UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Allen L. Munro et al,

Plaintiffs,

v.

University of Southern California et al,

Defendants.

Case No. 2:16-cv-06191-VAP-Ex

Order GRANTING IN PART and DENYING IN PART Defendants' Motion to Exclude and DENYING Plaintiffs' Motion to Exclude (Doc Nos. 264, 273)

Defendants University of Southern California ("USC") and the USC Retirement Plan Oversight Committee (collectively, "Defendants") moved to exclude the expert testimony of John Hare, Edward O'Neal, and Ty Minnich ("Defendants' Motion") on September 19, 2022. (Doc. No. 264). Plaintiffs Allen L. Munro, Daniel C. Wheeler, Jane A. Singleton, Sarah Wohlgemuth, Rebecca A. Snyder, Dion Dickman, Corey Clark, and Steven L. Olson (collectively, "Plaintiffs") filed an opposition ("Plaintiffs' Opposition") on October 3, 2022, (Doc. No. 280-1), and Defendants' filed a reply ("Defendants' Reply") on October 17, 2022. (Doc. No. 289).

Plaintiffs moved to exclude the expert testimony of Steven Gissiner ("Plaintiffs' Motion") on September 28, 2022. (Doc. No. 273). Defendants filed an opposition ("Defendants' Opposition") on October 17, 2022, (Doc.

No. 292-9), and Plaintiffs' filed a reply ("Plaintiffs' Reply") on October 24, 2022. (Doc. No. 302-1).

After considering all the papers filed in support of, and in opposition to, the Motions, as well as the arguments advanced at the hearing, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' Motion and **DENIES** Plaintiffs' Motion.

I. BACKGROUND

According to Plaintiffs' operative Second Amended Complaint ("SAC"), Defendant University of Southern California allows eligible employees to participate in the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax-Deferred Annuity Plan (the "Plans"). (SAC, Doc. No. 149, ¶ 9). Participants are responsible for choosing whether to contribute to the Plans, how much to contribute, and how to allocate their contributions. (*Id.* ¶ 73). Defendants, as the Plans' fiduciaries, are responsible for selecting the investment options available to participants. (*Id.* ¶ 66). Any fees associated with the investment options are deducted from the returns that participants receive on their investments. (*Id.*).

Prior to March 2016, Defendants engaged four recordkeepers to provide administrative services for the Plans: Teachers Insurance and Annuity Association of America and College Retirement Equities Fund ("TIAA"), the Vanguard Group, Inc. ("Vanguard"), Fidelity Investments Institutional Operations Company ("Fidelity"), and Prudential Trust Company

and Prudential Insurance Company of America ("Prudential"). (*Id.* ¶ 143). Plaintiffs contend that Defendants delegated the selection of the Plans' investment options to these recordkeepers, pointing out that over 96% of the more than 350 investment options available in the Plans were proprietary products of the recordkeepers. (*Id.* ¶ 143; Plaintiffs' Opposition at 4).

Plaintiffs allege that Defendants breached their fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., by failing to administer the Plans "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." (*Id.* ¶ 56 (quoting 29 U.S.C. § 1104(a)(1)(B)).

In support of their claims, Plaintiffs seek to introduce Hare's expert testimony proposing two more "prudent" sets of alternative investment options that, if selected by Defendants for inclusion in the Plans during the relevant time period, would have produced higher returns than the investment options actually offered. (Hare Report, Doc. No. 280-2). Plaintiffs also seek to introduce O'Neal's expert testimony estimating the damages resulting from Defendants' failure to select these alternative sets of investment options. (O'Neal Report, Doc. No. 266-3). Finally, Plaintiffs seek to introduce Minnich's expert testimony suggesting that Defendants' failure to actively and regularly negotiate the Plans' recordkeeping fees

resulted in plan participants paying fees that were higher than those prevailing in the market. (Minnich Report, Doc. No. 280-5).

