan's advisory services provider prior to FE, [redacted][25] After the Plan hired FE in 2011, the warnings continued. In 2013, the consultant admonished that [redacted][26]

Despite these red flags, the IC never inquired into what services Aon was actually providing nor the reasonableness of the revenue-sharing fees.[27] It was not until the switch from FE to AFA that *anyone* from Home Depot questioned whether Aon's purported services justified its share of the fees.[28] Aon claimed that the revenue-share was for data "connectivity" or a "communications link," but its contract with FE contained [redacted]

[24] SUMF ¶ 21; Ex. 127 (Wagner Dep.) at 264:12-17.
[25] SUMF ¶¶ 222; Ex. 56, THD_102513 at 102523.
[26] SUMF ¶¶ 224; Ex. 59, THD_010351 at THD_010364.
[27] SUMF ¶¶ 225–26; Tracey Exs. 17–27 (reflecting no such inquiry).
[28] SUMF ¶¶ 229; Ex. 104, THD_077521 at 77522.

[redacted].[29]

Moreover, at least two committee members, who each served on the IC for over six years, [redacted]. Nor could they recall ever discussing [redacted] with the members of the IC, or asking anyone at Home Depot to look into [redacted] one.[30] A [redacted].[31]

The result of Defendants' apathy: In 2013, Aon collected [redacted] By 2015, its fee was up to [redacted].[32] As the consultant testified, [redacted][33]

There is no genuine dispute that Defendants' conduct was highly imprudent.

B. Defendants Engaged in a Textbook Imprudent Process By Failing to Take Any Steps to Verify that FE's and AFA's Fees Were Reasonable

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[29] SUMF ¶¶ 212–13; Ex. 53 at FEA_0001938.
[30] SUMF ¶¶ 233–34; Ex. 121 (Dayhoff Dep.) at 81:25-84:13, 96:2-97:5; Ex. 123 (Bohrer Dep.) 265:22–266:6, 268:11–269:18.
[31] SUMF ¶¶ 162; Ex. 126 (Byrom Dep.) at 23:5-26:11, 210:24-211:3
[32] SUMF ¶¶ 208, 211; Ex. 1; Ex. 56 at THD_102523
[33] SUMF ¶ 236; Ex. 151 (Curcio Dep.) at 53:24–54:5; 54:6–56:17.

A fiduciary breaches its duties where, as here, it fails to "diligently" investigate and monitor the costs of a Plan service provider. *Tussey*, 746 F.3d at 336; *Pledger v. Reliance Tr. Co.*, 240 F. Supp. 3d 1314, 1330 (N.D. Ga. 2017) (failure "to monitor the fees and rein in excessive compensation" breaches duty). When selecting providers, fiduciaries must undertake "an objective process that is designed to elicit information necessary to assess," the "reasonableness of fees charged."[34]

Defendants' own expert opined that [redacted] And, she confirmed that [redacted].[35]

"When deciding whether a plan fiduciary has acted prudently, a '[c]ourt must inquire whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the[ir] merits.'" *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 420 (4th Cir. 2007) (citation omitted). Here, IC members made *no* investigation into the reasonableness of FE's and AFA's

[34] Ex. 146, U.S. D.O.L. Field Assistance Bulletin No. 2007-01.
[35] SUMF ¶ 23; Ex. 127 (Wagner Dep.) at 232:5-233:18; Ex. 129 ¶ 22.

fees compared to the market. Their failure to investigate amounts to a *per se* breach. *Springate v. Weighmasters Murphy, Inc. Money Purchase Pension Plan*, 217 F. Supp. 2d 1007, 1023 (C.D. Cal. 2002), *aff'd* 73 F. App'x 317 (9th Cir. 2003).

