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

BARBARA J. FULLER; MARIAH C. WILLIAMS; NATALIE BROWN; ELAINE JEFFERSON; BARBARA A. KENNEDY; SELETHIA PRUITT, Plaintiffs, v. SUNTRUST BANKS, INC.; MIMI BREEDEN; MARK CHANCY; ALSTON D. CORRELL; DAVID DIERKER; KEN HOUGHTON; THOMAS KUNTZ; DONNA LANGE; JEROME LIENHARD; THOMAS PANTHER; LARRY L. PRINCE;[1] WILLIAM H. ROGERS, JR.; CHRISTOPHER SHULTS; MARY STEELE; GREGORY MILLER; ALEEM GILLANI; PAUL BURDISS; BEAU CUMMINS; AL KELOSAR; REBECCA LYNN-CROCKFORD; TIM SULLIVAN; SUNTRUST BENEFITS PLAN COMMITTEE; SUNTRUST BENEFITS FINANCE COMMITTEE, Defendants.	CIVIL ACTION NO. 1:11-CV-784-ODE

ORDER

[1] On September 25, 2019 attorneys for Defendants filed a Suggestion of Death regarding Larry L. Prince [Doc. 277].

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This Employee Retirement and Income Security Act ("ERISA") class action is before the Court on Defendants' Motion to Exclude Opinion 5 of Plaintiffs' Expert Dr. Steve Pomerantz, Ph.D. [Doc. 250]; Defendants' Motion for Summary Judgment [Doc. 251], and Plaintiffs' Motion to Exclude the Reports of Defendants' Experts Dr. John R. Minahan and Dr. Bruce Stangle [Doc. 269]. For the reasons provided below, Defendants' Motion to Exclude Opinion 5 of Plaintiffs' Expert Dr. Steve Pomerantz, Ph.D. is GRANTED [Doc. 250]; Defendants' Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART [Doc. 251]; and Plaintiffs' Motion to Exclude the Reports of Defendants' Experts Dr. John R. Minahan and Dr. Bruce Stangle is DENIED [Doc. 269].

I. UNDISPUTED FACTS

The following facts are undisputed unless otherwise stated.

This ERISA class action involves claims against Defendants, who served as fiduciaries to the SunTrust Banks, Inc. 401(k) Plan ("Plan"), for alleged breaches of their fiduciary duties of prudence and loyalty by failing to properly monitor the funds in the Plan and subsequently failing to remove eight Affiliated Funds from the Plan [Docs. 194; 262 at 8-9].[2]

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[2] Plaintiffs created the denomination "Affiliated Funds" to describe eight proprietary SunTrust funds. Plaintiffs label them Affiliated Funds because the fees associated with these

On April 24, 2008, Mary Lee filed an administrative claim alleging violations of ERISA--including breaches of fiduciary duties--by the Plan's fiduciaries in causing the Plan to invest in SunTrust's proprietary, or affiliated, funds [Doc. 262-11 at 2-4]. This lawsuit was subsequently initiated on March 11, 2011, with the filing of the original complaint [Doc. 1]. Plaintiffs filed their Second Amended Consolidated Class Action Complaint ("Complaint") on December 19, 2017 [Doc. 194]. The Complaint brought eight claims against Defendants, who are--as described by Plaintiffs--"the two committees that had responsibility for Plan investments during the Class Period" and their members [Doc. 262 at 9].[3]

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investment options were paid to their investment advisor, RidgeWorth Capital Management, Inc.--a wholly-owned SunTrust subsidiary, during the Class Period [Docs. 194 ¶ 34; 236 ¶ 34]. For example, records reflect that Plan participants paid over $5.5 million in fees in 2005, $5.7 million in fees in 2006, $5.9 million in fees in 2007, and $5.3 million in fees in 2008 [Doc. 263-23 at 2]. The Court uses the Affiliated Funds denomination for consistency's sake. The Affiliated Funds include the following funds: Capital Appreciation, Growth and Income, Mid-Cap Equity, Small Cap Growth, International Equity Index, Prime Quality Money Market, Short Term Bond, and Investment Grade Bond [Docs. 194 ¶ 6; 262 at 9 n.1].

[3] All the members of the Plan Committee and its Investment Sub-Committee were SunTrust Banks, Inc. officers and employees [Doc. 266-14 at 9].

The Court granted summary judgment as to Count II of the Complaint in its order of May 2, 2018 [Doc. 219] and granted summary judgment as to Count VIII of the Complaint in its order of July 16, 2019 [Doc. 219]. Defendants filed their present motion for summary judgment on March 8, 2019 [Doc. 251]. In their motion, Defendants move for summary judgment as to the remaining claims in the Complaint--Counts I, III, IV, V, VI, and VII [Doc. 251-1 at 2]. The parties agree that Counts I and VII are duplicative and allege breaches of the fiduciary duties of loyalty and prudence, and the other counts--Count III, IV, and V --are derivative of Counts I and VII [Docs. 251-1 at 6; 262 at 9].[4] Thus, the viability of all remaining claims turns on whether a genuine issue of material fact exists as to whether Defendants violated their fiduciary duties of loyalty and prudence to the Plan. Plaintiffs responded in opposition to Defendants' motion on April 30, 2019 [Doc. 262], and Defendants filed their reply on May 24, 2019 [Doc. 268].

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[4] According to Plaintiffs, Count I and Count VII, which are "roughly equivalent," allege breaches of the fiduciary duties of loyalty and prudence and are the "primary claims" in the Complaint [Doc. 262 at 9]. "The remaining counts [in the Complaint] are 'derivative' in that they require a finding of liability under Counts I [or] VII . . . to be viable" [Id.].

A. The Plan

SunTrust Banks, Inc. ("SunTrust") is a commercial bank [Docs. 194 ¶ 28; 196 ¶ 28]. SunTrust sponsors two plans for its employees: (1) the SunTrust Banks, Inc. 401(k) Plan, a defined contribution plan; and (2) the Pension Plan, a defined benefit plan [Docs. 223-19 at 9-10; 194 ¶ 36; 196 ¶ 36]. The 401(k) Plan allows participating employees to invest part of their earnings, tax-deferred, in various investment options, with SunTrust matching employees' contributions to a certain extent [See generally Docs. 223-19; 223-20; 223-21]. The balance of a participant's 401(k) Plan account is equal to the sum of contributions plus or minus investment gains or losses [See generally Docs. 223-19; 223-20; 223-21].

Trusco Capital Management, Inc., a registered investment advisor, was a SunTrust subsidiary and acted as the investment manager for a group of mutual funds named STI Classic Funds [Id.]. Effective March 31, 2008, Trusco was renamed RidgeWorth Capital Management, Inc. (collectively, "RidgeWorth") [Doc. 223-6 at 8]. On June 2, 2014, well after the conclusion of the Class Period, SunTrust sold RidgeWorth [Docs. 194 ¶ 34; 196 ¶ 34].[5]

[5] According to the Court's order of June 27, 2018, the Class Period is March 11, 2005 to December 31, 2012 [Doc. 222].

B. The Plan Committee and Other Relevant Entities

SunTrust had a Benefits Plan Committee that served as the named fiduciary and administrator for the 401(k) Plan and Pension Plan [Docs. 228-10 at 6; 223-26 at 2-3]. Members of the Benefits Plan Committee were SunTrust officers and employees [Docs. 194 ¶¶ 31-32; 196 ¶¶ 31-32; 223-2 ¶ 30; 228-1 ¶ 30]. By 2008, the Benefits Plan Committee included an Investment Sub-Committee, which was responsible for overseeing and implementing investment monitoring guidelines for the Plan and reporting regularly to the Benefits Plan Committee [Id.].

The Investment Sub-Committee was tasked with "responsibility for reviewing and assessing performance of investment choices offered" in the Plan, as well as responsibility "for making recommendations to the Benefits Plan Committee with respect to investment fund additions, substitutions, replacements, removals, and changes in investment style categories" [Doc. 223-33 at 2]. The investment monitoring guidelines were created "to provide a framework for the committee's activities related to the investments that were available" in the Plan and "to support a documented, consistent process for monitoring performance of [the Plan's] investment options" [Docs. 251-23 at 54:2-7; 251-30]. The guidelines indicated that the Investment Sub-Committee "may" consider performance information from "a non-SunTrust affiliated investment consultant engaged by SunTrust to analyze and report on the Plan investments"; "[f]und investment performance metrics and scoring based on the SunTrust Retirement Solutions Product Methodology," used by SunTrust's Financial Services Oversight Committee ("FSOC")[6]; "[q]uantitative and qualitative analysis prepared by the Strategic Allocation Solutions group of [RidgeWorth] when requested by the Investment Sub-Committee in order to obtain additional non-performance related forward-looking information regarding existing funds or investments, or prospective funds or investments"; and other data at the discretion of the Investment Sub-Committee [Doc. 251-9 at 3].

The guidelines also required the Investment Sub-Committee to provide quarterly investment performance reports to the Plan Committee, which included an evaluation of the performance of Plan funds and fund performance ratings by Towers Perrin ("Towers"), an outside advisor, and also by SunTrust's FSOC [Id.

[6] The Financial Services Oversight Committee was a group in SunTrust's Wealth Management division that, in part, evaluated and selected funds to include in the Plan [Docs. 251-9 at 2; 251-10 at 206:17-20; 251-11 at 59:19-23; 251-12].

at 4]. Towers' fund performance ratings were assigned by color: green, yellow, or red [Doc. 251-32 at 2]. Green indicated "no action [was] necessary" regarding the fund; yellow indicated "action [was] not necessary but closer attention [to the fund] was warranted"; and red indicated "action [was] necessary" regarding the fund [Id.]. Towers' ratings were based on "five primary investment performance factors," including "fund performance relative to its respective benchmark" and "fund performance relative to its respective peer group" over periods of 1, 3, and 5 years and since client inception [Doc. 264-8 at 6]. The FSOC's fund performance ratings were assigned by number: one through five, with five being the best possible score [Doc. 251-9 at 9-10]. FSOC's scoring system contemplated a review of a fund's "performance ranking" over 1-, 3-, 5-, and 10-year periods [Id. at 8]. When FSOC ratings were presented to the Plan Committee, however, they were color-coded to be consistent with Towers' rating method [Doc. 264-7 at 2]. Green indicated the fund had preferred status and a score of greater than 3.0; yellow indicated discretion to move the fund to "on-watch" status and a score between 2.5 and 3; and red indicated the fund should be "on-watch" status, with discretion to move it to non-preferred status, and a score below 2.5 [Doc. 251-31 at 4].

In July 2011, the Benefits Plan Committee became two committees; one of them, the Benefits Finance Committee, assumed responsibility for the Plan's investments as the Benefits Plan Committee had done [Docs. 251-15, 251-16].[7] Like the Benefits Plan Committee before it, the Benefits Finance Committee was the named fiduciary "responsible for managing the funding, cost, and financial aspects of the Plan, including the investment of Plan assets" [Doc. 251-17]. Throughout the Class Period, the Plan Committee met at least quarterly--totaling over sixty meetings, and meeting minutes were kept for these meetings [Doc. 254 ¶ 34].

The Plan Committee had an Investment Policy Statement ("IPS") that was "intended to assist [it] with guidance in discharging certain fiduciary responsibilities" and with "administering the assets of the Plan consistently and effectively" [Doc. 263-44 at 2]. Drafts began and circulated as early as 2003, and the 2003 IPS draft stated that the Plan Committee was responsible for selecting the Plan's investment options and "[p]eriodically review[ing the] Plan's investment performance and approving investment option[s]" [Doc. 251-22 at

[7] For ease of reference, the Court refers to both committees responsible for the Plan's investments during the Class Period--the Benefits Plan Committee prior to July 2011 and the Benefits Finance Committee afterward--as the "Plan Committee."

3]. The document also listed criteria for selecting funds for the Plan, including that a fund's performance be "equal to or greater than the median return for an appropriate, style-specific benchmark and peer group over a specified time period" [Doc. 263-44 at 6]. The 2003 IPS draft also included guidelines for monitoring and retaining investments, one of which being to "confirm[] that the criteria originally satisfied[, such as the above-median return requirement against benchmarks,] remain so" [Id. at 7].

A later, 2008 draft of the IPS was formally approved by the Plan Committee at its January 8, 2008 meeting [Doc. 263-47 at 4]. Like the prior 2003 draft, it required Plan investments to meet certain criteria for selection, such as "a reasonable performance record, typically a minimum of three years," "relatively superior return (to 50th percentile or better) compared to its peers over a trailing performance of three or five years," and "reasonable expenses" [Doc. 263-48 at 6]. Following selection, the IPS specified that the Investment Sub-Committee was to annually review the performance of investments "based on the criteria specific in the Investment Monitoring Guidelines at least annually . . . consider[ing] the performance of each fund or fund manager against its appropriate benchmark" [Id. at 7]. Steve

Castle,[8] a SunTrust ERISA attorney, reviewed the Investment Policy Statement at the Plan Committee's January 8, 2008, meeting" [Docs. 194 ¶ 58; 196 ¶ 58; 251-248].

