Court Opinions

Lauderdale v. NFP Ret., Inc., No. 8:21-cv-301-JVS-KES, 2022 BL 424082 (C.D. Cal. Nov. 17, 2022), Court Opinion

Pagination | Jump To

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Robert Lauderdale, et al. v. NFP Retirement, Inc., et al.

8:21-cv-301-JVS-KES

November 17, 2022, Filed

November 17, 2022, Decided

Attorneys for Plaintiffs: Not Present.

Attorneys for Defendants: Not Present.

James V. Selna, United States District Judge.

James V. Selna

CIVIL MINUTES - GENERAL

Proceedings: [IN CHAMBERS] Order Regarding Motions for Summary Judgment *[192, 194, 196]*

Before the Court are the following motions: (1) Defendant NFP Retirement, Inc. ("NFP")'s motion for summary judgment on all claims against NFP, Dkt. No. 194; (2) Defendants' Wood Group U.S. Holdings, Inc., Wood Group Management Services, Inc., and the Committee of the Wood 401(k) Plan (collectively, the "Wood Defendants") motion for summary judgment on all claims against them, Dkt. No. 192; and (3) Defendant's flexPATH Strategies, LLC ("flexPATH") motion for summary judgment on all claims against flexPATH, Dkt. No. 196. Plaintiffs Robert Lauderdale et al. ("Plaintiffs") opposed all motions. Dkt. Nos. 208-09, 240-42. Defendants replied. Dkt. Nos. 229, 232, 233. The parties appeared for oral argument. See Dkt. 265.

The Court has carefully considered the parties' extensive briefing and oral arguments. For the following reasons, the Court:

1. **GRANTS** in part and **DENIES** in part NFP's motion. The Court dismisses Count 1 against NFP. The Court grants the motion as to Counts 2 and 3. No claims against NFP remain.

2. **GRANTS** in part and **DENIES** in part the Wood Defendants' motion. The Court grants the motion as to Counts 1, 2 and 3 but denies it as to Counts 4 and 5.

3. **DENIES** flexPATH's motion.

I. Background

A. Factual Background

This case arises out of a dispute over the management of the Wood 401(k) Plan ("Plan"). Former plan participants allege that the Plan's fiduciaries prioritized their interests ahead of the plan participants' at their expense by placing popular investment 401(k) vehicles known as "target-date funds"[1] in the Plan's lineup.

The Plan is a multiple employer defined contribution employee pension benefit plan. Wood Statement of Uncontroverted Facts ("SUF"), Dkt. No. 193, ¶ 2. Plaintiffs are seven former employees of adopting employers and are participants and beneficiaries of the Plan. Wood Group U.S. Holdings is the Plan sponsor. Id. ¶ 2. Wood delegated its day-to-day, administrative responsibilities with respect to the Plan to the Wood Committee. Id. ¶ 3. The Wood Committee is responsible for the selection, monitoring, and removal of investment options for the Plan's investment menu and service providers, including the investment consultant. Glickstein Decl. Ex. 54, at 2, Dkt. No. 197-54. NFP and flexPATH are both registered investment advisers. NFP & flexPath SUF ¶¶ 1, 12.

Starting in 2014, Wood Defendants decided to merge existing 401(k) plans and select plan service providers and investment options to offer to participants. Wood Defendants sent out requests for proposals to recordkeeper candidates and investment advisor candidates. One of Wood Defendants' main priorities was to offer a plan that was "as good" as their current plans, which included custom model portfolios. Wood SUF ¶ 8.

The Wood Defendants [*2] hired NFP to be the Plan's investment advisor on July 16, 2015. Id. ¶ 34. Pursuant to the parties' Investment Advisor Agreement ("IAA"), NFP was to provide research and analysis regarding investment advice and fiduciary due diligence services, and assistance on the selection of service providers, among other duties. Id. ¶ 34. Wood agreed to pay NFP an annual flat fee of $100,000 for its advisory services. Id. ¶ 35.

NFP presented its Qualified Default Investment Alternative Selection and Fit Analysis to the Wood Committee on September 8, 2015. NFP & flexPATH SUF ¶ 65. The "Fit Analysis" was NFP's analytical tool used to pair specific plans with target-date funds and glide paths based on demographics, risk profiles, and objectives of the Plan. Id. NFP conducted similar presentations in the months that followed. Id. ¶ 69.

The flexPATH target-date funds offered three "risk-based glidepaths": aggressive, moderate, and conservative. NFP & flexPATH SUF ¶ 31. This allowed participants to select the "aggressiveness" of the fund in terms of exposure to riskier assets. Id. ¶ 32. At the time in 2015, flexPATH's target-date funds were the only funds to offer three different "glide paths" for each "vintage," the anticipated year of retirement. Id. ¶¶ 32, 34. The flexPATH funds utilized a "funds of funds" structure, which meant that the fund allocated assets among other underlying funds managed by a manager. See id. ¶ 39. BlackRock was selected as the glidepath manager for the funds. Id. ¶ 26. These funds were designed and managed for each ten-year vintage. Id. ¶ 33. There were two versions of the target-date funds offered by flexPATH: (1) the "Index+" funds, which were 30% actively managed and 70% passively managed and charged a higher expense ratio; and (2) the "Index" funds, which were all passively managed, cheaper, and comprised of all BlackRock "LifePath Index" target-date funds. Id. ¶ 24.

NFP initially recommended the use of flexPATH "Index+" target-date funds in the Plan on November 17, 2015. Id. ¶¶ 70, 71. The flexPATH "Index" target-date funds were launched in January 2016, and the "Index+" target-date funds were launched in June 2015. Wood SUF ¶ 62. On February 25, 2016, upon recommendation from NFP, the Wood Defendants voted to add the flexPATH Index target-date funds to the Plan's investment menu. Id. ¶ 55.

The Wood Defendants hired flexPATH on March 23, 2016, as the Plan's discretionary investment manager with authority to select and monitor investment options, including flexPATH's target-date funds, for the Plan's qualified default investment alternative. NFP & flexPath SUF ¶¶ 89, 91; Glickstein Decl. Ex. 27, at 2. flexPATH served as the "subadvisor" to the flexPATH target-date funds. NFP & flexPATH SUF ¶ 30. flexPATH was paid for its services, and it agreed to "not charge . . . the Plan additional fees" if its collective investment trust vehicles "are selected." Glickstein Decl. Ex. 27, at 2.

NFP began to work on updating the Plan's Investment Policy Statement ("IPS"), which sets forth specific factors that must be considered by fiduciaries of defined contribution plans when selecting, monitoring, and removing plan investments, to include, among other [*3] things, its proprietary "Scorecard" method and criteria to evaluate the new target-date funds. See NFP & flexPATH SUF ¶ 62. The *2016 statement* mandates, among other things, that funds with "short time histories" or "other unique circumstances" would not be scored under the traditional criteria used for other funds, but rather would be evaluated "qualitatively." Glickstein Decl. Ex. 54, at 7. Other funds would normally be monitored and scored individually, reflecting overall performance. Id. at 6. If they fell below criterial standards, they would be placed on a "watch list." Id. If a fund remained on a "watch list" for three consecutive quarters or four of the following seven quarters, then the fund would be considered for possible removal. Id. However, due to the "unique importance" of target-date funds, target-date funds failing to achieve criteria standards should be "carefully reviewed" before removal from the Plan in absence of a reasonable alternative. Id.

In June 2016, flexPATH exercised its delegated fiduciary authority over the Plan's qualified default investment alternative and selected flexPATH's proprietary target-date funds for the Plan. Wood SUF ¶ 76. Specifically, the flexPATH Index Moderate target-date fund was designated as the Plan's qualified default investment alternative to receive participant contributions for those who do not make an investment election. For the moderate glide path, the target-date funds invested in BlackRock's "LifePath Index" target-date funds. NFP & flexPATH SUF ¶ 39.

The Plan's flexPATH target-date funds underperformed during quarters between 2016 through 2018. See id. ¶ 123. Despite this, NFP did not recommend removal of the funds, reasoning that performance remained "strong." Id. ¶ 125.

In late 2018, the Wood Committee decided to replace the flexPATH target-date funds with Vanguard target-date funds. Wood SUF ¶ 112. At the same time, flexPATH was terminated as an investment manager with authority over the Plan's qualified default investment alternative. NFP & flexPATH SUF ¶ 127. Upon the advice of NFP, the Wood Defendants approved and added flexPATH's three collective investment trusts—the International Stock Fund, the Core Bond Fund, and the Large Cap Value Fund (hereinafter, the "Collective Investment Trusts")—to the

Plan. flexPATH subadvised these trusts, and utilizing this structure offered 36%-45% discounts off the underlying investment share classes. Id. ¶ 105.

For all of the flexPATH funds discussed in this case, Wilmington Trust, N.A. is the trustee of the funds while flexPATH serves as the subadvisor with authority over the investing of fund assets and the developing of investment strategies for the fund. Id. ¶¶ 29, 30.

B. Relevant Procedural Background

Plaintiffs filed its lawsuit in this Court on February 15, 2021. Compl., Dkt. No. 1. Plaintiffs first amended their complaint on May 24, 2021. First Amended Complaint, Dkt. No. 70. NFP, flexPATH, and Wood Defendants moved to dismiss on June 14, 2021. Dkt. Nos. 72, 74, 75. The Court granted and denied in part the Wood Defendants' motion, denied flexPATH's motion, and granted [*4] and denied in part NFP's motion. Aug. 18, 2021 Order, Dkt. No. 98. Plaintiffs amended their complaint a second time. Second Amended Complaint ("SAC"), Dkt. 105. All defendants moved to dismiss again. Mots., Dkt. Nos. 108, 110, 111. The Court granted in part and denied in part all three motions to dismiss.[2] Feb. 8, 2022 Order, Dkt. No. 150.

Plaintiffs' claims are: (1) breach of fiduciary duties related to the flexPATH funds under **29 U.S.C. § 1104(A)(1)** ; (2) breach of fiduciary duties related to the use of higher-cost versions of plan investments under **29 U.S.C. § 1104(A)(1)** ; (3) prohibited transactions related to the flexPATH funds under **29 U.S.C. § 1106** ; (4) failure to monitor fiduciaries; and, (5) breach of fiduciary duties related to the selection of flexPATH under **29 U.S.C. § 1104(A)(1)** .

NFP moves for summary judgment on the first, second, and third claims against it. Mot., Dkt. No. 194-1, at 1. The Wood Defendants moves for summary judgment on all claims. Mot., Dkt. No. 192. Finally, flexPATH moves for summary judgment on the first and third claims against it. Mot., Dkt. No. 196-1, at 1 n.2.

IV. Legal Standard

Summary judgment is appropriate where the record, read in the light most favorable to the nonmovant, indicates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." **Fed. R. Civ. P. 56(a)** ; see also Celotex Corp. v. Catrett, **477 U.S. 317** , **322-23** (1986). Summary adjudication, or partial summary judgment "upon all or any part of [a] claim," is appropriate where there is no genuine dispute as to any material fact regarding that portion of the claim. **Fed. R. Civ. P. 56(a)** ; see also Lies v. Farrell Lines, Inc., **641 F.2d 765** , **769 n.3** (9th Cir. 1981) ("**Rule 56** authorizes a summary adjudication that will often fall short of a final determination, even of a single claim . . . ." (internal quotation marks omitted)).

When resolving a motion for summary judgment, courts may consider only admissible evidence. **Fed. R. Civ. P. 56** . The Court considered only admissible evidence in resolving both the Defendants' motions for summary judgment. When the order cites evidence to which the parties have objected, the objection is impliedly overruled. Additionally, the Court declines to rule on objections to evidence upon which it did not rely.

