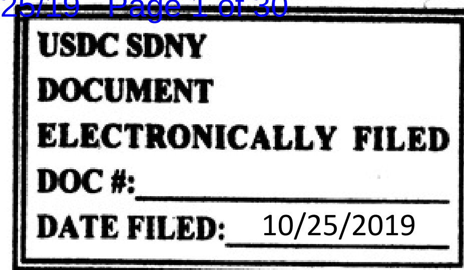

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Chandra Cates et al.,

Plaintiffs,

-against-

The Trustees of Columbia University in the City of New York,

Defendant.

1:16-cv-06524 (GBD) (SDA)

REPORT AND RECOMMENDATION

STEWART D. AARON, UNITED STATES MAGISTRATE JUDGE.

TO THE HONORABLE GEORGE B. DANIELS, UNITED STATES DISTRICT JUDGE:

Before the Court is a motion by Defendant, The Trustees of Columbia University ("Columbia" or "Defendant"),[1] for an Order, pursuant to Federal Rule of Civil Procedure 56, granting summary judgment in favor of Defendant and dismissing all the remaining claims in this case. (Def.'s Not. of Mot. for Summ. J., ECF No. 260.) Also before the Court are motions by Defendant to exclude Plaintiffs' experts, Ty Minnich (Def.'s Not. of Mot. to Exclude Minnich, ECF No. 251) and Al Otto (Def.'s Not. of Mot. to Exclude Otto, ECF No. 254), as well as Wendy Dominguez and Gerald Buetow.[2] (Def.'s Not. of Mot. to Exclude Dominguez and Buetow, ECF No. 257.)

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[1] Plaintiffs initially had named as defendants, in addition to Columbia, six individual defendants (the "Individual Defendants"). (Compl., ECF No. 5.) By Joint Stipulation and Order, entered October 19, 2018, Columbia assumed any liability of the Individual Defendants and all claims against them were dismissed. (Joint Stip. & Order, ECF No. 202). Thus, Columbia is the only remaining defendant.

[2] In making its recommendations below, the Court has reviewed the following documents, in order of their filing: Netter Decl. to Exclude Minnich and its exhibits, ECF No. 252; Def.'s Mem. to Exclude Minnich, ECF No. 253; Netter Decl. to Exclude Otto and its exhibits, ECF No. 255; Def.'s Mem. to Exclude Otto, ECF No. 256; Netter Decl. to Exclude Dominguez and Buetow and its exhibits, ECF No. 258; Def.'s Mem. to Exclude Dominguez and Buetow, ECF. No. 259; Netter Decl. for Summ. J. and its exhibits, ECF No. 261; Def.'s Summ.

For the reasons set forth below, I recommend that Defendant's motion for summary judgment be DENIED. I also recommend that Defendant's motions to exclude be DENIED.

BACKGROUND

I. The Plaintiffs And The Plans

Plaintiffs are employees or former employees of Columbia and participants in two defined contribution retirement plans sponsored by Columbia: the Retirement Plan for Officers of Columbia University ("Officers Plan") and the Columbia University Voluntary Retirement Savings Plan ("VRSP") (together, the "Plans"), established pursuant to Section 403(b) of the Internal Revenue Code. (Pls.' Counter 56.1 ¶¶ 1, 8.) The purpose of the Officers Plan was to provide retirement benefits to Columbia University faculty and staff. (Pls.' Counter 56.1 ¶ 14.) As of December 31, 2017, the Officers Plan had 29,775 participants with account balances and $3.5 billion in net assets. (*Id.*) The purpose of the VRSP was to provide Columbia University employees the option to save on their own for retirement on a tax-deferred basis. (Pls.' Counter 56.1 ¶ 15.) As of December 31, 2017, the VRSP had 25,664 participants with account balances and $2.5 billion in net assets. (*Id.*)

J. Mem., ECF No. 262; Def.'s 56.1, ECF No. 263; 4/29/19 Webb Decl. for Summ. J. and its exhibits, ECF No. 264; 4/30/19 Webb Decl. for Summ. J. and its exhibits, ECF Nos. 265-80; Pls.' Dominguez and Buetow Opp., ECF No. 289; Rohlf Dominguez and Buetow Decl. and its exhibits, ECF No. 290; Pls.' Minnich Opp., ECF No. 291; Rohlf Minnich Decl. and its exhibits, ECF No. 292; Pls.' Summ. J. Opp., ECF No. 293; Pls.' Counter 56.1, ECF No. 294; Rohlf Summ. J. Decl. and its exhibits, ECF Nos. 295-97; Dominguez Decl., ECF No. 298; Pls.' Otto Opp., ECF No. 299; Rohlf Otto Decl. and its exhibits, ECF No. 300; Def.'s Minnich Reply, ECF No. 306; Netter Reply Minnich Decl. and its exhibits, ECF Nos. 307 & 326; Def.'s Otto Reply, ECF No. 308; Netter Reply Otto Decl. and its exhibits, ECF No. 309; Mandhania Reply Decl., ECF No. 311; Def.'s Summ. J. Reply, ECF No. 312; Webster Reply Decl. and its exhibits, ECF Nos. 314 & 327; Def.'s 56.1 Reply, ECF No. 315; and the parties' post-oral argument correspondence (ECF Nos. 345 & 348).

II. Defined Contribution Plans Generally[3]

In a defined contribution plan, an employee contributes a percentage of his or her pre-tax income to the plan, with the employer often matching those contributions up to a specified percentage. (U.S. Dept. of Labor, *Types of Retirement Plans*.)[4] Each participant in the plan has an individual account. (*Id*.) "Participants direct the plan contributions into one or more investment options" chosen by the plan's fiduciaries. (*See* Cons. Compl., ECF No. 76-1, ¶ 32.) The retirement benefits that an employee receives are limited to the value of the employee's individual account, which depends upon contributions to the plan, the performance of the funds in which the employee invests and the fees and expenses charged to the account. *See Milgram v. Orthopedic Assocs. Defined Contribution Pension Plan*, 666 F.3d 68, 76 (2d Cir. 2011). As such, "participants in a defined contribution plan bear the risk that the value of their accounts will be reduced as a result of actions taken by the plan administrator[.]" *Id*.

The operation of a defined contribution plan involves a wide range of administrative work. (Pls.' Counter 56.1 ¶ 22.) Accordingly, plan fiduciaries typically retain a third-party administrator or "recordkeeper" to perform the tasks necessary to ensure continued operation of the plan on a day-to-day basis. (*Id*.) There are two primary methods for defined contribution plans to pay for recordkeeping and administrative fees: "direct" payments from plan assets, and "indirect" revenue sharing payments. (Cons. Compl. ¶ 50.) In a revenue sharing arrangement, "a portion of investment earnings are used to pay the fund's expenses." *Sacerdote v. New York Univ.*, 328

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[3] The materials cited in Background Section II were used by the Court to understand the context of the issues in this case. The materials were not relied upon in arriving at the recommendations contained herein.

[4] Available at https://www.dol.gov/general/topic/retirement/typesofplans (last visited Oct. 15, 2019).

