No. 22-13643

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAIME PIZARRO, *et al.*,
Plaintiffs-Appellants,

v.

THE HOME DEPOT, INC., *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the undersigned counsel for the Secretary of Labor as amicus curiae certifies that, in addition to those identified in the briefs filed by plaintiffs-appellants and defendants-appellees, the following persons and entities may have an interest in the outcome of this case:

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Secretary of Labor is vested with primary regulatory and enforcement authority for Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), see 29 U.S.C. §§ 1134, 1135, a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). The statute promotes this interest by, among other things, imposing stringent trust law-derived duties on those who manage the plan and its assets, including the trust law's familiar prudent person standard of care.

This case involves allegations that the fiduciaries of an ERISA-covered employee benefit plan breached their duties by failing to prudently investigate the reasonableness of fees paid to plan service providers and the merits of retaining certain underperforming investments on the plan's investment menu. Despite largely finding disputes of material fact on whether the breaches occurred, the district court granted summary judgment in favor of the fiduciaries because it found that the participants—by failing to adduce sufficient evidence that "no prudent fiduciary" would have taken the challenged actions—failed to raise a genuine dispute that the alleged breaches were the cause of the plan's losses. In so holding, the district court incorrectly placed the burden of proof on the participants to show loss causation, when it should have applied a burden-shifting framework,

adopted from trust law, that places the burden to disprove loss causation on the fiduciary after a plaintiff demonstrates a fiduciary breach and a related loss. The Secretary has a strong interest in ensuring that the Eleventh Circuit, which has not yet opined on the issue, articulates the proper standards of proof to show loss causation in ERISA fiduciary breach cases. The Secretary submits this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

ERISA requires fiduciaries to discharge their duties with respect to an employee benefit plan "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 a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Fiduciaries who breach their statutory duties "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). The issue presented is:

> Whether, in an action for fiduciary breach under 29 U.S.C. § 1109(a), once the plaintiff establishes a breach and a related plan loss, the burden shifts to the fiduciary to prove that the loss is not attributable to the fiduciary's breach.

STATEMENT OF THE CASE

A. Factual Background

The Home Depot FutureBuilder 401(k) Plan is a defined contribution retirement plan in which participants invest a portion of their earnings in investment options on the Plan's menu. *Pizarro v. Home Depot, Inc.*, No. 1:18-cv-01566-SDG, 2022 WL 4687096, at *2 (N.D. Ga. Sep. 30, 2022) (Dkt. 343). The Plan's Administrative and Investment Committees (both defendants) are responsible for managing the Plan, including adopting a written investment policy statement, setting guidelines for selecting investments for the Plan, monitoring the Plan's investments, and monitoring expenses paid by the Plan. *Id.* at *2–3. The Committees and their members are the Plan's named fiduciaries, *id.* at *2, and are herein referred to collectively as "Home Depot." Plaintiffs-Appellants allege that Home Depot breached its fiduciary duties under ERISA in two respects: (1) by failing to prudently investigate and monitor unreasonably high fees charged by two service providers to the Plan (Excessive Fees Claims); and (2) by selecting and retaining in the Plan's investment menu, without a proper investigation, four funds that underperformed comparable funds (Challenged Funds Claims).

1. Service Provider Fees

Plaintiffs-Appellants first allege that Home Depot failed to prudently investigate and monitor unreasonably high fees charged by two service providers

to the Plan, Financial Engines Advisors, LLC (FE) and Aon Hewitt Financial Advisors (AFA). *Id.* at *2, *4–6.

Home Depot hired FE in 2011 to provide "Professional Management" services to participants. If participants selected the service, FE would assume control of the participant's account and actively manage investments according to the participant's traits and preferences. *Id.* at *4. FE charged an asset-based fee for this service, referred to as a "Professional Management Fee." *Id.* To perform its services, FE integrated itself with the Plan's recordkeeper, Aon Hewitt, through a data-sharing arrangement that allowed FE to obtain pertinent information about participant accounts without the participant as middleman. *Id*. FE paid a "data connectivity fee" to Aon Hewitt, which was a percentage of the advisory fees that FE charged the Plan. *Id.* In 2016, Home Depot hired Aon Hewitt's subsidiary, AFA, to provide active account management services, with AFA then subcontracting with FE, which continued providing the services. *Id.* at *6.