Facts that are "material" are those necessary to the proof or defense of a claim, and are determined by referring to substantive law. Anderson v. Liberty Lobby, Inc., **477 U.S. 242** , **248** (1986). To determine if a dispute about a material fact is "genuine," the trial court must not weigh the evidence and instead must draw all reasonable inferences in the nonmoving party's favor. Tolan v. Cotton, **572 U.S. 650** , **655-59** (2014) (per curiam). The nonmoving party cannot manufacture a "genuine dispute" by relying on allegations in the pleadings. Anderson, **477 U.S. at 251** ; Oracle Am., Inc. v. Hewlett Packard Enter. Co., **971 F.3d 1042** , **1049** (9th Cir. 2020).

A trial court may not resolve issues of credibility to determine whether a fact is "genuinely disputed." Tolan, **572 U.S. at 658-59** ; Anderson, **477 U.S. at 255** ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."); Entrepreneur Media, Inc. v. Smith, **279 F.3d 1135** , **1149** (9th Cir.2002) ("[O]f course, it is for the trier-of-fact, not the court deciding whether to grant [*5] summary judgment, to determine issues of credibility."). To do so is to improperly weigh the evidence. Tolan, **572 U.S. at 658-59** . A court may discount uncorroborated, self-serving testimony where "it states only conclusions and not facts." Nigro v. Sears, Roebuck & Co., **784 F.3d 495** , **497-98** (9th Cir. 2015). However, a court may not discount "self-serving" testimony that includes contrary factual assertions and requires the observation of a witness's demeanor to assess credibility. See Manley v. Rowley, **847 F.3d 705** , **711** (9th Cir. 2017). Furthermore, an undisputed fact may support several reasonable inferences, but a trial judge must resolve those differing inferences in favor of the nonmoving party. Hunt v. Cromartie, **526 U.S. 541** (1999). In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, **477 U.S. at 255** .[3]

The moving party has the initial burden of establishing the absence of a material fact for trial. Id. at 256. "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . ., the court may . . . consider the fact undisputed." **Fed. R. Civ. P. 56(e)(2)** . Furthermore, "Rule 56[(a)][4] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., **477 U.S. at 322** . If the moving party meets its burden, to defeat summary judgment, the nonmoving party who bears the burden at trial must present more than a "mere scintilla" of "affirmative evidence" to raise a genuine issue of fact for trial. Galen v. Cnty. of L.A., **477 F.3d 652** , **658** (9th Cir. 2007) (citing Anderson, **477 U.S. at 248**). Therefore, if the nonmovant does not make a sufficient showing to establish the elements of its claims, the Court must grant the motion.

V. Discussion

A. Count 1: Breach of Fiduciary Duties re Investment in flexPATH Target-Date Funds

Plaintiffs allege that Defendants breached their fiduciary duties in violation of **29 U.S.C. § 1104(a)(1)** related to the selection, evaluation, and monitoring of the Plan's investments in the flexPATH target-date funds. SAC ¶ 164.

The Employee Retirement Income Security Act of 1974 ("ERISA") is designed to "protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." Wright v. Or. Metallurgical Corp., **360 F.3d 1090** , **1093** (9th Cir. 2004). ERISA imposes three duties on fiduciaries: (1) the duty to discharge their duties with "prudence"; (2) the duty to diversity investments to minimize risk of large losses; and (3) the duty to act in the sole interests of the participants for the "exclusive purpose" of providing benefits to the participants. **29 U.S.C. § 1104(a)(1)** . These duties "are the highest known to the law." Gilbert v. EMG Advisors, Inc., No. 97-17256, *1999 U.S. App. LEXIS 4719* , at *3 (9th Cir. Mar. 17, 1999) (internal quotations omitted).

Under ERISA's duty of prudence, fiduciaries are required to exercise "the care, skill, prudence, and diligence" that a "prudent" person in a "like capacity" would use. 29. U.S.C. § 1104(a)(1)(B); Tibble v. Edison Int'l (Tibble I), **729 F.3d 1110** , **1134** (9th Cir. 2013), vacated on other grounds[*6] , **575 U.S. 523** (2015). Drawing on the common law of trusts, this duty requires a fiduciary to "make such investments and only such investments as a prudent [person] would make of his [or her] own property." Tibble I, **729 F.3d at 1134** (internal quotations citations omitted). ERISA fiduciaries are required to "conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options." Hughes v. Nw. Univ., **142 S. Ct. 737** , **738** (2022).

Courts are required to evaluate whether the fiduciaries, "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." Wright, **360 F.3d at 1097** (quoting Donovan v. Mazzola, **716 F.2d 1226** , **1232** (9th Cir. 1983)). Thus, fiduciaries are not always required to "pick the best performing fund" or the "cheapest possible fund available on the market." Meiners v. Wells Fargo & Co., **898 F.3d 820** , **823** (8th Cir. 2018). That "one fund ultimately performed better than another fund, in the absence of a meaningful benchmark, do[es] not establish that the funds were an imprudent choice at the outset." Baird v. Blackrock Institutional Tr. Co., N.A., **403 F. Supp. 3d 765** , **780** (N.D. Cal. 2019). The "character and aims of the particular type of plan" that the fiduciary serves are important considerations when evaluating the alleged imprudence. In re Computer Scis. Corp. Erisa Litig., **635 F. Supp. 2d 1128** , **1134** (C.D. Cal. 2009) (quoting Kirschbaum v. Reliant Energy, Inc., **526 F.3d 243** , **253** (5th Cir. 2008)).

Courts "focus not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction." Tibble v. Edison Int'l (Tibble III), **843 F.3d 1187** (9th Cir. 2016) (en banc) (quoting Howard v. Shay, **100 F.3d 1484** , **1488** (9th Cir. 1996)). The prudence analysis focuses on the "fiduciary's conduct in arriving at an investment decision, not on its results." Id. A thorough investigation requires "a reasoned decision-making process." Tatum v. RJR Pension Inv. Comm., **761 F.3d 346** , **356** (4th Cir. 2014) (internal quotations omitted). The "prudent person standard" is "not concerned with results; rather, it is a test of how the fiduciary acted viewed from the perspective of the 'time of the [challenged] decision' rather than from the 'vantage point of hindsight.'" Roth v. Sawyer-Cleator Lumber Co., **16 F.3d 915** , **918** (8th Cir. 1994). The duty of prudence requires fiduciaries to "reach a well-reasoned decision after weighing the risks and benefits and consideration other alternatives." Cryer v. Franklin Resources, Inc., No. 16-cv-04265-CW, [**2018 BL 501778**], 2018 U.S. Dist. LEXIS 224010 , at *27 (N.D. Cal. Nov. 16, 2018) (citing Wright, **360 F.3d at 1097**). "Engaging consultants, even well-qualified and impartial ones, will not alone satisfy the duty of prudence." Tibble 1, **729 F.3d at 1134** .

The duty of prudence extends not only to the "initial selection of an investment" but also to "the continuous monitoring of investments to remove imprudent ones." Marshall v. Northrop Grumman Corp., No. 2:16-CV-06794, [**2019 BL 328678**], 2019 U.S. Dist. LEXIS 149162 , at *6 (C.D. Cal. Aug. 14, 2019) (quoting Wright, **360 F.3d at 1093**). ERISA fiduciaries must "systematically consider all the investments . . . at regular intervals" to ensure that they are "done in a manner that is reasonable and appropriate to the particular investments, courses of action, and strategies involved." Tibble v. Edison Int'l, **575 U.S. 523** , **523** (2015) (internal quotations omitted) (drawing on the law of trusts). Thus, fiduciaries breach [*7] their duty if they "fail to remove an imprudent investment" from the plan within a "reasonable time." Hughes, **142 S. Ct. at 738** .

ERISA's duty of loyalty mandates that fiduciaries "shall" act "solely in the interest of the participants" for the "exclusive purpose" of "providing benefits to participants." **29 U.S.C. § 1104(a)(1)(A)(I)** . The duty of loyalty is one of the common law trust principles that apply to ERISA fiduciaries. Washington v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, **504 F.3d 818** , **823** (9th Cir. 2007). While there is overlap with the duty of prudence, the duty of loyalty imposes distinct requirements. See Donovan v. Bierwirth, **680 F.2d 263** , **271** (2d Cir. 1982). The duty of loyalty prohibits a trustee "from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests." Baird, **403 F. Supp. 3d at 778** (citing Restatement (Third) of Trusts § 78 (2007)). If it is "possible to question the fiduciaries' loyalty," fiduciaries must "at a minimum to engage in an intensive and scrupulous independent investigation of their options to insure that they act in the best interests of the plan beneficiaries.'" Howard, **100 F.3d 1484** , **1488-89** (9th Cir. 1996) (quoting Leigh v. Engle, **727 F.2d 113** , **125-26** (7th Cir. 1984)).

1. NFP's Motion for Summary Judgment

Plaintiffs allege that NFP breached its duties of loyalty and prudence under **29 U.S.C. § 1104(a)(1)(A)** and **(B)** .[5] The crux of their claims is that because NFP was motivated to promote its affiliated company's investment funds to be included in the Plan at the time it was hired, it provided self-interested advice and failed to conduct a scrupulous and thorough process in evaluating the merit of the funds at the time of inception and monitoring the funds' performance. Because Plaintiffs' claims of imprudence are intertwined with their claims of disloyalty, the Court considers the issue of breach of duty of loyalty first.

a. Breach of Duty of Loyalty

NFP argues that the undisputed facts foreclose Plaintiffs' claim that NFP was influenced by "disloyal motives." Mot. 17. It argues that the evidence "shows that NFP genuinely and reasonably believed" the funds were in the best interests of the Plan participants and that Plaintiffs have not identified a single piece of evidence showing that NFP received "any benefit from the inclusion of flexPATH target-date funds." Reply 2.

According to the Investment Advisor Agreement, NFP was paid a flat fee for its advisory services. Ex. 29, at 5. Plaintiffs do not dispute this. They argue instead that despite this, NFP and flexPATH had "clear incentive" to promote and grow flexPATH's business because of their "close corporate relationship." Opp'n 15. They theorize that NFP's flat-fee arrangement was "entirely secondary" to its financial interest in "promoting its own investment business at the expense of the Plan participants' retirement savings." Opp'n 22. To refute NFP's claim of loyalty, Plaintiffs cite internal emails in which an NFP-flexPATH executive admits that adding flexPATH to the Plan lineup presented a lucrative "$900M opportunity" for them and that one of NFP's goals was to "position" flexPATH funds favorably in their presentations. Exs. PX72, at 1; PX 73, at [*8] 1. NFP and flexPATH share the same senior executives who hold the same positions at both companies. See, e.g., Vedova Tr. PX1; Giovinazzo Tr. Ex. PX2; Evlandar Tr. Ex. PX8. Additionally, certain NFP investment consultants received bonus compensation based on a percentage of the first-year revenue that flexPATH generated for flexPATH's services. Kallus Tr. Ex. PX16, at 9.

While NFP may have innocent explanations for these coincidences, a factfinder could reasonably conclude that NFP favored flexPATH's proprietary funds over others at the detriment of the plan participants. For instance, even when flexPATH's funds were consistently underperforming, NFP nonetheless recommended to continue utilizing the flexPATH funds. Shackleford Tr. 258:21-259:20, Ex. PX93. Indeed, a Wood Committee member expressed reservations about "be[ing] a little nervous about NFP pushing [f]lexPATH [target-date funds] as much as they do." Ex. PX92. NFP—as the Plan's objective, investment manager whose sole interest is in the plan participants—never recommended removal of the funds over which its parent corporation has an ownership interest in, despite the funds' consistent underperformance. In the end, it was the Wood Defendants who decided to remove the funds against NFP's advice. Johnson Tr. Ex. PX 44. at 21; Livingston Tr. Ex. PX10, at 43. While this is not per se evidence of disloyalty, considered holistically with the evidence in the record, these are "far too many coincidences" for a reasonable factfinder to conclusively find that NFP acted only with an "eye single" towards the Plan participants—even where it might not have beneficial for them to do so. See cf. Donovan, **680 F.2d at 271** .