1. Defendants Made No Inquiry into the Reasonableness of the Fees

In deciding to retain FE in January of 2011, the IC reviewed no data on the fees charged by similar providers or the fees that FE charged to other plans. The only other provider's fees mentioned [redacted][36] Indeed, IC member Dayhoff could not recall [redacted].[37] Yet, without data on the going market rate, the IC blindly agreed to FE's initial proposal of 60 basis points, an unreasonable above-market fee.[38]

In renewing the contract with FE in November of 2013, the IC again reviewed no data on other providers' fees or services nor the fees that FE charged to other plans; the IC also conducted no competitive bidding or market survey of fees. [39] Nor

[36] SUMF ¶169; Ex. 18 at p. 4 (THD_012951).
[37] SUMF ¶ 170, 251–52; Ex. 121 (Dayhoff Dep.) at 59:6-13, 73:18-74:23, 86:18-24.
[38] SUMF ¶ 139, 175–77; Ex. 49 at THD_089068.
[39] SUMF ¶¶ 186, 194–196; *see* Ex. 20 (referencing no such investigation); [redacted]).

did Home Depot retain its outside consultant to analyze FE's proposal.[40] Again, Defendants uncritically subscribed to above-market fees.[41] Their utter neglect—including their failure to "ever consider[] an alternative"—demarcates an imprudent process. *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 358-60 (4th Cir. 2014).

In fact, the IC never actually voted to renew the contract with FE, or even *saw* the proposed contract or reviewed its terms.[42] It passively allowed the Benefits Department to [redacted] the contract without fiduciary involvement or oversight.[43] No reasonable factfinder could find this sufficient to fulfill ERISA's fiduciary duties, the "highest known to the law." *Herman*, 126 F.3d at 1361.

ERISA "forbid[s] a fiduciary from causing a plan to enter into a contract… if the fiduciary knows ***or should know*** that the arrangement will enable the service provider to receive unreasonable compensation." *Taylor v. United Techs. Corp.*, 2007 WL 2302284, at *3 (D. Conn. Aug. 9, 2007) (emphasis added). Had the IC bothered to undertake any inquiry into the reasonableness of FE's fees, it would have known that [redacted]

[40] SUMF 189; Ex. 153 (Curcio Dep.) at 141:23–142:13; *see also id.* at 128:10–23, 137:19–20, 142:25 – 143:6 [redacted]

[41] SUMF ¶¶ 184–86; Ex. 101 at p. 4.

[42] SUMF ¶ 196; Ex. 20 (no mention of contract); Ex. 119 (IC Dep.) at 274:10-275:3.

[43] SUMF ¶ 191; Ex. 102 at THD_087864.

[redacted].[44]

As Plan fiduciaries charged with monitoring the reasonableness of the Plan's expenses, the Committee "should know" when a service provider submits a pricing proposal, and absolutely "should know" about data showing that Plan participants are paying above-average fees. Yet, [redacted] The record establishes a complete "lack of effort" on the part of the Plan fiduciaries in assessing the reasonableness of FE's fees. *Tatum*, 761 F.3d at 358–60.

It gets worse. When the Plan retained AFA to replace FE in April of 2016, the IC again failed to investigate, consider, or discuss any data on alternative providers; indeed, the IC did not even ask FE and AFA to present information on their service offerings and pricing.[45] It was content to let them charge participants millions of dollars in fees without even a rudimentary inquiry—**not one single question**.

In AFA's first full year on the Plan, it collected $9.4 million—the single highest expense.[46] Yet, there is no evidence that the IC reviewed *any* information

[44] SUMF ¶¶ 184-85; Ex. 101 at 4; Ex. 119 (IC Dep.) at 218:7-23; Ex. 102 at 56518
[45] SUMF ¶ 195; Ex. 23 at 6–9; Ex. 119 (IC Dep.) at 245:21-246:11.
[46] SUMF ¶ 140; Ex. 144.

regarding the "reasonableness" of its fees.[47] IC member Bohrer could not recall [redacted] Dayhoff could not recall [redacted].[48] To say that Defendants disregarded their responsibilities for hundreds of thousands of employees' life savings would be an understatement.

2. Defendants Imprudently Assumed That the Benefits Team Would Handle Defendants' Fiduciary Duties

Even after a service provider has been retained, the Plan fiduciaries have an ongoing duty to monitor its fees. *See Pledger*, 240 F. Supp. 3d at 1330; *Tussey*, 746 F.3d at 336; 29 C.F.R. § 2509.96-1(e). As Defendants' own expert opined, [redacted][49] The [redacted] for FE, she testified, [redacted][50]

Here, by 2013, [redacted].[51] [redacted]

[47] Ex. 146, U.S. D.O.L. Field Assistance Bulletin No. 2007-01.
[48] SUMF ¶¶ 166, 203; Ex. 123 (Bohrer Dep.) at 218:15-219:13; Ex. 121 (Dayhoff Dep.) at 181:23-182:16.
[49] SUMF ¶ 20; Ex. 129 (Wagner Rep.) ¶ 48.
[50] SUMF ¶ 23; Ex. 127 (Wagner Dep.) at 232:5-233:19.
[51] *See* SUMF ¶ 206; Ex. 139.