Defendants dispute the assertions of Plaintiffs' experts and offer Gissiner's expert testimony opining that Defendants took steps consistent with industry practice to ensure that the recordkeeping fees for the Plans were reasonable. (Gissiner Report, Doc. No. 280-9). Both Plaintiffs and Defendants argue that the other side's experts utilized unreliable methods to come to their conclusions.

II. LEGAL STANDARD

Federal Rule of Evidence 702 governs the admissibility of expert testimony, as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court announced that the trial court acts as a "gatekeeper" to the admission of expert scientific testimony and must ensure that all admitted expert

testimony is "not only relevant but reliable." 509 U.S. 579, 589, 597 (1993). The Supreme Court later clarified that this gatekeeping function extended beyond scientific testimony to all expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

The proponent of the expert testimony has the burden of proving that the proposed expert testimony is admissible under Federal Rule of Evidence 702, *Daubert*, and its progeny. *Lust ex rel. Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). This means "the district court can exclude an expert's opinion if the expert fails to identify and defend the reasons" for his conclusions. *Id*. Where the expert's testimony is not the product of peer-reviewed research produced outside the course of litigation, "the expert 'must explain precisely how [he] went about reaching [his] conclusions and point to some objective source . . . to show that [he has] followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in [his] field.'" *Id*. at 597 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318-19 (9th Cir. 1995) ("*Daubert II*")) (formatting in original).

An expert's testimony is relevant when the testimony is "relevant to the task at hand, . . . *i.e.*, that it logically advances a material aspect of the proposing party's case." *Daubert II*, 43 F.3d at 1315 (9th Cir. 1995) (quoting *Daubert*, 509 U.S. at 597). Relevancy requires opinions that would assist the trier of fact in reaching a conclusion necessary to the case. *See Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230 (9th Cir. 1998).

"A trial court has broad latitude not only in determining whether an expert's testimony is reliable, but also in deciding how to determine the testimony's reliability." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) (holding that the trial court's decision in admitting or excluding expert testimony will be reviewed for abuse of discretion). "In determining the reliability of a proffered expert, courts 'scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case.'" *Claudia Morales, et al. v. Kraft Foods Group, Inc., et al.*, No. CV-14-04287-JAK (PJWx), 2017 WL 2598556, at *10 (C.D. Cal. June 9, 2017) (quoting Fed. R. Evid. 702 Advisory Committee's Note (2000 Amendment)). "[T]he district court must keep in mind Rule 702's broad parameters of reliability, relevancy, and assistance to the trier of fact." *Sementilli v. Trinidad Corp.*, 155 F.3d 1130, 1134 (9th Cir. 1988).

The Ninth Circuit has clarified that some challenges to experts' testimony and reports affect the weight, rather than the admissibility, of the expert's opinion: "Disputes as to the strength of an expert's credentials, faults in his use of a particular methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony." *Kennedy*, 161 F.3d at 1231 (internal formatting omitted) (quoting *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995). Still, the Supreme Court has cautioned that "conclusions and methodology are not entirely distinct from one another." *Gen. Elec.*, 522 U.S. at 146. As such, "[a] court may conclude that there is simply too great an analytical gap between the

data and the opinion proffered." *Id*. Nothing in either *Daubert* or the Federal Rules of Evidence requires the admission of opinion evidence connected to existing data "only by the ipse dixit of the expert." *Id*.

III. DISCUSSION

A. Defendants' Motion to Exclude the Expert Testimony of John Hare

In 2014, Defendants hired a professional investment consultant to develop an investment policy statement ("IPS") that detailed criteria for selecting and monitoring the Plans' investment options. (Plaintiffs' Opposition at 4). In 2016, Defendants applied the IPS criteria to streamline the Plans' 350 investment options and four recordkeepers to a smaller set of 35 investment options and three recordkeepers. (*Id.*). Hare's expert report states that other plan fiduciaries used the IPS criteria prior to 2010 and suggests that Defendants should have applied similar criteria when selecting the Plans' investment options in 2010. (Hare Report at 13-16).