Home Depot retained FE and AFA without soliciting requests for proposals or competitive bids, or benchmarking against the fees charged by other active account management providers. *Id.* at *5–6. Thus, despite lowering fees over the course of their engagement, FE's and AFA's rates were higher than rates offered

by competitors for active account management, as measured in basis points.[1] *Id.* at *6. The Plan's fees were also higher than those charged by competitors to comparably-sized plans. *Id.*

2. Challenged Investment Funds

As to the Challenged Funds Claims, Plaintiffs alleged that Home Depot breached its fiduciary duties by selecting and retaining in the Plan's investment menu, without a proper investigation, four funds that underperformed comparable funds: the JPMorgan Stable Value Fund (JPMorgan Fund), the BlackRock LifePath Target Date Funds (the BlackRock TDFs), the TS&W Small Cap Value Fund (the TS&W Fund), and the Stephens Small Cap Growth Fund (the Stephens Fund). *Id.* at *7.

The JPMorgan Fund is a stable value fund designed to preserve investors' principal while earning consistent returns. *Id.* Home Depot measured the fund against changing benchmarks during the relevant period, the rationale for which was never discussed in the Investment Committee's meeting minutes. *Id.* at *7, *25. Indeed, only one set of meeting minutes reflected a specific question about the JPMorgan Fund. *Id.* at *25. As of the third quarter of 2013, the JPMorgan Fund had underperformed its three-year benchmarks for fourteen consecutive quarters

[1] A "basis point" in fees is equal to 0.01% of the amount of assets invested. *See Black's Law Dictionary* (11th ed. 2019)

and underperformed its five-year benchmarks for ten consecutive quarters. *Id.* at *26. Plaintiffs' expert opined that a prudent fiduciary would have dropped the Fund after the third quarter of 2012. *Id.*

The BlackRock TDFs are a suite of eight different target-date funds, each corresponding with a specific retirement date and managed by BlackRock. *Id.* at *7 The TDFs possess different glide paths, meaning they allocate assets differently as the target retirement date approaches. *Id.* As early as 2013, the Investment Committee learned that the BlackRock glide paths were conservative, which could negatively affect performance. *Id.* at *8. The Investment Committee measured the BlackRock TDFs using a BlackRock custom benchmark, which Plaintiffs contend was not reflective of the market and contravened the Plan's investment policy statement. *Id.* at *8, *21–22. The parties do not dispute that the BlackRock TDFs underperformed from 2013-2015. *Id.* at *23.

The performance of the TS&W Fund and Stephens Fund fluctuated during the relevant period. *Id.* at *9. As of March 2012, the TS&W Fund—for nine consecutive quarters—had underperformed 99% of its peers on a three-year basis and 83% of its peers on a five-year basis. *Id.* at *27. The Investment Committee did not address the Fund's performance at its May 2012 meeting, though a TS&W representative was present at a November 2012 meeting. *Id.* From 2012 into 2015, the TS&W Fund returns generally exceeded that of peer funds, but by 2016, the

returns fell. *Id.* at *9. In 2013, shortly after the Investment Committee added the Stephens Fund to the Plan, the Fund began underperforming its peers and its benchmarks, which lasted for five consecutive quarters. *Id.* at *29. Effective November 2017, the Investment Committee replaced both funds with a composite of small/mid cap investment options. *Id.* at *9.

B. Procedural History

Plaintiffs filed their Complaint on April 12, 2018, and an Amended Complaint on July 11, 2018. *Pizarro*, 2022 WL 4687096, at *10. The court certified three classes of Plan participants and beneficiaries who, at any time from April 12, 2012, through the date of judgment, invested in the Challenged Funds, or received active account management from either FE or AFA. *Id.*

On July 12, 2021, Home Depot moved for summary judgment on all of Plaintiffs' claims, which the district court granted. *See id.* at *30. The court required Plaintiffs to prove three elements to prevail on their fiduciary-breach claims: "(1) Home Depot Defendants acted as fiduciaries, (2) Home Depot Defendants breached their fiduciary duties, and (3) the breaches proximately caused a loss to the Plan." *Id.* at *15. Despite generally concluding that material disputes of fact existed as to whether Home Depot breached its fiduciary duties, *id.* at *16, *19, *25, *28, the court held that Home Depot was entitled to summary judgment on all claims because no reasonable fact finder could conclude that

