UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
BALTIMORE DIVISION

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

PLAINTIFFS' MOTION TO RECONSIDER CERTAIN FINDINGS IN THE COURT'S OPINION ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to the Federal Rules of Civil Procedure and Local Rule 105(10), Plaintiffs' respectfully seek reconsideration of certain findings in the Court's February 10, 2021 Memorandum Opinion denying in large part the parties' motions for summary judgment. (Dkt. No. 199 (unredacted), 200 (redacted); hereinafter "Opinion").

Plaintiffs believe (i) the Opinion errs as a matter of law in giving effect to Plan language limiting the investment menu to in-house funds; (ii) the Opinion errs as a matter of law in considering overall plan performance as a factor in assessing damages and liability for Defendants' breaches with respect to specific funds; (iii) the Opinion errs as a matter of fact in stating that Plan assets more than tripled in value during the relevant period, and that that shows good performance; and (iv) the Opinion errs as a matter of law in suggesting that the "egregiousness" of Defendants' conduct is a factor in assessing their liability or the Plan's losses.

A brief in support and declaration of Steve Pomerantz, Ph.D. are filed herewith.

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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO RECONSIDER CERTAIN FINDINGS IN THE COURT'S OPINION ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STANDARD 2

III. ARGUMENT 2

A. The Opinion Errs as a Matter of Law Since it Gives Effect to Plan Language that ERISA Dictates is Void 2

B. The Opinion Errs as a Matter of Law in Finding that, Contrary to the Holding of the Fourth Circuit, Overall Plan Performance Can Excuse Fiduciary Breaches with Respect to Particular Investments 5

C. The Opinion Errs as a Matter of Fact in Stating that Plan Assets "have more than tripled in value in the relevant period" 6

D. The Opinion Errs as a Matter of Law in Implying that the Egregiousness of Defendants' Conduct is a Factor in Determining Defendants' Liability for Damages 8

IV. CONCLUSION 10

I. INTRODUCTION

Plaintiffs respectfully seek reconsideration of certain findings in the Court's February 10, 2021 Memorandum Opinion denying in large part the parties' motions for summary judgment. (Dkt. No. 199 (unredacted), 200 (redacted); hereinafter "Opinion"). Plaintiffs are not seeking reconsideration of the Court's ultimate decision, i.e. its order denying Plaintiffs' Partial Motion for Summary Judgment, and denying in part Defendants' Cross-Motion for Summary Judgment. Instead, Plaintiffs seek reconsideration of certain findings that are highly relevant to how they prepare for trial.

As a preliminary matter, Plaintiffs note that the Opinion inadvertently misinterprets the nature of Plaintiffs' Motion for Partial Summary Judgment. The Opinion states "Plaintiffs moved for summary judgment on Counts I, III, and VI." (Op. at 7). Plaintiffs moved for summary judgment on Count VI (prohibited transactions), but did not move for summary judgment on Count III, and only moved for summary judgment on three specific issues related to Count I (not Count I in its entirety): (i) whether Defendants breached their ERISA fiduciary duties of prudence and loyalty by "failing to take reasonable steps to mitigate their conflict of interest in making decisions regarding selecting and retaining T. Rowe Price funds," (ii) whether Defendants breached those duties "by failing to investigate potentially superior non-proprietary investment options for the Plan," and (iii) whether Defendants breached those duties by "adding new T. Rowe Price funds to the Plan without performing any investigation into their merits." (See Dkt. No. 142 at 1). If Plaintiffs had been moving for summary judgment on the entirety of Count I, both their arguments and evidence would have been broader in scope and more extensive.

With respect to errors of law and fact addressed in this brief, as is further discussed below, Plaintiffs believe (i) the Opinion errs as a matter of law in giving effect to Plan language

limiting the investment menu to in-house funds because ERISA mandates that such language is void; (ii) the Opinion errs as a matter of law in considering overall plan performance as a factor in assessing damages and liability for Defendants' breaches with respect to specific funds, when controlling Fourth Circuit authority dictates that overall plan performance is irrelevant in such contexts; (iii) the Opinion errs as a matter of fact in stating that Plan assets more than tripled in value during the relevant period, and that that shows good performance, because half of that increase is attributable to new contributions to the Plan – not an increase in value – and, in any event, the overall Plan underperformed readily available nonproprietary funds; and (iv) the Opinion errs as a matter of law in suggesting that the "egregiousness" of Defendants' conduct is a factor in assessing their liability or the Plan's losses, because ERISA does not provide for punitive damages and only seeks to compensate participants for losses.