Even assuming NFP's claim that Wood hired NFP precisely *because* it could offer the target-date funds to be true and thus, there was nothing dubious about its commitment to flexPATH's funds, there is sufficient evidence that calls NFP's theory into question. The duty of loyalty is "a heavy one," and NFP is unable to meet its burden here. Whether NFP "genuinely and reasonably believed" that the flexPATH Index target-date funds were in the participants' best interests—and whether that was the primary motive for NFP's actions—ultimately rests on the parties' respective credibility, rendering summary judgment on the issue of breach inappropriate.

b. Breach of Duty of Prudence

Plaintiffs have alleged that NFP breached its duty of prudence by: (1) consistently recommending the use of flexPATH funds to be used even though they were brand new, untested, and not yet on the market, and thus had limited performance history; (2) applying a different method of analysis to the evaluation of the funds, suggesting favorable treatment; (3) relying on hypothetical data when recommending the use of the funds, contravening prudent investment practices; (4) advising Wood to retain the funds in a manner inconsistent with the plan's Investment Policy Statement; (5) failing to present information on comparable passively managed alternatives; and (6) failing to compare the funds to meaningful benchmarks.

To prevail on summary [*9] judgment, NFP must come forth with evidence to establish that no reasonable factfinder would find that NFP's process of advising and monitoring the investments was "imprudent." To achieve this, it must produce evidence that demonstrates that it employed the appropriate methods to investigate the merits of and to monitor the flexPATH target-date funds. Given that here, it is possible to "question" NFP's loyalty, NFP is obligated to present evidence that it "engage[d] in an intensive and scrupulous independent investigation of their options to ensure that they act[ed] in the best interests of the plan beneficiaries." Howard, **100 F.3d at 1488-89** .

Here, NFP argues that the undisputed evidence demonstrates that NFP followed a prudent process when it advised Wood to select flexPATH Index target-date funds because NFP (1) gathered information prior to recommendation; (2) conducted a "QDIA Selection & Fit Analysis; (3) compared the flexPATH funds with alternative fund options; and (4) monitored the funds' performance after they were added to the Plan. Mot. 1; Ex. 137, at 12-15.

First, NFP cites a presentation in which NFP conducted a "Fit Analysis" to the Wood Committee on September 8, 2015. Glickstein Decl. Ex. 18, at 37-54. NFP contends that the presentation examined the participant deferral rates by four demographics of various Wood plans, analyzed the equity exposure and performance of six different target-date fund providers, performed its "Scorecard" analysis for each of the underlying managers of the target-date funds, and compared the flexPATH target-date funds with one other non-flexPATH target-date fund option (Putnam). Mot. 6-7.

Plaintiffs do not dispute that some form of analysis was done. Rather, they attack the legitimacy and thoroughness of the Fit Analysis and contend that this "analysis" was a sham. See Opp'n 4, 15-16. To support their claim, they cite various internal emails[6] preceding the September meeting to suggest that this analysis done only *after* NFP already decided to "recommend" flexPATH to Wood Defendants. Ex. PX50, at 3, Struckhoff Decl., Dkt. No. 204-45 (stating it "[m]ight be worthwhile for [NFP]'s CIO to be there for an initial discussion of [flexPATH]"); Ex. PX54, at 1, Struckhoff Decl., Dkt. No. 204-49 (stating that "there are four different [target-date fund] strategies (which will help us position flexPATH)"); see Opp'n 16.

The Court is not permitted to weigh the evidence at this stage. The evidence presented creates a genuine dispute of fact as to whether the analysis was objective and scrupulous or whether the analysis was a mere "post hoc attempt" to push NFP's own new investment vehicles offered by flexPATH. Opp'n 4.

Next, the parties rigorously dispute whether NFP *adequately* weighed pros and cons of other target-date-fund alternatives when recommending Wood include and retain the funds. See Opp'n 18. An ERISA fiduciary will, at times, be faced with circumstances that "will implicate difficult tradeoffs," and the Court "must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." Hughes, **142 S. Ct. at 742** . While ERISA does not give **[*10]** courts "broad license to second-guess the investment decisions of retirement plans," Smith v. CommonSpirit Health, **37 F.4th 1160** , **1162** (6th Cir. 2022), ERISA does not permit fiduciaries hide behind the semblance of some deliberative process. Fiduciaries cannot merely offer a broad range of options on the menu and "call it a day." Id. at 1160. Thus, the issue is not whether NFP did some weighing of alternatives, but whether NFP's weighing employed the appropriate methods in light of the goals of the Plan.

Whether NFP adequately weighed the costs and benefits of alternative target-date fund options is material, and this is in genuine dispute. See Marshall, [**2019 BL 328678**], 2019 U.S. Dist. LEXIS 149162 , **at *29-30** (denying summary judgment where a factfinder could reasonably view that the defendants failed to adequately weight the costs and benefits of an active management strategy against a passive one); Cryer, [**2018 BL 501778**], 2018 U.S. Dist. LEXIS 224010 , **at *28** (denying summary judgment on breach-of-fiduciary claim because a genuine dispute existed whether defendants adequately weighed the costs and benefits of a stable-value fund against money-market funds); Tibble I, **729 F.3d at 1136** (finding that discussions about the pros and cons of a stable-value fund versus a short-term investment fund was "fatal" to plaintiffs' claim); Cunningham, [**2019 BL 368222**], 2019 U.S. Dist. LEXIS 167868 , **at *43** (finding that assessing "a reasonable range of investment options with a variety of risk profiles" satisfied the duty of prudence and granting summary judgment on the issue of breach).

Plaintiffs criticize NFP's method of comparing flexPATH's hypothetical performance data against only one other fund option's actual performance data. Ex. 36, at 3-5, 7-9. They offer evidence that prudent fiduciaries typically investigate and recommend "investments based on historical performance, experience of the fund manager, and comparison to passive alternatives. The Plan's "long-time investment advisor" noted that "it [was] not best practice" to pick a fund with "no track record." Ex. PX96, at 1. Plaintiffs' experts opined that similarly situated, prudent fiduciaries would have evaluated comparable alternative options in the market, not relied on hypothetical performance data, and relied on longer performance history. Otto Report, Ex. 17, ¶ 84; Buetow Report Ex. 18, ¶ 80-81; Dyson Tr. 226:3-229:23, Ex. 107.

Furthermore, Plaintiffs point to evidence suggesting that when NFP applied a different and more substantive methodology (its Scorecard analysis) for investment options in which it did not have ownership interests in. Opp'n 16. Specifically, when NFP conducted an analysis for a "prospective option [that] was not managed by flexPATH," it conducted a "full-blown manager search and evaluated numerous potential alternatives." See Ex. 65, at 66-78 (showing Scorecard analysis for the ClearBridge fund, which was placed on the watch list); cf. Baird, [**2021 BL 10092**], 2021 U.S. Dist. LEXIS 5997 , **at *7** (finding, as a genuine issue of material fact, allegations that a fiduciary applied different methodology to its proprietary funds, thus improperly favoring its own funds without compliance to its own policies).

NFP does not dispute that its own process "highlight[ed] the flexPATH [target-date fund]s." Mot. 11. **[*11]** This "made sense given that . . . Wood Committee hired NFP in significant part *because* it could offer those investments." Id. (emphasis added). Thus, it implies, the fact that flexPATH may have been "positioned" favorably did not taint its recommendation process. However, Plaintiffs argue that this evidence could support a competing inference that NFP's process was "mere window dressing" to create the "*appearance*" of prudent monitoring. Opp'n 18 (emphasis in original). Thus, in viewing the evidence in light most favorable to the Plaintiffs as the nonmoving party and drawing competing inferences in their favor, as the Court must, Barlow v. Ground, **943 F.2d 1132** , **1134** (9th Cir. 1991), the Court finds that there is a genuine issue of material fact as to whether NFP's process was "prudent" when advising Wood to include flexPATH target-date funds in the Plan.

Next, NFP argues that "there is no triable issue of fact with respect to NFP's advice on retention of the flexPATH Index [target-date funds]" because NFP reported to the Wood Committee on the funds' returns, the underlying funds' returns versus each fund's benchmark and against similar funds, the underlying funds' "Scorecard" score, asset allocations based on the three different glide paths, and the relative performance of the flexPATH funds to a style benchmark. Mot. 14-15. NFP presents evidence to suggest that the monitoring occurred on a quarterly basis and that when the funds underperformed for "some quarters," NFP discussed the reasons with Wood. Ex. 57, at 44.

However, Plaintiffs present evidence that NFP did not actually "routinely" monitor the investments and did not always report the funds' underperformance to Wood, despite a consistent downward trend. E.g., Exs. PX 100, 62, 65. ERISA imposes a stringent duty on fiduciaries to root out imprudent investments within a reasonable time and on a continuous, systematic basis. Tibble, **575 U.S. at 523** ; Hughes, **142 S. Ct. at 738** . Evidence suggests that flexPATH glidepaths were not discussed until three years after the funds were included in the Plan. Meeting Minutes, Ex. 177, at 22. At least one NFP representative acknowledged that the comparison data "look[ed] pretty bad" shortly after the funds were included in the Plan and inquired whether they could "show [Wood] that looks more favorable, perhaps favoring in equity %." Ex. PX 69, at 1. Plaintiffs also present evidence to suggest that NFP did not review performance of the funds relative to a benchmark until two years after funds' inception date. Ex. PX100, at 46. Also, NFP and the Committee did not always meet quarterly, and there were no meetings for an extended period of time. Ex. 57, at 39-43; Ex. 12, at 29-31.

Next, NFP argues that because its monitoring process was consistent with the Investment Policy Statement and the Department of Labor's target-date fund guidance, no reasonable trier of fact would find NFP's actions in retaining the target-date funds to be imprudent. Fiduciaries who are responsible for plan investments governed by ERISA "must comply" with the "plan's written statements of investment policy, insofar as those written statements are consistent with the [*12] provisions of ERISA." Cal. Ironworkers Field Pension Tr. v. Loomis Sayles & Co., **259 F.3d 1036** , **1042** (9th Cir. 2001); Baird, [**2021 BL 10092**], 2021 U.S. Dist. LEXIS 5997 , at *7 (N.D. Cal. Jan. 12, 2021) (finding genuine disputes of material fact relevant to whether defendants failed to follow the plan's Investment Policy Statement when they failed to obtain an opinion of counsel as required by the policy before including funds at issue in the plan).

The parties appear to dispute which version of the Investment Policy Statement is operative. Plaintiffs contend that the 2008 version of the statement controlled at the time the target-date funds were recommended to Wood. Opp'n 17. But they contend that NFP's actions were also inconsistent with the 2016 version, arguing that the target-date funds should have been scored. See 2016 IPS, Ex. 54. NFP argues that the 2016 version was operative at the time, in which case, it did not act inconsistently with the policies therein. NFP concedes that it did not follow the process identified in the 2016 version of the statement to evaluate and replace the target-date funds. But it argues that this was not a breach of its duty because the funds were never placed on the watch list given the funds' limited performance history. Because the funds had limited history, NFP argues, the departure from its normal procedures of scoring and qualitative analysis was prudent and reasonable.