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[8] According to Steve Castle's deposition testimony, his role with the Plan Committee was to "provide fiduciary guidance" and "monitor the process they engaged in" [Doc. 263-7 at 93:24-94:15]. Castle began working with the Plan Committee in February 2006 [Doc. 263-26 at 2-3]. On November 6, 2006, he sent an email to another SunTrust employee with the subject line "Investment Sub-Committee" and a document titled "Plan Investment Monitoring" attached [Doc. 263-50]. The body of the email stated that "[a]ttached are investment monitoring procedure proposals and a brief set of slides for discussion" [Id. at 2]. The Plan Investment Monitoring document was a PowerPoint presentation, and it acknowledged "[s]pecific challenges for the SunTrust 401(k)" Plan in "offering [its] own funds" as an "[i]nherent conflict" and a "[h]igher standard of scrutiny" [Doc. 264-1 at 3]. The presentation also included a monitoring proposal that "[r]equire[d] classification of funds not meeting performance standards" and "affirmative action if fund issues [are] not rectified within one year" [Id. at 4]. Later that month, Castle "presented a process for evaluating fund performance" in the Plan to the Plan Committee [Doc. 264-2 at 4] The proposed process included a requirement that funds categorized as "On Watch" be removed from the Plan "if the issue or issues resulting in the classification are not rectified within one year from the date the fund is classified" [Doc. 264-3 at 5]. Following Castle's presentation, Plan Committee member Mimi Breeden expressed that she "wanted to ensure that the process was not entirely formulaic but included some subjective measures" [Doc. 264-2 at 4]. Thus, Castle and Plan Committee member Ken Houghton worked to create a "final version" of the investment monitoring guidelines with the goal of leaving "discretion" to the Investment Sub-Committee to decide what actions to recommend to the Plan Committee in the event monitoring processes were triggered [Doc. 264-4 at 2]. The final Investment Monitoring Guidelines for the Plan did not include some of the language that was present in the earlier proposed guidelines; for example, the final guidelines did not require On Watch funds to be removed if issues were not resolved within a year [Doc. 264-5]. Plan Committee member Donna Lange

According to the Investment Policy Statement, the Plan Committee may "use an investment consultant to advise the Committee on Plan investment policy, investment options, investment monitoring and compliance" [Doc. 251-24 at 4]. Towers Perrin ("Towers"), a "third-party benefits management consulting firm," served as the investment consultant to the Benefits Plan Committee for the Plan [Docs. 223-30 at 8; 223-11 at 5]. Towers prepared quarterly reports for the Plan Committee regarding fund performance in the Plan [Doc. 251-27]. According to the deposition of Chris McGoldrick, a Towers independent investment consultant who advised the Plan Committee during the Class Period, one of Towers' functions was to advise the Plan Committee on what funds to retain or remove [Docs. 251-28 at 93:7-14, 323:10-324:19]. McGoldrick further testified that Towers' role was to "give an independent perspective" on the Plan's funds and that Towers "periodically help[ed] SunTrust review the fees and benchmark the fees" [Id. at 109:13-22, 130:17-18].

At a February 27, 2006, Plan Committee meeting, SunTrust attorney Steve Castle presented regarding "Plan Governance

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stated in her deposition that, though the Plan Committee never formally adopted the investment monitoring guidelines, they "used them as a guideline for the process that [they] followed" [Doc. 262-19 at 171:6-11].

Issues," which included a review of the fiduciary duties of loyalty and prudence [Docs. 263-8 at 3; 263-9]. An accompanying presentation included a slide that described the fiduciary duty of loyalty as a requirement that fiduciaries "discharge [their] duties solely in the interest of the participants" [Doc. 263-9 at 13]. The same presentation included a slide stating that the fiduciary prudence standard of care requires fiduciaries to "act with [the] care, skill[,] and diligence of a prudent and knowledgeable person . . . responsible for operating a plan" [Id. at 14]. Another slide listed as "[f]iduciary considerations" using an "independent investment advisor" for fund additions, deletions, and recommendations, and "expand[ing] . . . non-proprietary funds offered for participant selection" [Id. at 25]. Also at the February 27, 2006, Benefits Plan Committee meeting, a PowerPoint presentation regarding SunTrust's Retirement, or Pension, Plan was made titled "Investment Monitoring Overview" [Doc. 263-28 at 4]. One of the slides in the presentation acknowledged that a "[s]hift of assets to outside[, or non-proprietary,] funds represents tangible loss of revenue to the Company, based on expense ratios of funds utilized" [Id. at 5].

C. Plan Committee Conduct Regarding the Affiliated Funds

In April 1996, the Plan Committee considered replacing non-proprietary funds offered in the Plan with proprietary SunTrust mutual funds offered by RidgeWorth [Doc. 262-22 at 3]. At the Plan Committee's April 10, 1996, meeting, it was recommended that the Plan's investments be changed to "some combination of STI Classic Funds," many of which are the Affiliated Funds at issue [Id. at 3]. Questions arose at the meeting regarding whether the Plan Committee ought to "obtain investment evaluation/selection advice from an outside consultant" and consider funds "other than those offered by SunTrust companies" [Id.]. At a May 22, 1996, meeting, the five Plan Committee members present voted to change the non-employer stock investments in the Plan to mutual funds, and all the mutual funds considered were proprietary SunTrust mutual funds [Docs. 263-11 at 2; 262-27 at 77:3-77:19]. According to the deposition testimony of Rule 30(b)(6) witness Tom Panther, changing the funds offered in the Plan to mutual funds meant Plan participants--rather than SunTrust--would be paying the investment management fees [Doc. 262-24 at 56:20-25, 59:10-59:25].

At its July 10, 1996, meeting, the Plan Committee unanimously approved replacing the common trust funds in the Plan with six

RidgeWorth funds, four of which were Affiliated Funds: the Capital Appreciation Fund, Investment Grade Bond Fund, Short-Term Bond Fund, and Prime Quality Money Market Fund; it did so without comparing the RidgeWorth funds to non-proprietary funds or considering any non-proprietary funds [Doc. 263-13 at 2-3]. The same is also true for the addition of the Growth and Income Fund, Small Cap Growth Fund, Mid-Cap Equity Fund, and International Equity Index Fund [See, e.g., Docs. 262-19 at 120:15-121:23, 122:8-125:2, 126:24-127:4; 262-27 at 93:6-21, 113:20-114:5; 161-21 at 84:3-17; 262-25 at 235:2-236:5].

Notes summarizing the April 6, 2004, meeting of the Plan's Investment Sub-Committee reveal that one issue discussed regarding the Plan was "how to evaluate reputation risk associated with incorporating third party funds" [Doc. 263-21 at 2]. A member of the Investment Sub-Committee, Mark Chancy, stated in his deposition that the reference to reputation risk in the April 6, 2004, meeting notes related to the risk of incorporating non-proprietary, third-party funds in the Plan's lineup [Doc. 262-12 at 121:12-122:4]. Committee member Bill Rogers, in his deposition, noted that the Investment Sub-Committee likely considered reputation risk as a factor when monitoring the Affiliated Funds, which, in his opinion, was a legitimate consideration [Doc. 262-25 at 139:20-25, 140:14-23, 144:24-145:14].

Throughout the Class Period, the Plan offered between 15 and 19 investment options [Doc. 254 ¶ 35, Ex. A ¶ 12]. When the Class Period began, the Plan offered 14 investment options: the eight Affiliated Funds, three other proprietary funds, and three non-proprietary funds [Doc. 254 ¶ 35, Ex. A ¶ 12]. At the end of the Class Period, the Plan offered 17 investment options: five of the Affiliated Funds, three proprietary funds, and nine non-proprietary funds [Doc. 254 ¶ 35, Ex. A ¶ 12]. All but one of the eight Affiliated Funds were actively managed mutual funds [Doc. 262-10]. The Plan Committee's conduct regarding each of the individual Affiliated Funds is outlined below.

1. Capital Appreciation Fund

The Capital Appreciation Fund remained in the Plan for the entire Class Period [Docs. 194 ¶ 135; 196 ¶ 135].[9] Before the Class Period, the Fourth Quarter 2004 Investment Performance Review by Towers indicated the Fund lagged in its return versus its benchmark for 1-year, 3-years, and since the fund's inception

[9] The Capital Appreciation Fund was later named the "Large Cap Growth" fund [Docs. 194 ¶ 6; 196 ¶ 6]. For consistency's sake, however, the Court refers to the fund throughout the Class Period as the Capital Appreciation Fund.

[Doc. 264-9 at 31]. However, the Fund was not discussed at the Plan Committee meeting during which Towers presented its review [Doc. 264-11].

The Capital Appreciation Fund's benchmark initially was the S&P 500 Index [Doc. 264-14]; later, it was the Russell 1000 Growth Index [Doc. 265-23].

By the end of 2005, the Fund had lagged its benchmark since inception and over the trailing 1, 3, and 5 years and had a negative information ratio[10] [Doc. 264-12 at 4, 34]. The Fund "had the worst benchmark relative performance of the Plan's investments," "underperforming the S&P 500 Index by 6.8%" [Doc. 264-12 at 4]. The Fund trailed its benchmark and again had a negative information ratio in 2006 and into 2007 [Doc. 264-13 at 4, 6]. By First Quarter 2007, the Fund had earned 1.5% per year over the last five years, compared to the 6.3% per year earned by the S&P 500 Index [Doc. 264-14 at 4].

The Capital Appreciation Fund had a red or yellow rating from Towers and FSOC from the Second Quarter 2007 through the Third Quarter 2008 [Doc. 251-31]. During that period, the Fund was rated "double red" by both FSOC and Towers for two quarters:

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[10] Information ratio "indicat[es] the amount of value added relative to the amount of unique risk assumed by the manger." Patrick J. Collins, *Prudence*, Banking L. J. 29, 82 n.53 (2007).

Second Quarter 2007 and First Quarter 2008 [Doc. 251-38 at 3]. At an August 7, 2007, Plan Committee meeting, the Investment Sub-Committee was directed to interview the Capital Appreciation Fund's fund managers because of its red designation and the Investment Monitoring Guidelines [Doc. 251-30 at 4].

Investment Sub-Committee meeting minutes from August 13, 2007, indicate the Fund's new managers were present and reflect management changes to the Fund, which targeted "[i]mproved quantitative process"; "[u]pgraded personnel"; "[r]isk control"; and the "[r]eposition of [f]unds within the [p]ortfolio" [Doc. 251-41 at 2-3]. As a result, 31% of the Fund's stocks had been replaced as of the August 13, 2007, meeting [Id.]. After the Fund's new managers left the meeting, "[t]he general consensus was that the [Capital Appreciation Fund] should not be eliminated or closed to new contributions based on the significant process and personnel improvements instituted over the previous quarter" [Id. at 4]. When Ashi Parikh of RidgeWorth presented these changes to the Plan Committee at its August 13, 2007, meeting, he understood he was trying to convince them to retain the Fund [Doc. 263-4 at 134:11-135:21]. The Plan Committee subsequently voted to retain the Fund "based on the significant process and personnel improvements instituted over the previous quarter," noting that the Fund "should be evaluated on future performance rather than on past performance" [Doc. 263-32 at 4]. The Plan Committee "agreed with the Investment Subcommittee's recommendation to closely monitor the performance of the [Capital Appreciation Fund] over the next few quarters" because "the Fund [was] being managed by a new team [and] following a new process," and "the team should be given an opportunity to execute their strategy" [Doc. 251-42 at 3].

At the November 13, 2007, Investment Sub-Committee meeting, a Towers investment consultant "noted the tremendous turnaround in the performance of the [Capital Appreciation Fund] since [the new managers] have been in place" [Doc. 251-43 at 3]. The Sub-Committee agreed not to recommend action to the Plan Committee regarding the Fund "due to an improvement in both the absolute and relative performance of [the] Fund" and to continue closely monitoring the Fund [Id.]. The Towers' First Quarter 2008 Investment Performance Review noted that the Fund's performance "had improved significantly [under its new management] . . . before the slip over the past quarter," during which the Fund had received a double red rating from Towers and FSOC [Docs. 251-44 at 7; 264-23 at 4].

Investment Sub-Committee meeting minutes from May 19, 2008, indicate the Fund underperformed its benchmark over the three- and five-year period. A Towers independent consultant stated the underperformance could "be explained by holdings in the technology sector which declined significantly in the first quarter of 2008" [Doc. 251-43 at 4]. The Sub-Committee recommended continued close monitoring of the Fund with no immediate action "based on positive trends in the previous two quarters" [Id.]. According to the Plan Committee's June 3, 2008, meeting minutes, it agreed with the Sub-Committee's recommendation to continue closely monitoring the Fund--despite a red rating--because it had shown recent improvement and "interviews previously performed by Towers[] found the new process to be sound and the investment management team to be knowledgeable" [Doc. 251-39 at 3]. The Fund continued to have a red rating from Towers in the Second and Third Quarters of 2008 [Doc. 264-23 at 4].

August 25, 2008, Plan Committee meeting minutes noted that the Capital Appreciation Fund had outperformed its benchmark for the second consecutive quarter and that "[a]lthough the fund had negative absolute performance this period, the trend has been positive since the new management team has been in place" [Doc. 251-46 at 3]. Starting in the Fourth Quarter 2008, the Fund was not scored red by either FSOC or Towers again [Doc. 251-38 at 3]. The Capital Appreciation Fund was rated yellow by Towers and either yellow or green by FSOC from Fourth Quarter 2008 through Second Quarter 2012 [Doc. 251-38 at 7]. February 27, 2009, Plan Committee meeting minutes noted the Fund was no longer rated red and "show[ed] continued signs of improvement, outperforming the index by 1.1%" [Doc. 251-47 at 3]. However, Towers' Fourth Quarter 2009 Investment Performance Review noted that "[f]or 2009, the fund underperformed the benchmark by 4.2%" [Doc. 264-16 at 7]. Further, both Towers' Investment Performance Reviews and the Investment Sub-Committee's data collection revealed the Fund often failed to meet its benchmark over trailing periods of 3 and 5 years and had a negative information ratio [See, e.g., Docs. 264-15 at 4, 6-7; 264-16 at 4,6-7; 264-19 at 2-3; 264-21 at 2-3]. Then, according to the Towers' Third Quarter 2012 Investment Performance Report, the Capital Appreciation Fund's trailing 1-, 3-, and 5-year performance was above the median of its Morningstar[11] peer group [Doc. 252-1 at 33].

[11] Morningstar is a firm which provides investment research services. It provides peer group categories for different types of investments.

2. Small Cap Growth Fund

The Small Cap Growth Fund was offered in the Plan for the entire Class Period [Docs. 194 ¶ 135; 196 ¶ 135]. Before the Class Period, Towers' First Quarter 2003 report revealed the Fund had a one-year loss of 7.2% compared to its benchmark [Doc. 265-3 at 17]. In 2004, the Fund lagged its 1- and 3-year return versus its benchmark [Doc. 264-9 at 14].