[redacted] Yet the Plan's fiduciaries failed to conduct a "cost benchmarking" assessment to determine whether those fees were "consistent with" those of alternative providers or the fees that FE charged similarly situated plans for the same services.

The only purported "benchmark" assessment present on the record was created as part of the decision to switch from FE to AFA, but it contains no information on what universe the "benchmark" entails.[54] Even this analysis, however, was not presented to the full IC, the fiduciaries charged with "[redacted] Instead, only two of the five IC members received the document, as part of a separate Administrative Committee meeting.[55]

Committee member Dayhoff testified that she "[redacted]" that FE's services "[redacted][56] In fact, Dayhoff's assumption was unfounded. At no point

[52] *See* SUMF ¶ 189; Ex. 151 (Curcio Dep.) at 141:23–142:13; *id.* at 128:10–23; *id.* at 137:19–20 ([redacted]
[53] SUMF ¶ 206; Ex. 141.
[54] SUMF ¶ 199; Ex. 61, THD_006804; Ex. 151 (Curcio Dep.) at 249:3–9.
[55] SUMF ¶¶ 6-7; Ex. 23, at p. 5-8; Ex. 7, THD_002778 at 2779-80.
[56] SUMF ¶ 241; Ex. 121 (Dayhoff Dep.) at 105:11-22.

in time between the retention of FE in March of 2011 and the filing of this lawsuit in April of 2018 did the Benefits Department, or anyone else, conduct competitive bidding for the Plan's managed account services.[57] Indeed, in 2016 FE and Aon worked together to present a *joint* fee proposal—the very antithesis of competition.[58]

Dayhoff, unaware if anyone on the IC attempted to negotiate FE's initial fee, testified that she "[redacted]"[59] Likewise, IC member Bohrer testified that "[redacted]. Based on pure speculation, Bohrer testified that he "[redacted]"[60] Again, the IC's pass-the-buck assumption was groundless.

Simply put, there is no evidence that the IC actually delegated responsibility for negotiating or monitoring the fees of FE or AFA.[61] But even if they did so, they had an undelegable duty to critically review the work of any proxies.[62] It is well

[57] SUMF ¶¶ 242; Ex. 119 (IC Dep.) at 303:11–19; [redacted]
[58] SUMF ¶ 244; Ex. 160, THD_083613.
[59] SUMF ¶ 164; Ex. 121 (Dayhoff Dep.) at 76:3-10
[60] SUMF ¶ ;Ex. 123 (Bohrer Dep.) at 226:5-227:25; 228:23-229:10.
[61] SUMF ¶¶ 157–58; Ex. 119 (IC Dep.) at 283:6–284:7.
[62] SUMF ¶ 158; Ex. 127 (Wagner Dep.) at 269:5-13, 271:2-11 [redacted]

established that a fiduciary's reliance on the advice of an outside expert is not a salve for imprudent conduct. *Howard*, 100 F.3d at 1489. Here, Defendants did far less—relying solely on untested "assumptions" and "beliefs" that *someone* in the Benefits Department (though they do not know whom) was taking *some* steps (though they do not know what) to ensure that the fees were reasonable.

These espoused, but unconfirmed beliefs cannot discharge ERISA's fiduciary duties. *Moitoso v. FMR LLC*, 451 F. Supp. 3d 189, 218 (D. Mass. 2020). Reliance on "unconfirmed assumption[s]" evinces imprudence. *Tatum*, 761 F.3d at 358–60. Defendants, as Plan fiduciaries, must "do more than simply attend the meetings" and assume that others are handling fiduciary matters; they "have an independent duty to comply with ERISA." *Mazur v. Gaudet*, 826 F. Supp. 188, 192 (E.D. La. 1992). No reasonable factfinder could find that Defendants met these independent duties.