While the Investment Policy Statement gives the Wood Defendants the discretion to replace the funds, this does not shield NFP from liability. When viewed together with Plaintiffs' allegations that NFP tended to favor its affiliated company's funds, there is a genuine dispute over whether NFP acted contrary to its own policies to favor flexPATH's proprietary funds in failing to remove the funds within a reasonable time. The Court cannot resolve this issue at summary judgment. Based on the foregoing, Plaintiffs have raised a dispute of material fact as to whether NFP's monitoring process was "prudent" in light of the Plan's "particular investments, courses of action, and strategies involved." Tibble, **575 U.S. at 523** .

The "reasonableness" of a fiduciary's action is a "fact-intensive inquiry," and courts have recognized that "rarely will such a determination be appropriate on a motion for summary judgment." Cryer v. Franklin Res., Inc., No. 16-cv-04265, [**2018 BL 501778**], 2018 U.S. Dist. LEXIS 224010 , at *30 (N.D. Cal. Nov. 16, 2018) (internal citations omitted). Indeed, NFP cites cases in which issues of imprudent investigation and monitoring were not resolved at the summary judgment stage. Mot. passim (citing Reetz v. Lowe's Cos., Inc., No. 5:18-cv-00075, *2021 U.S. LEXIS 195803* , at *53-56 (W.D.N.C. Oct. 12, 2021), appeal filed, No. 21-2267 (4th Cir. Nov. 10, 2021); Reetz v. Lowe's Cos., Inc., No. 5:18-CV-00075, [**2021 BL 50374**], 2021 U.S. Dist. LEXIS 27076 , at *3 (W.D.N.C. Feb. 12, 2021) (denying summary judgment because evidence showed principled reasons for making investment decisions while acknowledging that the distinction depends heavily on the particular facts and circumstances of each case).

Because the evidence presented by the Plaintiffs would allow a reasonable trier of fact to conclude that the process was imprudent, the Court **DENIES** summary judgment as to NFP's breach of fiduciary duty.

c. Causation[*13]

"Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title 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** . The Ninth Circuit recognizes that a fiduciary's decision to "include an investment option on the plan menu . . . is a cause of any participant's loss." Tibble 1, **729 F.3d at 1124** (accepting tort-based theory of proximate cause as an acceptable interpreting of ERISA). A fiduciary is obligated to pay damages resulting only the portion of the investment that was imprudent, not the entire amount of the investment. Cal. Ironworkers Field Pension Tr. v. Loomis Sayles & Co., **259 F.3d 1036** , **1047** (9th Cir. 2001). Courts have recognized that "[c]ausal connection between breach and loss, like breach itself, is a fact-intensive inquiry that is not susceptible to summary judgment." Roth, **16 F.3d at 919** .

NFP argues that its alleged imprudent advice could not have caused losses to the plan because Wood's decision to hire flexPATH as the Plan's investment manager severed causation between NFP's advice and the selection of the funds. Mot. 18; IMA 5, Ex. 27. Plaintiffs argue first that NFP carries the burden of *disproving* causation, implying that Plaintiffs have met their burden of showing breach and loss. Id. Then they also contend that NFP's "relentless" self-interested advice caused plan losses, despite the "contractual boilerplate" in the Investment Manager Agreement. Opp'n 22. Plaintiffs argued that flexPATH was chosen "because NFP was most comfortable with them," which established the causal connection.

The Second, Fourth, Fifth, Eighth Circuits have explicitly taken the common law of trusts' burden-shifting approach[7] under ERISA, which shifts the burden of persuasion onto defendants to disprove causation by showing any loss to the plan was not caused by their breach of fiduciary duty. Sacerdote v. N.Y. Univ., 9 F.4th 95 , 113 (2d Cir. 2021) (holding that once plaintiffs prove breach of fiduciary duty and prima facie case of loss to the plan, the burden of persuasion shifts to the fiduciary to prove that loss was not caused by the breach of duty), cert denied, 142 S. Ct. 1112 (2022); Tatum v. RJR Pension Inv. Comm., 761 F.3d 346 , 362 (4th Cir. 2014) (same); McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234 , 237 (5th Cir. 1995) (same); Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915 , 917 (8th Cir. 1994) (same). In other words, defendants must show that "despite its imprudent decision-making process," the ultimate decision was "objectively prudent." Tatum, 761 F.3d at 363-65 . Once the burden shifts to defendants, defendants must show that a prudent fiduciary "would have" made the same decision. Id.

NFP does argue in its motion that its rationale for recommending the flexPATH target-date funds was "objectively" prudent, although it does so in the context of breach and not causation. See Mot. 12. Nevertheless, it has not been established that NFP breached its fiduciary duty, and NFP does not challenge the prima facie showing of loss. See id. at 17-18.

Assuming that Plaintiffs will be able to establish breach at trial and adopting the burden-shifting approach taken by a number of circuits, then the [*14] burden would shift to Defendants to disprove causation. But at this summary-judgment stage, given that breach has not been established, the burden does not shift, and Defendants can prevail if they present evidence that negates Plaintiffs' ability to demonstrate causation. At oral argument, Plaintiffs argued that logic demands that the burden always rests with defendants at summary judgment because at trial, the burden would never lie with plaintiffs to prove causation. This is because if a plaintiff succeeds in demonstrating breach, the burden shifts to the defendant. But if a plaintiff fails in demonstrating breach, the entire claim falls away, rendering as moot plaintiff's burden in demonstrating causation. While practically speaking this may be true, the Plaintiffs fail to identify any authority within the statutory framework of ERISA and summary judgment standard under Celotex that compels this reading at summary judgment. To prevail on a claim for breach of fiduciary duty under ERISA, a plaintiff must show that a defendant was (1) acting in a fiduciary capacity; (2) when the defendant violated an ERISA-imposed duty; and (3) defendant's breach caused losses to the plan. 29 U.S.C. 1109(a) . It cannot be the case that there is always presumption of causation.

To defeat Defendants' summary judgment motion, Plaintiffs must present facts that Defendants' actions caused the losses to the Plan. See Kopp v. Klein, 894 F.3d 214 , 221 (5th Cir. 2018) (holding that plaintiff "must allege facts to support the conclusion that the Defendants would have acted differently" and that "an alternative course of action could have prevented the Plan's losses"); Pizarro v. Home Depot, Inc., No. 1:18-cv-01566, *2022 U.S. Dist. LEXIS 181884* , at *37 (N.D. Ga. Sep. 30, 2022) (noting that it "cannot stand" that defendants "must disprove loss causation at summary judgment"); accord Wright v. Or. Metallurgical Corp., 360 F.3d 1090 , 1099 (9th Cir. 20014) ("[A] plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan.")[8] ; In re First Am. Corp. ERISA Litig., 258 F.R.D. 610 , 617 (C.D. Cal. 2009) (same); Friend v. Sanwa Bank Cal., 35 F.3d 466 , 469 (9th Cir. 1994) (holding that even if the defendant had breached section 1104(a)(1) 's duty of loyalty, plaintiff failed to present a genuine issue of material fact that this act caused the plan's losses).

The undisputed record shows that the causal connection between NFP's assumed imprudent advice and the ultimate loss resulting from the target-date funds' inclusion is too attenuated. No one disputes that NFP repeatedly recommended the approval of flexPATH target-date funds before the Wood Defendants voted to approve the passive flexPATH Index target-date fund in February 2016. See Ex. 137, at 12-15, Ex. 33, at 1. But ultimately, flexPATH—not the Wood Defendants—exercised its discretionary authority to select the funds in June 2016.[9] Ex. 27, at 1-2; Ex. PX80, at 22; Exs. 148, 106, 57. Furthermore, Wood Defendants agreed to be solely responsible for the selection of the Plan's investment manager. Ex. 27, at 5. Therefore, at most, it could be said that NFP's advice and recommendations were the "but-for" cause, but not the proximate cause, of the selection of the flexPATH [*15] target-date funds.

At oral argument, Plaintiffs suggested that even if NFP did not "cause" the selection of the target-date funds, NFP was nonetheless responsible for the damages flowing from the failure to remove the funds. However, prior to 2018, NFP was not the entity responsible or with authority to remove those funds—flexPATH was. Indeed, the Wood Defendants ultimately removed flexPATH as manager and then voted to remove the target-date funds. Any losses resulting from the failure to remove the funds would be caused by the flexPATH, not NFP.

In conclusion, while there are genuine issues of material fact as to NFP's breaches of fiduciary duties, Plaintiffs cannot show that NFP caused losses resulting from the Plan's investments in the flexPATH target-date funds. Accordingly, the Court **DISMISSES** Plaintiffs' breach-of-fiduciary duty claim against NFP.

2. Wood Defendants's Motion for Summary Judgment

Plaintiffs allege that the Wood Defendants breached their duty of prudence by selecting the flexPATH Index target-date funds and the flexPATH Collective Investment Trusts without a reasoned decision-making process. SAC ¶¶ 165, 166. As a result of these breaches, Plaintiffs allege that the Wood Defendants are personally liable for any losses resulting from their breaches. Id. ¶ 170.

a. Approving flexPATH Index Target-Date Funds

As a preliminary matter, this Court previously held that flexPATH's status as an appointed investment manager precludes claims against Wood Defendants under ERISA Section

405(d)(1) related to flexPATH's investment and monitoring of the target-date funds. See 29 U.S.C. § 1105(d)(1) ; Feb. 8, 2022 Order 24 ("Feb. 8 Order"), Dkt. No. 150; Aug. 18, 2021 Order 11 ("Aug. 18 Order"), Dkt. No. 98. Thus, contrary to Plaintiffs' assertion that Wood Defendants had a duty to "monitor the [target-date funds] on an ongoing basis," Opp'n 6, the Wood Defendants had no fiduciary duty to monitor the flexPATH target-date funds after June 2016, see Feb. 8 Order 24. To the extent that Wood Defendants are liable for "monitoring," they are liable only for the monitoring of the appointed fiduciary under Count 4. With regard to the selection of the funds, Wood Defendants can only be liable for its approval of the funds. See Feb. 8 Order 24.

First, Wood Defendants argue that the Wood Committee employed a reasoned decision-making process prior to approving the inclusion of the flexPATH target-date funds. Mot. 15. They claim that the Plaintiffs' allegations are contrary to the evidence, which demonstrates that the Wood Committee considered the pros and cons of selecting the flexPATH Index target-date funds to be included in the Plan's lineup.

In opposition, Plaintiffs argue that the Wood Committee's process of the selecting and approving the target-date funds had "numerous flaws." Namely, they argue that the Committee failed to consider flexPATH's management inexperience or the merits of alternative target-date funds from more experienced managers; failed to consider actual performance history of the funds relative to their benchmark index or peer group; failed to consider the funds' performance [*16] in accordance with the Investment Policy Statement; considered no performance data for the target-date funds; selected the target-date funds without fully understanding the differences between a "custom" target-date fund despite this being their goal; and failed to press NFP about its relationship with flexPATH. See generally Opp'n.

Plaintiffs first point to Wood Defendants' *lack* of evidence that they "extensively investigated [target-date fund] options" and adequately "consider[ed] the pros and cons" before voting to approve the addition of target-date funds to the Plan. The only evidence that Wood Defendants cite is a summary of meeting minutes that states conclusively that the "committee reviewed the pros and cons." Minutes 18, Ex. 12, Dkt. No. 197-12.

Plaintiffs then present evidence showing that the Committee considered only one other target-date fund option, Ex. 140, at 2 (inquiring about "other products" flexPATH was compared against); NFP Responses 2-3, Ex. 36 (identifying only Putnam Retirement Advantage), and also did not document its reasons for why it ruled out other "the [target-date fund]s in the merging plans were ruled out," e.g., Ex. PX75, at 30-31, 38-39; Ex. PX44, at 11, 28. Then, plaintiffs present evidence that the Committee did not fully understand the target-date funds' investments holdings and whether the target-date funds were "custom" or "noncustom," despite "heavily" emphasizing a desire for a "custom" target-date fund. Henderson Tr., Ex. PX76, at 26; Johnston Tr., Ex. PX44, at 9; Lisenbe Tr., Ex. PX75, at 14-17. They also present expert testimony that opines that Wood Defendants' investigation "fell far short" of the prudent investment-selection practices. See Otto Report & Dr. Buetow Report Exs. PX17-18.