Hare purports to apply the IPS criteria to recommend two sets of more "prudent" investment options that Defendants could have picked in 2010. (*Id.* at 35-45). The first set of investment options assumes that Defendants "would retain the three recordkeeper system as they did in 2016" and includes "the same funds that were selected in 2016" that would have "pass[ed] the IPS criteria in 2010." (*Id.* at 36). The funds that were selected in 2016 but would not have passed the IPS criteria in 2010 were replaced by other funds that did meet the IPS criteria in 2010. (*Id.* at 36-39). The second set of investment options assumes that Defendants would have

used only a single recordkeeper, but otherwise "appl[ies] the same process" of starting with the 2016 funds and replacing those that would not have satisfied the IPS criteria in 2010. (*Id.* at 42-45).

Defendants object to what they characterize as "hindsight-driven opinions." (Defendants' Motion at 10). In evaluating whether an investment manager of a trust governed by ERISA has discharged his or her duty "with the care, skill, prudence, and diligence under the circumstances then prevailing," 29 U.S.C. § 1104(a)(1)(B), "the primary question is whether the fiduciaries, '*at the time they engaged in the challenged transactions*, employed the appropriate methods to investigate the merits of the investment and to structure the investment.'" *California Ironworkers Field Pension Tr. v. Loomis Sayles & Co.*, 259 F.3d 1036, 1043 (9th Cir. 2001) (emphasis added) (quoting *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983)). "[H]indsight is the wrong metric for evaluating fiduciary duty." *Tibble v. Edison Int'l*, 729 F.3d 1110, 1136 (9th Cir. 2013), *vacated on other grounds*, 575 U.S. 523 (2015).

The Court agrees that the "prudent" alternative investment options Hare proposes improperly rely on hindsight and cannot be used to establish Defendants' breach of fiduciary duty. Hare's selection process starts with the funds chosen by Defendants in 2016 pursuant to the IPS criteria, which considered the funds' past three- and five-year performance. (Hare Deposition, Doc. No. 266-2, at 269). As Hare himself acknowledges, this all but guaranteed the funds would have had above-average performance between 2011 and 2016. (*Id.* at 268-69). Defendants did not have access

to the funds' 2011-2016 performance data back in 2010, and the fact that Defendants later selected the funds in 2016 is not a reliable indicator that Defendants acted imprudently by not selecting similar funds in 2010. Although Hare replaced some of the 2016 funds that would not have satisfied the IPS criteria in 2010 with other funds that would have satisfied the IPS criteria in 2010, these replacement funds appear to have also been selected with the benefit of hindsight. (*See id.* at 325 (describing the selection of a replacement fund based in part on data available only in 2016)).

Plaintiffs acknowledge that Hare's hindsight-driven approach is not a reliable method for determining a breach of fiduciary duty. (Plaintiffs' Opposition at 10). Plaintiffs assert, however, that their methods are appropriate for "proving plan losses under 29 U.S.C. §1109(a)." (*Id.*). Assuming that they can prove liability without the benefit of Hare's testimony, Plaintiffs argue that they should then be able to introduce Hare's testimony to prove damages. (*Id.*).

In support of this proposition, Plaintiffs primarily rely on Second Circuit precedent. They claim that when a plan fiduciary has breached his or her duty with respect to plan funds, the Court must "presume that, but for the breach, the funds would have been invested in the most profitable of alternatives." (Plaintiffs' Opposition at 2 (quoting *Dardaganis v. Grace Cap. Inc.*, 889 F.2d 1237, 1244 (2d Cir. 1989)). Moreover, they assert that the "errant fiduciary bears the burden of proving that the fund would have earned less than this amount." (Plaintiffs' Opposition at 12 (quoting

Dardaganis, 889 F.2d at 1244)). According to Plaintiffs, after they have proposed an alternative selection of investment options, the burden shifts to Defendants to "identify . . . other fund[s] that a prudent fiduciary would have selected instead." (Plaintiffs' Opposition at 17).