F. Supp. 3d 273, 288 (S.D.N.Y. 2018). Because plan revenue is a function of the assets invested in each investment option (each of which charge different fees), different funds and share classes of funds offer different amounts of revenue sharing.[5]

Historically, many service providers utilized a bundled pricing model in which the provider collected all the revenue sharing from the plans' investment options. Under this model, it was difficult for fiduciaries to determine the precise amount of fees it was paying for any particular service, such as recordkeeping. Following a change in U.S. Department of Labor ("DOL") regulations, service providers were required to disclose information to assist plan fiduciaries in assessing the reasonableness of their fees. As such, many service providers began to offer caps on their recordkeeping fees by setting a certain revenue requirement, measured in either basis points (as a percentage of Plan assets) or in a per-participant cap, such that if the total amount collected through revenue sharing payments exceeds the total contracted amount, the excess amount could be used to pay for other plan services or rebated to plan participants. *See* C. Frederick Reish, *The Equitable Allocation of Revenue Sharing to Participants*.[6]

In a direct fee arrangement, the fiduciary contracts with a recordkeeper to obtain administrative services in exchange for a flat annual fee based on the number of participants. (Cons. Compl. ¶ 51.) Under this type of arrangement, each participant, regardless of his or her investments or balance will incur the same fee. For those participants invested in funds that are

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[5] Many mutual funds offer institutional share classes to investors with large amounts to invest that charge lower fees, but may contribute less to revenue sharing. *See Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co.*, 961 F. Supp. 2d 393, 397 (D. Conn. 2013).

[6] This article is published on the website of the American Society of Pension Professionals & Actuaries: https://www.asppa.org/equitable-allocation-revenue-sharing-participants (last visited Oct. 15, 2019).

paying revenue sharing, revenue can be credited back to those participants to ensure that each participant is paying the same fee. *See* Sheldon Geller, "Understanding the Various Kinds of 401(k) Service Fee Arrangements," *CPA Journal* (Jul. 2016).[7]

III. Management Of The Plans

The Plan Administrator for both Plans was Columbia's Vice President for Human Resources ("VP of HR"). (Pls.' Counter 56.1 ¶ 18.) This role was held by various individuals throughout the class period. (*Id.*) Prior to 2012, a Retirement Committee appointed by the Board of Trustees was given "general authority to interpret the Plan[s] and make any necessary rules for [their] administration." (Officers Plan Document, ECF No. 265-9, at 129155; 2009 VRSP Plan Document, ECF No. 266-1, at 1461.) On June 8, 2012, the Board of Trustees established the Investment Advisory Committee ("IAC") and appointed three members, Roxie Smith (Vice Provost), Anne Sullivan (Executive Vice President for Finance) and Joanne Quan (Senior Vice President and Chief Financial Officer of Columbia University Medical Center). (Pls.' Counter 56.1 ¶ 20.) Sullivan served as Chair. (*Id.*)

The Board of Trustees delegated to the IAC "all discretionary authority and powers necessary to control and manage the assets of the Plan[s]" and "discretionary authority and power to carry out its duties and responsibilities as set forth in the Plan[s]" and appointed the IAC the "named fiduciary" with respect to the control or management of the assets of the Plans within the meaning of Section 402(a)(2) of the Employee Retirement Income Security Act ("ERISA"). (Def.'s 56.1 Reply ¶ 21.) Among the authority granted to the IAC was the authority to

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[7] This article is published on the CPA Journal website: https://www.cpajournal.com/2016/07/06/understanding-various-kinds-401k-service-fee-arrangements/ (last visited Oct. 19, 2019).

"periodically monitor the investment funds, including their performance and expense ratios, offered by [the] Plans and, when appropriate, add eliminate, or change investment funds offered to Plan participants and beneficiaries." (Def.'s 56.1 Reply ¶ 146.) In addition, upon its formation in June 2012, the IAC assumed responsibility for oversight of the Plans' recordkeeping contracts and fees. (Pls.' Counter 56.1 ¶ 39.)

IV. The Plans' Investments

Both Plans offered an identical investment menu, which at the time the Consolidated Complaint was filed included 116 investment options. (Cons. Compl. ¶ 101.) These options included fixed-dollar annuities issued by Teachers Insurance and Annuity Association of America ("TIAA"), the TIAA Real Estate Account, various College Retirement Equities Fund ("CREF") variable annuities offered by TIAA, and various mutual funds offered by TIAA, Calvert Research and Management ("Calvert"), and the Vanguard Group ("Vanguard"). (*Id.*) Participants had the right to direct all contributions made on their behalf into one or more of the Plans' investment options. (Pls.' Counter 56.1 ¶ 8.) As of October 31, 2010, $2,604,789,925 in participant assets were invested in TIAA, while $744,302,057 were invested in Vanguard, and $24,527,025 were invested in Calvert. (*Id.* ¶56.)

V. Recordkeeping Services And Fees

At the beginning of the class period, TIAA, Vanguard and Calvert each provided participant recordkeeping and administrative services to the Plans for their own investment products. (Pls.' Counter 56.1 ¶¶ 23, 47; Cons. Compl. ¶ 111.) The services provided by TIAA and Vanguard varied and included both "core" recordkeeping services (*i.e.*, the basic suite of services minimally necessary to operate a plan), as well as a variety of additional administrative services. (Pls.'

Counter 56.1 ¶ 26.) TIAA and Vanguard were compensated for the services they provided to the Plans through revenue sharing. (*Id.* ¶ 31.) In April 2013, the Calvert funds were consolidated onto the TIAA recordkeeping platform, leaving TIAA and Vanguard as the Plans' two remaining recordkeepers. (*Id.*¶ 50.)

PROCEDURAL HISTORY

Plaintiffs' Consolidated Complaint alleges that Defendant breached its fiduciary duties under ERISA in the following ways: breach of the fiduciary duty of loyalty (Counts I, III and V, in part); breach of the fiduciary duty of prudence (Counts I, III and V, in part); engaging in prohibited transactions (Count II, IV and VI); and, to the extent Defendant delegated its fiduciary duties, failing to monitor its delegates (Count VII). (Cons. Compl. ¶¶ 208-59.)

As relevant here, in Count III, Plaintiffs allege that Defendant breached its duty of prudence with regard to incurring excessive administrative fees relating to recordkeeping by: (1) failing to solicit competitive bids from other recordkeepers; (2) failing to monitor and control recordkeeping fees by not (a) monitoring the amount of revenue sharing received by the Plans' recordkeepers, (b) determining the competitiveness/reasonability of those amounts, or (c) using the Plans' size to reduce fees or obtain rebates; and (3) failing to "engage in a timely and reasoned decisionmaking process" to determine whether the Plans should use a single recordkeeper. (Cons. Compl. ¶¶ 222-25.)

In Count V, Plaintiffs allege that Defendant breached its duty of prudence by failing to prudently select and evaluate Plan investment options in the following ways: (1) selecting and retaining investment options with high expenses and poor performance relative to other readily available investment options; (2) including investment options that had unnecessary layers of

fees; (3) failing to consolidate the Plans' offerings into a "core investment lineup;" and (4) continuing to offer two funds—the CREF Stock Account and the TIAA Real Estate Account—despite excessive fees and underperformance. (Cons. Compl. ¶¶ 238-44.)