Plaintiffs met their burden to establish a genuine dispute of material fact on the issue of loss causation. *See id.* at *19, *24, *26, *29, *30. According to the court, that burden required Plaintiffs to marshal evidence that "no prudent fiduciary" would have taken the challenged actions. *See id.* at *18, *25, *27–30. The court disagreed with Plaintiffs' contention that, in order to prevail at summary judgment, Home Depot must disprove loss causation by establishing that a prudent fiduciary would have taken the challenged actions. *Id.* at *13. The court determined that Plaintiffs' position, which was based on burden-shifting, was inconsistent with Eleventh Circuit case law that "'the burden of proof on the issue of causation will rest on [the plaintiffs].'" *Id.* (quoting *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335, 1343 (11th Cir. 1992)).

Thus, regarding the Excessive Fees Claims, the court found there was a genuine issue of material fact whether Home Depot's monitoring of fees was procedurally prudent, due in part to evidence indicating that Home Depot "neither investigated nor discussed" whether FE's and AFA's fees were "reasonable relative to the services they performed." *Pizarro*, 2022 WL 4687096, at *16. Nevertheless, the court granted summary judgment to Home Depot because Plaintiffs did not adduce sufficient evidence to demonstrate "'that no reasonable fiduciary would have maintained the investment [or service] and thus [the defendants] would have acted differently' absent the alleged breach." *Id*. (quoting

Ramos v. Banner Health, 461 F. Supp. 3d 1067, 1127 (D. Colo. 2020)). It rejected Plaintiffs' argument that Home Depot could have obtained the same active account management for lower fees by engaging a different service provider: "Plaintiffs also failed to marshal any evidence that *no prudent fiduciary* in Home Depot Defendants' proverbial shoes would have selected FE or AFA over other managed account providers." *Id.* at *18.

Regarding the Challenged Funds Claims, the court characterized as "inconclusive" the evidence of Home Depot's procedural prudence in monitoring investments in most of the funds, and thus found that summary judgment was inappropriate on that basis. *Id*. at *19, *22, *24 (BlackRock TDFs); *25–26 (JP Morgan Fund); *28 (TS&W Fund).[2] Yet here again the court entered summary judgment for Home Depot because it found that Plaintiffs could not meet their burden to prove loss causation. For example, the court found that because the Plaintiffs had not presented sufficient evidence to show that "no prudent fiduciary would have concluded that the BlackRock TDFs' performance would improve in the future," they could not prove losses to the Plan. *Id.* at *25. As to the JPMorgan Fund, the court similarly concluded that "Plaintiffs marshal no material evidence

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[2] The lone exception was the Stephens Fund, as to which the court determined that the Investment Committee met its fiduciary responsibilities in monitoring the fund, and that Plaintiffs raised no dispute of material fact that the Investment Committee's process was objectively imprudent. *Id.* at *29.

that the benchmarks the [Investment Committee] in fact used were inappropriate such that no prudent fiduciary would have retained the JPMorgan Fund." *Id.* at *27. The court likewise found that Plaintiffs' evidence that the TS&W Fund underperformed did not necessarily require that they be removed, and Plaintiffs failed to otherwise establish that "no prudent fiduciary" would have retained the TS&W Fund. *Id.* at *28. Although it found that Plaintiffs failed to raise a material dispute of fact on Home Depot's prudence regarding the Stephens Fund, the court further found that Plaintiffs also failed to prove loss causation because they could not show that no prudent fiduciary would have retained the Stephens Fund. *Id.* at *30.

SUMMARY OF ARGUMENT

Section 409(a) of ERISA makes fiduciaries personally liable for any losses incurred by a plan "resulting from" their fiduciary breaches. 29 U.S.C. § 1109(a). ERISA does not, however, expressly state who bears the burden of proving that the breach caused the loss, or the applicable standard for meeting that burden. As the Supreme Court and this Court have recognized, where ERISA is silent, principles of trust law—from which ERISA is derived—should guide the development of federal common law under ERISA. Trust law provides that once a beneficiary establishes a fiduciary breach and a related loss, the burden on causation shifts to the fiduciary to show that the loss was not caused by the breach. That is why five

circuits have held that once an ERISA plaintiff proves a fiduciary breach and a related loss to the plan, the burden shifts to the fiduciary to prove the loss would have occurred even if it had acted prudently.

The district court here deviated from the weight of circuit authority and the law of trusts and instead placed the burden to prove loss causation solely on Plaintiffs. Indeed, despite generally finding disputes of material fact concerning whether Home Depot breached its fiduciary duties, the district court granted summary judgment for Home Depot on *all* claims because Plaintiffs could not show that "no prudent fiduciary" would have taken the challenged actions. In rejecting burden shifting, the district court purported to rely on this Court's decision in *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335, 1343–44 (11th Cir. 1992)). But *Willett* did not even consider burden shifting, let alone reject it. If anything, burden shifting is consistent with *Willett*, as well as with this Court's prior recognition that ERISA incorporates "procedural trust law principles." *Useden v. Acker*, 947 F.2d 1563, 1580–81 (11th Cir. 1991).

To the extent this Court's case law implicitly supported burden shifting in ERISA cases, the Court should now make it explicit. By adopting trust law's burden-shifting framework, the Eleventh Circuit would align itself with the vast majority of circuits that have considered how to allocate the burden to prove loss

causation in ERISA fiduciary breach cases. This Court should correct the district court's error and vacate the grant of summary judgment below.

ARGUMENT

The District Court's Decision Should Be Vacated Because It Failed to Apply Trust Law's Burden-Shifting Framework on the Issue of Loss Causation in ERISA Fiduciary Breach Cases

Notwithstanding that it found genuine disputes of material fact as to whether Home Depot breached its fiduciary duties, the district court entered summary judgment for Home Depot on all claims because it found that plaintiffs failed to put forth material evidence that "no prudent fiduciary" would have taken the challenged actions. The district court based its decision on the notion that the burden to prove loss causation in an ERISA fiduciary breach case lies solely with the plaintiff, and that the burden does not shift to the breaching fiduciary. As explained below, that holding is contrary to ERISA's trust law roots, the weight of circuit authority, and this Court's case law.

A. Trust Law Shifts the Burden to the Breaching Trustee to Disprove Loss Causation

When a statute is silent on how to assign the burden of proof, the "default rule" in civil litigation is that "plaintiffs bear the burden of persuasion regarding

the essential aspects of their claims." *Schaffer v. Weast*, 546 U.S. 49, 57 (2005). But "[t]he ordinary default rule, of course, admits of exceptions." *Id*.

One such exception is found in the common law of trusts, from which ERISA's fiduciary standards derive. *Tibble v. Edison Int'l*, 575 U.S. 523, 528 (2015). Trust law provides that "when a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach." Restatement (Third) of Trusts § 100 cmt. f (2012); *see, e.g.,* George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 871 (rev. 2d ed. 1995) ("If the beneficiary makes a prima facie case, the burden of contradicting it or showing a defense will shift to the trustee."). As Judge Friendly explained, "Courts do not take kindly to arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same." *In re Beck Indus., Inc.*, 605 F.2d 624, 636 (2d Cir. 1979).

This burden-shifting framework reflects the trust law principle that "as between innocent beneficiaries and a defaulting fiduciary, the latter should bear the risk of uncertainty as to the consequences of its breach of duty." *Estate of Stetson*, 345 A.2d 679, 690 (Pa. 1975); *Kim v. Fujikawa*, 871 F.2d 1427, 1430–31 (9th Cir. 1989); *Leigh v. Engle*, 727 F.2d 113, 138–39 (7th Cir. 1984). Trust law requires breaching fiduciaries to bear the risk of proving loss causation because fiduciaries

often possess superior knowledge to plan participants and beneficiaries as to how their plans are run. Restatement (Third) of Trusts § 100 cmt. f (listing among the reasons for burden shifting "the trustee's superior (often, unique) access to information about the trust and its activities").

In enacting ERISA's fiduciary-duty provisions, Congress built on existing trust law principles and expected courts to develop a "federal common law of rights and obligations under ERISA-regulated plans." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110–11 (1989)); *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 831–32 (2003). Thus, "[c]ourts have the authority 'to develop a body of federal common law to govern issues in ERISA actions not covered by the act itself.'" *Horton v. Reliance Standard Life Ins. Co.*, 141 F.3d 1038, 1041 (11th Cir. 1998) (quoting *Kane v. Aetna Life Ins.*, 893 F.2d 1283, 1285 (11th Cir. 1990)). The Eleventh Circuit has long acknowledged that ERISA "embod[ies] a tailored law of trusts—a legal fabric which not only adopts familiar trust principles, but also supplements these principles with more exacting standards . . . ." *Useden*, 947 F.2d at 1581. Indeed, this Court has recognized the incorporation into ERISA of "procedural trust law principles." *Id.* at 1580.

As explained below, because ERISA is silent on who bears the burden of proving loss causation in fiduciary breach cases, *see* 29 U.S.C. § 1109(a), the

majority of courts to consider the question have adopted the trust-law rule that once a plaintiff proves a fiduciary breach and a related loss, the burden shifts to the breaching ERISA fiduciary to disprove loss causation.

B. The Majority of Circuits to Consider the Question Have Held that Trust Law's Burden-Shifting Rule Applies in ERISA Fiduciary Breach Cases

The First, Second, Fourth, Fifth, and Eighth Circuits unequivocally hold that, once a plaintiff has proven a breach of fiduciary duty and a related loss to the plan, the burden shifts to the fiduciary to prove that the loss was not caused by the breach. *Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 113 (2d Cir. 2021); *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 35 (1st Cir. 2018); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 363 (4th Cir. 2014); *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995); *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992).

In *Brotherston*, for example, the First Circuit explained that "even if there were no freestanding expectation that the interpretation of ERISA would be informed by trust law generally," adopting trust law's burden-shifting framework "could stand on its own feet as an exception to the default rule." 907 F.3d at 38. That is because trust law has "long embodied similar logic" behind the exception to the "ordinary default rule," recognized by the Supreme Court in *Schaffer*, "that the burden may be allocated to the defendant when he possesses more knowledge

relevant to the element at issue." *Id.* (citing *Schaffer*, 546 U.S. at 60). Given that an "ERISA fiduciary often . . . has available many options from which to build a portfolio of investments available to beneficiaries," the First Circuit reasoned that "it makes little sense to have the plaintiff hazard a guess as to what the fiduciary would have done had it not breached its duty in selecting investment vehicles, only to be told 'guess again.'" *Brotherston,* 907 F.3d at 38. The court thus held that "once an ERISA plaintiff has shown a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that such loss was not caused by its breach." *Id.* at 39; *see also Sacerdote*, 9 F.4th at 113 (explaining that "[t]rust law acknowledges the need in certain instances to shift the burden to the trustee, who commonly possesses superior access to information") (citing Restatement (Third) of Trusts, § 100 cmt. f).

The Fourth Circuit in *Tatum* explained that trust law's burden-shifting rule "comports with the structure and purpose of ERISA," which is "to protect 'the interests of participants in employee benefit plans and their beneficiaries.'" 761 F.3d at 363 (quoting 29 U.S.C. § 1001(b)). To require that the plaintiff—who has already proven a breach and a related loss—also prove that the loss would not have occurred absent the breach "would provide an unfair advantage to a defendant who has already been shown to have engaged in wrongful conduct, minimizing the fiduciary provisions' deterrent effect." *Id.* at 363. The Fourth Circuit thus

concluded "that once a fiduciary is shown to have breached his fiduciary duty and a loss is established, he bears the burden of proof on loss causation . . . ." *Id.*; *see also McDonald*, 60 F.3d at 237 ("To establish a claimed breach of fiduciary duty, an ERISA plaintiff must prove a breach of a fiduciary duty and a prima facie case of loss to the plan. Once the plaintiff has satisfied these burdens, the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by . . . the breach of duty.") (internal quotation marks omitted); *Martin*, 965 F.2d at 671 ("[O]nce the ERISA plaintiff has proved a breach of fiduciary duty and a prima facie case of loss to the plan or ill-gotten profit to the fiduciary, the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by, or his profit was not attributable to, the breach of duty.").

In contrast, the Tenth Circuit is alone in outright rejecting the burden-shifting rule. *Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1336 (10th Cir. 2017). The court relied on the default rule that, where a statute is silent on burden allocation, the burden of proof lies "where it usually falls, upon the party seeking relief." *Id.* at 1335 (quoting *Schaffer*, 546 U.S. at 58). The court declined to apply trust law's burden-shifting framework to fill the statutory silence, citing cases from the Sixth, Ninth, and Eleventh Circuits. *Id.* at 1336 (citing, *inter alia*, *Kuper v. Iovenko*, 66 F.3d 1447, 1459–60 (6th Cir. 1995); *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1099

(9th Cir. 2004); and *Willett*, 953 F.2d at 1343–44). But the Sixth and Ninth Circuit cases did not directly address loss causation at all. Rather, both *Kuper* and *Wright* concerned the standard for showing breach by a fiduciary of an employee stock ownership plan (ESOP) in the face of a since-overturned presumption that an ESOP fiduciary's investment in employer stock is prudent. *See Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995), *abrogated by Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 418–19 (2014). In light of the so-called "*Moench* presumption," the Sixth and Ninth Circuits held that, in assessing whether a plan's continued investment in employer stock was prudent, "a plaintiff must show a causal link" between the fiduciary breach and harm to the plan. *Kuper*, 66 F.3d at 1459; *Wright*, 360 F.3d at 1099.

Neither *Kuper* nor *Wright* represent a rejection of burden shifting on loss causation. In the first place, a plaintiff's burden in overcoming a presumption in favor of an ESOP fiduciary is irrelevant to who should bear the burden on loss causation in other types of fiduciary breach cases, where no underlying presumption exists. Further, the Supreme Court rejected the *Moench* presumption in *Dudenhoeffer,* 573 U.S. 409, thus calling into question the continuing validity of these decisions. Regardless, requiring a "causal link" between breach and loss is not facially inconsistent with the trust-law requirement that plaintiffs prove a

"related loss," which necessarily requires some relationship (or "causal link") to the breach, in order to shift the burden to the fiduciary.

The Tenth Circuit also interpreted this Court's decision in *Willett* as rejecting burden shifting, a mistake the district court here also made. As explained further below, that reading is incorrect.

C. The District Court Misinterpreted Eleventh Circuit Precedent as Rejecting Burden Shifting

The district court did not grapple with whether to import trust law's burden-shifting rule because it erroneously found that this Court in *Willett* had already decided that plaintiffs exclusively bear the loss-causation burden in ERISA cases. But *Willett* did not even consider burden shifting, let alone reject it. If anything, Eleventh Circuit precedent—including *Willett* itself—supports applying trust law's burden shifting rule to ERISA fiduciary breach cases.

At issue in *Willett* was whether Blue Cross, as a fiduciary to the plaintiffs' health plan, could be liable for failing to inform participants that their coverage had ended because the employer-sponsor had stopped paying insurance premiums. *See Willett,* 953 F.2d at 1340–43. This Court explained that, to obtain summary judgment, "*Blue Cross* would have had to establish the absence of causation by proving that the beneficiaries' claimed losses could not have resulted from Blue Cross' failure to cure [the sponsor's] breach." *Id.* at 1343 (emphasis added). The Court's requirement that Blue Cross prove that the loss "could not have resulted"

from its breach is functionally equivalent to the breaching fiduciary's trust-law burden to prove that the loss would have occurred in the absence of a breach. *See Tatum*, 761 F.3d at 362, n.10 (explaining that *Willett* "undercuts" the dissent's position that the weight of circuit authority is against burden shifting).

Overlooking the substance of the decision entirely, the district court instead teased out a wholesale rejection of burden shifting from this Court's concluding line in *Willett:* that, on remand, "the burden of proof on the issue of causation will rest on the [plaintiffs]" who will have to show that the breach "proximately caused" their claimed losses. 953 F.2d at 1343–44. But that statement is hardly irreconcilable with burden-shifting. That the plaintiff generally bears the burden of proof does not mean that the burden cannot shift to the defendant once the plaintiff has established a breach and a "related loss." As noted, trust law's concept of a "related loss" necessarily implies some causal relationship between the breach and the loss. Thus, far from rejecting burden shifting, *Willett*'s concluding statement (to say nothing of its earlier discussion of the showing required of Blue Cross to merit summary judgment) is consistent with the trust law requirement that plaintiffs prove a breach and a related loss.