II. STANDARD

This Court has explained the relevant standard as follows

> Motions for reconsideration of interlocutory orders "are not subject to the strict standards applicable to motions for reconsideration of a final judgment." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514–515 (4th Cir. 2003). "In considering whether to revise interlocutory decisions, district courts in this Circuit have looked to whether movants presented new arguments or evidence, or whether the court has obviously misapprehended a party's position or the facts or applicable law." *Cohens v. Md. Dep't of Human Res.*, 933 F. Supp. 2d 735, 742–43 (D. Md. 2013) (internal quotation marks and citations omitted).

Baxter v. Burns & McDonnell Eng'g Co., Inc., No. CV JKB-19-3241, 2020 WL 4286828, at *2 (D. Md. July 27, 2020) (Bredar, J.)

III. ARGUMENT

A. **The Opinion Errs as a Matter of Law Since it Gives Effect to Plan Language that ERISA Dictates is Void**

In denying Defendants' motion to dismiss, this Court correctly rejected what Plaintiffs have referred to as Defendants' "the Plan document made me do it" defense. (Dkt. No. 58

(Motion to Dismiss Opinion) at 11-12; Dkt. No. 37 (Pls Opp.) at 10-13). Defendants had argued that Plan language requiring investment in all and only proprietary funds (what Defendants themselves referred to as "hardwiring" the Plan to permit only T. Rowe Price funds), insulated them from liability for fiduciary breaches. However, in its summary judgment opinion, this Court has let in through the back door what it shut the front door to in its motion to dismiss. By considering the existence of the hardwiring language as a relevant factor in determining whether Defendants are liable for ERISA fiduciary breaches, the Court has in effect allowed that Plan language to greatly weaken the fiduciary duties applicable to Defendants, and made it very difficult to prove a fiduciary breach. For example, the Court stated that "a fact-finder could very well determine that the Trustees prudently followed the Plan's instructions and showed a reasonable preference for" proprietary funds. (Op. at 17). The Court also wrote that "Defendants are correct that Dr. [sic] Halpern's failure to account for the Plan document's directions undermines his analysis…". (Op. at 15). For the reasons discussed below, such findings are without any precedent in the case law, are contrary to ERISA, and could potentially have major public policy consequences.

First, that language in the Plan Document is void under ERISA. Defendants have admitted that this language was intended to prevent them from being held liable for offering only proprietary funds in the Plan. (Dkt. No. 145-2, ¶62). But ERISA expressly provides that such provisions are void: "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part [of ERISA] shall be void as against public policy." 29 U.S.C. §1110(a). Hence, the Plan provision on which the Court's findings rely is void under ERISA since it purports to relieve Defendant fiduciaries of their ERISA fiduciary responsibility for selecting and monitoring Plan

investment options. *See, e.g.,* Solis v. Plan Benefit Services, Inc., 620 F.Supp.2d 131, 134-35 (D. Mass. 2005) (finding void under §1110(a) plan provision that stated "The Trustee shall be accountable for all contributions received by it, but shall have no duty to require any contributions to be made to it . . .," because it purported to relieve fiduciaries of responsibility for collecting employer contributions); Kayes v. Pac. Lumber, 51 F.3d 1449, 1460 (9th Cir. 1995); Chicago Bd. Options Exch. v. Conn. Gen. Life Ins., 713 F.2d 254, 259 (7th Cir. 1983); *see also* Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2468 (2014) (citing §1110(a) and holding that "the duty of prudence trumps the instructions of a plan document, such as an instruction to invest exclusively in employer stock").

Black's Law Dictionary defines "void" as:

> Null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended. An instrument or transaction which is wholly ineffective, inoperative, and incapable of ratification and which thus has no force or effect so that nothing can cure it.

