UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW WEHNER,

Plaintiff,

v.

GENENTECH, INC., et al.,

Defendants.

Case No. 20-cv-06894-RS

ORDER DENYING MOTION TO EXCLUDE TESTIMONY OF MICHAEL GEIST AND DENYING MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Matthew Wehner, a former employee of Defendant Genentech, brings this class action under the Employee Retirement Income Security Act ("ERISA") against Defendants Genentech, Inc. ("Genentech") and the U.S. Roche DC Fiduciary Committee ("Committee") (together, "Defendants") for breach of their fiduciary duties—specifically, the duty of prudence with respect to Recordkeeping and Administrative ("RK&A") fees and a derivative claim for failure to monitor co-fiduciary breaches.

Defendants have moved to exclude the testimony of Plaintiff's expert Michael Geist on the basis that they are unsupported and speculative, as well as moved for summary judgment. Plaintiff opposes, arguing that Geist's testimony is supported by his experience, and there remain genuine disputes over facts material to the case. For the reasons that follow, Defendants' motion to exclude and its motion for summary judgment are both denied.

II. BACKGROUND

A. Defendants & The U.S. Roche 401(k) Savings Plan

Defendant Genentech is a large, California-based biotechnology company that employs over 13,000 people. As part of the benefits package offered to its employees, Defendant sponsors and administers a defined contribution plan, the U.S. Roche 401(k) Savings Plan ("Plan"), in which eligible employees save for retirement through 401(k) contributions.[1] The Plan is of a considerable size: as indicated in its most recent Form 5500, a report that ERISA plans are required to file annually with the Department of Labor, the Plan holds over $12 billion in assets for over 35,000 participants.

Immediate responsibility of administering the Plan was delegated to the Committee, which is comprised of five to eight senior level managers from Genentech and its affiliates, who are appointed by the Board of Directors. The Committee is governed by a Charter that details its expectations and responsibilities—including, relevantly, the responsibility to appoint, monitor, and remove Plan service providers and monitor the fees charged under the Plan—and is required to meet a minimum of four times per year.

B. The Plan During the Class Period

Pursuant to authorization provided by its Charter, the Committee delegated specific responsibilities to the Roche/Genentech Funds Management Department (overseen by David McDede, Genentech Vice President and Treasurer, and member of the Committee). During the class period, this delegation included regular monitoring of the Plan's investments and associated fees (including RK&A fees), and how they compared against those that other defined contribution plans paid to their service providers and recordkeepers. As part of this effort, McDede's team regularly viewed publications regarding recordkeeping and service fees in the market, and participated in a yearly survey conducted by the Committee on Investment of Employee Benefit Assets Inc. ("CIEBA"), which "compiles various fees and information from over 100 of the country's largest pension and defined contribution plans to inform CIEBA members about how

[1] Former employees may also remain in the Plan as participants without making further contributions.

their respective fees compare to other CIEBA members." Dkt. 111 at 5.

During the Class Period, the Committee undertook two recordkeeping RFPs: once in 2014 and once in 2020. In 2014, the Committee hired a retirement plan advisory firm, Callan, LLC ("Callan"), to advise on the process. After surveying "several dozen" potential recordkeeping companies, the 2014 RFP solicited bids from five recordkeeper candidates and received responses from four firms. Dkt. 111 at 7. The Committee narrowed those down to two, and conducted onsite interviews and due diligence (via interviews of other plans that had retained the finalists for recordkeeping services) on both. After soliciting best and final offers from both finalists, the Committee decided to retain Fidelity, "due to a combination of its unique servicing abilities and competitive price." Dkt. 111 at 7. As a result of this RFP process, the per participant fee declined from $42 per participant per year to $38.[2]

The contract the Plan had with Fidelity as a result of the 2014 RFP had a term of five years, and was set to expire on December 31, 2019. Because the Committee was still in the midst of its RFP as the expiration of this contract was approaching, it signed a one-year extension with Fidelity for the same rate ($38).

For its 2020 RFP, the Committee followed a process similar to the 2014 RFP. Callan was once again retained as an advisor; RFP bids were solicited from five recordkeeping candidates; two finalists emerged (as the other three candidates declined to bid on the RFP); and the Committee held virtual final interviews[3] with, and conducted due diligence on, both finalists. After receiving the best and final offers from both, the Committee chose Fidelity, and the per participant fee declined from $38 to $36.[4] Dkt. 110-5 at 5, 7.

C. Procedural History

[2] In 2014, the Plan had approximately 29,320 participants.