On February 15, 2017, Defendants filed a motion to dismiss the Consolidated Complaint. (Not. of Mot. to Dismiss, ECF No. 81.) On August 28, 2017, District Judge Forrest issued a Decision granting in part and denying in part Defendants' motion. *See Cates v. Trustees of Columbia Univ. in City of New York*, 2017 WL 3724296, at *1 (S.D.N.Y. Aug. 28, 2017). Judge Forrest dismissed Counts I, II, IV, VI and VII in their entirety, and Counts III and V in part. *Id*. at *2. Judge Forrest's ruling in this case was based upon "the same reasons as those set forth in *Sacerdote*."[8] *See id. at *2*. Thus, all that remains in this case are the breach of fiduciary duty of prudence claims in Count III and Count V, as limited by *Sacerdote*. *See id.*

Following an Initial Pretrial Conference held before Judge Forrest on December 14, 2017, and pursuant to a Scheduling Order issued the same day (Sch. Order, ECF No. 129), discovery ensued, including expert discovery. On September 12, 2018, Judge Forrest referred this case to me for general pretrial purposes. (Order of Ref., ECF No. 179.) On September 20, 2018, this case was reassigned to District Judge Daniels. On November 15, 2018, the Court certified a plaintiff

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[8] In *Sacerdote*, Judge Forrest held at the motion to dismiss stage that Count III of a complaint similar to the Complaint here stated a prudence claim related to allegedly unreasonable administrative fees. *Sacerdote v. New York Univ*., No. 16-CV-06284 (KBF), 2017 WL 3701482, at *9 (S.D.N.Y. Aug. 25, 2017), *reconsideration denied*, 2017 WL 4736740 (S.D.N.Y. Oct. 19, 2017). Judge Forrest also allowed the *Sacerdote* plaintiffs to proceed on their duty of prudence claim regarding investment options (Count V) on the theory that NYU breached its duty by continuing to offer the CREF Stock Account and the TIAA Real Estate Account funds despite high fees and poor performance, and that NYU breached its duty by "[i]ncluding in the mix actively managed mutual funds and retail class options with high expenses and poor performance instead of other readily available Options." *Sacerdote*, 2017 WL 3701482, at *10. However, Judge Forest dismissed the duty of prudence claim under Count V to the extent it was based on allegations that NYU included investment options that had unnecessary layers of fees or that NYU failed to consolidate the Plans' offerings into a "core investment lineup." *Id.*

class consisting of "[a]ll participants and beneficiaries of the [Plans] from August 10, 2010, through the date of judgment, excluding the Defendants." (11/15/18 Order, ECF No. 218.)

On March 5, 2019, pursuant to an amended Order of Reference, all dispositive motions were referred to me. (Am. Order of Ref., ECF No. 243.) Oral argument on the pending motions was held before me on October 11, 2019. (10/11/19 Tr., ECF No. 346.)

LEGAL STANDARDS

I. Summary Judgment

Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-50 (1986). The moving party has the initial burden of demonstrating the absence of a disputed issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-23 (1986). A dispute concerning material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Aldrich v. Randolph Cent. Sch. Dist*., 963 F.2d 520, 523 (2d Cir. 1992) (quoting *Anderson*, 477 U.S. at 248). In making its determination, the court must resolve all ambiguities and draw all reasonable inferences in favor of the non-movant. *Anderson*, 477 U.S. at 255.

To defeat summary judgment, it is not sufficient for the non-moving party to present evidence that is conclusory or speculative, with no basis in fact. *See Anderson*, 477 U.S. at 249-50. Indeed, the non-moving party must go beyond the pleadings and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). Instead, the nonmoving party must present

"specific facts showing that there is a genuine issue for trial." *Beard v. Banks*, 548 U.S. 521, 529 (2006) (quoting Fed. R. Civ. P. 56(e)).

II. <u>ERISA Duty Of Prudence</u>

Under ERISA, the duties owed by fiduciaries to plan participants and beneficiaries "are those of trustees of an express trust—the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 271-72 n.8 (2d Cir. 1982). The duty of prudence requires a pension plan fiduciary to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). The "prudent person" standard asks whether "the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984) (quoting *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983)), *cert. denied*, 464 U.S. 1040 (1984); *see also Ferguson et al. v. Ruane Cunniff & Goldfarb Inc. et al.*, No. 17-CV-06685 (ALC), 2019 WL 4466714, at *5 (S.D.N.Y. Sept. 18, 2019). Fiduciaries' prudence is measured against an objective standard, and their own "lack of familiarity with investments is no excuse" for failing to act with the care, skill, prudence and diligence required under the circumstances then prevailing. *Katsaros,* 744 F.2d at 279.

Among other things, a fiduciary must ensure "that fees paid to recordkeepers are not excessive relative to services rendered." *Sacerdote*, 328 F. Supp. 3d at 286. "A prudence claim based on excessive fees must be supported by facts that take the particular circumstances into account." *Young v. Gen. Motors Inv. Mgmt. Corp.*, 325 F. App'x 31, 33 (2d Cir. 2009) (citations

omitted). ERISA requires a "fiduciary . . . to exercise care prudently and with diligence under the circumstances then prevailing." *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) (internal quotation omitted). Competitive bidding "can be an example of an action taken to ensure fees are appropriate." *Sacerdote*, 328 F. Supp. 3d at 286.

In addition, an ERISA fiduciary also has an ongoing "duty to monitor trust investments and remove imprudent ones" and must review investments at "regular intervals." *Tibble v. Edison Int'l*, — U.S. ——, 135 S. Ct. 1823, 1828 (2015). A fiduciary "cannot assume" that investments that were prudent at one time "will remain so indefinitely." *Id*. at 1828 (quoting A. Hess, G. Bogert & G. Bogert, Law of Trusts and Trustees ("*Bogert*") § 684, pp. 145-46 (3d ed. 2009)). Rather, the fiduciary "must 'systematic[ally] conside[r] all the investments of the trust at regular intervals' to ensure that they are appropriate." *Id*., 135 S. Ct. at 1828 (quoting *Bogert* § 684, pp. 147-48) (alterations in *Tibble*).

"To state a claim for breach of fiduciary duty under ERISA, a plaintiff must allege facts which, if true, would show that the defendant acted as a fiduciary, breached its fiduciary duty, and thereby caused a loss to the plan at issue." *Moreno v. Deutsche Bank Americas Holding Corp.*, No. 15-CV-09936 (LGS), 2018 WL 2727880, at *3 (S.D.N.Y. June 6, 2018) (citation omitted).

III. <u>Admissibility Of Expert Testimony</u>

"Federal Rule of Evidence 104(a) provides that the admissibility of expert testimony is a preliminary question of law for the court to determine." *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 437 (E.D.N.Y. 2013) (citing *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 592 (1993)). "Because the purpose of summary judgment is to weed out cases in which 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a

matter of law,' Fed. R. Civ. P. 56(c), it is appropriate for district courts to decide questions regarding the admissibility of evidence on summary judgment." *Id.* (citation omitted).

