

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re: Prime Healthcare ERISA Litig.

Case No. 8:20-cv-1529-JLS-JDE

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

1 The Court held a bench trial from April 9, 2024, through April 16, 2024. Having
2 considered the testimony presented at trial, the exhibits admitted into evidence, and the
3 parties' post-trial submissions, the Court makes the following Findings of Fact and
4 Conclusions of Law pursuant to Federal Rule of Civil Procedure 52.¹ The Court
5 concludes that Defendants used a prudent process to select, monitor, and retain
6 investments; to monitor the Plan's recordkeeping and administration fees; and to monitor
7 the share classes of the investments in the Plan. Therefore, the Court rules against
8 Plaintiffs² and in favor of Defendants³ on all of Plaintiffs' claims.

9 **I. FACTUAL BACKGROUND**

10 Prime owns and operates hospitals and clinics in fourteen states. (FPTC Order,
11 Doc. 196 ¶ 6.) Prime sponsors the Prime Healthcare Services, Inc. 401(k) Plan (the
12 "Plan"), which is a defined contribution 401(k) retirement plan subject to the Employee
13 Retirement Income Security Act ("ERISA"). (*Id.*) Participants in the Plan make tax-
14 deferred contributions to their individual accounts and then can choose one or more of the
15 investment options offered by the Plan. (*Id.*) The Plan is a multiple-employer plan. (Day
16 5 Trial Tr., Doc. 216 at 1012:14–19 (Gissiner)); *see* 29 C.F.R. § 4001.2 (defining a
17 multiple-employer plan as a plan "maintained by two or more contributing sponsors . . .
18 under which all plan assets are available to pay benefits to all plan participants and

19 ¹ After trial, the parties submitted Proposed Findings of Fact and Conclusions of Law, as well as
20 responses to the other side's submission. Because Plaintiffs separately numbered the paragraphs
21 under their Findings of Fact and Conclusions of Law headings, the Court cites the parties'
22 Findings of Fact and Conclusions of Law separately for clarity. (*See* Pls.' Proposed Findings of
23 Fact ("Pls.' Proposed FOFs"), Doc. 223-1; Pls.' Proposed Conclusions of Law ("Pls.' Proposed
24 COLs"), Doc. 223-1; Defs.' Proposed Findings of Fact ("Defs.' Proposed FOFs"), Doc. 222-1;
25 Defs.' Proposed Conclusions of Law ("Defs.' Proposed COLs"), Doc. 222-1; *see also* Pls.' Resp.,
26 Doc. 224; Defs.' Resp., Doc. 225.)

27 ² Named Plaintiffs are Maria D. Ornelas, Chantell Campbell, and Brian Horton. (FPTC Order,
28 Doc. 196 ¶ 1.) For each claim, Named Plaintiffs represent a Class of all participants and
beneficiaries in the Prime Healthcare Services, Inc. 401(k) Plan during the relevant Class Period.
(Class Certification Order, Doc. 190 at 1.)

³ Defendants are Prime Healthcare Services, Inc. ("Prime") and the Prime Healthcare Services,
Inc. Benefit Committee ("Committee") (collectively, "Defendants"). (FPTC Order ¶ 1.)

1 beneficiaries”). As the Court describes more fully below, the Plan is a particularly
2 complex and decentralized multi-employer Plan that is composed of sixty-eight different
3 employers. (*Infra* section VI.H.)

4 During the relevant Class Periods, the Committee used a third-party investment
5 consultant, Captrust Financial Partners (“Captrust”), to assist with its management of the
6 Plan and the Plan’s investments. Also during the relevant Class Periods, the Committee
7 used Transamerica Retirement Solutions, Inc. (“Transamerica”) as the Plan’s
8 recordkeeper. (*See* Stipulated Facts App., Doc. 196, Ex. A ¶¶ 35–39.)

9 **A. Plaintiffs’ Claims and Theories of Liability**

10 As set forth in Plaintiffs’ operative complaint and the Court’s Pre-Trial Conference
11 Order (“FPTC Order”), Plaintiffs assert four claims in this action—three against the
12 Committee and one against Prime itself for allegedly inadequately monitoring the
13 Committee. (*See* FPTC Order ¶ 8.⁴)

14 **1. Claim 1: The Committee’s Alleged Failure to Prudently Monitor**
15 **the Plan’s Investments**

16 Plaintiffs’ initial claim is that the Committee allegedly breached its “fiduciary duty
17 of prudence under 29 U.S.C. § 1004(a)(1)(B) by failing to appropriately monitor certain
18 investments in the Plan, causing the Plan to retain these imprudent investments” and
19 thereby incur losses. (FPTC Order ¶ 8.) Specifically, Plaintiffs fault the Committee for
20 allegedly failing to prudently monitor the following funds, which the parties collectively
21 refer to as the “Challenged Funds”: the actively managed Fidelity Freedom Funds (the
22 “Active Suite”); the Fidelity Institutional Asset Management Collective Trust Blend
23 Funds (the “FIAM Blend Funds”); the Prudential Jennison Small Company Fund (the
24

25 ⁴ In the FPTC Order, the parties presented this case as involving three claims—each asserted
26 against both the Committee and Prime itself. (*See* FPTC Order ¶ 8.) In this order, the Court
27 adopts the framing used by the parties in their post-trial submissions that present this case as
28 involving four claims, with those claims divided between the underlying claims against the
Committee and the derivative claim against Prime itself. This difference between the parties’ pre-
and post-trial submissions is one of form, not substance.

1 “Prudential Fund”); the Invesco Real Estate Fund (the “Invesco Fund”); the T. Rowe Price
2 Mid-Cap Value Fund (the “T. Rowe Price Fund”); and the Oakmark Equity & Income
3 Fund (the “Oakmark Fund”). (*See* Pls.’ Proposed FOFs ¶ 204; Defs.’ Proposed FOFs ¶ 1;
4 Stipulated Facts App. ¶¶ 178–192.) The Class Period for this claim is August 18, 2014, to
5 the present. (Class Certification Order, Doc. 190 at 1.) In support of this first claim,
6 Plaintiffs offer six different theories of liability or categories of evidence that allegedly
7 show the Committee acted imprudently. (*See* Pls.’ Proposed COLs ¶¶ 63–71.)

8 **First**, Plaintiffs contend that what they refer to as “Defendants’ fiduciary
9 governance structure” was inadequate. (*Id.* ¶ 64.) By this, Plaintiffs refer to three aspects
10 of the Committee’s governance structure: (1) its alleged lack of training; (2) its pre-2019
11 lack of a written charter; and (3) its allegedly amorphous Investment Policy Statement
12 (“IPS”). (*See id.* ¶ 64.)

13 **Second**, Plaintiffs contend that the Committee “insufficiently documented its
14 decision-making process,” which allegedly “resulted in a ‘check the box’ exercise” that
15 fell below what the ERISA-imposed duty of prudence requires. (*Id.* ¶ 65.)

16 **Third**, Plaintiffs contend that the Committee reflexively deferred to Captrust when
17 it came to monitoring the Plan’s investment options. (*Id.* ¶ 66.)

18 **Fourth**, Plaintiffs contend that the Committee violated the IPS by retaining certain
19 investments that were favorably rated by Captrust’s scoring system but which—according
20 to Plaintiffs—failed to meet the IPS’s criteria. (*Id.* ¶ 67.)

21 **Fifth**, Plaintiffs contend that the Committee “failed to identify that Captrust
22 provided an inappropriate benchmark to monitor the Freedom Funds.” (*Id.* ¶ 68.)

23 **Sixth**, Plaintiffs contend that the Committee overlooked certain alleged “red flags”
24 regarding the Active Suite—particularly a “Reuters Report and other indications of capital
25 flight” from those funds. (*Id.* ¶ 69.)

26 **2. Claim 2: The Committee’s Alleged Failure to Prudently Monitor**
27 **the Plan’s Recordkeeping Fees**

28 Plaintiffs’ next claim is that the Committee breached its “fiduciary duty of

1 prudence under 29 U.S.C. § 1004(a)(1)(B) by causing the Plan to pay excessive
2 recordkeeping and administrative (‘RKA’) fees [to Transamerica] through 2019.” (FPTC
3 Order ¶ 8.) The Class Period for this Claim is August 18, 2014, to July 31, 2019. (Class
4 Certification Order at 1.) Like the previous claim, Plaintiffs offer six different theories of
5 liability or categories of evidence that they contend show the Committee acted
6 imprudently. (*See* Pls.’ Proposed COLs ¶¶ 43–49.⁵)

7 **First**, Plaintiffs repeat their contention that what they refer to as “Defendants’
8 fiduciary governance structure” was inadequate. (*Id.* ¶ 44; *accord id.* ¶ 64.) Here,
9 Plaintiffs point to two aspects of that structure: (1) the Committee’s alleged lack of
10 training; and (2) the Committee’s pre-2019 lack of a written charter. (*See id.* ¶ 44.)

11 **Second**, Plaintiffs also repeat their contention that the Committee “insufficiently
12 documented its decision-making process.” (*Id.* ¶ 45; *accord* ¶ 65.) In this context,
13 Plaintiffs contend that the allegedly inadequate documentation caused the Committee to
14 lack “a touchstone for the application of a consistent process,” which in turn led to “near-
15 total reliance” on Captrust’s analysis of recordkeeping fees. (*Id.* ¶ 45.)

16 **Third**, Plaintiffs contend that “the Committee never undertook measures sufficient
17 [to] become informed of the reasonable market rate for the Plan’s services.” (*Id.* ¶ 46.)
18 This theory of liability, in turn, has two components. Plaintiffs fault the Committee for
19 never undertaking a formal request for proposals. (*See id.*) And Plaintiffs criticize as
20 flawed the 2015, 2017, and 2020 vendor-fee benchmark exercises that the Committee and
21 Captrust did conduct. (*See id.*)

22 **Fourth**, Plaintiffs contend that the Committee failed to ensure that the Plan’s fee
23 remained reasonable as the assets under the Plan grew significantly. (*Id.* ¶ 47.)
24

25 ⁵ Because Plaintiffs’ claims are so multifaceted—with twelve different theories of liability across
26 these first two claims—and because many of the Court’s factual findings relate only to certain of
27 those theories, the Court finds it necessary to intersperse its Findings of Fact and Conclusions of
28 Law. Accordingly, instead of having one standalone section of Findings of Fact and one
standalone section for Conclusions of Law, the Court makes factual findings and draws legal
conclusions in sections corresponding to Plaintiffs’ various theories of liability.

1 **Fifth**, Plaintiffs contend that Defendants failed to “review the total fees paid to
2 Transamerica on a per-participant basis” and failed to “consider all fees paid to
3 [Transamerica] from all sources.” (*Id.* ¶ 48.)

4 **Sixth**, Plaintiffs contend that Defendants improperly “caused the Plan[’s]
5 recordkeeping costs associated with Prime’s mergers and acquisitions to be paid by the
6 Plan.” (*Id.* ¶ 49.)

7 **3. Claim 3: The Committee’s Alleged Failure to Prudently Monitor**
8 **the Plan’s Share Classes**

9 Plaintiffs’ next claim is that the Committee allegedly breached its “fiduciary duty
10 of prudence under 29 U.S.C. § 1004(a)(1)(B) by failing to appropriately monitor certain
11 share classes of the Plan’s investments, causing the Plan to pay excessive investment
12 management expenses.” (FPTC Order ¶ 8.) The Class Period for this claim is August 18,
13 2014, to the present. (Class Certification Order at 1.)

14 **4. Claim 4: Prime’s Alleged Failure to Prudently Monitor the**
15 **Committee**

16 Plaintiffs’ final claim is that “Prime failed to adequately monitor the Committee,
17 which was delegated certain fiduciary responsibilities.” (Pls.’ Proposed COLs ¶ 86.)

18 **5. Unpled Claim: The Committee’s Alleged Mishandling of the**
19 **Plan’s Expense Budget Account**

20 Plaintiffs also contend that Defendants “misappropriated the Expense Budget
21 Account.” (*See* Pls.’ Proposed FOFs ¶¶ 172–190; Pls.’ Proposed COLs ¶ 52–53
22 (capitalization standardized).) Plaintiffs, however, never pled this claim; nor is it included
23 in the FPTC Order. For the reasons described more fully below, the Court declines to
24 consider this eleventh-hour claim suggested for the first time at trial and expressly
25 asserted for the first time in Plaintiffs’ post-trial submission. (*Infra* section IX.)
26
27
28

1 **II. JURISDICTION**

2 This Court has federal-question jurisdiction under 28 U.S.C. §1331 because this is
3 an action arising under ERISA.

4 **III. LEGAL STANDARD**

5 **A. ERISA’s Duty of Prudence**

6 ERISA imposes a duty of prudence on plan fiduciaries: Plan fiduciaries must act
7 “with the care, skill, prudence, and diligence under the circumstances then prevailing that
8 a [person] acting in a like capacity and familiar with such matters would use in the
9 conduct of an enterprise of a like character and with like aims.” 29 U.S.C.

10 § 1104(a)(1)(B). Prudence has two aspects: “[T]he court focuses not only on [1] the
11 merits of the transaction, but also on [2] the thoroughness of the investigation into the
12 merits of the transaction.” *Tibble v. Edison Int’l*, 843 F.3d 1187, 1197 (9th Cir. 2016) (en
13 banc) (quoting *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996)). When assessing
14 procedural prudence, the “court’s task” is to determine whether the fiduciaries “‘employed
15 the appropriate methods to investigate the merits of the [challenged] investment.’” *Wright*
16 *v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1097 (9th Cir. 2004) (quoting *Donovan v.*
17 *Mazzola*, 716 F.2d 1226, 1233 (9th Cir.1983)). Plaintiffs cannot prevail unless they make
18 a showing of procedural imprudence. *See, e.g., White v. Chevron Corp.*, 752 F. App’x
19 453, 455 (9th Cir. 2018) (unpublished) (affirming dismissal of a complaint because “the
20 allegations showed only that [the defendant] could have chosen different vehicles for
21 investment that performed better during the relevant period, or sought lower fees for
22 administration of the fund”).