The Small Cap Growth Fund's benchmark was the Russell 2000 Growth Index [Doc. 265-23].

At the August 15, 2005, Plan Committee meeting, a Towers independent investment consultant noted that, overall, "the benchmarks were hard to beat" because of "the unique economic environment," resulting in "poor relative performance" for the Small Cap Growth Fund compared to "the stellar performance of the benchmarks" [Doc. 252-3 at 3]. The Fund was still in the "top quartile rankings of the total returns" [Id.]. Towers' Second Quarter 2006 Investment Performance Review indicated the Fund's management had recently left, and Towers' Fourth Quarter 2007 Investment Performance Review indicated the Fund "ha[d] experienced a significant turnaround in performance since Chris D. Guinther took over as lead portfolio manager . . . in 2007" [Doc. 252-5 at 27]. The document went on to note that the Fund had outperformed its benchmark by an average of 1.7% in the past three quarters [Id.]. Similarly, Towers' Second Quarter 2008 Investment Performance Review noted "an overall improvement in performance since the change in management" [Doc. 252-6 at 27]. However, Towers' Fourth Quarter 2008 review indicated it had lagged its 3- and 5-year trailing return against its benchmark and now had a negative Information Ratio, noting the "fund underperformed the Russell 2000 growth index by 1.2%, the second consecutive quarter of lagging performance . . . in the second quarter as well as all of 2007, the Small Cap Growth Fund lagged the benchmark over the longer one-, three- and five-year periods" [Doc. 264-10 at 25-26].

The Small Cap Growth Fund was rated red by FSOC in the Second and Third Quarters 2009 and was never rated red by Towers [Docs. 251-31; 251-38]. Towers' Fourth Quarter reviews for 2009 and 2010 indicated the Fund lagged in its 2- and 5-year trailing returns, continued to have a negative Information Ratio, and--in 2010--had a gain of 1.9% compared to its benchmark's 5.3% [Docs. 264-16 at 4-5, 25; 264-17 at 4]. At the November 16, 2010, Plan Committee meeting, a Towers representative noted the Fund had underperformed but not as critically as the Growth and Income Fund had, partially because the Small Cap Growth Fund's "benchmark has been in the [first] and [second] quartile and very hard to beat" [Doc. 252-8 at 3]. The Investment Sub-Committee and Towers representative suggested the Fund should be monitored, and the Plan Committee "supported this action" [Id.]. At the Plan Committee's February 24, 2011, meeting, a Towers representative expressed concern regarding the Fund's performance and noted its yellow rating and that it was "trending down" [Doc. 265-11 at 3]. Towers' Fourth Quarter 2011 review indicated the Small Cap Growth Fund was below its benchmark for trailing 3- and 5-year performance [Doc. 264-18 at 10, 53].

Towers' Third Quarter 2012 Investment Performance Review placed the Small Cap Growth Fund at or exceeding its Morningstar peer group median for trailing 1- and 3-year performance [Doc. 252-10 at 52].

3. Growth and Income Fund

The Growth and Income Fund was in the 401(k) from the start of the Class Period until it was removed on June 1, 2011 [Doc. 194 ¶ 135].[12] Before the Class Period, Towers' Fourth Quarter

[12] The Growth and Income Fund was renamed the "Large Cap Relative Value Equity" fund in 2005 and was renamed again in 2007 as the "Large Cap Core Equity" fund [Docs. 194 ¶ 6; 196 ¶ 6]. For consistency, the Court refers to the fund as the "Growth and Income Fund."

2004 Investment Performance Review indicated the Fund was below its 1-, 3- and 5-year returns against its benchmark and had a negative Information Ratio [Doc. 264-9 at 29, 32].

The Growth and Income Fund's benchmark was the Russell 1000 Value Index [Doc. 264-14].

Between Second Quarter 2007 and Second Quarter 2010, the Fund was rated red by Towers in one quarter: Second Quarter 2008 [Doc. 251-31 at 3]. The Fund was rated green by FSOC in eight of those quarters [Id.]. Towers' First Quarter 2008 review indicated the Fund had fallen behind its 3-year return versus its benchmark [Doc. 265-22 at 5]. At the August 25, 2008, Plan Committee meeting, the Plan Committee discussed "concerns" regarding the Fund's performance and agreed with the Investment Sub-Committee's recommendation that Towers be asked to interview the Fund's management team [Doc. 251-46 at 3]. According to a September 2008 "Manager Brief" by Towers on the Growth and Income Fund, Towers was "unable to uncover evidence that there is a systemic problem with the manager" and recommended the Plan Committee "continue to monitor performance" [Doc. 252-61 at 5]. Towers' First Quarter 2009 Investment Performance Review indicated the Fund continued to be behind in its 3-year return against the benchmark and was below its trailing 5-year peer ranking [Doc. 265-23 at 4-5].

At the August 30, 2010, Plan Committee meeting, a Towers representative "pointed out that the [Fund] ha[d] underperformed during the last 5 quarters and that [the Fund] should be watched" [Doc. 262-15 at 3]. The Fund was rated red by FSOC in Third Quarter 2010 and double red by both Towers and FSOC in Fourth Quarter 2010 and First Quarter 2011 [Doc. 251-31 at 3]. Towers' Fourth Quarter 2010 Investment Performance Review indicated the Fund fell below its trailing 1-, 3-, and 5-year returns against the benchmark, was ranked in the bottom quartile in peer rankings, and had a negative Information Ratio; the document noted that "[t]he [F]und underperformed the benchmark by 5.1% for 2010, trailing the index all four quarter[s]" [Doc. 264-17 at 4-5, 9-10]. On February 11, 2011, RidgeWorth announced a "new portfolio management team" for the Fund [Doc. 252-16 at 2-4].

The Investment Sub-Committee met on February 22, 2011 and discussed the Growth and Income Fund [Doc. 252-17 at 2]. In its Fourth Quarter 2010 recommendation, the Sub-Committee stated "[t]here are no immediate concerns with the new management team of the Fund," but also that the recent resignation of one of the Fund's managers "raises questions with respect to the investment discipline needed in the core space" [Id. at 2]. The Sub-Committee also noted that a large percentage of the fund was held by the Plan and recommended the Fund be removed "if and when the Plan exceeds a significant portion of the [F]und" [Id.]. Additionally, the Investment Sub-Committee's research over the years indicated problems with the Fund [See, e.g., Docs. 266-1 at 4 (noting that, in part of 2008, the Fund's returns were negative and "continued to deteriorate" and that its "information ratio continued to decline and fell to the bottom of the third quartile"); Doc. 265-14 at 2 (noting the Fund's fourth and third quartile ranking among peers at years one and five, respectively, and noting that the Fund's "information ratio improved but remained in the fourth quartile" and "selection returns improved again but remained negative")].

On April 12, 2011, one month after this lawsuit was filed, five members of the Plan Committee met "to discuss the future of the [Growth and Income Fund] in the SunTrust Banks, Inc. 401(k) Plan" [Doc. 252-18 a 2]. A SunTrust employee "confirmed that the [F]und ha[d] been placed on the FSOC non-preferred list," and another noted that "a change in manager or advisor is considered a serious red flag and would look for an overwhelming reason to retain the fund" [Id.]. According to the meeting minutes, "[t]he

[Plan] Committee agreed that the combination of performance, management changes and changes to the fee structure necessitate the removal of the Fund from the 401(k) Platform" [Id.]. After a presentation of "several alternatives" to the Fund, the Plan Committee approved the removal of the Growth and Income Fund from the Plan and "the Vanguard Institutional Index Fund as a replacement" [Id. at 3]. The Committee "agreed that one fund in this space was appropriate" and "also approved the removal of the [proprietary] SunTrust 500 Index Fund" [Id. at 2].

4. Mid-Cap Equity Fund

The Mid-Cap Equity Fund was in the Plan from the start of the Class Period until its removal effective November 9, 2010 [Docs. 194 ¶ 135; 196 ¶ 135; 252-20 at 3].[13] Before the Class Period, at a May 20, 2002, Plan Committee meeting, a RidgeWorth representative, Doug Phillips, informed the Plan Committee that the Fund's performance was "unacceptably low and that he [would] address required changes in the management of the fund" [Doc. 265-1 at 3]. The meeting minutes do not indicate any further discussion of the Fund's performance or the management changes;

[13] Mid-Cap Equity Fund was renamed the "Mid-Cap Core Equity Fund" during the Class Period, but the Court refers to it consistently as the Mid-Cap Equity Fund [Doc. 194 ¶ 6, 196 ¶ 6].

Doug Phillips stated in his deposition that it "wasn't unusual that even though questions would come up on the [401(k) P]lan, it wasn't unusual that there were no questions on the [401(k) P]lan" [Docs. 265-1 at 3; 263-2 at 260:3-8]. Again at the Plan Committee's February 24, 2003, meeting, Doug Phillips "expressed continuing concern[n] with the performance of Mid-Cap equity investment [] and indicated he [would] likely make changes in the management and/or monitoring of the Mid-Cap funds" [Docs. 265-2 at 3; 253-2 at 249:24-20:8].

The Mid-Cap Equity Fund's benchmark was the Russell Mid-Cap Index [Doc. 264-14].

According to Towers' report for the First Quarter 2003, the Mid-Cap Equity Fund showed one-year losses of 4.2% compared to its benchmark [Doc. 265-3]. At the Plan Committee's August 25, 2003, meeting, a Towers representative again addressed the Mid-Cap Equity Fund, discussing its "relatively poor performance" and noting that the Fund had "a relatively new fund manager and [was] expected to see better relative performance in the future" [Doc. 265-5 at 3]. Again in its February 23, 2004, meeting, the Plan Committee "expressed concern with the performance of the mid-cap investments," and RidgeWorth's Doug Phillips stated "he believed the new fund manager was directionally on track and that he was still feeling okay with the manager's ability" [Doc. 263-46 at 4]. Towers' Fourth Quarter 2004 investment review indicated that the Mid-Cap Equity Fund lagged in its 2-, 3-, and 5-year returns --earning well below its benchmark--and had a 5-year negative Information Ratio [Doc. 264-9 at 29, 34]. At the Plan Committee's February 14, 2005, meeting, a member "reminded the Committee that based on the poor performance of the Mid[] Cap [Equity Fund] last year, and the recommendation of [RidgeWorth], the allocation to the Mid-Cap [Equity Fund] has been reduced over the past 1.5 years" in SunTrust's Pension Plan, in which the Fund was also included; there was no discussion of the Fund as it pertained to the 401(k) Plan [Doc. 264-11 at 3].

At the end of 2005, the Fund lagged its benchmark for 3- and 5-year trailing returns and had earned only 5.2% compared to its benchmark's 12.3% since inception [Doc. 264-12 at 14]. It also had a negative Information Ratio and a five-year ranking below its peer median [Id. at 26-27]. At the February 27, 2006 Plan Committee meeting, a Towers representative noted the Fund "posted negative returns relative to the benchmark" [Doc. 263-8 at 4].

The Fund was rated yellow by both FSOC and Towers for the Second, Third, and Fourth Quarters 2007. Towers' Fourth Quarter 2007 review indicated the Fund lagged its benchmarks over trailing periods of 3 and 5 years, had a negative information ratio, and remained below the median in its peer ranking for the five-year trailing period [Doc. 264-15 at 20-21]. The 2007 review also noted that the Fund's "returns ranked below median over short[-] and long[-]term period[s]," and "its rolling information ratio declined from the top to the bottom quartile over the past two years as a result of weaker selection decisions" [Id.]. After 2007, the Fund was rated red by Towers and either red or yellow by FSOC through at least the Second Quarter 2009 [Doc. 251-31 at 3]. The Fund was rated double red for six quarters between Fourth Quarter 2007 and First Quarter 2009 [Doc. 265-10 at 2].

According to minutes from the August 25, 2008, Plan Committee meeting, the Plan Committee discussed concerns regarding the Mid-Cap Equity Fund and agreed with the Investment Sub-Committee's recommendation for Towers to interview the Fund's management team [Doc. 251-46 at 3]. At the September 15, 2008, Plan Committee meeting, independent investment consultants from Towers stated that interviewing the Fund's managers, which was "prompted by significant underperformance," "did not reveal enough impairment to the team or process to warrant termination of this fund offering to plan participants at this time" [Doc. 251-46 at 7]. The Plan Committee reviewed recent fund performance which showed improvement "relative to the benchmark from 2.07 below the index as of 6/30/2008 to 1.99 below the index as of 8/31/2008" [Id.]. Two recommendations were made regarding the fund: (1) to freeze the option, thereby preventing new contributions to the Fund; or (2) to closely monitor the Fund's investment manager over the next few quarters and then make a decision regarding the Fund based on whether its performance improved [Id.]. The Plan Committee decided that "[g]iven the improvement in performance coupled with Towers['] report that no people or process issues were uncovered, the Investment Subcommittee agreed with the recommendation . . . to closely monitor performance . . ." [Id.].

At the February 27, 2009, Plan Committee meeting, a Towers representative noted the Mid-Cap Equity Fund "demonstrated positive trends," had "outperformed the index for the second consecutive quarter after lagging the benchmark in the previous three quarters," and was "expected to come off [the] watch list" and red status if it continued that way for another quarter [Doc. 251-47 at 3]. Later that year at the May 20, 2009, Plan Committee meeting, that same Towers representative noted that the Fund was "showing trends in the right direction" and that Towers expected it would be taken off the watch list "shortly if the trends continue" [Doc. 252-22 at 3]. According to the Investment Sub-

Committee's Second Quarter 2009 recommendations--made after an August 12, 2009, meeting--the Mid-Cap Equity Fund needed to continue to be closely watched, but the Sub-Committee did not recommend any action at the time because "[p]erformance is being dragged down by poor past performance of another fund manager," "[t]he fund beat the index in the previous three quarters and for the 1-year period," "[t]he manager remains focused on valuations, sustainability of earning growth and balance sheet strength," and "[w]hen fundamentals are again rewarded in the market, there should be a noticeable turnaround in the performance of this fund" [Doc. 252-23 at 2].