The Second Circuit cases Plaintiffs cite, however, do not support Hare's methodology. They do not require a district court to presume that funds would have been invested in the most profitable of *any* alternatives, but the most profitable of *plausible* alternatives. A district court should still "presume that the funds would have been treated like other funds being invested during the same period in proper transactions." *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985). It is only "[w]here several alternative investment strategies were equally plausible" that the Court "should presume that the funds would have been used in the most profitable of these." *Id.*

As explained above, Hare's hindsight-driven methodology does not treat the investment options in his two alternative lineups like other investment options would have been treated in 2010. It relies on information that would not have been available to plan fiduciaries evaluating investment options at the time. As such, even under the Second Circuit's approach in *Donovan*, the Court is not required to presume that a plan fiduciary would have selected the most profitable of Hare's proposed investment options.

The appropriate measure of damages is the difference between a plausible estimate of the Plans' investment returns had they been prudently managed and the Plans' actual investment returns. *See Donovan*, 754 F.2d at 1056 (describing an appropriate remedy as "the restoration of the trust beneficiaries to the position they would have occupied but for the breach of trust"). Plaintiffs bear the burden of proving that the expert testimony they introduce reliably measures this difference. *See Daubert II*, 43 F.3d at 1316. Plaintiffs have not done so. Hare's method of picking investment options that outperformed the market using information unavailable to Defendants in 2010 does not estimate the Plans' investment returns had they been prudently managed, but the Plans' investment returns had they been managed by one who had access to future data. It is premised on an incorrect legal standard. As such, Hare's conclusions are neither reliable nor relevant.

Accordingly, the Court GRANTS Defendants' motion to exclude Hare's expert testimony concerning the alternative investment options he claims Defendants should have selected in 2010.

B. Defendants' Motion to Exclude the Expert Testimony of Edward O'Neal

O'Neal's expert report purports to compute the losses suffered by plan participants as a result of Defendants' failure to offer the alternative investment options put forward by Hare. (*See generally* O'Neal Report). As the Court has determined that Hare's proposed alternative investment options are the products of a flawed methodology, O'Neal's derivative loss

calculations are similarly unreliable. Accordingly, the Court GRANTS Defendants' motion to exclude O'Neal's expert testimony concerning plan participant losses.

C. Defendants' Motion to Exclude the Expert Testimony of Ty Minnich

1. Methodology

In his expert report, Minnich provides his estimate of the per-participant recordkeeping fees the Plans would have been able to obtain had Defendants actively and regularly negotiated the fees with the Plans' recordkeepers. (Minnich Report ¶ 125). The report states that Minnich "established these reasonable fees on a per participant basis based on [his] 30 years of experience" before "validat[ing] [his] opinion regarding the expected reasonable recordkeeping and administrative fees" by "develop[ing] a pricing curve based on bids that the Plans received for a single recordkeeper structure and market pricing from 2010 through 2021." (*Id.* ¶¶ 126-27).

Minnich's report explains that pricing for recordkeeping services is typically dictated by: (1) the plan's participant count; (2) the enhanced services provided by the recordkeeper; and (3) the recordkeeper's ancillary revenue sources. (*Id.* ¶ 73). Of these, the participant count is "the primary factor used to determine the recordkeeping and administrative fees." (*Id.* ¶ 74). This is because "[t]he costs to perform core recordkeeping and administrative functions are mostly fixed," and "[a]s the number of participants increases, a recordkeeper is able to spread the fixed costs over

a larger participant base," resulting in lower per-participant recordkeeping fees. (*Id.* ¶ 21). Enhanced services, such as the provision of on-site financial advisors, can increase the recordkeeping fees. (*Id.* ¶ 83). On the other hand, the ancillary revenue that a recordkeeper expects to make, e.g. through the plan's inclusion of its proprietary investment options, can decrease recordkeeping fees. (*Id.* ¶ 86).