23 “Because the content of the duty of prudence turns on ‘the circumstances . . .
24 prevailing’ at the time the fiduciary acts,’ the appropriate inquiry will necessarily be
25 **context specific.**” *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014)
26 (emphasis added) (quoting 29 U.S.C. § 1104(a)(1)(B)). And “[t]he appropriate yardstick
27 of a fiduciary’s duty of prudence under ERISA is not that of a prudent lay person, but
28 rather that of a prudent fiduciary **with experience dealing with a similar enterprise.**”

1 *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1122 (D. Colo. 2020) (emphasis added)
2 (quoting *Troudt v. Oracle Corp.*, 2019 WL 1006019, at *5 (D. Colo. Mar. 1, 2019)). As
3 such, courts often rely on expert testimony regarding common practice in the retirement-
4 benefits industry to inform their decisions regarding what ERISA’s duty of prudence
5 requires in a particular situation. *Lauderdale v. NFP Ret., Inc.*, 2022 WL 17324416, at *3
6 (C.D. Cal. Nov. 17, 2022) (noting that, while there is “a difference between what is
7 sufficiently ‘prudent’ in the industry” and what “is considered *legally* sufficient . . . under
8 ERISA,” experts “are permitted to opine [on] . . . standards of [the] industry”). That said,
9 industry practice is not “coextensive with ERISA” prudence, and “the duty of prudence
10 under ERISA may be informed by other considerations.” *Troudt v. Oracle Corp.*, 369 F.
11 Supp. 3d 1134, 1142–43 & n.6 (D. Colo. 2019).

12 Finally, “ERISA’s fiduciary duty of care requires prudence, not prescience.”
13 *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 63–64 (2d Cir. 2016) (cleaned up);
14 *see also Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994) (“The
15 prudent person standard . . . is a test of how the fiduciary acted viewed from the
16 perspective of the time of the challenged decision rather than from the vantage point of
17 hindsight.” (cleaned up)). “At times, the circumstances facing an ERISA fiduciary will
18 implicate difficult tradeoffs, and courts must give due regard to the range of reasonable
19 judgments a fiduciary may make based on her experience and expertise.” *Hughes v. Nw.*
20 *Univ.*, 595 U.S. 170, 177 (2022).

21 **B. Expert Witnesses**

22 Federal Rule of Evidence 702 provides that an expert opinion is admissible “if the
23 proponent demonstrates to the court that it is more likely than not” that: (1) the witness
24 has “scientific, technical, or other specialized knowledge”; (2) the witness’s specialized
25 knowledge “will help the trier of fact to understand the evidence or to determine a fact in
26 issue”; (3) “the testimony is based on sufficient facts or data”; (4) “the testimony is the
27 product of reliable principles and methods”; and (5) the expert has reliably applied “the
28 principles and methods to the facts of the case.”

1 There is not a “definitive checklist” of factors to consider when applying Rule
2 702’s reliability requirement. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593
3 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150–51 (1999) (describing
4 *Daubert* factors as “helpful, not definitive” and acknowledging that the reliability inquiry
5 must be tailored to “particular circumstances of the particular case at issue”). However,
6 the Supreme Court has set forth several factors that help guide courts’ reliability analysis:
7 “[w]hether a ‘theory or technique . . . can be (and has been) tested’”; “[w]hether it ‘has
8 been subjected to peer review and publication’”; “[w]hether, in respect to a particular
9 technique, there is a high ‘known or potential rate of error’ and whether there are
10 ‘standards controlling the technique’s operation’”; and “[w]hether the theory or technique
11 enjoys ‘general acceptance’ within a ‘relevant [technical] community.’” *Kumho Tire*, 526
12 U.S. at 149–50 (quoting *Daubert*, 526 U.S. at 592–94).

13 “Vigorous cross-examination, presentation of contrary evidence, and careful
14 [consideration of] the burden of proof are the traditional and appropriate means of
15 attacking shaky but admissible evidence.” *Daubert*, 526 U.S. at 596.

16 **IV. FACTUAL FINDINGS REGARDING EXPERT WITNESSES**

17 Before trial, the Court denied Defendants’ *Daubert* motions to exclude Plaintiffs’
18 proffered experts. (See FPTC Minutes, Doc. 194.⁶) As the Court explained from the
19 bench at the FPTC, “*Daubert* is meant to protect juries from being swayed by dubious
20 scientific testimony. When the district court sits as the finder of fact, there is less need for
21 the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for
22 [herself].” *United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018) (emphasis
23 omitted) (quotation omitted); *see also FTC v. BurnLounge, Inc.*, 753 F.3d 878, 888 (9th
24 Cir. 2014) (“[W]e are mindful that there is less danger that a trial court will be unduly
25 impressed by the expert’s testimony or opinion in a bench trial.” (quotation omitted)).
26 Therefore, “in bench trials, the district court is able to make its reliability determination
27

28 ⁶ Plaintiffs never challenged the ability of Defendants’ expert witnesses to testify under Rule 702.

1 during [or after], rather than in advance of, trial.” *Flores*, 901 F.3d at 1165 (quotation
2 omitted). That is, a court in a bench trial has the flexibility “later to exclude [evidence] or
3 disregard it” in its Rule 52 order if the expert’s testimony “turns out not to meet the
4 standard of reliability established by Rule 702.” *Id.*

5 Having reserved the issue of both the admissibility and weight of the parties’
6 proffered experts, the Court now draws conclusions as to each proffered expert whose
7 testimony is relevant to the Court’s order.⁷

8 **A. Marcia Wagner**

9 The Court assumes without deciding that the testimony of Plaintiffs’ proffered
10 process expert, Marcia Wagner, is admissible under Rule 702. However, the Court finds
11 as a factual matter that Wagner’s testimony is entitled to no probative value in this case.

12 The Court does not question Wagner’s *general qualifications* to opine on industry
13 practice among benefits committees. Wagner founded and manages the Wagner Law
14 Group, which is an employee-benefits law firm. (*Id.* at 26:10–12 (Wagner).) Prior to
15 founding the Wagner Law Group, she led the employee-benefits practice at two law firms.
16 (*Id.* at 26:15–19.) Wagner’s experience has spanned the life cycle of plan administration.
17 (*Id.* at 27:10–13.) However, the Court finds Wagner’s testimony *specific* to this case to be
18 unpersuasive for the following four reasons.

19 **1. Generic, Conclusory Nature**

20 First, the Court finds that the weight of Wagner’s testimony is severely undermined
21 by her failure to describe the purported industry practices against which she found the
22 Committee’s practices to be deficient. Wagner simply offered the *ipse dixit* that the
23
24

25 ⁷ Because the Court finds that Plaintiffs have not proven a breach of fiduciary duty, the Court
26 does not address causation and damages. Accordingly, the Court does not here discuss the
27 parties’ damages experts: Martin Dirks and Lucy Allen. Below, however, the Court does explain
28 why it finds unpersuasive one of Dirks’s opinions that Plaintiffs offer in support of their
contention that the Committee imprudently monitored the Plan’s investments. (*Infra* section V.E.1
(not crediting Dirks’s opinion about the Active Suite’s glidepath).)

1 Committee’s process was insufficient.⁸ For example, Wagner opined “that the IPS did not
2 provide any effective or practical guidelines that the committee could utilize.” (*Id.* at
3 49:9–14.) Wagner never, however, described what industry practice is for the content of
4 an IPS; nor does she identify any particular clauses or sections that she believed were
5 either missing or inadequately drafted in the Plan’s IPS. As described more fully below,
6 the IPS is, when taking into account its appendices, a twenty-page document that
7 overviews the selection of funds, their monitoring, their removal, Captrust’s advisory role
8 to the Committee, and Captrust’s scoring methodology. (*Infra* section V.B.3.) Measured
9 against such a document, Wagner’s *ipse dixit* testimony severely undermines her
10 credibility.

11 **2. Unexplained Discarding of Countervailing Evidence**

12 Second, the Court finds that the weight of Wagner’s testimony is diminished by her
13 no-true-Scotsman approach to evidence that ran counter to her proffered opinions. Instead
14 of acknowledging that certain evidence ran counter to her opinions, she dismissed that
15 evidence as irrelevant. For example, Wagner opined that “[t]here was no adequate
16 training for the committee members at all.” (Day 1 Tr. at 34:15–16 (Wagner).) With
17 regard to fiduciary-duty litigation updates that Captrust routinely provided to the
18 Committee at the start of each quarterly meeting, Wagner simply dismissed those updates
19 without any explanation of why doing so would be appropriate: “[T]his was not fiduciary
20 training.” (*Id.* at 34:21–22.) Elsewhere, she again discards these updates without any
21 explanation: “[I]t was, like, training light, if I can say that.” (*Id.* at 45:16–18.)

22 **3. Internally Inconsistent Opinions**

23 Third, the Court finds that the weight of Wagner’s testimony is undermined by its
24 internally inconsistent nature.

25 For example, as mentioned above, Wagner opined that the Plan’s IPS “did not

26 ⁸ Although Wagner occasionally used terminology in her direct examination that suggested she
27 was offering legal conclusions, she clarified on cross-examination that her intent was to testify as
28 to whether a practice “was typical” in the industry or “whether it’s something that [she] ha[s] seen
or something [she] would have advised.” (Day 1 Tr. at 76:18–77:4 (Wagner).)

1 provide any effective or practical guidelines that the committee could utilize.” (*Id.* at
2 49:9–14; *see also infra* section V.B.3.) However, she elsewhere categorically testified
3 that the Committee failed to comply with the IPS. (*Infra* section V.D.) For example,
4 Wagner was asked, “Did the committee follow the requirements of the IPS?” To which
5 she responded, “No. No. It routinely did not, in fact.” (Day 1 Tr. at 42:12–13 (Wagner).)
6 A necessary premise of Wagner’s opinion that the Committee “routinely” violated the IPS
7 is that the IPS’s requirements can be discerned. Wagner never explained how, at one
8 point in her testimony, she could describe the IPS as vague and amorphous, while, at
9 another point, she could allege the Committee’s clear violation of the IPS’s requirements.

10 To take another example, Wagner opined that it is inappropriate for a fiduciary to
11 imbue a single consideration with a “formulaic” quality and she further opined that
12 qualitative considerations are important in addition to quantitative ones when assessing an
13 investment option’s performance. (*Id.* at 60:8–12, 96:24–97:11.) But she elsewhere
14 imbued the 3- and 5-year performance metrics with such a formulaic quality that she
15 believed removal of a fund could be premised solely on those metrics. (*See id.* at 56:14–
16 16 (“[T]he three- and five-year performance criteria that were called out . . . as important
17 on three specific occasions in the IPS itself”); *id.* at 59:17–19 (“So the IPS requires
18 [evaluation of three- and five-year performance], three times for a reason”); *id.* at
19 55:22–25 (the scoring mechanism “seems to completely miss this three- and five-year
20 rolling requirement on performance”); *id.* at 55:7–8 (the scoring system “did not provide
21 the factors that were required by the IPS”).

22 These unexplained internal inconsistencies suggest that Wagner’s opinions were
23 litigation-driven and not based on a considered application of her industry experience to
24 the facts with which she was presented.

25 **4. Reliance on Only Limited Documents**

26 Fourth, the Court finds that the weight of Wagner’s testimony is undermined by the
27 artificially limited world of documents on which she based her opinions. Wagner’s
28 opinions as to the scope of the Committee’s discussions were based only on the

1 Committee meetings’ minutes. Wagner contended that outside of the meeting minutes,
2 “[t]here was nothing to tell me what was discussed and what wasn’t.” (*Id.* at 105:23–24.)

3 The Court rejects this implausible factual contention. Wagner herself conceded
4 that minute meetings “are not meant to be treatises.” (*Id.* at 104:20–23.) Moreover, the
5 Court finds that Mark Davis—the principal advisor to the Plan from Captrust—credibly
6 testified that the minutes “focus[ed] on changes to be implemented and responsibilities for
7 those changes.” (Day 4 Tr., Doc. 215 at 794:5–7 (Davis); *see also* Day 1. Tr. at 123:23
8 (Brady) (“action items”).) And the Court finds that Davis and the Committee-member
9 witnesses credibly testified that the minutes—when considered in isolation—were under-
10 inclusive of what was discussed. As such, the Court finds that the Captrust introductory
11 emails, presentations, and Quarterly Investment Reports (“QIRs”) are reliable indications
12 of what was discussed at a particular Committee meeting. (*See* Day 2 Tr., Doc. 213 at
13 276:7–22, 285:5–13, 359:9–17, 374:16–24 (Brady); *id.* at 430:16–23 (Heather); Day 3
14 Tr., Doc. 214 at 524:4–12 (Heather); *id.* at 532:14–534:2 (Dhuper); *id.* at 594:23–595:3
15 (Gomez); Day 4 Tr. at 793:25–794:24, 880:8–13, 881:12–882:4 (Davis).)

16 * * *

17 The Court finds Wagner’s testimony was conclusory, internally inconsistent, and
18 not credible in its factual assumptions and characterization of evidence. Therefore, the
19 Court affords Wagner’s testimony little to no weight.

20 **B. Michael Geist**

21 Michael Geist is Plaintiffs’ proffered expert on industry practice surrounding the
22 evaluation of recordkeeping fees. The Court assumes without deciding that Geist’s
23 testimony on this subject is admissible under Rule 702. However, the Court finds as a
24 factual matter that Geist’s proffered opinions are—like Wagner’s—entitled to little to no
25 weight. In particular, the Court finds that Geist has only minimal relevant industry
26 experience and that, like Wagner’s, his testimony is undermined by its conclusory, *ipse*
27 *dixit* nature.

28 Geist is the current owner of Clear Sage Advisory Group, where he provides

1 retirement plan consulting services to plans. (Day 3 Tr. at 601:23–602:18 (Geist).) Since
2 founding Clear Sage, he has conducted vendor-fee assessments for only about 10 clients.
3 (*Id.* at 647:25–649:25 (Geist).) And Geist did not meaningfully describe any of the clients
4 for whom he has performed work at Clear Sage, leaving the Court in the dark as to the
5 industry, complexity, and size of those clients.