According to draft November 18, 2009, Plan Committee meeting minutes, a Towers representative recommended the Plan Committee "continue to monitor [the Mid-Cap Equity Fund] and wait for the markets to settle before jumping to any conclusions" [Doc. 252-25 at 2]. According to the Investment Sub-Committee's Fourth Quarter 2009 recommendations--made after a February 10, 2010, meeting--the Mid-Cap Equity Fund needed to continue to be closely watched, but the Sub-Committee did not recommend any action at the time because "[t]he fund exceeded [its benchmark] by 0.5% this quarter" [Doc. 252-26 at 2]. According to Towers' Fourth Quarter 2009

Investment Performance Review, however, the Fund's performance for 2009 "was 5.3% below the benchmark" [Doc. 264-16 at 20-21].

The Investment Sub-Committee's First Quarter 2010 recommendations, following a May 17, 2010 meeting, note that both the Sub-Committee and Towers recommend considering alternatives to the Mid-Cap Equity Fund because, although the market had been challenging, the Fund manager had not effectively navigated those challenges and the Fund had experienced "an extended period of underperformance" and Towers had expressed concerns about the Fund's appropriateness for the Plan [Doc. 252-27 at 2]. Then, at the May 18, 2010, Plan Committee meeting, a Plan Committee member noted it had been appropriate to allow the Fund's new management time to improve performance, but the Committee agreed with the Sub-Committee that it was time to look at alternatives to the Fund [Doc. 252-28 at 3]. Defendant Mimi Breeden, a Plan Committee member, requested that the Sub-Committee identify alternatives and "report back . . . as quickly as possible" [Id.]. At the August 3, 2010, Plan Committee meeting, member Chris Shults reported research regarding alternative funds and indicated that, following a rejection of three alternative funds, seven other funds had been considered [Doc. 252-29 at 2]. The Plan Committee concluded the Principal MidCap Blend Institution Fund was the best alternative to the Mid-Cap Equity Fund and approved a motion to replace the Mid-Cap Equity Fund accordingly [Id.]. Effective November 9, 2010, the Mid-Cap Equity Fund was removed from the Plan and replaced by the Principal MidCap Blend Institutional Fund [Doc. 252-20 at 3].

5. Investment Grade Bond Fund

The Investment Grade Bond Fund, later renamed the "Core Bond Fund," was offered in the Plan throughout the Class Period [Docs. 194 ¶ 6; 196 ¶ 6]. The Fund's benchmark was the BC Gov/Credit Index [Doc. 265-23].

Before the Class Period, Towers' Fourth Quarter 2004 Investment Performance Review indicated the Fund was below its 1-, 3-, and 5-year return against the benchmark and had a negative Information Ratio for those time periods, as well [Doc. 264-9 at 35-6]. The same was true of the Fund according to Towers' Fourth Quarter 2005 review [Doc. 264-12 at 14, 65].

The Investment Sub-Committee's compiled data during the Class Period revealed some performance issues for the Fund. For example, in the First Quarter 2008, the Fund's "[r]ank for benchmark relative performance, performance versus peers and performance attribution declined from green to yellow due to recent underperformance," and the Fund's Information Ratio rank declined from yellow to red [Doc. 266-1 at 5]. However, the Fund was rated green by both Towers and FSOC from First Quarter 2009 until Third Quarter 2010 [Doc. 251-38 at 7]. From Fourth Quarter 2010 through the Second Quarter 2012, the Fund was rated yellow by Towers and green by FSOC [Id.].

6. Short Term Bond Fund

The Short Term Bond Fund was offered in the Plan throughout the Class Period [Docs. 194 ¶ 135; 196 ¶ 135]. Before the Class Period, the Towers' Fourth Quarter 2004 review indicated the Fund was below its benchmark in its 1-, 3-, and 5-year returns [Doc. 264-9 at 29]. Towers' Fourth Quarter 2005 review similarly revealed the Fund was below its benchmark for 3- and 5-year trailing return and since inception [Doc. 264-12 at 14].

The Short Term Bond Fund's benchmark was the Merrill 1-3 Year G/C Index [Doc. 264-14].

The Fund was rated yellow by Towers and green by FSOC from the beginning of 2008 until the end of 2010 [Docs. 251-31 at 3; 251-38 at 7]. The Fund was rated green by both Towers and FSOC for two quarters of 2007 and two quarters of 2012 [Docs. 251-31 at 3; 251-38 at 7]. Towers' Fourth Quarter 2008 review indicated the Fund's returns were less than its benchmarks at the 3- and 5-year periods and that the Fund had lost 1% at one-year whereas its benchmark had gained 5.8% [Doc. 264-10 at 4]. Towers' Fourth Quarter 2009 review revealed the Fund's return to be below that of its benchmark at three and five years, and since inception [Doc. 264-16 at 4]. Towers' Fourth Quarter 2010 review showed the Fund's returns fell below its benchmarks at years three and five and since inception; Towers' Fourth Quarter 2011 review indicated the Fund was behind in its 5-year trailing return [Docs. 264-17 at 4; 264-18 at 10].

7. Prime Quality Money Market Fund

The Prime Quality Money Market Fund was in the Plan throughout the Class Period until October 29, 2010 [Doc. 194 ¶ 135; 196 ¶ 135]. Before the Class Period, Towers' Fourth Quarter 2004 review indicated the Fund's 1-, 3-, and 5-year returns were behind those of its benchmark, and it was behind since inception [Doc. 264-9 at 29]. Towers' Fourth Quarter 2005 review revealed the same [Doc. 264-12 at 14]. At the Plan Committee's May 10, 2005 meeting, member Ken Houghton asked about the Fund's performance relative to its benchmark and "commented that the negative performance had to be driven by the differences in fees paid by SunTrust versus our peers"; a RidgeWorth representative said he would investigate further [Doc. 266-5 at 3].

The Prime Quality Money Market's benchmark was iMoneyNet First Tier Money Fund Average [Doc. 265-23].

At one point during the Class Period, the Plan Committee had planned to transfer monies from the Prime Quality Money Market Fund to a different RidgeWorth money market fund with lower fees. This planned change arose out of an earlier email exchange. On January 4, 2008, Leilani Fountaine, a First Vice President of SunTrust Bank, emailed George Smith, a RidgeWorth employee, stating "it was brought to [her] attention . . . that the [Prime Quality Money Market Fund] used as an investment vehicle for this plan has a minimum charge of 53 [basis points]" [Doc. 266-6 at 5]. Fountaine went on to say that she "wonder[ed] if we should consider discussing with the Committee the possibility of using the institutional [money market] fund, with a 17 [basis points] charge" [Id.]. She noted it may be necessary to change the name of the institutional money market fund, but that "it would be a small inconvenience if participants could pick up 39 [basis points] . . . especially in this market!!" [Id.]. George Smith responded on January 14, 2008, to ask whether there were "large amounts of cash in each account" because there was typically a "$10 million minimum, which is probably why we have not done it in the past" [Id. at 4]. Leilani confirmed the amounts in the

Prime Quality Money Market Fund and added that "[i]n light of the 'investigation' of STI by a law firm regarding our policy of depositing the match into our own stock, I think that we should look closely at our reasoning behind continuing to offer a higher fee [money market fund] to our own participants (who pay these expenses)" [Id.]. After discovering there was "no reason not to move [from the Prime Quality Money Market Fund to the Institutional Cash Money Market Fund] at all," Fountaine indicated that "[n]ow we just have to get the Plan Committee to approve the change and we will all benefit!" [Id. at 2]. RidgeWorth employee George Smith forwarded the email exchange to fellow RidgeWorth representative Ashi Parikh with a message stating that "Leilani began investigating why we cannot use the institutional cash fund vs prime quality fund for the 401(k), with lower fees being the primary reason . . . . Based on the responses below, it looks like it is not a problem" [Id.]. Parikh forwarded the email to others and wrote, "[t]his email trail may have some minor implications to our P&L" [Id.]. In his deposition, Parikh indicated that his statement meant that if this change--from the Prime Quality Money Market Fund to the Institutional Cash Money Market Fund--were made with the Plan, he would need to "redo [the] forecast because there might be a difference in the fees SunTrust receives" [Doc. 263-4 at 188:21-189:17].

At the Plan Committee's August 25, 2008, meeting, member and Defendant Donna Lange presented the recommendation to move funds from the Prime Quality Money Market Fund to the Institutional Cash Money Market Fund, which had lower fees [Docs. 252-32 at 2; 251-46 at 5]. Upon motion, the Plan Committee approved a mapping of funds from the former to the latter [Doc. 251-46 at 5-6]. However, at the September 30, 2008, Plan Committee meeting, Lange recommended the decision be revoked due to SunTrust's decision to participate in a Treasury Department program that would ensure certain money market funds did not fall below a value of $1.00 per share [Doc. 252-33 at 3]. Under the program, "only those monies invested in the Prime Quality Money Market Fund as of September 19th would qualify for the program," so moving the funds to the Institutional Cash Management Fund would result in the loss of the government $1.00 per share guarantee [Id.]. The Committee agreed not to map the monies and executed a resolution "by unanimous written consent" to memorialize the decision on September 30, 2008 [Doc. 252-34 at 1-2].

In the Second Quarter 2010, the Fund's management changed from RidgeWorth to Federated Investors, Inc., and the Fund was renamed the Federated Prime Obligations Money Market Fund [Doc. 252-15 at 3].[14] The Fund was not rated by the FSOC, but it was rated by Towers [Docs. 251-31 at 3]. Towers gave the Prime Quality Money Markey Fund a green rating from Second Quarter 2007 until Second Quarter 2009, and again from Fourth Quarter 2010 until Second Quarter 2012 [Docs. 251-31 at 3; 251-38 at 7].

The Fund's benchmark may have changed during the Class Period. According to a 2003 Investment Policy Statement draft for the Plan, the Fund's benchmark was the iMoney Net First Tier Money Fund Average [Doc. 251-20 at 6]. The Towers Investment Performance Report for First Quarter 2006, however, lists the 3 Month Treasury Bill Index as the Fund's benchmark [Doc. 252-30 at 5]. The minutes of the May 15, 2006, Plan Committee meeting stated that "it was determined that the I-Money is the benchmark for the fund," and that Towers would correct the benchmark, which would "reflect a more favorable variance" [Doc. 252-31 at 2]. Towers made this change in subsequent reports [Doc. 252-4 at 4].

8. International Equity Index Fund

The International Equity Index Fund was in the Plan throughout the Class Period [Doc. 252-35 ¶ 5]. The Fund was

[14] The Court will refer to the Fund herein as the Prime Quality Money Market Fund.

rated green by Towers and FSOC from Second Quarter 2007 until First Quarter 2008 [Doc. 251-31 at 3]. The Fund was then rated either yellow and green, or "double yellow" by both Towers and FSOC, through First Quarter 2010 [Doc. 251-31 at 3; 251-38 at 7]. Starting at Second Quarter 2010, the Fund was rated yellow by Towers and red by FSOC until Second Quarter 2012 [Doc. 251-38 at 7].

The Fund's benchmark was MSCI EAFE GDP [Doc. 265-23].

According to John Floyd, former head of SunTrust's Strategic Allocation Solutions Group,

> [m]ost [international] index funds are capitalization weighted, which means that whenever the capitalization of the [country] is [sic] represents . . . their proportional share of the index fund. . . . The problem you can get into is that you can get an overweight country, something called country risk in international investing. . . . So if you did not weight by [gross domestic product], you could end up with an excessive concentration in single countries. By weighting by [gross domestic product] . . . [the International Equity Index Fund was able] to spread the risk better [Doc. 251-11 at 94:14-95:7].

Floyd further indicated that the Fund, which was passively managed, had fees equal to those of the actively-managed Fidelity Advisor Diversified International Fund [Doc. 263-5 at 99:23-101:4]. Plan Committee member Ken Houghton confirmed that the

Fund's expense ratio was within the top five percent of the most expensive funds for its class [Doc. 262-17 at 128:18-129:1].

At its March 1, 2010 meeting, the Plan Committee--after Towers presented its 2009 Investment Performance Review--noted that the Fund "doesn't correlate to its benchmark and as a double yellow will continue to be monitored" [Doc. 265-24 at 3]. The Investment Sub-Committee's recommendations for Fourth Quarter 2010 note that though the Fund "does not fully replicate the index," "[t]here are no options currently available to reduce this volatility" and that "[t]here are no concerns related to style, process, etc. and the fund continues to be an appropriate option going forward" [Doc. 252-17 at 2]. At the February 24, 2011, Plan Committee meeting, a Towers representative noted that the International Equity Index Fund's manager "does not try to fully replicate the index" and that there had been "a lot of volatility from December 31[, 2010,] to January 3[, 2011,] with pricing that corrected itself in the first quarter of 2011" [Doc. 252-9 at 3]. Towers' Fourth Quarter 2011 Investment Performance Review indicated that the International Equity Index Fund's returns were below that of its benchmark, MSCI EAFE GDP, at 1, 2, 3, 5, and 10 years, and annually since 2009 [Doc. 264-18 at 56].

D. Plan Committee Conduct Regarding Non-Proprietary Funds

At the May 10, 2005, Plan Committee meeting, John Floyd of SAS presented active "international fund options" for the Plan, discussing "finalist candidates," one of which was a propriety fund [Doc. 253-12 at 3]. Floyd recommended a non-proprietary option--the Bernstein International Fund—for strong consideration because it was less expensive, had "performed well during the tough periods, and "had some emerging market exposure" [Id.]. The Plan Committee approved the addition of the Bernstein International Fund to the Plan lineup [Id.].