While *Willett* did not explicitly address burden shifting, other Eleventh Circuit cases have endorsed the rationale behind it. This Court has long acknowledged that ERISA "embod[ies] a tailored law of trusts" and has cautioned

that courts should engage in a thorough analysis before determining that a "prominent feature of trust law" does not apply where ERISA is silent. *Useden*, 947 F.2d at 1580, 1581 (recognizing the "incorporation of procedural trust law principles" in ERISA). To determine whether a rule should be incorporated into ERISA's common law, the Eleventh Circuit instructs that "courts must examine whether the rule, if adopted, would further ERISA's scheme and goals." *Horton v. Reliance Standard Life Ins. Co.*, 141 F.3d 1038, 1041 (11th Cir. 1998) (quoting *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986)).

This Court's explicit adoption of a burden-shifting framework to prove loss causation would "further ERISA's scheme and goals" by advancing ERISA's protective purpose and promoting "uniformity in the administration of employee benefit plans." *Horton*, 141 F.3d at 1041. Just as trust law's burden-shifting rule protects beneficiaries' interests by making the breaching fiduciary "bear the risk of uncertainty as to the consequences of its breach of duty," *Estate of Stetson*, 345 A.2d at 690, applying the same rule in ERISA cases advances ERISA's protective purposes. In fact, rejecting the burden-shifting framework would render ERISA *less* protective than the trust law backdrop against which it was passed, a result directly at odds with Supreme Court guidance. *See* 29 U.S.C. § 1001(b); *Varity*, 516 U.S. at 497 (interpreting ERISA's fiduciary duties to account for "Congress' desire to offer employees enhanced protection for their benefits" beyond that

offered under trust law); *Firestone*, 489 U.S. at 113–14 (rejecting a default standard of deference to fiduciaries in ERISA benefits cases because it would "afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted."). Moreover, by adopting burden shifting, this Court would promote uniformity in the governance of ERISA plans by aligning with its sister circuits that already apply a burden-shifting framework for proving loss causation in ERISA fiduciary breach cases. *See supra*, Part B.

D. The District Court Erred by Entering Summary Judgment for Home Depot Based on Plaintiffs' Failure to Proffer Sufficient Evidence of Loss Causation

The district court failed to apply trust law's burden-shifting framework on the issue of loss causation, instead placing on Plaintiffs the exclusive burden to prove loss causation. Because that error infected its decision to award summary judgment to Home Depot, the decision should be vacated.[3]

The district court erred in rejecting burden shifting on the issue of loss causation, which it based not only on its misreading of *Willett* (discussed in Part C, *supra*), but also on the summary judgment standard under Federal Rule of Civil Procedure 56(a). *Pizzaro*, 2022 WL 4687096, at *13. The court explained that "the

[3] Again, the lone exception is the district court's ruling on the Challenged Fund Claim involving the Stephens Fund because the court determined that Plaintiffs raised no dispute of material fact about whether Home Depot breached its fiduciary duties in monitoring that fund. *Pizarro*, 2022 WL 4687096, at *29.

summary judgment movant must show an absence of evidence to support the non-movant's case to prevail at summary judgment." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). From that premise, the district court concluded, "Home Depot Defendants are not required to disprove loss causation regarding either of Plaintiffs' claims to win summary judgment; rather, to prevail, Home Depot Defendants must show an absence of any evidence supporting either breach or loss causation . . . ." *Id.*

But the *Celotex* standard relied upon by the district court applies only if the *non-moving party* (*i.e.*, the Plaintiffs here) has the burden of proof, not where the *moving party* has the burden of proof. *See Celotex* 477 U.S. at 322 (holding that Rule 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, *and on which that party will bear the burden of proof at trial*") (emphasis added).[4] As this Court has explained, "[w]hen the *moving* party has the burden of proof at trial, that party must show *affirmatively* the absence of a genuine issue of material fact: it must support its motion with credible evidence that would