6 Prior to Clear Sage, Geist worked at T. Rowe Price for approximately 10 years.
7 (*Id.* at 602:19–602:14.) There, Geist was involved in preparing new client pricing
8 proposals for T. Rowe Price’s recordkeeping division. But to prepare these proposals,
9 Geist simply inputted client information into a pricing model, developed by T. Rowe
10 Price, and the model “would spit out a price from a contract.” (*Id.* at 643:8–18.) Indeed,
11 Geist candidly stated at trial: The “pricing model that is put in the hands of a sales person”
12 like himself at the time “is made to be dummy proof.” (*Id.*) Inputting numbers into a
13 “dummy proof” model does not render Geist qualified to opine on the methods retirement
14 plans commonly use to assess whether they are paying reasonable recordkeeping fees.

15 And while Geist’s work at ClearSage Advisory Group is relevant, the Court finds
16 that his experience there is amorphous (he never described his clients) and limited (he has
17 performed vendor-fee assessments for only about 10 clients). This limited relevant
18 experience undermines the probative value of Geist’s testimony.

19 Additionally, Geist’s testimony suffered from the same *ipse dixit* flaw that
20 Wagner’s does. Geist, again who has only limited relevant professional experience,
21 rattled off several aspects of the Committee’s process that allegedly departed from
22 industry practice—several of which were hyper-specific:

- 23 • “It’s well understood in the standard of care to know that soliciting proprietary bids
24 is the conduct that is required”;
- 25 • The Committee “failed to abide by the minimum standard of care” because “if you
26 were going to require the competitors . . . to make presentations, you would also
27 require the incumbent to make a presentation as well”;
- 28 • Relying on pricing databases is “not consistent with the minimum standard of care

- 1 to achieve the best outcomes for plan participants”;
- 2 • Had the Committee “followed the standard of care, they would have then gone
- 3 back to Fidelity and Empower . . . and ask[ed] . . . what their fee rate would have
- 4 be[en] if they were given the opportunity to manage account services”; and
- 5 • “[T]o conclude that a plan’s fees” are reasonable if they are “are . . . around [the]
- 6 average” paid by materially similar plans “is an erroneous conclusion in this
- 7 industry”;
- 8 • “It’s the standard . . . to always evaluate fees for recordkeeping administration on a
- 9 per participant basis”;
- 10 • “[I]f a plan chooses to utilize an asset-based fee structure with the record keeper,
- 11 then the fiduciaries are required to evaluate the impact of that asset-based fee
- 12 structure on a much more regular basis.”

13 (*Id.* at 612:8–10, 615:11–15, 615:20–616:4, 621:5–8, 622:17–20.)

14 Though Geist hinted that he relied on more than his limited experience when

15 formulating these opinions, he never explained what that information was. (*See id.* at

16 641:16–18 (“Q. Mr. Geist, you relied on your professional experience in the retirement

17 industry in delivering the opinions you just gave; is that right? A. I wouldn’t limit it to

18 that necessarily, but, of course, yes.”). Geist’s failure to articulate the basis for his

19 opinions severely undermines the probative value of his testimony—particularly his more

20 counter-intuitive opinions. For example, if ERISA requires fiduciaries to act with the

21 prudence of a “a [person] acting in a like capacity,” 29 U.S.C. § 1104(a)(1)(B), it is

22 unclear why—as Geist opines—it is erroneous to equate the average fee paid by similar

23 plans with a substantively reasonable fee. (*See* Day 3 Tr. at 621:2–8 (Geist).) Geist’s

24 unexplained and sometimes counter-intuitive opinions read more like a list of quibbles

25 with the Committee’s process than well-founded opinions on industry practice.

26 This brings the Court to a more fundamental flaw in Geist’s testimony: He appears

27 to misunderstand both ERISA’s requirements and his role as a proffered expert witness in

28 an ERISA case. First, Geist’s testimony reflects that he believes ERISA requires

1 fiduciaries to have pursued the best possible course of action at every turn—as judged in
2 hindsight. This understanding was stated explicitly in one of his opinions: “[T]hat’s not
3 consistent with the minimum standard of care to achieve the **best outcomes** for plan
4 participants.” (*Id.* at 616:15–16 (emphasis added); *see also id.* at 635:19 (equating “the
5 best practice and the minimum standard of care”).) But the Supreme Court has instructed
6 that courts are to give “due regard to **the range of reasonable judgments** a fiduciary may
7 make based on her experience and expertise.” *Hughes*, 595 U.S. at 177 (emphasis added).
8 Second, Geist’s testimony was repeatedly framed in terms of the legal question of what
9 the standard of care is—not the factual question of what processes are commonly
10 followed in the retirement-benefits industry. But “an expert witness cannot give an
11 opinion as to [a] legal conclusion, i.e., an opinion on an ultimate issue of law.” *United*
12 *States v. Diaz*, 876 F.3d 1194, 1197 (9th Cir. 2017) (emphasis omitted) (cleaned up).

13 * * *

14 Geist has only minimal industry experience, his opinions were conclusory, his
15 testimony reflects a misunderstanding of his role as a proffered industry-practice expert,
16 and he left unexplained what sources he drew from other than his own minimal
17 experience. Therefore, the Court affords Geist’s testimony little to no weight.

18 C. Steven Gissiner

19 The Court concludes that, pursuant to Rule 702 and *Daubert*, Defendants’
20 proffered process expert, Steven Gissiner, can offer an expert opinion regarding the
21 process commonly used in the retirement-benefits industry to monitor a fund’s
22 investments, recordkeeping fees, and share classes. Moreover, given his substantial
23 experience in the retirement-benefits industry, his work with plans similar to Prime’s, and
24 his reliance on formal research, the Court finds his testimony to be highly probative.

25 The Court finds that Gissiner has broad, longstanding, and substantial experience
26 in the retirement-benefits industry. Gissiner has worked in industry for about 43 years.
27 (Day 4 Tr. at 958:13–15 (Gissiner).) He currently owns Orchard Hills Consulting, LLC
28 (“Orchard Hills”), where he has worked for approximately 20 years. (*Id.* at 958:18–22.)

1 At Orchard Hills, Gissiner provides retirement plan consulting services to clients,
2 including advising on investments, conducting recordkeeping-fee assessments, and
3 providing recordkeeping consulting. (*Id.* at 958:23–959:4.) Gissiner has approximately
4 30 recurring clients at Orchard Hills, and “another ten or so” non-recurring clients where
5 he provides services based on need. (*Id.* at 959:5–9.) Prior to Orchard Hills, Gissiner
6 worked at a compensation and retirement-plan consulting firm, Clark Bardis; was a
7 Partner in the Human Capital Practice at Arthur Anderson; and managed
8 PriceWaterhouseCoopers’ defined-contribution-retirement-plan and benefits-outsourcing
9 practices. (*Id.* at 959:10–960:14.) Over the course of his career, Gissiner has provided
10 consulting services to *thousands* of retirement plans. (*Id.* at 960:15–22.)

11 The Court further finds that Gissiner has experience assisting clients similar to
12 Prime. At Orchard Hills, Gissiner’s retirement-plan clients had assets ranging from less
13 than \$5,000,000 to over \$10,000,000,000 and participants ranging from less than 100
14 participants to over 50,000 participants. (*Id.* at 960:23–961:3.) Gissiner’s clients include
15 healthcare organizations, including Memorial Herman, Scripps Health, Orlando Health,
16 the Moffit Cancer Center of Tampa, Tallahassee Memorial Hospital, Lakeland Regional
17 Medical Center, and Riverside Hospital. (*Id.* at 961:11–24.) Gissiner has worked with
18 multiple employer plans like Prime’s Plan. (*Id.* at 961:25–962:10.) And Gissiner has
19 experience advising retirement plans for companies that, like Prime, acquired other
20 entities and merged those entities and their retirement plans into an existing plan. (*Id.* at
21 964:21–24.) Finally, Gissiner supplemented his substantial industry experience by citing
22 outside sources—most notably, a 2017 survey of retirement plans inquiring into how they
23 assessed the reasonableness of their recordkeeping fees. (*Id.* at 1045:13–1046:13.)

24 Given Gissiner’s broad experience in the retirement-benefits industry, his specific
25 experience specific working with clients similar to Prime, and his reliance on formal
26 research into industry practice, the Court finds Gissiner’s testimony to be highly probative
27 of common industry practice when it comes to managing the investments, recordkeeping
28 fees, and share classes of a Plan similar in size and nature to that of Prime.

1 **V. CLAIM 1: THE COMMITTEE’S ALLEGED FAILURE TO PRUDENTLY**
2 **MONITOR THE PLAN’S INVESTMENTS**

3 The Court concludes that the Committee prudently selected, monitored, and
4 retained the Challenged Funds. *See Wright*, 360 F.3d at 1097 (holding that the “court’s
5 task” is to determine whether the fiduciaries “employed the appropriate methods to
6 investigate the merits of the [challenged] investment”). The Court finds that Plaintiffs
7 presented no credible evidence showing that the Committee’s investment-monitoring
8 process fell below common industry practice. Moreover, the Court finds that Plaintiffs
9 failed to otherwise prove that the Committee’s investment-monitoring process lacked the
10 “the care, skill, prudence, and diligence under the circumstances then prevailing that a
11 [person] acting in a like capacity and familiar with such matters would use in the conduct
12 of an enterprise of a like character and with like aims.” 29 U.S.C. § 1104(a)(1)(B). The
13 Court offers a high-level review of the Committee’s general process and composition
14 before turning to the specific flaws that Plaintiffs contend were present in that process.

15 **A. Factual Findings Regarding the Committee’s Process and Composition**

16 The Committee generally met quarterly during the Class Period to review the
17 investments in the Plan, review administrative topics related to the Plan, review
18 recordkeeping for the Plan, and discuss other relevant Plan-related topics. (*See Stipulated*
19 *Facts App.* ¶ 42; Day 1 Tr. at 119:7–10, 123:3–8, 145:3–8, 161:14–163:1, 179:4–10,
20 201:17–25, 204:6–208:2, 221:16–222:5 (Brady); Day 2 Tr. at 277:24–278:18, 279:10–
21 280:1, 289:3–290:7, 293:24–295:21, 302:21–303:12, 306:18–308:17, 309:13–312:7,
22 313:25–315:3, 318:19–319:22, 320:24–321:25, 373:25–374:4 (Brady); *id.* at 421:11–
23 422:8, 425:6–426:24, 442:11–443:20, 446:4–447:13 (Heather); Day 3 Tr. at 530:5–11
24 (Dhuper); *id.* at 598:21–599:1 (Gomez); Day 4 Tr. at 789:6–12 (Davis).)

25 The Committee members and representatives from Captrust and Transamerica
26 generally attended every Committee meeting during the Class Period. (*See Stipulated*
27 *Facts App.* ¶¶ 42–115.) The Committee generally met for about an hour. (Day 2 Tr. at
28 374:3–4 (Brady)), and the Committee was composed of the following members:

- 1 • **Jamie Gomez:** Gomez is the Human Resources Benefits Manager for Prime and
2 has served on the Committee since 2005 (Stipulated Facts App. ¶¶ 5–6);
- 3 • **Arti Dhuper:** Dhuper is Prime’s Vice President of Human Resources and has
4 served on the Committee since 2012 (*id.* ¶¶ 7–8);
- 5 • **Mike Heather:** Heather was Prime’s Chief Financial Officer (“CFO”) and served
6 on the Committee from 2013 to 2020 (*id.* ¶¶ 9–10);
- 7 • **Steve Aleman:** Aleman was Heather’s successor as CFO and has served on the
8 Committee since 2020 (*id.* ¶¶ 11–12);
- 9 • **Michael Bogert:** Bogert was Prime’s Hospital System CFO and President of
10 Corporate Finance and served on the Committee from 2008 to 2020 (*id.* ¶¶ 13–14);
- 11 • **Mike Sarian:** Sarian was Prime’s President of Hospital Operations and served on
12 the Committee from 2012 to 2020 (*id.* ¶¶ 15–16);
- 13 • **Owen Shen:** Shen was Prime’s Corporate Controller and Director of Finance and
14 served on the Committee from 2015 to 2020 (*id.* ¶¶ 17–18); and
- 15 • **Brian Brady:** Brady was Prime’s Director of Investments and served on the
16 Committee from 2016 to 2023 (*id.* ¶¶ 19–20).

17 While Dhuper and Gomez—HR professionals—were more involved in the
18 “administrative” aspects of the Plan (*e.g.*, recordkeeping), Brady and Heather—each of
19 whom has a finance background—were more involved on the “investment side.” (Day 4
20 Tr. at 937:14–20 (Davis).⁹)

21 Captrust assisted the Committee with its monitoring of the Plan’s investments.
22 (Stipulated Facts App. ¶¶ 37–40.) Captrust has provided services to at least 48 defined
23 contribution Plans that have over \$500,000,000 in total assets. (Day 5 Tr. at 1021:14–19
24 (Gissiner).) Davis, a former Senior Vice President at Captrust, served as the principal
25 Captrust representative for the Plan and attended Committee meetings. (*See* Stipulated
26

27 ⁹ Plaintiffs’ expert, Wagner, testified that “it’s a very good thing” to have an “investment officer
28 as a Committee member.” (Day 1 Tr. at 101:18–23 (Wagner).) And she agreed that “it’s also
good to include people from finance, HR, and . . . benefits.” (*Id.* at 101:24–102:3.)

1 Facts App. ¶¶ 37–110.)

2 The Court finds that Davis has substantial experience in the retirement-benefits
3 industry. At Captrust, Davis advised plan sponsors of retirement plans and fiduciaries
4 responsible for operating retirement plans. In this role, he helped clients understand their
5 alternatives in terms of recordkeeping administrators and recordkeeping fees and costs;
6 assisted clients in the selection, monitoring, and replacement of investments; provided
7 fiduciary training; and generally provided data to clients to assist with their fiduciary
8 responsibilities. (Day 4 Tr. at 782:14–783:3 (Davis).). Davis was responsible for more
9 than 40 separate client relationships, which consisted of approximately 60 to 70 retirement
10 plans. (*Id.* at 785:6–10.) Davis credibly testified that Captrust differentiates itself from its
11 competitors by meeting “face to face” with the investment managers that their clients use.
12 (*Id.* at 791:10–792:4; *see also* Ex. 2016 Q3 Presentation, Ex. 256 at 32–34 (“Captrust’s
13 research team visited Fidelity’s headquarters in Boston”).)