In order for expert testimony to be admitted, Federal Rule of Evidence 702 requires that an expert's "specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue," that "the testimony is based on sufficient facts or data" and "is the product of reliable principles and methods," and that "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. "There is a presumption that expert testimony is admissible . . . and the rejection of [such] testimony is the exception rather than the rule." *Sec. & Exch. Comm'n v. Yorkville Advisors, LLC*, 305 F. Supp. 3d 486, 504 (S.D.N.Y. 2018) (citations and internal quotation marks omitted).

In determining the admissibility of an expert witness's testimony, a court must "undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002). However, "in accordance with the liberal admissibility standards of the Federal Rules of Evidence, only serious flaws in reasoning or methodology will warrant exclusion." *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164, 173 (S.D.N.Y. 2009). This is especially true in the context of a bench trial, where "there is no possibility of prejudice, and no need to protect the factfinder from being overawed by 'expert' analysis." *Victoria's Secret Stores Brand Mgmt., Inc. v. Sexy Hair Concepts, LLC*, 07-CV-05804, 2009 WL 959775, at *8 n.4 (S.D.N.Y. Apr. 8, 2009).

"When the fact-finder is the court, expert evidence should be quite freely admitted so that the judge may have the benefit of live testimony and cross-examination to determine how

much weight, if any, to give to the expert's conclusions." *Royal & Sun All. Ins. PLC v. UPS Supply Chain Sols., Inc.*, No. 09-CV-05935, 2011 WL 3874878, at *2 (S.D.N.Y. Aug. 31, 2011) (internal quotation marks and citation omitted); *see also Van Alen v. Dominick & Dominick, Inc.*, 560 F.2d 547, 552 (2d Cir. 1977) ("[O]rdinarily it may be the more prudent course in a bench trial to admit into evidence doubtfully admissible records, and testimony based on them. . . .").

DISCUSSION

Defendant moves for summary judgment and to exclude the reports and testimony of Plaintiffs' four experts, *i.e.*, Ty Minnich, Al Otto, Wendy Dominguez and Gerald Buetow.[9] I have reviewed the voluminous filings submitted by the parties.[10] Due to the presence of myriad factual issues, I recommend that summary judgment be denied. Further, I recommend that Defendant's motions to exclude Plaintiffs' experts be denied.

I. Recordkeeping Fees Claims

Plaintiffs' recordkeeping fee claims are based on their theory that if, beginning in 2010, Columbia had taken reasonable steps to determine the amount it was paying in recordkeeping fees it would have realized that those fees were excessive and, it if were acting prudently, would

[9] The opinions of Minnich and Otto relate to Plaintiffs' recordkeeping fees claims and are addressed in Discussion Section I.E., *infra*. The opinions of Dominguez and Buetow relate to Plaintiffs' investment monitoring claims and are addressed in Section II.B., *infra*.

[10] To start, Defendant submitted, pursuant to Local Civil Rule 56.1 (which requires a "short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried"), a 141-paragraph statement with 410 footnotes. (*See* Def.'s 56.1.) Then, following the filing of Plaintiffs' Response and Counterstatement which disputes many of Defendant's statements (*see* Pls.' Counter 56.1), Defendant filed a "Reply," not expressly contemplated by the Local Civil Rules (*see* S.D.N.Y. Local Civil Rule 56.1), consisting of 365 paragraphs and 2049 footnotes over 295 pages, with portions of those pages single-spaced. (*See* Def.'s 56.1 Reply.) Defendants' Reply itself disputes many of the statements contained in Plaintiffs' Response and Counterstatement. (*See*, *e.g.*, *id*. ¶¶ 29, 190.)

have taken steps to reduce them. In particular, Plaintiffs contend that Columbia breached its duty of prudence by: (1) failing to analyze or negotiate recordkeeping fees on a per participant basis; (2) failing to conduct competitive bidding for the Plans' recordkeeper; and (3) failing to consolidate to a single recordkeeper, all of which caused it to pay excessive recordkeeping fees. (Pls.' Summ. J. Opp. at 3-6, 11-18; Cons. Compl. ¶¶ 223, 225.) In moving for summary judgment, Columbia argues that the undisputed evidence shows that it acted prudently under the circumstances, but, in any event, Plaintiffs have not presented evidence that any of the alleged breaches resulted in excessive fees.[11] (Def.'s Summ. J. Mem. at 9-13.) For the reasons set forth below, the Court finds genuine issues of fact as to whether Columbia breached its duty of prudence regarding recordkeeping fees and whether any such breach caused a loss to the Plans.

A. <u>Consolidation To A Single Recordkeeper</u>

First, Columbia argues that it is entitled to summary judgment because "[t]he undisputed facts demonstrate that Columbia evaluated recordkeeper consolidation, decided to consolidate from three recordkeepers to two, and was not required to consolidate to a single recordkeeper, which could only have been TIAA." (Def.'s Summ. J. Mem. at 5.) Plaintiffs dispute both the process

[11] Defendant refers to "loss causation" as an element of Plaintiffs' ERISA claim. (Def.'s Summ. J. Mem. at 9.) However, "loss causation is a term of art" that is not used in the ERISA context. *Moreno*, 2018 WL 2727880, at *4 (internal quotations omitted). In addition, the Court rejects Defendant's argument that Plaintiffs are required to show that the fees were objectively imprudent, as that standard is more stringent than the standard applied in this Circuit. *See id.* ("No 'objective prudence' requirement is contained in the Second Circuit's succinct and unambiguous description of the loss analysis."). As Judge Schofield aptly points out in *Moreno*, "infusing the loss analysis with questions of 'objective prudence' is analytically messy[,]" as "'objective prudence' is already the cornerstone for evaluating whether or not the duty of care has been breached." *Id.* at *5. Thus, Plaintiffs need only establish that the Plans suffered some loss as a result of Defendant's breach. *See Trustees of Upstate New York Engineers Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 567 (2d Cir. 2016)

Columbia undertook to evaluate consolidation and whether its decision not to consolidate to a single recordkeeper was prudent under the circumstances. (Pls.' Summ. J. Opp. at 12-16.)

According to Columbia, it began assessing "the wisdom of consolidating to a single recordkeeper" in 2010 and "decided consistently that such an action was not in the interests of the Plans' participants." (Def.'s Summ. J. Mem. at 6; *see also* Def.'s 56.1 ¶¶ 47-64.) Plaintiffs dispute that the emails cited by Defendant show actual consideration of consolidation and instead argue that the evidence shows that Columbia continually put off the issue despite being aware that consolidation was a way to reduce fees. (Pls.' Counter 56.1 ¶¶ 52, 54, 57.) For example, Plaintiffs contend that the documents from the Retirement Committee cited by Defendant refer to an offer by TIAA to reduce prices by becoming the single recordkeeper, but that there are no documents showing that TIAA's offer was discussed or considered at that time. (Pls.' Summ. J. Opp. at 12-13; Pls.' Counter 56.1 ¶¶ 52, 54.) Plaintiffs also point to evidence that TIAA could recordkeep all the Vanguard funds in the Plans as early as 2004 or 2005, but that Defendant did not obtain a quote from TIAA regarding the cost savings that could be achieved through a single recordkeeper until 2014. (Pls.' Counter 56.1 ¶¶ 47-49.)