Black's Law Dictionary (Sixth ed.) (citations omitted). Plaintiffs are not aware of any prior opinion that has given effect to Plan language that is void under ERISA, and to do so would clearly conflict with the recognized legal meaning of "void." Moreover, in the only other case of which Plaintiffs are aware where the Plan document purported to require investment in proprietary funds, the parties determined that such an argument was meritless and expressly agreed not to even raise it. Brotherston v. Putnam Inv's, 907 F.3d 17, 23-24 (1st Cir. 2018).

Second, if the Court's unprecedented findings stand, they are likely to unleash a wave of attempts by ERISA plan fiduciaries to limit their liability for investment breaches by "hardwiring" Plan documents, so that the documents mandate inclusion of specific identified investments. This could then eviscerate ERISA's fiduciary duties to prudently monitor and select the investments that are in the best interest of plan participants, Tibble v. Edison Int'l, 135

S.Ct. 1823, 1828-29 (2015). The Court noted in its opinion that there have been a number of ERISA proprietary fund suits brought in recent years; many of these have resulted in significant settlements and replacement of underperforming proprietary funds in plan lineups with cheaper, better non-proprietary funds, (Dkt. No. 171 at 13; *see, e.g.*, Fuller v. SunTrust Banks, 2019 WL 5448206 at *17 (N. D. Ga. Oct. 3, 2019) (shortly after Plaintiffs' filed a proprietary fund suit all proprietary funds in the plan were promptly replaced by low-cost Vanguard index funds). This has benefited hundreds of thousands if not millions of plan participants in helping them save for their retirement – which is doubtless exactly the result Congress intended by empowering private parties to enforce ERISA fiduciary duties, Braden v. Walmart Stores, Inc., 588 F.3d 585, 598 (8th Cir. 2009) ("Congress intended that private individuals would play an important role in enforcing ERISA's fiduciary duties…" (quotation marks omitted)). This remarkable progress could be reversed if the Court's findings stand.

For these reasons, the Court should modify its opinion to clarify that (i) the Plan's "hardwiring" language is not relevant to evaluating Defendants' liability for fiduciary breach, and (ii) that the opinions of Plaintiffs' expert Samuel Halpern is not undermined by his following the instructions of Plaintiffs' counsel not to consider the hardwiring language in his analysis since that language is void as a matter of law.

B. The Opinion Errs as a Matter of Law in Finding that, Contrary to the Holding of the Fourth Circuit, Overall Plan Performance Can Excuse Fiduciary Breaches with Respect to Particular Investments

The Opinion also errs as a matter of law in suggesting that overall plan performance is a relevant factor in determining whether, and the extent to which, Defendants are liable for breaches concerning individual funds. For example, the Opinion states: "…the Court does not see the sort of egregious improprieties that would support the nine-figure damages award Plaintiffs seek. Though Defendants showed a preference for in-house funds, those funds have

generally performed well as attested by the fact that the Plan's assets have more than tripled in value in the relevant period." (Op. at 2). This language shows the Court employing overall plan performance as a factor to lessen or eliminate Defendants' liability. But the Fourth Circuit has expressly proscribed such a holding:

> "Under ERISA, the prudence of investments or classes of investments offered by a plan must be judged individually." *Langbecker*, 476 F.3d at 308 n. 18; see also *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 438–41 (3d Cir.1996). That is, a fiduciary must initially determine, and continue to monitor, the prudence of each investment option available to plan participants. …the relevant "portfolio" that must be prudent is each available Fund considered on its own…not the full menu of Plan funds.

DiFelice v. U.S. Airways, 497 F.3d 410, 423 (4th Cir. 2007). The Fourth Circuit explained that to hold otherwise would permit fiduciaries to escape liability for poor or self-interested investment choices simply by pairing them with funds that performed well. That would, of course, harm participants who were unlucky enough to choose to invest in the poor funds rather than the good performing funds. *Id.* at 423-24. The Court cites DiFelice's requirement to evaluate fiduciary decisions regarding each Plan investment individually, (Op. at 15-16), but loses sight of this mandate when explaining the basis for its findings. Accordingly, whether or not other funds in the Plan performed well and the Plan's total assets increased during the Class Period, is of no moment and, respectfully, cannot be part of the Court's analysis.