14 Davis began working in the financial services industry in 1991 with Fidelity, where
15 he provided employee education training and printed materials for plan sponsors that hired
16 Fidelity. (*Id.* at 783:9–19.) Thereafter, Davis joined Charles Schwab where he worked on
17 various mutual funds. And after Charles Schwab, Davis created his own independent
18 advisory firm before eventually joining Captrust. (*Id.* at 783:20–24.)

19 Davis, or other Captrust representatives, emailed the Committee members in
20 advance of each quarterly Committee meeting and provided them with Quarterly
21 Investment Reports (“QIRs”). (*See* Tr. Exs. 555–556, 560, 566, 572, 574, 577, 580, 583,
22 589, 591, 598, 607, 615, 617, 620, 626, 627, 633, 636, 642, 653, 658, 662, 671, 675, 682,
23 688 (Captrust emails); Exs. 6–7, 9, 13, 21, 60–62, 79, 246–254, 256–259, 261–281, and
24 716–724 (Captrust QIRs).) The Court finds that the QIRs contained detailed information
25 regarding the market, updates for the Committee regarding their fiduciary duties, the total
26 Plan assets in each fund in the Plan, the scores under Captrust’s scoring system for each
27 fund in the Plan, and detailed commentary regarding each fund in the Plan. (*See* Exs. 7, 9,
28 60–62, 246–254, 256–259, 261–281.)

1 Finally, the Court credits Davis’s testimony that the Committee’s engagement at
2 meetings was “higher” than most Captrust clients, and the Committee “was more involved
3 than a typical client would be.” (Day 4. Tr. at 796:11–15 (Davis).)

4 * * *

5 To summarize, the Court finds that the Committee met quarterly; was composed of
6 well-qualified individuals with diverse professional backgrounds, including multiple
7 individuals with financial and/or investment experience; received and reviewed
8 substantial amounts of information from Captrust, a well-qualified advisor; and actively
9 engaged with the material Captrust presented. The Court now turns to the procedural
10 deficiencies that Plaintiffs assert and find that they—whether viewed individually or
11 collectively—do not rise to the level of a breach of the fiduciary duty of prudence.

12 **B. Allegedly Inadequate Fiduciary-Governance Structure**

13 Plaintiffs’ first theory of liability is that “Defendants’ fiduciary governance
14 structure” was inadequate. (Pls.’ Proposed COLs ¶ 64.) By this, Plaintiffs refer to three
15 aspects of the Committee’s process: (1) the Committee’s alleged lack of training; (2) the
16 Committee’s pre-2019 lack of a written charter; and (3) the Committee’s allegedly
17 amorphous Investment Policy Statement (“IPS”). (*See id.* ¶ 64.)

18 The Court concludes that Plaintiffs selected, monitored, and retained the Plan’s
19 investments pursuant to a prudent fiduciary-governance structure. As to each challenged
20 aspect of Defendants’ fiduciary-governance structure, Plaintiffs rely on the testimony of
21 their proffered process expert, Wagner, regarding putative industry practice. However,
22 the Court finds that there is no credible evidence in the record showing (1) that the
23 training the Committee received fell below industry practice; (2) that having a written
24 charter is common industry practice; or (3) that the IPS’s contents fell below industry
25 standards for specificity. Moreover, the Court concludes that Plaintiffs failed to otherwise
26 show that Defendants’ fiduciary-governance structure was imprudent.

27 **1. Alleged Lack of Training**

28 The Court concludes that Defendants received a prudent level of training.

1 Plaintiffs' contention is based on the testimony of their process expert, Wagner, who
2 contended that, based on her review of meeting minutes, formal fiduciary training "was
3 minimal and sporadic." (Day 1 Tr. at 45:1 (Wagner).) However, as explained, the Court
4 finds that Wagner's testimony in general (*supra* section IV.A) and her testimony on this
5 specific subject (*supra* section IV.A.2) has no probative value. Moreover, the record
6 refutes her contention that the Committee received only "minimal and sporadic" training.

7 The Court finds that the Committee received regular fiduciary updates as part of
8 their quarterly Committee meetings. (Day 1 Tr. at 202:24–203:10, 204:19–205:8 (Brady);
9 Day 2 Tr. at 393:18–393:22, 443:21–444:24 (Heather); Day 4 Tr. at 782:23–783:1,
10 789:18–22 (Davis); *see also* Ex. 9 at 15; Ex. 60 at 15–17; Ex. 246 at 50–61; Ex. 248 at
11 10–11; Ex. 250 at 10; Ex. 251 at 13–15; Ex. 252 at 10–14; Ex. 253 at 15–16; Ex. 254 at
12 13–19; Ex. 256 4–7; Ex. 257 at 7; Ex. 258 at 4–7; Ex. 259 at 4–8; Ex. 261 at 4–7; Ex. 262
13 at 7–9; Ex. 263 at 4–6; Ex. 264 at 4–6; Ex. 265 at 6; Ex. 266 at 4–5; Ex. 267 at 4–7; Ex.
14 268 at 4–7; Ex. 269 at 5; Ex. 270 at 4–8; Ex. 271 at 5–9; Ex. 272 at 4–6; Ex. 273 at 6–7;
15 Ex. 275 at 4–8; Ex. 276 at 4–7; Ex. 277 at 4–10; Ex. 278 at 4–8; Ex. 279 at 4–5; Ex. 280
16 at 4–8; Ex. 281 at 4–11.) The Court further finds that Captrust routinely flagged these
17 fiduciary-training sections in the QIRs for the Committee in the emails that preceded the
18 Committee meetings. (*See* Ex. 555 at 1–2; Ex. 566 at 1–2; Ex. 572 at 1; Ex. 574 at 1; Ex.
19 577 at 1–2; Ex. 580 at 1; Ex. 583 at 1; Ex. 589 at 2; Ex. 591 at 1–2; Ex. 595 at 2; Ex. 607
20 at 1; Ex. 615 at 1–2; Ex. 617 at 2; Ex. 620 at 2; Ex. 626 at 1; Ex. 627 at 1; Ex. 633 at 1;
21 Ex. 636 at 2; Ex. 642 at 2; Ex. 653 at 1; Ex. 658 at 1; Ex. 662 at 1; Ex. 671 at 2–3; Ex.
22 675 at 2; Ex. 682 at 2; Ex. 688 at 2.) And as the Court previously found, Wagner provides
23 no explanation for her counter-intuitive proposition that the fiduciary-duty updates that
24 regularly formed part of Captrust's QIRs and presentations are somehow not fiduciary
25 training. (*Supra* section IV.A.2.) Nor does anything else in the record support that
26 proposition. Therefore, the Court finds that the Committee received regular and
27 substantive training on their fiduciary duties.
28

1 **2. Pre-2019 Lack of a Written Charter**

2 The Court concludes that Plaintiffs have not proven that the Committee’s pre-2019
3 lack of a written charter was imprudent.

4 Plaintiffs’ contention is again based on Wagner’s testimony. As discussed, the
5 Court finds that Wagner’s testimony in this case is deserving of little to no weight. (*Supra*
6 section IV.A.) Moreover, the Court finds that Wagner’s testimony on this specific subject
7 was thoroughly undermined on cross-examination. She testified on direct examination:
8 “Without a[] charter . . . that tells [the Committee members] what to do and how to
9 accomplish their roles and responsibilities, they really didn’t know what to do” (Day
10 1 Tr. at 42:23–43:1 (Wagner).) However, on cross-examination, Wagner agreed that
11 “[n]ot all plans have charters,” and she further admitted that she did not “even know what
12 percentage of plans actually do have charters.” (*Id.* at 101:10–14.) Moreover, Gissiner—
13 Defendants’ process expert whose testimony the Court finds to be highly probative given
14 his substantial industry experience—testified that it is not a “universal industry practice”
15 to have a written charter. (Day 5 Tr. at 1016:15–17; *supra* section IV.C.). Without any
16 evidence of the prevalence of written charters, the Court cannot conclude it is industry
17 practice to have one.¹⁰ Moreover, there is no other evidence in the record supporting the
18 proposition that a reasonably diligent person “acting in a like capacity” would have
19 adopted a written charter for the Plan. 29 U.S.C. § 1104(a)(1)(B).

20 **3. Allegedly Amorphous IPS**

21 The Court concludes that Defendants selected, monitored, and retained the Plan’s
22 funds pursuant to a prudent IPS. Plaintiffs’ criticism of the IPS is based on the testimony
23 of their process expert, Wagner, who opined that “[t]here was no practical, no effective

24 _____
25 ¹⁰ The Court’s conclusion is not meant to suggest that plaintiffs must produce empirical evidence
26 to support their contention that something is industry practice. On cross-examination, Wagner
27 was asked whether she knew of any studies on the commonality of written charters—to which she
28 responded, no. Nowhere did she testify on direct or cross-examination as to what quantum of
Plans (some, most, all) she believed have written charters. And Plaintiffs elected not to conduct
any re-direct examination of Wagner.

1 guidelines that were provided to the committee in the IPS itself.” (Day 1 Tr. at 35:21–22
2 (Wagner); *see also id.* at 49:12–14 (“[T]he IPS did not provide any effective or practical
3 guidelines that the [C]ommittee could utilize.”).) However, as explained above, the Court
4 finds that Wagner’s testimony in general (*supra* section IV.A) and her testimony on this
5 specific subject (*supra* sections IV.A.1, IV.A.3) is conclusory, internally inconsistent, and
6 entitled to essentially no weight. Moreover, the Court finds that a review of the IPS itself
7 shows that it provides the Committee members with guidance on how to select, monitor,
8 and remove funds from the Plan. (See IPS, Ex. 3 at 4 (“[T]he IPS[] . . . [1] establishes a
9 prudent process for selecting appropriate investment options . . . ; [2] [e]stablishes a
10 prudent process by which selected investment options generally will be monitored for
11 compliance with this IPS; and [3] [d]evelops methods for . . . replacing existing
12 investment options that do not comply with the terms of the IPS.”).¹¹)

13 **Selection.** In a section entitled “Investment Selection,” the IPS states that the
14 “following screening criteria will be among those applied to the available actively
15 managed options”: (1) Fees, (2) Style Consistency, (3) Volatility and Diversification, (4)
16 Performance, (5) Management and Organization, and (6) Additional Factors. (IPS at 7.)
17 The IPS then explains each of these factors in further detail. For example, the IPS
18 explains the third factor—Volatility and Diversification—as follows:

19 Unless chosen to deliver investment performance that is
20 characteristic of a specific industry or sector of the investment
21 spectrum, investment options generally will be broadly
22 diversified portfolios and will avoid unreasonable
23 overweighing in a given investment, industry or sector.
24 Volatility, as measured by Standard Deviation of returns,
25 should be within reasonable ranges for the given peer group.
26 Other risk measures including Sharpe ratio, information ratio
27 and beta, may be used as well.

28 ¹¹ This trial exhibit is the 2013 IPS. (*See id.*) Although there are two other versions of the IPS
admitted into evidence, for the sake of convenience, the Court cites only the 2013 IPS, as Wagner
testified that there are no “material differences between” the three versions of the Plan’s IPS.
(Day 1 Tr. at 42:6–10 (Wagner); *see also id.* at 211:5–19 (Davis).)

1 (Id. at 6.) As to the fourth factor—Performance—the IPS explains:

2 With few exceptions, all actively managed investment options
3 should rank in the top 50% of their given peer group for the 3
4 or 5 year annualized period at the time of their selection. While
5 past performance is not indicative of future returns, peer-
6 relative performance offers the Committee perspective on how
7 the investment has performed over a reasonably demonstrative
8 period of time relative to other choices. In addition to
9 performance, the Committee should consider other variables
10 . . . in order to develop a holistic view about a strategy and its
11 appropriateness within the Plan.

12 (Id. at 6.)

13 **Monitoring.** In a section entitled “Investment Evaluation,” the IPS provides that
14 “the Committee will monitor the investment options made available within the Plan to
15 ensure they remain compliant with the criteria used to initially select them for inclusion in
16 the Plan under this IPS or such other or additional criteria as appropriate.” (Id. at 6.) The
17 IPS further provides that, “[a]s part of that process, the Committee may consider the
18 ranking of investment options relative to their peers using a comprehensive Scoring
19 System proprietary to the Investment Consultant/Advisor” and cites three appendices to
20 the IPS overviewing that Scoring System. (Id. at 6–7.) The IPS also “outline[s] . . . the
21 evaluation process”:

- 22 • On a quarterly basis, the Plan’s Investment
23 Consultant/Advisor will provide the Committee with a
24 comprehensive report of each investment option’s
25 relevant performance and relative rankings against
26 appropriate indexes, and within appropriate peer groups.
27 The investment Consultant/Advisor will review the
28 report with the Committee at least annually, but
generally on a quarterly basis.
- The investment Consultant/Advisor will also
communicate with the Committee on an ad hoc basis, as
appropriate, concerning any material changes affecting
any of the selected investment options. Material changes
may include management changes, changes to the

investment option's pricing structure or significant changes in the investment option's fundamental policies and procedures that the Investment Consultant/Advisor feels warrant Committee review.

- The Committee normally will meet with the Investment Consultant/Advisor, at least annually, to evaluate each investment option as well as the overall status of the Plan's Investment Policy Statement.
- If the Investment Consultant/Advisor's proprietary Scoring System indicates that a given investment option may no longer meet the appropriate and reasonable standards required to remain included in the Plan's menu, the Committee will take appropriate steps.

(*Id.* at 7.)

Removal. In a section entitled "Replacement of Selected Investment Options," the IPS states: "Since the intention of the Plan is to provide opportunities for long-term asset accumulation for participants and beneficiaries, it is not expected that either the investment universe or specific investment options will be changed or deleted frequently."

(*Id.*) The IPS then cautions: "It is possible that changes may become desirable or necessary, however, based upon factors such as[] . . . [t]he need to replace or eliminate one of the Plan's investment options after noncompliance with the IPS has been established, or appears likely." (*Id.* at 8.)

Captrust's Role. The IPS provides that Captrust would be responsible for, among other things, "[e]ducating the Committee on issues concerning the selection of investment options for the Plan," "[a]ssisting in the analysis and initial selection of investment options made available for participant investment," [a]ssisting the Committee with the ongoing review of the investment universe made available within the Plan's chosen administrative environment, and "[a]ssisting the Committee with the review of the performance of the selected investment options." (*Id.* at 4–5.)