In September 2006, the Plan Committee met and discussed the addition of a target date fund to the Plan as a default investment option [Doc. 253-2 at 3-4]. John Floyd of SAS presented three options; one option was proprietary--the STI Life Vision Target Date funds, but the Investment Sub-Committee recommended a different option--the T. Rowe Price Target Date Fund--over the proprietary option because, among other reasons, it had been in existence the longest of the three options and had lower fees [Id.]. The Plan Committee approved the addition of the T. Rowe Price Fund as an investment option for the Plan [Id. at 4].

On February 20, 2008, a SunTrust actuary who assisted the Plan Committee, Jim Pisano, emailed Plan Committee member Ken

Houghton information regarding investments in the Plan [Doc. 253-3 at 2]. His message noted that the "Lazard [Mid-Cap Institutional Fund] was a big concern and Randy [Cusick of Towers] recommended action based on fundamental process issues (lack of confidence, sell discipline is off, stock picks are wrong, account churning, etc.)" [Id.]. Pisano further noted there was "[s]ome concern expressed if we immediately take action on a non-proprietary fund as compared to the drawn out process taken with our own funds" [Id.]. Cusick, however, said the problems with the Lazard fund were "significant enough that not taking action could present a problem" and that they "interviewed the fund manager already and still have a problem with the fund" [Id.].

Shortly thereafter, on February 25, 2008, Cusick discussed Lazard's poor performance at a Plan Committee meeting, noting that the Lazard fund had "significantly underperformed against the benchmark" and that its managers "made significant bets on investments that were negatively impacted by the sub prime industry" [Doc. 253-4 at 3]. The Lazard Fund had received a double red rating in the Fourth Quarter 2007 and First Quarter 2008 [Doc. 264-23 at 3]. Cusick stated "serious concerns with the Lazard fund relating to style drift . . . , an impaired process, leadership change, poor self discipline[,] and a tendency for them to 'fall in love' with their losers (i.e. double down)" [Doc. 253-4 at 3]. SunTrust employee Diane Schmidt, who had expertise in investments, recommended the Fund's removal [Id.]. The Plan Committee subsequently voted to remove the Lazard Mid-Cap Institutional Fund from the Plan [Id. at 4].

On March 10, 2008, the Investment Sub-Committee met "to discuss the replacement of the Lazard Mid-Cap [Institutional F]und as approved by the Benefits Plan Committee on February 25" [Doc. 253-5 at 3]. In the meeting, the Sub-Committee discussed identifying "the reason for change and why this is different from previous issues involving poor fund performance"; the reasons noted included "[f]undamental concerns above and beyond anything we have seen to date regarding management of the fund, style drift, poor sell discipline, etc. [which] place[] significant fiduciary risks that require quick action in this case" [Id.]. The Sub-Committee was also noted to have discussed whether to keep the Mid-Cap Equity Fund and "map participants there," but "[t]he Committee decided it would be prudent to offer a choice of Mid-Cap funds" [Id.]. The Sub-Committee ultimately recommended that the Lazard fund be replaced with a "mid-cap pure index fund" and asked Diane Schmidt to provide "additional pure index options in the Mid-Cap space to be sure our due diligence process is complete and we choose the best fund possible" [Id. at 4]. Schmidt provided three alternatives to the Lazard fund to the Sub-Committee in April 2008, none of which were proprietary funds [Docs. 253-6 at 2; 253-7 at 3]. The Sub-Committee considered the alternatives and chose to recommend the Vanguard Mid-Capitalization Index Fund [Docs. 253-6 at 2; 253-7 at 2]. Plan Committee member Ken Houghton stated in his deposition that "if a proprietary fund had done the kind of things that the Lazard fund had done, it would have been removed" [Doc. 253-8 at 205:2-206:9]. In comparing the Lazard fund to the proprietary Capital Appreciation Fund, Houghton stated that the Capital Appreciation Fund "had nothing like [what was happening with the Lazard fund] going on at the time" [Id.].

In September 2008, Plan Committee member Donna Lange received an email from a SunTrust employee and Plan participant asking the Plan Committee to consider adding a Government Bond Fund to the Plan [Doc. 253-9 at 2]. Lange then sought potential "safe haven" Government Bond Fund candidates for the Investment Sub-Committee to review; thus, Alan McKnight of SunTrust Institutional Advisors was asked to conduct a search for fund alternatives "that [Plan] participants would consider a safe haven" [Docs. 253-9 at 2; 252-33 at 3]. McKnight told the Plan Committee on September 30, 2008, that "funds that fit this criterion would typically have a significant portion of their portfolio invested in Treasury Bills" [Doc. 252-33 at 3]. Later that day, Paul Robertson, the President of StableRiver Capital Management LLC, emailed Donna Lange indicating he had been asked to do so by McKnight [Doc. 253-10 at 3]. As requested, Robertson provided information regarding RidgeWorth's U.S. Treasury Money Market Fund [Id.]. Robertson indicated that, although there was capacity in that fund, he instead recommended the RidgeWorth Institutional U.S. Treasury Securities Money Market Fund for the Plan [Id.]. However, in October 2008 the Plan Committee instead added non-proprietary Dreyfus Institutional Reserves Treasury Prime Fund as a Plan option [Doc. 253-11 at 2].

At its February 27, 2009, meeting, the Plan Committee "discussed the Dreyfus Small Cap [Value Fund] at great length" due to its extended underperformance, as reported by a Towers representative [Doc. 251-47 at 3]. The Committee expressed concerns about the Fund due to management changes, "removal of the fundamental overlay strategy, and a consistent level of risk without the appropriate returns" [Id.]. The Plan Committee decided "it was appropriate to take a deeper look at [the] fund" [Id.]. At this same meeting, a member of the Investment Sub-

Committee presented the Sub-Committee's recommendations for replacing the Dreyfus Small Cap Value Fund [Id. at 4]. The Plan Committee discussed four potential alternatives--including one proprietary RidgeWorth fund--and agreed to recommend one of the other, non-proprietary options, the Dreyfus-Boston Company Small Cap Value Fund, to replace the Dreyfus Small Cap Value Fund [Id.].

At the February 27, 2009, Plan Committee meeting, a member of the Investment Sub-Committee presented the Sub-Committee's recommendations regarding the underperforming Bernstein International Fund, a non-proprietary, active international fund that had been added to the Plan lineup in 2005 [Doc. 251-47 at 3]. All three replacement options considered were non-proprietary, and the Plan Committee voted to replace the Bernstein International Fund with one of the options, the non-proprietary Mainstay International Fund [Id. at 4].

E. Plan Committee Conduct Regarding Potential ERISA Litigation Related to the Plan

At the Plan Committee's February 25, 2008, meeting, Steve Castle "discussed the letter regarding Law Firm 'Investigations' of [the Plan] . . . . Mr. Castle spoke to several recent incidents where 401(k) Plans were under investigation based on alleged breaches of fiduciary responsibility" [Doc. 263-33 at 5]. Castle noted that "[t]he claims against other employers were based on the premise that employer stock is an imprudent investment based on high risk investments made by senior management who are also acting in the capacity of plan fiduciaries" [Id.]. Following Castle's comments, Plan Committee chair Mark Chancy "provided an overview of the steps taken by the Committee to ensure that employees have been given ample opportunity to diversify out of Company stock" [Id.]. As previously stated, Mary Lee filed an administrative claim on behalf of the Plan for alleged ERISA violations on April 24, 2008. A few weeks later, on May 15, 2008, a sub-committee of the Plan Committee met to discuss the claim [Doc. 266-9 at 2].

During a July 15, 2008, interview with lawyers Mark Meudeking and Ian Taylor of DLA Piper--who were hired to investigate the administrative claim filed by Mary Lee in 2008--SunTrust ERISA attorney Steve Castle was noted to have said that "he was concerned that the Committee was not adequately monitoring investments" [Doc. 263-26 at 3]. However, Ian Taylor's notes from a later telephone call with Castle indicate "he did not recall making such a statement" [Id. at 4].

F. The Plan's 2012 Vanguard Index Fund Overhaul

At the November 15, 2011, Plan Committee meeting, one member noted it was "time to take a close look at all the funds in [the

Plan], given that the pension plan is being frozen" [Doc. 253-14 at 3]. Another Plan Committee member, Tom Panther, recommended "a full style box review in light of an 'all' defined contribution approach for delivering retirement benefits" [Id.]. The Plan Committee asked Towers to provide information on "various approaches . . . and best practices being utilized by all industries as a whole as well as approaches being used by the financial services sector" [Id.].

A new consulting engagement with Towers and the Plan Committee--sent by James Pisano to some members of the Plan Committee for approval--proposed to engage Towers for a review of the Plan's "fund line-up, types of investments, best practices, concentration concerns," etc. [Doc. 253-15 at 2-3]. At the Plan Committee's March 13, 2012, meeting, a Towers representative presented the "SunTrust Banks, Inc. 401(k) Plan Investment Structure Review" and recommended that the Plan Committee "establish a philosophical position on the governance structure of the plan, either a hands on or active approach vs. a dialed back [or] passive approach" [Doc. 253-16 at 3]. The Towers representative noted a "trend away from a 'style box' approach to a target date approach" [Id.]. The Plan Committee recommended the formation of a sub-group to "establish SunTrust Bank's philosophy and guiding principles related to retirement savings and discuss the various options available in more detail" [Id. at 3-4].

At the July 19, 2012, Plan Committee meeting, a member presented the analysis and recommendations by the aforementioned sub-group regarding the Plan [Doc. 253-18 at 3]. Some of the issues the sub-group researched and reviewed included whether SunTrust stock should continue to be offered as an investment option and whether the "investment menu [should] be modified to better reflect a 'broad set of core investment alternative'" [Doc. 253-19 at 2]. These items were at issue because of the freeze on SunTrust's Pension Plan, the "[p]otential legal and fiduciary risks that employers face when offering 401(k) plans which include their own stock and/or proprietary funds," and to "[e]nsure that all investment and program design elements are aligned with the mission of the 401(k) program" [Id.]. The Plan Committee approved the sub-group's recommendation of using index or passive funds for all of the Plan's investment alternatives [Doc. 253-18 at 3].

Following that meeting, the sub-group reviewed available index funds from Fidelity with Towers and met with other SunTrust resources to "gain insight and perspectives of the fund families [under consideration] from our client experience" [Doc. 253-21 at

3]. After this, the sub-group recommended using Vanguard index funds for the Plan [Id.]. At its August 10, 2012, meeting, the Plan Committee approved this recommendation [Doc. 253-20 at 2]. After a "due diligence visit" with Vanguard, a member of the Plan Committee reported that "[o]verall the meeting with Vanguard was positive and the team believes that Vanguard is well positioned to provide 401(k) investment funds for the [Plan]" [Doc. 253-22 at 3]. All investment options in the Plan were replaced by Vanguard funds effective January 2013 [Docs. 194 ¶ 14; 196 ¶ 16].

II. MOTIONS TO EXCLUDE EXPERT OPINIONS

Before turning to Defendants' Motion for Summary Judgment, the Court will first address the parties' motions to exclude expert opinions. The Federal Rules of Evidence require expert testimony be offered by a witness "who is qualified . . . by knowledge, skill, experience, training, or education," and that:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. In accordance with Rule 702, the Court may thus admit expert testimony if: (1) the witness is "qualified as an expert," such that he can testify competently with regard to a matter at issue; (2) the testimony is reliable and supported by the expert's knowledge in the relevant discipline; and (3) the testimony is relevant, in that it assists the trier of fact to understand or come to a conclusion regarding a material issue. City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998). Moreover, although an expert "may testify as to his opinion on an ultimate issue of fact[,]" "[a]n expert may not . . . merely tell the [factfinder] what result to reach" or "testify to the legal implications of conduct." Montgomery v. Aetna Cas. & Surety Co., 898 F.2d 1537, 1541 (11th Cir. 1990) (citation omitted).

The Court also conducts its analysis with the understanding that the "general approach" of the Federal Rules is to "relax[] the traditional barriers to opinion testimony." Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 588 (1993). Moreover, "[t]hose barriers are even more relaxed in a bench trial situation, where the judge is serving as factfinder . . . . There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." United States v. Brown, 415 F.3d 1257, 1268-69 (11th Cir. 2005). And "[d]eterminations of the admissibility of evidence are left to the broad discretion of the district court . . . ." Montgomery v. Aetna Cas. & Surety Co., 898 F.2d 1537, 1541 (11th Cir. 1990) (citation omitted).

A. Defendants' Motion to Exclude Opinion 5 of Plaintiffs' Expert Dr. Steve Pomerantz, Ph.D. [Doc. 250]

Defendants move to exclude Opinion 5 of Plaintiffs' damages expert, Dr. Steve Pomerantz. Defendants make two arguments in favor of excluding Dr. Pomerantz's Opinion 5: (1) Opinion 5 is unreliable because he did not review the necessary, relevant documents necessary to form an informed, factually-substantiated opinion; and (2) Opinion 5 is irrelevant because it evaluates the Affiliated Funds all together as opposed to individually.

Defendants' first argument, that Dr. Pomerantz's Opinion 5 is unreliable, targets the following statement: "I do not believe a prudent and loyal fiduciary would have selected or retained the Affiliated Funds in the Plan" [Doc. 250-2 at 22]. Defendants argue that this opinion necessarily involves an evaluation of Defendants' monitoring process, about which Dr. Pomerantz admits he is unfamiliar. Specifically, Defendants argue Dr. Pomerantz's opinion is factually baseless because he did not review the Plan Committee's meeting minutes (with the exception of minutes from one meeting) or any other evidence of the Plan Committee's monitoring process for the Affiliated Funds. Essentially, Defendants contend Dr. Pomerantz lacked the necessary knowledge of the context surrounding the Plan Committee's decisions and, therefore, his opinion should be excluded.