To determine market pricing from 2010 through 2021, Minnich primarily considered the relationship between recordkeeping fees and plan size. He compiled a list of defined contribution plans that were similar in size to Defendants' Plans and, for each of those plans, recorded the number of plan participants and the per-participant recordkeeping fees. (*Id.* ¶ 94, Ex. 4). He then fit a price curve to these data points using a method employed by Fidelity. (*Id.* ¶ 75). Using this curve, Minnich determined that a defined contribution plan of a similar size to Defendants' Plans typically paid approximately $30 per participant in recordkeeping fees. (*Id.* ¶ 128). Minnich claims that this comports with his initial estimate, based on his experience, that Defendants' Plans could have secured a recordkeeping fee between $34 and $40 during the relevant time period. (*Id.* ¶ 125). Defendants' Plans instead paid a per-participant recordkeeping fee of ranging from $101.29 to $250.89 between 2010 and 2019. (*Id.* ¶ 91).

2. Defendants' Objections

Defendants raise several objections to Minnich's methodology. First, Defendants object to Minnich's reliance on his experience, asserting that "conclusory reliance on experience is not sufficient to support an expert

opinion." (Defendants' Motion at 17). Minnich, however, does not rely "solely or primarily on experience," as Defendants suggest. (*Id.* at 18 (quoting Fed. R. Evid. 702 advisory committee's note to 2000 amendment)). Rather, Minnich bases his opinion in large part on the recordkeeping fees paid by other similarly-sized defined contribution plans. (*See* Minnich Report ¶ 127, Ex. 4). The fact that Minnich's experience also informed his opinion does not render his opinion inadmissible.

Defendants next object to the fact that Minnich formed an opinion of what a reasonable recordkeeping fee should be before validating his opinion with data. (Defendants' Motion at 19). Experts, however, often formulate and consider hypotheses before testing them. Indeed, in some situations, experts are expected to "compile a comprehensive list of hypotheses," and an expert that "neglects to consider a hypothesis . . . may [] be unreliable." *See Clausen v. M/V NEW CARISSA*, 339 F.3d 1049, 1058 (9th Cir. 2003). While Defendants argue that it would have been preferable for Minnich to approach his task without any preconceived notions of what a reasonable recordkeeping fee might be, it would be unrealistic to expect that an expert with "30 years of experience, including significant experience providing pricing information . . . for defined contribution plans," (Hare Report, ¶ 126), would not have already formulated an opinion on the subject. To the extent that Minnich's pre-existing opinion may have biased his subsequent analysis, such bias affects the weight of his testimony, not its admissibility. *United States v. Abonce-Barrera*, 257 F.3d 959, 965 (9th Cir. 2001) ("Generally, evidence of bias goes toward the credibility of a witness, not his competency to testify, and credibility is an issue for the jury.").

Defendants contend that Minnich went beyond forming an opinion as to what a reasonable recordkeeping might be and admitted to "cherry-picking" the data he used to support his hypothesis. (*See* Defendants' Motion at 19). If true, such an admission may render Minnich's testimony inadmissible. "Result-driven analysis, or cherry-picking, undermines principles of the scientific method and is a quintessential example of applying methodologies (valid or otherwise) in an unreliable fashion." *See In re Incretin-Based Therapies Prod. Liab. Litig.*, 524 F. Supp. 3d 1007, 1039 (S.D. Cal. 2021) (quoting *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prod. Liab. Litig. (No II) MDL 2502*, 892 F.3d 624, 634 (4th Cir. 2018)). After reviewing Minnich's supposed admission, however, the Court determines that Minnich did not make the admission Defendants say he did.