Beyond the process employed by Columbia, the parties also dispute whether consolidation was a prudent choice. (Pls.' Counter 56.1 ¶¶ 58-64.) Plaintiffs cite to numerous documents,[12] including a July 2011 presentation in which an investment advisor, Cammack LaRhette ("Cammack"), advised Columbia to "[c]onsider a consolidation of active vendors from the current number to two or one (one would be ideal), via a [RFP] process[.]" (Webb Decl., Ex.

[12] *See* Pls.' Counter 56.1 ¶¶ 173-76 & nn.1264-76.

61, ECF No. 270-8, at 1902.) Defendants argue that they could only consolidate with TIAA and that the decision not to do so was prudent. (*See* Def.'s Summ J. Mem. at 5-8.) The Court finds that there is at least a genuine issue of material fact as to whether it was imprudent not to consolidate with TIAA. Plaintiffs have adduced evidence that consolidation to TIAA as the sole recordkeeper could have lowered Columbia's recordkeeping fees. (Pls.' Summ. J. Opp. at 17.) For example, in October 2014, TIAA gave a presentation to Columbia titled "Problems and Potential Solutions Facing Columbia University's Retirement Plan" in which it discussed the potential benefits and showed that, if Columbia consolidated to TIAA as the sole recordkeeper, TIAA would reduce the cost by a significant amount per participant.[13] (Pls.' Counter 56.1 ¶ 206; Oct. 2014 TIAA Presentation, Rohlf Summ. J. Decl. Ex. P56, ECF No. 296-6, at 8.) TIAA also indicated that it could save Columbia money on Vanguard funds by moving certain fund to lower cost share classes. (Oct. 2014 TIAA Presentation, ECF No. 296-6 at 9.) In February 2018, TIAA delivered a pricing proposal to Columbia offering a significantly lower per-participant fee if, among other things, TIAA would become the exclusive provider for Columbia. (Feb. 2018 TIAA Pricing Proposal, Rohlf Decl. Ex. P. 87, ECF No. 296-38, at 1.)

Moreover, there is a genuine issue of material fact as to whether Columbia could have consolidated with any recordkeeping provider other than TIAA. Defendants contend that no company other than TIAA could provide recordkeeping for TIAA's annuities, but Plaintiffs point to evidence from Defendant's expert Glenn Poehler (as well as Plaintiffs' expert, Ty Minnich) that

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[13] The Court has not included as part of this Report and Recommendation the dollar amounts of TIAA's pricing proposals (*see*, *e.g.*, ECF Nos. 296-6 & 296-38), since TIAA objected to making its pricing information public. (*See* 10/11/19 Tr. at 3-4.) However, there are specific dollar amounts contained in the cited record documents from which the amount of loss to the Plans from failing to accept such proposals may be determined.

there are other recordkeepers that regularly recordkeep other vendors' fixed annuities. (Pls.' Counter 56.1 ¶ 53.) It is a close question as to whether this evidence is sufficient to create an issue of fact, as Plaintiffs have not pointed to any other vendor who actually has recordkept TIAA annuities. Nonetheless, Plaintiffs also argue that, even if another vendor could not recordkeep TIAA annuities, Columbia could have "mapped" TIAA annuities to other investments. (*Id.* ¶¶ 153-72.) Plaintiffs cite to testimony from Poehler that, in essence, if TIAA assets could be mapped to other investments, a reasonable fee for the Plans' would be lower than the Vanguard fees. (*See id.* ¶ 229.)

Columbia argues that this evidence is meaningless because the individual TIAA annuity contracts prevented mapping (*see* Def.'s 56.1 Reply ¶ 30), but the Court finds that there is a genuine issue of material fact as to whether TIAA assets could be mapped to other investments. While Plan documents state that the Plan Administrator had the right to eliminate a Funding Vehicle (by transferring those investments to a successor Funding Vehicle) only "to the extent permitted by the Funding Vehicle" (Def.'s 56.1 Reply ¶ 152), Plaintiffs have pointed to testimony from a TIAA corporate representative that he could not identify any provision of the applicable contracts that prevented mapping. (Pls.' Counter 56.1 ¶¶ 53, 55.) In addition, the parties dispute whether Columbia could have mapped TIAA annuities by switching to group annuity contracts beginning in 2005 or 2006. (*Id.*)

For these reasons, the Court finds that there are genuine issues of material fact as to whether Columbia acted prudently throughout the class period by not consolidating to a single recordkeeper.

B. RFP Process

Plaintiffs also contend that Columbia breached its duty by failing to solicit competitive bids when it was standard industry practice to conduct an RFP every three to five years. (*See* Pls.' Summ. J. Opp. at 2-4, 16-17; Def.'s 56.1 Reply ¶ 88.) In support of their motion, Columbia argues that it was not required to conduct formal competitive bidding and, in any event, Plaintiffs have not shown how such processes could have resulted in materially lower fees. (Def.'s Summ. J. Mem. at 8-13.)

Columbia contends that Plaintiffs' attempt to show breach by pointing to standard industry practice is untethered from the facts facing Columbia in 2010, at the beginning of the class period. (*See* 10/11/19 Tr. at 29, 106-09.) At that time, over sixty percent of the Plans' assets were invested in TIAA annuities. (*Id.* at 33.) As set forth above, Columbia contends that only TIAA could recordkeep TIAA annuities and, thus, argues that an RFP would have been meaningless with respect to a large portion of the Plans' assets. Therefore, Columbia asserts that members of the IAC made a "conscious decision" to use benchmarking and an RFI process instead of an RFP. (Def.'s 56.1 Reply ¶ 88.)

The Court recognizes that Columbia's relationship with TIAA as of 2010 may have been akin to a hostage-type situation.[14] As a result, even though Columbia realized its fees were "too high,"[15] it may have had limited options to reduce them. Nonetheless, Plaintiffs have adduced

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[14] At oral argument, the Court referred to this situation as a "hostage situation." (10/11/19 Tr. at 109-10.) ("[B]ecause you were in this arrangement with them at the time the limitations period started, you had no choice [but] to accept their higher fees.").) In response, Columbia stated: "So if you want to call that a hostage situation, I guess it's a matter of terminology. But based on the conditions on the ground, that's how Columbia had to make a decision." (*Id*. at 110.)

[15] *See* Pls.' Counter 56.1 ¶ 190 (citing Pls.' Ex. 84, ECF No. 296-35 ("WE [sic] do believe fees from TIAA are too high and are currently working to determine the amount."))

evidence that Columbia paid excessive fees as a result of its failure to conduct an RFP in or after the start of the class period in 2010. Among other evidence, Plaintiffs cite evidence that, once Columbia conducted an RFI, in late 2017 to early 2018, TIAA lowered its fee by more than half per participant and Vanguard lowered its fee by over 25% per participant. (Pls.' Counter 56.1 ¶ 75.) Plaintiffs contend that Columbia could have achieved similar savings by conducting competitive bidding sooner. (Pls.' Summ. J. Opp. at 4; *see also* Pls.' Counter 56.1 ¶¶ 34, 44, 71, 75, 173-76.) Based upon this evidence, the Court finds genuine issues of material fact as to whether Columbia breached its duty and caused a loss to the Plans by not conducting competitive bidding earlier in the class period.

C. <u>Evidence Of Loss To The Plans</u>

Columbia does not address Plaintiffs' other alleged deficiencies in its process for monitoring recordkeeping fees, including its alleged failure to analyze and negotiate recordkeeping fees on a per-participant basis. Instead, Columbia argues that it is entitled to summary judgment because Plaintiffs have not shown that the Plans could have obtained materially lower fees even if Columbia had restructured the Plans in the ways Plaintiffs advocate. (Def.'s Summ. J. Mem. at 9-13.)

As an initial matter, the parties dispute which side has the burden to prove (or disprove) that the alleged breaches caused a loss to the Plans. Section 409 of ERISA provides, in relevant part, that a fiduciary who breaches a fiduciary duty "shall be personally liable to make good to such plan any losses to the plan *resulting from* each such breach[.]" 29 U.S.C. § 1109(a) (emphasis added). The most recent guidance from the Second Circuit on this topic comes from its decision in *Silverman v. Mutual Benefit Life Insurance Co.*, 138 F.3d 98 (2d Cir. 1998). There, a majority of

the Second Circuit panel found that, "[c]ausation of damages is . . . an element of the [ERISA § 409(a)] claim, and the plaintiff bears the burden of proving it." *Silverman*, 138 F.3d at 105 (Jacobs, J., concurring). Judge Jacobs found that Congress had departed from the common law of trusts by "plac[ing] the burden of proving causation on the plaintiff by requiring him to prove that the losses 'result[ed] from' the defendant's inaction." *Id.* (quoting 29 U.S.C. § 1109(a)) (emphasis in original).

Plaintiffs rely on two older Second Circuit cases, *N.Y. Teamsters Council Health & Hosp., Fund v. Estate of DePerno*, 18 F.3d 179 (2d Cir. 1994), and *Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir. 1994), for the proposition that once they have come forward with evidence of breach and a *prima facie* case of loss, the burden shifts to Defendant to disprove causation. (*See* Pls.' Summ. J. Opp. at 9.) However, as at least one other court in this District recognized, this was precisely the argument rejected by the Second Circuit in *Silverman*. *See Bd. of Trustees of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 860 F. Supp. 2d 251, 261 (S.D.N.Y. 2012) (rejecting argument that defendant must disprove causation) (citing *Silverman*, 138 F.3d at 105). Moreover, "[s]ection 409 speaks both to causation . . . and damages." *In re State St. Bank & Tr. Co. Fixed Income Funds Inv. Litig.*, 842 F. Supp. 2d 614, 652 (S.D.N.Y. 2012); *see also Salovaara v. Eckert*, No. 94-CV-03430, 1998 WL 276186, at *4 (S.D.N.Y. May 28, 1998) ("[B]oth loss to the fund, and a causal connection between that loss and defendant's breach, are necessary elements of an ERISA claim for damages under 29 U.S.C. § 1109(a) . . . ."), *aff'd*, 182 F.3d 901 (2d Cir. 1999).[16] As Judge Scheindlin

[16] Other courts have declined to decide which party bears the burden on causation when the plaintiffs did not meet their burden to show a *prima facie* case of loss. *See, e.g., Cunningham v. Cornell Univ.*, No. 16-CV-06525 (PKC), 2019 WL 4735876, at *6 n.6 (S.D.N.Y. Sept. 27, 2019) ("Because plaintiffs have come forward with no evidence demonstrating a genuine issue with respect to loss, the Court need not consider who bears the burden of proving causation."); *see also Sacerdote*, 328 F. Supp. 3d at 286.

explained, in both *Donovan* and *DePerno*, the Second Circuit framed the issue as one of damages, while in *Silverman* the Second Circuit directly addressed the issue of causation. *See Bd. of Trustees of AFTRA Ret. Fund*, 860 F. Supp. 2d at 260-61. Thus, the Court finds that Plaintiffs have the burden to show "some causal link between the alleged breach . . . and the losses [they] seek[ ] to recover." *Silverman*, 138 F.3d at 104; *see also Leber v. Citigroup 401(k) Plan Inv. Comm.*, 323 F.R.D. 145, 158 (S.D.N.Y. 2017) (discussing standard in context of motion for class certification); *In re Beacon Assocs. Litig.*, No. 09-CV-00777 (LBS) (AJP), 2012 WL 1569827, at *9 (S.D.N.Y. May 3, 2012) (same).

Here, the Court finds that Plaintiffs have adduced evidence from which a factfinder could conclude that the alleged breaches caused a loss to the Plans. As set forth above, Plaintiffs have cited evidence that Columbia could have lowered its recordkeeping fees through consolidation or competitive bidding. Moreover, Plaintiffs have cited to evidence that, once Columbia began negotiating its fee arrangements, it did achieve reductions. To take one example, in June 2015, Vanguard presented Aon[17] with three proposals to reduce the Plans' recordkeeping fees: (1) "share-class solution" that would move the Vanguard 500 Index Fund and Vanguard Bond Market Index Fund to institutional share-classes; (2) "institutional target date fund" that would shift the Vanguard target date funds to institutional share-classes; and (3) "fee leveling" that would institute a $32 per participant recording fee and moving all funds to the lowest available share class. (Pls.' Counter 56.1 ¶¶ 79, 209.) Plaintiffs contend that Columbia delayed consideration of

[17] In May 2013, Columbia issued an RFP for an outside investment advisor to provide, among other things, ongoing recordkeeping and analysis. (Pls.' Counter 56.1 ¶ 44.) At an October 17, 2013 IAC meeting, Columbia selected Aon, in part because of its demonstrated knowledge in negotiating recordkeeping fees with TIAA and Vanguard. (*Id*. ¶45.)

these offers and did not accept an offer until October 2018, when it executed an agreement to reduce Vanguard's fees to $32 per account, retroactive to August 2018. (*Id.* ¶¶ 79, 209-11.) If a factfinder concludes that Columbia's conduct amounted to a breach of its duty of prudence under the circumstances, this evidence is sufficient for the factfinder to conclude that the alleged breach caused a loss to the Plans.

D. Other Evidence Regarding Excessive Fees

In addition to the evidence discussed above, Plaintiffs cite to various other evidence that the recordkeeping fees paid by Columbia were excessive, including benchmarking performed by Columbia's advisors, TIAA pricing data, and the opinions of Plaintiffs' two expert witnesses, Ty Minnich and Al Otto. Minnich and Otto opined that, if Columbia had followed prudent practices, reasonable recordkeeping fees would have been at a substantially lower dollar amount per account.[18] (Pls.' Counter 56.1 ¶¶ 216-24.) Defendants argue that this evidence is insufficient, in various ways, to support Plaintiffs' claims. (*See* Def.'s 56.1 Reply ¶¶ 216-24.) At the summary judgment stage, it is sufficient that Plaintiffs have adduced some evidence that Columbia breached its duty with respect to recordkeeping fees and the alleged breaches caused a loss to the Plans. Because I find that they have, I recommend that Columbia's motion for summary judgment be denied as to Plaintiffs' recordkeeping claims.

E. Motion To Exclude Plaintiffs' Experts Regarding Recordkeeping Fees

As set forth above, the Court finds that there are issues of material fact as to Plaintiffs' theories of liability regarding recordkeeping fees. In making these findings, the Court does not

[18] The Court notes that in *Cunningham*, Judge Castel found that similar evidence, standing alone, was not sufficient evidence of loss. *See Cunningham*, 2019 WL 4735876, at **6-7.

rely on the opinions of Minnich or Otto. Thus, the Court need not decide the question of admissibility at this stage. *See Strauss*, 925 F. Supp. 2d at 431 n.12 (court need not decide issue of whether expert testimony should be excluded on summary judgment motion where genuine issue of material fact existed as to essential element). In any event, I recommend that Defendant's motion be denied.

Defendant's challenges to the qualifications of Minnich and Otto are misplaced. As Judge Castel noted in a similar case regarding 403(b) plans of Cornell University, "Defendants' challenges to Otto and Minnich's qualifications do not provide a basis to exclude their testimony." *Cunningham*, 2019 WL 4735876, at *8. At best, any lack of experience on the part of Minnich goes to the weight to be given to his testimony, not its admissibility. *See Mahoney v. JJ Weiser & Co.*, No. 04-CV-02592 (VM) (HBP), 2007 WL 3143710, at *7 (S.D.N.Y. Oct. 25, 2007) ("Defendants' contention that Mr. Leitner does not have experience with the precise type of insurance policy in issue here goes to the weight of Mr. Leitner's testimony, not its admissibility"); *see also Yorkville Advisors, LLC*, 305 F. Supp. 3d at 508 ("An expert is not unqualified 'merely because he or she does not possess experience tailored to the precise product or process that is the subject matter of the dispute.'" (citation omitted)).

While the Court is mindful of the many defects that Defendant contends exist in the opinions offered by Plaintiffs' experts, any defects in Minnich's methodology also go to the weight to be given to his testimony. *See McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995) ("[F]aults in [the] use of . . . [a particular] methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony."). Moreover, there are at least portions of Minnich and Otto's opinions that Judge Daniels may find helpful at trial. *See*

Cunningham, 2019 WL 4735876, at *10 n. 10 ("Otto and Minnich's testimony regarding general characteristics of fund structure and 403(b) plans will likely be admissible."). As Judge Forrest noted in denying a pre-trial motion to exclude experts in *Sacerdote*, "[w]hile the parties have identified a wealth of material for cross-examination, the Court does not find that any expert is subject to exclusion based on the arguments presented by the parties." *Sacerdote*, No. 16-CV-06284, ECF No. 270. So too here, the Court finds that any decision to exclude Plaintiffs' experts is more properly made by Judge Daniels at or after trial.

II. Investment Monitoring Claims

Plaintiffs assert in Count V that Columbia breached its fiduciary duty by failing to monitor and remove certain investments, including the CREF Stock Account and the TIAA Real Estate Account, despite high fees and poor performance. (Cons. Compl. ¶¶ 238-44.) In total, Plaintiffs challenge twenty-two of the investment funds offered in the Plans. (Pls.' Counter 56.1 ¶ 93.) Columbia concedes that the question of whether it properly monitored the Plans' investments (or were "procedural[ly] prudent") is ill-suited for summary judgment. (Def.'s Summ. J. Mem. at 14.) Indeed, Plaintiffs have submitted evidence that the Columbia did not meet its fiduciary obligations to monitor the Plans' investments until at least 2016. (*See* Rohlf Summ. J. Decl. Ex. P73, ECF No. 296-24.[19]) Nonetheless, Columbia argues that summary judgment is appropriate

[19] In April 2016, almost four years after the IAC was formed, and more than five years into the class period, VP of HR Kenney writes: "I fear the IAC (Anne [Sullivan] now Chair) will never get off the start line to meet its fiduciary obligations at the rate its going. . . . Anne is looking for very specific direction from outside counsel as the minimum legally required work our IAC must do (which is going to be very hard to get from any outside counsel). . . . CUHR is willing to work with any outside counsel that Anne will listen to and work with, so that we can once and for all get the IAC's fund monitoring work off the start line and at least up to that of a peer school (any peer school at this point!)." (*See* Rohlf Summ. J. Decl. Ex. P73, ECF No. 296-24.)

because "Plaintiffs have failed to adduce any probative evidence as to the objective prudence of the challenged investment options[.]" (Def.'s Summ. J. Mem. at 15; *see also* Def.'s 56.1 ¶ 93.)

"[I]n order to state a claim for breach of the duty of prudence connected to the retention of certain investment options, plaintiffs must raise a plausible inference that . . . 'a prudent fiduciary in like circumstances would have acted differently.'" *Sacerdote*, 2017 WL 3701482, at *7 (quoting *Pension Ben. Guar. Corp ex. rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719-20 (2d Cir. 2013); *see also Jacobs v. Verizon Commc'ns, Inc.*, No. 16-CV-01082 (PGG), 2017 WL 8809714, at *8 (S.D.N.Y. Sept. 28, 2017). However, "[i]n attempting to demonstrate a breach of fiduciary duty founded on making available an imprudent investment option, a plaintiff cannot rely solely on an investment's drop in price or value." *Jacobs*, 2017 WL 8809714, at *8. "Nor is it necessarily sufficient to show that better investment opportunities were available at the time of the relevant decisions." *Id.* (citing *St. Vincent*, 712 F.3d at 718 ("It is clear that 'nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund.") (internal citation and quotation marks omitted)). Instead, a plaintiff must adduce sufficient "nonconclusory factual content raising a plausible inference of misconduct [that] does not rely on the vantage point of hindsight." *St. Vincent*, 712 F.3d at 718 (internal citation and emphasis omitted).

A. Record Evidence Regarding Investment Monitoring Claims

With respect to the CREF Stock Account and the TIAA Real Estate Account, the two investment options to which the parties devote the majority of their briefing, the parties dispute whether those investments were underperforming and supply conflicting evidence as to the appropriate benchmarks for assessing their performance. (Pls.' Counter 56.1 ¶¶ 95-116.) The

Court finds that there are questions of fact as to the appropriate benchmark and whether the investment options were underperforming as of September 2010, when Plaintiffs contend they should have been removed, or at some later point during the class period. Moreover, there are questions of fact as to whether a prudent fiduciary would have removed the investments, and when, based on the alleged underperformance.

Beyond evidence that the investments underperformed when compared to certain benchmarks, Plaintiffs have presented sufficient evidence for a factfinder to conclude that a prudent fiduciary would have removed the funds at an earlier date. In July 2012, Cammack provided Columbia with a free review of its investments in an apparent attempt to convince Columbia to hire it on a long-term basis. (Pls.' Counter 56.1 ¶ 232.) Cammack evaluated the Plans' investments using a custom report card methodology based on, among other things, manager tenure, performance versus a benchmark index, and category ranking. (July 2012 Cammack Due Diligence Report, Rohlf Summ. J. Decl. Ex. P109, ECF No. 297-9, at 48, 57-64, 71-72.) A fund that failed to meet four or more of the guidelines in Cammack's investment scorecard would cause "concerns" and require "more scrutiny." (Pls.' Counter 56.1 ¶ 234.) Cammack's scorecard showed the TIAA Real Estate Account failing eight of the eleven guidelines and the CREF Stock Account failing six of the eleven guidelines. (*Id.* ¶ 236, 240.) Also in July 2012, Aon issued a report on TIAA annuities for its clients, which had a sell rating on the CREF Stock Account. (Pls.' Counter 56.1 ¶ 238.)