3. Defendants Failed to Ensure that the Services Provided by FE and AFA Justified Their Exorbitant Cost

During its 2011 presentation to the IC, FE claimed that [redacted].[63] But, there is no record evidence that the IC ever took any action to verify FE's claim of enhanced returns. The IC had no policy or procedure for evaluating

[63] SUMF ¶ 256; Ex. 18 at p. 4; Ex. 119 (IC Dep.) at 65:23-67:7.

such performance—[redacted].[65]

Had the IC bothered to undertake any inquiry, it would have known that FE sent quarterly reports to the Benefits Department containing [redacted] Each report indicated that [redacted].[66] Unfortunately, the IC never reviewed the reports and never even requested such data, allowing FE to continue to generate millions in fees for actually [redacted].[67]

As part of a prudent process, fiduciaries should also "periodically review" the "utilization of the investment advice services . . . in relation to the[ir] cost" to ensure the provider receives only reasonable compensation.[68] Here too, the IC ignored this

[64] SUMF ¶¶ 257–258, 264–66; Ex. 119 (IC Dep.) at 299:14-300:19.
[65] SUMF ¶¶ 268–69; Ex. 20 at pp. 2–3; Ex. 79 at AONTHD-0005631; Ex. 119 (IC Dep.) at 336:25-337:13.
[66] SUMF ¶¶ 260–62; Ex. 54 at FEA_0002060, 2072; Ex. 2.
[67] SUMF ¶ 263; *see, e.g.*, Ex. 119 (IC Dep.) at 281:22–283:5, 299:4–13.
[68] Ex. 146, U.S. D.O.L. Field Assistance Bulletin No. 2007-01.

duty entirely, and never reviewed reports showing that [redacted] utilized FE's Online Advice service; yet, FE collected between [redacted] per year from all active participants for this service alone.[69]

In sum, no reasonable fact finder could conclude that Defendants prudently monitored the fees FE and AFA charged Plan participants.

II. Defendants Breached Their Duty of Prudence in Retaining the BlackRock Target Date Funds Despite Chronic Underperformance

The undisputed facts establish fiduciary breach with respect to the TDFs in at least three independent ways, set forth in sections A – C below.

A. The Plan Fiduciaries Failed to Investigate and Utilize Appropriate Benchmarks for the BlackRock Funds

The duty of prudence required Defendants to "employ appropriate methods to investigate the merits of" retaining the Funds in light of their "character and aim." *Tatum*, 761 F.3d at 358.[70] Furthermore, the IPS required the IC to assess the Funds relative to an "appropriate benchmark."[71] Here, Defendants failed to do so, instead relying on BlackRock's "custom" benchmark as the sole measure of the TDFs'

[69] SUMF ¶ 263; Ex. 54 at FEA_0002060; Ex. 1 (summarizing online advice fees).
[70] *See also* 29 U.S.C. § 1104; 29 C.F.R. § 2550.404a-1(b)(1)(i) (a fiduciary must give "appropriate consideration to those facts and circumstances that... the fiduciary knows or should know are relevant to the particular investment or investment course of action involved"); *Fuller v. SunTrust Banks, Inc.*, No. 1:11-CV-784, 2019 WL 5448206, at *24 (N.D. Ga. Oct. 3, 2019).
[71] *E.g.* SUMF ¶¶ 7, 32; Ex. 7 at THD_0027780.

performance.[72] As the IC testified, a benchmark "[redacted]"; it should be "a[redacted]," and identify "[redacted]."[73]

BlackRock's benchmarks do not perform this job. They fundamentally differ from common broad-based benchmarks (like the S&P 500 Index), administered by third parties and designed to track a segment of the market. *See* 75 Fed. Reg. 64,910, 64,916–17 (Oct. 20, 2010). In lieu of this paradigm, BlackRock fashions benchmarks for its own TDFs.[74] Rather than tracking the market, the "benchmarks" track *the TDFs themselves*; specifically, BlackRock rebalances its benchmarks every quarter to match changes made to the TDFs' asset allocations.[75] Recognizing the inherent flaws in such self-serving methods, the Department of Labor forbids fiduciaries from using custom benchmarks as the exclusive measure of performance in participant disclosures, and requires plan administrators to provide "broad-based" indexes. 29 C.F.R. § 2550.404a–5(d)(1)(iii); *See* 75 Fed. Reg. at 64,916–17 (rejecting disclosure of only "customized" benchmarks as they may be "subject to manipulation.").