Defendants point to Minnich's responses during his deposition to argue that Minnich admitted to only looking at plans with low per-participant recordkeeping fees. (Defendants' Motion at 19). For example, when asked why he chose to include MIT's plan in his pricing curve, Minnich stated: "Higher education, 18,000 participants at the end of 2014, just as my comments state. And the per-participant fee is approximately $33." (Minnich Deposition, Doc. No. 266-6, at 179). A broader reading of the deposition questioning, however, reveals that Minnich did not refer to the per-participant fee as a reason for including the plan in his analysis. Instead, Minnich cites plan size as the primary reason for including the plan, and subsequently brings up the per-participant fee to emphasize his opinion that Defendants' recordkeeping fees were excessive. Here, Minnich goes

on to state: "You've got approximately 18,000 participants, and you've got a fee of $33 per participant for the same period in time. I would suggest that with 29,000 participants versus 18, USC should have had a lower fee." (*Id.*)

Minnich's other answers conform to this pattern. When asked about his inclusion of Stanford in his analysis, Minnich responded: "In 2006, there's a public document that says they had 31,373 participants, and they were paying approximately $44 per participant for recordkeeping. I think that is very relevant to what USC was paying during the relevant period in 2016." (*Id.* at 183). When asked about his inclusion of Harvard, Minnich stated: "The document reflects that in 2018, Harvard had 25,877 participants. It also reflects the per-participant fee for the providers. I think that's important as a comparator plan for the 2018 time period, to again reflect that an institution that didn't consolidate to a single provider was able to attain fees that are less than the fees that USC was paying, with 15,000 fewer participants." (*Id.* at 186). Minnich's testimony about the recordkeeping fees of the plans he considered is not an admission that he improperly selected those plans based solely on their recordkeeping fees.

In addition to objecting to Minnich's consideration of certain plans in his analysis, Defendants also object to Minnich's failure to consider other plans. Defendants note that Minnich computed the recordkeeping fees paid by Harvard in 2018 but not other years, that Minnich included the recordkeeping fees paid by MIT in 2014 but not in 2022, and that Minnich did not analyze what other peer institutions were paying to TIAA, one of the Plans' three recordkeepers, between 2010 and 2015. (Defendants' Motion

at 20-21). In response to questioning about these omissions, Minnich explained that a Google search did not turn up information about Harvard's recordkeeping fees for other years, and that he did not conduct a more thorough search of Harvard's publicly available tax disclosures as Defendants suggest he could have done. (Minnich Deposition at 186-87). Minnich admitted that he may have been able to obtain information about MIT's 2022 recordkeeping fees through publicly available tax disclosures but did not think it was necessary to do so. (*Id.* at 180). Finally, Minnich stated that it would be inappropriate to focus on the recordkeeping fees other institutions were paying TIAA because doing so would result in a non-random and biased sample, especially since he believed that TIAA's recordkeeping fees were overpriced. (*Id.* at 219).

Unless Minnich were to analyze every defined contribution plan for every year in the relevant time period, however, Defendants could always raise this same criticism. The Court is satisfied that Minnich's methodology of considering only a representative sample of defined contribution plans is reliable. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 144 (1997) ("Trained experts commonly extrapolate from existing data."). Although Minnich opined that TIAA's recordkeeping fees were overpriced, Minnich did not categorically exclude TIAA's recordkeeping fees from his analysis. (*See* Minnich Report ¶ 127, Ex. 4 (listing TIAA's $44 per-participant fee for New York University in 2016)). And while Defendants may disapprove of the data Minnich relies on, the Court does not find Minnich's sampling to be so flawed as to render his testimony inadmissible. *See City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1048 (9th Cir. 2014) ("A minor flaw in an

expert's reasoning or a slight modification of an otherwise reliable method does not render expert testimony inadmissible." (alteration, citation, and quotation marks omitted)); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 746 (3d Cir. 1994) ("The judge should only exclude the evidence if the flaw is large enough that the expert lacks 'good grounds' for his or her conclusions.").