In July 2013, Cammack provided Columbia with another sample investment review as part of its response to Columbia's investment advisor RFP. (Pls.' Counter 56.1 ¶ 239.) In Cammack's scorecard for the TIAA products, the CREF Stock Account again failed six of the eleven guidelines

and the TIAA Real Estate Account again failed eight of Cammack's eleven guidelines. (*Id.* ¶¶ 240-41.) In January 2014, Aon continued to list a sell rating for the CREF Stock Account, among other TIAA-CREF annuities. (*Id.* ¶ 243.)

In September 2016, Aon recommended termination of the CREF Stock Account, in addition to seven other funds. (*Id.* ¶ 245.) Aon also recommended twenty-four additional funds be added to a "watch list" for "[h]istorical underperformance," including TIAA Real Estate. (*Id.* ¶ 246.) In response, Columbia placed CREF Stock, along with several other funds, on a watch list. (*Id.* ¶ 254, 269, 281.) In March 2017, Columbia terminated the CREF Stock Account and in February 2018, Columbia voted to find a replacement for the TIAA Real Estate Account based on underperformance. (*Id.* ¶¶ 256, 364.)

Beyond CREF Stock and TIAA Real Estate, there is evidence in the record that Defendant was made aware of other underperforming funds, but that the IAC did not vote to remove any investment options prior to September 2016, after this case was filed. For example, in its July 2012 Due Diligence Report, Cammack advised Columbia to "consider elimination of Calvert as a provider to the [P]lans" because "virtually all Calvert funds have serious performance issues." (July 2012 Cammack Due Diligence Report, Rohlf Summ. J. Decl. Ex. P109, ECF No. 297-9, at 994.) Cammack's analysis showed 16 of 21 Calvert funds failed four or more measures (Cammack's standard for concern). (*See id*. at 1051-52.) In addition, ten Vanguard funds failed four or more of Cammack's measures. (*See id*. at 1037-43.)

Based on this evidence, I find that there are genuine issues of material fact as to whether certain investments were prudent, precluding summary judgment.[20] *See Tracey v. Massachusetts Inst. of Tech.*, No. 16-CV-11620 (NMG), 2019 WL 4192148, at *4 (D. Mass. Sept. 4, 2019) ("The debate over whether certain kinds of funds should have been included in the Plan is a material factual dispute that will be preserved for trial.").

B. Plaintiffs' Experts Regarding Investment Monitoring Claims

Plaintiffs also rely on the analysis and opinion of one of their experts, Wendy Dominguez, "related to the investment decisions and related matters relative to the [Plans] . . . and the fiduciary process employed by [Defendant] and its [IAC] . . . in the selection, monitoring and retention of investment options included in the Plans." (Dominguez Expert Rpt. ¶ 1.) Dominguez reviewed "information that was available to [Columbia] in 2010" and conducted an "analysis" of the investment options "as if [she] were a fiduciary to the Plans as of August 2010." (Dominguez Expert Rpt. ¶ 57.) She then considered the investment options that she would have removed as of September 1, 2010 and identified alternative investments that she contends a prudent fiduciary would have selected. (*See id.* ¶¶ 62-229.) Based on Dominguez's analysis, Plaintiffs cite to the expert report of Gerald Buetow as evidence that, if Columbia had removed the investments, the Plans would have earned even more than they actually earned, based on the

[20] In granting summary judgment regarding investment monitoring claims relating to Cornell University's 403(b) plan, Judge Castel stated that "Plaintiffs offer no evidence, affidavits, or testimony beyond the conclusory assertion of their expert Wendy Dominguez that the level of underperformance of the TIAA and CREF funds alone, as measured by the benchmarks [ ], would lead a prudent fiduciary to conclude the funds should be removed from the plans before July 2013." *Cunningham*, 2019 WL 4735876, at *11. Here, however, I find that the data and recommendations from Columbia's investment advisors are sufficient to create factual issues as to whether a prudent fiduciary should have removed certain funds from the Plans.

performance of the alternative funds identified by Dominguez. (Buetow Expert Rpt., ECF No. 258-5.)

Columbia has moved to exclude Dominguez (and derivatively, Buetow), taking issue with the process used by Dominguez in arriving at her opinion and argues that her opinion is unreliable. (Def.'s Mem. to Exclude Dominguez and Buetow at 7-23.) Columbia also argues that Dominguez "impermissibly opines on the legal question whether [Defendant] acted prudently." (*Id*. at 24.) Defendant then seeks to exclude Buetow's opinions because they are derivative of Dominguez's opinions. (*See* Def.'s Mem. to Exclude Dominguez and Buetow at 25.) Although Columbia finds many flaws in Dominguez's process, the Court finds that those flaws go to the weight to be given to Dominguez's testimony, not its admissibility. *See McCullock*, 61 F.3d at 1044.

Columbia will have the opportunity to cross examine Dominguez at trial and if, after live testimony, Judge Daniels concludes that she lacks the proper qualifications or offers unreliable opinions, he will give those opinions little or no weight in his decision. *See Daubert,* 509 U.S. at 596 (particularly in a bench trial, "[v]igorous cross-examination, presentation of contrary evidence, and careful . . . [attention to] the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *see also Tiffany (NJ) Inc. v. eBay, Inc*., 576 F. Supp. 2d 457, 457 n.1 (S.D.N.Y. 2007) (Sullivan, J.) ("In the context of a bench trial where there is not a concern for juror confusion or potential prejudice, the court has considerable discretion in admitting the proffered testimony at the trial and then deciding after the evidence is presented whether it deserves to be credited by meeting the requirements of *Daubert* and its progeny."). Similarly, to extent that Judge Daniels believes that Dominguez impermissibly has opined on any

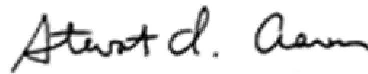
legal questions, he can ignore such opinions. For these reasons, I recommend that Columbia's motion to exclude Dominguez (and Buetow) be denied.

CONCLUSION

For the foregoing reasons, I recommend that Defendant's motions for summary judgment (ECF No. 260) and to exclude Plaintiffs' experts (ECF Nos. 251, 254 & 257) be DENIED.

SO ORDERED.

DATED: New York, New York
October 25, 2019



STEWART D. AARON
United States Magistrate Judge

* * *

NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties shall have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. *See also* Fed. R. Civ. P. 6(a), (d) (adding three additional days when service is made under Fed. R. Civ. P. 5(b)(2)(C), (D) or (F)). A party may respond to another party's objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections, and any response to objections, shall be filed with the Clerk of the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Daniels.

FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); *Thomas v. Arn,* 474 U.S. 140 (1985).