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[72] SUMF ¶¶ 82-83; [redacted]

[73] SUMF ¶ 74; Ex. 118 (IC Dep.) at 162:6–163:6.

[74] SUMF ¶ 84, Ex. 81 at THD_005652

[75] SUMF ¶ 86–87; Ex. 81 at THD_005652; Ex. 118 (Smith Dep.) at 202:13–203:7; Ex. 130 (Wermers Rep.) ¶ 89(b).

Here, the IC retained the TDFs to provide "[redacted]"[76] "Any reasonably sophisticated investor" – knowing "the decision to pick one investment over another might result in a measurable loss of opportunity," *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 31 (1st Cir. 2018) – would have measured the Funds' performance relative to a benchmark that provided *some way* to identify "[redacted]"[77] But BlackRock's custom benchmarks contained no relative performance data and thus provided no insight into whether the funds met their stated investment objective.[78] In sum, Defendants failed to use "appropriate benchmarks," as required by the IPS, and also failed to employ an "appropriate method" to evaluate the TDFs' performance. *Tatum*, 761 F.3d at 358.

Worse still, the IC failed to even *discuss* whether the "custom benchmark" was appropriate or consider obvious alternatives[79] Indeed, the IC's reliance on the custom benchmark contradicts BlackRock's—and Home Depot's—own disclosures. In annual disclosures, BlackRock identified [redacted]

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[76] SUMF ¶ 59; Ex. 118 (IC Dep.) at 190:5-190:13; Ex. 81 at THD_005651 ("The fund shall be invested … to maximize assets available during retirement.").
[77] SUMF ¶ 74; Tracey Ex. 18 (IC Dep.) at 162:6–163:6.
[78] SUMF ¶ 83; Ex. 128 at 135:4-136:17; *see also* Ex. 118 at 203:8–204:14 ([redacted]; Ex. 124 at 70:14-19 (same); Smith Dep. at 162:6–163:6.
[79] SUMF ¶¶ 94; Ex. 118 (IC Dep.) at 203:21-204:4.

[redacted] for the Funds.[80] Home Depot (in participant disclosures) disclosed the same index as an "appropriate" benchmark for the Funds until 2016.[81] Yet, the IC eschewed the S&P 500 in its fiduciary decision-making process.[82] Had the IC looked, it would have seen massive losses compared to the S&P 500.[83]

Nor did the Committee employ other benchmarks common in the TDF space. For example, the S&P 500 Target Date Indexes are the most widely-used target maturity index for measuring target date fund performance.[84] But the Committee never investigated or considered this common benchmark in its fiduciary process.[85]

Standing alone, Defendants failure to compare the BlackRock Funds to an appropriate benchmark – or to even *consider* obvious alternatives – is sufficient to establish breach. *Tatum*, 761 F.3d at 358; *see also Dardaganis v. Grace Cap. Inc.*, 889 F.2d 1237, 1241 (2d Cir. 1989) (failing to follow investment guidelines is breach). Other facts only reinforce this conclusion. For example, despite relying exclusively on the custom benchmarks, [redacted]

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[80] SUMF ¶ 75; *See, e.g.*, Ex. 85 at THD 050344; Ex. 86 at THD 050349. [redacted] *E.g.*, Ex. 81 at THD_005651.
[81] SUMF ¶ 76; Ex. 9 at THD 005270; Ex. 10 at 005278; Ex. 11 at THD 005282.
[82] SUMF ¶ 82-83; Ex. 118 at 197:16–198:3; 206:23-207:3; 213:5-25.
[83] SUMF ¶¶ 77; Ex. 3 (chart comparing S&P 500 and TDFs)
[84] SUMF ¶¶ 78; Ex. 134 at 31; Ex. 111 at THD_079426 ([redacted].
[85] SUMF ¶¶ 82-83; Ex. 118 (Smith Dep.) at 231: 9-15.

[redacted]

Together, these undisputed facts reveal fundamental lapses in the IC's knowledge about, and rationale for relying on, the custom benchmarks. The IC's "blind reliance" was, as a matter of law, "inconsistent with fiduciary standards." *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 301 (5th Cir. 2000).

B. The Fiduciaries Ignored Blatant Evidence of Underperformance

ERISA fiduciaries have "a continuing duty" to "monitor investments and remove imprudent ones." *Tibble v. Edison Int'l*, 575 U.S. 523, 530 (2015). They must do so with the "care, skill, prudence, and diligence" of expert investment managers. 29 U.S.C. § 1104(a)(1)(B); *Katsaros v. Cody*, 744 F.2d 270, 275, 279 (2d Cir. 1984). After a thorough investigation (*Howard*, 100 F.3d at 1488), a fiduciary must "balance the relevant factors and make a reasoned decision." *George v. Kraft Foods Glob., Inc.*, 641 F.3d 786, 796 (7th Cir. 2011). Defendants fell well below

[86] SUMF ¶ 94–95; [redacted]

[87] SUMF ¶ 84; Ex. 188 at 197:16–198:3; 201:20-202:3; Ex. 123 at 162:12-163:14; Ex. 124 at 66:13–67:3.

that floor, failing to even engage in meaningful "discussion or analysis" of the Funds despite their poor performance. *Tatum*, 761 F.3d at 358.

The Plan's IPS required the BlackRock Funds to maintain [redacted]

The IPS further established that the IC [redacted].[88] ERISA's "duty of prudence" required Defendants to "discharge their duties in accordance with" the IPS. *Tussey v. ABB, Inc.*, 2012 WL 1113291, at *14 (W.D. Mo. Mar. 31, 2012); *cf. Dardaganis*, 889 F.2d at 1241.[89]

Throughout the Class Period, the BlackRock Funds persistently failed the objectives of the IPS by ranking below the median of their peer groups for both the three and five-year periods. [redacted]

[88] *E.g.* SUMF ¶¶ 32-35; Ex.7 at THD_02779-81, 83; Ex. 8 at THD_002806, 09.

[redacted]

[90] *See* SUMF ¶¶ 100; Tracey. Decl. Ex. 4; Ex. 39 at THD 011369-70; Ex. 40 at THD 008648-49; Ex. 41 at AONTHD- 0001885-86; Ex. 42 at THD 010810-11; Ex. 43 at THD_ 010908-09; Ex. 44 at THD_006924-40; Ex. 45 at THD 007103-19; Ex. 46 at THD 010035-49.

[redacted] Based on this remarkable underperformance, Plaintiffs' expert, world-renowned economist Dr. Arthur Laffer, opines that [redacted]

The abysmal performance continued, as summarized in Ex. 4 to the Tracey Decl. By the end of 2015, net of fees, every BlackRock Lifepath Fund but the 2020 Fund (which ranked exactly 66th out of 100) performed in the bottom third, ranking in the bottom 15-28 percent of funds in their respective peer universes. Seven of the funds underperformed the median during at least three of the five preceding calendar years (2011-2015).[94] Overall, from 2014 through the end of 2020, the Funds vastly underperformed the Morningstar peer universe median; other popular target date funds; and the most popular TDF benchmarks, the S&P TDF Indexes.[95]

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[91] *See* SUMF ¶ 106; Tracey. Decl. Ex 40 at 008648-9.
[92] SUMF ¶ 106; Ex 40 at 08651-52
[93] SUMF ¶ 107; Ex. at ¶ 52.
[94] SUMF ¶ 111; Ex. 48 THD_008321 at 8331–32.
[95] SUMF ¶ 113; Ex. 133 ¶¶ 118–38.

Despite this sustained poor performance, the IC failed to investigate or even express a modicum of concern. Its minutes from 3Q 2013 through 1Q 2018 do not reflect any discussion concerning the Funds' returns relative to peers; and there is no recorded rationale for retaining them.[96] To be sure, [redacted] but these presentations were woefully inadequate.[97] At the March 2013 meeting, [redacted]."[98] This claim is contradicted by [redacted].[99] Further, the IC's [redacted] and the minutes do not reflect *any* questions about the Funds' performance.[100] Likewise, BlackRock's October 2014 presentation [redacted], and the minutes do not reflect any discussion about the Funds'

[96] SUMF ¶ 114; *see generally* Ex. 20 at THD_006704 – Ex.25 at THD_006715; [redacted] *See* Ex. 20; *Cf. Tatum*, 761 F.3d at 358 (discussion lasting "no longer than an hour" supported imprudence claim).
[97] *See* SUMF ¶¶ 101-102; Ex. 20 at THD_009727-29; Ex. 21 at THD_006691.
[98] *See* SUMF ¶¶ 101; Ex. 20 at THD_009729.
[99] SUMF ¶ 103; Ex 25 at THD_031102; Ex. 87 at THD_114773–114826; Ex. 90 at THD_014858–14904; Ex. 92 at THD_010761–10785.
[100] SUMF ¶ 112; Ex. 28 at THD_037565; Ex. 20 at THD_009729.

performance relative to peers.[101] Indeed, [redacted]; they were content to let BlackRock skate by based on conclusory "assumptions," without any "research or investigation" to back them. *Tatum*, 761 F.3d at 358. And despite the poor performance, neither the IC, nor AHIC, *ever* met or communicated with BlackRock's portfolio managers – i.e. the individuals actually making investment decisions for the hundreds of millions of dollars the Plan invested in the Funds.[102] No prudent investor would been so blasé. *See, e.g.*, *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 436 (3d Cir. 1996) (a fiduciary must "analyze the basis" for consultant's conclusions and may not "passively accept its consultant's positive appraisal … without conducting the independent investigation that ERISA requires"); *Bussian*, 223 F.3d at 301 (same).

Instead of acting, the IC buried its head further in the sand. In 2015, AHIC [redacted][103]

[101] SUMF ¶ 117; Ex. 21 at THD_006691; Ex. 28 at THD_036220; Ex. 121 (Dayhoff) 223:17-224:6 (failing to recall asking BlackRock reps about performance).
[102] SUMF ¶¶ 118-19, 124; Ex. 83 at 10782; Ex. 88 at 14865; Ex. 87 at 114782; Ex. 88 at 14865; Ex. 25 at 31102; Ex. 92 at 113192; Ex. 124 at 130:4-13, 131:9-13.
[103] SUMF ¶¶ 110; Ex. 33 at THD_007006-08; Ex. 47 at THD_7461-62, 7495-7502; Ex. 118 (IC Dep.) 262:1–262:10 ("[redacted]").

From Q2 2015 onward, the IC could not evaluate the TDFs' peer ranking on a three and five-year basis, [redacted] *See supra* at 28 & n.89 and cases cited.

Further confirming the cursory nature of the IC's investigations, in deposition, members evidenced extreme ignorance about the BlackRock Funds. [redacted][104]

In sum, Defendants failed to investigate the Funds' poor performance with anything close to "care, skill, prudence and diligence," 29 U.S.C. § 1104(a)(1)(B).

C. The Plan Fiduciaries Failed to Consider Alternative Investments

The Court must find imprudence where there is "no evidence that [defendant] ever considered an alternative" investment choice. *Tatum*, 761 F.3d at 358–59.[105] As

[104] SUMF ¶¶ 121, 123; Ex. 122 (Kimmett) at 135:13-18; Ex. 120 (Johnson) at 182:10–25, 265:7-24; Ex. 123 (Bohrer) at 167:3-17, 194:22-195:15.

[105] *Accord* 29 C.F.R. § 2550.404a-1 ("appropriate consideration" includes comparison to "reasonably available alternatives."); U.S. D.O.L., Adv. Op. 88-16A, 1988 WL 222716, at *3 ("[A] decision to make an investment" should not be made "unless the investment . . . would be equal or superior to alternative[s]."); *Martin v. Feilen,* 965 F.2d 660, 671 (8th Cir. 1992) ("[C]ourts should look closely at whether the fiduciaries investigated alternative actions"); *Goldenberg v. Indel,* 741 F. Supp. 2d 618, 636 (D.N.J. 2010).