[3] In person site visits were, according to Defendants, precluded by the COVID-19 pandemic. Dkt. 110-5 at 7.

[4] In 2020, the Plan had approximately 34,836 participants.

Plaintiff is a former Genentech employee and current participant in the Plan, who maintained investments through the Plan and paid associated recordkeeping fees. Plaintiff first filed suit against Defendants in October 2020, averring breaches of fiduciary duty for: (1) excessive RK&A fees; (2) excessive investment management fees; and (3) the retention of investment funds that allegedly underperformed, despite high fees. After two rounds of motions to dismiss, the only of Plaintiff's claims to survive were his claim for a violation of duty of prudence for excessive RK&A fees, and the derivative claim for failure to monitor. Dkt. 61 at 23.

The parties stipulated to class certification, which was approved on November 22, 2022. The following class was certified: "All participants and beneficiaries in the U.S. Roche 401(k) Savings Plan at any time on or after October 2, 2014 to the present ("the "Class Period"), including any beneficiary of a deceased person who was a participant in the Plan at any time during the Class Period." Dkt. 98 at 1.

III. LEGAL STANDARD

Summary judgment is proper "if the movant shows 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). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett*, 477 U.S. 317, 323–24 (1986). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323 (internal quotation marks omitted). If it meets this burden, the moving party is then entitled to judgment as a matter of law when the non-moving party fails to make a sufficient showing on an essential element of the case with respect to which it bears the burden of proof at trial. *Id.* at 322–23.

To preclude the entry of summary judgment, the non-moving party must bring forth material facts—that is, "facts that might affect the outcome of the suit under the governing law[.]" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The opposing party "must do more

than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). The trial court must "draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 520 (1991) (citing *Anderson*, 477 U.S. at 255). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," however, "there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

IV. DISCUSSION

A. Motion to Exclude Testimony of Michael Geist

Plaintiff's recordkeeping fee expert, Michael Geist, opines that the Plan Fiduciaries' process during the Class period had a "multitude of significant errors" and represented "an imprudent process." Dkt. 109-4 ("Geist Report") ¶ 206. In particular, Geist points to "two critical errors" as "the primary drivers" of the unreasonable RK&A fees: (1) the failure to solicit competitive bids effectively; and (2) the failure to solicit proprietary discount bids. *Id.* at ¶ 209. Additionally, Geist also finds fault with other aspects of the Fiduciaries' process, including the fact that they acted on behalf of multiple plans (for at least four 401(k) plans and exercised decision-making authority for at least two other plans sponsored by the Company or its affiliates), which did not enable them to act in the exclusive best interest of Plan participants.[5] Altogether, Geist argues, such errors suggest that Defendant was "merely 'going through the motions' of fiduciary oversight," rather than exhibiting the required prudence. *Id.* at ¶ 209. Geist further opines that this caused losses to the Plan—his "conservative estimate" is that the reasonable market fee rate for the Plan's RK&A services should have been no more than $32.

Defendants move to exclude Geist under Federal Rule of Evidence 702. As an initial observation, Defendants do not present arguments that Geist lacks either the requisite credentials

[5] As evidence, Plaintiffs point to the fact that certain smaller plans, such as the Roche U.S. Retirement Plan, had lower fees per participant ($30 vs $36/$38).

or experience to qualify as an expert; Geist is currently an owner of the retirement plan consulting firm ClearSage Advisory Group, and previously spent 10 years in various "senior-level" roles at T. Rowe Price, where he had experience in pricing proposals for retirement plans, including recordkeeping and administrative fees.[6] *See* Dkt. 109-4 ("Geist Report") ¶¶ 4, 9. Instead, Defendants generally take issue with: (1) Geist's failure to cite any sources to support his opinions about flaws in Defendants' RFP process and (2) Geist's failure to consider the specific services other recordkeepers provided to their plans and how those services compared to what Fidelity provided to the Plan.

1. Lack of Factual Support

Defendants first argue that Geist's opinions are "based solely on his own speculation and subjective beliefs," and therefore "entirely unsupported and merely conclusory." Dkt. 112 at 3. Plaintiffs respond by invoking *Primiano v. Cook* to support their argument that opinions can be reliable notwithstanding lack of citation if they are based on experience. 598 F.3d 558, 564 (9th Cir. 2010), *as amended* (Apr. 27, 2010). Reliance on *Primiano* here, however, is somewhat misplaced: while *Primiano* does explain that the *Daubert* inquiry should be "flexible," it does so in the context of testimony by physicians,[7] specifically noting that: "medical knowledge is often uncertain," *id.* at 565; "[t]he human body is complex . . . and ethical concerns often prevent . . . studies calculated to establish statistical proof," *id.* at 565–66; and "[p]eer reviewed scientific literature may be unavailable because the issue may be too particular, new, or of insufficiently broad interest, to be in the literature." *id.* at 565. *Primiano* does not, however, generally excuse an

[6] Defendants do note that Geist has been retained in over 20 ERISA breach of fiduciary duty cases wherein he, with only one exception, provides testimony to "second guess the decisions made by plan fiduciaries just as he has done in this case." Dkt. 111 at 13. The irony of this claim is not lost on Plaintiff, who hastens to point out that Defendants are "throwing stones from a glass house," in light of the fact that Defendants' expert, Mr. Gissiner, is also a repeat player for defendants in ERISA cases.

[7] This is true, too, of the cases raised by Plaintiff (all analyzed in *Primiano*) as demonstrating the "embrace of experiential expert testimony" in other circuits. Dkt. 116 at 5 (citing *Dickenson v. Cardiac & Thoracic Surgery of E. Tenn.,* 388 F.3d 976, 982 (6th Cir.2004); *Schneider ex rel. Estate of Schneider v. Fried,* 320 F.3d 396, 406–07 (3d Cir.2003)).

expert's lack of citation to facts without explanation as to why the topics at hand do not as readily admit of calculation or citation.

Pursuant to Rule 702, an expert witness "who is qualified . . . by knowledge, skill, experience, training, or education may testify" if, among other requirements, the expert's testimony is "based on sufficient facts or data," "the testimony is the product of reliable principles and methods," and "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702(b)-(d). While Geist's experience would seem to qualify him as an expert, "[e]ven where the reliability of expert testimony is largely dependent on the expert's experience, the witness must still explain how the experience leads to the conclusions reached, why the experience provides a sufficient basis for the opinions, and how the experience is reliably applied to the facts." *United States v. Cerna*, No. CR 08-0730 WHA, 2010 WL 2347406, at *6 (N.D. Cal. June 8, 2010) (citations omitted). As the Supreme Court has explained, "expert testimony must have a traceable, analytical basis in objective fact before it may be considered on summary judgment." *Bragdon v. Abbott*, 524 U.S. 624, 653 (1998) (citing *General Electric Co. v. Joiner,* 522 U.S. 136, 144–145, 146 (1997)).

As Defendants note, Geist does not actually cite sources in his report to support his opinions regarding flaws in the RFP process. This is true, for instance, of his opinion that "[i]n virtually all cases it is necessary to have a minimum of three providers at the finalist stage to create the best conditions for negotiating fee reductions," Geist Report ¶ 203, and his opinion that "[f]ailing to require all bidders to provide [open architecture and reenrollment] bids at a minimum and/or comparing open architecture bids to proprietary bids are clear errors and do not achieve the best results for plan participants." Geist Report ¶ 193; *see also id.* ¶ 231.

Geist defends by arguing that "you don't have to cite certain things because they're well-known and understood in the industry." Dkt. 109-3 (Geist Dep.) at 115:7-21. When pressed about the basis of his opinion that three RFP finalists are required, Geist responded that it was "all of my experience working at T. Rowe Price negotiating on behalf of a recordkeeper"; "observing the best practices of all the retirement advisors and consultants who were acting on behalf of their clients";

"what is discussed at plan conferences like the National Association of Plan Advisors," which he "attend[s] regularly"; and "implied through many of these documents that talk about RFP best practices." Geist Dep. at 115:22-116:22. Geist gave a similar answer when asked about his opinion that it is a "fundamental and critical error" not to have required Fidelity to provide "both an open architecture bid [that does not assume any investment by a plan in the recordkeeper's own proprietary investment products] and a proprietary discount bid [that does assume an amount of plan assets invested in the recordkeeper's proprietary investment products]." *See* Geist Dep. 141:12-142:7.

"While experience may qualify an expert . . . credentials alone do not suffice to establish that the expert's opinion has a reliable basis in fact." *Troudt v. Oracle Corp.*, 369 F. Supp. 3d 1134, 1139 (D. Colo. 2019) (internal quotation marks and citations omitted); *see id.* ("[E]xperience is not a methodology." (citation omitted)). Geist's generalized references to experience certainly prompt questions about the persuasiveness of his testimony, in light of the thin "methodology" he advances.[8] The specific facts on which Geist's opinions regarding process flaws are based do seem rather "opaque," *id.*, leaving the Court "without any independent knowledge of what the evidence supporting Mr. Geist's opinions actually consists." *Id.* at 1140. Skepticism may also be warranted regarding Geist's claims about what Fidelity *would have done* had Geist's recommended best practices been followed. *See, e.g.*, Geist Report at ¶¶ 237, 239, 258. As Defendants note, Geist neither worked at Fidelity, nor spoke with Fidelity representatives,[9] nor

[8] Plaintiff's contention that Defendants do not challenge any aspect of Geist's opinions other than his analysis of the reasonable market rate for the Plan's services—and thereby concede the other opinions (such as those relating to the marketplace for RK&A services and prevailing standards for fiduciary monitoring on RK&A fees)—is not well taken, given Defendants' arguments about the lack of support for Geist's conclusions. *See, e.g.*, Dkt. 119 at 2.

Plaintiff's frustrations with Defendants' piecemeal argumentation, however—wherein the bulk of the argumentation for excluding Geist's expert report is not found in their 2 page motion to exclude, but rather primarily found in Defendants' concurrent motion to dismiss—are shared. In the future, on pain of exclusion, the Parties are expected to provide all germane argumentation in the appropriate brief.

[9] Geist's general statement that "a number of people who worked at Fidelity came to T. Rowe and incorporated a number of Fidelity's practices into T. Rowe's practices" is insufficient to change

sought discovery from Fidelity or other recordkeepers, including those who bid on the Plan RFPs. Defendants' concern that his conjectures on what would have occurred are "unsupported speculation packaged as expert opinion," Dkt. 111 at 20, is understandable.

Nonetheless, Geist's proposed testimony is not tantamount to the junk science from which juries need to be shielded. Geist has reviewed the facts of the case, and his opinions are at least plausibly tied to his experience in the industry, from whence he may have observed the industry standards on which he opines.[10] Therefore, particularly as Rule 702 "contemplates a broad conception of expert qualifications," *Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1269 (9th Cir. 1994) and "the rejection of expert testimony is the exception rather than the rule," *Caldwell v. City of San Francisco*, No. 12-CV-01892-DMR, 2021 WL 1391464, at *2 (N.D. Cal. Apr. 13, 2021) (quoting Fed. R. Evid. 702, Advisory Committee Notes)—there are sufficient indicia of reliability to refrain from triggering the court's gatekeeping function. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction . . . are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 595. Defendants are correct that there are serious questions about certain of Geist's opinions, and perhaps those objections may prove disabling at trial. At this juncture, however, Geist's opinions are not so unreliable as to require wholesale exclusion. On this basis, Defendants' motion is denied.

2. Failure to Compare Plan Services

Defendants also argue that Geist "offers no comparison of the services Fidelity performed for the Plan versus alleged peer plans," calling it "fatal" to Plaintiff's ability to support any triable facts regarding relevant comparators. Dkt. 111 at 15. As support, Defendants point to the Court's previous orders, which explain that "[f]ederal district courts in California have held that a plaintiff must plead administrative fees that are excessive in relation to the *specific* services the

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this conclusion.

[10] Opinions regarding prevailing courses of conduct, moreover, may not find themselves widely reported or academically dissected in literature.

recordkeeper provided to the *specific plan* at issue," and "[a] plaintiff must allege "facts from which one could infer that the same services were available for less on the market," Dkt. 45 at 8–9 (citing *White v. Chevron Corp.*, No. 16-CV-0793-PJH, 2016 WL 4502808, at *14 (N.D. Cal. Aug. 29, 2016). Defendants further point to various cases that have granted summary judgment when Plaintiff failed to analyze specific services provided by the recordkeeper. *See* Dkt. 111 at 15-16 (citing cases).

Plaintiffs respond by identifying two cases where "courts . . . have rejected the argument that a retirement plan recordkeeping expert's opinion should be excluded where the expert did not compare the services of the plan at issue to comparator plans": *Karla Terraza v. Safeway Inc.*, No. 16-CV-03994-JST, 2019 WL 1332721 (N.D. Cal. Mar. 25, 2019) and *In re Omnicom ERISA Litig.*, 2022 WL 18674830 (S.D.N.Y. Dec. 23, 2022). *Terraza*, however, is distinguishable, as the opinion identifies four additional, factual bases for the expert's opinion regarding excessive fees, and the Court's prior determination that the comparator plan was sufficiently similar for comparison. *Terraza*, 2019 WL 1332721, at *3. *In re Omnicom* is even further afield—though it evaluates an "analogous" opinion by Geist in another case, the discussion does not at all center on whether the various services of different plans render those good comparators.

Even so, Geist does identify a set of "similarly-sized" plans, based on publicly available information from Form 5500s, that he believes are good comparators for the Plan at issue, *see* Geist Report, Ex. 11a, Ex. 22, for which he has provided a methodology regarding his various calculations. *See id.,* Appendix B. Though it borders on conclusory, Geist's opinion that bundled RK&A services are subject to commodity pricing and that certain differences in services are immaterial to the RK&A fees for plans beyond a certain size or complexity are, at least at this stage, sufficient to hurdle the gatekeeping function. *See* Geist Dep. at 175:19-176:6.

It is true that Plaintiff was indisputably on notice that "a plaintiff must plead administrative fees that are excessive in relation to the *specific* services the recordkeeper provided to the *specific plan* at issue," and that conclusory statements that RK&A services are the same for all large

defined contribution plans are generally found to be unavailing.[11] *See Krutchen v. Ricoh USA, Inc.*, No 22-678, 2023 WL 3026705 at *2 (E.D. Pa. April 20, 2023) (finding conclusory statement that recordkeepers provide the same quality of services "insufficient to render comparison meaningful" (quoting *Mator v. Wesco Distribution, Inc.*, No. 2:21-CV-00403-MJH, 2022 WL 3566108, at *4 (W.D. Pa. Aug. 18, 2022), *appeal argued*, No. 22-2552 (3d Cir. Apr. 18, 2023)). Defendants may also be correct when they argue that certain of the comparators Geist used are obviously different. *See* Dkt. 111 at 16 (noting that Beaumont Health 403(b) plan retained *two* different recordkeepers). Yet even though certain courts have found these flaws enough to grant summary judgment, *see Huang v. Trinet HR III, Inc*., No. 8:20-cv-2293-VMC-TGW, 2023 WL 3092626 at *12 (M.D. Fl. April 26, 2023) (finding expert testimony "insufficient to avoid summary judgment" where the expert "did not analyze the specific services provided by [the recordkeeper]—an element of the loss causation analysis that courts have found necessary in cases such as this." (citing cases)), it is more appropriate to probe the relative merits of Plaintiff's expert's testimony through cross examination. For all the reasons stated above, therefore, Defendants' motion to exclude the testimony of Michael Geist is denied.

B. Motion for Summary Judgment

Plaintiff brings suit under ERISA, the underlying purpose of which is to "protect the interests of participants in employee benefit plans and their beneficiaries." *White v. Chevron Corp.*, No. 16-CV-0793-PJH, 2016 WL 4502808, at *1 (N.D. Cal. Aug. 29, 2016) (quoting *Schikore v. Bankamerica Supplemental Retirement Plan*, 269 F.3d 956, 963 (9th Cir. 2001)). ERISA imposes several duties on plan fiduciaries, including that they shall discharge their duties "solely in the interests of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1), and use "the

[11] As Defendants identify, Geist's expert report itself notes that "[w]hen evaluating and clarifying informal or formal RFI or RFP responses, the plan fiduciary should compare the services offered and the pricing proposals across vendors," and that fiduciaries should request any additional information "necessary to evaluate any material differences" in the services offered, as only then can an "'apples-to-apples comparison'" be made "with the detailed information provided by the bidders." Geist Report ¶ 195.

care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.* § 1104(a)(1)(B). The standard for the duty of prudence therefore "focus[es] on a fiduciary's conduct in arriving at [a] decision, not on its results, and ask[s] whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular [decision]." *White*, 2016 WL 4502808, at *5 (citations omitted). To succeed on their claims, Plaintiffs must prove "(1) Defendants acted as fiduciaries, (2) Defendants breached their fiduciary duties, and (3) the breaches proximately caused a loss to the Plan." *Huang*, 2023 WL 3092626, at *11.