Plaintiffs, in response, agree with Defendants that "in determining whether a breach of fiduciary duty occurred, the focus should be on whether, at the time of the decision, Defendants employed a prudent process in making their decisions" [Doc. 255 at 10]. Moreover, Plaintiffs agree that "any conclusions Dr. Pomerantz would make regarding the prudence of the specific process employed by the Defendant fiduciaries would be speculative . . ." [Id.]. Plaintiffs contend, however, that Dr. Pomerantz's opinion is not about the prudence of Defendants' processes, but instead the prudence of "the decisions that resulted from those processes" [Id. at 11]. Plaintiffs differentiate between these two concepts--the prudence of Defendants' processes versus the prudence of Defendants' decisions following those processes--as procedural and substantive prudence, respectively. Thus, Plaintiffs contend Dr. Pomerantz's opinion was not based on Defendants' processes at all, but rather whether the decision they made after following their processes was, in itself, reasonable and prudent.

In their reply, however, Defendants point out that Plaintiffs' characterization of Dr. Pomerantz's opinion--that it is an opinion on Defendants' substantive prudence--cannot be accurate when viewed in light of Dr. Pomerantz's deposition testimony. Defendants base this assertion on several deposition statements by Dr. Pomerantz:

> A: Well, I don't think that [the Affiliated Funds'] selection in this plan was the result of a prudent process or a loyal process, and I don't think that a loyal or prudent fiduciary would have necessarily selected this slate [of funds].
> Q: Why don't you think that their selection was the result of a prudent and loyal process?
> A: So what I'm expecting is some justification for the Committee basically ignoring those hundreds of alternatives and selecting the slate that they did. I don't see any evidence of that. All I see is what I think the Committee's process is based on and my attempt to look at those criteria and look at the mutual fund universe in light of those criteria, and I see many superior alternatives and I see no reason why all of those superior alternatives were ignored. And that's the basis of my opinion.
> . . .
> And then what I am referring to here is the observation that there were and continue to be many superior alternatives to the Affiliated Funds, and what I perceive of as the lack of the defendants' explanation for why they are choosing an inferior fund [Doc. 254-13 at 170:11-173:6].

In short, the Court agrees with Defendants that, according to Dr. Pomerantz's own deposition testimony, his Opinion 5 is based on his conceptions of the Plan Committee's monitoring processes, or lack thereof. Because Dr. Pomerantz admits his opinion is based on the Plan Committee's monitoring processes--yet also admits he is uninformed regarding those processes--the Court agrees with Defendants that his Opinion 5 is unreliable and should be excluded. Accordingly, Defendants' Motion to Exclude Opinion 5 of Plaintiffs' Expert Dr. Steve Pomerantz, Ph.D., is GRANTED [Doc. 250].[15]

B. Plaintiffs' Motion to Exclude the Expert Reports of Defendants' Experts Dr. John Minahan and Dr. Bruce Stangle [Doc. 269]

1. Dr. John Minahan's Expert Reports

Plaintiffs' motion first seeks to exclude the expert report of Defendants' expert Dr. John Minahan. Defendants offer Dr. Minahan as an expert regarding Defendants' monitoring process for the SunTrust Banks, Inc. 401(k) Plan's ("the Plan") investments [Doc. 270 at 5]. Plaintiffs move to exclude Dr. Minahan's report on two grounds: (1) Dr. Minahan's opinions are based on insufficient facts and data, and (2) Dr. Minahan's opinions are not the result of reliable methods [Doc. 269-1 at 8-15].

Plaintiffs argue Dr. Minahan's opinions are based on insufficient facts and data because he chose to be "willfully blind" to "all events occurring prior to the inception of the Class Period, including the initial selection of the Affiliated Funds" [Id. at 9]. Plaintiffs further contend Dr. Minahan's failure to review documents and minutes from before the Class Period renders

[15] The Court having found Dr. Pomerantz's Opinion 5 unreliable and thus inadmissible, it need not address Defendants' secondary argument that the opinion is also irrelevant.

his opinions unreliable because he is essentially drawing conclusions "without critical data" [Id. 10].

The Court is unpersuaded by Plaintiffs' argument. For Dr. Minahan to opine on Defendants' monitoring process during the Class Period, it is not necessary for him to have reviewed how the Plan investments were monitored prior to the Class Period. Plaintiffs cite cases that purportedly support their argument, but as Defendants aptly point out, these cases merely held documents from outside a class period were *discoverable.* See David v. Alphin, No. 3:07-cv-11, 2010 WL 1404722, at *5-6 (W.D.N.C. Mar. 30, 2010) (finding pre-class period documents were discoverable because they met the liberal relevance standard for discovery under Rule 26); see also Beesley v. Int'l Paper Co., No. 06-703-DHR, 2008 WL 207537, at *1 (S.D. Ill. Jan. 24, 2008) (finding documents pre-class period were discoverable and noting that "the statute of limitations does not necessarily provide a cut-off date for discovery" because "the scope of discovery is defined by relevance" and "[i]nformation need not be admissible to be relevant"). These cases fail to establish that experts evaluating fiduciaries' investment monitoring processes during a class period must review documents outside the class period--specifically, from when the funds were selected--for their opinions to be admissible.[16] The object of Dr. Minahan's report is to evaluate Defendants' investment monitoring processes during the Class Period; it is understandable and perfectly acceptable, then, that his document review would be limited to that time period. Plaintiffs' argument to the contrary is unavailing.

Plaintiffs also give a few examples of allegedly unconfirmed or "demonstrably erroneous" facts upon which Dr. Minahan relied [Doc. 269-1 at 11-12]. However, it appears Plaintiffs' objection primarily concerns Dr. Minahan's interpretation of--and the weight he awarded--certain evidence [Doc. 269-1 at 11 (arguing that Dr. Minahan should have "assigned little, if any, weight" to the letter denying the original administrative claim in this case because it was from one of the defendants and "no one can be an impartial judge of his own conduct"). The Court finds these arguments go to the weight that should be given to Dr. Minahan's report, not its admissibility. That is, the Court agrees with Defendants that these alleged shortcomings affect the persuasiveness of Dr. Minahan's report, but not whether it should be admitted.

[16] This is particularly true here, where the Court previously granted summary judgment as to Plaintiffs' Count VIII, which provided the strongest justification for the relevance of pre-Class Period documents.

Plaintiffs next argue Dr. Minahan's reports should be excluded because they are not based on reliable methods because he failed to consider alternative explanations for Defendants' conduct [Tr. 269-1 at 13-15]. Namely, Plaintiffs argue Dr. Minahan failed to consider that some of Defendants' conduct--for example, removing one of the Affiliated Funds from the Plan--may have been motivated by a desire to avoid litigation. "Plaintiffs never explain why Defendants' subjective state of mind would have any bearing on the prudence of their investment decisions, which are evaluated under an objective standard" [Doc. 270 at 13].

Plaintiffs are correct that one of the factors for assessing the reliability of expert testimony, according to Rule 702's advisory committee notes, is whether the expert has adequately accounted for obvious alternative explanations. However, Plaintiffs fail to cite any cases suggesting Dr. Minahan was responsible for even evaluating--let alone providing alternative explanations for--Defendants' motives for their investment monitoring processes. In fact, the cases Plaintiffs cite for support are cases involving medical opinions, where the expert at issue failed to provide any alternative explanations for the plaintiff's injury. See Magbegor v. Triplette, 212 F. Supp. 3d 1317, 1328 (N.D. Ga. Mar. 16, 2016) (Cohen, J.); see also Claar v. Burlington N. R.R. Co., 29 F.3d 499, 502-03 (9th Cir. 1994) (noting that the expert doctors failed to make "any effort to rule out other possible causes for the injuries plaintiffs complain of, *even though they had admitted that this step would be standard procedure before arriving at a diagnosis*") (emphasis added).

Plaintiff argues that because Dr. Minahan found that "documentary evidence . . . demonstrates that the Plan Committee monitored all funds diligently and did not hesitate to remove an STI Fund from the lineup when the circumstances indicated that such action was appropriate," he was also required to consider "alternative explanations" for this conduct by Defendants, such as a motive to avoid litigation [Doc. 278-1 at 45]. But this finding does not concern Defendants' motive in "diligently" monitoring the investments; it merely summarizes what the facts indicate Defendants did in Dr. Minahan's opinion. Even if the conclusion referenced by Plaintiffs did concern Defendants' motive, Dr. Minahan had no obligation to explain in his report every possible motive supported by the evidence. Even if he did, his failure to do so would be just one factor among many in determining whether his report was based on reliable methods [Doc. 269-1 at 13 ("It is well settled that *one of the factors* courts should consider in assessing the reliability of an expert's methods is '[w]hether the expert has adequately accounted for obvious alternative explanations.'" (citing Ma v. Equifax Info

Servs., LLC, 288 F. Supp. 3d 1360, 1365 (N.D. Ga. 2017)) (May, J.)]. This would, even then, be insufficient to merit exclusion of his reports, especially considering that the Court--not a jury--will serve as factfinder in any future trial. See Brown, 415 F.3d at 1268-69.

For these reasons, Plaintiff's motion is denied as to Dr. Minahan's reports.

2. Dr. Bruce Stangle's Expert Reports

Next, Plaintiff argues the reports of Defendants' other expert, Dr. Bruce Stangle, should be excluded. Plaintiffs contend exclusion is warranted because (1) he is not qualified as an investments expert; (2) his reports are not helpful to the trier of fact because they contain "idiosyncratic standards"; and (3) his rebuttal report regarding damages falls outside the scope of Dr. Pomerantz's original report.

Plaintiffs first contend Dr. Stangle's reports should be excluded because he has opined on five investment-related topics --topics which fall outside his area of expertise. Plaintiffs argue Dr. Stangle's education and experience, pertaining primarily to economics, are not sufficiently tailored to the area of investments. Plaintiffs contend Dr. Stangle's "only investment-related experience is serving on a few boards of entities where investments were among the matters at issue, such as the 401(k) plan of the company he co-founded [Doc. 269-1 at 18].

As Rule 702 makes clear, an expert may be qualified through "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Moreover, as a case cited by both parties indicates, "courts liberally construe a witness's qualifications in favor of expert status and consider gaps in a witness's qualifications a matter for the jury to consider in determining what weight to give to the testimony." Thomas v. Hubtex Maschinenbau GmbH & Co KG, No. 7:06-CV-81(HL), 2008 WL 4371977, at *2 (M.D. Ga. Sept. 23, 2008).

Plaintiffs emphasize that Dr. Stangle's education and experience are overwhelmingly in economics, not investments. However, as the aforementioned indicates, Dr. Stangle has ample experience in the area of investments. He has served on the board of directors of both a large asset manager and a mutual fund, which involved responsibilities such as "fiduciary monitoring of fees, expenses, and relative investment performance of the funds on our platform" [Id.]. He also has served as a fiduciary to his firm's 401(k) plan for "many years," on which he "review[s] the financial performance of various fund offerings, assessing fee levels for appropriateness, and ensuring that [the] plan offers its participants a wide array of investment products"

[Id.]. The Court thus finds his experience as an economist is sufficiently related to investments and the subject matter at issue here. See Thomas, 2008 WL 4371977, at *2 (noting that "[a] witness's qualifications must correspond to the subject matter of his or her proffered testimony," but also that "[g]eneral knowledge in a field . . . is normally sufficient to qualify a witness as an expert in that field's specialties as well").

Plaintiffs next argue Dr. Stangle's initial report should be excluded as unreliable and unhelpful to the trier of fact because it uses undefined, meaningless phrases such as "economically reasonable" and unclear standards such as "generally consistent with" [Doc. 269-1 at 19-20]. The Court disagrees and finds Dr. Stangle's initial report both helpful for the trier of fact and sufficiently reliable. Regarding Dr. Stangle's conclusion that the Affiliated Funds were "economically reasonable" investment options, the Court finds his use of the word "economically" does not disqualify his opinion from admission. As Defendants point out, Dr. Stangle did explain this phrase in his deposition; he explained that he was asked to evaluate whether the Affiliated Funds were unreasonably included in the Plan, and he found they were not and specifically noted they were "economically" reasonable because he conducted his evaluation "from the perspective of an economist" [Doc. 269-6 at 161:2-19). Thus, Dr.

Stangle's use of this phrase does not merit exclusion of his initial report. Neither does his use of the phrase "generally consistent with," which Plaintiffs argue is an improperly "nebulous concept[]" [Doc. 269-1 at 20]. To the extent this phrase is vague, such imprecision may affect the weight given to Dr. Stangle's report by the Court as factfinder. However, the Court finds these few instances of purported vagueness in Dr. Stangle's lengthy report do not merit its exclusion.

Finally, Plaintiffs argue for the exclusion of Dr. Stangle's rebuttal opinion to the expert opinion of Defendants' expert Dr. Steve Pomerantz. According to Plaintiffs, Dr. Stangle's rebuttal opinion is outside the scope of both Dr. Pomerantz's opinion and Dr. Stangle's own expertise. Specifically, Plaintiffs argue the opinion improperly introduces new opinions at the rebuttal stage and opines on the legal issue of the appropriate measure of damages without being an expert on the law [Doc. 269-1 at 22-23]. Defendants contend Dr. Stangle's rebuttal report was a proper critique of assumptions and supplied information upon which Dr. Pomerantz operated in making his damages calculations [Doc. 270 at 21].

Under Federal Rule of Civil Procedure 26, rebuttal reports are permissible "solely to contradict or rebut evidence on the same subject matter" as the initial expert report. Fed. R. Civ.

P. 26(a)(2)(D)(ii). The parties do not cite any case law on the issue of whether Dr. Stangle's rebuttal report falls within the "same subject matter" as Dr. Pomerantz's original expert report. "Neither the Rules nor the Eleventh Circuit has defined or explained the term 'same subject matter[,]'" but other courts have construed it broadly. Northrup v. Werner Enterprise, Inc., No. 8:14-cv-1627-T-27JSS, 2015 WL 4756947, at *3 (M.D. Fla. Aug. 11, 2015) (collecting cases). Plaintiffs essentially contend that, because Dr. Pomerantz was asked by them to perform specific calculations, Dr. Pomerantz's report does not provide an opinion as to what the appropriate damages calculation would be in this case; he just conducted the requested "number crunching" [Doc. 269-1 at 22]. Thus, by opining on what the appropriate measure of damages would be in this case, Dr. Stangle allegedly exceeded the "same subject matter" scope required by Rule 26.