C. The Opinion Errs as a Matter of Fact in Stating that Plan Assets "have more than tripled in value in the relevant period"

As noted above, the Court's Opinion states that the in-house funds "generally performed well as attested by the fact that the Plan's assets have more than tripled in value in the relevant period." (Op. at 2). Plaintiffs have explained above why they believe this fact is irrelevant as a matter of law to their claims. But since the Court has relied upon it, they also feel constrained to point out that it is not factually correct.

While the Opinion does not disclose the precise basis for its assertion, the Opinion is likely referring to the fact that, as disclosed in the chart below, Plan assets were approximately $1 billion in 2011, the year in which the Class Period begins, and approximately $3 billion at the end of 2019. While that does represent a tripling of Plan assets, only a portion of this increase represents an increase "in value." As illustrated in the chart, over $1 billion, fully half of the increase, is simply due to additional contributions to the Plan, not returns on existing investment.

	Total Assets at the End of the Year	**Total Contributions (Employer, Participants, Other) Schedule H, Line 2a(1)(A-C)**	**Transfers of assets to the Plan by Merger, Schedule H, Line 2I(1)**
2011	$996,948,744.00	$80,041,859.00	$0.00
2012	$1,202,098,433.00	$86,566,883.00	$0.00
2013	$1,535,303,014.00	$92,630,323.00	$0.00
2014	$1,692,177,739.00	$110,606,908.00	$0.00
2015	$1,785,545,765.00	$118,467,336.00	$0.00
2016	$1,980,662,418.00	$126,383,578.00	$0.00
2017	$2,483,379,946.00	$148,668,029.00	$0.00
2018	$2,446,776,116.00	$169,904,392.00	$0.00
2019	$3,117,017,204.00	$170,735,631.00	$0.00
Total		$1,104,004,939.00	

(Source of data is Plan filings with the U.S. Department of Labor; see Dkt. Nos. 163:22-26, 164:1-4).[1]

Moreover, contrary to the statement in the Opinion that this shows that the in-house funds "generally performed well," to the extent it shows anything, it actually shows underwhelming performance. Based on this data, Plaintiffs' expert Dr. Steve Pomerantz has calculated the overall Plan investment return based on the above data to be 84.2%. (Pomerantz Decl. ¶4).[2] If Plan assets had instead been invested in a low-cost Vanguard index fund that simply *tracks* (rather than attempting to exceed) the returns of the U.S. stock market, the return would have been 197.5%, and Plan participants would have earned approximately $1.5 billion more for their retirement. *Id.* If Plan assets had instead been invested in another low-cost Vanguard index fund that consists of a mix of 60% equities and 40% bonds, and also merely attempts to track those markets, the Plan would have earned an investment return of 113.5%, resulting in $455 million more in retirement funds for Plan participants. *Id.* Hence, two of the many quality non-proprietary low-cost funds that Defendants failed to even consider for the Plan easily and substantially best the raft of higher cost in-house funds that Defendants forced upon participants as their only option.

D. <u>The Opinion Errs as a Matter of Law in Implying that the Egregiousness of Defendants' Conduct is a Factor in Determining Defendants' Liability for Damages</u>

The Opinion states "the Court does not see the sort of egregious improprieties that would support the nine-figure damages award Plaintiffs seek." (Op. at 2). This is an error of law

[1] At the time of the parties' 2020 summary judgment filings, Plan year 2020 was of course not yet completed, so it is excluded from this analysis.

[2] "Pomerantz Decl." refers to the "Declaration of Steve Pomerantz, Ph.D. in Support of Plaintiffs' Motion for Reconsideration," filed herewith.

because nothing in ERISA suggests the egregiousness of improprieties affects Defendants' liability or whether Plaintiffs are to be made whole for all of their losses.

While egregiousness of conduct is clearly an element in determining appropriate remedies in some civil litigation, especially where punitive damages are at issue, that is not the case here. ERISA does not permit punitive or extra-contractual damages. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985). ERISA's fiduciary liability provision is squarely centered upon compensating and protecting participants – not punishing fiduciaries. It indicates that fiduciaries are