Home Depot's own expert recognized, "[redacted]"[106] Similarly, under trust law's Prudent Investor Rule, trustees must ordinarily obtain "relevant information about... the nature and characteristics of **available investment alternatives**." Restatement of Trusts (Third) § 90, cmt. d (emphasis added).

Here, Defendants and their consultant, AHIC, utterly failed to investigate other target date funds. In the eleven years from 2009 to 2020, the IC never engaged in substantive discussion about alternative TDFs and never invited another provider to present its offerings.[107] The Plan's consultant, AHIC, was equally uninformed. AHIC's designee could not tell [redacted].[108]

Defendants' failure to investigate alternatives was so absolute that they did not consider better TDFs *from BlackRock itself.* BlackRock offers TDFs in both a collective trust ("CIT") and a mutual fund structure, which "[redacted]."[109] The Plan offered the CITs, but never had a

[106] SUMF ¶ 18; Ex. 129, Wagner Report ¶ 26 (emphasis added)
[107] SUMF ¶ 125-26; Ex. 17-27; Ex. 123 (Bohrer) 197:6-17, 199:17-24, 200:14-201:11.; Ex. 120 (Johnson) at 260:15-261:12; Ex. 121 (Dayhoff) at 222:23-223:16.
[108] SUMF ¶ 136; Ex. 124 (Penter Dep) at 55:12-56:21.
[109] *See* SUMF ¶ 131; Ex. 73; Ex. 128 ¶ 123.

substantive dialogue about the mutual funds.[110] Indeed, [redacted].[111] With appropriate diligence, the IC would have learned that the mutual funds consistently outperformed the CITs during the Class Period. *See* Tracey Decl. Ex. 5.

By failing the investigate alternatives—including obvious alternatives managed by BlackRock itself—Defendants "acted with procedural imprudence no matter what level of scrutiny is applied to [their] actions." *Tatum*, 761 F.3d at 358.

CONCLUSION

There can be no genuine dispute that Defendants breached their fiduciary duty by squandering [redacted]—which would have injected millions of dollars in assets into the Plan at no cost. Thus, summary judgment is warranted for Plaintiffs on this claim. Likewise, the undisputed facts demonstrate Defendants failed to adequately investigate and monitor the fees charged by FE and AFA and the performance of the BlackRock Funds. Accordingly, the Court should grant partial summary judgment on liability as to those claims.

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[110] *See* SUMF ¶¶ 135; Exs. 17-27. IC Minutes (reflecting no such discussion); Ex. 118 (Smith Dep.) at 189:18–190:4 [redacted]; Ex. 120 (Johnson Dep.) at 261:13-25.

[111] SUMF ¶ 134; Ex. 118 (IC Dep.) at 187:24-189:19; Ex. 123 (Bohrer Dep.) at 200:9-13; Ex. 120 (Johnson Dep.) at 261:13-25.

/s/ Brandon Welch

STILLMAN WELCH
T. Brandon Welch (GA Bar # 152409)
3453 Pierce Drive, Suite 150
Chamblee, Georgia 30341
Telephone: (404) 895-9040
Facsimile: (404) 907-1819
brandon@stillmanwelch.com

BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP
*Norman Blumenthal
2255 Calle Clara
San Diego, CA 92037
Phone: (858) 551-1223
Facsimile: (858) 551-1232
norm@bamlawca.com

SANFORD HEISLER SHARP, LLP
*Charles Field
655 West Broadway, Suite 1700
San Diego, CA 92101
Telephone: (619) 577-4242
Facsimile: (619) 577-4250
cfield@sanfordheisler.com

*Kevin H. Sharp
*Leigh Anne St. Charles
611 Commerce Street, Suite 3100
Nashville, TN 37203
Telephone: (615) 434-7000
Facsimile: (615) 434-7020
ksharp@sanfordheisler.com
lstcharles@sanfordheisler.com

*David Tracey
1350 Avenue of the Americas, 31st Floor
New York, NY 10019
Telephone: (646) 402-5650
Facsimile: (646) 402-5651
dtracey@sanfordheisler.com

*Sean Ouellette
700 Pennsylvania Avenue SE,
Suite 300
Washington, DC 20003
Telephone: (646) 402-5644
souellete@sanfordheisler.com

**Admitted Pro Hac Vice*