The Court disagrees. Although it is true that Dr. Pomerantz does not explicitly offer an opinion on what the appropriate measure of losses would be, the Court cannot ignore the implication of Dr. Pomerantz's calculations; that is, in performing the calculations requested by Plaintiffs, Dr. Pomerantz endorsed their purported significance. Understandably, then, Dr. Stangle's report attacks the assumption underlying Dr. Pomerantz's report--one Dr. Pomerantz confirmed in his deposition

--that his calculations would be an appropriate measure of damages [Doc. 274-2 at 73 ("If the Court finds liability, then they would hopefully be guided by these numbers to determine damages.")]. Thus, in light of this underlying assertion and the Court's view that Rule 26's "same subject matter" standard should be broadly construed, the Court will not exclude Dr. Stangle's report as outside the scope of Dr. Pomerantz's expert report. For these reasons, Plaintiffs' Motion to Exclude the Reports of Defendants' Experts Dr. John R. Minahan and Dr. Bruce Stangle is DENIED [Doc. 269].

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [Doc. 251]

A. Legal Standard

The Court will grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (citation omitted). Once the movant has met this initial burden, the opposing party must present evidence establishing a material issue of fact. Id. at 325. The non-moving party must go "beyond the pleadings" and present evidence designating "specific facts showing that there is a genuine issue for trial." Id. at 324 (internal quotation marks and citation omitted).

To be material, a fact must be identified by the controlling substantive law as an essential element of the non-moving party's case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Genuine disputes are those in which the evidence is such that a reasonable jury could return a verdict for the non-movant. For factual issues to be considered genuine, they must have a real basis in the record." Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996) (internal quotation marks and citation omitted). "[M]ere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." Ellis v. England, 432 F.3d 1321, 1326 (11th Cir. 2005). Moreover, the Local Rules specify that a respondent to a summary judgment motion must directly refute the movant's facts with *specific* citations to the evidence. Unless the respondent "specifically informs the court to the contrary," the court will "deem the movant's citations supportive of its facts." LR 56.1B(2)(a)(3), NDGa.

In so reviewing the record, the Court must construe the facts and make all reasonable inferences in favor of the non-moving party. Anderson, 477 U.S. at 255; Reese v. Herbert, 527 F.3d 1253, 1271 (11th Cir. 2008).

B. Discussion

Defendants move for summary judgment on Plaintiffs' remaining claims on two grounds. First, Defendants argue Plaintiffs have failed to adduce evidence that Defendants breached their duties of loyalty or prudence to the Plan in monitoring and or failing to remove Affiliated Funds [Doc. 251-1 at 10-24]. Second, Defendants argue that even if a genuine issue of material fact exists regarding whether Defendants breached their duties, Plaintiffs cannot show any such breach proximately caused a loss to the Plan [Id. at 24-29]. Plaintiffs, in response, contend Defendants have failed to meet their burden at summary judgment and that there is sufficient evidence of breach and loss causation to create genuine issues of material fact and withstand Defendants' motion.

ERISA fiduciaries operate under a "[p]rudent man standard of care," which requires the fiduciary to discharge his duties to a plan "solely in the interest of the participants and beneficiaries"--for the exclusive purpose of providing them benefits and "defraying reasonable expenses of administering the plan"--"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. Duty of Loyalty

The duty of loyalty arises out of the fiduciary's statutory obligation to act "solely" in the participants' and beneficiaries' interest, exclusively to benefit them and defray reasonable expenses. 29 U.S.C. § 1104(a). Defendants argue there are no facts that could create a genuine issue of material fact as to whether they acted disloyally in monitoring the Plan. The Court disagrees. A fiduciary's actions, "taken together and viewed in context, shed light on their motivations." Tussey v. ABB, Inc., 850 F.3d 951, 957 (8th Cir. 2017). And a fiduciary's motives may be questioned if "there [are] too many coincidences to make the beneficial outcome for [the plan sponsor] serendipitous." See id. at 958. Moreover, fiduciaries functioning amidst potential conflicts of interest must execute their duties with caution to avoid disloyalty. See Deak v. Masters, Mates & Pilots Pens. Plan, 821 F.2d 572, 580 (11th Cir. 1987) (noting that "the statutorily imposed fiduciary duty to act solely in the interest of the participants and beneficiaries under ERISA requires trustees who are officers or agents of a corporation . . . to act with caution in areas of potential conflicts of interest").

Here, the Court finds a genuine question of material fact exists as to whether Defendants acted solely in the interest of the Plan's participants and beneficiaries or, instead, acted for the purpose of benefitting SunTrust and themselves. As officers and employees of SunTrust, the plan sponsor and recipient of fees paid by participants for the Affiliated Funds, the Plan Committee Defendants faced an inherent conflict of interest: the interest of benefitting SunTrust as their employer, which could in turn--as Plaintiffs point out--financially benefit them, versus the interest of benefitting Plan participants. As Defendants rightly point out, however, this inherent conflict is insufficient to evidence a breach of the fiduciary duty of loyalty. See Wildman v. Am. Century Servs., LLC, 362 F. Supp. 3d 685, 701 (W.D. Mo. 2019) (noting that "a conflict of interest alone is not a per se breach" and that "it is not disloyal as a matter of law to offer only proprietary funds") (internal quotation marks and citations omitted).

However, the Court finds additional evidence precludes summary judgment as to the issue of the fiduciary duty of loyalty. First, Defendants' differing treatment of the Affiliated Fund versus non-proprietary funds--and acknowledgement thereof--suggests Defendants may have prioritized benefitting SunTrust over benefitting plan participants. Whereas the Plan Committee swiftly removed the Lazard Mid-Cap Institutional Fund when it began to perform poorly, the Plan Committee allowed the proprietary Capital Appreciation Fund, despite multiple quarters of double red ratings, to linger in the Plan with the expectation that its performance would improve. Similarly, the Mid-Cap Equity Fund was rated double red for six quarters between 2007 and 2009 yet remained in the Plan until 2010. Moreover, the email sent to a Plan Committee member after an Investment Sub-Committee meeting noting "[s]ome concern expressed if we immediately take action on a non-proprietary fund as compared to the drawn out process taken with our own funds" further suggests a pattern of allowing proprietary funds to underperform for extended periods, particularly compared to non-proprietary funds, at the expense of the Plan.

The 2006 pension plan PowerPoint presentation for the Plan Committee acknowledging that "[s]hift of assets to outside[, or non-proprietary,] funds represents tangible loss of revenue to the Company, based on expense ratios of funds utilized" also suggests improper motives by Defendants [Doc. 263-28 at 5]. Although Defendants are correct that this presentation concerned SunTrust's other employee benefit plan--the pension plan--the presentation's acknowledgement of considering SunTrust's bottom line in determining which funds to include in one of SunTrust's plans reasonably raises a question as to whether such considerations bled over into the Plan Committee's decision-making for the 401(k) Plan.

Defendants suggest direct evidence of disloyalty, or Defendants' subjective intent to benefit SunTrust, is necessary to withstand summary judgment. The Court disagrees and finds enough circumstantial evidence exists to create a genuine issue of material fact as to whether Defendants breached their duty of loyalty to the Plan.

2. Duty of Prudence

The duty of prudence arises out of the fiduciary's statutory obligation to act with the "care, skill, prudence, and diligence" with which a prudent man under the then-existing circumstances would act. 29 U.S.C. § 1104(a). "A plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." Tibble v. Edison Int'l, 135 S. Ct. 1823, 1829 (2015). Courts evaluate alleged breaches of the duty of prudence using an objective standard and "focusing on whether the fiduciary employed appropriate methods to reach an investment decision" under the prevailing circumstances. New Orleans Emp'rs Int'l Longshoremen's Ass'n, AFL-CIO Pension Fund v. Mercer Inv. Consultants, 635 F. Supp. 2d 1351, 1372 (N.D. Ga. 2009) (Evans, J.) (citing Meinhardt v.

Unisys. Corp., 74 F.3d 420, 434 (3d Cir. 1996)). The Department of Labor promulgated a regulation clarifying a fiduciary's investment duties under ERISA's standard of care, stating in part that a fiduciary must "'give[] appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved.'" Id. (quoting 29 C.F.R. § 2550.404a-1). The issue is "whether [Defendants] considered [the] options and came to a reasoned decision." See Wildman, 362 F. Supp. 3d at 704.

First, Defendants contend the Plan Committee's monitoring process was prudent, "regular, robust, and objective" [Doc. 251-1 at 13]. They argue this is evidenced by the Plan including "roughly equal numbers of proprietary and non-proprietary funds" during the Class Period; the Plan Committee adding ten non-proprietary funds to the Plan during the Class Period; and the Plan Committee selecting non-proprietary funds over proprietary funds "[o]n multiple occasions" [Id. at 15]. That the Plan Committee selected some non-proprietary funds during the Class Period, however, does not preclude a finding of imprudent monitoring process for the Plan's Affiliated Funds. Defendants next contend the opinions of Plaintiffs' expert Samuel Halpern cannot qualify as evidence of an imprudent process. The Court disagrees. Halpern's opinions that the Affiliated Funds' performance and fees, and the Plan Committee members' structural conflicts, contributed to the imprudence of the Funds' retention are appropriate considerations in determining whether Defendants breached their duty of prudence.[17] See, e.g., Mercer Inv. Consultants, 635 F. Supp. 2d at 1376 (evaluating a fund's performance as part of determining whether its retention was prudent).

Defendants then argue no genuine question of material fact exists as to whether Defendants made imprudent monitoring decisions with respect to each of the Affiliated Funds because Plaintiffs have failed to produce evidence of imprudence for the individual funds. Defendants are correct that Plaintiffs point to some generalized evidence to show a genuine question of material fact exists as to Defendants' prudence.[18] Plaintiffs

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[17] The Court agrees with Defendants, however, that the initial selection of the Affiliated Funds is not relevant in determining whether Defendants breached their fiduciary duties during the Class Period.

[18] Defendants challenge the use of generalized evidence by Plaintiffs to show imprudence based on language in the Court's June 27, 2018 order [Doc. 222]. The Court noted that it "disagree[d] with Plaintiffs' statement that generalized proof can establish whether Defendants breached their fiduciary duties to the Plain in offering all of the Affiliated Funds[,]" and that "[i]t would be necessary for Plaintiffs to address whether Defendants, in maintaining each of the eight Affiliated Funds in the Plan breached their fiduciary duties to the Plan [Id. at 7]. This statement did not render irrelevant generalized evidence of

note that, according to their expert Steve Pomerantz's conclusions, "there were numerous better performing, lower cost, and more highly rated funds (by Defendants' own rating methods) available that were comparable to each of the Affiliated Funds" [Doc. 262 at 22 (citing Pomerantz's report, Doc. 254-10 at 5-9)]. Nevertheless, Plaintiffs contend, Defendants did not "objectively consider the many specific, competing alternative unaffiliated funds" [Doc. 262 at 23].

Plaintiffs next point out that all of the Affiliated Funds but the International Equity Index were actively managed, and that--as their expert, Halpern, indicates--Defendants "violated reasonable standards of investment due diligence" by failing to determine whether "'it was reasonable to expect a given actively managed Affiliated Fund to generate investment performance superior to alternative, lower cost, passively-managed options'" [Id. at 24 (quoting Halpern's expert opinion)]. Plaintiffs also indicate that Defendants failed during the Class Period to compare the Affiliated Funds' performance to that of alternatives, in violation of the Plan's investment policy statement [Id. at 24].

imprudence by Plaintiffs; rather, it clarified that such generalized proof would be insufficient, and specific proof of imprudence--in addition to any generalized evidence--would be necessary.

The Court agrees with Plaintiffs that this generalized evidence is probative of whether Defendants prudently monitored the Affiliated Funds during the Class Period. Although the fact that most of the Affiliated Funds were actively managed would not, in and of itself, typically be evidence of imprudence, Plaintiffs' additional allegation that Defendants also failed to analyze and compare the Affiliated Funds to other funds to evaluate their appropriateness makes their argument more probative of Defendants' degree of prudence. See Henderson v. Emory Univ., 252 F. Supp. 3d 1344, 1350-51 (N.D. Ga. May 10, 2017) (Pannell, J.) (finding that the plaintiffs stated a claim for imprudent retention of funds where the plaintiffs alleged both that the plan's funds were all actively-managed and that "the defendants . . . did not properly analyze the funds used in the [p]lans").

Plaintiffs' generalized evidence is insufficient on its own, however, to raise a question of material fact as to whether Defendants prudently monitored and retained each of the Affiliated Funds. As the Court indicated in its June 27, 2018, order, this generalized evidence is insufficient on its own; Plaintiffs must also have evidence of imprudence for each Affiliated Fund individually. To begin, the Court agrees with Defendants that there is no genuine issue of material fact as to Defendants' prudence regarding the Short Term Bond Fund, Investment Grade Bond Fund, and Small Cap Growth Fund.

For the Short Term Bond Fund, Plaintiffs argue sufficient evidence of Defendants' imprudence exists because the Fund was underperforming its benchmark at the inception of the Class Period and, according to the report of Plaintiffs' expert Dr. Steve Pomerantz, the Fund ranked 61 out of 67 comparable funds at the beginning of the Class Period [Doc. 262 at 26]. The Court finds this evidence is simply insufficient to raise a question of material fact regarding whether Defendants prudently monitored and retained the Short Term Bond Fund. Notably, the two pieces of evidence Plaintiffs point to only reflect the Fund's performance at the start of the Class Period. Moreover, as the undisputed facts indicate, the fund was rated green for a significant portion of the Class Period and, although it did underperform its benchmark at various points during the Class Period, it was never significant enough to warrant a red rating. Thus, there is not enough evidence of this Fund's underperformance to create a genuine issue of material fact regarding Defendants' prudence in monitoring and retaining it.