Defendants further criticize Minnich's opinions based on his use of recordkeeping fees from the 401(k) plans of non-educational institutions, rather than the 403(b) plans of universities, from 2010 to 2013; his consideration of only a single 401(k) plan from 2010 to 2012; and his failure to identify a single university 403(b) plan that paid less than $30 per participant for recordkeeping services. (Defendants' Motion at 21-24). Although Defendants raise valid concerns, their objections go to the weight of Minnich's testimony, not its admissibility.

Minnich explains that he considers 401(k) and 403(b) plans together because recordkeepers for those plans often use the same recordkeeping system, bidding process, and pricing methodology. (Minnich Report ¶¶ 49-50). Moreover, he arrived at his conclusion that $30 represents a reasonable per-participant recordkeeping fee after identifying several 401(k) plans with per-participant recordkeeping fees below $30, 403(b) plans with recordkeeping fees as low as $33, and recordkeeping bids for Defendants' Plans as low as $21. (*See* Minnich Report Ex. 4). The Court finds that Minnich's conclusion is the product of a sufficiently reliable method and that

there is not "too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co.*, 522 U.S. at 144.

Defendants finally point out that Minnich's price curve is not based on the comparison plans' total recordkeeping fees, but on the plans' recordkeeping fees for a single recordkeeper. (Defendants' Motion at 24-25). For example, Harvard used at least two recordkeepers in 2018, one with a per-participant fee of $34 and one with a per-participant fee of $37. (*See* Minnich Report Ex. 4). Minnich treats these fees as two separate examples of per-participant recordkeeping fees in the $30-$40 range, instead of a single example of a plan's overall $71 per-participant recordkeeping fee. (*See id.*). On the other hand, Minnich aggregates the fees for Defendants' four recordkeepers to come up with a $250.89 per-participant fee in 2010, instead of breaking it out into four separate per-participant recordkeeper fees of $75.82, $146.53, $11.37, and $17.17. (*See id.* ¶ 91). The Court agrees with Defendants that Minnich's report makes an invalid comparison. (*See* Motion Defendants' Motion at 24). Minnich's analysis, however, is still relevant to the question of what a reasonable per-participant fee for a single recordkeeper might be. At trial, the factfinder may therefore consider Minnich's testimony for this purpose. Accordingly, the Court DENIES Defendants' motion to exclude Minnich's testimony.

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D. Plaintiffs' Motion to Exclude the Expert Testimony of Steven Gissiner

1. Methodology

Gissiner's expert report attempts to show that Defendants could not have obtained Minnich's proposed recordkeeping fees given the pricing available in the marketplace at the time. (Defendants' Opposition at 4). The report compares the fees Defendants' Plans paid to each of its current three recordkeepers—TIAA, Fidelity, and Vanguard—with the fees paid by other university plans to the same recordkeepers. (Gissiner Report Exs. 4-18). It shows that, for many of the years in the relevant time period, Defendants' Plans paid lower rates to those three recordkeepers than other university plans. (*Id.*).

2. Plaintiffs' Objections

Plaintiffs state that Gissiner receives over 60% of his income from expert work, has testified exclusively for defendants in these types of cases, and has never opined that a plan's recordkeeping fees were unreasonable. (Plaintiffs' Motion at 1-2). Plaintiffs also question the strength of Gissiner's credentials, noting that the Gissiner has worked primarily with smaller plans, has only advised two or three plans that were recordkept by TIAA, and has never advised a plan recordkept by TIAA with over 3,000 participants. (*Id.* at 2). These facts, however, affect the strength, not admissibility, of Gissiner's testimony. *See Kennedy*, 161 F.3d at 1231 (9th Cir. 1998).

Plaintiffs next take issue with Gissiner's decision to limit his fee comparisons to university plans on a recordkeeper-by-recordkeeper basis.

(Plaintiffs' Motion at 9-11). They claim that Gissiner never applied such a method before, and that it makes more sense to look at a broader set of plans and recordkeepers. (Plaintiffs' Motion at 9-11).

As a preliminary matter, the fact that Gissiner used different methods in prior cases does not invalidate the method he chose to use in this case. What matters is that he "explain[s] precisely how [he] went about reaching [his] conclusions and point to some objective source . . . to show that [he has] followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in [his] field.'" *Lust*, 89 F.3d at 597 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318-19 (9th Cir. 1995) ("*Daubert II*")).

Gissiner explains that he compared Defendants' Plans with other university 403(b) plans and not other 401(k) plans because, among other things, 403(b) plans are much more likely to offer, and 403(b) participants are much more likely to invest in, individual annuities. (Gissiner Report ¶¶ 16, 19). As an individual annuity cannot be transferred to another annuity provider without the consent of the participant holding the annuity, 403(b) plans are often limited to a smaller selection of recordkeepers that service the annuities in their plans. (*Id.* ¶ 17). Moreover, because some annuity providers do not offer other investment options, 403(b) plans that offer annuities usually rely on multiple recordkeepers to service both annuities and mutual funds, whereas 401(k) plans that do not offer annuities can and often do rely on a single recordkeeper. (*Id.* ¶ 20). Finally, Gissiner justifies his recordkeeper-by-recordkeeper comparisons because each recordkeeper

provides a different set of services that may justify higher or lower recordkeeping fees. For example, TIAA charges a higher fee to recordkeep its annuities because they utilize a complex crediting rate system and are more difficult to administrate. (*Id.* ¶¶ 37-40).

Gissiner is not alone in performing this type of analysis. In a November 2014 "Expense Analysis & Benchmark" presentation to USC, CAPTRUST, an investment advisor, compared the fees paid by multiple plans to each of five recordkeepers. (Doc. No. 292-5, at 16-20). Similarly, in a "Vendor Fee Benchmark" exercise conducted on behalf of Cornell University in 2017, CAPTRUST compared the fees paid by Cornell and other plans to Fidelity, and likewise compared the fees paid by Cornell and other plans to TIAA. (Doc. No. 292-6, at 20-21). Gissiner's explanation concerning his method of comparing the fees paid by 403(b) plans on a recordkeeper-by-recordkeeper basis, as well as CAPTRUST's employment of similar methods, suffice to render his testimony admissible.

In addition to objecting to Gissiner's methodology, Plaintiffs accuse Gissiner of "blindly rel[ying] upon data provided to him by defense counsel." (Plaintiffs' Motion at 11). They claim that Gissiner failed to verify the information he received, resulting in errors in his original report that he has since had to correct. (*Id.* at 12-13). Defendants respond that Gissiner did not rely solely on data provided to him and consulted "publicly available data that [he] collected through research." (Defendants' Opposition at 13 (quoting Gissiner Report ¶ 136). Even if Gissiner did not source his own information, however, Plaintiffs do not claim that the revised data on which

Gissiner now relies is inaccurate. While Gissiner's prior mistakes may undermine his credibility, they do not require the exclusion of his testimony. Any future errors that Plaintiffs discover are the proper subject for cross-examination at trial. *See United States v. Prime*, 431 F.3d 1147, 1153 (9th Cir. 2005) ("As long as the process is generally reliable, any potential error can be brought to the attention of the jury through cross-examination and the testimony of other experts."). Accordingly, the Court DENIES Plaintiffs' motion to exclude Gissiner's testimony.

IV. CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendants' Motion as to the testimony of Hare[1] and O'Neal and **DENIES** Defendants' Motion as to Minnich. The Court **DENIES** Plaintiffs' Motion as to Gissiner.

IT IS SO ORDERED.

Dated: 11/1/22

Virginia A. Phillips
Senior United States District Judge

[1] Hare's testimony is excluded only with respect to his opinion concerning alternative investment options. Defendants did not move to exclude, and the Court does not exclude, Hare's testimony on other topics such as the IPS criteria, whether Defendants' 2010 investment options met those criteria, and whether Defendants offered an excessive number of investment options in 2010.