Second, Wood Defendants contend that part of its prudent process, the Wood Committee "took several steps" to assure there was no conflict of interest between NFP and flexPATH. But the undisputed evidence does not support this. The only evidence in the record are (1) a single email in which a committee representative asked whether flexPATH would receive additional fees and (2) a single, in-person conversation that took place between a committee representative and one NFP representative. Ex. 34; Johnson Tr. 138:4-14, 141:15-17, Ex. 5. Indeed, the Committee largely regarded NFP and flexPATH's potential revenue sharing relationship as irrelevant and stated that if "[NFP was] comfortable with the flexPATH target-date funds], then that was good enough for me." Lisenbe Tr. 268:4-13, Ex. 4, Dkt. No. 197-33; Lisenbe Tr. 2067-17, Ex. PX75. But later, a committee representative admitted that it made him "a little nervous about NFP pushing" flexPATH's funds. Ex. 92. Thus, a factfinder can reasonably find that these limited inquiries into NFP and flexPATH's relationship insufficient investigation into the potential conflicts of interest.

Construing the foregoing evidence in a light most favorable to Plaintiffs, the Court finds that a reasonable factfinder can conclude that the Wood Defendants failed their duty of prudence in approving the flexPATH target-date funds to be [*17] included in the Plan.

b. Selecting flexPATH Collective Investment Trusts

It is undisputed that at the time the flexPATH Collective Investment Trusts were added to the plan, flexPATH was no longer the investment manager, and thus the Wood Defendants approved and added these trusts to the Plan themselves. Therefore, unlike the claims regarding the target-date funds, the Wood Defendants had a duty to employ a prudent process in selecting (not just approving) these Collective Investment Trusts and would be liable for any resulting losses.

Plaintiffs allege that the Wood Defendants failed their fiduciary duty of prudence by employing an imprudent process in selecting the three flexPATH Collective Trusts: the International Stock, the Core Bond, and the Large Cap Value funds, all of which plaintiffs claim to have been inferior to prudent alternatives available to the Plan at the time.

In essence, Wood Defendants argue that Plaintiffs manufacture issues of fact with the benefit of hindsight to avoid summary judgment. Mot. 3. They contend that the record reflects that they employed a prudent process in choosing these Collective Investment Trusts, which "cost less, and performed as well as or better than, than the funds they replaced." Id. at 2; Ex. 85. These funds saved the Plan about $855,000 per year and reduced recordkeeping expenses. Ex. 85. In choosing these funds after a "rigorous and lengthy consideration," Wood Defendants asked for and received discounts or cheaper investment options. Id.

In opposition, Plaintiffs argue that record is devoid of investigative efforts by the Wood

Committee to investigate these funds or other alternative funds, while there is evidence to suggest that other, prudent alternatives in the same investment category were available at the time to the Plan. The Court agrees.

The Wood Defendants present no evidence to suggest that the Wood Committee considered or investigated any other non-flexPATH Collective Investment Trusts when the Committee instructed NFP to consider options outside the Wood and Amec plans. Ex. 80, at 10648 (presenting the three Collective Investment Trusts to Wood); Fiduciary Investment Review, at 59, Ex. 70 (same). Plaintiffs point to the meeting minutes (and lack of meeting minutes) of the Wood Committee between the first time the Collective Investment Trusts were proposed in July 27, 2017, until the time they were added on November 14, 2018, which demonstrates a lack of discussion of and investigation into the Collective Investment Trusts at all. See, e.g., Ex. 62, at 64-55 (July 27, 2017 meeting); Ex. 12, at 30, 32 (meetings on Apr. 24, 2018; Aug. 2, 2018; and Nov. 1, 2018); Ex. 66, at 74 (Aug. 2, 2018 meeting presentation with one page about the Collective Investment Trusts); Ex. 67 (Nov. 1, 2018 meeting presentation); Ex. 57, at 51-52 (Nov. 1, 2018 meeting notes). And while the mere fact that a record of discussions does not appear in meeting meetings does not mean that such discussions never took place, see Falberg v. Goldman Sachs Grp., Inc., No. 19 CIV. 9910 (ER), *2022 WL 4280634* , at *13 (S.D.N.Y. Sept. 14, 2022), the Court finds that the evidence [*18] cited by Plaintiffs, balanced against the slim evidence cited by Defendants, raise serious questions as to whether the Wood Committee's investigatory process was prudent.

To demonstrate that Wood Defendants' process in selecting the Collective Investment Trusts were deficient by industry standards, Plaintiffs present expert testimony, Dr. Buetow Ex. PX 18, ¶¶ 97-98, that shows during the same period in which the Plan invested in the Collective Investment Trusts, there were other options that were in the "same investment category" as the flexPATH Collective Investment Trusts that had longer performance histories and favorable attributes. Plaintiffs also offer expert testimony to suggest that Wood's investigation of the Collective Investment Trusts "fell far short" of industry practice. Otto Report, Ex. PX17, ¶¶ 1, 5-8.

Next, the parties dispute whether Wood Defendants acted consistently with the Investment Policy Statement in deciding to add the Collective Investment Trusts to the Plan, given Plaintiffs contest the operative version of the statement. Nevertheless, Wood Defendants contend that their conduct was consistent with either version. Plaintiffs do not respond to this in their opposition and fail to identify any provisions in either the 2008 or 2016 version that would demonstrate Wood Defendants' violations thereof. See Opp'n 19. Thus, no reasonable factfinder would find that the Wood Defendants' conduct was inconsistent with the policy statement, whichever version it may be. However, this is only one consideration of whether Wood Defendants acted prudently in selecting the Collective Investment Trusts for the fund lineup.

Viewed together with the allegations and the evidence calling into question Wood Defendants' efforts in investigating non-flexPATH alternatives and failure to evaluate the merits of the investment trusts themselves, a trier of fact can reasonably conclude that Wood Defendants failed their duty of prudence in selecting the Collective Investment Trusts.

The Court **DENIES** the motion for summary judgment as to Wood Defendants' breach regarding the selection of both the flexPATH target-date funds and the Collective Investment Trusts.

c. Causation

Wood Defendants argue that they are entitled to summary judgment because Plaintiffs cannot show a causal link between any of the purported breaches and the harm suffered by the Plan. Mot. 20. Plaintiffs contend that the burden is on Wood Defendants to disprove causation at this stage and that the issue is genuinely disputed. See Opp'n 19-20.

Regarding the selection of target-date funds, this Court previously stated that the Wood Defendants "clearly played a formal and influential role that led to the Plan's investments in the target-date funds." Feb. 8 Order 34. But the evidence now reveals that the only conduct taken by Wood Defendants before they appointed flexPATH was their approval of the funds in March 2016. Therefore, the issue is whether Wood Defendants' approval of the flexPATH target-date funds "caused" flexPATH [*19] to select the funds, given that flexPATH retained the sole authority and discretion to make that ultimate decision. Based on the foregoing, Plaintiffs cannot establish causation with regard to the investments in the target-date funds. While the Wood Defendants might have "greenlit" use of the flexPATH target-date funds, it was flexPATH who made the choice to select those funds.

Apart from the issue of selection, Plaintiffs raised the question at oral argument of whether the Wood Defendants' failure to remove the target-date funds sooner caused losses to the Plan. However, flexPATH retained the exclusive authority to remove the target-date funds between 2016 and 2018. The Wood Committee ultimately decided to select the Vanguard funds instead of the flexPATH funds and concurrently terminated flexPATH as investment manager in 2018. Therefore, flexPATH's status as the investment manager during this period precludes Plaintiffs' ability to establish causation post 2018 with respect to removal of the target-date funds.

While there is no similar "severance" of causation with regard to the selection of the Collective Investment Trusts because the Wood Defendants alone selected the trusts, the Court nonetheless concludes that plaintiffs have failed to demonstrate a causal link between the Wood Defendants' decision to include the trusts and the losses resulting from that decision. At oral argument, the Wood Defendants argued that because Plaintiffs carry the burden in showing causation, they must, at a minimum, present evidence that no prudent fiduciary would have made the very same decision to add the Collective Investment Trusts to the Plan. The Court is inclined to agree.

Given that breach has not been established at summary judgment, the burden does not shift to

Defendants to show that "a reasonable and prudent fiduciary 'would have' made the same decision" to add the trusts to the Plan. Tatum, **761 F.3d at 342** . The burden rests with Plaintiffs to prove that the losses are causally connected to the Wood Defendants' alleged breach. To that end, Plaintiffs must demonstrate that no prudent fiduciary in the Wood Defendants' position would have made the same decision. But the existence of reasonable alternatives is not enough to establish causation. The mere fact that reasonable alternatives existed at the time the decision was made does not compel the conclusion that the decision itself was objectively imprudent. Of course, one can infer from the existence of better options that the decision was imprudent, but that is not the only inference that can be drawn. While it is true that Plaintiffs presented evidence of other reasonable alternatives on the market, see Ex. PX18 Dr. Buetow Report ¶¶ 97-98, Plaintiffs presented no evidence showing that no prudent fiduciary would have selected these collective investment trusts.

In conclusion, the Court **GRANTS** the Wood Defendants' motion for summary judgment as to the issue of causation for both the flexPATH target-date funds and Collective Investment Trusts. As a result, [*20] the Court **DISMISSES** Plaintiffs' claims against the Wood Defendants.

3. flexPATH's Breach of Fiduciary Duties re flexPATH Investments

Plaintiffs allege that flexPATH breached its duties of prudence and loyalty by failing to conduct a thorough investigation into whether selecting and retaining its own target-date funds would be in the best interests of the Plan participants.

a. Breach of Duty of Loyalty

flexPATH contends that no reasonable trier of fact would find that it acted disloyally when it selected its own funds to be included in the Plan's lineup because Plaintiffs' have presented "no evidence" that flexPATH's decision to include the target-date funds were not made in the best interests of the Plan participants. Mot. 17-18. flexPATH argues that it was without want for Woods' "seed money" and received compensation "independent" of the type of investments made. Id. at 18.

For similar reasons previously discussed, the Court disagrees. While the fact that flexPATH selected its own funds is not per se evidence of disloyalty, the Court finds that Plaintiffs have presented sufficient evidence that would allow a trier of fact to reasonably conclude that flexPATH prioritized its own interests in growing its investment business at the expense of the Plan participants. Resolution of this issue necessarily involves weighing the credibility of witnesses and weight of the evidence presented by both parties. Both parties offer competing theories and supporting evidence, but the Court must draw all inferences in favor of the nonmoving party, and in doing so, the Court denies summary judgment as to flexPATH's breach of duty of loyalty.

b. Breach of Duty of Prudence

flexPATH argues that it undisputedly employed a sound process when selecting the target-date funds as the Plan's investments, relying in large part, of the actions that NFP took when advising Wood Defendants to approve the inclusion of the funds in the Plan's lineup.

First, flexPATH argues that cannot be held liable because it need not have "needlessly repeat[ed]" the "exact same analyses" previously performed, implying that it did not need to perform further analysis of the target-date funds after NFP advised Wood to approve the target-date funds. See Mot. 11. The Court disagrees.