[4] Indeed, the district court's opinion later seems to acknowledge this point, pointing to "the Supreme Court's clear rule that summary judgment is fitting 'against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, *and on which that party will bear the burden of proof at trial*.' *Celotex Corp.*, 477 U.S. at 322" (emphasis added). *Pizzaro*, 2022 WL 4687096, at *13.

entitle it to a directed verdict if not controverted at trial." *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 530 (11th Cir. 2013) (court's emphasis) (internal quotation marks omitted). Moreover, the *Celotex* standard does not answer the predicate question of who has the burden of proof in the first place. Because the question before the court was who bears the burden of proof on loss causation at trial, it was illogical for the court to decide the answer using a summary judgment standard that presupposes that the non-movant bears the burden. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) ("Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.").

The district court's error infected its disposition of nearly every strand of Plaintiffs' claims. Under the correct burden-shifting framework, where Home Depot (the movant) bears the burden to disprove loss causation, Home Depot could have prevailed at summary judgment on that element only if it presented evidence allowing a reasonable factfinder to conclude that the alleged breach did not cause the Plan's losses. *See Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994); *see also Rich*, 716 F.3d at 530. In short, Home Depot would have to prove "that a prudent fiduciary would have made the same decision." *Tatum*, 761 F.3d at 364; *see Pursifull v. Unum Life Ins. Co. of Am.*, No. 2:00-CV-3318-VEH, 2007 WL 9697495, at *11 (N.D. Ala. Sept. 17, 2007) (granting summary judgment

to fiduciary because it had "affirmatively shown that [the plaintiffs'] claimed losses could not have resulted from" its breach (quotation marks omitted)), *aff'd*, 296 F. App'x 830 (11th Cir. 2008).

But the district court did not hold Home Depot to that standard, instead granting summary judgment to Home Depot because of *Plaintiffs*' failure to offer sufficient evidence that "no prudent fiduciary" would have acted as Home Depot did—a ruling erroneously grounded on Plaintiffs having the burden to prove loss causation. For example, on the Excessive Fees Claims, the district court faulted Plaintiffs for failing to prove that "*no prudent fiduciary* in Home Depot Defendants' proverbial shoes would have selected FE or AFA over other managed account providers," *Pizzaro*, 2022 WL 4687096, *18 (court's emphasis), even though Plaintiffs presented evidence suggesting that "other service providers offered comparable investment advisory services at lower rates than those FE and AFA charged, and that FE and AFA charged lower rates to other plans they serviced." *Id.* at *16. Similarly, on the Challenged Fund Claims, the district court noted, for example, that "Home Depot Defendants do not dispute that the BlackRock Funds underperformed from 2013-2015, when some of the BlackRock TDFs ranked near the bottom of their peer group for 3- and 5-year periods." *Id.* at *23. Yet here again, the court faulted Plaintiffs for a "lack of material evidence

that *no prudent fiduciary* would have concluded that the BlackRock TDFs' performance would improve in the future . . . ." *Id.* at *25.

The district court's formulation is fundamentally inconsistent with trust law's burden-shifting framework. If a plaintiff succeeds in showing that "no prudent fiduciary" would have taken the challenged action, they have conclusively established loss causation, and there is no burden left to "shift" to the fiduciary defendant. *See Sacerdote*, 9 F.4th at 113 ("By requiring the plaintiffs here to prove that the alternative fee ranges proposed by their expert were 'the only plausible or prudent ones,' the district court failed to shift the burden onto the defendant."). Because requiring Plaintiffs to prove that "no prudent fiduciary" would have taken the challenged actions inverts the burden of proof, the district court's decision should be vacated.

CONCLUSION

For the reasons stated above, the Secretary urges this Court to vacate the district court's grant of summary judgment to Home Depot and remand.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(5), 32(a)(5)–(6), and 32(a)(7)(B), I certify on February 10, 2023, that this amicus brief uses a 14-point proportionally spaced typeface font (Times New Roman) and contains 6,355 words.

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CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 25(d), I certify that on February 10, 2023, I electronically filed the foregoing document with the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

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