> liable to make good to [the] plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. §1109(a). Notably, while the statutory language indicates the court is to have discretion in awarding "such other equitable or remedial relief," there is no indication of discretion when it comes to compensating participants and the plan for losses. Furthermore, it is well-settled that any doubts in measuring loss should be resolved against the breaching fiduciaries. Roth v. Sawyer–Cleator Lumber Co., 61 F.3d 599, 602 (8th Cir. 1995) ("To the extent that there are ambiguities in determining loss, we resolve them against the trustee in breach"); Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2d Cir. 1985) (same); Meyer v. Berkshire Life Ins. Co., 250 F. Supp. 2d 544, 572–73 (D. Md. 2003), aff'd, 372 F.3d 261 (4th Cir. 2004); Chao v. Moore, No. CIV. A. AW-99-1283, 2001 WL 743204, at *7-8 (D. Md. June 15, 2001). Plaintiffs are aware of no case following or espousing the principle suggested in the Opinion, i.e. that doubts in measuring losses should be resolved against Plan participants when the fiduciaries' breaches are not egregious.

In cases such as this, any award of losses to the Plan almost always involves a simple transfer of assets from an employer (the Plan sponsor) to its employees (the Plan participants via the Plan). There is nothing punitive in such an award, and, indeed, such a remedy is eminently fair given that the breaches Plaintiffs alleged directly benefited the Plan sponsor financially.

Finally, Plaintiffs note that they believe that in several respects, Defendants' conduct is egregious compared to the conduct of other fiduciaries in such cases. First, Defendants have cited no other instance, and Plaintiffs' counsel are aware of none, in which proprietary fund managers themselves were members of the fiduciary committee making decisions about whether their own funds (and those of their colleagues) should be included in a 401(k) Plan. This shows a blatant disregard for the need to mitigate obvious conflicts of interest. Second, Defendants have cited no other instance, and Plaintiffs' counsel are aware of none, in which proprietary funds were offered in a 401(k) Plan and the responsible fiduciaries never got any independent advice or independent evaluations of those funds. This once again shows a complete lack of interest in mitigating conflicts of interest. Third, this case is highly unusual in that no non-proprietary funds whatsoever were offered in the Plan, and participants had no ability to purchase non-proprietary funds if they wished to. Finally, the Court itself noted the telling fact that Defendants' never replaced any of the poor performing in-house funds they purported to evaluate, (Op. at 6), and Plaintiffs have already explained at length in their summary judgment briefing how Defendants simply added every new in-house fund without any meaningful analysis of its merits.

IV. CONCLUSION

For the reasons discussed, the Court should amend the Opinion to correct the errors identified above.

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UNITED STATES DISTRICT COURT
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David G. Feinberg, et al.,

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

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

Defendants.

DECLARATION OF STEVE POMERANTZ, PH.D. IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION

Steve Pomerantz, Ph.D. declares:

1. I am one of Plaintiffs' proposed expert witnesses in this action. I earned a Ph.D. in mathematics from the University of California – Berkeley. My curriculum vitae is included in my initial expert report in this matter. (See Dkt. No. 142-3, Ex. 11).

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

3. Plaintiffs' counsel provided me with the following data regarding the T. Rowe Price U.S. Retirement Program ("Plan"), which is the 401(k) Plan at issue in this case.

	Total Assets at the End of the Year	Total Contributions (Employer, Participants, Other) Schedule H, Line 2a(1)(A-C)	Transfers of assets to the Plan by Merger, Schedule H, Line 2I(1)
2011	$996,948,744.00	$80,041,859.00	$0.00
2012	$1,202,098,433.00	$86,566,883.00	$0.00

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2019	$3,117,017,204.00	$170,735,631.00	$0.00
Total		$1,104,004,939.00	

4. Plaintiffs' counsel requested that I calculate the investment returns indicated below based on these numbers. First, I calculated the overall Plan investment return during these years to be 84.2%. I also calculated what the investment return would have been if Plan assets had instead been invested in Vanguard's Total Stock Market Index Fund (ticker symbol VITSX), which tracks the returns of the United States stock market. The return would have been 197.5%, earning approximately $1.5 billion more for the Plan and its participants. Finally, I calculated what the investment return would have been if Plan assets had instead been invested in Vanguard's Balanced Index Fund, (ticker symbol VBAIX), which has a portfolio target of 60% equities and 40% bonds. The return would have been 113.5%, resulting in approximately $455 million more for the Plan and its participants.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed February 22, 2021 in New York, New York, USA.

Steve Pomerantz, PhD