It is beyond dispute that ERISA imposes a strict and heavy burden upon fiduciaries to conduct careful and prudent analysis before exercising their discretionary power to make investments on behalf of Plan participants. Here, Wood Defendants entrusted this critical duty to flexPATH. flexPATH was the Plan's discretionary investment manager with the sole authority to choose the type of investments the Plan would include. Ex. 27 at 1-2 (describing that "flexPATH will have complete authority and discretion"). While it may be true that Wood Defendants approved the funds for selection, it was flexPATH who made the ultimate decision to include the funds. Even if NFP performed months of "prudent analysis"—which Plaintiffs rigorously dispute—flexPATH cannot skirt its own ERISA [*21] prudence obligations by relying solely on "analyses" performed prior to its appointment. It must "exercise *independent*, professional judgment and to insure that the investments of assets entrusted to it are based on such judgments." Lowen v. Tower Asset Mgmt., **829 F.2d 1209** , **1219** (2d Cir. 1987) (emphasis added) ("ERISA contemplates that after management authority over Plan assets is delegated to an investment manager under Section 402(c)(3), the manager becomes a fiduciary to the plan and *not merely the instrument* by which the investment whims of trustees are carried out with unquestioning obedience." (emphasis added)).

The Court recognizes that in some cases, the processes by which investment managers and investment advisors utilize in the course of their duties will overlap, the Court finds that the flexPATH has failed its summary-judgment burden to establish that its conduct was prudent as a matter of law. Furthermore, the decision on which flexPATH relies for this proposition undercuts its own argument that summary judgment is warranted here. See Reetz v. Lowe's Cos., No. 5:18-cv-75, [**2021 BL 389235**], 2021 U.S. Dist. LEXIS 195893 (W.D.N.C. Oct. 12, 2021) (involving a five-day bench trial, after which the court carefully rendered its decision based on the voluminous testimonial and documentary evidence presented).

Next, flexPATH presents various arguments that the target-date funds were objectively prudent products, attacking Plaintiffs' proffered evidence as improper hindsight analysis. See Mot. 13-16. However, for similar reasons previously discussed, the Court finds that Plaintiffs have presented sufficient evidence to defeat flexPATH's motion for summary judgment. Both parties challenge the other's expert opinions to dispute whether the target-date funds were objectively prudent investments. See Mot. 16; Opp'n 21. Because these investments were "objectively prudent," flexPATH argues, it is "insulated from liability" because it has demonstrated that "a hypothetical fiduciary would have made the same decision anyway." Tatum, **761 F.3d at 374** . However, whether or not this holds true goes to the issue of causation, not breach, and flexPATH makes no argument that Plaintiffs cannot demonstrate causation.[10] See generally Mot. In any event, Plaintiffs have presented sufficient evidence to overcome flexPATH's motion for summary judgment.

Based on the foregoing and for the reasons similarly discussed above, the Court **DENIES** flexPATH's motion for summary judgment on Plaintiffs' ERISA claims based on the flexPATH's selection of the target-date funds.

B. Count 2: Breach of Fiduciary Duties Related to the Use of Higher-Cost Versions of Plan Investments (Share Class Claim)

Plaintiffs allege that Defendants failed to minimize fees and costs by using higher-cost mutual fund investments rather than investing in the less expensive, lowest-share class[11] of the underlying funds.

The Supreme Court in Tibble noted that a "trustee cannot ignore the power the trust wields to obtain favorable investment products, particularly when those products are *substantially identical —other than lower cost*—to products [*22] the trustee has already selected." **843 F.3d at 1198** (emphasis added). The existence of lower-cost alternatives alone is insufficient to show that retaining the funds were imprudent; the alternatives must be substantially identical to be comparable. Davis v. Salesforce.com, No. 21-15867, [**2022 BL 123748**], 2022 U.S. App. LEXIS 9527 (9th Cir. Apr. 8, 2022) (unpublished) (identifying two lower-cost shares as available substitutes for the mutual funds during class period as sufficient to support a breach of duty of prudence claim for failing to switch to lower-cost alternatives); White v. Chevron Corp., **752 F. App'x 453** , **455** (9th Cir. 2018) (unpublished) (noting that fiduciaries "could have chosen different vehicles for investment that performed better during the relevant period," or "sought lower fees for administration of the fund" is insufficient to establish a breach of fiduciary duty).

"[C]ost-conscious management is fundamental" to the prudent investments and "should be applied not only in making investments," but also in monitoring such investments. Tibble v. Edison Int'l, No. 07-5359, [**2017 BL 287522**], 2017 U.S. Dist. LEXIS 130806 , at *34 (C.D. Cal. Aug. 16. 2017). Beneficiaries subject to "higher fees for materially identical funds lose not only the money spent on higher fees, but also 'lost investment opportunity': that is, the money that the portion of their investment spent on unnecessary funds would have earned over time." Tibble III, **843 F.3d at 1198** .

The Ninth Circuit has recently sustained complaints containing allegations that ERISA fiduciaries failed to remove virtually "identical" shares of the same investments. See Kong v. Trader Joe's Co., No. 20-56415, [**2022 BL 132358**], 2022 U.S. App. LEXIS 10323 , at *2-3 (9th Cir. Apr. 15, 2022) (unpublished) (finding that the fiduciary's executive committee could be found to have failed the duty to monitor and control the offering of a number of mutual funds in the form of retail share classes, which carried higher fees than those charged by otherwise identical institutional share classes of the same investments); Davis, [**2022 BL 123748**], 2022 U.S. App. LEXIS 9527 , **at *1** (finding that defendants could be found to have acted imprudently by failing to timely switch over to lower-cost alternatives that were the "same in every respect other than price").[12]

District courts have found a breach of fiduciary duty for investing in higher-cost shares instead of lower-cost shares of the same product. Tibble, [**2017 BL 287522**], 2017 U.S. Dist. LEXIS 130806 , **at *38** (finding no prudent fiduciary would purposefully invest in higher-cost retail shares instead of lower-cost institutional shares for the mutual funds in question); Terraza v. Safeway Inc., **241 F. Supp. 3d 1057** , **1076-77** (N.D. Cal. 2017) (finding that plaintiff alleged breach of fiduciary duty where the only difference price and there was an allegedly deficient process).

1. NFP's Motion for Summary Judgment

It appears that Plaintiffs' only excessive fee claim against NFP relates to the "Trust Plus" shares of Vanguard Target Retirement target-date funds. See Opp'n 23. Plaintiffs essentially claim that NFP breached its duty of prudence by failing to negotiate further with Vanguard to obtain the lower-cost "Select" shares. Id.

The Court agrees with NFP that Plaintiffs cannot demonstrate that NFP breached its duties by failing to obtain lower-cost Vanguard shares. Plaintiffs' arguments [*23] rest largely on speculation and hindsight. There is no genuine dispute that NFP sought the lowest-cost options from Vanguard and communicated the best offers to Wood Committee. Ex. 158. The only evidence upon which Plaintiffs rely is Vanguard's follow-up email requesting "feedback" on their "bundled" offer. Id. at 1. Based on this, Plaintiffs argue that NFP should have negotiated further to obtain a more palatable result. This argument is without merit. NFP argues that the Wood Plan "was not close to meeting the minimum investment threshold" for the "Select" share class, which was offered for plans "more than twice the size" of the Plan. Mot. 25. While it is "common for investment advisors representing large 401(k) plans to call mutual funds and request waivers of the investment minimums," Tibble v. Edison Int'l, No. 07-5359, [**2010 BL 170372**], 2010 U.S. Dist. LEXIS 69119 , at *27-28 (C.D. Cal. July 8, 2010), affirmed, **729 F.3d 1110** (9th Cir. 2013), plaintiffs offer no evidence that "further negotiation" with Vanguard would have resulted in Vanguard dropping its condition (that Vanguard also manage the index tier).

The Court finds that there is no genuine dispute that NFP acted prudently when seeking and advising Wood Defendants to retain the "Trust" shares of the Vanguard Retirement target-date funds. The Court **GRANTS** NFP's motion for summary judgment as to Count 2.

2. Wood Defendants' Motion for Summary Judgment

Plaintiffs allege in their complaint that Wood Defendants breached their duty of prudence by selecting and continuing to retain "higher-cost" shares of the mutual funds and the Collective Investment Trusts despite lower-cost shares for the exact same investment options having been available to the Plan. SAC ¶¶ 111, 122, 138, 174. Plaintiffs allege Wood Defendants should have utilized lower-cost "R" shares and lower-cost "Select" shares of the Vanguard Target Retirement target-date funds that were available to them, and should have asked NFP to investigate whether the underlying funds could be available at lower cost. Id. ¶ 147.

a. Collective Investment Trusts

The parties dispute whether the Wood Defendants had an obligation to investigate the underlying investments to determine whether they would be available at a lower cost. Mot. 17-18; Opp'n 19. Wood Defendants argue that investigating the underlying funds made little sense because these were "fund-of-fund" structures offered at 36%-45% discounts "off what it would cost Wood to buy underlying investments outside of the [Collective Investment Trust]." Mot. 17-18; Executive Review Compilation at 40, 44, Ex. 57 (identifying savings); Ex. 5, at 70, 80 (same). Utilizing this structure offered "volume discounts" that Wood Defendants would not have otherwise obtained. Mot. 17-18. Plaintiffs do not dispute this.

This is precisely the kind of "difficult tradeoff" a fiduciary faces when choosing one investment vehicle over another. See Hughes, **142 S. Ct. at 742** . As Wood Defendants point out, the Plan would have had to trade off flexPATH's sub-advisor services for the benefit for the investing in the underlying funds. Moreover, Plaintiffs present no evidence whatsoever that any of the [*24] underlying fund providers would have agreed to offer their investments on a "standalone basis." Based on the foregoing, the Court finds that there is no genuine dispute that Wood Defendants acted prudently by choosing to invest in the Collective Investment Trusts instead of investing in the underlying funds.

b. Index Target-Date Funds in "I1" shares

Wood Defendants argue that no prudent fiduciary would have chosen the lower-cost "R" shares because the record reveals that the "I1" shares of the flexPATH Index Funds were, in fact, the lowest-cost versions of the funds that were available, not the "R" shares. At the time in March 2016, the I1 funds charged a total fee of 25.6 basis points. See Appendix B, Participation Agreement 5-6, Ex. 43, at 6-7 (showing breakdown of I1 share class fees). The "R" shares charged 19 to 20 basis points. SAC ¶ 147.[13] Pursuant to the custom pricing arrangement in the IMA, flexPATH needed to credit back "some of" its standard fee of 10 basis points. Ex. 44, at 1. By April 2016, the fees had been reduced by 2 basis points, bringing the total to 23.6 basis points. Ex. 45, at NFP0004949. After calculating the credits back to the Plan, the total fees were calculated to be 17.5 to 17.6 basis points. Ex. 45, at 1 (email reflecting a summary of the net expense ratio after re-enrollment of flexPATH target-date funds was complete). However, Plaintiffs point to contradicting evidence that suggests that the net expense ratio was actually 24 basis points, not around 17 basis points, as of September 2016. FIR 42, Ex. 150, at 45.

Nevertheless, Plaintiffs have failed to respond entirely to Wood Defendants' arguments regarding the "I1"class shares. Because Plaintiffs have failed to defend their position regarding these investments and offer no evidence to refute Defendants' claims, the Court infers that Plaintiffs abandon the claims regarding the "I1" shares. See Marentes v. State Farm Mut. Auto. Ins. Co., **224 F. Supp. 3d 891** , *919* (N.D. Cal. 2016). The only share-class theory Plaintiffs advance concerns the Vanguard Target-Date fund "Select" shares, which the Court now considers in turn.

c. Vanguard Target-Date Fund "Trust Plus" shares

Wood Defendants argue that no prudent fiduciary would have selected or been able to secure lower-cost "Select" shares over the "Trust Plus" shares of the Vanguard Target Retirement target-date funds. NFP asked for Vanguard's "best pricing." In response, Vanguard offered a "bundle" of "Select" shares for 5 basis points but only if Vanguard manages the "index tier below." Ex. 89, at 6. Vanguard also offered stand-alone index funds for 6 basis points. Id. at 5. Ultimately, Wood selected the latter. Id. at 3.

Plaintiffs present no evidence to dispute that Wood Defendants' selection of the "Trust Plus" shares over the "Select" shares was imprudent. They erroneously focus solely on the fact that the "Select" shares charged "lower fees" without addressing the condition that came with that lower price. Indeed, even Plaintiffs admit that fiduciaries are "required to consider factors other than price." Opp'n 19 (citing White, [**2016 BL 281396**], 2016 U.S. Dist. LEXIS 115875 , **at *31**). Plaintiffs offer no evidence that Wood Defendants' decision to reject [*25] the offer for the Select shares was objectively imprudent. Therefore, the evidence establishes that no reasonable trier of fact would conclude that the Wood Defendants "ignored" the Plan's ability to obtain the lowest-cost shares for these funds.

In conclusion, Plaintiffs' 20/20 hindsight arguments are insufficient to maintain Count 2 against the Wood Defendants. Plaintiffs have failed to demonstrate that the Wood Defendants' conduct fell short of their fiduciary obligations when selecting Collective Investment Trusts, "I1" shares of the flexPATH Index Funds, and Vanguard "Trust Plus" shares. Thus the Court **GRANTS** Wood Defendants' motion for summary judgment on Count 2.

C. Count 3: Prohibited Transaction Related to the flexPATH Funds

In addition to imposing duties of loyalty and care, ERISA "expressly prohibits certain transactions where the potential for abuse is particularly acute." Wright, **360 F.3d at 1094** . ERISA broadly prohibits two kinds of transactions: (1) transactions between a plan and a party-in-interest; and (2) transactions between a plan and a plan fiduciary. See **29 U.S.C. § 1106** .

A fiduciary "is not permitted to cause the plan to engage in a transaction, if he or she knows or should know that the transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest of any assets of the pan." **29 U.S.C. § 1106(a)(1)(D)** . ERISA defines "party in interest" to include persons furnishing "services" to a plan. Id. This includes fiduciaries and service providers. Danza v. Fid. Mgmt. Tr. Co., **533 F. App'x 120** , **125** (3d Cir. 2013) (unpublished). Congress "defined 'party in interest' to encompass those entities that a fiduciary might be inclined to favor at the expense of the plan's beneficiaries." Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc., **530 U.S. 238** , **242** (2000). **Section 1106(a)** does not require that the "party in interest" who receives the benefit to be the same entity that causes the prohibited transaction. See **29 U.S.C. § 1106(a)(1)** .

Section 1106(b) prohibits self-dealing by a plan fiduciary regarding plan assets. Id. § 1106(b). Specifically it states that a fiduciary shall not

> (1) deal with the assets of the plan in his own interest or for his own account, (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Id. § 1106(b)(1)-(3). The purpose of this section is prevent a fiduciary "from being put in a position where he has dual loyalties and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries." Danza, **533 F. App'x at 126** . "The protective function of ERISA is at its height . . . when there is a risk of fiduciary self-dealing." Sweda v. Univ. of Pa., **923 F.3d 320** , **324** (3d Cir. 2019). A fiduciary who has conflicting loyalties must still adhere to the general duty of loyalty as described in section 404 of ERISA. A party may be found to have breached the duty of loyalty, "even if the party has not committed a per [*26] se prohibited transaction under ERISA." Kanawi v. Bechtel Corp., **590 F. Supp. 2d 1213** , **1223** (N.D. Cal. 2008).

1. NFP's Prohibited Transaction

Plaintiffs allege that NFP participated in prohibited transactions by causing the Plan to engage in a transaction with a party in interest, flexPATH.

NFP argues that it cannot have "caused" the Plan to engage in a prohibited transaction with flexPATH because NFP was never responsible for selecting the investment options for the Plan, raising the same argument it did at the motion-to-dismiss stage. Mot. 18. This Court previously declined to answer whether **section 1106(a)(1)(D)** required fiduciaries have discretionary authority to "cause" a prohibited transaction because the only instructive case, Fish v. Greatbanc Trust Co., No. 09-C-1668, *2016 U.S. Dist. LEXIS 137351* , at *60-61 (N.D. Ill. Sept. 1, 2016), did not answer whether "but-for" cause was sufficient under **section 1106(a)(1)** .[14] Thus, the Court allowed the Plaintiffs' claims against NFP to proceed because the allegations support that NFP was the "but-for" cause given that it "clearly played an influential role that lead to the Plan's investments in the flexPATH target-date funds," but warned that "the evidence may ultimately not support a finding of liability." Order 33.

Here, the Court finds that based on the undisputed evidence in the record, the causal link between NFP's conduct and the resulting "prohibited transaction" is "too distant." See Feb. 8 Order 33. At most, it could be said that NFP was the "but-for" cause of the prohibited transaction, but not the proximate cause. While the Court allowed Plaintiffs' claims to proceed past the motion-to-dismiss stage without answering whether but-for causation would be sufficient, the Court answers that question here. Based on the existing, limited case law, a logical reading of ERISA's prohibited transaction claims, and the Ninth Circuit's acceptance of tort law in ERISA claims, Tibble 1, **729 F.3d at 1124** , the Court finds that but-for cause is insufficient to sustain a prohibited transaction claim.

The evidence establishes that "prohibited transaction" (the Plan's investments in the flexPATH target-date funds in June 21, 2016) are too far removed from NFP's conduct. NFP repeatedly advised Wood Defendants to include the target-date funds into the Plan's line-up, and it was hired because of its ability to create "custom risk tolerance funds." NFP & flexPATH SUF ¶¶ 54, 71, 75, 77, 83. Then, adopting NFP's recommendation, the Wood Defendants approved of the target-date funds to be used in February 25, 2016. Then, Wood Defendants made the sole decision to hire an investment manager, flexPATH, precisely for the role of managing and selecting the investments. Ex. 27, at 1-2. Finally, the flexPATH exercised its independent and sole authority to select those funds, which the Plan ultimately invested in beginning June 21, 2016. Thus, while it could be said that NFP caused Wood Defendants' approval of the funds, the same cannot be said for the ultimate selection of the funds. The foregoing sequence of events severed the causal link.

The Court also agrees with NFP's timing argument that the undisputed evidence establishes that at the [*27] time NFP "caused" the prohibited transaction between the Plan and the party in interest (flexPATH), flexPATH was not yet a "party in interest." NFP recommended that flexPATH Index+ funds and Index funds be included in the Plan lineup between November 2015 and February 2016. See, e.g., Ex. 138, at 15; Ex. 33; Ex. 140; Ex. 140; Ex. PX72; Ex. 12, at 19. However, flexPATH did not become a party in interest until March 2016 when it was hired by Wood Defendants as the Plan's discretionary investment manager. Ex. 27, at 3, 8. Plaintiffs do not present evidence that NFP's actions after March 2016 caused flexPATH to select the funds in June 2016. Ex. PX80, at 22. Thus, Plaintiffs' prohibited-transaction claim against NFP is barred.

In sum, the Court **GRANTS** NFP's motion as to Count 3.

2. Wood Defendants' Prohibited Transaction

Plaintiffs allege that the Wood Defendants participated in a prohibited transaction by causing the Plan to transfer plan assets to flexPATH, the party in interest, with respect to the flexPATH Index target-date funds. Plaintiffs advance under two theories that Wood Defendants "caused" the prohibited transaction: that Wood Defendants caused the transaction either (a) prior to flexPATH's appointment or (b) when it appointed flexPATH to be the Plan's discretionary manager. Under the former, the Court agrees with Wood Defendants that Plaintiffs' claim is barred because flexPATH was not yet a "party in interest." Under the latter, Plaintiffs essentially argue that the "prohibited transaction" was the transaction that made flexPATH a party in interest.

Plaintiffs' position is untenable. The Court agrees with Wood Defendants that a "fiduciary does not cause a prohibited transaction by entering into a contract that makes that counterparty a 'party in interest.'" Mot. 24. Courts have declined to find a prohibited transaction where defendants hire active fund managers and pay them for the fees for which they were hired. Marshall v. Northrop Grumman Corp., No. 2:16-CV-06794, [**2019 BL 328678**], 2019 U.S. Dist. LEXIS 149162 , at *24 (C.D. Cal. Aug. 14, 2019). To do so would be "circular." Id. ("[I]t is circular to suggest that an entity which becomes a party in interest by providing services to the Plan[ ] has engaged in a prohibited transaction simply because the Plan[ ] ha[s] paid for those service." (quoting Sacerdote v. N.Y. Univ., No. 16-cv-6284, [**2017 BL 299499**], 2017 U.S. Dist. LEXIS 137115 , at *41 (S.D.N.Y. Aug. 25, 2017)). Allowing prohibited-transaction claims to proceed where the transaction only becomes "prohibited" by virtue of the transaction itself would contravene the meaning and purpose of **section 1106(a)** . At the time Wood Defendants engaged flexPATH to be the discretionary manager, flexPATH was not yet a party in interest. It was only after the appointment did it become a party in interest. Cf. Sellers v. Anthem Life Ins. Co., **316 F. Supp. 3d 25** , **34** (D.D.C. 2018) (declining to read **section 1106(a)** to categorically prohibit "the very transactions that cause a person to obtain the status of a party in interest").

Based on the foregoing, the Court **GRANTS** Wood Defendants' motion for summary judgment as to Count 3.

3. flexPATH's Prohibited Transaction

a. Transaction with Party in Interest

Plaintiffs claim that under **section 1106(a)** , **[*28]** flexPATH, as a plan fiduciary, improperly caused the Plan to transfer "half a billion dollars" in Plan assets to Wilmington, the trustee of the target-date funds, for the benefit of flexPATH, the party in interest, for the benefit of providing "seed money" flexPATH needed to grow its retirement business.

The Court finds that Plaintiffs' allegations against flexPATH, based on the evidence presented, are more appropriately brought under **section 1106(b)** , which addresses self-dealing by a Plan fiduciary. **Section 1106(a)** addresses transactions between "two distinct parties." Danza, 533 F. App'x at 125 n.3 [15] ("At the time that Fidelity was collecting the fee under the terms of the Trust Agreement, it was both a fiduciary of the plan and a party in interest, but its conduct in causing the plan to pay the fee for its own benefit cannot trigger liability under **ERISA Section 406(a)** because this section deals with transactions between two distinct parties."), accord Santomenno v. Transamerica Life Ins. Co., **883 F.3d 833** , **840** (9th Cir. 2018). Here, there is only one party: flexPATH. Plaintiffs argued at oral argument that the "two parties are the Wood Plan and flexPATH." But this confuses which two parties are part of the transaction. Plaintiffs' theory is actually that flexPATH can constitute two "distinct" parties: flexPATH as a fiduciary and flexPATH as the party-in-interest—in the same transaction. But the two "parties" cannot, as Plaintiffs would have it, flexPATH and the Wood Plan; the two parties must consist of flexPATH and some other party in interest.

b. Self-Dealing Transaction

There is no dispute that flexPATH was a fiduciary at the time of the challenged transaction. Rather, the issue is whether flexPATH stood to personally gain from its decision to select the target-date funds. See **29 U.S.C. § 1106(b)** .

flexPATH argues that it did not deal with the Plan's assets in its own interests because it received only its flat-rate service fee and no additional compensation based on the funds that would be selected, and there is no evidence that it acted adversely to the Plan. Id. § 1106(b)(1)-(2); Mot. 23. But here, plaintiffs are not using flexPATH's collection of service fees as a basis of their prohibited-transaction claim; rather, they claim that the benefit is derived from the transfer of the Plan assets to the Wilmington trust, which resulted from the decision to select the flexPATH target-date funds. In other words, the transaction that benefitted flexPATH was its decision to select the target-date funds. This decision to cause the Plan to invest in flexPATH's own proprietary funds provided "seed money" for flexPATH to grow its business as a legitimate company and help bolster flexPATH's reputation in the industry.

flexPATH argues that any "marketability" benefit it received was incidental, not the cause of, to its decision to include the target-date funds. Mot. 25. But as flexPATH would seem to concede, id. (citing Reetz v. Lowe's Cos., No. 5:18-cv-75, [**2021 BL 389235**], 2021 U.S. Dist. LEXIS 195893 (W.D.N.C. Oct. 12, 2021) (finding that only after weighing the evidence in *trial*, the fiduciary did not have an operative, disloyal motive in selecting its own fund for the plan)), determining flexPATH's **[*29]** motives necessarily involve the weighing of evidence and credibility. Similar to its breach-of-loyalty arguments, flexPATH argues that it was not financially motivated to select its funds over other fund options because it was well funded a year after it selected its funds to be included in the Wood Plan. As previously discussed, all inferences must be drawn in favor of the nonmoving party, and thus, it cannot accept flexPATH's theory based on the undisputed evidence as true at this stage.

To this extent, viewing the evidence in the light most favorable to Plaintiffs, a reasonable factfinder could conclude that flexPATH dealt with the Plan's assets as the discretionary investment manager in its own interest in violation of **section 1106(b)(1)** -**(2)** . **Section 1106(b)(3)** does not apply here because this subsection addresses a situation in which a defendant engaged in self-dealing by accepting "kickbacks," which is inapplicable here.

In sum, the Court **DENIES** flexPATH's motion for summary judgment on the prohibited-transaction claim to the extent it is a self-dealing transaction.

D. Count 4: Wood Defendants' Failure to Monitor Fiduciaries

ERISA imposes a "limited duty" upon fiduciaries "to monitor and review the performance of their appointed fiduciaries" to ensure that they are ensuring their fiduciary obligations. In re Comput. Scis. Corp. Erisa Litig., **635 F. Supp. 2d 1128** , **1144** (C.D. Cal. 2009). This monitoring duty is derivative of the underlying breach-of-duty claim. Id. at 1144; Marshall, [**2019 BL 328678**], 2019 U.S. Dist. LEXIS 149162 , **at *23-24** (denying summary judgment to defendants for underlying breach-of-duty claim but granting as to failure-to-monitor claim). An appointing fiduciary "must act with prudence in supervising or monitoring the agent's performance and compliance with terms of delegation." Restatement (Third) of Trusts § 80 cmt. D(2). The appointing fiduciaries should "review the performance of their appointees at reasonable intervals and in such a manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards." In re Comput. Scis., **635 F. Supp. 2d at 1144** (internal quotations omitted) (citing In re Syncor ERISA Litig., **410 F. Supp. 2d 904** , **912** (C.D. Cal. 2006).

Where an appointing fiduciary is aware of their appointee fiduciaries' conflicting loyalties, the appointing fiduciary is obligated to take "prudent and reasonable action" to determine whether they are fulfilling their obligations. Leigh v. Engle, **727 F.2d 113** , **135-36** (7th Cir. 1984).

Here, Plaintiffs allege that Wood Defendants breached their fiduciary monitoring duties by essentially giving flexPATH "carte blanche" to invest in the flexPATH target-date funds, "doing nothing" to monitor their performance relative to a market benchmark or peer group for "[ten] months after they were placed in the Plan." Opp'n 22-23. They allege that the Wood Defendants failed to have an adequate system in place to evaluate performance, ensure that the appointees considered comparable, less-costly investment options, and remove appointees whose performance was inadequate. SAC ¶ 190.

Wood Defendants argue that summary judgment should be awarded [*30] in their favor because the Wood Committee repeatedly reiterated its investment preferences, asked NFP to evaluate other target-date fund alternatives, obtained outside advice when analyzing issues; and "clearly understood" the reasoning and process behind retaining the flexPATH Index funds. Mot. 22-24.

In opposition, Plaintiffs point to evidence to suggest that the Wood Committee met inconsistently to discuss the flexPATH funds despite its own policy of meeting quarterly; failed to question flexPATH's target-date funds' poor performance for a period of ten months after the funds were added to the Plan; failed to put the funds on the "watch list" as they contend the Investment Policy Statement required them to do despite the funds' underperformance for one full year; and failed to suggest or inquire about removal of the funds despite twenty-two months of underperformance. Ex. 12, at 21, 30-31, 32 (Wood Committee's meeting minutes); Ex. 57, at 39-43 (NFP's meeting minutes).

Taking the facts in the light most favorable to Plaintiffs, there are genuine issues of material fact as to whether the Wood Committee satisfied its "limited duty" in monitoring its service providers in reasonable intervals regarding the Plan's investments. The Court **DENIES** Wood Defendants' motion for summary judgment as to Count 4.

E. Count 5: Wood Defendants' Breach of Duty of Prudence Related to Selection of flexPATH as Discretionary Investment Manager

Plaintiffs allege that Wood Defendants breached their duty of prudence by failing to conduct any independent investigation into the merits of using flexPATH as the discretionary investment manager because flexPATH had limited and untested experience. SAC ¶¶ 193-95.

The selection of a newly minted investment manager such as flexPATH does not alone establish Wood Defendants' violation of their duty of prudence. However, like the duty to employ a prudent process in selecting investments, the duty of prudence likewise requires Wood Defendants to employ a prudent process in selecting the investment manager.

Oddly, while Wood Defendants provide ample, undisputed evidence that it employed a prudent and thorough process when seeking to retain NFP as the investment advisor, they present no evidence whatsoever about the process they used to evaluate *flexPATH*'s qualifications as investment manager. See Mot. 21. The only evidence that tangentially supports Wood Defendants' position is NFP's response to the committee's question about NFP's scoring mechanism in which NFP discusses the members of the "flexPATH Investment Committee." Ex. 36, at 3. Thus, while the evidence demonstrates that the Wood Defendants considered multiple other investment candidates for its advisor, there is no evidence of any investigation (let alone an extensive one) into flexPATH's qualifications and ability to manage the Plan's assets. Nor do they present any evidence to explain the discrepancy in process between the selection of the Plan's investment manager versus investment advisor to justify the lack of [*31] evidence.

Wood Defendants essentially argued that there was no need to conduct a separate investigatory process for selecting the Plan's investment manager because it was not "important" to the Wood Defendants what corporate entity served as the manager; it was only important what services were provided. The Court finds this argument unavailing, especially given that flexPATH was the sole entity responsible in selecting and removing investment funds in the Plan. Unless

Defendants are willing to concede that flexPATH and NFP were one and the same, Defendants cannot use evidence of investigating NFP as an investment advisor as the same basis to justify their selection of flexPATH as investment manager.

Based on the foregoing, the Court **DENIES** Wood Defendants' motion for summary judgment as to Count 5.

VI. Conclusion

For the foregoing reasons, the Court:

1. **GRANTS** in part and **DENIES** in part NFP's motion. The Court dismisses Count 1 against NFP. The Court grants the motion as to Counts 2 and 3. No claims against NFP remain.

2. **GRANTS** in part and **DENIES** in part the Wood Defendants' motion. The Court grants the motion as to Counts 1, 2 and 3 but denies it as to Counts 4 and 5.

3. **DENIES** flexPATH's motion.

IT IS SO ORDERED.

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fn 1

Target-date funds are single diversified investment vehicles tailored to become more conservative as the fund approaches the employee's retirement date.

fn 2

In its order, the Court dismissed the first claim against NFP to the extent that the claim relied on co-fiduciary liability for actions taken by flexPATH as investment manager, the second claim to the extent it relies upon direct liability, and the third claim with respect to the transactions involving the flexPATH Collective Investment Trusts. Feb. Order 2. The Court dismissed the third claim against flexPATH to the extent that it involves the flexPATH Collective Investment Trusts. Id. The Court dismissed the first claim against the Wood Defendants taken by flexPATH as investment manager and the third claim with respect to the transactions involving the flexPATH Collective Investment Trusts. Id.

fn 3

"In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." L.R. 56-3.

fn 4

Rule 56 was amended in 2010. Subdivision (a), as amended, "carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine 'issue' becomes genuine 'dispute.'" **Fed. R. Civ. P. 56** , Notes of Advisory Committee on 2010 amendments.

fn 5

As the Court previously held, NFP is not liable for any co-fiduciary actions taken by flexPATH. Order 2.

fn 6

Plaintiffs also cite an internal email dated April 3, 2018—three years later—in which a NFP investment consultant states, "We did not prepare a fit analysis when [flexPATH] Index was implemented." See Ex. PX118, Struckhoff Decl., Dkt. No. 205-101, at 1. But as NFP accurately points out, Plaintiffs conspicuously omit the response to that email in which another NFP representative states that NFP did perform a "fit analysis . . . for [Wood] back then." Ex. A, Laroche Decl., Reply.

fn 7

"[I]n matters of causation, when a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach." Restatement (Third) of Trusts § 100, cmt. f (2012) (internal citation omitted)

fn 8

The Court acknowledges that the Ninth Circuit's decision in Wright did not address the burden-shifting question. But it is the Court's view that this does not change the analysis of whether a plaintiff is entitled to a presumption of causation at summary judgment where breach has not been established.

fn 9

The date appears to be in dispute, but this is not material. While Plaintiffs and Wood Defendants contend the funds were added on June 21, 2016, NFP and flexPATH contend that they were added "on June 22 and 23, 2016."

fn 10

Relatedly, flexPATH argues in the prohibited-transaction claim that it could not have "caused" whatever Plan assets that came to be invested in the target-date funds. Mot. 21. The Supreme Court in Hughes rejected this line of reasoning. **142 S. Ct. at 742** . While plan participants retain the right to choose which fund is appropriate for them, the plan must ensure that "*all* fund options remain prudent options." Smith, **37 F.4th at 1166** . Any argument premised primarily on participant choice is a red herring.

fn 11

Mutual funds and collective investment trusts commonly offer multiple share classes for a given investment vehicle. The investment manager charges a different amount of fees, depending on the share classes.

fn 12

Although the Court recognizes these memorandum decisions are unpublished and address issues only at the motion-to-dismiss stage, the Court finds the Ninth Circuit's decisions as instructive as whether [charging for higher price] material.

fn 13

Frustratingly, neither party cites evidence to confirm the cost of the "R" shares at the time the shares were chosen. See Mot. at 22; Opp'n at 20-21.

fn 14

In Fish, the court was "tempted to agree" with defendants that discretionary authority was required to find that they "caused the prohibited transaction," but ultimately applied a statutory exemption to its analysis, punting the question for another court at a later time. Fish v. Greatbanc Tr. Co., No. **09 C 1668** , [**2016 BL 330978**], 2016 WL 5923448 , at *60 (N.D. Ill. Sept. 1, 2016). The Fifth Circuit has stated clearly that a person "cannot cause a prohibited transaction unless he or she exercise[s] discretionary authority or control over whether the plan enters into a transaction." Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan, **883 F.2d 345** , **352** (5th Cir. 1989). The Ninth Circuit has not rendered an opinion on the issue, nor have courts within the Ninth Circuit. NFP "has not identified any court" that has adopted the view that but-for causation is sufficient. Mot. 19.

fn 15

The Court acknowledges that this is an out-of-circuit, unpublished decision. However, the