The same is true for the Investment Grade Bond Fund. Plaintiffs again assert that, like the Short Term Bond Fund, this Fund was underperforming its benchmarks at the beginning of the

Class Period and had a low ranking--122 out of 151--amongst comparable funds when the Class Period began [Id.]. Again, this is not enough. Further, as the undisputed facts indicate, the Fund was rated green for a significant portion of the Class Period and never fell below a yellow ranking. The Court thus finds there is insufficient evidence of potential imprudence regarding the Investment Grade Bond Fund.

Plaintiffs' evidence regarding the Small Cap Growth Fund is also insufficient to raise a question of material fact. Plaintiffs contend the Small Cap Growth Fund performed poorly during the entire Class Period and was thus imprudently retained, but the evidence indicates the Fund's performance fluctuated and that part of its underperformance was due to the Fund's benchmarks being "hard to beat" [Doc. 252-8 at 3]. The Court finds no genuine issue of material fact exists regarding Defendants' prudence in monitoring and retaining the Small Cap Growth Fund.

i. Mid-Cap Equity Fund

The Mid-Cap Equity Fund was underperforming its benchmark at the beginning of the Class Period and ranked last amongst 37 comparable funds at that time according to Plaintiffs' expert, Dr. Pomerantz [Doc. 254-10 at 12]. Evidence indicates the Fund was performing "unacceptably low" before the Class Period; notably, the Fund was removed from SunTrust's Pension Plan, in which it had also been offered, due to its poor performance before the Class Period even began. During the Class Period, the Fund consistently underperformed its benchmark and had a negative Information Ratio. In 2007, Towers noted that the Fund had ranked below the median in both the short-term and long-term and had an Information Ratio that had declined over a two-year period "as a result of weaker selection decisions" [Doc. 264-15 at 20-21]. As the undisputed facts indicated, the Fund's ratings were poor for most of the Class Period; it was ranked red by Towers for an extended period and was rated double red for six quarters between 2007 and 2009.

After years of continued and significant underperformance, Towers recommended in September 2008 that the Plan Committee either closely monitor the Fund and make a decision regarding it after a few quarters or freeze the Fund option immediately [Doc. 251-46 at 7]. The Fund continued to mostly perform poorly but was not removed by the Plan Committee until November 2010, well after the administrative claim regarding the Affiliated Funds had been filed by Mary Lee. The Plan Committee clearly allowed the Fund to linger in the Plan for an extended period despite its notable underperformance, in sharp contrast to the Plan Committee's quick removal of the non-proprietary Lazard Mid-Cap Institutional Fund in early 2008 after it was rated double red for two quarters. The Court finds the Fund's notable underperformance and the Plan Committee's slow reaction thereto --particularly compared to the Plan Committee's different treatment of a poorly performing non-proprietary fund--raises a genuine question of material fact as to whether Defendants monitored and retained the Mid-Cap Equity Fund prudently during the Class Period.

ii. Capital Appreciation Fund

Plaintiffs challenge the Plan Committee's retention of the Capital Appreciation Fund after its management changed in 2007. They argue the Plan Committee's decision to evaluate the Fund based on "future performance rather than on past performance" once the new management had been introduced "violates reasonable standards of investment due diligence, specifically the rule against offering a fund without a performance record" [Doc. 262-27]. The Court disagrees. Prior to the change in management, the Fund underperformed its benchmark and had a red or yellow rating from Towers and FSOC, with one quarter being a double red rating. The Fund's managers then changed in 2007 and, afterward, the Plan Committee voted to keep the Fund "based on the significant process and personnel improvements instituted" [Doc. 251-41 at 4].

As Defendants indicate, the Plan Committee investigated the new fund managers and closely monitored the Fund, and the Fund's performance under new management improved. The Plan Committee's reasoned, and subsequently monitored, decision to give new management a chance to improve the Fund's performance--as opposed to immediately removing the Fund--was a decision within the Plan Committee's "discretionary authority" as fiduciary to the Plan. See 29 U.S.C. § 1002(21)(A). The Court finds that the Plan Committee's decision to keep the Fund under new management--as opposed to removing the Fund--is not enough evidence of imprudence to create a genuine issue of material fact.

iii. Prime Quality Money Market Fund

Plaintiffs allege Defendants were imprudent in failing to identify a different RidgeWorth fund, the Cash Money Market Fund, as a superior and less expensive alternative to the Prime Quality Money Market Fund. As the undisputed facts indicate, the Institutional Cash Money Market Fund was brought to the attention of the Plan Committee by Leilani Fountaine, a SunTrust Vice President who was uninvolved in the Plan. Defendants argue the Plan Committee's failure to switch from the Prime Quality Money Market Fund to the Institutional Cash Money Market Fund is justified because, although the Plan Committee had intended to make the switch, it "reversed course after learning that making the switch would cause participants to lose the protection of federal guaranties" [Doc. 251-1 at 24]. Plaintiffs contend "[i]t indicates a shocking lack of due diligence when other SunTrust employees discover a superior alternative that Committee Defendants never even looked for" [Doc. 262 at 27]. Plaintiffs' expert Halpern stated in his rebuttal report that "Committee members could not explain why they picked and kept the higher cost fund" [Doc. 254-8 at 23].

The Court finds there is no genuine issue of material fact and Defendants did not breach their duty of prudence as to the Prime Quality Money Market Fund. It is true that the Institutional Money Market Fund had lower fees, but the Court is unaware of--and Plaintiffs have not cited to--authority requiring the Plan Committee to find and offer the fund with the lowest fees. See Hecker v. Deere & Co., 556 F.3d 575, 586 (7th Cir. 2009) (analyzing the plaintiffs' claim of excessive fees and noting that "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund").

iv. Growth and Income Fund

Defendants contend the Plan Committee's monitoring and retention of the Growth and Income Fund was prudent because they followed the advice of Towers concerning the Fund and removed it in early 2011. Plaintiffs, in turn, essentially contend that the

Fund's April 12, 2011 removal--soon after the original complaint was filed in this case--was too little too late. The Court agrees with Plaintiffs and finds a genuine issue of material fact exists as to whether Defendants prudently monitored and retained the Growth and Income Fund.

In August 2008, the Plan Committee discussed concerns regarding the Fund and asked Towers to interview the Fund's managers. The Fund then continued to underperform, at one point underperforming for five consecutive quarters and receiving red and double red ratings. As with the Mid-Cap Equity Fund, the extended and significant underperformance of the Growth and Income Fund--particularly compared to how quickly the Plan Committee acted to remove the poorly performing, non-proprietary Lazard Mid-Cap Institutional Fund--creates a question of material fact as to whether Defendants prudently monitored and retained the Fund. This is especially true given the timing of the Fund's removal; the speed with which the Plan Committee removed the Fund after the filing of the complaint suggests the Plan Committee itself may have recognized the imprudence of retaining the Growth and Income Fund for so long. Thus, the facts alleged regarding the Growth and Income Fund are sufficient to withstand summary judgment.

v. International Equity Index Fund

Defendants contend the Plan Committee's monitoring and retention of the International Equity Index Fund was prudent because the Fund was a unique, gross domestic product ("GDP")-weighted investment that justified its higher fees relative to other passively managed funds. Defendants also note the Fund's fees were less than those of the only other GDP-weighted fund during the Class Period. Conversely, Plaintiffs argue keeping the Fund was imprudent because of its high expenses and fees compared to other international equity index funds. Although the Plan Committee's failure to invest in the cheapest fund available does not necessarily imply a breach of fiduciary duty, see Hecker, 556 F.3d at 586, the Court finds Plaintiffs' allegation that the Plan Committee invested in the most expensive fund of its kind might. Thus, a genuine question of material fact exists as to whether the higher fees for the International Equity Index Fund were justified and thus finds summary judgment inappropriate as to this Fund.

3. Loss Causation

Finally, Defendants assert there is no genuine issue of fact that any breach by them caused loss to the Plan and thus Plaintiffs' claims fail. The requirement of causation stems from 29 U.S.C. § 1109, which states that fiduciaries are liable for "any losses to the plan resulting from each breach [of fiduciary duty]." See also Willett v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335, 1343 (11th Cir. 1992) ("Section [1109] of ERISA establishes that an action exists to recover losses that 'resulted' from the breach of a fiduciary duty; thus, the statute does require that the breach of the fiduciary duty be the proximate cause of the losses claimed . . . ." (citation omitted)).

Defendants first argue Plaintiffs have failed to establish loss to the Plan. "In determining losses under ERISA, the relevant benchmark is what a prudent investment would have returned in lieu of the imprudent one." In re Bellsouth Corp. ERISA Litig., 1:02-CV-2440-JOF, 2006 WL 8431178, at *5 (N.D. Ga. Dec. 5, 2006) (Forrester, J.). Moreover,

> [c]ourts are not of one mind in the manner in which they determine losses for breach of fiduciary duty under ERISA § 409(a). Some courts have looked to the difference between actual investments and the 'most profitable' investment alternative. *See Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985). Other courts have measured losses by comparing the performance of the imprudent investment with the amount the plan 'would have earned during this period as measured and adjusted by the movement of an appropriate index reflecting the stock market.' *Dasler v. E.F. Hutton & Co., Inc.*, 694 F. Supp. 624, 634 (D. Minn. 1988) (looking to the return of the S&P 500 stock index for the purpose of establishing losses under ERISA § 409). Id.

Defendants contend that Plaintiffs' damages expert's opinions, Dr. Pomerantz, are not tied to the facts of this case because he "did not connect his loss calculations to specific breaches," select suitable comparators for the Affiliated Funds, or "opine on the prudence of any of the alternatives that he used" [Doc. 251-1 at 27 (quoting Wildman, 362 F. Supp. 3d at 710-11)]. In response, Plaintiffs argue Defendants cherry-picked passages of Dr. Pomerantz's report and wrongly focused on Dr. Pomerantz's first of three methods of calculating damages, which Plaintiffs state they do not offer as proof of the loss suffered by the Plan. In short, the Court agrees with Plaintiffs that they have sufficiently established loss to the Plan such as to create a genuine issue of material fact. As Plaintiffs contend--and as the above-quoted In re Bellsouth Corporation Court indicated--Dr. Pomerantz employed methods for damages calculations approved by courts; moreover, the method specifically challenged by Defendants is one upon which Plaintiffs do not rely. Defendants also argue that, because Dr. Pomerantz did not state that the Vanguard funds he used as comparators for his calculations were prudent and suitable comparators for the Plan, there is no genuine issue of fact regarding loss. The Court again disagrees. As Plaintiffs point out, the Plan Committee replaced all the funds in the Plan with Vanguard funds shortly after the end of the Class

Period, suggesting the funds were prudent and suitable for the Plan. Moreover, the case cited by Defendants as support for their argument, Wildman v. American Century Services, LLC, 362 F. Supp. 3d 685, 710 (W.D. Mo. 2019), noted that whether Pomerantz's comparator funds were suitable benchmarks was a "question[] of fact." The Wildman court further indicated that, "[u]nlike the court in Brotherston"--in which the Court found Pomerantz's analysis made out a prima facie case of loss using Vanguard funds --"this Court has heard Dr. Pomerantz's testimony and the Defendants' cross-examination . . . . After hearing the evidence, the Court finds Dr. Pomerantz's models did not use suitable benchmarks . . . ." Id. Thus, even the case cited by Defendants emphasizes that the determination of the appropriateness of the comparator funds used is a question for trial, not summary judgment. For these reasons, a genuine issue of fact exists as to whether the Plan suffered loss.

Defendants next argue Plaintiffs have not sufficiently shown loss causation. The Court again agrees with Plaintiffs that a genuine issue of fact exists on the issue. First, the parties disagree regarding who between them bears the burden of proving loss causation. Regardless whose burden it is, however, the Court finds summary judgment is not appropriate on the issue. Defendants essentially contend that because Plaintiffs' expert, Halpern, did not unequivocally state that Defendants should have replaced all of the Affiliated Funds, no genuine issue of fact exists as to loss causation. Halpern stated in his deposition that he "think[s] it's highly likely . . . that the--the [A]ffiliated [F]unds would have been and should have been replaced" [Docs. 254-10 at 22; 254-14 at 154:8-3]. The Court does not find Halpern's statement must be unequivocal for it to be probative of the issue, and Defendants cite no authority suggesting such. Thus, Halpern's statement is sufficient at this stage to create a genuine issue of material fact as to whether, by not removing the Affiliated Funds, Defendants caused the loss alleged to the Plan.

IV. CONCLUSION

For the reasons provided above, Defendants' Motion to Exclude Opinion 5 of Plaintiffs' Expert Dr. Steve Pomerantz, Ph.D. is GRANTED [Doc. 250], and Plaintiffs' Motion to Exclude the Reports of Defendants' Experts Dr. John R. Minahan and Dr. Bruce Stangle is DENIED [Doc. 269]. Lastly, Defendants' Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART: it is GRANTED to the extent Plaintiffs' claims are premised on Defendants' conduct regarding the Short Term Bond Fund, Investment Grade Bond Fund, Small Cap Growth Fund, Capital Appreciation Fund, and Prime Quality Money Market Fund; and it is DENIED to the extent

Plaintiffs' claims are premised on Defendants' conduct regarding the Mid-Cap Equity Fund, Growth and Income Fund, and International Equity Index Fund [Doc. 251]. The parties are DIRECTED to file a proposed consolidated pretrial order no later than thirty days from the date of entry of this Order. The parties are further DIRECTED to file proposed findings of fact and conclusions of law no later than seven (7) business days before trial, which will be set at a later date.

SO ORDERED, this 3 day of October, 2019.

Orinda D. E

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE