IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DAVID G. FEINBERG et al., and all others similarly situated, Plaintiffs, v. T. ROWE PRICE GROUP, INC. et al., Defendants.	Civil Action No. 1:17-cv-00427-JKB

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF CERTAIN FINDINGS IN THE COURT'S SUMMARY JUDGMENT OPINION

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INTRODUCTION

Plaintiffs' motion for reconsideration does not ask the Court to revisit its ultimate decision on the parties' motions for summary judgment, but instead asks the Court to correct four supposed "errors of law and fact" in its opinion for the ostensible purpose of enabling Plaintiffs to properly prepare for trial. For the reasons explained below, each of Plaintiffs' claims of error is misplaced, and their motion should be denied in its entirety.

ARGUMENT

I. The Court Correctly Recognized That The Plan Document's Instructions Must Be Taken Into Account When Evaluating The Trustees' Conduct

The Court's summary judgment opinion follows established Fourth Circuit precedent in explaining that the "prudence analysis is informed by a fiduciary's duty to act 'in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA].'" Dkt. 200 ("MSJ Op.") at 11 (alteration in original; quoting 29 U.S.C. § 1104(a)(1)(D)); *see Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 367-68 & n.16 (4th Cir. 2014). Applying that standard, and having reviewed the evidence submitted by the parties, the Court concluded that "a fact-finder could very well determine that the Trustees prudently followed the Plan's instructions and showed a reasonable preference for the high-performing investment vehicles that the Trustees and Plan participants knew best—to the benefit of participants." MSJ Op. 17. The Court also noted that, because the duty to comply with plan terms influences how a prudent fiduciary would act in the circumstances, Plaintiffs' expert Samuel Halpern's "failure to account for the Plan document's directions" in forming his opinions about the Trustees' process "undermines his analysis." MSJ Op. 15.

Plaintiffs' motion for reconsideration supplies no basis for disturbing these conclusions. Plaintiffs argue that the Court erred as a matter of law in affording the Plan document any

significance because, Plaintiffs assert, the Plan provisions requiring the use of T. Rowe Price funds are "void" under ERISA § 410(a), 29 U.S.C. § 1110(a). *See* Dkt. 205-1 ("Mot.") at 3-4. Plaintiffs are incorrect. As Defendants have previously explained, ERISA § 410(a) declares "void as against public policy" only plan terms that "purport[] to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty" imposed by ERISA. 29 U.S.C. § 1110(a); *see Rounds v. Beacon Assocs. Mgmt. Corp.*, 2009 WL 4857622, at *2 (S.D.N.Y. Dec. 14, 2009) (ERISA § 410(a) "governs the enforceability of exculpatory provisions" and voids any "provision that purports to indemnify a fiduciary even when he or she has violated the ERISA prudent person standard of care"); *see also* Dkt. 147-1 at 12 & n.3. Provisions specifying the investment options to be included in a plan do not fit that definition, as § 410(a) "is narrow and limited to its plain terms." *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 65 F. Supp. 3d 653, 673 (S.D. Iowa 2014), *aff'd*, 811 F.3d 998 (8th Cir. 2016); *cf. Tatum*, 761 F.3d at 367-68 & nn.15-16 (plan document that "required the Nabisco Funds to remain as frozen funds in the Plan" should have been considered when evaluating claims concerning removal of those funds). The § 410(a) cases that Plaintiffs cite do not address provisions governing plan investment options, but involve distinct plan terms that fall comfortably within the plain language of § 410(a) by purporting to relieve fiduciaries of responsibility or liability for duties imposed by ERISA.[1]

[1] *See Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1460 (9th Cir. 1995) (addressing provisions specifying named fiduciary and explaining "any interpretation of the Plan which prevents individuals acting in a fiduciary capacity from being found liable as fiduciaries is void"); *Chi. Bd. Options Exch., Inc. v. Conn. Gen. Life Ins. Co.*, 713 F.2d 254, 259 (7th Cir. 1983) (declaring void provision stating that "the Insurance Company's liability as a Fiduciary is limited to that arising from its management of any assets of the Plan held in its separate account"); *Solis v. Plan Benefit Servs., Inc.*, 620 F. Supp. 2d 131, 145 (D. Mass. 2009) (provision that purported to "preclude[] the [t]rustee's responsibility … for the collection of employer contributions," which would relieve the trustee of a duty imposed by ERISA § 403, was void under § 410(a)).

The sponsor's purpose in writing the Plan (*see* Mot. 3) has no bearing on the validity of its terms under ERISA § 410(a). Setting plan terms is not a fiduciary function, and T. Rowe Price was free to amend the Plan for whatever reason it liked. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44 (1999); *see also* Dkt. 147-1 at 12, 22 n.11. What matters is that the Plan provisions themselves do not do what § 410(a) forbids—"purport[] to relieve a fiduciary from responsibility or liability" for ERISA duties. 29 U.S.C. § 1110(a). The Trustees were therefore duty-bound to follow the Plan's instructions about the composition of the investment menu unless prudence or other ERISA duties demanded a departure. *See* 29 U.S.C. § 1104(a)(1)(D); *see also Tatum*, 761 F.3d at 358 n.7 ("failure to act in accordance with plan documents serves as evidence of *imprudent* conduct" if "the plan documents are consistent with ERISA's requirements").[2]

Although the Court drew on *Tatum* to explain how plan document language interacts with the duty of prudence, *see* MSJ Op. 11, Plaintiffs' motion does not address *Tatum* at all. Plaintiffs instead emphasize that the parties in *Brotherston* (another case involving a plan document-directed investment menu) stipulated that the plan terms did "not immunize defendants from potential liability based on the duty of prudence in selecting investment offerings under the [p]lan." *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 23-24 (1st Cir. 2018); *see* Mot. 4. But this is exactly so here, too. As explained, the terms of the Plan document are relevant in this case not because they "immunize" the Trustees from potential liability for breach of fiduciary duty,

[2] While the sponsor's purpose is irrelevant, Plaintiffs also distort the record in claiming that Defendants "admitted" that the Plan document was amended in 2014 "to prevent [the Trustees] from being held liable for offering only proprietary funds in the Plan." Mot. 3 (citing Dkt. 145-2 ¶ 62). Defendants have acknowledged only that one of several sponsor objectives in amending the Plan was to make litigation over the Plan's investment structure less likely, *see* Dkt. 154 at 31 ¶ 62, which is not the same as attempting to relieve the Trustees of their fiduciary duties with respect to the Plan menu or absolve them of responsibility in the event of a breach.

but because the Plan document's instructions necessarily influence how a prudent fiduciary would approach oversight of the Plan's investment options. That argument was not available to the defendants in *Brotherston*, where the fiduciaries conceded that they did not separately monitor the plan's investment options. *See Brotherston v. Putnam Invs., LLC*, 2017 WL 2634361, at *9 (D. Mass. June 19, 2017). Here, by contrast, the Trustees did independently and rigorously monitor the Plan menu and took additional steps to investigate underperforming funds, including by meeting with top T. Rowe Price management to probe the reasons for highlighted performance issues and to ascertain whether the company's plans for addressing them would sufficiently protect the Plan's interests. *See* Dkt. 147-1 at 5-7; *see also* MSJ Op. 15 ("the evidence shows the Trustees engaged in a legitimate oversight process").[3]

Contrary to Plaintiffs' suggestion, recognizing that fiduciaries' duty to comply with plan terms informs the prudence inquiry does not undermine ERISA's prudence standard, which is always shaped by the surrounding circumstances. *See Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014) ("Because the content of the duty of prudence turns on 'the circumstances ... prevailing' at the time the fiduciary acts, § 1104(a)(1)(B), the appropriate inquiry will necessarily be context specific."). As the Court's summary judgment opinion correctly observes, while the statutory duty to adhere to plan documents must be taken into account when evaluating a fiduciary's conduct, "a fiduciary has an obligation to diverge from plan document instructions

[3] Defendants did not contend at the dismissal stage that the Plan language "insulated them from liability for fiduciary breaches," as Plaintiffs falsely suggest (Mot. 3). Rather, Defendants argued that the Plan language made Plaintiffs' allegations of imprudence and disloyalty implausible because it provided an "obvious alternative explanation" for the Plan's all-T. Rowe Price fund lineup. *See* Dkt. 35-1 at 8-12. In ruling on Defendants' motion to dismiss, this Court did not hold that the Plan language was irrelevant, but that the Plan document did "not provide a blanket defense" in light of allegations of poor performance and high fees that had to be taken as true at that stage. Dkt. 58 at 12.

where necessary to protect the interests of plan participants"—i.e., where following plan terms would amount to a breach of other duties. MSJ Op. 11 (citing *Tatum*, 761 F.3d at 367 n.16). Because there is no question that, in the event of a conflict, the duty of prudence would trump the duty to follow the plan document, provisions specifying the investment options to be offered in a plan can never insulate fiduciaries from liability for selecting or retaining funds that are not reasonable choices. While some proprietary funds may be unreasonable options for some in-house plans based on their performance, fees, or other characteristics, the Department of Labor and numerous courts have recognized that proprietary funds often *are* appropriate options. *See* Class Exemption Involving Mutual Fund In-House Plans, 42 Fed. Reg. 18,734 (Apr. 8, 1977); Dkt. 184 at 6 & n.4 (collecting decisions ruling in whole or in part for defendants on proprietary fund claims); *see also* MSJ Op. 2 (noting that Congress and the Department of Labor have declined to prohibit use of proprietary funds in in-house plans).[4] Indeed, the court in *Wildman* found no breach of fiduciary duty in offering an all-proprietary-fund menu even absent plan language specifying that approach, and even in the face of sub-benchmark performance across the lineup. *See Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 697, 700-04 (W.D. Mo. 2019). Against this backdrop, there is no reason to suspect that prudence will invariably require fiduciaries to depart from plan terms directing the inclusion of proprietary funds, and no reason to reject such provisions out of hand in order to avoid diluting ERISA's duty of prudence.

[4] That many plans have been sued for offering proprietary funds and some have settled or otherwise voluntarily chosen to alter their lineups in response (*see* Mot. 5) establishes nothing about the general soundness of the practice. *Cf.* Fed. R. Evid. 408(a). Plaintiffs' comparison to *Fuller v. SunTrust Banks, Inc.*, 2019 WL 5448206 (N.D. Ga. Oct. 3, 2019), is particularly inapt, as the challenged proprietary funds in that case included funds with "continued and significant underperformance," which Plaintiffs cannot establish for any T. Rowe Price fund offered in the Plan. *Id.* at *26, *28; *see* Dkt. 184 at 12-13 n.8.

II. The Court Did Not Err In Recognizing That The Performance Of The Plan's Investment Lineup As A Whole Is Relevant In Assessing Plaintiffs' Claims

Plaintiffs next argue that the Court erred in referencing the performance of the Plan lineup as a whole when evaluating their claims, proposing that the Court must focus exclusively on the 39 allegedly "underperforming" funds that Plaintiffs have picked out of the broader Plan menu. This criticism, too, is unavailing.

To begin, as the context surrounding the Court's reference to overall Plan performance makes clear, the Court correctly understood that Plaintiffs' central theory—that the Trustees systematically favored T. Rowe Price funds over non-proprietary options—reaches across the full Plan lineup. *See* MSJ Op. 2-3. The strong collective performance of the Plan's investment options is directly relevant to that theory, as it undercuts any suggestion that the entire fund menu was imprudent, or even that large portions of it were. *See id.* The benchmark- and peer-beating performance of the Plan's T. Rowe Price funds also underscores the reasonableness of the Trustees' conclusion that participants would be well-served by the all-T. Rowe Price investment menu specified in the Plan document. *See* Dkt. 147-1 at 7-8, 19-21; Dkt. 184 at 7-8, 10-11. Notably, Plaintiffs have identified no other case where there was undisputed evidence that a plan's proprietary funds collectively outperformed their benchmarks and peer-group medians over the relevant period, and Defendants are aware of none. And although it is true that strong overall performance cannot excuse a failure to remove any specific funds that are not reasonable offerings, Plaintiffs have not shown (and will not be able to show) that there were any such funds the Trustees failed to remove here.

To be sure, faced with undisputed evidence that they cannot establish a net loss from their Plan-wide theory of breach, Plaintiffs' counsel have artificially narrowed their sights to focus on 39 allegedly "underperforming" funds that they contend should have been excluded from the

Plan. As the Court noted in its opinion, however, Plaintiffs have never articulated an *ex ante* basis for separating those 39 funds from the rest of the Plan lineup, and their selections appear to be based entirely on the funds' performance in hindsight. *See* MSJ Op. 17; Dkt. 147-1 at 27-28; Dkt. 184 at 16-17. ERISA does not allow plaintiffs to manufacture a loss by arbitrarily picking and choosing which funds they want to challenge based on after-the-fact performance evaluations.[5] To challenge a single fund or a discrete sub-set of the available options, a plaintiff must supply a coherent *ex ante* standard for distinguishing the challenged investments from the rest of the menu. Put differently, the plaintiff must identify criteria that, if applied by prudent fiduciaries within the class period, would have prompted them to remove the challenged fund or funds. Crucially, *all* of the funds that would have been removed based on even-handed application of whatever measure allegedly disqualified the challenged options must be taken into account when assessing whether the asserted breach produced a net loss, with any gains from affected funds applied to offset losses. *See Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 570 (2d Cir. 2016); *Cal. Ironworkers Field Pension Tr. v. Loomis Sayles & Co.*, 259 F.3d 1036, 1047-48 (9th Cir. 2001); *see also* Dkt. 147-1 at 27-28 & n.13; Dkt. 184 at 17.[6]

[5] Moreover, it is undisputed that even Plaintiffs' 39 allegedly "underperforming" funds collectively outperformed their benchmarks by nearly $9 million over the class period. *See* Dkt. 147-1 at 19; Dkt. 154 at 103 ¶ 293 (citing Dkt. 151-1 ¶ 121 & Ex. 26). Plaintiffs are able to generate the appearance of a "loss" as to that sub-set of the Plan menu only through inapt comparisons to funds with fundamentally different strategies. *See* Dkt. 184 at 17-18.

[6] Plaintiffs have previously attempted to dispute this point by citing the Fourth Circuit's holding that defendants cannot offset losses with gains that "would have [been] obtained regardless" of a breach. *Brundle ex rel. Constellis Emp. Stock Ownership Plan v. Wilmington Tr., N.A.*, 919 F.3d 763, 782 (4th Cir. 2019); *see* Dkt. 171 at 47. As Defendants have explained, that principle does not apply where the gains in question *would not have accrued but for the breach*—i.e., where the gains were earned on funds that prudent fiduciaries also would have removed. *See* Dkt. 184 at 17.

Consistent with this authority, the Court's opinion allows for the possibility that *if* there were an *ex ante* basis for singling out an individual fund that should have been removed for unique reasons, Plaintiffs in theory could pursue a claim of breach and resulting loss based on that fund alone. *See* MSJ Op. 17. ERISA, however, does not permit a plaintiff to do what Plaintiffs attempt, *see* Mot. 6—compute "losses" on a sub-set of funds that plan fiduciaries would have had no principled basis for removing without touching any other options in the menu.

Plaintiffs' lone authority, *DiFelice v. US Airways, Inc.*, 497 F.3d 410 (4th Cir. 2007), does not hold otherwise. *DiFelice* recognizes only that fiduciaries have an obligation to monitor every fund offered in a plan to ensure that it is prudent on its own terms, and cannot escape liability for unreasonable individual options by arguing that participants could have constructed an appropriate portfolio by combining those funds with others. *See id.* at 423. That unexceptionable description of the duty to monitor does not allow plaintiffs to ignore the existence (and performance) of additional funds that would also be deemed imprudent if the proffered theory of breach were accepted.

III. The Court's Assessment That The Plan's All-T. Rowe Price Fund Lineup Generally Performed Well Is Well-Founded

Plaintiffs also dispute the accuracy of the Court's observation that the Plan's all-T. Rowe Price menu "generally performed well as attested by the fact that the Plan's assets have more than tripled in value in the relevant period." Mot. 6 (quoting MSJ Op. 2). Plaintiffs admit that total Plan assets *did* roughly triple from 2011 through 2019, but they quibble with whether all of that increase represents added "value," noting that some of the growth is attributable to contributions rather than investment returns. Mot. 7. When the Plan's investment returns are isolated, Plaintiffs argue, the results look less impressive. *See* Mot. 8.

Plaintiffs' critique is flawed at both steps. To start, while Plaintiffs argue that contributions that *increased* total Plan assets during the class period must be set aside when evaluating overall Plan performance, the new calculations that Plaintiffs offer fail to account for distributions to participants that *decreased* total Plan assets for reasons unrelated to investment performance in the same years. *See* Decl. of Jennifer Conrad, Ph.D. in Support of Defs.' Opp. to Pls.' Mot. for Reconsideration ("Conrad Decl.") ¶ 4. Adjusting for the impact of contributions *and* distributions, the Plan delivered a total return of 144.5% from 2011 through 2019, well above the 84.2% calculated by Plaintiffs' expert without considering distributions. Conrad Decl. ¶ 5 & Ex. 1; *see* Dkt. 205-2 ¶¶ 3-4. Indeed, once Plaintiffs' failure to account for distributions is corrected, the Plan as a whole *outperformed* the Vanguard Balanced Index Fund that Plaintiffs invoke to illustrate the Plan's supposedly "underwhelming performance" (Mot. 8) in the class period. Conrad Decl. ¶ 5.

Further, Plaintiffs' comparison of the Plan's total returns to those it would have earned if invested entirely in either the Vanguard Total Stock Market Index Fund (VITSX) or the Vanguard Balanced Index Fund (VBAIX) ignores the actual composition of the Plan menu and the allocation decisions made by the Plan's self-directed participants. *See* Conrad Decl. ¶ 6; *cf. Wildman*, 362 F. Supp. 3d at 711 (rejecting proposed loss measures that "mis-mapped risk profiles between the at-issue fund and the alternative" and "ignored Plan participants' preferences"). The Vanguard Total Stock Market Index Fund is a pure domestic equity fund, and the Vanguard Balanced Index Fund invests in domestic equities and fixed income only. *See* Conrad Decl. ¶ 6; *see also* Dkt. 205-2 ¶ 4. Yet the Plan here offered participants a far broader range of options with varied investment strategies, risk profiles, and expected returns. *See* Conrad Decl. ¶ 6 & Ex. 2. For example, the Plan menu included several international equity

strategies not represented at all within Plaintiffs' Vanguard comparators, and participants allocated a significant portion of total Plan assets to those strategies and other categories beyond domestic equities and fixed income. Conrad Decl. ¶ 6 & Ex. 2. In fact, the Trustees could not have concentrated all of the Plan's assets in the Vanguard Total Stock Market Index Fund or Vanguard Balanced Index Fund and still qualified for ERISA § 404(c)'s safe harbor, which requires that participants have access to at least three investment options with different risk/return characteristics. *See* 29 C.F.R. § 2550.404c-1(b)(3)(i)(B). Notably, when the Vanguard Total Stock Market Index Fund's return is compared to the weighted average return of the Plan's 26 domestic equity funds—the Plan options in the same asset category—the T. Rowe Price funds' weighted average return is higher. Conrad Decl. ¶ 7.

The same pattern of outperformance holds for the Plan menu as a whole when the actual distribution of assets across strategies is taken into account and funds are measured against benchmarks and peers more closely aligned with their individual mandates. It is undisputed that participants accumulated nearly $341 million more over the class period by investing in the Plan's T. Rowe Price funds than they would have earned from hypothetical investments in the funds' benchmarks, Dkt. 151-1 ¶ 38 & Ex. 5, and the funds offered in the Plan collectively outperformed the median returns of their Lipper and Morningstar peers by $313 million and $351 million, respectively, *id.* ¶¶ 42-43 & Exs. 7-8.

IV. The Court's Opinion Correctly Recognizes That The Summary Judgment Record Does Not Support A Finding Of The Type Of Widespread, Systemic Fiduciary Breach On Which Plaintiffs' Nine-Figure Damages Claims Are Based

Finally, Plaintiffs argue that the Court erred as a matter of law by noting that, after reviewing the evidence presented on summary judgment, it did "not see the sort of egregious improprieties that would support the nine-figure damages award Plaintiffs seek." Mot. 8 (quoting MSJ Op. 2). Plaintiffs take this statement as an indication that the Court believes

"doubts in measuring losses should be resolved against Plan participants when the fiduciaries' breaches are not egregious." Mot. 9. Read in context, however, the Court's statement appears to reflect nothing more than its conclusion that Plaintiffs are highly unlikely to be able to prove breaches of the scope necessary to support the total damages they claim—i.e., breaches cutting across wide swaths of the Plan lineup. *See* MSJ Op. 3 (explaining that the "evidence does not conform with Plaintiffs' allegations of shocking *and pervasive* mismanagement" (emphasis added)). The Court did not suggest that ERISA plaintiffs can recover damages only by proving an "egregious" breach of fiduciary duty, or that a plaintiff who could prove a breach as to an individual fund or coherent sub-group of funds within a broader lineup would be precluded from recovering the corresponding net loss just because there was no plan-wide breach. Plaintiffs' effort to show that the Trustees' conduct was "egregious" (Mot. 10) is therefore beside the point.

Nevertheless, for reasons Defendants have previously explained, the conduct Plaintiffs cite also does not establish any breach of fiduciary duty, let alone an "egregious" one. Plaintiffs' theory that Defendants' conduct was "egregious" because they did not "mitigate … conflicts" by excluding portfolio managers from the group of Trustees or securing outside investment advice (Mot. 10) rests on the false premise that ERISA required Defendants to take either of those steps. As the Court correctly recognized, "numerous courts have rejected the argument that ERISA imposes liability for merely failing to avoid conflicts." MSJ Op. 13 (collecting cases); *see also, e.g.*, *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 812, 834-35 (N.D. Cal. 2005). More specifically, "ERISA explicitly permits corporate officers and employees to serve as fiduciaries," MSJ Op. 13 (citing 29 U.S.C. § 1108(c)(3)), and "there is no rule that conflicted fiduciaries must seek independent advice," *id.* (citing *Dormani v. Target Corp.*, 970 F.3d 910, 916-17 (8th Cir. 2020)). Plaintiffs' suggestion that the portfolio manager Trustees faced a

material conflict beyond the unobjectionable, theoretical tension inherent in their status as T. Rowe Price employees is unfounded. Plaintiffs have marshalled no evidence that any Trustee's compensation was linked to Plan decisions, and they do not contend that either of the two Plan investment options that were managed by a Trustee should have been removed. *See* Dkt. 147-1 at 23-24; Dkt. 184 at 4-5.

Plaintiffs are also off base in arguing that the composition of the Plan lineup, and the fact that the Trustees never independently removed a fund based on its performance, suggest an "egregious" breach of duty (or any breach at all). As Defendants have previously explained, neither the all-T. Rowe Price lineup nor the inclusion of recently launched strategies in the Plan is suspect on its own, and the Trustees came to a reasoned view that participants would benefit from a menu spanning the full range of T. Rowe Price retirement offerings—a view that has been amply confirmed in hindsight. *See supra* at 5-6, 9-10; Dkt. 147-1 at 4-8, 10-13, 19-21; Dkt. 184 at 5-8, 10-11; *see also* MSJ Op. 15 (noting Plaintiffs' "paltry showing" on theory based on addition of new funds to the Plan). Plaintiffs say it is "telling" that the Trustees never removed a fund from the Plan lineup due to poor performance, Mot. 10, but it is well established that "a fiduciary may—and often does—retain investments through a period of underperformance as part of a long-range investment strategy," *White v. Chevron Corp.*, 2016 WL 4502808, at *17 (N.D. Cal. Aug. 29, 2016); *see also* Dkt. 147-1 at 20. And where a fund's performance raised more fundamental questions that might otherwise have led the Trustees to remove the fund from the Plan, their consultations with T. Rowe Price senior management confirmed that the company was already taking action that the Trustees judged sufficient to protect the Plan's interests—including, in some instances, by merging the fund into another strategy. These actions made unnecessary any independent removal decision by the Trustees. *See* Dkt. 147-1 at 6-7; Dkt. 154

at 76-81 ¶¶ 155-81; *id.* at 85-87 ¶¶ 200-08.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for reconsideration should be denied.

Dated: March 10, 2021

Respectfully submitted,

By: */s/Brian D. Boyle*
Brian D. Boyle (*pro hac vice*)
Shannon M. Barrett (D. Md. Bar No. 16410)
Deanna M. Rice (*pro hac vice*)
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414
bboyle@omm.com
sbarrett@omm.com
derice@omm.com

Gerard A. Savaresse (*pro hac vice*)
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, New York 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061
gsavaresse@omm.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Brian D. Boyle, hereby certify that on March 10, 2021, I caused a copy of the foregoing document to be served upon all counsel of record via the CM/ECF system for the United States District Court for the District of Maryland.

/s/*Brian D. Boyle*
Brian D. Boyle

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
BALTIMORE DIVISION

David G. Feinberg, et al.,

Plaintiffs,

vs.

T. Rowe Price Group, Inc., et al.,

Defendants

Case No.: 1:17-cv-00427-JKB

DECLARATION OF JENNIFER CONRAD, PH.D. IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION

I, Jennifer Conrad, Ph.D., declare as follows:

1. I have been retained by counsel for T. Rowe Price Group, Inc. ("T. Rowe Price" or the "Company"), certain T. Rowe Price Group, Inc. affiliates, and certain current and former employees of T. Rowe Price Group, Inc. (collectively "Defendants") as an expert witness in the above-captioned case and previously provided an expert report on April 3, 2020. I am currently the Dalton L. McMichael Sr. Distinguished Professor of Finance at the Kenan-Flagler Business School, University of North Carolina at Chapel Hill, where I have been on the faculty since 1985. My qualifications are included in my initial report in this matter. (See Dkt. No. 151-1).

2. I am more than 18 years of age and would be competent to testify at trial regarding the facts stated herein.

3. Defendants' counsel provided me with the Declaration of Steve Pomerantz, Ph.D. in Support of Plaintiffs' Motion for Reconsideration (Dkt. No. 205-2), in which Dr. Pomerantz claims to calculate the T. Rowe Price Plan's total investment returns between 2011 and 2019.

Dr. Pomerantz compares the total Plan returns that he calculates to the returns of two Vanguard index funds: the Vanguard Total Stock Market Index Fund (ticker: VITSX) and the Vanguard Balanced Index Fund (ticker: VBAIX). Dr. Pomerantz calculates a total return of 84.2 percent for the T. Rowe Price Plan from 2011 through 2019, compared to VITSX's return of 197.5 percent and VBAIX's return of 113.5 percent over the same period. Based on these calculations, Dr. Pomerantz claims that Plan participants would have earned approximately $1.5 billion or $455 million more had the Plan's assets been invested entirely in VITSX or VBAIX, respectively.

4. I have identified a number of flaws in Dr. Pomerantz's analysis. First, Dr. Pomerantz's calculation of Plan returns is erroneous. Dr. Pomerantz calculates the Plan returns based on year-end Plan balances minus contributions made to the Plan.[1] For example, Dr. Pomerantz calculates the 2012 Plan return so that the reported end-of-year 2011 Plan assets, grown at the calculated return, plus the total contributions to the Plan made in 2012 (assumed to occur at year end), equal the reported end-of-year 2012 Plan assets.[2] The Plan's total assets at year-end 2011 and 2012 were $996,948,744 and $1,202,098,433, respectively. Total contributions to the Plan in 2012 were $86,566,883. Under Dr. Pomerantz's calculation, the Plan started 2012 with $996,948,744, and then earned a return of 11.9% during 2012 and received $86,566,883 in contributions at the end of 2012 to achieve an asset balance of $1,202,098,433 at the end of 2012. The critical flaw in this calculation is that Dr. Pomerantz only considers total gross contributions made to the Plan in each year, and fails to account for distributions made to

[1] The data used in Dr. Pomerantz's calculations are drawn from the Plan's Form 5500s.
[2] That is, Dr. Pomerantz calculates the Plan's 2012 return using the following equation: Year-end 2011 Plan Assets * (1+ Plan's Calculated 2012 returns) + 2012 Total Contributions to the Plan = Year-end 2012 Plan Assets. Using reported values for 2011 and 2012 Plan Assets, the equation solves for the Calculated 2012 return as: $996,948,744 * (1 + Plan's Calculated 2012 returns) + $86,566,883 = $1,202,098,433, or the Calculated 2012 return = 11.9%.

Plan participants (e.g., participants withdrawing money from their Plan accounts) or to other parties (e.g., Plan expenses) over the same period. These outflows from the Plan must be taken into account when calculating the Plan's returns. To continue the example while still using Dr. Pomerantz's method, Dr. Pomerantz should have calculated the 2012 Plan return so that the end-of-year 2011 Plan assets, grown at the calculated rate of return, plus the total 2012 contributions to the Plan minus total 2012 distributions from the Plan (both assumed to occur at year end), equal end-of-year 2012 Plan assets.[3] The Plan's Form 5500 filed with the Department of Labor shows that the Plan made $36,385,866 of benefit payments to participants in 2012. These benefit payments reduce the reported end-of-year assets in the Plan; when these benefit payments are taken into account by adding them back to the reported end-of-year assets, the calculated year-end balance is higher. As a consequence, the calculated Plan return over 2012, using Dr. Pomerantz's (corrected) methodology, must increase to match the adjusted year-end balance for 2012 that adds back total distributions. Specifically, with the correction to Dr. Pomerantz's calculation to account for distributions, the Plan started 2012 with $996,948,744, earned a total return of 15.5% (not 11.9% as Dr. Pomerantz calculates) during 2012, and then received $86,566,883 in contributions and paid out $36,385,866 in distributions at the end of 2012, resulting in an asset balance of $1,202,098,433 at the end of 2012.

5. I have corrected Dr. Pomerantz's calculations for the 2011 through 2019 period. To be conservative, I include only the total benefit payments (Form 5500, Schedule H, line 2e(4)) in calculating the Plan's total annual distributions and do not adjust for the administrative expenses paid by the Plan (Form 5500, Schedule H, line 2i(5)). As reflected in the attached

[3] Dr. Pomerantz should have calculated the Plan's 2012 return using the following equation: Year-end 2011 Plan Assets * (1+ Plan's Calculated 2012 returns) + 2012 Total Contributions to the Plan – 2012 Total Distributions from the Plan = Year-end 2012 Plan Assets. $996,948,744 * (1 + Plan's Calculated 2012 returns) + $86,566,883 – $36,385,866 = $1,202,098,433.

Exhibit 1, when I take into account the Plan's total benefit payments as well as contributions, the T. Rowe Price Plan return from 2011 through 2019 is 144.5 percent, not 84.2 percent as claimed by Dr. Pomerantz. I note that the T. Rowe Price Plan's total return from 2011 through 2019, calculated correctly, is higher than the return of VBAIX over the same period.[4]

6. Another critical conceptual flaw in Dr. Pomerantz's approach is that he uses inappropriate comparators to assess the T. Rowe Price Plan's returns. In fact, Dr. Pomerantz does not claim that the Vanguard funds he uses as comparators reflect the asset allocation of the Plan and that therefore they are reasonable performance benchmarks for the Plan. The Plan offered funds with a variety of strategies, including funds that invested in domestic and foreign equities, fixed income funds, and specialty funds. One of the Vanguard funds Dr. Pomerantz uses as a comparator (VITSX) is a pure domestic equity fund, and the other (VBAIX) is a balanced fund investing in domestic equities and fixed income only. The attached Exhibit 2 shows the distribution of the T. Rowe Price Plan's assets across fund categories as of the start of the Class Period, February 14, 2011.[5] As Exhibit 2 shows, the Plan had significant investments in categories other than domestic equities and fixed income. For example, 16 percent of the Plan's assets were invested in pure international equity funds. Note that this is a conservative estimate of the Plan's total investments in international equities at the time, since other funds, including funds classified under Equity Sector/Specialty, Asset Allocation/Balanced Funds, and Retirement/Target Date Funds, may have some portion of their portfolios invested in

[4] As an alternative approach, I calculate the weighted average return of Plan's funds. In this calculation, I multiply the monthly return of each fund with the fund's weight in the Plan at the beginning of each month (calculated as the fund's monthly balance divided by the Plan's monthly balance). I add these weighted returns to arrive at the monthly Plan return. I then cumulate the monthly returns to obtain the Plan return for the period January 2011 to December 2019. Using this alternative methodology produces a Plan return of 148.6 percent. See my workpaper: Plan Returns Jan2011-Dec2019 workpaper.xlsx.

[5] I obtained this categorization of funds from the T. Rowe Price USRP Performance Reports (see, e.g., TRP_Feinberg00041469) and used the same categorization as in my prior report. For example, see Exhibit 5 in my April 3, 2020 report, Dkt. No. 151-1.

international equities. For example, as of December 31, 2011, the T. Rowe Price Retirement 2020 Fund had approximately 19 percent of its portfolio invested in international equities.[6]

7. If VITSX, which invests only in domestic equities, is to be used as a benchmark, a more appropriate comparator group of Plan funds would be those that also invested in domestic equities only. I have listed these 26 funds in Exhibit 5 of my April 3, 2020 report (Dkt. No. 151-1, Ex. 5). The weighted average return of the 26 Domestic Equity Funds included in the T. Rowe Price Plan from January 2011 through December 2019 was 220.3 percent.[7] This return is higher (by 22.8 percentage points) than the 197.5 percent return Dr. Pomerantz reports for VITSX for the same period.

8. There is another fundamental flaw with the concept of using a 401(k) plan's overall returns to draw inferences about fiduciary decisions, particularly when inappropriate comparators are used. Plan returns are in large part determined by plan participants' asset-allocation decisions, which are outside the control of plan fiduciaries. Consider two plans that offered the identical array of index funds that Dr. Pomerantz used in his February 28, 2020 report to calculate his third asserted measure of damages.[8] If the participants in the first plan allocate their investments primarily to lower returning index funds (e.g., fixed income index funds) while the participants in the second plan primarily choose higher return funds (e.g., equity index

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[6] Approximately 41 percent of the Plan holdings are in mixed asset class investments (e.g., the Retirement/Target Date Funds, which include holdings of domestic and international equity and fixed income securities). If I only include the funds that have a single asset class focus, the portfolio weights are as follows: Domestic Equity 54.7 percent; Domestic Fixed Income 15.8 percent; International Equity 27.2 percent; and International Fixed Income 2.3 percent. See my workpaper: Exhibit workpaper.xlsx, tab "Asset Allocation workpaper."

[7] I calculated the weighted average return of the Plan's Domestic Equity Funds as follows: I multiplied the monthly return of each Domestic Equity Fund with the fund's weight in the Plan at the beginning of each month (calculated as the fund's monthly balance divided by the total monthly balance in the Plan's Domestic Equity Funds). I sum these weighted returns to arrive at the monthly return of the Plan's Domestic Equity Funds. I then cumulate the monthly returns to obtain the return of Plan's Domestic Equity Funds for the period January 2011 through December 2019.

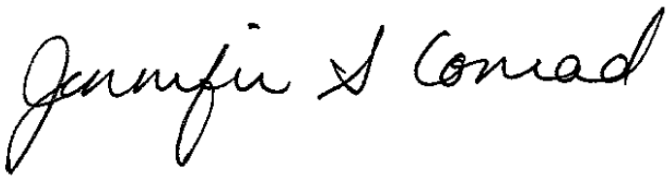
[8] Dkt. No. 142-3.

funds), the first plan will have lower "plan returns" than the second plan. However, this difference in total plan returns does not provide any information about the fiduciaries' decisions about which funds to include in the plan.

9. In fact, the difference in returns between VITSX and VBAIX illustrates the large impact that asset allocations can have on performance. VITSX, which invested in domestic equities by tracking the CRSP US Total Market Index (an unmanaged benchmark representing the overall U.S. equity market), returned 197.5% from 2011 through 2019 while VBAIX, which invested 60% of its portfolio in domestic equities (by tracking the same index as VITSX) and 40% of its portfolio in domestic fixed income (by tracking the Bloomberg Barclays U.S. Aggregate Float Adjusted Index) returned 113.5 percent over the same period.[9] Because VITSX and VBAIX tracked the same index for their domestic equity investments (i.e., their domestic equity portfolios were the same), the difference in their performance is entirely due to VBAIX's investments in fixed income instruments.

10. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 5th of March, 2021



Jennifer Conrad, Ph.D.

[9] See https://investor.vanguard.com/mutual-funds/profile/portfolio/vbaix, https://investor.vanguard.com/mutual-funds/profile/portfolio/vitsx

Exhibit 1

Corrected T. Rowe Price Plan Returns Accounting for Distributions

2011 – 2019

	Total Assets at the End of the Year	Total Contributions (Form 5500) [1]	Total Benefit Payouts (Form 5500)[1] [2]	Net Contributions [1] – [2]	Pomerantz Calculations Ignoring Benefit Payouts		Corrected Calculations Accounting for Benefit Payouts	
					Annual Return[2]	Cumulative Return[3]	Annual Return[4]	Cumulative Return
2011	$996,948,744	$80,041,859	$29,907,194	$50,134,665				
2012	$1,202,098,433	$86,566,883	$36,365,828	$50,201,055	12%	12%	16%	16%
2013	$1,535,303,014	$92,630,323	$47,049,000	$45,581,323	20%	34%	24%	43%
2014	$1,692,177,739	$110,606,908	$68,280,660	$42,326,248	3%	38%	7%	54%
2015	$1,785,545,765	$118,467,336	$61,263,541	$57,203,795	-1%	36%	2%	57%
2016	$1,980,662,418	$126,383,578	$61,236,241	$65,147,337	4%	42%	7%	69%
2017	$2,483,379,946	$148,668,029	$76,842,047	$71,825,982	18%	67%	22%	105%
2018	$2,446,776,116	$169,904,392	$89,643,087	$80,261,305	-8%	53%	-5%	96%
2019	$3,117,017,204	$170,735,631	$111,800,265	$58,935,366	20%	84%	25%	144%
Total		**$1,104,004,939**	**$582,387,863**	**$521,617,076**		**84.2%**		**144.5%**

Source: Declaration of Steve Pomerantz (February 22, 2021, Dkt. No. 205-2); Form 5500 data for T. Rowe Price 401(k) Plan, 2011 - 2019

Note:
[1] Total Benefit Payouts are collected from the Form 5500, Schedule H, line 2e(4).
[2] Dr. Pomerantz recovers the Annual Return from the following equation: [(Total Assets in year *t* - Total Contributions in year *t*)/Total Asset in year *t-1*]-1.
[3] I calculate the Cumulative Return as [(1+Return in year *t*)*(1+Return in year *t+1*)x ... x (1+Return in year *t+N*)]-1.
[4] I calculate the corrected Annual Returns from the following equation: [(Total Assets in year *t* - Net Contributions in year *t*)/Total Asset in year *t-1*]-1.

Exhibit 2

Asset Allocation of Plan at the Start of the Class Period

2/14/2011

Type of Funds	Amount of Plan Assets Invested	Percentage of Plan Assets
Domestic Equity Funds	$322,697,348	32.26%
Domestic Fixed Income[1]	$92,960,805	9.29%
International Equity Funds[2]	$160,441,063	16.04%
International Fixed Income Funds	$13,821,326	1.38%
Equity Sector / Specialty Funds	$140,403,186	14.03%
Fixed Income Specialty Funds	$23,839,128	2.38%
Asset Allocation/Balanced Funds	$42,575,815	4.26%
Retirement / Target Date Funds	$203,680,133	20.36%
Total	**$1,000,418,804**	**100%**

Source: Exhibit 5 of Dr. Jennifer Conrad's Rebuttal Report (Dkt. No. 151-1)

Note:
[1] Domestic Fixed Income Funds includes the Domestic Fixed Income Funds, Capital Preservations Funds, and Money Market & Stable Value Funds.
[2] International Equity Funds includes International Equity Funds and International Regional Equity Funds.