Captrust's Scoring System. The IPS provides a scoring system for evaluating

1 actively managed funds “relative to their peers using a comprehensive scoring system
2 proprietary to [Captrust].” (*Id.*) The IPS emphasizes that the “scoring system is designed
3 to serve as a guide and an aid to the Committee when evaluating investment options,
4 providing a baseline for measurement and discussion” and that “[t]he scoring system is
5 not intended to trigger an automatic and mandated fiduciary outcome or decision for a
6 given score.” (*Id.* at 11 (emphasis omitted).)

7 The scoring system for actively managed options measured “eight (8) quantitative
8 areas and two (2) qualitative ones.” (*Id.* at 11.) The quantitative measurements include
9 Risk Adjusted Performance on a 3- and 5-year basis, Performance versus Peer Groups on
10 a 3- and 5-year basis, Style Attribution on a 3- and 5-year basis, and Confidence on a 3-
11 and 5-year basis. (*Id.*) The qualitative measurements included Management Team and
12 Investment Family Items. (*Id.*) The IPS details the points that an investment can attain
13 for each measurement and explains the bases for how points are awarded for each
14 measurement. Funds that receive a total score of 80 or above are in “Good Standing”;
15 funds that receive a score between 70 and 79 are “Marked for Review”; and funds that
16 receive a score of 69 or below are “Consider[ed] for Termination.” (*Id.* at 11–12.)

17 For target date funds (“TDFs”), the IPS explains that “the principles behind target
18 date evaluation mirror those of the scoring system for traditional options, [however] target
19 date investments are much more complex due to the shifting nature of the portfolios
20 through time, and therefore require a more complex scoring framework.” (*Id.* at 16.) To
21 that end, the IPS provides separate measurements for evaluating TDFs, which includes
22 performance (20 points), glidepath risk (10 points), regression to global equity index (10
23 points), portfolio construction (15 points), underlying investment vehicles (15 points),
24 management team (25 points), and the fund’s firm (5 points). (*Id.* at 16–19.)

25 ***Gissiner’s Testimony.*** In addition to the Court’s own review of the IPS, the Court
26 credits Gissiner’s testimony that the Committee’s IPS is “very similar to others that [he
27 has] seen.” (Day 5 Tr. at 1015:14–22 (Gissiner).).
28

The Court finds that the IPS provides appropriate and reasonable guidance to the Committee on the selection, monitoring, and replacement of investment options and delineates the respective roles and responsibilities of the Committee and Captrust.

C. Alleged Insufficient Documentation

Plaintiffs next contend that the Committee “insufficiently documented its decision-making process,” which allegedly “resulted in a ‘check the box’ exercise” that fell below what the ERISA-imposed duty of prudence requires. (Pls.’ Proposed COLs ¶ 65.)

Though the parties discuss the factual issue of whether the Committee’s recordkeeping complied with industry standards, the parties do not provide any legal authority for the proposition that procedural prudence contains a recordkeeping element. Here, the Court assumes without deciding that recordkeeping defects can fall under procedural prudence’s rubric, but finds that the Committee adequately documented its decision-making process. Plaintiffs’ contention to the contrary is based on Wagner’s opinion, which in turn is based on her view that the meeting minutes—and *not* Captrust’s emails, QIRs, and presentations—are the only relevant documentation of the Committee’s process. As explained, the Court finds that there is no sound reason to adopt Wagner’s myopic view of what constitutes relevant documentation. (*Supra* section IV.A.4.) Moreover, the Court credits Gissiner’s testimony that the Committee’s documentation—consisting of the meeting minutes and incorporated materials—was “[p]retty consistent” with his experience with other retirement plans and “typical” of similar plans. (Day 5 Tr. at 1019:22–1020:3 (Gissiner).). Accordingly, the Committee’s recordkeeping met industry standards, and Plaintiffs introduced no other evidence showing that the Committee’s recordkeeping lacked “the care, skill, prudence, and diligence under the circumstances then prevailing that a [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” 29 U.S.C. § 1104(a)(1)(B).

1 **D. Alleged Failure to Comply with the IPS**

2 Plaintiffs contend that the Committee violated the IPS by retaining certain
3 investments that were favorably rated by Captrust’s scoring system but which were
4 allegedly required to be removed by the IPS. (Pls.’ Proposed COLs. ¶ 67.)¹² This
5 contention is based on the testimony of Plaintiffs’ process expert, Wagner. In her view,
6 Captrust’s scoring methodology was “inconsistent with the IPS” and the Committee acted
7 imprudently by using that scoring methodology to assess investment options. (Day 1. Tr.
8 at 56:10–13 (Wagner); *see also id.* at 42:12–13 (“Q. Did the committee follow the
9 requirements of the IPS? A. No. No. It routinely did not, in fact.”).) In particular,
10 Wagner reads the 3- and 5-year performance metrics specified in the IPS to be standalone,
11 categorical requirements—that once an investment falls in the bottom-half of its peer
12 ranking for either of those lookback periods, the investment must be removed. (*See id.* at
13 56:14–16 (“[T]he three- and five-year performance criteria . . . were called out . . . as
14 important on three specific occasions in the IPS itself . . .”); *id.* at 59:17–19 (the IPS
15 references these metrics “three times for a reason”); *id.* at 55:22–25 (the scoring
16 mechanism “seems to completely miss this three- and five-year rolling requirement on
17 performance”); *id.* at 55:7–8 (the scoring system “did not provide the factors that were
18 required by the IPS”).

19 **1. Legal Standard**

20 Plan fiduciaries are required to act “in accordance with the documents and
21 instruments governing the plan insofar as such documents and instruments are consistent
22 with [ERISA].” 29 U.S.C. § 1104(a)(1)(D). This includes a plan’s IPS. *See Lauderdale*,
23 2022 WL 17260510, at *10 (citing *Cal. Ironworkers Pen. Tr. v. Loomis Sayles & Co.*, 259
24 F.3d 1036, 1042 (9th Cir. 2001)); *Baird v. BlackRock Inst. Tr. Co., N.A.*, 2021 WL
25 105619, at *2 (C.D. Cal. Jan. 12, 2021).

26
27 ¹² The Court addresses this contention out of order because Plaintiffs’ contention regarding the
28 Committee’s alleged reflexive deference to Captrust is premised on the Court accepting their
interpretation of the IPS. (*See* Pls.’ Proposed COLs ¶ 66.)

2. Factual Findings

The Court concludes that Plaintiffs and Wagner’s reading of the IPS is, frankly, non-sensical and belied by the record. The Court, therefore, finds that the Committee complied with the IPS. Given this factual finding, the Court concludes that the Committee acted “in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA].” 29 U.S.C. § 1104(a)(1)(D).

First, the Captrust scoring system cannot be “inconsistent with the IPS” because that scoring system is itself *part* of the IPS. The IPS expressly provides that the Committee will evaluate investment options’ performance “relative to their peers using a comprehensive *scoring system proprietary to [Captrust]*.” (IPS at 6–7 (emphasis added).) The IPS then explains that scoring system’s mechanics in details—breaking it down by investment type. (*See supra* section 11–13.)

Second, the IPS contemplates that its provisions are “guidelines” and that “[t]here may be specific circumstances that the Fiduciary determines warrant a departure from the guidelines contained herein.” (IPS at 1.)

Third, even if the Court were to look only at the investment-selection section of the IPS in which the 3- and 5-year performance consideration is laid out, that consideration is just one of 5 considerations the IPS requires the Committee to consider. (*See id.* at 5–6.)

Fourth, the 3- and 5-year performance metrics contemplate that they are not be-all, end-all metrics: “In addition to performance, the Committee should consider other variables . . . in order to develop a holistic view about a strategy and its appropriateness within the Plan.” (*Id.* at 6.)

Fifth, the removal-specific section of the IPS contemplates that investment options should not “be changed or deleted frequently.” (*Id.* at 7.) That would not be possible if, as Plaintiffs contend, an investment option was required to be removed as soon as it fell in the bottom half of its peer group for either the 3- or 5-year lookback period.

Sixth, Wagner elsewhere criticized the Committee for allegedly imbuing the

1 Captrust scoring system with a “formulaic” quality that replaced its “own independent
2 judgment to determine how best to proceed.” (Day 1 Tr. at 60:8–12 (Wagner).) And
3 Wagner elsewhere testified that qualitative considerations “are important” and “matter[.]”
4 when reviewing an investment in a retirement plan, noting that “it’s extremely important
5 to know about the management team.” (*Id.* at 96:24–97:11.) But Wagner would have the
6 Court believe that the IPS imbues the 3- and 5-year performance consideration with that
7 exact same “formulaic” quality. Indeed, to the extent that Plaintiffs’ reading of the IPS
8 were correct and required blind adherence to a single consideration to the exclusion of all
9 other relevant information, such an IPS would likely violate ERISA and would not be
10 binding under 29 U.S.C. § 1104(a)(1)(D), which requires adherence to Plan documents
11 only “insofar as such documents . . . are consistent with [ERISA].”

12 **E. Alleged Reflexive Deference to Captrust**

13 Plaintiffs next contend that the Committee reflexively deferred to Captrust when it
14 came to monitoring the Plan’s investment options. (Pls.’ Proposed COLs ¶ 66.) For
15 several reasons, the Court finds as a factual matter that the Committee did not reflexively
16 defer to Captrust.

17 First, Plaintiffs’ contention depends in large part on the testimony of Wagner that,
18 based on the materials she reviewed, the Committee “did nothing, from what [she] can
19 tell, to check or to probe or to inquire with respect to Captrust’s giving [of] favorable
20 ratings to the challenged funds.” (Day 1 Tr. at 38:23–25 (Wagner); *see also id.* at 46:22–
21 24 (“[The Committee] really just passively relied on Captrust in that respect[.] . . .”).)
22 But, as explained, the Court does not find Wagner’s testimony on what the Committee did
23 and did not do to be probative because she focused on the meeting minutes as the only
24 evidence of what the Committee discussed. (*Supra* section IV.A.4.)

25 Second, this claim requires the Court to accept Plaintiffs’ reading of the IPS, which
26 it squarely rejected above. (*Supra* section V.D.) Indeed, Plaintiffs expressly tie this
27
28

1 contention to that rejected reading of the IPS:

2 [E]ach of the Challenged Funds underwent prolonged and
3 substantial periods of *underperformance under the criteria*
4 *established by the Plan’s IPS* and the Committee failed to
5 analyze the continuing prudence of retaining the Challenged
6 Funds. Indeed, despite reserving for itself the duty to make all
7 decisions regarding the Plan including its investment
8 alternatives and ratifying an IPS that provided specific
9 evaluative criteria, Defendants effectively abdicated their
10 monitoring role to the *Captrust scoring system*

11 (*Id.* (emphasis added).)

12 Third, the Court finds that the Committee—with the assistance of Captrust—
13 closely monitored the Challenged Funds. Below, the Court describes the Committee’s
14 monitoring of each of the Challenged Funds.

15 **1. Active Suite**

16 The Court finds that the Committee closely monitored the Active Suite. The
17 Active Suite was the Plan’s qualified default investment alternative (“QDIA”) while it
18 was in the Plan and, as such, the Committee paid especially close attention to the
19 performance of the Active Suite, the amount of Plan participant money invested in the
20 Active Suite, and any changes to the Active Suite that would affect its performance. (*See*
21 Day 1 Tr. at 218:13–219:17 (Brady); Day 2 Tr. at 311:20–312:3, 450:5–451:5, 453:2–
22 454:4 (Heather); Day 3 Tr. at 497:1–14, 502:7–12 (Heather).)

23 At each Committee meeting, the Committee monitored the portion of Plan
24 participants’ assets that were invested in each fund, including the Active Suite, and there
25 was a separate line in each Captrust QIR showing the amount of Plan participants’ assets
26 specifically invested in the Plan’s QDIA (the Active Suite). (*See, e.g.*, 2013 Q3
27 Presentation, Ex. 246 at 15–16.) Consider, for example, the Committee’s 2012 Q3
28 meeting as just one example (of many) of specific discussions the Committee had
regarding the Active Suite. At the time, the Active Suite received a score of 80 (“Good
Standing”), but the “Fund Management” measurement was nevertheless “Marked for

1 Review” by Captrust’s scoring system. (2013 Q3 Presentation at 20.) Fidelity had
2 announced upcoming changes to the Active Suite, including a change in fund managers
3 with the addition of new managers who had a strong track record of performance, and
4 changes to the fund’s glidepath. Captrust informed the Committee that they believed
5 these changes were “well-researched and thoughtful, however, clients should re-evaluate
6 the appropriateness of this series for their participant base,” a discussion that Committee
7 member Heather credibly testified to at trial. (*Id.* at 22; Day 2 Tr. at 453:2–457:21
8 (Heather).)

9 Additionally, the Court finds that the Committee appropriately discussed and
10 analyzed the benchmarks Captrust used for the Active Suite. Brady credibly testified
11 specifically that, using his background as a former investment advisor, he “often looked at
12 the benchmarks to make sure that [he] agreed” with the benchmarks Captrust used in their
13 analyses. (Day 1. Tr. at 120:7–15 (Brady).) Given Plaintiffs’ sprawling theories of
14 liability and the length of the Class Periods, the credibility of Brady’s testimony about his
15 confirmatory research is not undermined by his inability to recall the benchmark for a
16 different fund years later during his deposition. (*Contra* Pls.’ Proposed FOFs ¶ 273.)
17 Moreover, the Court finds that there is not sufficient evidence in the record even to
18 support a finding that the Committee had used an incorrect benchmark for the Active
19 Suite. Martin Dirks, Plaintiffs’ proffered expert on damages, testified in passing that the
20 Committee used an incorrect benchmark for the Active Suite, but, in support of that
21 proposition, he simply referenced his report—which is not in evidence. (Day 3 Tr. at
22 688:16–689:15 (Dirks); *see* Day 1 Tr. at 63:16–17 (“[T]he expert reports haven’t been
23 admitted into evidence by agreement of the part[ies].”).) Similarly, Wagner testified, in a
24 conclusory manner, that the Plan used the wrong glidepath and the wrong benchmark.
25 (Day 1 Tr. at 52:1–13 (Wagner).) The Court found her not to be credible as a general
26 matter (*supra* section IV.A) and she specifically conceded that she was not “an economic
27 expert,” not an expert in “determining the appropriate benchmarks for a fund,” and not an
28 expert in assessing “investment performance.” (Day 1 Tr. at 74:4–16 (Wagner).)

2. FIAM Blend Funds

The Committee elected to replace the above-discussed Active Suite with the FIAM Blend Funds, which the Committee understood to be a similar strategy to the Active Suite—but in a different investment vehicle (collective trust) and with a “hybrid” approach to investment management (compared to the “active” management of the Active Suite). The Court finds that the Committee, after replacing the Active Suite with the FIAM Blend Funds, continued its close monitoring of the Plan’s QDIA (now the FIAM Blend Funds). (*See* TDF Comparison, Ex. 720; Day 2 Tr. at 317:18–20 (Brady); *id.* at 433:17–22 (Heather); Day 4 Tr. at 828:14–829:12 (Davis).)

In early 2021, the Committee conducted another comprehensive review of the FIAM Blend Funds, which included a presentation by Captrust that analyzed the FIAM Blend Funds and its characteristics, and compared the FIAM Blend Funds to other TDF alternatives in the marketplace. The Committee elected to retain the FIAM Blend Funds in the Plan as the QDIA, but, around the same time, Captrust secured approval from Fidelity to move the Plan’s investment in the FIAM Blend Funds to a lower cost share class. (Day 2 Tr. at 433:6–10 (Heather); Day 4 Tr. at 935:11–936:5 (Langkamp); *see also* Stipulated Facts App. ¶ 186 (“Captrust worked with Fidelity to gain approval for the Plan to invest in a share class of the FIAM Blend with a lower expense ratio.”).)

3. Prudential Fund

The Court finds that the Committee closely reviewed the Prudential Fund even when it was in “Good Standing” under Captrust’s scoring system. (*See* Day 2 Tr. at 280:2–18 (Brady); *id.* at 425:14–426:5 (Heather).). As of the first quarter of 2018, the Prudential Fund had an overall score of 85 under Captrust’s scoring system (“Good Standing”), but it was “Marked for Review” due to its 3- and 5-year performance versus its peers. (2018 Q1 Presentation, Ex. 263 at 23.) At that quarterly meeting, the Committee analyzed and discussed a detailed analysis of the Prudential Fund that Captrust prepared, which noted “[t]he strategy’s Q1 2018 results were in the bottom quartile of its small cap growth peer group.” (*Id.* at p. 27.) Based on this recent underperformance,

1 Captrust “continue[d] to recommend this strategy, but look[ed] for improved results in the
2 coming quarters in order to maintain our conviction.” Captrust also presented its analysis
3 of this underperformance, noting the Prudential Fund’s “[o]verweight positions in energy
4 and real estate, two of the worst performing sectors in the index, also weighed on peer-
5 relative results. The strategy has less of a growth tilt than some of its peers, which has
6 weighed on results in the growth-driven rally over the past year.” (*Id.*; *see also* Day 2 Tr.
7 at 280:5 – 282:14 (Brady).) The Committee analyzed and discussed this information, and
8 agreed with Captrust’s recommendation to maintain the fund in the Plan but “look for
9 improved results in the coming quarter.” (Day 2 Tr. at 280:19–282:14 (Brady).)

10 **4. Invesco Fund**

11 The Court finds that the Committee closely monitored and reviewed the
12 performance of the Invesco Fund during the time it was an investment option under the
13 Plan. For example, as of the first quarter of 2021, the Invesco Fund received a total score
14 of 70 under Captrust’s scoring system (“Marked for Review”). (2021 Q1 Presentation,
15 Ex. 275.) Following the Committee’s meeting, Captrust emailed Committee member
16 Brady to flag the recent underperformance of the Invesco Fund, and recommended the
17 Committee consider alternatives for this fund. (May 21, 2021 Emails, Ex. 696.) After he
18 received this email and reviewed the attached analysis, Brady spoke with Captrust to
19 discuss the Invesco Fund and potential alternatives, and he relayed that conversation to the
20 Committee at the next meeting. (Day 2 Tr. at 303:18–304:20 (Brady).) At the second
21 quarter 2021 Committee meeting, the Committee analyzed and discussed potential
22 alternatives for the Invesco Fund, and the Committee decided to replace the Invesco Fund
23 with the Cohen & Steers Institutional Fund following a comprehensive review. (May 26,
24 2021 Minutes, Ex. 239; *see also* Day 2 Tr. 302:10–304:16 (Brady).)

25 **5. T. Rowe Price Fund**

26 The Court finds that the Committee closely monitored and reviewed the
27 performance and suitability of the T. Rowe Price Fund, even when it was considered in
28 “Good Standing” under Captrust’s scoring system. For example, as of the second quarter

1 of 2017, the T. Rowe Price Fund scored 100 under Captrust’s scoring system (“Good
2 Standing”). (2017 2Q Presentation, Ex. 259 at 20.) Despite this high score, Captrust
3 flagged recent information for the Committee to consider. (*Id.* at 25; *see also* Day 2 Tr. at
4 306:18–307:19 (Brady).) Specifically, Captrust noted that the fund’s “year-to-date results
5 have lagged behind its peers and benchmark” but that the fund was “coming off a very
6 strong 2016 performance and its longer-term results remain in the top quartile of its peer
7 group.” (2017 2Q Presentation at 25.) Captrust “continue[d] to recommend” this
8 investment option “due to its experienced portfolio manager and unique investment
9 process.” (*Id.*) Captrust explained: “David Wallack has been at the helm of the strategy
10 since 2001 and with the firm since 1990. He uses a contrarian approach which looks for
11 solid companies that are underperforming their potential. The process focuses on firms
12 with strong management and market leading positions. David believes that a depressed
13 stock price is often the best catalyst to pressure management to implement changes.” (*Id.*)

14 **6. Oakmark Fund**

15 The Court finds that the Committee closely monitored the Oakmark Fund while it
16 was an investment option under the Plan. (*See* Day 2 Tr. at 296:6–302:8 (Brady).) In
17 May 2020, Captrust sent the following email to the Committee:

18 Oakmark Equity & Income’s conservative nature has caused it
19 to struggle for some time. While we have respect for the long-
20 term management of the Fund, it has evolved considerably
21 since it was first included in the Plan’s menu and it continues to
22 change its structure going forward. Initially the Fund was
23 chosen because it used a conservative approach on the equity
24 side and also used a ‘government backed’ only approach on the
25 bond side. Over time, the Fund has loosened that latter stance
26 and in fact the team recently appointed a new fixed income
27 manager who continues to expand the Fund’s corporate bond
28 exposure. There is nothing wrong with that, but it represents a
meaningful change in strategy, which, when combined with the
Fund’s relative underperformance, we think should cause you
to consider the Fund’s inclusion in your menu. Our best
recommendation is to use this as an opportunity to simplify
your Plan’s menu by removing the Fund.

1
2 (May 12, 2020 Email, Ex. 671 at 1.) At the first quarter 2020 Committee meeting, the
3 Oakmark Fund received a score of 67 (“Consider for Termination”). (2020 Q1 QIR, Ex.
4 270 at 25.) The Committee analyzed detailed information regarding the Oakmark Fund’s
5 then-recent underperformance and strategy changes. (*Id.* at 31; *see also* Day 2 Tr. at 298:1–
6 300:15). Accordingly, the Committee decided to remove the Oakmark Fund from the Plan
7 and map the Plan participant assets invested in the fund to the age-appropriate vintage of
8 the Plan’s TDF, the FIAM Blend Funds.

9 **F. Alleged Failure to Consider Red Flags**

10 Plaintiffs contend that the Committee acted imprudently by failing to consider
11 certain alleged “red flags” regarding the Active Suite. (Pls.’ Proposed COLS ¶ 69.) In
12 particular, Plaintiffs argue that the Committee acted imprudently by failing to consider the
13 “Reuters Report and other indications of capital flight with respect to the [Active Suite].”
14 (Pls.’ Proposed FOFs ¶ 308–318.) The Court rejects this contention for three reasons.

15 First, as an initial matter, the Court already found that the Committee used a
16 prudent process to monitor the Active Suite specifically and the Plan’s investment options
17 generally. Therefore, it appears that Plaintiffs are simply taking issue with the Committee
18 not more quickly moving to better-performing alternatives—without showing any
19 underlying deficiencies in the investment-monitoring process. *See* Tibble, 843 F.3d at
20 1197 (“[T]he court focuses not only on [1] the merits of the transaction, but also on [2] the
21 thoroughness of the investigation into the merits of the transaction.”); *White*, 752 F. App’x
22 at 455 (unpublished) (affirming dismissal of a complaint because “the allegations showed
23 only that [the defendant] could have chosen different vehicles for investment that
24 performed better during the relevant period”).

25 Second, the Court rejects a factual premise of Plaintiffs’ argument: that Defendants
26 failed to consider the Reuters report. Indeed, Plaintiffs’ own post-trial submission
27 acknowledges that one Committee member, Brady, was familiar with it. (*See* Pls.’
28

1 Proposed FOFs ¶ 309.) And Brady credibly testified that, while he had reviewed the
2 report, he simply disagreed with its evaluation of the merits of the Active Suite’s strategy
3 change. (See Day 1 Tr. at 147:17–20 (Brady) (“Q. Was it concerning to you that that
4 strategy change had occurred? A. No, I think it actually helped and was good.”); *see also*
5 2013 Q3 Presentation at 22 (detailed evaluation of the strategy change).)

6 Third, the Court rejects another premise of Plaintiffs’ argument: that the Active
7 Suite’s loss of market share was necessarily a red flag linked to those funds’ alleged
8 underperformance. Brady and Davis credibly testified that the Active Suite’s loss of
9 market share was reflective of increased competition in the target-date-fund market. (Day
10 1 Tr. at 146:21–147:3 (Brady); Day 4 Tr. at 822:22–823:1 (Davis).)

11 Therefore, even assuming that failure to consider a red flag can constitute
12 procedural prudence where a fiduciary employed a prudent process to monitor
13 investments, the Court finds Defendants did not ignore any relevant red flags.

14 * * *

15 For the above reasons, the Court concludes that the Committee used a prudent
16 process to select, monitor, and remove investment options in the Plan. Accordingly, the
17 Court rules in Defendants’ favor on Plaintiffs’ first claim.

18 **VI. CLAIM 2: THE COMMITTEE’S ALLEGED FAILURE TO PRUDENTLY**
19 **MONITOR THE PLAN’S RECORDKEEPING FEES**

20 The Court concludes that the Committee used a prudent process to monitor the
21 recordkeeping fees that the Plan paid to Transamerica. *See Wright*, 360 F.3d at 1097
22 (holding that the “court’s task” is to determine whether the fiduciaries “employed the
23 appropriate methods to investigate the merits of the” challenged transaction). The Court
24 finds that Plaintiffs presented no credible evidence showing that the Committee’s
25 recordkeeping-fee-monitoring process fell below common industry practice. The Court
26 further finds that the Committee reasonably informed itself of the market for
27 recordkeeping fees through its 2012 request for information and its 2015, 2017, and 2020
28 vendor-fee benchmarks; that the Committee routinely monitored the quality of

1 Transamerica’s services, including at a standing monthly meeting a Committee member
2 had with Transamerica; and that Gissiner credibly testified that the Committee’s
3 monitoring process was consistent with what he had seen over the course of his career in
4 the retirement-benefits industry. Therefore, Plaintiffs failed to prove that the Committee’s
5 recordkeeping-fee-monitoring process lacked the “the care, skill, prudence, and diligence
6 under the circumstances then prevailing that a [person] acting in a like capacity and
7 familiar with such matters would use in the conduct of an enterprise of a like character
8 and with like aims.” 29 U.S.C. § 1104(a)(1)(B). Below, the Court describes the
9 Committee’s recordkeeping-fee-monitoring process before turning to the specific flaws
10 that Plaintiffs contend were present in that process.

11 **A. Legal Standard**

12 Fiduciaries have a duty to monitor recordkeeping fees to ensure that they are
13 reasonable. See *Tibble v. Edison Int’l*, 843 F.3d at 1197–98. They “have an obligation to
14 (i) determine the needs of a fund’s participants, (ii) review the services provided and fees
15 charged by a number of different providers and (iii) select the provider whose service
16 level, quality and fees best matches the fund’s needs and financial situation.” *Liss v.*
17 *Smith*, 991 F. Supp. 278, 300 (S.D.N.Y. 1998).

18 **B. Factual Findings Regarding the Committee’s Fee-Monitoring Process**

19 Transamerica has specialized experience in the healthcare industry, was recognized
20 as a “Best in Class” service provider by industry experts, was specifically recognized for
21 work it did providing Prime Plan participants with “custom education[al]” programs, and
22 was favorably rated by 95% of Prime Plan participants. (Stipulated Facts App. ¶¶ 159–
23 161; Day 3 Tr. at 577:14–578:6 (Gomez); Day 4 Tr. at 834:3–6 (Davis); *id.* at 943:13–
24 944:2 (Langkamp).) Indeed, Wagner, Plaintiffs’ proffered process expert, conceded that
25 Transamerica was experienced and well-regarded—testifying that she believed
26 Transamerica has specialized experience working with healthcare entities and that
27 Transamerica is “very well known,” “highly regarded,” “very prominent [and] very
28 prestigious.” (Day 1 Tr. at 91:16–19 (Wagner).) Moreover, Sarah Langkamp, the lead

1 account representative at Transamerica for the Plan, has experience working with
2 healthcare clients—having worked with 14 such clients. (Day 4 Tr. at 916:20–24.)

3 **1. 2012 RFI**

4 The Committee conducted a formal review of Transamerica’s fee and services
5 every few years, reviewing Transamerica’s fees as relevant here in 2012, 2015, 2017, and
6 2020. In 2012, Captrust conducted a Request for Information (“RFI”) for the Committee
7 and prepared a vendor fee benchmark presentation for the Committee to assess
8 Transamerica’s fee. (2012 Vendor Fee Benchmark, Ex. 79; Day 3 Tr. at 550:7–552:24
9 (Dhuper).) Transamerica’s then-current fee was lower than all of the bids from eligible
10 companies received by the Committee. Nevertheless, following this exercise, the
11 Committee was able to secure from Transamerica a fee decrease from 0.23% to 0.21%.
12 (Day 4 Tr. at 836:7–838:12 (Davis); Amendment to Fee Schedule, Ex. 199 at 1.)

13 **2. 2015 Vendor-Fee Benchmark**

14 In 2015, Captrust worked with the Committee to identify recordkeeping candidates
15 to present to the Committee regarding their fee structures and services. (Vendor Search &
16 Selection Minutes, Ex. 33.) Prudential, Milliman, and Fidelity all presented to the
17 Committee and discussed their fee structures and the services that they could provide to
18 the Plan. (Vendor Search and Selection Minutes, Ex. 33 (identifying “Firms Presenting”);
19 *see* Day 2 Tr. at 408:25–409:7, 409:23–410:4 (Heather); Day 4 Tr. at 839:3–841:2
20 (Davis).) Transamerica was not present at the initial presentations, but they later
21 presented to the Committee. At that meeting, Transamerica stated that they could provide
22 an improved service team to assist the Plan with the complex administration required by
23 the fact that the Plan was a multi-employer plan that was routinely adding new payrolls
24 due to Prime’s merger and acquisition activity. (*See* Vendor Search & Selection Minutes
25 (“Subsequent to the presentations by the above three vendors, Transamerica presented a
26 proposal that provided an improved service team. As a result, the Committee determined
27 they would remain with Transamerica, but will continue to monitor service.”); *see* Day 2
28 336:9–20 (Brady) (describing the risk in moving to another service provider, especially

1 since Transamerica had agreed to “create[] a dedicated team because they realized the
2 heavy lift on their part”); *id.* at 448:15 – 450:4 (Heather) (noting Transamerica increased
3 the size of its team dedicated to the Plan); Day 4 Tr. at 840:8–841:5 (Davis) (describing
4 discussions of “service level”).)

5 **3. 2017 Vendor-Fee Benchmark**

6 In 2017, Captrust and the Committee conducted another review of Transamerica’s
7 fee to determine whether it was still reasonable. (*See* Apr. 20, 2017 Meeting Minutes, Ex.
8 52 at 2 (“Mr. Davis asked Ms. Langkamp to work with her internal team to determine if
9 Transamerica fees will be reduced as Transamerica will no longer provide document
10 support services to Prime Healthcare.”); June 26, 2017 Email at 1 (“We want to get an
11 updated proposal from Transamerica on fees as they will no longer be doing amendments
12 to the plan[,] which should reduce administrative burden.”); Day 2 Tr. at 326:18–327:14
13 (Brady) (describing the thought process behind the 2017 benchmark exercise); Day 4 Tr.
14 at 842:16–844:15 (Davis) (same).) Captrust utilized its proprietary client database to find
15 comparator retirement plans that it could use to assess the reasonableness of
16 Transamerica’s fee and corresponding services. (2017 Vendor Fee Benchmark, Ex. 6 at
17 9.) Captrust identified “drivers of pricing,” including “administrative complexity.” (*Id.* at
18 5.) Captrust’s analysis provided the following ranges for retirement plans with over
19 \$250,000,000 in assets: “High”: 0.39%; “Average”: 0.32%; and “Low”: 0.25%. (*Id.* at
20 10.¹³) At the time, Transamerica’s fee was 0.21% of Plan assets. (*Id.* at 11.)

21
22 ¹³ The Court rejects Plaintiffs’ contention that Captrust failed to include similarly sized plans in
23 its 2017 vendor-fee benchmark. Multiple witness testified that Captrust, at that time, had clients
24 with plan assets over \$500,000,000. (*See* Day 4. Tr. 785:6 (Davis) (Captrust had clients with
25 “well over a billion dollars in assets” and Captrust was “[d]ecidedly not” a “small-sized plan
26 investment advisor”); Day 5 Tr. at 1021:9–19 (Gissiner) (“I actually went online and looked to
27 see how many clients they had over a half a billion in assets. And as of 2017, they serviced 48
28 plans that had over 500 million in assets, and the way that I did that was using the Form 5500 data
sets. So, again, as of 2017, 48 plans with over half a billion in assets.”).) The vendor-fee
benchmark used Captrust’s proprietary database of client information, and those plans would
have been included in that dataset. Therefore, of the two different articulations of the upper band
of plans in the dataset—\$250 to \$500 million (as one slide states) or \$250 million and above (as

1 Accordingly, Transamerica’s fee fell below the “Low” range in Captrust’s analysis.
2 Following this fee review, the Committee decided to stay with Transamerica: Despite the
3 above-average services that Transamerica was providing to the Plan, its fee fell on the
4 low-end of the market. (*See* Day 2 Tr. at 327:15–330:1 (Brady).)

5 **4. 2020 Vendor-Fee Benchmark**

6 In 2020, the Committee had Captrust conduct another vendor-fee benchmark.
7 (Mar. 16, 2020 Minutes, Ex. 234 at 2 (“Captrust will provide a fee benchmark for the Plan
8 later this year.”). Accordingly, Captrust solicited bids from recordkeeping candidates and
9 presented those bids to the Committee at an August 2020 meeting. (*See* 2020 Vendor Fee
10 Benchmark, Ex. 13; Day 2 Tr. at 334:19–337:23 (Brady).) Consistent with its previous
11 fee reviews, Captrust worked with the Committee to prepare client-specific screening
12 criteria, and Captrust used that criteria to identify eligible candidates to bid for the Plan’s
13 recordkeeping services. (2020 Vendor-Fee Benchmark at 5.) Empower, Fidelity, and
14 Milliman all submitted bids for the Plan’s recordkeeping services. Empower’s bid was
15 \$43 per participant, Fidelity’s bid was \$36.50 per participant, and Milliman’s bid was \$39
16 per participant. (*Id.* at 14). Transamerica also submitted a bid, which was initially \$40
17 per participant. (*Id.*; Aug. 31, 2020 Emails, Ex. 677.) Captrust and the Committee
18 continued negotiations with Transamerica to reduce their fee even further. Through these
19 negotiations, Transamerica agreed to an even lower fee of \$34 per participant, provided
20 that the Committee would also allow Transamerica to offer its “Managed Account
21 Services”¹⁴ as a voluntary option to Plan Participants. (Day 3 Tr. at 540:24–541:24
22 (Dhuper); Day 4. Tr. at 869:19–870:25 (Davis).) At the 2021 first-quarter meeting, the
23
24

25 another slide states)—the Court finds that the former articulation is more likely to be a typo.
26 Accordingly, Plaintiffs have not proven that the 2017 vendor-fee benchmark compared Prime’s
recordkeeping fee to those of Plans much smaller than Prime (*i.e.*, \$500 million or less).

27 ¹⁴ Managed Account Services are a service offered by Transamerica to Plan Participants through
28 which Transamerica works with Plan Participants, who voluntarily elect the service, to select
investments for their account.

1 Committee officially agreed to retain Transamerica as the Plan’s recordkeeper with a
2 reduced fee of \$34 per participant. (Feb. 24, 2021 Minutes, Ex. 238 at 1–2.)

3 **5. Ongoing Monitoring**

4 In addition to the above fee-assessment exercises, the Committee continuously
5 monitored the level of services that Transamerica was providing the Plan. Committee
6 member Gomez held a monthly meeting with Transamerica to discuss its ongoing
7 administration and work on various projects related to the Plan. Transamerica also held
8 an annual meeting with one or more Committee members to review Transamerica’s
9 overall performance servicing the Plan. (*See* Day 3 Tr. at 573:18–574:12 (Gomez); Day 4
10 Tr. at 938:23–939:12, 942:1–25 (Langkamp).)

11 * * *

12 The Court now turns to what Plaintiffs contend were flaws in the above-described
13 fee-monitoring process. The Court finds that Plaintiffs have not proven by a
14 preponderance of the evidence that the Committee departed from industry practice; nor
15 have Plaintiffs otherwise shown that the Committee’s fee-monitoring process was
16 imprudent in any of the challenged aspects.

17 **C. Allegedly Inadequate Fiduciary Governance Structure**

18 First, Plaintiffs contend that the Committee’s fees-monitoring process was
19 imprudent because its “fiduciary governance structure [allegedly] failed to provide
20 members of the Committee with appropriate guidance or training regarding their [fee]
21 monitoring responsibilities”—namely that (1) Committee members allegedly received
22 inadequate training on their fiduciary duties, and (2) the Committee lacked a charter
23 before 2019. (Pls.’ Proposed COLs ¶ 44.) The Court has already rejected Plaintiffs’
24 contention that Committee members received inadequate training. (*Supra* section V.B.1)
25 And the Court has already concluded that it is not *per se* imprudent to lack a written
26 charter. (*Supra* section V.B.2.) Therefore, the Court concludes that Defendants acted
27
28

1 pursuant to a prudent fiduciary-governance structure.

2 **D. Alleged Insufficient Documentation**

3 Second, Plaintiffs contend that the Committee’s fee-monitoring process was
4 imprudent because the “Committee insufficiently documented its decision-making
5 process”—in Plaintiffs’ view because “the Committee’s meeting minutes were largely
6 boilerplate.” (Pls.’ Proposed COLs ¶ 45.) The Court again assumes without deciding that
7 procedural imprudence encompasses a recordkeeping component. Even assuming that it
8 does, the Court finds that the Committee reasonably documented its decision-making
9 process. (*Supra* section V.C.)

10 **E. Allegedly Flawed Information Gathering Exercises**

11 Third, Plaintiffs contend that the Committee “never undertook measures sufficient
12 [to] become informed of the reasonable market rate for the Plan’s services or [to]
13 sufficiently leverage the Plan’s size to obtain reasonable fees.” (Pls.’ Proposed COLs
14 ¶ 46.) This contention is two-fold: (1) that it is industry custom to conduct formal request
15 for proposals (“RFP”); and (2) that vendor-fee benchmarks that the Committee and
16 Captrust did conduct were fundamentally flawed, such that the Committee did not have
17 reliable information against which to assess the fees it was paying to Transamerica. The
18 Court rejects both factual contentions.

19 **1. Lack of RFPs**

20 The Court finds that Plaintiffs have failed to prove by a preponderance of the
21 evidence that it is industry custom to always conduct an RFP, which is the most formal
22 and time-intensive type of information-gathering exercise.

23 The Court finds that Gissiner credibly testified that the Committee’s combination
24 of an RFI and vendor-fee benchmarks was “pretty robust” and “consistent with [the]
25 industry practice” he had observed over the course of his substantial experience in the
26 retirement-benefits industry. (Day 5 Tr. at 1047:16–1048:15 (Gissiner).) Gissiner also
27 credibly testified that RFPs are not industry standard. Gissiner cited a survey of plans that
28 found, in 2017, only about 18% of plans used RFPs to assess recordkeeping fees. Instead,

1 the “most common way that plan sponsors benchmark[ed] recordkeeping fees” was “using
2 a consultant database,” like that used by Captrust in its vendor-fee benchmarks, with
3 about 50% of plans taking such an approach. (*Id.* at 1045:13–1046:13.)

4 Only Geist testified that RFPs are industry practice. As explained, the Court
5 generally finds Geist’s testimony has little to no probative value given his limited relevant
6 experience and the *ipse dixit* nature of his testimony. (*Supra* section IV.B.) The Court’s
7 concerns apply with full force here. Unlike Gissiner who relied both on his substantial
8 industry experience and a survey of plans, Geist leaves the basis of his opinion
9 unexplained: “[I]t’s well understood in the standard of care to know that soliciting
10 proprietary bids [*i.e.*, conducting an RFP] is the conduct that is required because it
11 achieves best outcomes for plan participants.” (Day 3 Tr. at 615:11–15.)

12 Moreover, Geist’s testimony is contradicted by that of Wagner—another of
13 Plaintiffs’ proffered experts. Wagner testified both that “ERISA does not mandate best
14 practices” (a premise of Geist’s testimony) and that “Plan fiduciaries can obtain the same
15 information as an RFP without incurring the expenditure of time and resources that an
16 RFP requires through benchmarking services, industry surveys, and the like.” And she
17 further testified that “categorically stating that an RFP is the only reliable way for a plan
18 fiduciary to maximize its bargaining power is a proposition [she has] disagreed with under
19 oath.” (Day 1. Tr. at 80:7–17, 88:3 (Wagner).)

20 **2. Alleged Flaws in the Vendor-Fee Benchmarks**

21 The Court finds that Plaintiffs have failed to prove by a preponderance of the
22 evidence that the vendor-fee benchmarks the Committee relied on were so flawed that the
23 Committee was not apprised of the market for recordkeeping fees for plans similar to
24 Prime’s. The Court has already rejected Plaintiffs’ contention that the vendor-fee
25 benchmarks failed to compare the Plan’s recordkeeping fee to those paid by similarly
26 sized plans. (*See* Pls.’ Proposed FOLs ¶ 141; *supra* n.13.) And the Court does not credit
27 the remaining criticisms that Geist raised—as they are unsubstantiated nitpicks, not well-
28 informed opinions about how the Committee allegedly departed from industry practice or

1 otherwise used an imprudent process. (*Supra* section IV.B.)

2 **F. Alleged Failure to Monitor Fees as Assets Grew**

3 Fourth, Plaintiffs contend that the Committee acted imprudently by failing “to
4 monitor fees closely to ensure that growth in asset levels do not result in fees increasing
5 precipitously.” (Pls.’ Proposed COLs ¶ 47.) Because the Court finds that the Committee
6 closely monitored fees over the course of the Class Period and that the 2012, 2015, 2017,
7 and 2022 fee-monitoring exercises were prudent (*supra* section VI.E), the Court
8 necessarily finds that the Committee closely monitored the fees over the subset of the
9 Class Period in which the assets under management were growing significantly.

10 **G. Alleged Failure to Consider Per-Capita Fees**

11 Fifth, Plaintiffs contend that Defendants breached their fiduciary duties by
12 allegedly failing “to review the total fees paid to Transamerica on a per-participant basis
13 and, after the managed advice service was added to the Plan, total fees from all sources.”
14 (Pls.’ Proposed COLs ¶ 48.) The Court rejects both contentions.

15 The Court rejects the first contention, which appears to be based on nothing more
16 than the fact that the Plan previously used a basis-points arrangement to pay
17 Transamerica. Simply because the Committee paid Transamerica on a basis-points
18 arrangement rather than a per-participant arrangement during a portion of the relevant
19 Class Period, it does not follow that the Committee failed to consider per-participant
20 costs. Indeed, as Plaintiffs acknowledge in their post-trial submission, the effective per-
21 participant fee is readily calculated from a basis-points arrangement. (*See* Pls.’ Proposed
22 FOFs ¶ 107 (“Transamerica was paid the following effective per-participant rates based
23 on the total dollar amounts on an average, per participant basis: \$42 in 2014; \$34 in 2015;
24 \$35 in 2016; \$43 in 2017; \$43 in 2018; \$52 in 2019; \$50 in 2020; \$41 in 2021.”).)

25 The Court finds the second contention to be irrelevant. The Class Period for
26 Plaintiffs’ fee-monitoring claim is August 18, 2014, to July 31, 2019. (Class Certification
27 Order at 1.) The Committee, however, did not add the managed advice service until 2021.
28 Moreover, Plaintiffs offer no authority for the proposition that the Committee should have

1 considered the revenue Transamerica would receive from participants who *voluntarily* opt
2 into that service. Nor do Plaintiffs explain how the Committee could have estimated that
3 figure—since the voluntary opt-in rate would have been unknown at the time. And there
4 is, in any event, no evidence in the record that the revenue from that voluntary service
5 materially impacted the per-participant fee Transamerica received.

6 **H. Settlor Expenses**

7 Sixth, Plaintiffs contend that Defendants improperly “caused the Plan
8 recordkeeping costs associated with Prime’s mergers and acquisition to be paid by the
9 Plan.” (Pls.’ Proposed COLs ¶ 49; *see also id.* ¶ 50.) And Plaintiffs make the alternative
10 argument that, even if the fees were properly payable by the plan, “the Committee failed
11 to evaluate the reasonableness of the fees attributable to merger and acquisition services.”
12 (*Id.* ¶ 51.) Plaintiffs rely on Department of Labor Advisory Opinion 2001-01A (Jan. 18,
13 2001),¹⁵ which reads in relevant part:

14 Expenses incurred in connection with the performance of settlor
15 functions would not be reasonable expenses of a plan as they
16 would be incurred for the benefit of the employer and would
17 involve services for which an employer could reasonably be
18 expected to bear the cost in the normal course of its business
19 operations. *However, reasonable expenses incurred in
connection with the implementation of a settlor decision
would generally be payable by the plan.*

20 (Pls.’ Proposed COLs ¶ 49 (emphasis added).)

21 Plaintiffs’ argument is entirely undeveloped. Plaintiffs do not identify which
22 “costs associated with Prime’s mergers and acquisitions” are the subject of their
23 argument. Beyond the above Advisory Opinion quotation, Plaintiffs provide the Court
24 with no legal authority. Plaintiffs make no contention regarding the weight to which
25 Department of Labor Advisory Opinions are generally entitled or the weight that this
26 particular Advisory Opinion should be afforded. And most critically, Plaintiffs fail to

27 ¹⁵ Available at [https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-](https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2001-01a)
28 [center/advisory-opinions/2001-01a](https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2001-01a).

1 offer any argument whatsoever as to why the following costs (which the Court assumes
2 are the expenses subject to Plaintiffs’ argument) are costs “incurred in connection with . . .
3 settlor functions” as opposed to costs “incurred in connection with the implementation of
4 a settlor decision”—which, according to the Advisory Opinion, are “payable by the plan”:

- 5 • Enrolling new employees in the multi-employer plan following Prime’s acquisition
6 of new companies;
- 7 • Separately processing the payrolls of the 68 employers in the multi-employer plan;
- 8 • Meeting with and providing educational programming to employees on-site at the
9 various locations of the 68 employers in the Plan; and
- 10 • Implementing specific rules for subsets of employees who were subject to
11 collective bargaining agreements.

12 (Day 2 Tr. at 328:12–329:4 (Brady); *id.* at 418:1–6, 446:4–447:25 (Heather); Day 3 Tr. at
13 542:14–23 (Dhuper); *id.* at 582:17–583:24 (Gomez); Day 4 Tr. at 848:25–849:16, 859:14–
14 860:9 (Davis); *id.* at 926:1–927:5, 928:14–929:6, 931:1–933:9, 952:25–953:21
15 (Langkamp); Day 5 Tr. at 1012:14–1013:15 (Gissiner); 2018 Plan, Ex. 167 at 109–111
16 (listing protected benefits for subsets of Plan participants).) And as explained above, the
17 Committee routinely assessed the reasonableness of the fees paid to Transamerica—
18 defeating Plaintiffs’ fallback contention. (*Supra* sections VI.B, VI.E.)

19 * * *

20 For the above reasons, the Court concludes that the Committee used a prudent
21 process to monitor the recordkeeping fees that it paid to Transamerica. Therefore, the
22 Court finds in Defendants’ favor on Plaintiffs’ second claim.

23 **VII. CLAIM 3: THE COMMITTEE’S ALLEGED FAILURE TO PRUDENTLY**
24 **MONITOR THE PLAN’S SHARE CLASSES**

25 The Court concludes that the Committee used a prudent process to monitor the
26 share classes of the investment options in the fund. *See Wright*, 360 F.3d at 1097 (holding
27 that the “court’s task” is to determine whether the fiduciaries “employed the appropriate
28 methods to investigate the merits of the [challenged] investment”). The Court finds that

1 Plaintiffs have not proven by a preponderance of the evidence that the Committee
2 “reflexively switched to a zero-revenue sharing fee structure and inadvertently added
3 share classes with higher net effective expenses.” (Pl.’s Proposed COLs ¶ 56.) Instead,
4 the Court finds that the Committee closely monitored the Plan’s share classes and made
5 reasonable, informed choices with respect to those share classes.

6 Prior to July 2019, during the time that the Plan paid an asset-based recordkeeping
7 fee to Transamerica, the Plan utilized share classes that included “revenue sharing.” (Day
8 1 Tr. at 129:20–130:12 (Brady).) In July 2019, when the Committee decided to change
9 the recordkeeping fee structure to a per-participant fee, the Committee also began to
10 transition the funds in the Plan to institutional share classes, which generally do not offer
11 revenue sharing. (Day 2 Tr. at 331:7–15 (Brady).) The Committee made this decision
12 because the Plan was no longer paying an asset-based fee to Transamerica and, therefore,
13 revenue sharing was no longer needed to mitigate recordkeeping costs because
14 recordkeeping fees would not increase if the Plan’s assets increased. (*Id.*).

15 Additionally, Brady, a former investment advisor, researched funds and the share
16 classes offered for those funds, and he discussed his analysis with Captrust and the
17 Committee. (*See* Apr. 21, 2017–May 5, 2017 Emails, Ex. 602 (emails between Brady and
18 Davis comparing two share classes); June 28, 2017 Emails, Ex. 610 (forwarding prior
19 discussion to Committee); Aug. 13, 2017–Sept. 9, 2017 Emails, Ex. 678 (further
20 discussion of the two share classes); Oct. 1, 2017 Emails, Ex. 680 (email from Davis to
21 Brady about “a new share class for T. Rowe’s Stable Value Fund”); Day 2 Tr. at 339:14–
22 346:16 (Brady) (testifying about above-cited exhibits).) Indeed, while Plaintiffs’ theory
23 of liability is that the Committee overlooked net expenses, the above-cited emails refute
24 that. As Plaintiffs themselves describe one of Davis’s emails: “In weighing whether to
25 select the R5 or I share class of the MassMutual Fund, Mr. Davis advised that, while the
26 expense ratio of the R5 share class was higher, since it returned 15 basis points in revenue
27 sharing, *its net effective cost was lower* than the I share class, which had zero revenue
28 sharing component.” (Pls.’ Proposed FOFs ¶ 194 (emphasis added).)

1 Brady credibly testified that “share classes and their investment expenses [were]
2 something that the committee routinely discussed.” (Day 2 Tr. at 339:14–18 (Brady); *see*
3 *also* Sept. 15, 2016 Minutes (noting Captrust’s recommendation to replace certain “index
4 funds with collective trusts . . . at lower fees”).) And Captrust worked with fund
5 managers to investigate whether the Plan could qualify for lower-cost share classes. For
6 example, Captrust leveraged its relationship with Fidelity to move the FIAM Blend Funds
7 into a lower share class in 2021. (Sept. 18, 2021 Minutes, Ex. 240 at 1 (“moving to a
8 lower cost share class of the FIAM Blend Target Date Suite”); Stipulated Facts App.
9 ¶ 186 (“In June 2021, Captrust worked with Fidelity to gain approval for the Plan to invest
10 in a share class of the FIAM Blend with a lower expense ratio.”).)

11 * * *

12 For the above reasons, the Court concludes that the Committee used a prudent
13 process to monitor the share classes of investment options in the Plan. Therefore, the
14 Court finds in Defendants’ favor on Plaintiffs’ third claim.

15 **VIII. CLAIM 4: PRIME’S ALLEGED FAILURE TO PRUDENTLY MONITOR**
16 **THE COMMITTEE**

17 A claim for breach of the duty to supervise is derivative of an underlying fiduciary-
18 duty claim. *See Lauderdale*, 2022 WL 17260510, at *24. Because the Court finds no
19 underlying breaches of fiduciary duty with respect to the Committee’s investment,
20 recordkeeping-fee, or share-class monitoring, this derivative claim fails as well.

21 **IX. UNPLED CLAIM: ALLEGED MISUSE OF THE EBA**

22 Plaintiffs’ Proposed Findings of Fact and Conclusions of Law assert a claim that
23 Defendants breached their fiduciary duties by failing to “distribute” the funds in the Plan’s
24 expense-budget account (“EBA”) directly “to participants.” (Pls.’ Proposed COLs ¶ 53.)
25 That is, Plaintiffs fault Defendants for using the EBA to pay the Plan’s recordkeeping fees
26 for active participants. (*See* Pls.’ Proposed FOFs ¶ 184.)

27 Under Federal Rule of Civil Procedure 26(e), “[t]he pretrial order controls the
28 subsequent course of the action and the parties are bound by their agreement to limit the

1 issues to be tried.” *United States v. Joyce*, 511 F.2d 1127, 1130 n.4 (9th Cir. 1974)
2 (citations omitted); (*see also* FPTC Order at 10 (“[T]his Final Pretrial Conference Order
3 shall supersede the pleadings and govern the course of the trial of this cause, unless
4 modified to prevent manifest injustice.”)).

5 Here, neither the FPTC Order nor Plaintiffs’ operative complaint included such a
6 claim. (*See generally* FPTC Order; Amended Consolidated Class Action Compl., Doc.
7 16.) And while a single paragraph of Plaintiffs’ pre-trial memorandum of contentions of
8 fact and law alludes to the EBA, it advances a materially different theory: that Defendants
9 acted unlawfully by “failing to return over \$650,000 to Plan or participants *or use the*
10 *same for their benefit.*” (Pls.’ Pre-Trial Memo., Doc. 162 at 14 (emphasis added).) Now,
11 Plaintiffs scrap the “or” clause presumably because they learned at trial that the funds in
12 the EBA were used for participants’ benefit—*i.e.*, by paying their recordkeeping fees.

13 The Court is concerned with Plaintiffs’ pattern of sandbagging in this case—raising
14 issues and presenting evidence in a manner that leaves Defendants with a moving target of
15 what to defend against. At trial, Plaintiffs attempted to use a demonstrative featuring the
16 “updated . . . loss calculations” of one of their experts that had been “augmented to
17 address” the criticisms of that expert’s initial report raised by one of Defendants’ experts.
18 (Day 1 Tr. at 108:13–14, 109:12–13.) The updated loss calculations, which were never
19 included in an expert report, increased Defendants’ damages exposure from “\$9 million
20 up to above \$30 million” and the demonstrative featuring that more-than-tripled exposure
21 was disclosed just a week before trial. (*Id.* at 111:3–7.) The Court excluded that
22 evidence, finding that it was an undisclosed surrebuttal expert report. (*Id.* at 113:20–24.)

23 Similarly, here, Plaintiffs—after trial concluded—introduced a theory of liability
24 they never raised over the course of this years-long case: that it was improper for
25 Defendants to use the EBA to pay for recordkeeping fees.¹⁶ Because this claim was

26 ¹⁶ Indeed, the Court questions whether Defendants were on notice as to several of Plaintiffs’
27 theories of liability advanced in Plaintiffs’ post-trial submission. Plaintiffs’ contentions regarding
28 Defendants’ alleged failure to monitor fees on a per-capita basis, Plaintiffs’ criticism of the

1 neither pleaded nor contained in the FPTC Order, the Court declines to consider it. In any
2 event, the Court finds that Plaintiffs’ contention has no merit. The Plan document
3 establishing the EBA provides that funds in the EBA can *either* “be allocated to Plan
4 Participants at the end of the year” *or* “be used to pay Plan-related expenses”—with this
5 latter option being exactly what the Committee did. (Amendment to Fee Schedule at 3.)
6 And the Court credits Gissiner’s testimony about industry practice regarding expense
7 budget accounts over the competing testimony of Geist for the reasons previously stated.
8 (*See supra* sections IV.B, IV.C); Day 5 Tr. at 1083:25–1084:12 (Gissiner).)

9 **X. CONCLUSION**

10 For the above reasons, the Court concludes that the Committee used a prudent
11 process to monitor the Plan’s investments, recordkeeping fees, and share classes.
12 Therefore, the Court rules against Plaintiffs and in favor of Defendants on all of Plaintiffs’
13 claims. Consistent with Federal Rules of Civil Procedure 52(a)(1) and 58, the Court shall
14 issue a separate Judgment.

15
16 DATED: August 22, 2024

17 **JOSEPHINE L. STATON**

18

HON. JOSEPHINE L. STATON
19 UNITED STATES DISTRICT JUDGE

20
21
22
23
24
25
26
27 managed-advice offering, and Plaintiffs’ argument about Defendants’ alleged use of Plan assets to
28 pay for “settlor” expenses appear to have been in- or post-trial developments—having never
appeared in Plaintiffs’ complaint, Plaintiffs’ pre-trial memorandum, or the FPTC Order.