Defendants argue that summary judgment is appropriate where, as here, the evidence demonstrates that a prudent process was implemented and followed, and where Plaintiff "cannot present any evidence" to satisfy its burden of proving a fiduciary breach that resulted in losses to the Plan. Indeed, Defendants argue they maintained a prudent process by: undergoing two recordkeeper RFPs, both resulting in a decrease in the per participant recordkeeping fee and increase in services provided; maintaining a process to review Fidelity invoices and 408(b)(2) disclosures[12] upon receipt (by two separate departments, to ensure appropriate invoicing and reasonableness of fees); meeting quarterly to review service providers' performance; reviewing Plan fees at least yearly to determine year-over-year differences; adopting performance standards that would reduce Fidelity's fees for failure to meet certain thresholds, increasing the services that Fidelity provided to the Plan without incurring additional fees for Plan participants; and benchmarking the fees Participants paid through the annual CIEBA surveys and other metrics. Dkt. 111 at 12-13.

However meritorious these steps were, having found Geist's testimony admissible, there are accordingly several disputed facts that preclude summary judgment. While a recitation of all the disputes is unwarranted, a few are highlighted below.

[12] These are disclosures that ERISA requires of service providers so that fiduciaries receive the information they need to assess the reasonableness of compensation received by the provider.

First, while the Parties acknowledge that the best way accurately to determine a reasonable market rate for a plan's RK&A services is through a formal RFP, there are genuine disputes over whether Defendants' conduct in connection with the RFPs was sufficiently prudent. This includes whether, as Plaintiffs argue, the RFP process should have been conducted more regularly (Geist opines that it should be done every three years, rather than once every six years, *see* Geist ¶ 173)—and that, because it had not been done in six years, Defendants had no reliable basis for benchmarking the RK&A fees they were paying to Fidelity. Defendants object, arguing that "[n]othing in ERISA compels periodic competitive bidding," *White*, 2016 WL 4502808 at *14, and that as part of the responsibility to ensure that the Plan's service provider fees were reasonable, the RFPs were bolstered by the yearly evaluation of the CIEBA surveys. As Plaintiffs point out, the CIEBA surveys seem rather inadequate at informing Defendants of a reasonable fee rate for the Plan, especially in light of the criticisms about suitable comparators (and need to evaluate specific services) discussed above. As a result, even if nothing in ERISA *compels* periodic bidding, questions remain as to whether what Defendants actions did demonstrate sufficient prudence. *See, e.g.*, Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 75 Fed. Reg. 41,600, 41,625 (July 16, 2010) (Department of Labor guidance noting that "plans normally conduct requests for proposal (RFPs) from service providers at least once every three to five years"). Likewise, Geist's opinions regarding other aspects of the RFP—such as the number of finalists or the types of bids already discussed above—will need to be examined.

The timing of the second RFP, in 2020, presents further questions. As Defendants note, the Plan's RK&A fees were lower than the CIEBA average *except for the 2019 survey*. Dkt. 111 at 5. Defendants explain that "[a]t the time the Plan received these results, a recordkeeping RFP already was underway," *id.*—but the Committee signed a one-year extension with Fidelity for 2020, without negotiating a reduction in the rate. Marks Dep., at 102:19–103:14. Plaintiff describes why it believes this might have been imprudent: "In other words, when faced with an opportunity to negotiate for a reduction, Defendants simply bowed to Fidelity and acceded to another year at the same rate the Plan was previously charged without any investigation or consideration of the

prevailing market rate for RK&A services for plans of similar size and scale." Dkt. 117 at 10. Defendants have not provided an explanation to justify either why an extension at the same rate (and lack of negotiation) was reasonable,[13] or why the RFP process was not initiated in time to evaluate and decide on potential alternatives before the expiration of the 2014 contract with Fidelity.[14] To be clear: this oversight, if indeed it was one, may not ultimately be sufficient to demonstrate imprudence, but at this stage, there is sufficient dispute on the issue to foreclose summary judgment for Defendants.

V. CONCLUSION

For the reasons discussed above, the motion to exclude the expert testimony of Michael Geist is denied. Though Plaintiff's claims for breach of fiduciary duty appear uncertain, the availability of Geist's testimony leads to disputes of material fact that caution against summary judgment. Accordingly, the motion for summary judgment is denied, and the case will proceed to a bench trial, to begin on October 30, 2023.

IT IS SO ORDERED.

Dated: August 11, 2023

RICHARD SEEBORG
Chief United States District Judge

[13] Though Defendants explained that Fidelity continued to provide a heightened level of service (which the Plan negotiated for as part of its 2004 RFP) at the hearing, that benefit was neither newly acquired in 2019, nor an answer that compels summary judgment for Defendants.

[14] Defendants also generally explained that the Committee was focused on other priorities and initiatives for the Plan, but that answer is similarly inadequate to resolve the question of prudence for the purposes of summary judgment.